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Indigenous Peoples as Guardians of Nature. The role of International Environmental and Human Rights Law in the preservation of Amazonia.

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ABSTRACT

Questa tesi è volta ad analizzare dal punto di vista del diritto internazionale e degli strumenti esistenti che sono a nostra disposizione, in che modo gli stati Latinoamericani e dell'America Centrale si comportano per proteggere i diritti delle popolazioni indigene che vivono nella Foresta Amazzonica e nei suoi contorni più ampi, quali i bacini pluviali e le zone più remote della foresta. Ciò perché specialmente negli ultimi decenni si è sensibilizzata la popolazione mondiale a temere i rischi dovuti alla deforestazione e alla perdita di biodiversità dettati dallo sviluppo irrefrenabile dell'economia e dello sfruttamento delle risorse dei paesi in questione che vogliono mantenere il proprio status sul mercato internazionale, e anche a causa di fattori domestici che portano ad un controllo blando degli standard di diritti umani e ambientali nella zona dell'Amazzonia tutta.

La Foresta Amazzonica è l'ecosistema più vario in termini di biodiversità, e numerose sono le popolazioni indigene che la abitano. Queste popolazioni portano con sé un bagaglio culturale non indifferente, il quale è purtroppo sottoposto ad inadeguata valorizzazione da parte delle autorità a livello domestico. Altrettanto notevoli sono i rischi cui sono esposte le comunità per causa della perdita della biodiversità e della deforestazione, che risulterebbero nel graduale abbandono degli habitat tradizionali e della perdita del sistema di credenze che i popoli indigeni sono riusciti a trasmettere di generazione in generazione. La conseguenza più profonda di questi fattori a rischio sarebbe il distacco fisico e spirituale dal passato e dalla propria identità culturale, che invece dovrebbe essere altresì tutelato e favorito dagli standard internazionali cui gli stati hanno l'obbligo di rimandare. Inoltre, le conseguenze che i danni ambientali e l'impoverimento degli habitat nativi possono causare per il sostentamento e la tutela culturale delle popolazioni indigene, sono più ampiamente una preoccupazione per la popolazione internazionale che dipende in gran parte dalle risorse di acqua e ossigeno che la foresta pluviale immagazzina.

A completare il quadro contemporaneo della situazione in cui si trovano a vivere le popolazioni indigene degli stati Latinoamericani, vi sono altri problemi e tematiche di respiro locale, che funzionano come "stress-multipliers", ad esempio il rischio di incendi per le temperature troppo elevate, l'eccessivo sfruttamento delle risorse non rinnovabili e i mutamenti climatici, a terminare con la più recente ma non per questo meno disastrosa pandemia da Covid-19 che ha messo in ginocchio i sistemi sanitari e ha progressivamente escluso i componenti delle comunità indigene dal godere di molti diritti fondamentali.

La tesi è dunque volta ad analizzare da un lato i problemi e le sfide a livello regionale degli stati dell'America Latina, e il sistema delle istituzioni cui è affidato il compito di proteggere il diritto consuetudinario delle comunità indigene, dall'altro a fornire una valutazione del grado di adempimento alle convenzioni internazionali sui diritti delle comunità indigene e sui diritti delle foreste da parte degli stati. Particolare attenzione è prestata all'analisi giuridica delle codificazioni esistenti e delle innovazioni di corti di diritti umani a livello sia nazionale che internazionale, che svolgono da filo conduttore della ricerca, il cui scopo è mettere in luce le potenzialità degli strumenti esistenti, più che i suoi fallimenti.
Nello specifico, i diritti indigeni analizzati sono il diritto all'autodeterminazione, alla cultura, alla proprietà terriera e all'uso delle risorse naturali, nonché il diritto ad un ambiente salubre.

Alla luce delle diversità culturali e delle tradizioni indigene in materia di proprietà e gestione delle foreste, uno sguardo è rivolto anche allo studio dei fattori per cui il sistema regionale è poco adeguato alla tutela della Foresta Amazzonica e dei diritti territoriali consuetudinari delle popolazioni indigene dell'Amazzonia.
I dati raccolti dimostrano come gli stati si siano adattati ben volentieri agli standard di diritti umani supportati dalla comunità internazionale e dai membri tutti delle Nazioni Unite, tuttavia l'aspetto più preoccupante è che spesso questi traguardi vengono messi in secondo piano rispetto ad altre questioni nazionali quali lo sviluppo economico e la posizione nel mercato internazionale. Gli impegni concreti di alcuni stati di cui si parlerà approfonditamente nei seguenti capitoli, sono stati la restituzione di territori che tradizionalmente erano indigeni, il crescente coinvolgimento delle popolazioni interessate e la selezione di obiettivi comuni per ridurre lo sfruttamento delle risorse forestali. Tuttavia, se questi obiettivi fossero già alla portata di tutti gli stati coinvolti, non si starebbe discutendo su questo argomento. Infatti, uno degli obiettivi di questa ricerca è di far notare che il rispetto sostanziale dei diritti indigeni, e degli obblighi concordati, porterebbe senz'altro a delle pratiche più coscienziose da parte degli stati Latinoamericani per quanto riguarda la salvaguardia della biodiversità forestale. Ciò fino ad ora non è stato pienamente ottenuto, o almeno non in tutti i casi.

Se da un lato le fonti analizzate dimostrano che le caratteristiche della foresta Amazzonica la rendono la foresta pluviale più significante a livello globale, non a caso definita "il polmone della terra", dall'altro notiamo come gli stati primariamente responsabili della sua protezione, o quantomeno della sua gestione, si dimostrino incoerenti negli approcci

utilizzati. E per approcci si intendono norme e standard internazionali, come ad esempio le norme di protezione delle aree protette redatte dalla Unione Internazionale per la protezione della natura (IUNC). Queste linee guida per mantenere gli standard di protezione, coerentemente con quanto affermato nell'articolo 8j della Convenzione sulla Biodiversità, si dimostrano utili nel caso della protezione di aree ad alto rischio di perdita della biodiversità come alcune aree della foresta pluviale. I bacini del nord-est Brasiliano negli stati di Parà, Acres, Amazonas, ma anche il Pantanal, le zone paludose dell'Ecuador e via dicendo, non sono solo luoghi d'importanza per il loro carattere naturale, ma anche, e soprattutto, per le popolazioni che vi abitano e che hanno sviluppato un intero mondo fatto di credenze, tradizioni, riti e identità, i quali garantiscono senz'altro la memoria e la vitalità della tradizione degli antenati, che senza la possibilità di cogliere l'elemento sacro dei luoghi naturali dell'Amazzonia andrebbero perduti.

Dunque le considerazioni finali mettono in luce come gli stati concretamente si comportano riguardo ai due temi principali della ricerca della tesi: il rispetto dei diritti dei popoli indigeni che garantiscono loro la possibilità di beneficiare delle terre ereditate dagli avi e svolgervi in libertà tutte le attività correlate al corretto svolgimento della cultura e del sistema di credenze su cui si ergono la società, l'economia e il diritto consuetudinario. E il rispetto di questi ultimi implica che gli stati si impegnino – di più rispetto al passato – a non sottovalutare i danni ambientali, anzi a prendere in considerazione che le misure di protezione dell'ambiente e dell'Amazzonia sono volte anche a salvaguardare l'eredità indigena.

Le domande che questa tesi si pone sono: gli stati dell'America Latina e Centrale coinvolti nella salvaguardia dell'Amazzonia, si impegnano a tutti gli effetti a proteggere il diritto delle popolazioni indigene di svolgere la propria vita in piena sicurezza e autonomia nella foresta pluviale? E poi, può un eventuale miglioramento degli standard di protezione dell'ambiente migliorare le condizioni di vita di queste popolazioni?
La risposta alla prima domanda è che gli stati non hanno effettivamente messo in atto tutti gli strumenti a loro disponibilità per far si che gli standard concordati a livello internazionale siano totalmente rispettati. Un classico esempio è il fatto che le limitazioni poste allo sfruttamento delle risorse non rinnovabili vengono aggirate da terze parti che invadono le terre di proprietà delle comunità indigene. Questo suggerisce che non vengano impiegati strumenti quali meccanismi di controllo e istituzioni che si occupino di rendere partecipi le comunità o di consultare i diretti interessati in caso di progetti che coinvolgono la creazione

di scavi nei territori protetti. Tutto ciò si ricollega anche al fatto che se questi diritti non vengono rispettati significa che i popoli non hanno pieno controllo delle proprietà di loro pertinenza, e dunque neanche delle aree gestite da loro utilizzando misure sostenibili.

La seconda risposta è che si, se la protezione e l'impegno degli stati migliorassero al fine di creare un diritto formale nei confronti della protezione delle foreste come oggetto imprescindibile di godimento dei diritti, probabilmente potrebbero diminuire i casi di violazioni. L'impegno che al momento gli stati hanno preso può sembrare insufficiente a garantire la protezione della biodiversità, non perché le norme internazionali siano sbagliate, ma perché a livello domestico si riesce a raggirare facilmente il sistema.

È necessario, in ogni caso, che avvengano dei cambiamenti. Di che tipo di cambiamenti si tratta? Nuove politiche ambientali, per favorire il raccoglimento dei dati ed eseguire verifiche dell'impatto ambientale delle attività che arrecano danno all'ambiente, quali scavi, R&D, estrazione di minerali. Anche nell'amministrazione del territorio ci sono alcune lacune, come la sorveglianza effettiva ed efficace dei territori remoti dell'Amazzonia, in cui i popoli scelgono di vivere incontattati, e la divisione delle categorie di territori, tra pubblici, privati e collettivi. Infatti, aumentare l'autonomia delle comunità nella gestione collettiva dei territori ad alto rischio attraverso usanze e tecniche indigene risulta più sostenibile e a lungo andare ha un effetto rinvigorente sulla biodiversità della foresta pluviale e del suo contorno.

In tutte queste misure, il fattore culturale è fondamentale, perché nelle valutazioni d'impatto ambientale, come suggeriscono le linee guida Akwe:Kon, l'impatto ambientale ha serie ripercussioni sullo svolgimento corretto delle funzioni tradizionali, rituali e socio-economiche delle popolazioni indigene.

Sembra quasi, dall'analisi di pareri di esperti e di fonti primarie come le decisioni delle corti internazionali di diritti umani, che ci sia un certo timore nel consentire l'autodeterminazione ai popoli, e conseguentemente tutte le libertà fondamentali, come se l'acquisizione di questi diritti possa frammentare lo stato o diminuire il controllo sui territori ricchi dal punto di vista economico che gli stati vorrebbero millantare.

Quindi, in conclusione, verrà dimostrato che gli stati sono per la maggior parte sulla buona strada per la corretta implementazione dei diritti delle popolazioni indigene e dei diritti forestali, anche se gli impegni presi non vengono rispettati all'unisono, ma solo alcuni stati si sono dimostrati pienamente disposti a conferire la personalità legale e tutti i diritti che ne derivano ad entrambi i soggetti della ricerca.

Se il diritto internazionale si evolvesse nella direzione della creazione di strumenti con valore legale per la protezione dei diritti dei popoli indigeni e delle foreste, questo potrà senz'altro portare alla presa di coscienza che un impegno più concreto è necessario, e deve coinvolgere tutti gli stati interessati, ma anche i popoli, poiché il problema della distruzione dell'Amazzonia si ricollega direttamente alle comunità indigene, ma più ampiamente al benessere futuro della comunità internazionale tutta.

LIST OF ABBREVIATIONS

ACHR: American Convention of Human Rights

ACTO: Amazon Cooperation Treaty Organisation

ADHR: American Declaration of the Human Rights of the Men

BLA: Brazilian Legal Amazon

CBD: Convention on Biological Diversity

CEDAW: Convention to End Discrimination Against Women

COICA: Coordinator of Indigenous Organizations of the Amazon River Basin

EIA: Environmental Impact Assessment

FAO: Food and Agriculture Organisation

FSC: Forest Stewardship Council

HCV: High Conservation Values

HR: Human Rights

HRC: Human Rights Committee

HVF: High Value Forests

IACHR: Inter-American Commission on human rights

IACtHR: Inter-American Court of Human Rights

ICCPR: International Covenant on Civil and Political Rights

ICERD: International Covenant to End Racial Discrimination

ICESCR: International Covenant on Economic, Social and Cultural Rights

IEL: International Environmental Law

IFF: International Forum on Forests

IL: International Law

ILO C N. 107: International Labour Organisation Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries

ILO C N. 169: International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries

ILO: International Labour Organisation

IPF: International Panel on Forests

ITTA: International Tropical Timber Agreement

ITTO: International Tropical timber Organisation

IUNC: International Union for Natural Conservation

OAS: Organisation of the American States

PIVAC: Intergenerational Pact for the Life of the Colombian Amazon

SESAI: Segreteria especial de Saude Indigena

TEK: Traditional Environmental Knowledge

TFRK: Traditional Forest-Related Knowledge

UN: United Nations

UNCCD: United Nations Conference to Combat Desertification

UNCED: United Nations Conference on the Environment and Development

UNDRIP: United Nations Declaration of the Rights of Indigenous Peoples

UNESCO: United Nations Environmental S and Cultural Organisation

UNFCCC: United Nation Framework Convention on Climate Change

UNFF: United Nations Forum on Forests

UNGA: United Nations General Assembly

UNSC: United Nations Security Council

WHC: World Heritage Convention

WIPO: World Intellectual Property Organisation

WTO: World Trade Organisation

WWI: World War I

WWII: World War II

INTRODUCTION

The present thesis is structured in four Chapters, in which the common thread will be the analysis of the legal condition of Indigenous peoples of LAC and their function as dwellers in the protection of their habitats in the Amazon Rainforest. The issues under analysis are Indigenous cultural and territorial rights and forest rights.

The focus of Chapter one is the Indigenous populations of the nine countries of LAC, properly Colombia, Ecuador, Bolivia, Peru, Brazil, Guyana, Suriname and Venezuela. Starting from the definition of Indigenous peoples in the international framework of Indigenous law, the interest will move towards the importance of correctly valorising the characteristics of the traditions and ancestral cultures that are performed in contact with nature, as to favour the well-being of the concerning populations and the surrounding environments.[1]

In order to do so, we will go through the contemporary international legal framework regarding Indigenous law, particularly the evolution of the notion and status of Indigenous peoples thanks to the work of Martinez Cobo and the ILO Convention on Tribal and Indigenous peoples, respectively Convention N.107 and 169.[2]

The peculiarity of this research on the rights of Indigenous peoples is that it is analysed in a way that Indigenous cultural and territorial rights are put in direct relationship with environmental protection, and the current challenges to the environment and the natural resources show how vulnerable are going to become Indigenous heritage and environmental safety if LAC countries do not accept serious commitments. These challenges comprise the loss of forest crown due to economic and extractive activities, which are destroying the reproduction of endangered species that contribute to enriching the biodiversity of the Amazon biome, and are putting at risk the pollination and dissemination of native vegetable species. Moreover, the current situation is partly due to the governments' inability to respond to the demand of G&S, and sacrificing the rainforest and the ancestral habitats seems to be the most recurrent path.[3]

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1 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, Gland, Switzerland and Cambridge, IUCN, 2004.

2 A FALK, R. B. HOWARD, V. LEARY, H. HANNUM, R. T. COULTER, M. DAVIES and O. LYONS, *Are Indigenous Populations Entitled to International Juridical Personality?*, Proceedings of the Annual Meeting (American Society of International Law), 1985.

3 A. BEN YISHAY, S. HEUSER, D. RUNFOLA and R. TRICHLER, *Indigenous Land Rights and Deforestation: Evidence from the Brazilian Amazon*, Journal of Environmental Economics and Management, 2017.

The role of climate change and the unhealthy circumstances caused by the destruction of moist forests and water reserves in the biome, are triggering a vicious cycle of climate emergencies and wildfires, which are not managed correctly by the authorities as to prevent repercussions on Indigenous ways of life.[4]

Chapter two will show the limits of Indigenous law and the new frontiers of environmental law. In order to analyse the rights of Indigenous peoples that are salient in the research, we will analyse ILO conventions (N. 107 and 169), UNDRIP and the ICCPR, together with the ACHR, which says a lot on how Indigenous rights are dealt with in the framework of LAC.[5] The rights that will be dealt with are the right to self-determination, territorial rights, cultural rights, the right to use natural resources, to live in a healthy environment and to participate in decision-making. Moreover, Environmental law instruments will be analysed too, as to provide the perspective that forest rights are interconnected with Indigenous rights and Indigenous customary sustainability are a useful instrument to guarantee biodiversity preservation, and to show that protected areas managed by Indigenous peoples have revealed to be a successful example of biodiversity enhancement. These instruments are the CBD, the Ramsar Convention, the Rio Declaration and the Stockholm Declaration.[6]

The instruments used for the analysis of the current framework protecting Indigenous peoples and forests internationally bring to light that: land rights and the right to a healthy environment are salient, if not fundamental, for the well being of the concerning populations and the rainforest. The legal analysis of these instruments in the Chapter demonstrates that there is a connection between Indigenous and environmental rights. This connection is not limited to the right to a healthy environment, but is deeper, and implies that Indigenous peoples cannot live without natural environments, and vice versa, biodiversity and natural habitats benefit from the presence of Indigenous peoples, as long as they are able to preserve their practices. However, the relationship between the two fields of IL is still not adequately explored, and it is reflected in the state practice of the concerned states.[7]

4 W. D. CARVALHO, K. K. MUSTIN, R. R. HILÁRIO, I. M. VASCONCELOSE, V. EILERS, M. PHILIP and P. M. FEARNSIDE, *Deforestation control in the Brazilian Amazon: A conservation struggle being lost as agreements and regulations are subverted and bypassed,* Perspectives in Ecology and Conservation, 2019, Vol. 17, p. 122–130.
5 A FALK, R. B. HOWARD, V. LEARY, H. HANNUM, R. T. COULTER, M. DAVIES and O. LYONS, *Are Indigenous Populations Entitled to International Juridical Personality?*, op. Cit.
6 R. G. TARASOFSKY, *Assessing the International Forest Regime*, IUCN, Gland, Cambridge and Bonn.
7 Ibidem.

As it will be shown through the explanation of some useful case law and comments and reports of the international bodies and courts related to the analysis of Indigenous rights violations, the problem remains that there is still no attempt at applying environmental rights in the field of Indigenous rights violations.

In order to better understand the context of the Amazon Rainforest and the populations that live in the forests, Chapter three analyses the regional peculiarities and environmental sub-systems that are present in the Amazon biome. What emerges from the studies is that the inaccuracy of documentation and management of the forests has favoured devious behaviours in the LAC states. For example, deforestation, is the major cause of destruction of the Rainforest, and also causes Indigenous peoples forced removal and abandonment of traditional ways of life.[8]

In particular, the regional system of territorial subdivision shows incoherences in the management of what are called "collectively managed areas", a sub-category of protected areas that is very much spread in the Amazon region and has revealed to be a solution to the claims of Indigenous peoples, and a way through which customary law and traditions may play the leading role in biodiversity preservation.[9]

A focus is also made in relationship to the cultural aspects of Indigenous communities that have lived in the Amazon from before the modern era, and the help that they could give with the techniques and customs in managing and enhancing natural environments and forests if governments started to apply these measures as ordinary measures, not exceptional ones. This is the case of Brazil, that has implemented many measures for Indigenous communities allocation and curbing deforestation, but has not obtained positive outcomes due to the emerging of new problems (or exacerbating of old ones), such as land-grabbing and forest conversion.[10]

Finally, once we have seen in practice how the system for forest protection and Indigenous rights to lands and cultural identity works, Chapter four will demonstrate in concrete how states comply with Indigenous rights, from the point of view of the governmental practices and the application of the principles of Indigenous rights law and IEL with regards to the

8 W. D. CARVALHO, K. K. MUSTIN, R. R. HILÁRIO, I. M. VASCONCELOSE, V. EILERS, M. PHILIP and P. M. FEARNSIDE, *Deforestation control in the Brazilian Amazon: A conservation struggle being lost as agreements and regulations are subverted and bypassed, op. Cit.*

9 Ibidem.

10 Ibidem.

respective Indigenous communities.[11] The aim is to define how the regional system of compliance has evolved in the years and what still needs to be done, with the aim to favour Indigenous peoples' well-being from the constitutional point of view, but also more openness of the state to introduce towards traditional practices for sustainable management of the environment and customary law principles. The examples analysed suggest that improvements still need to be done, but the situation is not irreversible in the future.[12]

11 *ECLAC, Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges,* CEPAL, 2014.
12 Ibidem.

CHAPTER 1. THE INDIGENOUS PEOPLES OF LATIN AMERICA AND THE CARIBBEAN

1. Who Are The Indigenous Peoples?

The core of any definition of an indigenous person is the recognition of their identity and customs, and as it will be demonstrated in the following chapter, the respect of the human and cultural rights of the existing communities is not obvious. The uniqueness of indigenous groups derives from the fact that the knowledge of the ancestors they have passed on through centuries is advanced. They literally live in the nature, and they have their own set of laws, institutions, and public figures that deal directly with environmental issues.[13]

It is worth mentioning that the outcomes of colonization and historical struggles have shaped the evolution, cultural and political organisation, and economic propensities of the natives. European *conquistadores* arrived in the countries that now form the Latin American Region, triggering wars and revolts due to the imposition of new societal structures, oppression and violence. It was not until the last century that states began to grant a certain degree of autonomy to the respective indigenous communities, thus encouraging demands for the recognition of their rights in national constitutions. Furthermore, their cultural heritage was enlarged and enriched by the mixture of different influences, including the African slaves who worked in the plantations, and European religious missionaries.[14]

Although the presence of indigenous communities on national territories is high, statistical data gathered by the World Bank show that almost half of the total of Indigenous persons lives in conditions of poverty and face difficulties in accessing basic health and hygiene services.[15] In addition to this, many women are unemployed or uneducated, due to their status in the community and also for the traditional belief that the female gender is a symbol of fertility and has its role in the household. Girls and young women dedicate to family activities, while men work themselves in agriculture and hunting. A limited percentage of indigenous persons have access to university and colleges, and adverse economic conditions force them to renounce to higher education. The average years in mandatory education institutes are six, which represents half the years dedicated by normal citizens. They are put in a disadvantaged sphere of action, due to the fact that they are forced to attend school in the

13 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, Gland, op. Cit.
14 CEPAL and BID, *Los pueblos indígenas de Panamá: Diagnóstico sociodemográfico a partir del censo del 2000, Santiago,* Documentos de Proyectos, N. 20, 2005, p. 18.
15 C. Y. DAVIS-CASTRO, *Indigenous Peoples in Latin America: Statistical Information*, Washington, Congressional Research Service, 2020.

national language, because indigenous teachers lack and the schooling programs are basic.[16] Communities are also present the urbanised areas, however the occupation rate is low, and usually indigenous persons find employment as domestic workers, artisans and wipers because of their discriminated conditions in society.[17]

By studying the development and the gradual integration of Indigenous communities in the national contexts, some cultural and social discrepancies emerge: the "indigenous" condition seems to become a burden that excludes them from the enjoyment of basic rights. In the past centuries, it was common mistake to connect the idea of "indigenous" with that of savage, uncivilised race, or uneducated, especially in the vision of Western European scholars. The difficulty of understanding the traditions, the motives behind the rituals and their religions derives from the usual mistrust of Western cultures with regards to "exotic" cultures, which is undoubtedly a feature of Eurocentrism.[18] Fortunately, this concept has been overcome, and with the formation of new inclusive societies there is more openness towards the meaning of the term "indigenous" from the internal perspective, with the aim of creating further integration in the national contexts.[19] In the light of the analysis of the colonial history of Indigenous peoples, the Special Rapporteur Martinez Cobo conducted a study on the issue of discrimination in the application of human rights to Indigenous Peoples, on which was developed the definition of Indigenous peoples as we know it today, affirming that:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their

16 L. E. LOPEZ, Background paper prepared for the Education for All Global Monitoring Report 2010 Reaching the marginalized, *Reaching the unreached: indigenous intercultural bilingual education in Latin America*, UNESDOC Digital Lybrary, 2009.
17 G. OVIEDO, L. MAFFI and P. B. LARSEN, *Indigenous and traditional peoples of the world and ecoregion conservation, an integrated approach to conserving the World's biological and cultural diversity*, Gland, WWF International and Terralingua, 2000.
18 STEWART G, *What does 'indigenous' mean, for me?,* Educational Philosophy and Theory, 2018, Vol. 50, N. 8, p. 741.
19 CEPAL and BID, *Los pueblos indígenas de Panamá: Diagnóstico sociodemográfico a partir del censo del 2000, Santiago,* Documentos de Proyectos, N. 20, 2005, p. 21.

> continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal system."[20]

In addition to that, in the explanation of the Special Rapporteur, indigenous persons are those persons who identify as indigenous and are recognized by the group they identify with, based on that they have the right to self-government. It is curious to notice that until the most recent times they have been recognized as citizens of the state whose territory they occupy, but those states have failed to protect and guarantee their rights.

Indigenous peoples have been endowed with rights that most of the Western world considered obvious until half a century ago.[21] The most recent evolution of international law has allowed national governments to include in codes of law and constitutions the rights of the indigenous peoples, but the issue of integration in the civil society and its repercussions on Indigenous groups is still widely discussed.

The evolution of International Human Rights Law in the field of Indigenous Rights has been marked by the 1989 ILO Convention 169, which on the line of the Martinez Cobo study defines Indigenous peoples on the basis of independence from central laws and institutionalized traditions of the state, as follows:

> "(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."[22]

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20 J. B. HENRIKSEN, *Key Principles in Implementing ILO Convention No. 169,* Programme to Promote ILO Convention No. 169, 2008, p. 5.

21 E. HAFNER-BURTON and K. TSUTSUI, *Human Rights in a Globalizing World: The Paradox of Empty Promises,* American Journal of Sociology, 2005, Vol. 110, N. 5.

22 International Labour Organization, *Convention 169 Concerning Indigenous and Tribal People*, Geneva, June 27th, 1989 available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

Currently, the Convention has been ratified by almost all Latin American countries concerned with this study, thus its provisions have a legally binding character for those states.[23] Suriname on the other hand, has still not sign nor ratified the Convention, despite Indigenous groups are evidently part of the country's historical background.

As this definition suggests, it is first of all necessary to distinguish tribal and indigenous peoples: the formers share the same value, culture and customs but are not hereditary connected to the lands they occupy; on the contrary, the latter share both identity and culture, and historical bonds to the territory. What we assume from this definition, and from the overall content of the Convention C169 is that regardless of this semantic distinction, these categories of individuals are given equal opportunities in matters of social and economic possibilities, because the Indigenous rights are nothing less than universal rights applied to the situation of Indigenous peoples[24]. The definition provided by the ILO has been used in national constitutions to describe Indigenous peoples, both in countries that are members to the Convention and in other countries that did not ratify it.[25]

The words of the UN Declaration on the concerned peoples and their rights, emphasise the historical importance of Indigenous Rights recognition, putting particular stress on the peculiarities of their traditions as cultural elevation. The United Nations Declaration on the Rights of Indigenous Peoples does not provide a proper definition of the meaning of "indigenous peoples", since they prefer to take into consideration the general features that characterise Indigenous peoples, such as land inheritance, self-identification, independent institutions. However, it states that:

> «Indigenous peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. […] indigenous peoples have suffered from historic injustices as a

23 International Labour standards Department, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169), Handbook for ILO Tripartite Constituents*, International Labour Organization, Geneva, 2013, p. 5.
24 *op. cit,* p. 3.
25 J. B. HENRIKSEN, *Key Principles in Implementing ILO Convention No. 169,* Programme to Promote ILO Convention No. 169, 2008.

result of, *inter alia*, their colonization and dispossession of their lands, territories and resources».[26]

Considering these definitions, the assumption is that the issue of identification alludes to a genealogical connection with the past, either with a member of the family or clan, or with a specific place. Giving a definition of what is "Indigenous" is a relational act *per se*, because it derives from the need of categorisation of a form of association that differs from the classical European idea of society and nation state. Indeed, insiders of indigenous groups do not refer to themselves as "Indigenous", although this description has replaced the terms "native" and "Indian", which offered instead derogatory depiction of the cultural condition of being indigenous.[27] Despite having been victims of scepticism, criticism and sometimes indifference throughout history, Indigenous peoples represent a direct contact with the ancient world. In certain social contexts they are mostly integrated; actually, among almost 800 ethnic groups located, some decided to have no relations with society and live in their territories providing for themselves.[28]

Today, there are estimated to be 370 million indigenous people in the world: Latin American countries count 45 million circa among their overall population.[29] The countries in the Latin American and Caribbean region which are touched by the Amazon region are eight. Currently, although there is no precise information on the entity of the ethnicities populations who inhabit the Amazon region.[30] According to the Peruvian Ministry of Culture there are 55 indigenous peoples, amongst whom 4 live on the national territory of the Andes and 51 in the Amazon region. Peruvian laws envisage the rights of the Indigenous peoples since 1993.[31] For the most, individuals who consider themselves Indigenous the last census of 2017 share *Awajún, Kukama Kukamiria, Shipibo-Konibo, Shawi, Matsigenka, Yagua, Ashaninka Yanesha, Achuar, Wampis, Asheninka* origins. Moreover, an imprecise number of peoples do not have contact with the outside world, and enjoy complete protection of the state, among which we count the *Mashco Piro, Isconahua, Matsigenka, Mastanahua, Amahuaca, Kakataibo, Chitonahua, Murunahua* and *Yora*. The characteristics of the above

26 UN Website: https://www.un.org/development/desa/indigenouspeoples/about-us.html
27 STEWART G, *op.cit.,* p. 742.
28 *ECLAC, Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges,* CEPAL, 2014.
29 Ibidem.
30 Ibidem.
31 Ibidem.

mentioned groups are rural, and very similar to the original forms of organisation that precede the formation of the national government.[32]

The most recent census of the indigenous population of Suriname is dated back to 2012; from the data emerges that the country is home to a small percentage of Amazonian groups in the Northern area, among which there are the *Arawak* and *Carib*, and in the South there are *Wayan* and *Trio* tribes.[33] Despite the numerous attempts of human rights organisations sustained by native populations, currently Suriname has no legal means through which Indigenous rights have been implemented, due to government adversity to the recognition of the status of indigenous people, alas posing major preoccupation upon the management of natural resources on indigenous lands, and it remains one of the few states of the Latin American region to not have ratified the ILO Convention C169.[34]

Guyana is historically divided in two, the French and the English territories, and counts 9 groups among which the *Lokono, Arawak* and *Kalina*. The country has been open to migration flows from the neighbouring Suriname and Venezuela, hence the communities have common historical patterns. The Aboriginal peoples are called "Amerindians", since they are direct descendants of the native groups who fought in the resistance to the first European colonisation.[35] As well as Suriname, the state of Guyana does not recognise the ILO C169, and the economic elites have been denying property and identity rights to the Amerindians because of the hectic production in the field of mining, mineral and gold extraction. Many indigenous groups are now advocating programs for reforestation and the reduction of pollution levels.[36]

Brazil hosts a huge portion of the amazon Rainforest, where the *Guarani, Yanomami* and *Tikuna* peoples live. Most of the individuals who self-claim to be indigenous are mixed-race and reside in urbanised areas. However, the indigenous population rate covers only 0.5% of the overall population of the country.[37] Of utter relevance is the preoccupation of the Brazilian peoples who have required a new census in 2022, since the last one dates back to 2010, because the inaccuracy of information makes it impossible to both study the

32 Portal Cultural de la Región Andina Website: http://www.quechuanetwork.org/
33 IWGIA Website: https://www.iwgia.org/en/suriname.html
34 Human Rights Committee, *Concluding observations: Suriname*, CCPR/CO/80/SUR, 4th May 2004, HRC para 21, available at: https://www.refworld.org/docid/415a66964.html
35 Amerindian Peoples Association Website: http://apaguyana.com/
36 Inter-American Development Bank, *Guyana: Technical Note on Indigenous Peoples*, 2007.
37 B. RICARDO and F. RICARDO (Ed.), *Povos Indígenas no Brasil: 2001-2005*, São Paulo, Instituto Socioambiental, 2006.

complexity of the population and implement the adequate measures for human rights protection. Although Indigenous rights are comprised in the national constitution, the continuous interference of multinationals and wrong political measures are worsening the life conditions for the survival of these important components of the Brazilian society.[38]

In Colombia there are 115 groups, and an increase in indigenous population presence has been recorded in 2018. The main ones are the *Naza, Wayuù*, *Pascos* and *Zenu*; also, isolated groups such as the *Jurumi, Passe* and *Yuri* still live in the area.[39] Despite the milestones of the last century in the field of indigenous rights, various cases of violence against tribes conducted by economic groups and terrorists show an unsolved problem between the central government and the territorial authorities, namely the issue of independence and land rights. Also, the illegal organisations in the country represent a threat, as drug trafficking and cultivation in the forests violate the territorial boundaries of the protected reserves. The Colombian case is peculiar, since as a result of the unanswered necessity of protection by the central authorities the groups have united in what they call "The Indigenous Guard", which is a symbolic police corps fighting in the name of Mother Earth through non-violence.[40]

Bolivia recognizes a large indigenous population of *Quechua, Aymara, Chiquitano, Guarani* and *Mojeño* origins, together with Afro-Bolivians, since the indigenous population rate of 2001 Census was higher than 60%; the recognized populations are 36, and during the last decades has been recorded a decrease in people self-identifying as indigenous.[41] As a matter of fact, the indigenous population of Bolivia is divided into few recognized large communities and confined small ones, the latter being exposed to external factors of insecurity, strictly linked to environmental over-exploitation. The average number of individuals per community is lower than 200 persons, in the protected area of the Amazon area; they have recently been challenged by infrastructure projects and the long-standing illegal cocaine traffic, along with the government sympathy for resource extraction companies.[42]

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38 Amazon Watch, *Brazil's Belo Monte Dam – Sacrificing the Amazon and its Peoples for Dirty Energy*, 2014, available at http://amazonwatch.org/work/belomonte-dam
39 N. DE LA HOZ, *Diversidad Cultural del sur de la Amazona colombiana*, Bogotà, Instituto Humboldt, 2007.
40 The World Website: https://www.pri.org/stories/2019-12-10/photos-colombia-s-indigenous-guard-defenders-land-environment-and-their-own-lives
41 Aymara People Parliament Website: www.puebloindio.org/Parlamento_Aymara/index.htm
42 INE Instituto Nacional de Estadistica Website: https://www.ine.gob.bo/index.php/censos-y-banco-de-datos/censos/

Ecuadorian institutions acknowledge 14 nationalities of indigenous origins, all of them sub-divisions of the main and totemic *Quechua* population.[43] A brief digression on the situation of Ecuador may be helpful to better realise what improvements shall be adopted in other states of the Latin American region. Ecuador, apart from having recognized indigenous rights of the UN Declaration and the ILO C169, is a strong supporter of the rights of nature. As a matter of fact, it is one of the first states to have introduced the rights of the nature in its national Constitution of 2008, and to have included the ancestral teachings of the *Quechua* indigenous group as fundamental principles, such as the emblematic principle of *Sumak Kawsay*. The expression in indigenous language means peaceful co-existence of humans and nature, and its use in the legal framework encourages the advancements towards the reevaluation of nature as a source of well-being other than economic profit.[44]

Venezuela counts 51 macro ethnicities, the most numerous one being the *Wayuù, Barí, Yukpa, Pemón, Yabarana, Yanomami, Warao, Kariña* and *Yekuana.*[45] Beyond the official recognition of the indigenous socioeconomic and political status in the country, of their lands and institutions, little was done to foster integration and well-being of the communities. Particularly, the creation of a specialized ministry, namely the Ministry of Popular Power for Indigenous Peoples, has not assisted the groups during the economic crisis of 2016. What is more, basic assistance to the most fragile groups has been limited, if not denied, for example, in access to public education and health, and harsh conflicts between *rancheros*, the owners of ranches, and the tribes continue to exacerbate the discrimination of the minorities.[46]

43 R. SERRANO, *The Rights of Nature. Theoretical and Practical Analysis, the Ecuadorian Perspective*, Melbourne Law School, 2015.
44 R. SERRANO, Op. cit.
45 M. MENGARELLI, *Pueblos Indígenas y Áreas Protegidas en América Latina*, Santiago, FAO/OAPN, 2008.
46 V. COTT and D. LEE, *Latin America's Indigenous Peoples*, Journal of Democracy, 2007 Vol. 18, N. 4, p. 130.

2. What Is Their Bond With Nature?

Nature is home to Indigenous peoples. These peoples lead a life that is extraordinarily in harmony with natural cycles, or rather they have a prominent role in keeping those cycles in balance[47]. It is common belief among tribal communities that the individuals who form part of the tribe become a single whole with natural elements, hence nature represents a superior entity which rules the lives of common people and must be protected. Latin America is a fertile region of the world that consists of small and intertwined ecosystems: each Indigenous community is endowed with very specific geographic and climate conditions that shape their identity. A principle that summarises indigenous cosmologic ideologies, and that is common to the Quechua and Aymara populations, is the *Sumak Kawsay* or *Suma Qamaña:* in Spanish *El Buen Vivir*, the principle of good living[48]. This principle was first applied by tribal communities, as they conceived the nature as the *ratio* of every event. In this perspective human beings cease to be the main actors and become subordinate to the Mother Earth, which in turn acquires legal personality. This political concept was reintroduced in during the 1960-70s, after the economic boom and the wave of globalization, as an alternative to the capitalist perception of economic accumulation. It became the basis on which Latin American countries constituted the new government structure known as the New Constitutionalism Wave.[49] This ideology which is the basis of the affirmation of environmental rights of which the nature becomes subject is in contract with the assumption that nature is an object in the hands of the humans, and the new relational sphere between all human beings and animals is a condition of equality. In Latin American countries the rights of the nature have been accepted and included only in Bolivia and Ecuador.[50] Hence, the Preamble of the Ecuadorian Constitution of 2008 recites:

47 P. DESCOLA, *In the Society of Nature: A Native Ecology in Amazonia*, Cambridge, Cambridge University Press, 1994.
48 I. VARGAS-CHAVES, G.A. RODRÍGUEZ, A. CUMBE FIGUEROA and S.E. MORA-GARZÓN, *Recognizing the Rights of Nature in Colombia: the Atrato River case*, Revista Jurídicas, 2020 vol. 17, N. 1, p. 13-41.
49 R. SERRANO, *The Rights of Nature. Theoretical and Practical Analysis, the Ecuadorian Perspective*, Melbourne Law School, 2015.
50 E. R. ZAFFARONI, *La Pachamama y el humano*, Ediciones Madres De Plaza de Mayo, Buenos Aires, 2011.

> "We women and men, the sovereign people of Ecuador Celebrating nature, the Pacha Mama (Mother Earth), of which we are a part, and which is vital to our existence." [51]

And in Section 9, Chapter 7, Articles 71 and 72 of the Constitution it is affirmed:

> "Art. 71 Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.
> Art. 72 Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems."[52]

The same statements can be found in the articles of the Bolivian Constitution of 2009: in the Preamble emerges the divine character that has been attributed to the Mother Earth, hence the spiritual sphere of the ecology, is given recognition as a pillar of the text:

> "We found Bolivia anew, fulfilling the mandate of our people, with the strength of our Pachamama and with gratefulness to God."[53]

Likewise, Articles 33 and 34 confer to the environment the status of a subject of socioeconomic rights and, as such, the right to be protected and the call to the whole population to maintain its healthiness:

> "Art. 33 Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present

51 *Constitución Política de la República del Ecuador,* 20th October 2008, available at: https://www.refworld.org/docid/3dbd62fd2.html
52 *Constitución Política de la República del Ecuador*, op. Cit.
53 *Constitución Política del estado de Bolivia* ,07 February 2009, available at: https://www.oas.org/dil/esp/constitucion_bolivia.pdf

and future generations, as well as to other living things, so they may develop in a normal and permanent way.

Art. 34 Any person, in his own right or on behalf of a collective, is authorized to take legal action in defence of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment." [54]

It should be noted that the *Pachamama* is the ancient word used to talk of the Mother Earth; the literal meaning of *Pacha* is "whole", and *Mama* indicates the "Earth".[55] She is a goddess who concedes nourishment and shelter to every living being establishing a condition of reciprocity that is satisfied to human and animal sacrifice: she provides her sons with fertile lands, water and food, but she must be nourished too, in the *challaco* rituals, that consist of ceremonies and feasts through the tribes offer her food and drinks.[56]

The way indigenous peoples conceive nature is in relation to themselves, meaning that nature is a whole and its functioning is governed by cosmologic rules. Years ago, a study of the perception of ecology in relation with the persons was developed by Gerardo Reichel-Dolmatoff[57]: he studied the conception of cosmology in the Brazilian indigenous people named *Tukano*. The study of this population can be applied to most of the indigenous structures and traditional beliefs, although subject to the differences in terminology and experiences of each people. He realized that this *Tukano* people believes that life originates in the divinity of the Sun, who releases a flow of energy, called *luz seminal*, that is transmitted to all human beings and animals; hence, life is perceived as a circle: life starts and ends to allow other life forms. Nonetheless, the living beings are intended to be humans and animals. The purpose of the interaction of human activities with the animal world must always be *au-pair*, meaning that if an animal is killed, human sacrifice is needed to keep the cycle of the flow of energy alive.

54 Ibidem.
55 J. PESÁNTEZ BENÍTE, *Los Derechos de la Naturaleza y la Naturaleza de sus Derechos*, Carlos Espinosa Gallegos-Anda y Camilo Pérez Fernández Editores, Quito, 2011.
56 M. RODOLFO and M. RABEY, *Pastores del Altiplano andino meridional: religiosidad, territorio y equilibrio ecológico*, Allpanchis, 1983, pp. 149-171.
57 K. ÅRHEM, *Ecocosmología Y Chamanismo En El Amazonas: variaciones sobre un tema,* Revista Colombiana de Antropología, 2001, Vol. 37, p. 269.

Under this model, the indigenous societies have developed a societal and governmental model to organise their activities and to manage the availability of food resources that is completely in line with natural balances of the Amazon ecosystems. [58]

58 Ibidem.

3. The Amazon: The Earth's Lungs

The Amazon Rainforest encompasses 6.7 million km2 and the area of eight countries forming the vastest rainforest of the planet. Scientists consider the Amazon as a powerful means of balance for the global levels of humidity and temperatures, hosting 10 to 15% of the Earth's biodiversity and half of the global remaining tropical fauna. The environment of the Amazon is so complex that more ecosystems coexist in it: the mountain chain of the Andes, the Amazon River and the wetlands of the Basin, savannas and deserted lands.[59] This massive tropical forest has been defined the "World's Lungs" for the incredible impact it has on global warming; the dense vegetation helps releasing major quantities of oxygen while storing greenhouse gases and carbon dioxide.[60] The Amazon today is considered to be the world largest reserve of oxygen and water, which thanks to their immensity are vital to counter climate change. Of utmost importance is also the Amazon River, sometimes referred to as the "river ocean" for its vastness, as in it flows one fifth of the world fresh water and it reaches almost every country in the South American continent, with numerous affluents contributing to it course, and emptying in the Atlantic Ocean.[61] Unfortunately, scientists report that in the last half century the global lands covered by tropical forests was reduced by 9 million km2, and what is more the pace of forest depletion is increasing. In Latin America only, rainforests suffer a reduction by 0.40% yearly.[62] The Eastern Amazon is the part of the rainforest that is currently at risk of more frequent droughts and is steadily being deforested. The Western side, instead, is the most pristine environment, though multinational pressures and governmental inactivity are the worst threats to its integrity.[63]

Brazil is the main country in which the Amazon unfolds, properly known as the Brazilian Legal Amazon, or the BLA, a geographic area of 5 million square kilometres that covers 9 states of the Brazilian Federal Republic, notwithstanding precise information with regard to

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59 The Forest crosses the following eight countries: Brazil, Bolivia, Peru, Ecuador, Colombia, Venezuela, Guyana and Suriname. Information accessed on the WWF Website: https://wwf.panda.org/discover/knowledge_hub/where_we_work/amazon/about_the_amazon/

60 IPCC, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, 2019.

61 S. CHARITY, N. DUDLEY, D. OLIVEIRA and S. STOLTON (editors), *Living Amazon Report 2016: A regional approach to conservation in the Amazon,* Brasília and Quito, WWF Living Amazon Initiative, 2016.

62 D. ARMENTERAS, G. RUDAS, N. RODRÍGUEZ, S. SUA and M. ROMERO, *Patterns and causes of deforestation in the Colombian Amazon.* Ecological Indicators, 2006, Vol. 6, N. 2, p. 354.

63 M. FINER, C. N. JENKINS, S. L. PIMM et al, *Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples.* PLoS ONE, 2008, Vol. 3, N. 8, p. 2.

scientific data on vegetation, deforestation and biodiversity still lacks.[64] There is also few information about the state of the rainforest and its surroundings, including the unfortunate future of the ecosystems. The Amazon is undergoing a wide loss of trees and vegetation due to the development of Latin and Central American countries in recent past. Still, the government is not taking the necessary measures to protect the amazon, despite the physical evidence. The Bolsonaro administration is disrupting environmental law that protects the Amazonian environment and is willing to concede even more for the sake of economic profit.[65] This form of violence against the Amazonian societies was announced publicly in various occasions by the same president since he took office in 2019. Bolsonaro is claimed responsible by numerous NGOs and social movements for the massive deforestation and the uncontrolled wildfires that are taking place. His administration is blatantly sacrificing indigenous land, cultural and identity rights to open their protected territories to industrial activities, first of all mineral extraction and logging.[66] The public policy coordinator of Greenpeace in Brazil has claimed that:

> "[…] Bolsonaro's policies are causing irreparable damage, his government dismisses the environmental catastrophe facing Brazil and attacks those working to protect life on this planet. Bolsonaro uses hate speech and rhetoric as a smokescreen to divert people's attention from the real danger his government poses – not only to Brazil, but to the global climate. Global political and business leaders must immediately condemn his call for violence and demand an end to this destruction."[67]

Despicably, the Brazilian Constitution has not officially introduced the rights of the nature, however Article 225 comma 4 states that the Brazilian Amazon is national patrimony and "shall" be preserved.[68]

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64 W. D. CARVALHO, K. K. MUSTIN, R. R. HILÁRIO, I. M. VASCONCELOSE, V. EILERS, M. PHILIP and P. M. FEARNSIDE, *Deforestation control in the Brazilian Amazon: A conservation struggle being lost as agreements and regulations are subverted and bypassed,* Perspectives in Ecology and Conservation, 2019, Vol. 17, p. 122–130.
65 Greenpeace Website: https://www.greenpeace.org/usa/news/bolsonaro-denies-brazil-is-burning-blames-indigenous-people-for-fires-in-disturbing-speech-at-unga/
66 Ibidem.
67 *Ibidem.*
68 *Constitution of the Federative Republic of Brazil: constitutional text of October 5, 1988, with the alterations introduced by Constitucional Amendments no. 1/1992 through 64/2010 and by Revision Constitutional Amendments no. 1/1994 through 6/1994*, Chamber of Deputies, Documentation and Information Center, Brasilia, 2010.

For what concerns the other states, on the same line as Brazil, they are all involved in national led programs for reforestation and conservation. The Peruvian Amazon is now extended for almost 200 thousand square kilometres, it hosts the Peruvian Andes, and from its glaciers starts the course of the Amazon River. The *Selvas* here are protected in small percentages by a coalition of private and public actors which are permanently committed to implement sustainable initiatives and the path towards zero deforestation.[69] The Tropical Forest Alliance, in which Peru, Colombia and Brazil participate, has set the objective of deforestation reduction by 30% to reach by 2030. The issues with these remarkable initiatives remain the judicial constrains that delay and reduce the effectiveness of the actions.[70] Similarly, both Guyana and Suriname host a high percentage of Amazon forests but have lost respectively thousands of forested hectares. Guyana and Suriname have built Forest Plans for the interests of the indigenous communities to regulate the use and extraction of forest resources. Forestry programs have been renewed, with the objective of protecting forest resources as the first source of income for the nation. Besides, environmental management have improved and directed the efforts at enhancing sustainable development, systems of protected areas and associations for tutelage.[71]

Furthermore, the case of Venezuela is peculiar, since for a long time President Maduro has been violating human rights and threatening the existence of indigenous communities in the Amazon for economic profits.[72] The destruction of the rainforest proceeds in the National Parks of *Yapacana* and *Canaima*, and the government authorised foreign companies to participate in the mining activities. Venezuela is historically an exporter in high quality raw materials; however, the state is involved in intra-state illegal traffics that are led by Middle Eastern companies with the help of public policies that legalise logging.[73]

Differently from their neighbours, Bolivia and Ecuador have paid more attention to the question of deforestation, from the legal point of view, because they have established in their constitution the rights of the nature, as it was reported above. Unfortunately, the condition of

69 A. NINIO, *The evolution of environmental law in Latin America: the cases of Brazil, Colombia and Peru and the effort to protect forest resources*, Washington, The World Bank, 1999.
70 Ibidem.
71 Cooperative Republic Of Guyana, *Revised National Forest Policy Statement 2018*, available at: https://www.forestry.gov.gy/wp-content/uploads/2018/02/Guyana-National-Forest-Policy-Statement-10-1-2018.pdf
72 M. RENDON, L. SANDIN, and C. FERNANDEZ, *Illegal Mining in Venezuela Death and Devastation in the Amazonas and Orinoco Regions*, CSIS Briefs, 2020.
73 Ibidem.

the Amazon biome is deplorable, and the protection systems are deceived by illegal loggers and mining companies.[74] As a matter of fact, it had been Colombia, with the Constitution of 1991, the first nation to introduce environmental rights, but eventually it was overcome by Ecuador and Bolivia. Nonetheless, Colombia has made advancements in environmental law in the past years: two milestones for the Colombian Supreme Court were achieved in 2017 with the *Tierra Digna* Case, and in 2018 with the *Dejusticia* Judgement.[75] The issue of the illegal extractions in the Atrato River basin, in the District of Chocó, was tackled in the Tierra Digna Case, when the court judged the activities as violations of the indigenous peoples rights that inhabit the territory, and infringement of Art. 8 obligation of the whole population to preserve the environment.[76] This case was pivotal for the *Dejusticia* Judgement that has changed the legal status of the Colombian Amazon applying at the population of Colombia for the conservation and re-forestation of the Amazonia biome for the survival of the humankind and the cultural and traditional background of the native populations. The Court also advised the creation of an international pact for tutelage, the PIVAC, or Intergenerational Covenant for the Life of the Colombian Amazon.[77]

74 T. M. AIDE, M. L. CLARK, H. R. GRAU et al, *Deforestation and Reforestation of Latin America and the Caribbean (2001-2010) op. Cit.*
75 P. VILLAVICENCIO CALZADILLA*, A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia*, 15/1 Law, Environment and Development Journal, 2019, p. 49.
76 I. VARGAS-CHAVES, G.A. RODRÍGUEZ, A. CUMBE FIGUEROA and S.E. MORA-GARZÓN, *Recognizing the Rights of Nature in Colombia: the Atrato River case*, Revista Jurídicas, op. Cit.
77 Ibidem.

4. Challenges of the new century: uncertainties and risks for the Indigenous Peoples and the Amazon biome

Both the Amazon biome and its population face the same uncertainties of the future. The 21st century represents either a challenge or a threat, depending on the perspective from which the current circumstances are analysed. In this paragraph a brief description of the main issues of today's concern will be exposed: Climate change, Biodiversity loss, Indigenous Health, Economic factors and the most recent Wildfires. These are not the only factors of worry but represent key themes that are worth analysing to better understand the starting situation in which the object of this thesis is involved. Each of the following phenomena is interconnected with another issue, that is the incorrect implementation of human and environmental rights, if not the absence of such, by national codes of law.

4.1 Climate Change

Climate change is now a global emergency that is threatening the present and future generations worldwide. Ecologic equilibriums are supposed to be affected too by the climate changes in the long run, especially where natural events already manifest violently, for example monsoon seasons, earthquakes, extreme draughts and so on. It is generated by human activities, which produce CO2 and greenhouse gases through the consumption of natural energy and the combustion of wood, carbon and fossil fuels.[78] The global medium temperature is estimated to rise dramatically in the next decades, hence the members of the Paris Agreement in 2015 committed to keep the temperature rises below 2°C.[79] Given the fact that the unease of the conditions caused by climate change events adds to existing problems, it acts itself as a threat multiplier, the UN Security Council affirms: the nations that do not engage the fight against climate change entail higher risks of conflict.[80] That is because series of other factors, either domestic or external to the country are involved, namely social dynamics, poverty rates, political relations and economic trends. The World Meteorological Organisation Chief Scientist, Professor Pavel Kabat, has explained how unpredictable changes in climate events limit food and water quality, together with air pollution caused by huge quantities of dust and wildfires. In addition to that, if natural disasters start to occur with more frequency, a great deal of displaced persons and migrants will move to neighbouring countries, exacerbating precarious reception infrastructure and restraining migration policies.

First of all, the impacts of climate change are visible in the unexpected rainfall and draughts levels mutations; starting from the 1990s, new extreme climate phenomena began to occur, such as steep daily temperature variations, long periods of draught and delay of the monsoon season[81] The Amazon is subject to great vulnerability because of the bad management of the natural endowments first, and second for the huge consequence of climate change it is expected to generate the environment. Climate change is not merely an environmental issue

78 G.O. MAGRIN, J.A. MARENGO, J.P. BOULANGER et al, *Central and South America.* In *Climate Change 2014: Impacts, Adaptation, and Vulnerability*. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge, Cambridge University Press, 2014.
79 UNFCCC, *UN Climate Change Annual Report 2018*, New York, 2019, p. 8.
80 UN News: https://www.un.org/peacebuilding/fr/news/climate-change-recognized-%E2%80%98threat-multiplier%E2%80%99-un-security-council-debates-its-impact-peace
81 G.O. MAGRIN, J.A. MARENGO, J.P. BOULANGER et al, *Central and South America.* In *Climate Change 2014: Impacts, Adaptation, and Vulnerability*. Op. Cit.

for the indigenous peoples, since it adds injustice to existing social, cultural and economic inequalities. [82] As for the indigenous groups, their communities have developed in areas that are extremely sensitive to climate change. However, being so attached to their lands does not impede forcible migration to other countries, which usually entail identity loss.[83] Article 18 of the UNDRIP claims: "*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights[…]*".[84] Therefore the exclusion of indigenous peoples from governmental decisional processes regarding climate and environmental management is supposedly the main cause of the existence and persistence of inequalities in tackling climate change, moreover no information is provided to the communities, especially the ones that live in protected and isolated areas.[85]

82 E. L. MALONE, *Hot Topics: Globalization and Climate Change*, Social Thought & Research, 2002, Vol. 25, N. 1/2, p. 143–173.
83 United Nations Declaration on the Rights of Indigenous People, New York, September 13th, 2007 available at https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
84 Ibidem.
85 Servicio De Género, Igualdad Y Diversidad Programa Empleos Verdes, *Los pueblos indígenas y el cambio climático*, Ginevra, ILO, 2018, p. 18.

4.2 Biodiversity Loss

In Rio de Janeiro in 1992 was held the UN "Earth Summit" for sustainable development and environmental awareness; in this conference, apart from the Declaration on Environment and Development, the Convention on Biological Diversity was launched. Art. 2 of the Convention defines the meaning of biodiversity:

> "*Biodiversity* means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems."[86]

The Convention stresses the importance of conservation and assessment of environmental impacts, state compliance, participation in conferences and international cooperation[87] between the signatories of the Convention. Today every Latin American, South American and Caribbean country has signed and ratified the document and tried to implement the Precautionary Principle.[88] With regards to the issue of biodiversity loss in relation with the survival of indigenous peoples' culture, art. 8 (j) recites:

> "[Each Contracting Party shall, as far as possible and as appropriate:] 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."[89]

86 United Nations Environmental Programme, *Convention on Biological Diversity*, Rio de Janeiro, June 5th, 1992, available at *https://www.cbd.int/doc/legal/cbd-en.pdf*
87 Art 5 "*Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or. where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity*" United Nations Environmental Programme, *Convention on Biological Diversity*, Rio de Janeiro, June 5th, 1992 available at *https://www.cbd.int/doc/legal/cbd-en.pdf*
88 A. VAN DOMMELEN, *The Precautionary Principle: Dealing with controversy*, Biotechnology and Development Monitor, 2000, N. 43, p. 8-11.
89 United Nations Environmental Programme, *Convention on Biological Diversity*, op. Cit.

Therefore, the protection of biodiversity is fundamental in the perspective of sustainable development, and indigenous peoples are practically the guardians of biological diversity because part of the indigenous heritage covers environmental management techniques, in fact their healthy coexistence with nature and the technical environmental knowledge (TEK) on the administration of resources, land use and conservation methods are to be taken into consideration for the future as a model for countries with high pollution and degradation levels, in the light of the conservation of the environment.[90] The Amazon biome does not only include forests, but also deserts, glaciers, wetlands and so forth, hosting the most various biodiversity in the world.

Biodiversity depletion is a threat for the stability of indigenous communities because if sudden changes occur, they lost their food and employment sources. Both flora and fauna are important in human life, but they have been sacrificed for societal necessities. The decrease in species diversity is human caused. Historical demographic growths that occurred in the past were possible thanks to technological improvements in agricultural production and machinery. Indeed, the growth in global population levels recorded at the end of the 20th century encouraged the food industry to increase the production of selected vegetal species with a better yield on market.[91] The creation of monocultures and croplands reduced dramatically local varieties of the production in favour of soy plantations, bananas and other lucrative crops that were once traditional but then started to be produced only for foreign markets. For instance, the FAO conducted inquiries on the sustainability level of quinoa croplands in Bolivia, Peru and Ecuador, and found out that the use of pesticides is impoverishing soils and damaging agricultural and traditional biodiversity.[92] Similarly, the UNESCO claimed that the avocado is another exported good that is largely consumed in the west is a cause of soil depletion, water scarcity and deforestation.[93] The same goes for cattle industry: high demand on the market for meat and animal products forced the introduction of industrial made animal feed and the deforestation of wild lands for livestock. Moreover, the

90 G. OVIEDO, L. MAFFI and P. B. LARSEN, *Indigenous and traditional peoples of the world and ecoregion conservation, an integrated approach to conserving the World's biological and cultural diversity*, Gland, WWF International and Terralingua, 2000, p. 6.
91 op. cit. p. 10.
92 T. WINKEL, H. BERTERO, P. BOMMEL, J. BOURLIAUD, M. CHEVARRÍA LAZO, G. CORTES, P. GASSELIN et al, *The sustainability of quinoa production in southern Bolivia: from misrepresentations to questionable solutions*, Comments on Jacobsen, 2011, J. Agron. Crop sci, Vol. 197, p. 392.
93World Economic Forum Website: https://www.weforum.org/agenda/2020/02/avocado-environment-cost-food-mexico/

waste and sewage spoil the landscape and the ground waters get polluted.[94] As a consequence, water diversion can leave an indigenous group displaced, as farms take water from basins to irrigate the soil and feed cattle, river basin vulnerable to drought in times of low rainfall.[95] Secondly, industrial and transportation infrastructure are to be considered another cause of biodiversity decrease: ballast water released by hydroelectric plants, but also tourist reception structures in the Amazon, and roads hamper animal migration routes and vegetation growth, destabilising indigenous peoples' lives.[96] For instance, river dams contribute to the loss of fish species because they block their migrations, the increase of bacteria and pollution in water basins, and also floods near the places in which indigenous communities are based.[97] Industrial plants are pollutant entities per se, but the worst consequences they have on biodiversity is when it comes to transporting oil, gas and minerals, but also wood; railways and highways are necessary for massive shipments, as long as they are constructed neither in protected areas nor near natural sites of Indigenous property.[98]

94 R. ALKEMADEA, R. S. REIDB, M. VAN DEN BERGA, J. DE LEEUWC and M. JEUKEN, *Assessing the impacts of livestock production on biodiversity in rangeland ecosystems,* Proceedings of the National Academy of Sciences, 2013, Vol. 110, N. 52, p. 20900-20905.
95 M. L. THIEME, D. KHRYSTENKO, S. QIN, R. E. GOLDEN KRONER, B. LEHNER, S. PACK et al, *Dams and protected areas: Quantifying the spatial and temporal extent of global dam construction within protected areas*, Conservation Letters, 2020.
96 O. PERERA and D. UZSOKI*, Biodiversity and Infrastructure: A better nexus? Policy Paper on mainstreaming biodiversity conservation into the infrastructure sector – CBD SBSTTA 21*, International Institute for Sustainable Development (IISD) and WWF Switzerland, 2017.
97 M. L. THIEME, D. KHRYSTENKO, S. QIN, R. E. GOLDEN KRONER, B. LEHNER, S. PACK et al, op.cit.
98 O. PERERA and D. UZSOKI*, Biodiversity and Infrastructure: A better nexus? Policy Paper on mainstreaming biodiversity conservation into the infrastructure sector – CBD SBSTTA 21, op.cit.*

4.3 Health Issues

Indigenous peoples were hit by massive death rates because of the spread of diseases brought by the colonists. Moreover, from the 18th century circa, new diseases commenced to circulate as international exchanges flourished. Measles, tuberculosis and smallpox provoked waves of deaths among the indigenous groups who had not developed enough antibodies. The state of health of the peoples has always been inclined to genetic diseases, though in the period of colonisation infectious diseases were used as a political weapon to exterminate them.[99] The WHO warned that the increasing concentrations of CO2 in the atmosphere, deforestation in the Amazon and rising temperatures and decreasing humidity levels: these are all causes of the worsening of health conditions.[100] Nowadays, the indigenous persons in Latin America suffer from sexually transmitted diseases, as well as HIV and AIDS, which have spread in the region because of sexual exploitation. Especially young women and girls are at risk, since the average age of sex workers is 13-14 years old. Moreover, 21% of casualties from malaria have been reported in Venezuelan Amazon, where workers have been forced to work in inadequate mines in rivers and basins, contracted the disease.[101]

The Amazon Rainforest and the peoples whose lives and main activities depend on biological cycles are calculated to become some of the most sensitive areas in the globe to drastic climate changes.[102] Ecological balances in terms of food sources, clean water, salubrious soil and air, are directly involved with the concept of human health. Indeed, the right to a healthy environment should be enjoyed almost by every UN Member State, including Latin American countries.[103] But, as we will discuss later, this is not always a practice of the states. Despite the healthiness of the environmental is deeply concerned with human health, we may consider not only to physical illnesses that affect peoples, but also psychological problems that could arise for them. There are examples of mental diseases as consequences of bad practices that involve indigenous communities: local peasants that lose their job positions in agriculture and the primary sector due to the presence of mono-cultivations of multinationals and the phenomenon of land-grabbing, often become mental

99 M. H. DURIE, *The health of indigenous peoples*, BMJ, 2003, Vol. 326, N. 7388, p. 510-511.
100 M. H. COSTA and J. A. FOLEY, *Combined effect of deforestation and doubled atmospheric CO2 concentrations on the climate of Amazonia*, Journal of Climate, 2000, Vol. 13, p. 26.
101 M. H. DURIE, *The health of indigenous peoples*, op. Cit.
102 A. J. MCMICHAEL, *Globalization, Climate Change, and Human Health,* The New England Journal of Medicine, 2013, N. 368, p. 1335.
103UNEP, *Right to a healthy environment: good practices,* 29 May 2020, p. 12.

unstable and begin to abuse of drugs and alcohol because feel deprived.[104] Nonetheless, the growing number of displaced persons as a cause of environmental degradation should be mentioned too. Scientists and climate experts say it is a brutal reality which we will get accustomed to in the following decades. Public health, as well as environmental health, are also threatened by the diffusion of infectious diseases due to rising temperatures interfering with their conservation.[105]

In addition to receiving little investment in medical infrastructures and sanitation from the state, the lack of inclusion of these communities or recognition of their right to receive health assistance led to the failure of many of the policies implemented, and as a result, unhealthy life conditions hinder life expectancy.[106]

104 A. J. MCMICHAEL, *Globalization, Climate Change, and Human Health, op. Cit.*
105 Ibidem.
106 IPAM, Human rights Watch and IEPS, *The Air is Unbearable" Health Impacts of Deforestation-Related Fires in the Brazilian Amazon,* IPAM, 2020.

4.3.1 Sars-Cov-2 Pandemic

An analogous case is represented by the COVID-19 Pandemic, that hit the entire international community and made the media distract from the issues mentioned above. Covid-19, or Coronavirus, is a highly infective disease, the international community has now spent almost one and a half year fighting. The widely discussed diffusion of the virus seems to have exacerbated the conditions of populations that were already endangered and to have brought about severe losses in terms of human lives. The only possible solution to the outburst of Covid-19 will be through mass vaccination programs. Since the WHO claimed the official outbreak of this infective disease, there have been recorder one million casualties in the South American continent.[107]

We may examine the situation in the Brazilian Amazon population, since it is the area with the majority of ethnic groups inhabitants. There is evidence that medical infrastructure is not equally accessible to the entire population in countries such as Brazil, where indigenous peoples hardly ever get health care because they live in in isolated areas of the country. Indeed, with respect to medical care for people suffering from Covid-19, the Brazilian government implemented a health program that excluded indigenous persons living in the cities[108]. In the colonial past, indigenous peoples suffered from diseases with high mortality rates for being more vulnerable than "normal" people, but this very recent event demonstrates that. Signs of inequalities emerge also in the way the evolution of the virus was documented throughout the last year, reporting false numbers and showing irregularities; in addition, the death rate is considerable if compared to the deaths recorded among the overall population.[109]

Hygienic norms set by the WHO were clearly not respected in the indigenous villages, on a par with the use of protective devices and isolation measures. Moreover, the contagion of Covid-19 was also favoured by illegal workers who keep invading protected indigenous lands. For what concerns the groups which inhabit the most remote areas of the Amazon, their safety is also threatened by the arrival of foreigners who enter in contact with them and are unintentionally vehicles of the disease.[110] The SESAI, the Special Indigenous Health

107 WHO Website: https://www.who.int/
108 M. FELLOWS, V. PAYE, A. ALENCAR et al., *Under-Reporting of COVID-19 Cases Among Indigenous Peoples in Brazil: A New Expression of Old Inequalities*, Psychiatry, 2021, Vol. 12, N. 638359, p. 1.
109 Ibidem.
110 The National Geographic Website: https://www.nationalgeographic.com/history/article/disaster-looms-indigenous-amazon-tribes-covid-19-cases-multiply

Secretariat, has communicated 27 thousand people were infected from Covid-19 and 800 casualties circa were recorded among indigenous groups of the Brazilian Amazon since 2020, and the COICA, the Indigenous Coordinating Body for the Amazon Basin, has requested limitation in the number of incoming visitors.[111] Whereas in Colombia, indigenous communities have shut themselves inside their villages with all the supplies they need. From the perspective of the tribes, the apparent indifference of the government on this theme adds to the non-intervention during the wildfires that are burning portions of the Forest, to the ineffectiveness of the measures to contrast deforestation and to a series of other actions that are leading to the destruction of the cultural and environmental endowments of the Latin and Caribbean continent.[112]

111 M. FELLOWS, V. PAYE, A. ALENCAR et al., *Under-Reporting of COVID-19 Cases Among Indigenous Peoples in Brazil: A New Expression of Old Inequalities*, op. cit.
112 Amnesty International Website: https://www.amnesty.org/en/latest/news/2020/04/colombia-pueblos-indigenas-covid19-hambre/

4.4 Local Economies

Indigenous cosmology traditions imply that in order to live in harmony, human beings must respect the circle of reciprocity: if humans need to harvest in order to eat, they have to repay their Mother Earth, and they comply with this moral norm through feasts, rituals and spiritual offers. This norm applies to every sphere of life, including the economy. The aim of the economic exchanges, in the perspective of ecological cycles, is to provide every component of the community with the same possibilities to live their life. The basis on which this principle stands, is environmental protection and conservation, because nature represents a source of wealth for the fulfilment of self-sufficiency.[113] Dependence on the environment has been undermined in the last decades, and will be, as long as the global economy keeps expanding. The economic rhythms of production underwent substantial increase from the 1970s: agricultural commodities and resource extraction for the economic demands of the contemporary consumerist society have escalated environmental emergencies.[114]

We shall take as a starting point for the wave of economic growth of the region the 1970s-1980s, years in which Latin and South America were characterised by more openness, institutional and politic modernisation and conformation with the Western industrial systems. Nonetheless, most indigenous groups lived and continue to live in isolation with respect to the more urbanised districts that have developed and integrated in different economic fields.[115] The populations that live in the Amazon are rural, and their occupational fields are mainly agriculture, fishing, hunting and craftsmanship. Indigenous peoples are self-sufficient and rely on the seasonality of the harvest, they usually produce what they consume in the tribe, and the tribes are composed by specific families. The tribes are used to helping each other and are supported sometimes by small businesses or NGOs to sell locally their hand made products such as baskets, bags, jewellery and so forth.[116]

Today Latin American countries are the world's largest exporters of agricultural commodities, in fact local producers are overwhelmed by big multinationals, in most cases The Coca-Cola Company, Nescafé and Nestlé. Economic growth exploded together with

113 Instituto Interamericano de Derechos Humanos, *Economía indígena y mercado*, IIDH, San Josè, 2007, p. 118.
114 Ibidem.
115 T. STEINWEG, B. KUEPPER and G. THOUMI, *Economic Drivers of Deforestation: Sectors exposed to sustainability and financial risks,* Washington, Chain Reaction Research, 2016.
116 Instituto Interamericano de Derechos Humanos, *Economía indígena y mercado*, op. Cit.

urbanisation, oil and mineral extraction and infrastructure. Infrastructural modernisation and the enlargement of the principal cities were possible thanks to logging, at a time when the main national objective was not environmental protection but rather development.[117] National industrialisation coincided in most cases, such as in Brazil, with rising degrees of pollution, mostly because the production was centred upon petrol-chemical, plastic and pharmaceutical production.[118] In addition to this, Latin American countries are rich of carbon and fossil fuels extraction sites and mines, and they have always played a role in global exportation. Apart from being potentially harmful for the environment, those extraction sites of oil, coal, gas and so forth are usually located in protected indigenous lands, and obviously in the Amazon region. The principal companies that work on Latin American soils, for instance Petroamazonas, AGIP and Chinapetrol have been granted licences by the national institutions to invade protected areas and national parks, thus undermining legislation that protects indigenous rights.[119]

Since indigenous peoples are traditionally dependent on crops and agricultural production, it is necessary to shed light on a fundamental topic: their needs do not go hand in hand with the needs of those export-oriented governments, but they should.[120] Many heard of Indigenous states began questioning about what possible repercussions they may have on the future. First of all, taking into account the protection of the indigenous peoples involved, the growing violations of human rights should be addressed. In fact, local communities are forcefully displaced and deprived of their properties for the sake of economic success. Secondly, globalisation is ruining local economies and social dynamics; responses to contrast the detrimental effects of globalisation are needed, so that the differences of the Amazonian indigenous communities gain recognition. Finally, the economy shall begin to orient towards more sustainable development approaches, such as the Fair-Trade system, to provide more support to local activities.[121]

117 A. J. BEBBINGTON et al, *Resource extraction and infrastructure threaten forest cover and community rights*, Proceedings of the National Academy of Sciences of the United States of America, 2018, Vol. 115, N. 52, p. 13164.
118 W. BAER and C. MUELLER, *Environmental Aspects of Brazil's Economic Development*, Luso-Brazilian Review, 1995, Vol. 32, N. 1, p. 86.
119 M. FINER, C. N. JENKINS, S. L. PIMM et al, *Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples.* PLoS ONE, 2008, Vol. 3, N. 8, e2932.
120 A. J. BEBBINGTON et al, *op. cit.*, p. 13166.
121 E. L. MALONE, *Hot Topics: Globalization and Climate Change*, Social Thought & Research, 2002, Vol. 25, N. 1/2, p. 146.

4.5 The 2019 Wildfires

There is a difference between natural and human caused fires. The former type follows a natural calamity, for example a period of intense droughts, or a volcanic explosion. The latter instead derives from human negligence or activities, and it is source of deforestation. The most common evidence is provided by logs and debris burning to leave space for intensive breeding and massive mono-cultures. Also, human caused fires and deforestation differ, in fact the remains of the cut off trees and the dead leaves and vegetation are more likely to set a fire, especially in dry seasons.[122] Incessant wildfires are definitely of huge impact for natural cycles. After being burned, flora needs a long recovery time, that takes even more than two decades. The surrounding environment becomes inhabitable, and water and air quality are seriously jeopardised.[123]

Wildfires have always occurred in the continent, given the geographical position in the globe, therefore the usual period of the year in which fires are more frequent is during the summer season.[124] Regardless, in the year 2019 all the usual annual trends recorded with regards to wildfire rates were exceeded because there was no intervention to cease the fires, and the burning continued undisturbed for months. The loss in terms of square meters of forest burned areas were concentrated in the South of Brazil. Scientists talk of record-breaking wildfires because the last time in which a similar devastation was recorded in the 21st century had been during the years of the *El Niño* (2006-2013), a strong Pacific Wind that occurs every five years circa, that brings warm and dry air flows the before regulations.[125] Whereas, starting from 2018 wildfires increased in the Amazon region from Northern Venezuela, Western Peru and Southern Brazil heading towards the heart of the forest. Brazilian spots in wildfire mapping cover more than double the area of the fires traced in the past century, even after the country approved Forest Legislation in 2006 to block illegal deforestation. It seems that at a distance of two years hot-spots have become than 80% more than 2019.[126]

122 NASA Global Climate Change Website: https://climate.nasa.gov/news/2892/through-smoke-and-fire-nasa-searches-for-answers/
123 T. ARTES, D. OOM and J. SAN-MIGUEL-AYANZ, *Wildfires in the Amazon 2019*, EUR 30257 EN, Publications Office of the European Union, Luxembourg, 2020.
124 Ibidem.
125 W.H. QUINN et al, *El Niño occurrences over the past four and a half centuries,* Journal of Geophysical Research-Oceans, 1987, Vol. 92, N. 13, p- 14449–14461.
126 GLOBAL FIRE EMISSIONS DATABASE Website: https://www.globalfiredata.org/

If on the one hand, the decreasing temperature differences between the Arctic and Antarctic Poles and the lands nearby the Equator enhance more rapid vegetation growth thanks to the humid climate; on the other hand, sudden temperature variations also allow warmer air flows to dry plants. Warmer soil, water scarcity and hot air currents favour the creation of the perfect environment for wildfires to light.[127] The 2019 exceptional Wildfires provide the classic example of the consequences of Climate change.

Wildfires, among others, a consequence of uncontrolled deforestation. It is likely that the almost 200 billion tons of carbon dioxide currently gathered every year in the Amazon biome will remain in the atmosphere. Scientists have claimed that the depletion of the Amazon biome has reached a "Tipping Point"[128], that is of 20% reduction since the 1980s, and which constitutes a serious menace for the implementation of conservation programs. The consequences of wildfires on the global population health are not significant, but the same does not apply to local indigenous populations of Amazonia, for their villages and harvests are destroyed and their daily life is abruptly interrupted, because Indigenous persons are genetically inclined to respiratory diseases so they will have to coexist with the looming of a harder future.[129]

With the advent of the Covid-19 pandemic, the focus of interest switched from environmental and human rights issues to access to health systems and fundamental freedoms. Before last year police forces were employed to control activities in the forests, but since they stopped illegal burning and deforestation regained the upper hand. There is urgent necessity of government actions to change the current outlined situation in the Amazon, as well as in other vulnerable indigenous lands.

Without the support of the institutions, the concerned groups could lose their natural habitats and villages and be forcibly transferred to other territories, hence losing their knowledge of the local ecosystems. The fires burn vegetation and trees, including the animals who live there, that give the necessary subsistence to the "forest guardians".

127 WWF, *Fires, Forests and the future: A crisis raging out of control?,* Gland 2020, *passim.*
128 Semana Sostenible Website: https://www.semana.com/especiales-comerciales/articulo/la-amazonia-cerca-de-un-punto-de-no-retorno/53666/
129 Ibidem.

CHAPTER 2. THE INTERNATIONAL LEGAL FRAMEWORK CONCERNING INDIGENOUS RIGHTS AND FORESTS

1. The Connection Between Indigenous Rights and Environmental Law

In Chapter 1 we made an overview of the core subjects of this thesis: Indigenous peoples, their position in the international community and the complicated relationship with domestic and international pressures. On the other hand, this Chapter will be dedicated to the study of the international milestones of Indigenous and Environmental Laws. Reference will be made to the evolution of Indigenous and Environmental Rights, and to important cases and court decisions that contributed to the innovation of jurisprudence.

The core Human Rights instruments will be discussed with the aim of exploring both the success and fragility of international Indigenous rights instruments that have been adopted post-WWII and their repercussions on Indigenous peoples from their adoption until today. Secondly, International Environmental Law, hereinafter IEL, will be touched too, in order to analyse the field of forest rights and the advancements towards Indigenous customary sustainability.

The thread of the Chapter is to demonstrate that there is a connection between Indigenous and environmental rights. This connection is not limited to the right to a healthy environment, but is deeper, and implies that Indigenous peoples cannot live without natural environments, and vice versa, biodiversity and natural habitats benefit from the presence of Indigenous peoples, as long as they preserve their practices. However, the relationship between the two fields of IL is still not adequately explored.[130]

The aim of this approach is to enlighten the potential outcomes of cross-fertilisation between the two branches of IL. Indigenous recognition in the international arena is not a sufficient guarantee for their rights, since Indigenous authorities keep demanding participation and they are fighting in order to enhance their land rights over forests. However the problem is that states do not consider them the legitimate owners of ancestral lands, and in addition, these forested lands represent an undeniable economic resource for logs and non-wood sources.[131]

130 S. H. DAVIS and A. WALI, *Indigenous Land Tenure and Tropical Forest Management in Latin America*, Ambio, 1994, Vol. 23, N. 8, p. 485-490.
131 Ibidem.

The purpose of the approach to the analysis of IEL instruments is not to study the existing framework on forest preservation and management of wood resources, but to see which of the existing instruments highlights the need of cooperation with Indigenous peoples in protecting forest biodiversity.[132]

On the one hand one can notice continuous evolution and new perspectives in addressing Indigenous peoples' claims, such as the fact that land property rights and the right to enjoyment of culture are connected, in the opinion of the HRC. On the other, there is more reluctance in exposing connection between environmental/forest rights to the spiritual sphere of nature.[133] These arguments were deeply discussed in the Separate Opinion of Judge Cancado Trindade to *Certain Activities in Nicaragua,* in relation to *restitutio ad integrum* of environmental damages caused by the stated. Judge Trindade expressed his concern on the fact that the damaged populations must be repaired for the "spiritual damage" they suffer consequently to the violation of the rights, and he stressed that this should be the guiding norm for courts that decide cases of environmental violations.[134]

132 R. G. TARAFOSKY, *Assessing the International Forest Regime*, IUCN, Gland, Cambridge and Bonn, 1999.

133 D. FARRIER et al, *The Legal Aspects of Connectivity Conservation – Case Studies,* IUCN Environmental Policy and Law Paper, 2013, Vol. 85, N. 2, p. 23-45.

134 A. CANCADO TRINDADE, *Sep. Op. Cançado Trindade, in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), I.C.J. Judgment,* 16th December 2015, p.758-781, available at: https://www.icj-cij.org/public/files/case-related/150/150-20151216-JUD-01-04-EN.pdf

2. Indigenous rights – binding instruments at the international level

Special Rapporteur, Professor S. James Anaya, asserts that in the course of the 20th century, with the momentous changes and the affirmation of the Human Rights doctrine in the aftermath of WWII, both individual and collective rights gained importance in the international arena.[135] Historically, the recognition of Indigenous peoples entailed domestic and general opposition, however there are some milestones that contributed to the gradual affirmation of Indigenous Rights at international level. The work of Martinez Cobo and his study on discrimination favoured the creation of specific bodies for the safeguard of Indigenous Rights, such as the UN Working Group on Indigenous Rights – which proposed the first Draft Declaration of the Indigenous Peoples. [136]

As Professor Sigfried Wiessner points out, the most recurrent requests solicited by Indigenous peoples can be summarized in five principles: self-determination, preservation of ancestral lands, cultural and spiritual recognition, self-government, and access to primary human needs (education, healthcare, employment etc.).[137] In the opinion of James Anaya, the claims of autonomy and self-determination advanced by Indigenous groups were seen as a challenge to the supremacy of the state, and they still are, in the face of the contemporary problems that affect the effectiveness of the government' sovereignty over Indigenous community reserves.[138]

The instruments of which we will discuss in the next paragraphs are the International Covenant on Civil and Politic Rights (ICCPR), and ILO Convention N. 169.[139] The aim of the analysis of these conventions is not only to shed light upon the existing framework for the protection of Indigenous Rights, but also to note that there are progresses towards a more ecocentric human rights approach. Moreover, the American Convention of Human Rights (ACHR) will be analysed too, since it has the status of international binding law, and it offers a vision of the Latin American context. The ICCPR and the ACHR are not Indigenous

135 O. MAZEL, *The Evolution of Rights: Indigenous Peoples and International Law,* Australian Indigenous Law Review, 2009, Vol. 13, N. 1, p. 140.
136 Ibidem.
137S. WIESSNER, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges,* The European Journal of International Law, Vol. 22 No. 1, p. 121–140, Miami, 2011.
138 S. JAMES ANAYA, *Proceedings of the Annual Meeting (American Society of International Law)*, The Challenge of Non-State Actors, Vol. 92, p. 96-99.
139R. A FALK, R. B. HOWARD, V. LEARY, H. HANNUM, R. T. COULTER, M. DAVIES and O. LYONS, *Are Indigenous Populations Entitled to International Juridical Personality?*, Proceedings of the Annual Meeting (American Society of International Law), 1985.

law instruments, for they do not directly make reference to the concerned peoples, however, they create state obligations towards every human being and people with no distinction.[140]

140 R. A FALK, R. B. HOWARD, V. LEARY, H. HANNUM, R. T. COULTER, M. DAVIES and O. LYONS, *Are Indigenous Populations Entitled to International Juridical Personality?, op. Cit.*

2.1 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights, hereinafter ICCPR, was created by the UN and adopted by the GA Resolution 2200A (XXI) on 16th December 1966, entering into force almost ten years later on 23rd March 1976, by means of Article 49 of the Covenant. It consists of six parts and 53 Articles, and two Optional Protocols.[141] Together with ICESCR and the UDHR is part of the International Bill of Human Rights.

Article 1, which is identical to Art 1 of ICESCR, stresses the importance of one of the fundamental human rights, *self-determination*, and claims:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[142]

This article applies to peoples in general, and guarantees the right to self-determination to all peoples on the territory of a State which is party to the Covenant. The Human Rights Committee specifies that self-determination is a fundamental prerogative of all peoples, and it is based on the fact that human rights apply to every people without discrimination, as claimed in Art. 2.[143] The Covenant, together with the ICESCR, has paved the way towards the affirmation of collective rights, and has been applied in the assessment of violations of minority rights, though it does not specify what are collective and individual rights and the difference between them. (Individual rights are rights that apply to single persons; every human right applies to individuals who participate in a given group.[144] Collective rights, instead apply to a group, community or people as a whole, such as in the case of Indigenous peoples, tribal groups and minorities. The aim of collective rights is granting protection to peoples' collective cultural identity and traditions. Both individual and collective rights apply to minorities who live on the country's territory.[145]

141 United Nations General Assembly, *International Covenant on Civil and Political Rights,* December 16th, 1966 available at *https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx*
142 Ibidem.
143 Human Rights Committee, *General Comment No. 12 Article 1 (The right to self-determination of peoples), HRI/GEN/1/Rev.9*, HRC, 1984, Vol 1, available at: https://ccprcentre.org/ccpr-general-comments
144 Ibidem.
145 Ibidem.

Moreover, the HRC affirms that, as self-determination also applies to women, when reading Art 1 one shall take into consideration that discriminatory acts include sexual discrimination as described in Art. 1 of CEDAW, hence Art. 3 of ICCPR provides that states have the duty to assure equal enjoyment of rights listed in the Covenant to all men *and women*.[146]

Self-determination is, however, an essential right, especially for Indigenous peoples, since it grants people the liberty to pursue their own life, meaning that they can create their own form of government, society, institutions and set of norms in order to take primary control of their lives.[147] Hence, the government of the concerned minority, people, or Indigenous community, will not have to show substantial obedience to the central government of the nation of which they are citizens, and vice versa the state government will have the obligation to respect that right and assure that the state will not interfere with the activities and life.[148]

Although the ICCPR was not adopted in order to address Indigenous peoples, the HRC has applied several provisions of the Covenant to cases of violation of Indigenous Rights; these are respectively the right to self-determination (Article 1), the right to move freely (Article 12), the right to a home and family free from arbitrary/unlawful interference (Article 17), the right to equality in matters of marriage (Article 23), the right to equality before the law and equal protection (Article 26), and the right to culture (Article 27).[149] These provisions were all applied to the famous case involving a Canadian Indigenous woman who was denied access to her native reserve after she married a Canadian non-Indigenous man.

The case *Lovelace vs Canada* served as innovation in the domestic jurisprudence of Canada and in the Human Rights Committee's practice on issues of indigenousness denial by State parties.[150] The applicant, Ms. Sandra Lovelace, born as an Indian woman, in the tribe of Maliseet, but eventually, when she married her non-Indian husband, she lost her Indigenous status, consistent with the Canadian Indian Act. The Act, which then became Bill C31, enforced in 1976 by the government, was an instrument used throughout the 19th century to regulate marriages between Canadian men and Indian women, and vice versa, and

146 Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, HCR, 1994, available at: https://www.refworld.org/docid/453883fc0.html
147 Ibidem.
148 Ibidem.
149 Human Rights Committee, *General Comment No. 18 (Non-discrimination), HRI/GEN/1/Rev.9*, HRC, 1989, Vol. 1, available at: https://ccprcentre.org/ccpr-general-comments
150 *Sandra Lovelace v. Canada*, Communication No. 24/1977, Canadian Human Rights Yearbook, 1983, Vol. 1, p. 305-314.

established the loss of indigenous status implying gender bias and discrimination of minorities.[151] The Act was originally thought to protect the communities' integrity from the risks of territory loss deriving from mixed marriages. Indian women were put in a more disadvantageous situation in marriage related issues, and in many other cases Canada was found responsible of enacting discriminatory actions and forced removal of the applicant from her native settlement. Even though the treaty was adopted in Canada after six years from Ms. Lovelace's marriage, since the conditions of the woman protracted throughout the years.[152]

The Committee noted that, consistent with Article 23.4 on the obligation of the state to protect both parties before and during marriage and in case of divorce, what happened to Ms. Lovelace represented a violation of such right.[153]

In addition, the loss of Indigenous status implied that Ms. Lovelace could not enjoy from her culture and her access to the Indian reserve where she was born, and her family lived, was denied, plus she lost many aids provided by the Canadian legislation, such as tax relief and the possibility to demand money from Indigenous fund, and so on.[154]

The Committee commented that, as Indigenous persons are human beings and their rights are protected under the Covenant, Articles 12 and 17 were violated by Canada, since the woman was not allowed to return to her reserve, and to live with her family; in fact, Article 12 explains that "*lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence"*, in accordance with Article 2 and 3 of the Covenant and the principle of non-discrimination.[155]

The above mentioned case contributed to innovate the field of gender and minority discrimination under the ICCPR, but also strengthened the protection of the prerogative of Indigenous identification under Article 27. Nonetheless, it also shed light on the problematic of individual and collective rights in Canada, as well as in other countries struggling against the recognition of tribal groups and minorities.[156]

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151 *Sandra Lovelace v. Canada*, Communication No. 24/1977, op. Cit.
152 *Individual and Collective Self-Identification as Indigenous in the European Arctic: International Legal Perspectives*, University of Lapland, Rovaniemi, 2018.
153 Ibidem.
154 K. S. COATES and B. FAVEL, *Understanding FPIC From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development*, Aboriginal Canada and the Natural Resource Economy Series, 2016, N. 9, p. 1- 42.
155 Human Rights Committee, *General Comments Adopted By The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights*, CCPR/C/21/Rev.1/Add.9, HRC, 1999.
156Ibidem.

Article 27 envisages that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[157]

Under this provision, people can lodge complaints on the alleged violation of the above cited right under the Optional Protocol of the Covenant – provided that the contending state is party to the treaty and has accepted the Committee's competence on that matter.[158]
The arguments of the Article aim at protecting precise minority cultures that are vulnerable in the context of the State legislation, hence the underlying principle applies to Indigenous peoples, despite not being openly mentioned. In fact, the Article envisages the obligation of the state to protect the rights of the individuals taking part in those minorities.
The words of the provision are controversial, since they do express a negative obligation for the state, but the fact that the State is called not to deny the right to the enjoyment of culture to the individuals of the groups means that the state is required not to violate said provision, and the right to culture has to be guaranteed via specific measures.[159] The right intrinsically recognises that groups and minorities who live on the state territory are free to express their culture, and the Committee explains that the ways of expression of a minority's culture can involve activities connected to land and natural resources.

As a result, the State is committed to not interfere, damage nor deprive the groups of their natural reserves, thus *Lovelace vs Canada* represents a case of violation, for the woman was denied the enjoyment of her physical participation to the Maliseet reserve, which was the place where her culture manifested.[160] The only case in which an actual violation of this provision was found is *Lovelace vs Canada,* which in turn served as innovation in the domestic jurisprudence of Canada and in the Human Rights Committee's practice on issues of Indigenous status denial.[161]

157 United Nations General Assembly, *International Covenant on Civil and Political Rights*, op. Cit.
158 Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, op. Cit.
159 Ibidem.
160 *Sandra Lovelace v. Canada*, Communication No. 24/1977, op. Cit.
161 Human Rights Committee, *General Comments Adopted By The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights*, op. Cit.

Furthermore, the Committee has suggested that environmental rights might be implicitly envisaged in ICCPR, although not openly stated, in relation to cases of violations of the right to life (Article 6), the right to equality before the law and equal protection (Article 26) and the right to culture (Article 27).[162] As suggested in the introduction to the Chapter, the connection between IEL and Indigenous Rights is unintelligible if one does not consider that Indigenous culture exists only in determined natural environments, thus it cannot persist if the spiritual ties with the ancestral lands are lost, nor traditions can be practised if Indigenous communities are not physically present in their lands.[163]

This interpretation of the ICCPR is quite innovative, despite until now none of the reported alleged violations of human rights caused by environmental damages was found to be a violation of the human rights expressed in the Covenant. In fact, there are no provisions in the Covenant that openly cite the right to a healthy environment, though this means that the connection has simply not been explored yet, rather than claimed inexistent.

The Committee has issued recommendations and concluding observations to some state parties' reports in which the actor claimed that environmental detriment caused a violation of human rights.[164] For starters, Article 6 of the ICCPR, about the right to life, is applicable to every person, and people, and it is binding under every circumstance for the state and punishes arbitrary killings with no exception.[165]

In 2018 the Committee gave an innovative interpretation of this provision, linking the observation of the right to life to the state's ability to preserve the environment, on the assumption that environmental degradation, pollution and natural disasters endorsed by states can cause the death of human beings. Hence the state must act in conformity with the precautionary principle.[166] Despite there is no actual link with environment rights in the Covenant, the provision was invoked in the case *EHP et al vs Canada,* in which the applicant reported to the Committee that the presence of harmful waste in the city of Port Hope (Canada) represented a state violation of the right to life.[167] In fact, the radioactive waste was produced by a government-sponsored industry around 1950s, and a consistent part

162 Ibidem.
163 Ibidem.
164 Human Rights Committee, *General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, HRC, 2018, available at: https://ccprcentre.org/ccpr-general-comments
165 Ibidem.
166 Ibidem.
167 Human Rights Committee, *E.H.P. v. Canada*, *included in Selected Decisions of the Human Rights Committee under the Optional Protocol*, CCPR/C/OP/2, HRC, 1982.

of it was never removed from the city, remaining until the case was reported in 1980. The inadmissibility of the case however, confirmed that environmental harm was not enough evidence for the violation of Article 6, and the Committee merely encouraged the state to remediate the situation.[168]

Similarly, in General Comment N. 23, the HRC discussed the link between environmental healthiness and the enjoyment of Art. 27, acknowledging that the violation of the right to culture is frequently cited in cases involving minority and Indigenous peoples' right to culture.[169] Indeed, as previously commented, the right to culture implies that culture manifests differently from case to case, and particularly in the case of Indigenous peoples, culture *is* deeply connected with the use of specific natural resources and the spiritual sphere of ancestral lands.

The Committee suggested that culture also comprehends traditional community activities, such as gathering, fishing and hunting, since they are charged with a cultural and religious meaning.[170] For example, in *E.P.F et al. v. Columbia*, the Indigenous community who lived on a Colombian archipelago claimed the state was allegedly violating Art. 27, for the activities of the government were interfering with their Indigenous livelihood, and the tourist accommodation infrastructure was damaging the environment and impairing their activities. However, the case was inadmissible for the same reasons as before.

Again, in *Ilmari Länsman et al vs Finland*, and *Kitok vs Sweden*, the Sami reindeer breeders pointed that government-led extraction activities in Sami territories and road infrastructure construction was affecting Sami traditional ceremonies and activities.[171] In *Ilmari Länsman et al vs Finland* in the opinion of the Committee those state-led activities, which had been approved by the Sami communities, were not invasive up to affecting the life of the Sami, and they would only represent a violation of Art. 27 if they were so.[172]

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168 *Ibidem.*
169 United Nations Office Of The United Nations High Commissioner For Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Individual Report on the International Covenant on Civil and Political Rights, Report No. 2 Prepared for the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment,* HRC, 2013.
170 Ibidem.
171 HRC, *Ilmari Länsman, et al. v. Finland*, *CCPR/C/52/D/511/1992,* 26 October 1994, available at: http://hrlibrary.umn.edu/undocs/html/vws511.htm
172 *Ibidem.*

The Committee further questioned, in the two separate decisions, the relationship between logging and environmental degradation and if they represented an obstacle for the Sami.[173] In the first one the committee had pointed out that only if logging continued to expand it would cause a violation of the right to culture expressed in Art. 27; indeed, at the time of the second decision, four years later, logging had actually halved the lichen forests where reindeer fed, affecting the life of the Sami breeders. However, the second decision claimed that intensive logging did not represent a crucial problem for the Sami communities since reindeer breeding was not the primary activity of the communities.[174]

What the Committee pointed out in its opinions is that Indigenous claims do not represent sufficient evidence of violation of Article 27, but this question will be better analysed in the next Paragraph in light of ILO C. 169, in the case of *Kitok vs Sweden*. The Committee emphasised however, that there is a problem with Indigenous participation to decision-making and governmental affairs in Finland, for the Sami have scarce influence in the decision processes of the state.[175]

173 HRC, *Jouni Länsman I,* CCPR/C/58/D/671/1995, 30 October 1996, and *Jouni Länsman II,* CCPR/C/83/D/1023/2001, 17 March 2005, available at: https://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf
174 HRC, *Jouni Länsman I* and *Jouni Länsman II, op. Cit.*
175 HRC*, Kitok v Sweden, Merits, Communication No 197/1985, CCPR/C/33/D/197/1985*, 27th July 1988, available at: https://opil.ouplaw.com/view/10.1093/law:ihrl/2484unhrc88.case.1/law-ihrl-2484unhrc88

2.2 ILO Convention N. 169

Before the adoption of ILO Convention N. 169, Indigenous and Tribal populations were protected under ILO Convention N. 107. The two Conventions are worth mentioning as they show both innovations and limits regarding International Indigenous law. Moreover, they are to be put in a line of continuity, in fact, after the adoption of the Convention N.107, many states felt the need to improve the provisions of the treaty and revised it with the amendments of the Convention N.169.[176]

ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, hereinafter ILO C N.107, was adopted on the 26th of June 1957 and entered into force two years later on the 2nd of June 1959.[177] It was innovative for it dealt formally for the first time in history with the establishment of the rights of the Indigenous and tribal populations, aiming at discouraging oppression and inequality in in the countries that ratified it.[178] It consists of eight parts and 37 Articles, but the most important ones are parts I and II on the application of the Convention and land ownership rights.

Through means of this Convention was introduced an embryonic definition of "Indigenous and Tribal populations", as it is reported in Art. 1 statement of coverage of the convention, referring to "Indigenous and tribal or semi-tribal populations" as peoples

> regulated wholly or partially by their own customs or traditions or by special laws or regulations [and descending] from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation.[179]

Yet, the first limit of the Convention is easily found in the definition of the status of an "Indigenous person", since it affirms in Article 1.1 that they are "*groups and persons who,*

176 Indigenous Foundations Website: https://indigenousfoundations.arts.ubc.ca/ilo_convention_107/
177 International Labour Organization, *"History of ILO's Work*," available at: https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_117356.pdf
178 Ibidem.
179*ILO Convention N. 107 Indigenous and Tribal Populations Convention*, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107

although they are in the process of losing their tribal characteristics, are not yet integrated into the national community".[180]

Critics said that for a Convention that should have fought for the integration and implementation of Indigenous Rights, as a result of the eleven years of work of the International Labour Organisation it was not inclusive at all. Indeed, the recurrent image of Indigenous peoples as being a less advantaged category encouraged the derogatory perception of the status of Indigenous peoples, with respect to the status of European lineage.[181] Furthermore, it encouraged the perception that the aim was not changing the state's attitude and reevaluating Indigenous identity, but rather assessing the inevitability of the process of "De-indianisation". The consequences of the adoption of this Convention were not of great impact, also for the fact that it itself did not mention the right to self-determination.[182]

Beyond the human rights of the concerned communities, the Convention enlarged the spectrum of political and cultural rights, and introduced the concept of land rights in Art. 12 (1), where it states that the Indigenous and tribal populations "*shall not be removed without their free consent from their habitual territories*", however this right did not stand if the state deemed it necessary to use said territories for economic interests or national security, thus giving the state the faculty of decision-making and in a certain way justifying the states' wrongdoings and the forced removals.[183] The Convention did not envisage the then affirmed principle of *free, prior, and informed consent*, the right to participation and the right to ancestral lands. Moreover, in the Convention is not mentioned the right to self-determination, which is the basic right that allows Indigenous peoples to be recognised and not denigrated.[184]

The provisions of the Convention were not enough effective as to guarantee Indigenous rights, and did not work in the right direction, since it did not make a distinction between Indigenous and tribal peoples, which in Art. 1 appear as a sub-category of tribal populations, and it did not call for the right of self-determination, thus it was amended with ILO Convention N. 169.[185]

180 ILO Convention N. 107, art 1(1), op. cit.
181 International Labour Organization, *Applying the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Excerpts from reports and comments of the ILO Supervisory Bodies*, ILO, Geneva, 2019.
182 Ibidem.
183 Ibidem.
184 Ibidem.
185 Ibidem.

Differently, the Indigenous and Tribal Peoples Convention N. 169, hereinafter ILO N. 169, supported the identification of the demands of the concerned populations and offered some specific answers to their legal needs, which can be grouped in two main categories, namely self-determination and land property rights. From the beginning of the Convention what emerges is the importance that is given to issues such as participation, state cooperation and consultation, the concept of self-determination and property rights.[186]

It was adopted on the 27th of June 1989 and entered into force on the 5th of September 1991. Its text is divided into ten parts and consists of 44 Articles. What marks the discrepancy with ILO Convention N. 107 is first of all the language used.[187] The improvement of the language of the previous Convention is to be noticed in the definition of tribal and Indigenous peoples provided in the first Article, that sheds light on the difference in the origins and the historical background between the two peoples – as discussed in Chapter 1 –, though they are entitled of the same rights under the Convention.[188] Convention N. 169 has a wider objective, and it overcome the inaccuracy of C N. 107 with the statement of coverage in Article 1.1 (a) and (b), that clarifies the differences between Indigenous and tribal peoples, following the definitions of the Martinez Cobo study.[189]

The provisions of the Convention have been translated into domestic legislation in the countries who ratified it, thus they formally committed to respect the rights of Indigenous communities living on the country's territories. Nonetheless, ILO Convention 169 is also applied in relation to Indigenous peoples in states that are not parties to the Convention.[190] Nowadays, the Convention is the most recurrent instrument employed in cases of Indigenous Rights violations, and represents the sole legally binding instrument to protect Indigenous Rights; moreover, the ILO is the only international organization to provide a strict supervisory framework.[191] The ILO has created a framework for the monitoring of the application of the conventions that is made of two bodies, the CEASCR, or Committee of

186*International Labour Organisation, Indigenous and Tribal Peoples Convention N. 169,* Geneva, June 27th, 1989, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314

187 J. S. PHILLIPS, *The rights of indigenous peoples under international law*, Global Bioethics, 2015, Vol. 26, N. 2, p. 120-127.

188 International Labour Organisation, *Applying the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Excerpts from reports and comments of the ILO Supervisory Bodies*, op. Cit.

189 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents / International Labour standards Department*, ILO, Geneva, 2013.

190 Ibidem.

191 C. COURTIS, *Notes On The Implementation By Latin American Courts Of The Ilo Convention 169 On Indigenous Peoples,* International Journal On Human Rights, 2008.

Experts on the Application of Conventions and Recommendations, which deals with general complaints made by countries, and the CAS, the Conference Committee on the Application of Standards.[192]

Article 1.2 is salient in the study of Indigenous identification, since it affirms that the criterion used in the application of this Convention is self-identification. The ILO explains that, in order to "define" Indigenous peoples, several factors shall be acknowledged, such as historical background, spiritual connection to the ancestors who lived in the same lands, but also collective self-identification.[193] Self-identification can be both individual and collective: this means that either a person sees themselves as an active participant of a given Indigenous or tribal group, or the concerned group decides to accept the idea of identifying as Indigenous, thus giving recognition to their cultural background.[194]

In several occasions this article was applied to cases of state denial of self-identification of Indigenous groups and persons. For example, this is the case of the Sami people, who have been living for centuries in vast regions of Finland, Norway, Russia and Sweden. The problem with this population is that only Norway has ratified the Convention N. 169 and has recognized the Sami as a people, so they do not have independent government bodies that are able to act as an independent government since have not been recognised transnationally.[195] Usually, the criteria for defining Indigenousness are to be found in the identification of common features of language, traditions, institutions and origins. However, in this case the decision on the compliance with the requirements of Indigenousness was left to the state government of each home country of the Sami populations, and today there are still uncertainties on the criteria to use in order to grant Indigenous recognition to Sami communities.[196] In Finland for instance, the Sami Parliament, that is a body of the Finnish parliament which responds to Indigenous requests, uses language as a criterion for identification, although the Sami are brought together neither by a common language nor by their traditions – given the vastness of Sami lands, each community has differentiated its culture. Indigenous leaders consider it as a strategy of the government in order to reduce the strength of the Sami identity, due to the fact that they worry it could undermine the country's

192 S.J. ROMBOUTS, *Consultation And Consent Norms Under Ilo Convention No. 169 And The Un Declaration On The Rights Of Indigenous Peoples Compared*, Tilburg University, 2011.
193 Ibidem.
194 Ibidem.
195 *Individual and Collective Self-Identification as Indigenous in the European Arctic: International Legal Perspectives*, op. Cit.
196*I ibidem.*

unity.[197] However, the issue of identification goes deeper: the actual matter is that the Sami people has not decided itself to divide into the five countries, in fact, their differentiation was the outcome of geopolitical choices, hence this could be considered a violation of the Sami's right to self-determination.[198] This case can be put in a wider context, giving that the Sami are not the only Indigenous people experiencing this situation. The ratification of ILO Convention N. 169 could foster Indigenous self-determination worldwide, since the Convention calls for the protection of identity and institutions as they are instruments of social determination. [199]

Article 2 affirms that the actions of governments should be directed at favouring the permeability of Indigenous peoples in the national structures, since through participation the governments can build respect and guarantee the implementation of human rights.[200] With respect to the Convention N. 107, we can notice the withdrawal from the attempt to incorporate Indigenous peoples in the civil society, and the renewed interest in fostering the creation of dialogue between the state and Indigenous government and institutions.[201]
Article 6 of the Convention reflects the norm of international human rights law to consult Indigenous peoples and their institutions regarding decisions of the central government, and to allow their full participation to decision-making processes that may weight on their future.[202] Consultation is at the basis of governmental cooperation, and the provision stresses its importance in the face of the conclusion of agreements, underlying that the fundamental concern is not the act of consulting *per se* but the possibility of a positive outcome affecting the concerned peoples.[203] As far as states allow participation, the concerned peoples preserve the right to take their own decisions upon

> […] their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise

197 Ibidem.
198 *Individual and Collective Self-Identification as Indigenous in the European Arctic: International Legal Perspectives, op. Cit.*
199 Ibidem.
200 International Labour Organisation, *Indigenous and Tribal Peoples Convention N. 169*, op. Cit.p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314
201 Ibidem.
202 Ibidem.
203Oficina Regional para América Latina y el Caribe, *Convenio núm. 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes y la consulta previa a los pueblos indígenas en proyectos de inversión*, op. Cit.

use, and to exercise control, to the extent possible, over their own economic, social and cultural development.[204]

Nonetheless the concerned peoples should in every circumstance cooperate with the government looking forward to the outcomes of policies that involve their existence, as reported in Art. 7.[205] These last two articles were applied in the Case of *Kitok v. Sweden,* where the applicant, Mr. Kitok, claimed that he was allegedly denied his right to the "enjoyment" of indigenous culture as the community refused to acknowledge his status as Indigenous – as well as Art. 27 of the ICCPR. As controversial as it may seem, the legislation regulating collective rights of Indigenous communities in Sweden, seeks to preserve membership in order to avoid cultural detriment.[206] In fact, Mr. Kitok claimed to feel a connection with the Sami culture, given that he had lived in the Sami territory and herd reindeer, although he lost his status as Indigenous for his prolonged absence from the community. The Human Rights Committee considered this mere condition not sufficient to grant him Indigenous identification. Nonetheless, he was conceded the possibility to continue living in the Sami territory and enjoying the traditions as he did before. [207]

The issue of conservation of Indigenous customary law is envisaged in Article 8, which relates to the matter of Indigenous membership and from which derives the obligation of the state not to interfere with Indigenous customs and traditions, unless they act contrary to internationally established principles or national codes of law. [208] This principle aims at protecting customary law and human rights from any abuse of power. Indeed, a brief digression should be opened in this merit. There are Indigenous practices which international human rights law regards as brutal. If some are to be cited, sexual mutilation, abuse of minors, the alive burying of invalid, handicapped and albino newborns, and other practices as such, constitute cultural specificities of tribes/communities, but nonetheless are violations of fundamental rights of the men and women.[209]

204International Labour Organisation, *Indigenous and Tribal Peoples Convention N. 169*, op. cit.
205 Ibidem.
206 Human Rights Committee*, Kitok v Sweden, Merits, Communication No 197/1985, CCPR/C/33/D/197/1985*, op. Cit.
207 UNHRC*, Kitok v Sweden, Merits, Communication No 197/1985, CCPR/C/33/D/197/1985*, op. Cit.
208 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents / International Labour standards Department*, op. cit
209J. S. PHILLIPS, *The rights of indigenous peoples under international law*, op. Cit.

Especially in Latin and South America, there are lots of cases in which provisions on land rights are violated by the states, for instance the Case of the *Yakye Axa Indigenous Community vs. Paraguay*[210], filed at the OAS Human Rights Court in 2005. The same theory of the Court on land deprivation was applied in the *Sawhoyamaxa vs. Paraguay* and the *Saramaka Vs. Suriname* Cases.[211] The articles which the Court referred to were Articles 4, 7, 8, 13, 16. The *Yakye Axa* Community is of the *Enxet* ethnicity, and traditionally lives in Paraguay, but was forced to leave its traditional lands in the Chaco region and was transferred to an area confining with the Pozo Colorado-Concepción highway. It is a community of only 319 people, who in the last centuries resisted to several attempts to influence their culture with other religions and languages and was left with no aids after they were forced to move in 1996, since their territories were bought by a third party.[212] Paraguay was already party to ILO Convention N. 169 and introduced indigenous Rights in national legislation in 1993; nonetheless several cases such as this one occurred in the last decades. The Court found the state of Paraguay responsible for the violation of Indigenous land rights, forced removal and denial of health and food reserves under the Inter American Convention and in consultation of the principles of ILO Convention N. 169.[213] An alleged victim, Mr. Fernández, contributed to the gathering of evidence explaining the life conditions in which the people were force to live. He said children could not go to school, since their families were poor and they could not dress, and they could not study from the books provided by the local authorities, since they were in Spanish and most of the people from the community only spoke Enxet, their traditional language. Another witness reported that the community farmers were threatened by locals and were robbed by the neighbouring settlements.[214]

The Court found violations of the provisions of ILO Convention, for instance Article 4, since the government actions collided with the interests of the indigenous peoples and the article envisions the opposite.[215] Moreover, by inhibiting the correct performance of traditional activities of hunting and fishing, that were not permitted in the perilous area whereby they were moved, the state also violated Article 5 on the protection of indigenous values and

210 Inter-american Court of Human Rights, *Yakye Axa Indigenous Community vs. Paraguay, Judgment of 17th June 2005,* IACtHR, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf
211 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname Judgment (Preliminary Objections, Merits, Reparations, and Costs),* 28th November 2007, IACtHR, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf
212 *Yakye Axa Indigenous Community vs. Paraguay*, op. Cit.
213 Ibidem.
214Ibidem.
215 ibidem

practices. The evidence provided by the victims recalls that the main preoccupation in the community was the loss of their culture and their past.[216]

Hence by violating land possession rights the state puts at stake the survival of rituals that take place in those lands, and also tramples the memory of the past, as affirmed in Article 13.[217] The Convention stresses how lands are not only vital for the communities, but have also a spiritual value for their religious practices. The provision indeed puts in relevance the sacred character of the ancestral lands for the concerned groups, thus outlining the central role of the territories in Indigenous practices either for spiritual or more practical necessities.[218] In fact, the concerned peoples relied on the products of their lands for subsistence when they still lived in the Chaco region.[219]

The court made reference to Article 16, which provides that Indigenous peoples cannot be forcibly removed from the territories they occupy, unless exceptional measures must be taken and only with their "*free and informed consent*".[220] Indeed the Court ruled that their removal was a violation of Indigenous right to property, since the state did not take action to recognize the lands as indigenous, and obliged the community to suffer from severe deprivations and the death of six people too.[221]

Moreover, the Convention has been interpreted in an innovative way by the IPF, which considers the provisions on territorial rights as potential instruments to be applied also for forest protection. The provisions 6, 7, 13 14, 15 and 16 on land rights may reveal an innovative nature if they are read in reference to Indigenous ownership upon forests. For instance, Article 16 denies the state appropriation of Indigenous lands without their expressed consent, hence the destruction of forests could – someday – fall within the category of non-forceable removal from ancestral lands.[222] Moreover, in the words of ILO bodies, the provisions of the Convention regarding consultation, participation and independence of Indigenous forms of organisation and government, involves Indigenous participation to land projects beyond formal consultation. In fact, Indigenous communities shall be encouraged to fully participate decision-making processes that influence their

216 Yakye Axa Indigenous Community vs. Paraguay, op. Cit.
217 S.J. ROMBOUTS, *Consultation And Consent Norms Under Ilo Convention No. 169 And The Un Declaration On The Rights Of Indigenous Peoples Compared*, op. Cit.
218International Labour Organisation, Indigenous and Tribal Peoples Convention N. 169, op. cit.
219 Amnesty international Website: http:/www.amnesty.org/en/for-media/press-releases/paraguay-congress-puts-lives-90-indigenous-families-risk- 20090629
220Ibid.
221 S.J. ROMBOUTS, *Consultation And Consent Norms Under Ilo Convention No. 169 And The Un Declaration On The Rights Of Indigenous Peoples Compared*, op. Cit.
222 Ibidem.

activities, and most importantly, they should be considered as active actors of forest environments when decisions are to be taken with regards to deforestation and extraction activities – that may affect Indigenous forest reserves.[223] For this reason, Articles 6, 7 (right to participate and right of consultation) and Article 15 (right to use of natural resources) must be implemented by states before any project affects Indigenous lands, because, in the opinion of ILO supervisory bodies such state-led activities may impact the cultural and spiritual relationship that the concerned communities have built on their lands.[224] And most importantly, Article 13 exposes that land rights do not only apply to the physical relationship of Indigenous communities with their territories, but also to the collective spiritual and cultural values of traditional lands.[225]

For instance, in 2010, the CEASCR pointed out in one of its opinions, that after a report of Indigenous applicants in Peru, the Peruvian government was requested to stop its activities in natural reserves, since exploitation of resources was damaging the livelihood of Indigenous communities, since such activities constituted non-compliance with Articles 6, 7, 13 and 15 as they were preventing Indigenous consultation and enjoyment of then natural resources on their territories.[226] Despite cases like this represented also in Colombia and Brazil, the CEASCR cannot force the respect of the provisions in the Convention, but only encourage the states to implement better behaviours, hence the legal value of the Convention has been criticised for not proving so effective in the field of forest rights, although the fact that there is innovation of its uses regarding forest use of resources and property shows signals of change.[227]

223 S.J. ROMBOUTS, *Consultation And Consent Norms Under Ilo Convention No. 169 And The Un Declaration On The Rights Of Indigenous Peoples Compared*, op. Cit.
224 J. S. PHILLIPS, *The rights of indigenous peoples under international law*, op. Cit.
225 Ibidem.
226 Oficina Regional para América Latina y el Caribe, *Convenio núm. 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes y la consulta previa a los pueblos indígenas en proyectos de inversión*, op. Cit.
227 Ibidem.

2.3 Indigenous Rights – Binding instruments at the LAC Regional Level

Created by Organisation of the American States, it was adopted on the 22nd of November 1969 and entered into force on the 18th of July 1978, the Pact of San José, or American Convention of Human Rights, is divided in three parts and consists of 82 Articles, and its aim is to create obligations for the states of the OAS on the respect of Human rights.[228]
Although it is applied to every human being who is citizen of one of the signatory states, it does not openly address Indigenous Peoples in the provisions. Nonetheless, the provisions cite civil and political rights based on customary family ties and traditional land tenure, hence the IACHR and IACtHR have used the provisions of the American Convention, together with the American Declaration, to address issues of ownership rights regarding Indigenous ancestral lands.[229]

Article 1.1 affirms that the States Parties formally recognise their obligation to:

> respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[230]

And Article 1.2 specifies that the use of the statement of application is to be interpreted as applying also towards Indigenous peoples, in so far as human beings, as suggested by the Inter-American Commission.[231]
Despite lacking direct reference to Indigenous and tribal peoples, the most applied articles of the Convention in cases of Indigenous land rights violations are mainly Article 21 – usually

228 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, OAS, 2010.
229 Ibidem.
230 Organization of American States, *American Convention on Human Rights, "Pact of San Jose",* Costa Rica, 22nd November 1969, available at https://www.refworld.org/docid/3ae6b36510.html
231 Ibidem.

in combination with Article XXIII of the American Declaration –, 25 and 29.[232] Many of the articles invoked are similar to other already noted rights, such as the right to life (ACHR Article 4).[233]

Article 21.1 states that "*everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society*", hence it implicitly asserts that Indigenous peoples have collective rights upon the lands they historically own.[234] It is usually interpreted, in accordance to Article 31 of the Convention on the law of the treaties[235], under Article 29 of the ACHR, that obligates states to refrain from interpreting the human rights of the American Convention in a limited perspective. This practically means that in order to properly address Indigenous rights, both the Court must interpret cases in light of the other international instruments on Indigenous Rights – ILO 169 and UNDRIP.[236]

Article 21.1 is applied and reinforced by Article XXIII of the ADHR, which states that "*Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home*".[237] These articles were applied by the court in occasion of the *Awas Tingni vs Nicaragua* case and favoured the evolution of the Court's jurisprudence regarding land rights. The *Awas Tingui*, a Nicaraguan Indigenous community, claimed their ownership over the lands that were traditionally occupied by their ancestors, which instead the state did not approve, for the absence of a written document that testified Indigenous property had been recognised by the central government.[238]

This practice is very much spread in states with high Indigenous population numbers, since governments are pressed by companies and land speculators who want to acquire land titles upon community conserved lands, that they consider as being unoccupied for the mere lack of an official certificate. The doubt that rose was: do Indigenous peoples retain the *collective*

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232 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.

233 Organization of American States, *American Convention on Human Rights, "Pact of San Jose",* op. Cit.

234 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.

235 United Nations, *Vienna Convention on the Law of the Treaties*, 23rd May 1969, Treaty Series, Vol. 1155, available at: https://www.refworld.org/docid/3ae6b3a10.html

Article 31.1 "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

236 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.

237 Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man*, 2nd May 1948, available at: https://www.refworld.org/docid/3ae6b3710.html

238 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.

right of land property? The court interpretation of Article 21 took for granted that land rights are both individual and collective – however it is not specified by the provision.[239] Hence, thanks to this case the scope of Article 21 was enlarged to community land property.[240] This interpretation of the Convention was fostered by the fact that the Court considered it essential to grant community land rights to Indigenous peoples, given their strong relationship with the spiritual sphere of land use, and they concluded that precluding the ownership of ancestral lands would have brought to the violation of the right to life and dignity, cited in Article 4, since the ways of life of such populations are highly dependent on ancestral lands and take their identity from the manifestation of culture.[241] The fact indigenous collective property and culture is recognised as intrinsic with the right to life, however, was not so easily accepted by American states.[242]

The ACHR is usually implemented together with the ILO Convention n. 169 in cases regarding Indigenous rights violations, also in assessing state responsibility of states that are not parties to ILO Convention in cases in which states do not accept to recognise indigenous communal property on the base of ancestral occupation of the lands, such as the case of *Maya Indigenous Communities of the Toledo District v. Belize*.[243] ILO Convention is invoked to strengthen the Importance of the American Convention in the implementation of rights also in the context of Indigenous rights.

Moreover, the ACHR does not directly recognise the right to a healthy environment as human right, but it has been integrated in the Additional Protocol of San Salvador, in Article 11, which establishes that every human being has the right to "*live in a healthy environment*", and in the 2018 Escazú Agreement, which aims to safeguard "*the right of every person of present and future generations to live in a healthy environment*".[244] The provision was applied to the case in 2020, the Inter-American Court of Human Rights held that Argentina had violated the right of the *Lhaka Honhat* Indigenous groups to a healthy environment due to the lack of effective measures to stop activities harmful to them.

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239 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.
240 Ibidem.
241 Ibidem.
242 A. FUENTES, *Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources,* International Journal on Minority and Group Rights, 2017, Vol. 24, N. 3, pp. 229-253.
243 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.
244United Nations General Assembly, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/40/55*, HRC, 8th January 2019, available at: https://undocs.org/en/A/HRC/40/55

Thus, the regional and domestic courts have established the formal obligation towards states and citizens of the OAS to comply with the right to a healthy environment.[245]

245 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.

3. Indigenous Rights – Soft Law at the International Level: UNDRIP

The process of adoption of the UNDRIP lasted almost 20 years. The proposal of the creation of a UN Draft Declaration of the rights of Indigenous Peoples was first proposed after the study of the Special rapporteur on Indigenous Rights, Martinez Cobo, which fostered the creation of the Working group on Indigenous rights in 1982, on the monitoring of a then abolished organism of the UN Commission on Human Rights. The then Working group was substituted by the Expert mechanism on the rights of Indigenous peoples.[246]

After the first years of research, a first Draft Declaration was presented in 1994, but eventually the GA took longer than expected to approve the provisions. The main concerns were the right of self-determination (Article 3) and Indigenous collective ownership over natural resources and ancestral lands.[247] After two ad hoc working group mandates, many advancements of amendments and revisions of the draft articles, the last version of UNDRIP was lastly adopted in 2007. The UN Declaration on the Rights of Indigenous Peoples was adopted in 2007 through the 61/295 UN General Assembly Resolution.[248] The Declaration was adopted with 11 abstentions and 4 votes against, respectively of Canada, USA, Australia and New Zealand, which later changed their opinion.[249] The character of the Declaration is non-binding, yet the wide participation of the states showed signs of interest in the theme, and the state parties of the UN are called to implement the Declaration in good faith.[250]

The Declaration is considered a continuation of the Convention N. 169, taken that the two instruments do resemble a lot in the content of the provisions, but the latter has no legal value, hence the Declaration has been largely criticised for being a mere reiteration of already in use human rights principles, strongly backed by *opinio juris,* and already implemented in international and national courts dealing with cases of Indigenous rights violations.[251] Nonetheless, the two instruments differ in that the Declaration stresses the importance of the notion of self-determination as a right to be granted to the concerned

246 J. S. PHILLIPS, *The rights of indigenous peoples under international law*, op. Cit.
247United Nations, *UN Declaration on the Rights of Indigenous People, General Assembly Resolution 61/295*, op. Cit.
248 Ibidem.
249 C. CHARTERS and R. STAVENHAGEN, *Making The Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, UN, Copenhagen, 2009.
250 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents*, op. Cit.
251 Ibidem.

peoples, and the Convention applied the same principle as a criterion for the evaluation of the requirements of Indigenous identification.[252]

In this new light, the UNDRIP states that the indigenous peoples have their rights for the fact that they consider themselves as being indigenous on the basis of their right of self-determination. The first two articles of the Declaration assert that Indigenous peoples have both individual and collective rights, without any discrimination.[253] However, collective rights are enhanced in the Declaration for the first time, and thanks to this new perception Indigenous peoples are addressed as a whole and also for their spiritual sphere that concerns everyday life and activities; the Expert mechanism has explained in one occasion that Indigenous way of life are developed as a community, and as such they have to preserve their collective memory and their traditions.[254]

The outstanding collective character permeates the Declaration, since it recognises that this value is inalienable to Indigenous communities and they thus must be protected from any form of discrimination and tentative to undervalue their culture shall be avoided, as the aim of the declaration. Therefore, insofar as Indigenous, they have the right to "*freely determine their political status and freely pursue their economic, social and cultural development*", as reported in Article 3 of the Declaration.[255]

The Declaration envisages the right to self-government in situations that affect the internal organisation of Indigenous societies and local economies and activities (Article 4), but also the right to participate to government decision making institutions (Article 5) at their discretion.[256] Indeed, in many cases Indigenous institutional and governmental arrangements are not recognised by the domestic government, thus the equilibrium between the right to self-government and governmental requirements is not respected. The result is that Indigenous governments are not recognised, and domestic governments create obligations to align with the existing forms of government, which undermines traditional institutions and the cultural heritage behind it.[257]

252J. M. PASQUALUCCI, *The Evolution of International Indigenous Rights in the InterAmerican Human Rights System*, Human Rights Law Review, 1st January 2006, Vol.6, N. 2, p. 281-322.
253 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents*, op. Cit.
254 Ibidem.
255 United Nations, UN Declaration on the Rights of Indigenous People, op. Cit.
256 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents*, op. Cit.
257 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents*, op. Cit.

Furthermore, Article 18 states that Indigenous peoples have the right to participate in decision-making processes if their rights are under threat. This provision is usually coupled with the right to free, prior and informed consent, or FPIC, in Article 19.[258] Indeed the principle of FPIC is envisaged in almost every provision of the Declaration, such as in Article 32, regarding the effects of resource extraction, in Article 10 on the obligation of consultation before removal of Indigenous peoples from traditional lands, and also in Article 28, which cites that Indigenous peoples are entitled to restitution or compensation if their lands have been taken without their FPIC.[259] FPIC is also implemented in cases of cultural and religious property, which rather shows that states have a renewed interest in spiritual concept of nature and lands. The Expert mechanism has also defined FPIC as a prerogative for the realisation of self-determination. FPIC is necessary to preserve Indigenous identity, dignity and livelihoods, and seeks to protect and preserve Indigenous peoples' TK.[260]

The Declaration serves to the scope of this thesis, since it shows an innovative perspective in the field of Indigenous rights, and a new sensibility in the approach towards the study of Indigenous peoples. The concerned peoples have been treated as "special" human beings throughout the last century; indeed, the Declaration seeks to translate their rights into universal human rights.[261] In this context, it is worth mentioning the jurisprudence of the Inter-American Court of Human Rights, or IACtHR, with regards to the UNDRIP. The Court usually applies the principles of the ILO C.169 in the interpretation of Human Rights cases, since, as we discussed above, it set general norms with a binding character for the states parties of the Convention.[262] However, in 2007 the Court was the first human rights court to cite the UNDRIP in the judgment of the *Saramaka People*, and in 2012, in the judgment of the *Sarayaku* v. *Ecuador* Case.[263] Afterwards, the Declaration was implemented in 2016 for the scope of interpreting the American Declaration of Human Rights for the assessment of Suriname's obligations and reparations in favour of the two indigenous peoples damaged in the Case of *Kaliña and Lokono Peoples vs Suriname*, for the state was not party to the ILO

258 Ibidem.
259 J. M. PASQUALUCCI, *The Evolution of International Indigenous Rights in the InterAmerican Human Rights System*, op. Cit.
260A. XANTHAKI, *The UN Declaration on the Rights of Indigenous People: A Commentary*, Oxford, Oxford Public International Law, 2018.
261 C. CHARTERS and R. STAVENHAGEN, *Making The Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, op. Cit.
262 Ibidem.
263 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment of 28th November 2007, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

C. 169.[264] This circumstance explains the potentials of the Declaration as a substitute of the Convention, for its innovative provisions that have the feature of state obligations and have been taken into account ever since by UN in the interpretation of human rights law. In this case, the Kaliña and Lokono Peoples, who inhabited the country since pre-colonial times, in the 80s were split into three natural reserves and each community denied the access to the other two reserves.[265] This, in addition to the state mining expeditions, impaired the conditions of the peoples and the ecosystems of the reserves. However the peoples could not appeal to any human right instrument or Indigenous institution since Suriname was, and still is, not willing to recognise indigenous rights to self-determination, land and property.[266] The IACtHR appealed to the American Convention to show the violations committed by the state, and this is when the UNDRIP stepped in: international soft-law, despite its limits, was used as a further instrument through which the Court was able to reinforce the provisions of the ACHR. The court claimed that the state was violating internationally recognised norms of Indigenous law, specifically under Article 26 of the Declaration, as follows:

> Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership [and] States shall give legal recognition and protection to these lands, territories and resources.[267]

The Court explained that the state, by means of this provision, had the obligation to "*refrain from taking steps that could lead to State agents, or third parties adversely affecting the existence, value, use or enjoyment of their territory"* and eventually "*adopt special measures to recognize, respect, protect and guarantee this right*".[268]
The Court also noted that the issue of land possession is strictly enlaced to the right of self-determination envisaged in Article 3, which is the pillar of the Declaration.[269] Among the

264 Inter-American Court Of Human Rights, *Case Of The Kaliña And Lokono Peoples V. Suriname (Merits, Reparations and Costs)*, Judgment Of 25th November 2015, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf
265 Ibidem.
266 Ibidem.
267 United Nations, UN Declaration on the Rights of Indigenous People, op. Cit.
268 F. MACKAY, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*, Erasmus Law Review, 2018, Vol. 1, p. 31-42.
269 United Nations, UN Declaration on the Rights of Indigenous People, op. Cit.

rights that are connected to the concept of self-determination, there is the issue of participation and decision-making institutions, expressed in Article 18 of the declaration and applied in this case to reiterate that it should be interpreted as a guiding principle, since it is the state who must create the institutions and allow dialogue with indigenous representatives, the Court said.[270] Also, reference was made to this pillar in relation with the matter of property rights, for the state must provide safety for the peoples and must not interfere with the correct use of their territories against their will. In fact, the Court used also the words Article 29 of the Declaration to affirm that states are required to cooperate with the Indigenous communities living in protected areas, since they are entitled of the "right to conservation and protection of the environment", in order to assure their means of subsistence are not put in danger.[271] This explanation was given as a further interpretation of the application of Article XXXIII of the American Declaration and Article 21 of the ACHR to this case, and some judges considered it a newness with respect to the Court past jurisprudence.[272] In fact, the right of participation was never applied to cases of land property before, unless the case implied a matter of public interest for the state. Later in *Kaliña and Lokono* the Court concluded that the right to participate in decision-making processes must be respected since the observance of indigenous rights is of public interests.[273] Moreover, in situations that involve risky measures that could affect the concerned peoples, the Court said that Articles 19 and 32 on "*free, prior and informed consent*" must be applied.[274]

With regards to the norms on restitution and reparations of the violations by the State, this Court decision revealed particularly "creative" for this case and for general situations. The final consideration upon the *Kaliña and Lokono* peoples was that the State was guilty of the violations of Indigenous human rights, and Article 40 of the Declaration was applied to reinforce the provisions in Article 21 and 23 of the American Convention. In compliance with the principle of Article 40, which states that the reparation of harms must be made in coherence with the Indigenous traditions and legal institutions, the Court ruled that the

270 F. MACKAY, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement, op. Cit.*

271 Ibidem.

272 Organization of American States, *American Declaration of Human Rights of Men, op. Cit.*

Article 23 of the American Declaration: "*Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country".*

273 F. MACKAY, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement, op. Cit.*

274 Ibidem.

"reparation should help strengthen the collective cultural identity".[275] In this consideration the Court, and also the Committee showed a renewed interest in reducing the struggle of minorities to gain both constitutional and human rights when they are not supported by the central government. Indeed, being indigenous and tribal communities minorities living isolated from the society, and in traditional ways, they are entitled of protection under international law, when state-led activities jeopardize their existence in a given territory.[276]

In contrast with the general belief that the Declaration has opened the way towards a future binding treaty on Indigenous rights, some would say that the adoption and implementation of the principles of UNDRIP has brought to light several uncertainties. Nor we can say that states have unanimously welcomed the Declaration in their domestic legislation, since the major incoherence is the nature of the provisions.[277] In this context the scope of the Declaration should not be vilified, since Indigenous rights have been enriched with environmental, collective and cultural ones, and the international community has been urged to stop any acts of discrimination against these peoples. Yet, the articles of UNDRIP called on states to reach minimum standards on domestic issues regarding Indigenous rights, in order to meet the objectives set in the principles; however, the implementation of the Declaration depends on the domestic laws of each country.[278]

The Declaration adopts language that imposes obligations and responsibilities on States. Accordingly, the United Nations system is increasingly recommending that States take concrete and targeted actions in this regard. For example, the Special Rapporteur on the rights of Indigenous peoples has made recommendations to States that they review their laws and policies that impact on Indigenous peoples in light of the Declaration.[279]

Take for example the situation of Canada, New Zealand, the United States and Australia, who historically have fought with what the affirmation of Indigenous law, and initially were reluctant to adopt the Declaration, for it would have altered their domestic laws and constitutions. Indeed, the four countries were the sole ones who ended up voting against the Declaration in 2007.[280] The four nations considered the Declaration as an aspirational document with no legal value, a debatable assertion which many international scholars and

275 F. MACKAY, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement, op. Cit.*
276 Ibidem.
277 Office of the United Nations High Commissioner for Human Right, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, UN, 2013.
278 Ibidem.
279 Ibidem.
280 A. XANTHAKI, *The UN Declaration on the Rights of Indigenous People: A Commentary*, Op. Cit.

indigenous leaders disagree with. In fact, their attitude towards Indigenous rights seems focused on one provision in particular, that can summarise their historical aversion to accepting the indigenous past of the nation, which is self-determination.[281]

We should look at the case of Canada in the specific, and take as a starting point its traditional denial of civil and politic rights to Indian peoples in the country; the real fear of Canadian people in accepting change in domestic laws was the possibility of indigenous leaders to gain power and word in internal affairs.[282] Their concern was mostly centred on the legal repercussions of Article 28 of UNDRIP, that is to say the principle of "*free, prior and informed consent*", in situations that involve resource development, a field in which the country invests and applies specific legislation.[283] Based on this interpretation of the article, Canada thought that the requirement of Indigenous consultation in situations that may alter their habitat and way of life could translate in a veto for indigenous representatives over resource development issues. Clearly, this is not the case, although the provision encourages the government to cooperate with the communities of interest on such occasions, for the sake of economic development and partnership improvement, but also to avoid repercussions on the ancestral lands.[284] Indeed, if the state has to favour Indigenous participation and control over territories and institutions, the issue of FPIC is central, for any action of the central government that ruins ancestral lands and mineral resources is against the right expressed in Article 28.[285]

281K. S. COATES and B. FAVEL, *Understanding FPIC From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development*, op. Cit.
282 Ibidem.
283 United Nations, UN Declaration on the Rights of Indigenous People, op. Cit.
284 K. S. COATES and B. FAVEL, *Understanding FPIC From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development*, op. Cit.
285 United Nations, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, op. Cit.

4. Forest Law – Binding instruments at the international level

These following paragraphs aim at explaining the salience of environmental law for the conservation and enhancement of Indigenous habitats, and vice versa, the improvements that have been made in environmental law thanks to the inclusion of human rights approaches.[286]
IEL has evolved drastically in the last fifty years due to the rise of new human-caused disasters, related more frequently to pollution, climate change, the use of hazardous natural resources and so forth. During the last decades the international community has felt the urge to develop a legal framework for the protection of resources and landscapes. In this regards, some have taken this position with criticism, as they perceive environmental concerns as an egoistic response to the mutation of the ecosystems.[287] Since the ancient times, humankind has been questioning the role of nature and wilderness in everyday life, with the intent of rationalising the food and water reserves and the resources for the sustenance and the building of houses, cities and means of transport. Despite that, the idea our ancestors had of protection of natural areas and biodiversity was quite different from ours.[288]
The problem of the preservation of natural resources as we intend it today emerged only in modern times, around the First Industrial Revolution, with the first environmental movements in Western European countries.[289] After the two World Wars the problem was exacerbated when economic activities began to demand more and more natural resources, inducing the world population to worry about a possible exhaustion of mineral, food and energy sources and the introduction of environmental awareness and studies on the measures to redress damages to ecosystems.[290]

Especially in the field of Forest law, that is a system of rules designed for the sustainability of forest related activities, there have been international attempts at formulating general strategies, but nowadays no internationally binding treaty with the features of a "Forest Convention" has been concluded, exception made for some treaties on the protection of forest resources, or on the economic value of timber and non-timber products. Despite that,

286 D. BRACK, *International Environmental Disputes: International Forums For Non-Compliance And Dispute Settlement In Environment-Related Cases,* Royal Institute Of International Affairs, London, 2001.
287 J. M. WITTE, C. STRECK and T. BENNER, *Progress or peril? Partnerships and Networks in Global Environmental Governance, The Post-Johannesburg Agenda*, Global Public Policy Institute, Washington, 2003.
288 C. R. YOUNG, *The Royal Forests of Medieval England*, Leicester UP, Leicester, 1979.
289 B. J. LAUSCHE, *Integrated planning: policy and law tools for biodiversity conservation and climate change*, Stockholm, IUNC Environmental Policy and Law Paper, 2019, N. 88.
290C. R. YOUNG, *The Royal Forests of Medieval England*, Leicester UP, Leicester, 1979.

numerous existing soft and hard-law instruments are in use regarding the protection and the sustainable management of forests.[291] For example, the outstanding case of India, which has adopted a comprehensive instrument, the Forest Conservation Act, which has managed since the 1980 to control deforestation, thus consenting the safety of local community living in the forests and in proximity.

In the analysis of the existing instruments on forests, the connection between forest protection and sustainable management, and the role of Indigenous people in complying with these objectives is not noticeable. However, it is present in the CBD, in provision 8(j) and 10 (c) and in the Rio Declaration, for instance. For this reason, the analysis of international forest instruments will only focus on the most comprehensive instruments that involve forest rights, forest biodiversity and the valorisation of Indigenous rights. Also, the Ramsar Convention and the Stockholm Declaration will be analysed for they represent a possibility for the evolution of forest protection and for the improvement of human rights concerning the environment.[292]

The aim is not to discredit the existing instruments on forests, however, they show different scopes; for example, the objective of the UNFCCC is to protect the forests for they represent a resource against climate change, and for the economic value of carbon sinks they contain; the CITES and ITTA have regarded forests and natural resources for their trade value. None of these instruments provide a perspective that is met for the sake of this research, for the relationship between environmental rights and Indigenous rights is not involved, or not possible at all.[293]

291 B. J. LAUSCHE, *Integrated planning: policy and law tools for biodiversity conservation and climate change*, p. cit.
292 R.COONEY and B. DICKSON, *Biodiversity and the Precautionary Principle: Risk, Uncertainty and Practice in Conservation and Sustainable Use*, Routledge, 2005, London.
293 Ibidem.

4.1 UN Convention on Biological Diversity

The framework that emerged in the UN Conference on Environment and Development, also known as Rio Conference or "Earth Summit", held from the 3rd to the 14th of June 1992, made a special contribution to the international system of environmental law. During the Conference the Rio Declaration was adopted and three Conventions were opened for signature: the Framework Convention on Climate Change (UNFCCC), the Convention on Desertification (UNCCD) and the Convention on Biological Diversity.[294]

Proposed during the Nairobi conference on the 22nd May 1992, the Convention on Biological Diversity was launched at the "Earth Summit" and entered into force the following year with 163 state parties, and today it counts 174 parties.[295] It is a legal instrument designed to protect the vegetal and animal species under threat due to (human caused) environmental degradation. I represented a novelty in international law as it was the first binding treaty analysing biological diversity from the legal perspective, including forest biodiversity.[296]

In 2016, the Special rapporteur on human rights and the environment, pointed out that, in his thought, the CBD is a potential instrument for Indigenous law, and submitted a study that proved that every article of the Convention is likely to be applied to Indigenous rights, and human rights in general.[297] For example, the *Kaliña and Lokono* Case, illustrated in the previous paragraphs, is an example of how Indigenous Rights are contaminated by Environmental Rights, and vice versa, since the IACtHR, in the proceedings of this case, relied upon provision 8(j) of the CBD as an interpretative tool of Indigenous rights – alongside with the ACHR.[298]

The Convention has shown a deep concern regarding the impacts of biodiversity loss on human rights, such as the right to water, shelter and life and so forth. The Preamble discloses that TK and traditions are explicitly considered useful in attaining of biodiversity objectives of the convention, taking a different position from the other Conventions adopted at UNCED.[299] The Convention emphasises that biological diversity must be restored when

294 R.COONEY and B. DICKSON, *Biodiversity and the Precautionary Principle: Risk, Uncertainty and Practice in Conservation and Sustainable Use*, op. Cit.
295 United Nations Environmental Programme, *Convention on Biological Diversity*, Rio de Janeiro, June 5th 1992, available at https://www.cbd.int/doc/legal/cbd-en.pdf
296 B. M. G. S. RUIS, *No forest convention but ten tree treaties*, op. cit.
297 R.COONEY and B. DICKSON, *Biodiversity and the Precautionary Principle: Risk, Uncertainty and Practice in Conservation and Sustainable Use*, op. Cit.
298Ibidem.
299 D. R. DOWNES, *Global forest policy and selected international instruments: a preliminary review*, op. Cit.

needed and preserved by all states for the benefit of the next generations, for its huge impacts on the social, cultural development of all peoples.[300]

The issues at stake at the time of the Conference for the Adoption of the CBD were: the fair access and benefit-sharing of resources, the involvement of Indigenous peoples, the problem of traditional knowledge and the national sovereignty upon the biological resources, which represent the objectives of the Convention envisaged in Art. 1.[301]

The most important articles of the Convention that acknowledge the role of Indigenous peoples in preserving forest biodiversity are Article 6 (b), 8 (j) and 10 (c). Article 6(b) entails the integration of the conservation and sustainable use of biological diversity into relevant sectoral and cross-sectoral plans, programmes and policies, reflecting a clear intention to link biodiversity to socio-cultural, and economic issues such as those related to human rights expressed in the preamble of the CBD.[302] A relevant trait of the Convention addresses "Traditional knowledge, Innovations and Practices" cited in the Preamble, namely Article 8(j), 10 (c).[303] Article 8(j) is emblematic for it acknowledges the matter of Indigenous traditional knowledge in the perspective of nature – and forest – conservation, not only for the sake of the landscapes but also of Indigenous cultural background linked to it. Article 8 is a legal obligation on *in-situ* conservation, namely the conservation of natural surroundings and local habitats, and enhances the creation of a national system of protected areas, and the restitution of natural sites to local populations.[304] Moreover, the provision fosters the implementation of TK only with Indigenous communities' approval.[305]

The Working Group on the application of Article 8 (j) towards Indigenous peoples has achieved promotion of customary sustainable use of biodiversity. In one yearly report, it was assessed that the provision 8 (j), together with 10(c), has been very useful in addressing the matter of customary sustainable use of resources. Many Indigenous representatives noted that the application of the two provisions in the domestic context has enhanced biodiversity, since the use of TK and ancestral practices in taking care of the environment have proven

300 Ibidem.

301 United Nations Environmental Programme, *Convention on Biological Diversity*, *op. Cit.*

302 D. R. DOWNES, *Global forest policy and selected international instruments: a preliminary review*, op. Cit.

303 J. AMIOTT, *Investigating the Convention on Biological Diversity's Protections for Traditional Knowledge*, Journal of Environmental and Sustainability Law, 2003,Vol. 11, N1, p. 2.

304 Ibidem.

305 G. OVIEDO, L. MAFFI and P. B. LARSEN, *Indigenous and traditional peoples of the world and ecoregion conservation, an integrated approach to conserving the World's biological and cultural diversity*, op. cit.

effective and a reliable alternative to modern techniques.[306] In fact, customary sustainable practices do not only consist of innovations in biodiversity protection, but also revitalisation of old practices, which are likely to be found within Indigenous communities.[307] The implementation of the two provisions, is fostered under the Working group through processes that involve increasing Indigenous participation to decision-making and adopting customary sustainable practices in also strictly protected areas, not only in community managed areas.[308] It was noted that the implementation of the articles cannot only promote revitalisation of old practices, but also create innovative ones that raise from the merging of different types of knowledge with TFRK, and that the deriving benefits are to be seen in the perspective of all peoples.[309] Moreover, the Convention, through these provisions in the specific, hase given a positive example of how Indigenous culture is in any case the better alternative, since the spiritual values of peoples have a positive repercussion on the physical protection of environments. But in order to do so the state parties must engage continuative communication and cooperation with the concerned groups.[310] Finally the report recognised that Indigenous heritage and cultural lineage are intrinsically connected with biodiversity and the most likely to implement "ecosystem-based" approach to biodiversity protection through means of TK. Most notably, the Working group has asserted that the there is a connection also between customary use of natural resources and the right to self-determination, since customary practices are a way through which self-determination manifests.[311]

Furthermore, Article 14(1) obligates state parties to conduct EIA, environmental impact assessments, before starting projects that could undermine biodiversity.[312] The framework of the provision has favoured the creation of the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments. These guidelines on EIAs, adopted at COP-7, aim to limit the spread of state actions, projects, developments that may threaten Indigenous sacred sites and environmental heritage.[313] The guidelines provide that EIAs must evaluate the impacts of activities on the different spheres of Indigenous life,

306Convention on Biological diversity, *Report Of The Meeting On Article 10 With A Focus On Article 10(C) As A Major Component Of The Programme Of Work On Article 8(J) And Related Provisions Of The Convention*, UNEP/CBD/WG8J/7/INF/5, 12 June 2011, available at: https://www.cbd.int/doc/meetings/cop/cop-12/official/cop-12-05-en.pdf
307 Ibidem.
308 Ibidem.
309 Ibidem.
310 Ibidem.
311 Convention on Biological diversity, *Report Of The Meeting On Article 10 With A Focus On Article 10(C) As A Major Component Of The Programme Of Work On Article 8(J) And Related Provisions Of The Convention*, op. Cit.
312 United Nations Environmental Programme, *Convention on Biological Diversity*, op. Cit.

such as the assessment of cultural impacts, religious impacts, customary use of natural resources and so forth. Moreover, the guidelines for the application of obligation to conduct EIAs envisage that Indigenous peoples must be included in decision-making processes.[314] The possible impacts on all aspects of culture, including the preservation of sacred sites, should therefore be taken into consideration while developing cultural impact assessments.[315]

Lastly, the CBD is also relevant for the fact that it includes specific guidelines for the issuing of protected areas. Protected areas are fundamental in the protection of critical environments, such as moist forests, forests contained in wetlands, and forests at risk of desertification. The issue will be explored more in detail in the next Chapter, where we will see that, notwithstanding the great importance of protected areas for biological diversity enhancement, the issuing of such areas impedes the enjoyment of certain lands to Indigenous peoples, who are removed for not being compatible lifestyle with biodiversity objectives.[316]
The current international framework for the identification and management of environmental protected areas works under the guidelines proposed by the IUNC, which were presented during the IUNC World Parks Congress in 2003, and were later approved by the CBD during COP7 in 2004, which adopted the Programme of Work on Protected Areas, by means of Decision 7.16.[317]
Also, in recommendation number 5.27 of the 1993 Durban Congress, was strongly underlined that traditional conservation techniques fostered by Indigenous communities living on ancestral lands are very useful and instructing, and biodiversity preservation is more likely to be achieved if supported by cultural beliefs.[318]
In Article 2, the CBD describes protected areas as "*geographically defined areas, [which are] designated or regulated and managed to achieve specific conservation objectives*".[319]
On the other hand, the IUNC fostered the establishment of an international framework for

313 Secretariat of the Convention on Biological Diversity,.*Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities,* CBD Guidelines Series Montreal, 2004.
314 Ibidem.
315 V. TAULI-CORPUZ, *On international standards and policy on protected areas, conservation and sustainable use of biodiversity and on the rights of indigenous peoples. Expert Testimony of the UN Special Rapporteur on the Rights of Indigenous Peoples, before the Inter-American Court of Human Rights (IACHR)on the Case of Kaliña and Lokono Peoples vs. the Government of Surinam,* Costa Rica, 2015.
316 K. BISHOP, N. DUDLEY, A. PHILLIPS and S. STOLTON, *Speaking a Common Language. The uses and performance of the IUCN System of Management Categories for Protected Areas*, IUNC, Gland, 2004.
317 Ibidem.
318 Ibidem.
319 Ibidem.

protected areas that included cultural and sacred natural areas, providing a renewed definition of protected areas at the IV World Parks Congress in 1992. The Conservation Union defined a protected area as

> a*n area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means*.[320]

Using this definition as a starting point, the IUNC identified six categories of protected areas, determining the degree of protection that is required in each natural and cultural protected site respectively. Category I envisages Strict Nature Reserves and Wilderness Areas, which are inhabited by tribes that live in isolation. Category II protects ecosystems of National Parks, and together with Category I represents the strictest areas for their role in maintaining biodiversity standards. Category III supervises Natural Monuments, Category IV manages habitats populated by endangered species, and Category V deals with Protected Landscapes. Finally, in Category VI fall sustainably managed Resource Protected Areas.[321] The main differences between said categories is the degree to which human presence is allowed to interact with biodiversity in the protected area. For instance, national parks are open to visitors, whereas human activities such as hunting, fire lighting and resource extraction are banned in Category VI areas as they could stress endangered species. Whether human presence, both Indigenous and non-Indigenous, is permitted in the areas or not, depends on the conservation status of the ecosystems and on the conservation objectives.[322]

320 K. BISHOP, N. DUDLEY, A. PHILLIPS and S. STOLTON, *Speaking a Common Language. The uses and performance of the IUCN System of Management Categories for Protected Areas*, op. Cit.
321 N. DUDLEY, *Guidelines for applying protected area management categories including IUCN WCPA best practice guidance on recognising protected areas and assigning management categories and governance types*, op. Cit.
322 Ibidem.

5. Forest Law – Soft Law at the International level

Analysing the declarations, what comes to the eye is that they introduced concepts that have deeply influenced the international framework of protection of forests and human rights. Some would argue that soft law is useful in environmental law since it consents to all countries to cooperate and accept minimum standards of commitment otherwise they would not commit at all. Moreover, the Stockholm Declaration and the Rio Declaration have influenced developments both at regional and national levels, and their potential is that their principles have been translated into binding law, for example the principles of the Rio Declaration were also included in CBD and UNFCCC, and despite their status have served their scope and have been implemented.[323]

323 Y. AGUILA and J. E. VIÑUALES (ed), *A Global Pact for the Environment: Legal Foundations*, Cambeirge Publications, Cambridge, 2019.

5.1 The Ramsar Convention

The framework of this convention is helpful to understand a theme that will be widely addressed in the following chapter, which is the issue of protected areas.

The Ramsar Convention on Wetlands was adopted on the 2nd of February 1971 as a consequence of the economic role wetlands started to acquire.[324] The Convention was designed to limit the exploitation of plants and water but also to regulate the usage of resources outside state borders, because many wetlands are situated in between state frontiers, mostly in Latin American states whose borders were decided regardless of the natural extension.[325] The reason why wetlands are important in forest environments and why the Ramsar Convention on Wetlands is of international importance is that many protected sites under the convention are situated in forests, especially in tropical environments, such as the Brazilian Pantanal, the Bolivian Rio Bianco and many others in other regions such as African south-western coasts.[326] Despite the Convention creates no binding obligations towards states that issue protected wetlands on their territories to protect them under determined measures, some experts, however, think it could be helpful if forests were introduced in the Convention. Forests and Indigenous peoples are not directly an object of relevance in the Convention, since the aim is explicitly to protect wetlands and waterfowl habitats.[327] The reason why we cite this convention is for the future effects it could have on forests it the object of application was enlarged to tropical forests, being them among the most humid areas worldwide, as they could help contrast deforestation and the loss of water sources and tropical moist vegetation that generates livelihood for Indigenous peoples.[328]

Originally, the Ramsar Convention focused exclusively on preserving wetlands as waterfowl habitats, but it has changed extensively over time to embrace the broader implications of wetland destruction. During COPs, state parties have demonstrated their intention in extending the objective of the Convention to larger environments in which wetlands are located and to different environments that exist in the wetlands.[329]

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324 Ramsar Convention Secretariat, *An Introduction to the Ramsar Convention on Wetlands,* Ramsar Handbook 5th Edition, Gland, 2016.
325 Ibidem.
326 Ibidem.
327G. OVIEDO, L. MAFFI and P. B. LARSEN, *Indigenous and traditional peoples of the world and ecoregion conservation, an integrated approach to conserving the World's biological and cultural diversity*, op. cit.
328 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, op. Cit.
329 Ibidem.

Article 1 specifies the definition of wetland, as "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary". Article 2 is a voluntary commitment to identify domestically wetlands and waterfowl of international importance and create a list of priority areas for wetland biodiversity conservation.[330] However, the provision itself is not an obligation to formally grant to international protection such areas, in fact the convention recognise that states still have decisional power over the lands and their natural resources. Although, states accept the responsibilities generated by the provision and acknowledge that their contribution to preservation of environment is essential. Article 3 asserts that states accept to promote sustainable activities and to make "wise use" of the wetlands listed among the protection areas.[331]

Differently from the CBD, the Convention does not provide official protection to wetlands. In fact, in order to be protected by the Convention, wetlands do not need to be part of the CBD programme for protected areas, as well as they do not automatically involve international commitments to protection. However, if the scope of the convention is enlarged to protecting Indigenous reserves and areas that have a relevant role in providing livelihood to local communities, maybe on the long-run measures become effective.[332]

As it was previously discussed, tropical forests are fragile environments in which different ecosystems survive. For this reason, one shall question why wetlands are included in the endangered natural areas. The answer is that wetlands constitute a vital environment for climatic equilibrium. Many are situated in tropical areas, as in the case of the Amazon biome; they are made of aquatic vegetation, such as mangroves, small trees that grow their roots in the water.[333] Wetlands, as they are endowed with high biodiversity rates, are usually fundamental for the subsistence of local communities, but they can also provide shelter, and serve as sacred sites, such as in Ecuador, where there are the tallest mangroves, these are worshipped by Indigenous communities as spiritual dwellers. The Convention however does not make specific reference to Indigenous peoples and their communities.[334] Nonetheless, the Fourth Ramsar Strategic Plan has on one occasion expressed its concern about "traditional knowledge, innovations and practices of Indigenous peoples and local communities" since

330 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, op. Cit.
331 Ramsar Convention Secretariat, *An Introduction to the Ramsar Convention on Wetlands, op. cit.*
332 G. OVIEDO, L. MAFFI and P. B. LARSEN, *Indigenous and traditional peoples of the world and ecoregion conservation, an integrated approach to conserving the World's biological and cultural diversity*, op. cit.
333 Ibidem.
334 Y. AGUILA and J. E. VIÑUALES (ed), *A Global Pact for the Environment: Legal Foundations*, op. Cit.

customary sustainable uses of wetlands are very much implemented, and Indigenous cooperation to the biodiversity objectives at national level should be considered as fundamental for the objectives of the convention. [335]

This digression about the Ramsar convention is only to show that there are international instruments for the protection of environments, but enlarging their sphere of action to forests is one tricky issue, since it entails many unsolved questions, such as the role of Indigenous peoples, the state sovereignty over the protected territories and the risk that economic and development objectives overwhelm the need of biological diversity protection.[336]

335 Ibidem.

336 Ramsar Convention Secretariat, *An Introduction to the Ramsar Convention on Wetlands*, op. cit.

5.2 Stockholm Declaration

The "Earth summit" can be defined the continuation of the UN Conference on the Human Environment, which was held in Stockholm from the 5th to the 16th of June 1972.[337] The UN Declaration on the Human Environment, adopted at the Stockholm Conference, was considered a goal in environmental law for it outlined a set of objectives for the regulation of environmental impact and was adopted with success among both developing and advanced countries, a sign that they were ready for cooperation on such widespread matters.[338] The Stockholm Declaration, indeed, introduced in its Preamble and 26 Principles the concepts of sustainable development and the right to a healthy environment, and the duty to protect the environment for future generations.[339] The main outcome of the Stockholm Conference was the fact that it put the basis for an Action Plan for the "rational management" of resources and human activities, with the aim to safeguard the environment, rather than exploit resources.[340] Moreover, the Stockholm Declaration put the basis for the moral responsibility of states guilty of environmental damages, which was later developed by the ICJ by means of the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* and the *Pulp Mills Case on the Uruguay River.*[341]

The strength of the Declaration consists in having introduced the right to a healthy environment, which instead is not present in other human rights instruments. This right has always been present in Indigenous customary law, while it was not acknowledged by the modern societies. Principle 1 indeed claims that "*man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*."[342] The influence this provision has had to the ecosystem approach of international law in both human rights and environmental branches, is outstanding, for, despite being non-binding, it has demonstrated that there is

337 Y. AGUILA and J. E. VIÑUALES (ed), *A Global Pact for the Environment: Legal Foundations*, op. Cit.
338L. B. SOHN, The Stockholm Declaration on the Human Environment, INTERNATIONAL LAW JOURNAL, Vol. 14, N. 3, 1973.
339Report Of The United Nations Conference On The Human Environment, Stockholm June 1972, NY, 1973, available at: http://www.un-documents.net/aconf48-14r1.pdf
340J. BRUNNEE, *The Stockholm Declaration and the Structure and Processes of International Environmental Law, The Future of Ocean Regime Building,* Essays in Tribute to Douglas M. Johnston, 2008.
341Ibidem.
342 Ibidem.

general interest towards the promotion of this right. It stresses that a healthy environment is necessary for a life of quality and dignity, very innovative at the time.[343]

Since Portugal formally introduced the right to a healthy environment to its Constitution in 1976, the international arena followed its example. For instance, in the African Charter of Human Rights in 1981.[344] Furthermore, the Additional Protocol of San Salvador to the ACHR, in Article 1 stated that every human being protected by the Convention has the right to environmental quality for the fulfilment of their well-being, and the IACtHR added that this rights prevents environmental damages to threaten peoples' right to life and dignity.[345]
Later developments have favoured the HRC adoption in 2021 of the Resolution to recognise the right to a clean, safe and healthy environment. This achievement was possible thanks to the work of the Special rapporteur on human rights and environment, David Boyd, and the former rapporteur John Knox, who encouraged states of the Core Group of States on human rights and the environment to call for the actual introduction of a legal obligation to the right to a healthy environment.[346] It was on the 8th of October 2021 that the HRC adopted Resolution 48/13 that recognised the right to a healthy environment. This may result fundamental for the evolution of environmental law regarding the environment and forest biodiversity, since it recognise that natural elements do not only have a physical value, but also a more intense value, and contribute to our life.[347]

In this the Declaration helped a lot, but it is limitative in scope since many of the provisions were overcome by the Rio Declaration. Moreover, principle from 1 to 4 stress also the prerogative of sustainable development for the well-being of the future generations, and Principle 21 claims the essentiality of preventive measures to environmental harm.[348]

343 Y. AGUILA and J. E. VIÑUALES (ed), *A Global Pact for the Environment: Legal Foundations*, op. Cit.
344 G. H. EBERHARD, *Declaration Of The United Nations Conference On The Human Environment (Stockholm Declaration) 1972 And The Rio Declaration On Environment And Development 1992*, United Nations Audiovisual Library of International Law, 2012.
345 Ibidem.
346 Dr. J. E. VIÑUALES, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment,* op. cit.
347 Y. AGUILA and J. E. VIÑUALES (ed), *A Global Pact for the Environment: Legal Foundations*, op. Cit.
348 Ibidem.

5.3 Rio Declaration and Forest Principles

The preparative measures for the UNCED took in consideration the great achievements of Stockholm declaration, however, the initial aim of the Rio Conference was to adopt an "Earth Charter" with a binding character, with right towards the environment and human rights. Similarly to the Stockholm Declaration, the Rio Declaration, hereinafter the Declaration, envisaged the right to a healthy environment and most of customary norms regarding the environment, but reinforced the nature of the provisions, thought they remained non-binding.[349] The Declaration is a set of 27 principles decided by the parties on matters of concern linked to sustainability, environmental degradation and the future of next generations.[350] At the time of the UNCED, together with the Declaration was adopted also the AGENDA 21 on the objectives and implementation of the established principles, but also another important document for the protection and sustainable use of forests, namely the Forest Principles, a statement with no legal value, but however useful.[351]

Although the Rio Declaration is itself a non-binding instrument, its principles are of extreme importance in the development and implementation of environmental policy and law, both nationally and internationally. In addition, some of its principles reflect rules set out in customary international law or standards established in international treaties.[352] Principle 1 reiterates the discourse over sustainable development, but did not stress the right to a healthy environment, since the contracting states at the Conference showed reluctance to affirm a binding norm, as initially the Declaration was thought to become binding. Nonetheless, the core of the Conference was sustainable development, which is also enshrined in Agenda 21 and the Millennium goals, and the then SDGs adopted at following Rio+20 Conference. The principle of sustainable development is enshrined in all the text of the Declaration, which addresses also indigenous peoples.[353]

Principle 2 states that states have a responsibility towards the environment and they shall not impair natural resources and the environment, and shall also implement regulations on the environmental use and any possible harm. This customary norm is of great impact, since it

349United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, A/CONF.151/26/Rev.1, Río de Janeiro, June 3rd to 14, 1992, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

350G. H. EBERHARD, *Declaration Of The United Nations Conference On The Human Environment (Stockholm Declaration) 1972 And The Rio Declaration On Environment And Development 1992*, op. Cit.

351 Ibidem.

352 Ibidem.

353 Ibidem.

was applied by the ICJ in the its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* and the *Pulp Mills on the River Uruguay* case, in which the Court openly stated the state must refrain from provoking environmental damages based on the obligation of prevention.[354]

Although not every principle of the Declaration entails Indigenous rights, they are worth mentioning since they link environmental harm to human rights violations. Indeed the precautionary principle is the most innovative instrument provided by the Declaration, stated in Principle 15:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[355]

Moreover, the precautionary principle was not envisaged in the Stockholm Declaration, and was indeed included in the UNFCCC and the CBD. At the regional level, the ECtHR has applied, using as interpretative means the UNFCCC, the Rio Principles, such as the no harm principle, the precautionary principle, and the sustainability principle. The occasion was the recent dispute, the *Urgenda case vs Netherlands.*[356] *T*he court, according to the existing principles and consequently to the events of the case, established that states must act in due diligence to avoid any environmental harm and must adopt measures to prevent damages and scientific research before initiating projects and activities that involve the exploitation of environmental resources, since the repercussions may impair the well-being of the peoples living in those areas.[357] The nature of this provision is largely discussed: for some the precautionary principle is a norm of international customary law, others assign to it the status of a mere approach to environmental law.[358] Deeper studies in this regard, highlight that the

354R. G. TARASOFSKY, *Assessing the International Forest Regime*, IUCN, Gland, Cambridge and Bonn.
355 United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, op. Cit.
356 G. H. EBERHARD, *Declaration Of The United Nations Conference On The Human Environment (Stockholm Declaration) 1972 And The Rio Declaration On Environment And Development 1992*, op. Cit.
357 Ibidem.
358 Ibidem.

precautionary principle, despite having been cited in many binding treaties, cannot be considered a binding rule.

Another important provision is contained in Principle 7, about the concept of common but differentiated responsibilities is an innovative provision, since it entails that states must act according to their economic and developmental status. For starters, the court referred to this principle in the case of *Gabcíkovo-Nagymaros* where Hungary and Slovakia had a dispute on the construction of dams in the area between the two city districts.[359] The principle of Common but Differentiated Responsibility and Respective Capabilities, also known as CDRC, calls on all the states to do their best to counter environmental degradation, in accordance with their respective means. However, this concept is connected with the principle of "Intergenerational Equity" of the UN Charter; both were taken into consideration when the Court judged that the construction of the project could trigger risks for human beings and the future generations. Moreover, the Court used as interpretative tool also the principle of Sustainable Development, acknowledging that economic development must be limited in the event that the environment is under threat.[360]

The principle of Sustainable Development was also useful on the occasion of the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, on 8th July 1996; it was strongly promoted by Judge Weeramantry, who contributed personally to the research in a separate opinion on the humanitarian nature of environmental rights.[361] The emblematic the response of the court to the question posed by the UN General Assembly implied that "*the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment*" was backed by the belief that "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.*"[362] The same opinions were reiterated by Judge Cançado Trindade in 2006 with regards to the dispute between Uruguay and Argentina upon the construction of *Pulp Mills* in the Uruguay River and the potential negative externalities for the local settlements on the two riverbanks, on the basis of the Precautionary Principle.[363]

359 International Court of Justice,Gabcikovo-Nagumaros Project (Hung. v. Slovk.), 5th February1997, available at: http://www.worldcourts.com/icj/eng/decisions/1997.02.05_gabchkovo.htm

360 Dr. J. E. VIÑUALES, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment,* op. cit.

361 G. H. EBERHARD, *Declaration Of The United Nations Conference On The Human Environment (Stockholm Declaration) 1972 And The Rio Declaration On Environment And Development 1992*, op. Cit.

362 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*,8th July 1996, available at: https://www.refworld.org/cases,ICJ,4b2913d62.html

363 Dr. J. E. VIÑUALES, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment,* op. cit.

Principle 20 and 21 regard women and children as positive actors in biodiversity protection and sustainable management of environment, and are also used in reference of Indigenous women and children. In addition, Principle 10 on participation and access to information and environmental justice, reiterates a human right that has been applied to Indigenous peoples.[364] Furthermore, Principle 22 claims that the "*vital role of Indigenous people and their communities and other local communities*" is possible thanks to the TK they possess and it should be conceived as potential instruments of sustainable development. As well, it suggests that if states recognise this, they can comply with the principle of sustainable development and participation to decision-making. For innovative it is, this concept is fortunately included in the interpretation of the CBD and extensively discussed in ILO 169.[365]

Lastly, together with the Rio Conference was adopted the "Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests", also known as the Forest Declaration or the Forest Principles, which have been conceived as an innovative instrument, although not implemented, since they were never translated into a binding agreement.[366] Among the Forest Principles identified, there are the objective of creating a holistic approach to environmental preservation, limit national sovereignty over forests and wood and non-wood resources, and Indigenous communities' participation to forest sustainable management, as it emerges in the Preamble of the forest statement.[367] In addition, Principle 1 claims state sovereignty over their forested territories, nonetheless they are obliged to manage them as to not provoke any environmental harm.[368] Principle 2(b) explains that forests are not ought protecting for their economic value, but also for the fact that many human beings rely on them for the spiritual, cultural, social and developmental factors it enhances, thus forest sustainable management is necessary for attaining these prerogatives.[369] Principle 4 in fact, recognises that

364 G. H. EBERHARD, *Declaration Of The United Nations Conference On The Human Environment (Stockholm Declaration) 1972 And The Rio Declaration On Environment And Development 1992*, op. Cit.
365 Y. AGUILA and J. E. VIÑUALES (ed), *A Global Pact for the Environment: Legal Foundations*, op. Cit.
366 Ibidem.
367 Report Of The United Nations Conference On Environment And Development, Annex III, *Non-Legally Binding Authoritative Statement Of Principles for A Global Consensus On The Management, Conservation And Sustainable Development Of All Types Of Forests,* 3- 14 June 1992, Rio de Janeiro.
368 Report Of The United Nations Conference On Environment And Development, Annex III, *Non-Legally Binding Authoritative Statement Of Principles for A Global Consensus On The Management, Conservation And Sustainable Development Of All Types Of Forests, op. Cit.*
369 Ibidem.

> "The vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognized."[370]

But most importantly, provision 2 (d) and 5 (a) call on the participation to forest sustainable management of Indigenous peoples and local communities and must allow the persistence of the concerned peoples in the forests and provide a framework of cooperation and respect of their practices and identity, recognising that spoiling forests can lead to loss of cultural heritage. As well as to foster the adoption of sustainable measures on forest uses, in order to allow the local communities to live according to their traditions and acknowledge their help in maintaining forest biodiversity.[371] In fact, as stated in Principle 12 (d), the government shall encourage the implementation of TK and traditional practices in nature conservation, always trying to foster their participation in these activities.[372]

370Ibidem.
371Ibidem.
372Ibidem.

CHAPTER 3. THE AMAZON RAINFOREST: ECOSYSTEMS, CULTURE AND POPULATIONS

1. The State Of Tropical Forests In Latin America and Deforestation

In the light of the topics exposed in Chapter 2, this Chapter will instead explore the focal point of the research in a more practical perspective. We have underlined the centrality of environmental preservation and Indigenous rights in the international debate over the effectiveness of Human Rights And Environmental Conventions in the international community, and the limits of application in domestic contexts.

In order to assess state compliance of Latin-American states with International Conventions, which is the aim of Chapter 4, it is important to shed light on the features of the regional forest regime, the socio-economic structure, and, most importantly, the challenges that raise with regards to the conservation forest and traditional practices. It is also decisive to consider the regional trends of land management, how regional treaties operate in this field, and if international conventions have repercussions in it. Moreover, in order to better understand the cultural diversity of the continent and the commonalities of Amazonian Indigenous communities, a section will be dedicated to the illustration of Indigenous cultural heritage of the concerned peoples with the aim to demonstrate that traditional knowledge represents a resource for the future of the Amazon Rainforest.

Before we move forward, some words shall be spent on defining what is a forest, in order to better analyse the features of the Amazon Rainforest. The most used definition is the one provided by UNECE and FAO, employed in the report "State of the World's Forests" of 2001. For FAO a forest is as "*an area with at least 10% crown cover*", a very broad definition that narrows the countless forest categories around the globe.[373] UNESCO and EROS (Earth Resources Observation and Science Center), on the other hand, in their studies gave an account of the existence of more than one hundred different forests. Among the numerous categories, we shall point out three main ones, namely boreal, temperate and tropical forests, which in turn divide into needle-leaf, broad-leaf, dry and moist forests, or

373 S.B. JENNINGS, N.D. BROWN, and D. SHEIL, *Assessing forest canopies and understorey illumination: canopy closure, canopy cover and other measures*, Forestry: An International Journal of Forest Research, 1999, Vol. 72, N. 1, p. 59–74.

mixed forests.[374] In the light of this premise, Amazonia falls within the category of tropical forests, with its vast ecosystem that differs from country to country, depending on the altitude and latitude of the covered lands. It contains 85 thousand plant species circa, based on the reports of FAO, representing almost 30% of the global forested areas alone.[375] Of all the tropical areas around the globe, Latin America hosts the highest variety of vegetation and habitats, hence it is usually referred to as a biome.[376] The Amazon biome is a much varied ecosystem made of sub-ecosystems, where we can find moist areas, namely the Amazon Basin in southeastern Brazil, Central Peru, Guyana and Suriname, and dry areas, respectively in Peru, northern Colombia, southern Venezuela, southeastern Bolivia, northeastern Brazil and Ecuador.[377]

Moreover, FAO gives another classification of forests, relying on their being pristine. The studies of FAO brought to light that forests can be further divided into primary and planted forests. The first category indicates endemic forests that date back to ancient times. These forests show no sign of change due to human-led activities and store key biological habitats, that FCS also calls "High-value forests".[378] They can be found in the remaining share of unspoilt tropical forests and in proximity of the arctics. In Latin America, most of the remote Amazonian forests are pertinent to this category, since endemic vegetation such as lianas and woody plants cover more than 60% of the total forest crown.[379] Instead, planted forests consist of all the forests that are exploited for the value of their products and serve commercial scopes, such as industrial plantations and intensive croplands. They are artificial forests, composed of high yield native species or imported tree species. The phenomenon of planted forests has spread mostly in South America, but it is beginning to affect also Amazonian low-lands, that are easily convertible to croplands.[380]

The geography of the Amazon Rainforest is quite extended, also for the fact that it embraces different habitats, from densely forested lands to open forests and dry forests. These latter

374 UNEP and WCMC, *The State of Biodiversity in Latin America and the Caribbean: A mid-term review of progress towards the Aichi Biodiversity Targets*, Cambridge, UNEP-WCMC, 2016.
375 F. AKIMOTO, *The birth of 'land use planning' in American urban planning*, Planning Perspectives, 2009, Vol. 24, N. 4, p. 457-483.
376 S. CHAPE, M. SPALDING and M. D. JENKINS, *The World's Protected Areas*, UNEP World Conservation Monitoring Centre, University of California, Berkeley, 2008, pag. 4-34.
377 UNEP and WCMC, *The State of Biodiversity in Latin America and the Caribbean: A mid-term review of progress towards the Aichi Biodiversity Targets*, Cambridge, op. cit.
378 FAO and UNEP, *The State of the World's Forests 2020. Forests, biodiversity and people*, FAO, 2020, Rome.
379 Ibidem.
380 Ibidem.

are less dense forested areas with a larger crown cover that function as transition regions from forested to non forested lands.[381]

The role of moist and semi-moist forest areas is quite significant in maintaining levels of oxygen and water in the air and soil. The Amazon Basin covers most of Central America, and is the largest humid forest of the continent.[382] The Basin contains thousands of rivers and tributaries to the Amazon River, which represents the principal river of Central America, originating in the district of Arequipa in Peru and flowing towards east.[383] Moreover, the biome hosts a variety of natural sites other than forests, such as wetlands; the most important wetland is found in Peru and is the *Pacaya Samiria* National Reserve, followed by the Brazilian *Pantanal*, both of which have a great influence on the balances of seasonal inundations in the Basin and are also protected under the Ramsar Convention on Wetlands since 2005.[384] Particularly, the greatest role is played by the Brazilian southeastern regions of *Igapò vàrzea* and *Terra firme*, which through seasonal inundations contribute to regulating water reserves of the humid ecosystems of the Rainforest.[385]

The richness of natural biodiversity of these wet areas stems from the presence *epiphynes* and *lianas*, organisms that provide the basic nutrients for reproduction and allow steady proliferation of bacteria.[386] Moist habitats, in fact, prevent the spreading of desertification and contrast the phenomenon of "White-sand lands", which consists of the impoverishment of soil and the enlargement of canopy forests, also known as *caatinga* or *campina,* and is becoming more and more frequent in the whole Amazon biome.[387]

Amazonian secular vegetation is continuously subject to changes, and it has adapted to climate alterations and geological transformations, but most importantly, it has both resisted human domestication and survived thanks to herbal and agriculture traditional knowledge.[388]

Yet, the ecosystems that coexist in the Amazon Basin are constantly subject of research of botanists and scientists, and the amount of plant and tree species that are being discovered

381 FAO and UNEP, *The State of the World's Forests 2020. Forests, biodiversity and people*, op. cit.
382 UNEP and WCMC, *The State of Biodiversity in Latin America and the Caribbean: A mid-term review of progress towards the Aichi Biodiversity Targets*, Cambridge, op. cit.
383 Ibidem.
384 I. A. VELÁSQUEZ NIMATUJ and A. FORD, *State of Indigenous Peoples Land, Territories and Resources (LTR) in Latin America*, Indigenous Peoples Major Group for Sustainable Development, available at https://www.indigenouspeoples-sdg.org/index.php/english/all-resources/ipmg-position-papers-and-publications/ipmg-reports/national-regional-reports/108-state-of-indigenous-peoples-land-territories-and-resources-in-latin-america-the-carribean/file
385 Ibidem.
386 E. SAMPAIO, *Overview of the Brazilian caatinga*, In S. BULLOCK, H. MOONEY and E. MEDINA, *Seasonally Dry Tropical Forests,* Cambridge University Press, Cambridge, 1995, p. 35-63.
387Ibidem.
388Ibidem.

seems infinite. The main problematic is gathering complete information on the precise number of existing plant and tree species, and their location, given the complexity of riverine ecosystems that spread to hundreds of different watercourses, which in turn, through drainage and inundation phenomena trigger changes and evolution of the species in the Amazon Basin.[389]

As far as today, the extraordinarily vastness of living organisms in the Rainforest is rather unclear and under-documented. Notwithstanding the fact that the ecosystem of the Amazon are so exposed to external changes, we still have incomplete knowledge, and that is synonym of widespread bad management of forest resources.[390] Studies conducted by the IUNC on Ecuador and Peru vascular and fungi plant populations suggest that the risk of ignoring the actual population rate of endemic species could lead to the loss of biologic diversity by more than 65%. Notwithstanding the fact that plant and tree species rely upon animal presence for dispersal of seeds and pollination, experts foresee that great deals of forested areas may be halved due to habitat loss and deforestation.[391]

389 E. SAMPAIO, *Overview of the Brazilian caatinga*, op. cit.
390 M. MORAES and G. ZAPATA RIOS, *Biodiversity And Ecological Functioning In The Amazon*, Science Panel for the Amazon, 2021.
391 C. R. CLEMENT et al.,*The domestication of Amazonia before European conquest,* The Royal Society, 2015, Vol. 282, N. 1812.

1.1 Deforestation drivers

Research on deforestation in Latin and Central America tends to be based on data provided by national inquiries, which in many situations have revealed to be incorrect and incomplete. The problem of limited information and non-publication of environmental related data, as well as the scarce involvement of the government in environmental impact assessments, is widespread in the Latin-American regions.[392] Few reliable study share complete pictures of deforestation and afforestation rates in the Rainforest, and this practice does not facilitate the adoption of efficient measures to halt deforestation in critical areas and address adequate financial and political resources towards supervising bodies.[393] Moreover, existing policies do not consider that forest fragmentation exacerbates the repercussions of deforestation, due to the fact that it discourages habitat recreation and tends to isolate endangered species and make them more vulnerable to external agents.[394]

Experts have estimated that in less than 50 years time tropical forests of the Central and South American continent have been halved by 20%, with a rate of 0.8% yearly loss.[395] The Amazon Basin is mostly targeted by deforestation activities in the low-lands, due to the fact that the soils are easier to convert for agricultural aims. Whilst the inner forests and high-lands are less affected by deforestation, nonetheless they continue to be exposed to environmental repercussions, such as soil impoverishment, water pollution and climate mutations.[396]

A study conducted by Olson on deforestation in Latin America and the Caribbean from 2001 to 2010 shows which are the most afflicted areas of the rainforest and how rapid or slow is their recovery from deforestation. As it is shown in Figure 1[397], in ten-years time, vegetation rates in tropical moist forests, indicated by bright green colour, have been severely affected in southeastern Brazil, Central Peru, Guyana and Suriname. Particularly relevant is the fact that that for every square kilometre of deforested area, only half of it is currently being reforested.[398] In fact, the almost inexistent interest of states in participating to reforestation

392 T. M. AIDE, M. L. CLARK, H. R. GRAU et al, *Deforestation and Reforestation of Latin America and the Caribbean (2001-2010),* Biotropica, 2012, Vol. 45, N. 2, p. 22-271.
393 Ibidem.
394 FAO and UNEP, *The State of the World's Forests 2020. Forests, biodiversity and people*, op. cit.
395 T. M. AIDE, M. L. CLARK, H. R. GRAU et al, *Deforestation and Reforestation of Latin America and the Caribbean (2001-2010), op. Cit.*
396 Ibidem.
397 Figure 1: D. M. OLSON et al., *Terrestrial Ecoregions of the World: A New Map of Life on Earth: A new global map of terrestrial ecoregions provides an innovative tool for conserving biodiversity,* BioScience, 2001, Vol. 51, N. 11, p. 933–938.
398 T. M. AIDE, M. L. CLARK, H. R. GRAU et al, *Deforestation and Reforestation of Latin America and the Caribbean (2001-2010), op. Cit.*

and afforestation projects, such as UN REDD+ and forest sustainability plans, affects the pace at which deforested lands and degraded forests regain their initial health standards. For instance, the recovery period of a forest that has been exploited for mining activities and mineral extraction can be more than double the recovery period from agriculture production.[399]

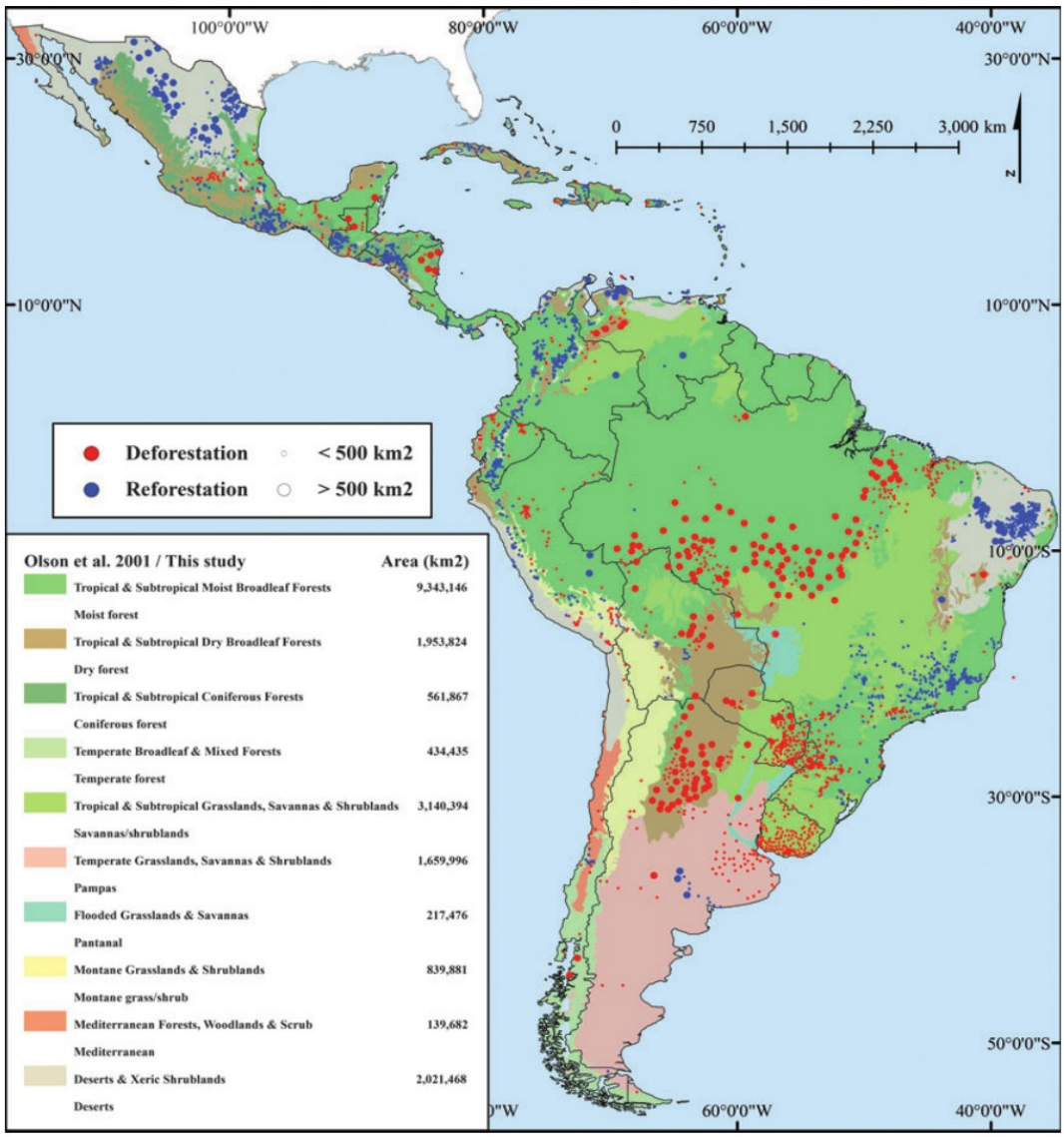

Figure 1. *Deforestation and reforestation rates from 2001 to 2010 in reference to the major forest biomes of Latin, Central and south America.*[400]

399 *Ibidem.*
400 D. M. OLSON et al., *Terrestrial Ecoregions of the World: A New Map of Life on Earth: A new global map of terrestrial ecoregions provides an innovative tool for conserving biodiversity,* op. Cit.

The causes of deforestation are varied, and we will address each of them and the problems they trigger. They can be divided in two main typologies: primary and secondary causes, or drivers.[401] The former category implies that logging occurs in order to make space for soil conversion, such as the creation of plantations for agricultural commodities and cattle pasture, farms and livestock. The latter factors in turn trigger deforestation implicitly, and they are related to political choices, such as infrastructure projects, agrarian reforms and forest concessions.[402]

Agriculture is the first driver of forest conversion and deforestation, due to the fact that it causes the loss of huge portions of forest that is replaced with industrial plantations and cattle pasture. In the majority of countries, the products of plantations are essential for the country's position in order to strengthen their position in the global commodity market, but they are also destined to local food industry and livestock. The conversion of forests into plantations for livestock pastures, high yield tropical plantations, such as coffee, exotic fruits, soy and quinoa has been the most documented cause of forest degradation in Central America from the 1990s, as FAOSTAT reported in 2011.[403] The reason for this is that agriculture techniques and soil fertilisation are implemented incorrectly, and the excessive use of fertilisers degrades soil in the long run. Furthermore, peasants and land speculators implement techniques only to increase crop yield, such as in the case of slash and burn techniques, when they could take advantage of traditional fertilisation methods such as crop rotation and other Indigenous TEK, as will be exposed in the other Paragraph 3.[404]

Still, planted forests do not only represent a problem for biodiversity for the increase of industrial production and the use of antibiotics and fertilisers, but also for the fact that agricultural production is the perfect target for the proliferation of illegal activities. In fact, many fields are controlled by criminal organisations for drug production.[405] Organised criminality chooses Amazonian territories for the fact that plantations and laboratories are more secure and less accessible, and special paramilitary forces are establish to patrol settlements. However, drug cultivation and illegal traffics represent an indirect cause of deforestation, and a further cause of instability in Amazonian regions.[406] For instance, attacks

401A. BLACKMAN ed., *Latin American and Caribbean Forests in the 2020s: Trends, Challenges, and Opportunities*, Inter-American Development Bank, 2020.
402 Ibidem.
403 T. STEINWEG, B. KUEPPER and G. THOUMI, *Economic Drivers of Deforestation: Sectors exposed to sustainability and financial risks,* Washington, Chain Reaction Research, 2016.
404 Ibidem.
405 Ibidem.
406 T. STEINWEG, B. KUEPPER and G. THOUMI, *Economic Drivers of Deforestation: Sectors exposed to sustainability and financial risks,* op. Cit.

by drug dealers directed to the local populations, guerrillas and armed conflicts intimidate Indigenous communities in Palcazu Valley in Peru, where the locals are threatened by guerrilla attacks of criminal forces.[407] Illegal drugs production and traffic also affects Alto Putumayo and Macarena regions of the Colombian Amazon since the late 1970s. This suggests that greater attention at a national and international level should be directed towards the Colombian Amazon.[408] Despite recent developments led by authorities have allowed to cut illegal agriculture, the burden of environmental damages is relevant, and special measures are aimed at repopulating of flora and fauna, such as biodiversity corridors.[409]

Similarly, the wood industry relies much upon deforestation for economic purposes. Logging activities are usually controlled under international standards, such as those provided by the Forest Stewardship Council (FSC).[410] The FSC implements special measures for the protection of the so-called High Value Forests, based on the standards of High Conservation Value that is assigned to forests that are subject to high risks of biodiversity loss. High Value Forests, or HVF, are created also in account of the Precautionary Approach and the principle of Free Prior and Informed Consent of Indigenous Populations.[411] However, it is not unusual for Indigenous groups to participate themselves in deforestation, although, as we will, see it is against their nature. They can become victims of bribes by investors and peasants, and as a result they either sell their property rights upon forest resources in exchange for money, or they take advantage of their forest property rights, which are supposed to advantage them, and join logging activities in order to make profit.[412]

As for secondary deforestation drivers, Dourojeanni notes that deforestation and exploitation of wood resources continue without controls, and are usually coupled with infrastructure construction of roads, bridges and railways in order to favour transportation of logs and other forest commodities.[413] More and more high biodiversity areas are being deforested in order to make space for transportation infrastructure, such as in the case of the Pan-American and the Trans-Amazonian Highways. The Pan-American Highway stretches from Alaska to Argentina, but it is interrupted by the Darién National Park, that connects Panama to

407 Ibidem.
408D. ARMENTERAS, G. RUDAS, N. RODRÍGUEZ, S. SUA and M. ROMERO, *Patterns and causes of deforestation in the Colombian Amazon.* Ecological Indicators, 2006, Vol. 6, N. 2, p. 353-368.
409 Ibidem.
410 Forest Stewardship Council, *Guía sobre Altos Valores de Conservación para Administradores Forestales*, FSC, Bonn, 2020.
411 Ibidem.
412 UNEP and WCMC, *The State of Biodiversity in Latin America and the Caribbean: A mid-term review of progress towards the Aichi Biodiversity Targets*, Cambridge, UNEP-WCMC, 2016.
413 Ibidem.

Colombia, however, construction projects are going on and experts foresee the motorway is going to be finished.[414] This will certainly cause forcible removal and displacement of Indigenous and local populations, but also biodiversity loss of the endemic tree species in the Darién National Park, such as the *cativo* tree.[415] Similarly, the Trans-Amazonian Highway, financed by the South American Regional Initiative for Infrastructure Integration, stretches throughout all of the Legal Amazon states of Brazil, including Tocantins, Parà and Amazonas, via a system of roads, ports and waterways that connect the Rainforest to the Atlantic. This project was realised in the 1970s, but it has been subject of further regional initiatives for future connection between Brazil, Ecuador, Peru and Colombia, obviously for commercial interests.[416] The project is transforming the Amazon in an unsafe hub for native settlements, since the infrastructure is being constantly enlarged. Such activities are impairing the capacity of states to guarantee environmental safety, for the projects cause soil and water degradation and pollution, for the polluting agents of the materials for construction and machinery and dumping of sediments from hydroelectric industries, that affect biodiversity detriment.[417]

Furthermore, habitat loss is also a consequence of the activity of extractive industries. The Amazon is rich of resources, both renewable and non-renewable, which attract investors and companies. There are weak rules for the access to resources, due to the fact that states tend not to preclude foreign investments and concede extraction licences and permits for the creation of plants. Every Amazonian country is involved in mining, oil and fossil fuels, or hydroelectric extraction respectively.[418]

The repercussions of the exploitation of minerals and fossil fuels affect the rainforest's fauna and flora and human presence, for example health levels of populations who live in close proximity to extraction plants depend highly on pollution levels of air and water. This has brought to several cases of death of local people in mines, as documented by state parties annual reports submitted to ILO.[419] These reports show that usually local tribal and Indigenous populations are involved in these activities and forced to accept underpaid jobs

414 T. STEINWEG, B. KUEPPER and G. THOUMI, *Economic Drivers of Deforestation: Sectors exposed to sustainability and financial risks,* op. Cit.
415 Ibidem.
416 P. PACHECO, *Deforestation in the Brazilian Amazon: a review of estimates at the municipal level*, Washington, World Bank (Draft for Discussion), 2002.
417 Ibidem.
418 D. ARMENTERAS, G. RUDAS, N. RODRÍGUEZ, S. SUA and M. ROMERO, *Patterns and causes of deforestation in the Colombian Amazon, op. Cit.*
419 Oficina Regional para América Latina y el Caribe, *Convenio núm. 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes y la consulta previa a los pueblos indígenas en proyectos de inversión*, ILO, Lima, 2016.

and indecent work conditions, as it is their only source of income. In Amazonian countries such as Colombia, Ecuador, and Peru much of the fossil fuel exploration and production are carried out near Indigenous settlements, but this does not exclude the possibility to build plants in protected areas of Indigenous property.[420]

Another unexplored issue is gold mining in the Amazon. Gold mines are found mostly in the Guayana Forest, which is the portion of Rainforest that is extended to Guyana, Suriname and Venezuela.[421] Although gold mines and dams are temporary, the environmental impacts they provoke persist in the long-run. Mining activities in fact release air and water pollutants, such as mercury and arsenic, and the sediments they leave affect people who live there.[422] When dams are cleared, water courses move sediments up to 50 kilometres far from the plants, risking to provoke widespread pollution of watercourses and water sources, and impairing animal breeding and food chains. Notwithstanding the innumerable health problems endured by Indigenous peoples who drink or inhale substances, or eat contaminated food.[423] It is quite alarming that governments give concessions to mining projects in the protected areas and Indigenous reserves, as it occurs in Peru in the reserves located in the region of Madre de Dios or in Brownsberg Park in Suriname. The continuation of these activities is caused by governments inaction and reflects on the capacity of the affected local populations to request government intervention.[424] British Guyana has reported studies of the Forestry Commission that show that nearly 70% of deforestation between 200 and 2010 is related to mining, such as gold, bauxite and diamonds, regardless of the presence of high biodiversity habitats and protected areas under strict management of Category I of IUNC.[425]

In addition, when deforestation is driven by extraction field, there are other non predictable damages, such as natural disasters caused by spills and accidents in work in the Amazon. There are numerous gas projects in the Amazon, but most of the production in the Amazon region is concentrated in Peru and Ecuador.[426] It is not unusual to experience disasters in the areas of gas and oil extraction, for example the oil spill from the pipeline of Camisea in Peru

420 Ibidem.
421 Ibidem.
422N. L. ALVAREZ-BERRÍOS and T. M. AIDE, *Global demand for gold is another threat for tropical forests,* Environmental Research Letters, 2015, Vol. 10, N. 1, 014006D.
423 Ibidem.
424 Oficina Regional para América Latina y el Caribe, *Convenio núm. 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes y la consulta previa a los pueblos indígenas en proyectos de inversión*, op. Cit.
425 K. BISHOP, N. DUDLEY, A. PHILLIPS and S. STOLTON, *Speaking a Common Language. The uses and performance of the IUCN System of Management Categories for Protected Areas*, op. Cit.
426 Ibidem.

in 2004 or the one in Yusuni in Ecuador in 2008. Those events occurred despite high security measures were taken in oil operations, demonstrating why such activities should not be conducted in forest reserves under any circumstances, since they exposed critical areas to further damages.[427]

All the above mentioned deforestation drivers are intensified by another factor, that acts as stress multipliers, which is climate change. In fact, climate related mutations act as stress multipliers in situations that are already tough. As ecosystem cycles are impacted by irregular weather events, forests become more vulnerable to atmospheric agents.[428] This suggests that policies that address deforestation should focus less on forests *per se*, and more on the wider context of factors that influence forest preservation, among them environmental policies and land regulations.[429]

427 M. FINER, C. N. JENKINS, S. L. PIMM et al, *Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples.* PLoS ONE, 2008, Vol. 3, N. 8, e2932.
428 UNFCCC, *UN Climate Change Annual Report 2019*, New York, 2020.
429 Ibidem.

2. Regional Forest management

Being aware of the size and distribution of natural endowments in the Amazon Region, we should now pass to the issue of management of tropical lands in Central and Latin America. Land management and forest supervision are conducted by public administration of single states in the whole region.[430] Environmental polices on forest and forestry differ in each country; particularly, in the case of Latin and Central America one can notice that there are varying but recurrent trends: some states prefer to exploit natural resources for production, due to their value on the commodity market, thus they minimise environmental regulations; others consider conservation policies as the state's priority; and still, others are weighing the introduction of a system of payments for environmental services.[431]

Latin-American countries' administrative departments deal with agriculture, natural resources, forest and forestry issues respectively, by means of agencies, ministries and inspectorates, both at national and local levels. In the field of forest and resource management, a general failure has been recorded in the region, depending on the country's conditions and efforts, due to excessive government intervention or the absence of it.[432] Indeed, in some cases, such as in Brazil, states tend to take the same role of private companies when it comes to monitoring production of marketable goods and wood, and they end in fulfilling their interests while damaging forest endowments. In other cases, they do not provide sufficient policy frameworks and forest supervision, but they also fail to limit property rights of private actors, and in the worst-case scenario they do not collect data on the status of forested lands, thus making forests vulnerable to private interests, and organised criminality.[433] The result is that forestry activities go unmonitored and deforestation is not addressed adequately, affecting the liveability of forested areas and degradation. If one were to compare the national agenda of all the nine national forests administration, they would notice that there are recurrent characteristics in land management. The first feature is represented by the presence of non-participatory and fragile institutions, which do not favour

430 S. H. DAVIS and A. WALI, (1994) *Indigenous Land Tenure and Tropical Forest Management in Latin America*, op. Cit.
431 A. M. ROCA, L. BONILLA MEJÍA and A. SÁNCHEZ JABBA, *Geografía económica de la Amazonia colombiana,* Cartagena de Indias, *CEER*, 2013.
432 E. PONCE DE LEÓN, *Áreas protegidas y territorios colectivos de comunidades en la Conservación*, Bogotá, Parques Nacionales Naturales de Colombia, 2005.
433 A. BEN YISHAY, S. HEUSER, D. RUNFOLA and R. TRICHLER, *Indigenous Land Rights and Deforestation: Evidence from the Brazilian Amazon*, Journal of Environmental Economics and Management, 2017.

communication, and are fragmented on the national territory.[434] Furthermore, there is heterogeneity of policy frameworks, since nations adopt discordant measures and regulations. These dynamics create a system made of scarce supervision in the field of deforestation and habitat loss, hence Amazonian states are more reluctant to finance policies for environmental sustainability, but tend to favour economic policies that enhance short-term revenues.[435] In such non-integrated regional structure, it is difficult to combine different, and usually competing perspectives, and the outcome is a complex and reductive environmental policy framework that is not appropriate for the preservation of the rich biodiversity of the Latin-American region.[436]

434 R. VIGNOLA and K. A. KAMIMURA, *Experiencias de monitoreo forestal en la Amazonia Legal relevantes para la mitigación del cambio climático en Brasil Centro Agronómico Tropical de Investigación y Enseñanza*, Turrialba, CATIE, 2019.
435 T. M. AIDE, M. L. CLARK, H. R. GRAU et al, *Deforestation and Reforestation of Latin America and the Caribbean (2001-2010), op. Cit.*
436 Ibidem.

2.1 IUNC guidelines and forest preservation in protected areas: is it positive or negative for Indigenous peoples?

It should be noted that the current distribution of environmental territories in the Latin-American region is characterised by three typologies of lands: private lands, public lands and protected areas. Private lands are mainly constituted by *ranchos* for cattle breeding and plantation fields possessed by private entities, such as family businesses and peasants. Private lands that are destined to agricultural activities can be both crop fields and tree plantations.[437] Instead, public lands consist of lands of state property, which exercise *de jure* possession rights on these territories, that are designated for state activities, including resource extraction, infrastructure construction and so forth.[438] Not only state governments have decisional power upon the administration of these possessions, but they also intervene and subsidise actions for the conservation of critical ecosystems, including forested areas.[439] Lastly, protected areas are lands which states decide to preserve by imposing standards of conservation and limits to exploitation of natural resources, for the survival of essential natural ecosystems and cultural practices.[440] They comprise national parks and Indigenous reserves.

Most of the protected areas of Latin and Central America are situated in forests, although they count for only 11% of the overall forest cover of the region.[441] Critical forested areas of Central and Latin America are usually managed by IUNC protection programmes or are catalogued as UNESCO World Heritage Sites. Still, not all forests are managed as protected areas. In fact, currently only 34% of tropical moist forests in Central America are treated as such, which is quite misleading data if one considers that the overall Amazon wet forest cover stretches for more than 200 thousand square kilometres.[442] On the same line, the Amazon dry forest portion that is actually protected by restraining access and bans represent only 21% out of a total crown cover of 3 thousand square kilometres.

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437 A. J. BEBBINGTON et al, *Resource extraction and infrastructure threaten forest cover and community rights*, Proceedings of the National Academy of Sciences of the United States of America, op. Cit.
438 Ibidem.
439 Ibidem.
440 A. NINIO, *The evolution of environmental law in Latin America: the cases of Brazil, Colombia and Peru and the effort to protect forest resources*, op. Cit.
441 C. A. RUIZ AGUDELO, N. MAZZEO, I. DÍAZ, M. P. BARRAL, G. PIÑEIRO, I. GADINO, I. ROCHE, and R. ACUÑA, *Land use planning in the Amazon basin: challenges from resilience thinking, Ecology and Society,* Ecology and Society, Vol. 25 N. 1, p. 8.
442 UNEP and WCMC, *The State of Biodiversity in Latin America and the Caribbean: A mid-term review of progress towards the Aichi Biodiversity Targets*, Cambridge, op. cit.

Since the 1990s, protected areas doubled in number due to a change in societal values concerning environmental problems. Protected areas can represent cornerstones for the development of Indigenous settlements and traditional societies in determined areas on the country's territory, as they favour the protection of sacred archaeological and natural sites.[443] Protected areas are a means through which to defend vulnerable ecosystems, but they also function as a shelter for Indigenous Peoples, since the conservation objectives for which they are created are highly compatible with Indigenous lifestyles.[444] However, as much as this brought positive outcomes for the protection of natural sites, it also forced many Indigenous communities to abandon their lands, more than 80% of the existing strict protected areas in the South American continent are located on ancestral lands, and they are believed to be no longer suitable for human exploitation.[445]

The issue with Indigenous land rights, as reported by the IACHR, originates from the fact that LAC countries do not recognise Indigenous land property rights, As it was emphasised in a report of the IACHR, in LAC countries Indigenous ownership over ancestral lands is not a normative principle, but it derives from long-standing use and evolution of settlements on said territories.[446]

Apparently, protected areas are systematically established on the soil of collective reserves, generating overlapping rights and obligations for Indigenous inhabitants.[447] This may sound controversial, given the great achievements in terms recognition of customary land rights in Latin American states. Also, if one considers that the most recent achievement in the field of Indigenous Rights, namely the UNDRIP, is rooted on the assertion that Indigenous peoples are essential actors in preserving the Earth's biodiversity, the reasons why Indigenous communities should represent a threat on the front of environmental conservation of high-biodiversity areas seem unclear.[448] Also, in the 1993 Durban Congress recommendation No. 5.27, was strongly underlined that traditional conservation techniques fostered by Indigenous

443 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, Gland, Switzerland and Cambridge, IUCN, 2004.
444 K. KEIPI (ed.) *Forest Resource Policy in Latin America*. Washington, The Inter-American Development Bank, 1999, p. 135.
445 CEPAL, *Los pueblos indígenas en América Latina Avances en el último decenio y retos pendientes para la garantía de sus derechos*, Santiago, Series, 2014.
446 Organisation of the American States, *Indigenous And Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources Norms and Jurisprudence of the Inter-American Human Rights System*, op. Cit.
447 CEPAL, *Los pueblos indígenas en América Latina Avances en el último decenio y retos pendientes para la garantía de sus derechos*, op. Cit.
448 Ibidem.

communities living on ancestral lands are very useful and instructing, and biodiversity preservation is more likely to be achieved if supported by cultural beliefs.

Since ex-colonial states gained awareness of the numerous ecological damages caused by the agriculture industry, specifically in the Americas, creating protected areas has been a priority.[449] The common concern that enhanced the creation of national reserves and natural parks was the need to protect specific environments and their "wilderness". The concept of "wilderness" and "beauty of landscapes" was widespread among scholars and environmentalists during the second half of the 1800s, a period in which the First Industrial Revolution was beginning to show its devastating effects on the environment.[450] Moreover, in the past, the establishment of protected areas systematically resulted in the unfair appropriation of Indigenous lands, due to the fact that governments were left free to decide upon the spaces of the colonies, regardless of the existence of Indigenous customary land property norms.[451] This lack of understanding of the role of Indigenous communities in the preservation of biological cycles, influenced the way states addressed environmental issues and biodiversity loss.[452]

On the other hand, nowadays designation of protected areas in Latin America takes place when national authorities detect potential risks of losing natural endowments and cultural heritage in native ecosystems, according to the above mentioned directives of the CBD Work Programme and the IUNC Guidelines for the recognition of protected areas.[453] There are, in fact, four common governance models of protected areas: government management plans, joint management, private management and Indigenous communities customary management.[454] Government-led governance is conducted by state, regional or local authorities, who act consequently to the rules established by the central ministerial bodies that are responsible for land and nature conservation and for the supervision of protected areas.[455] In this case, it is the central government who decides to issue protected areas, thus the approval of external stakeholders, such as companies, the civil society and local communities, is not required. This model, however, shows why protected areas can damage

449 G. GALLOWAY, S. KENGEN et al, *15 Cambios en los paradigmas del sector forestal de América Latina*, Stockholm, IUFRO World Series, N. 17, 2005.
450 Ibidem.
451 IUCN, *Conservation And Indigenous Peoples In Mesoamerica: A Guide,* Washington, Indian Law Resource Center, 2015.
452 Ibidem.
453 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, op. Cit.
454 H. PARATHIAN, *Understanding Cosmopolitan Communities in Protected Areas: A Case Study from the Colombian Amazon*, Conservation & Society, 2019, Vol. 17, N. 1, p. 26-37.
455 Ibidem.

Indigenous settlements or local communities, and reveals how important it is to allow Indigenous participation in government decision-making.[456] Indeed, Latin-American states that have recognise Indigenous rights, voluntarily create protected areas in order to provide Indigenous communities with protection from land-grabbing and for the enjoyment of self-determination and self-organisation of their territories and institutions.[457]

Secondly, joint or shared land governance models imply more communication with stakeholders, since decision-making is co-managed by government bodies and non-governmental actors.[458] This can lead to more or less cooperation. In some cases, joint governance can bring to unilateral decisions, when the government is open to discuss with non-governmental bodies, but in the end the decision over protected areas is left to the central authority. In other cases, it can foster transparency, if for example, once the decisions over land regulations are taken, implementation methods are left to NGOs and other non-governmental actors, but as we saw this is not the most likely outcome.[459]

Instead, private governance is led by private actors, who can be both a single person or a company, and in cases even an NGO with legal ownership of the protected area. Private management is conducted by the land owner for private interests that include conservation and ecological values, but it must respond to national legislation.[460]

Lastly, Indigenous peoples and native communities governance is a bit more complex. It must be noted that not all Indigenous reserves are national protected areas; for this reason they are usually called "community conserved areas" or "collective lands", in order to suggest that they are owned and managed by an Indigenous community under a set of customary norms provided by Indigenous institutions.[461] Indigenous institutions and customary norms must have been recognised by the state first, in order for the protected area to be managed as community conserved. In fact, since Indigenous peoples derive legal ownership and decisional power upon the protected territories and natural resources, they

456 A. FUENTES, *Judicial Interpretation and Indigenous Peoples' Rights to Lands, Participation and Consultation. The Inter-American Court of Human Rights' Approach*, International Journal on Minority and Group Rights, 2016, Vol. 23, N. 1, p. 39-79.
457 Ibidem.
458 UNEP and WCMC, *The State of Biodiversity in Latin America and the Caribbean: A mid-term review of progress towards the Aichi Biodiversity Targets*, Cambridge, op. cit.
459 Ibidem.
460 N. DUDLEY, *Guidelines for applying protected area management categories including IUCN WCPA best practice guidance on recognising protected areas and assigning management categories and governance types*, op. Cit.
461 Ibidem.

must respect the existing national regulations and objectives regarding the conservation of biodiversity in protected areas, but the creation of enforcement bodies is left to them.[462]

Community conserved areas are found to be more legitimate in performing biodiversity protection, as they can fulfil their functions even better than government-led management, for Indigenous communities not only have an ecological interest, but they also have cultural and spiritual ties with those lands.[463]

Indigenous protected areas, or community conserved areas, are spread across the Latin-American region, however, for the following reasons they prove quite controversial.[464] On the one hand, if they do not get official recognition of community, Indigenous lands might lose some state guarantees and become more vulnerable to land grabbing. But on the other hand, if they do achieve state recognition, they might as well face some risks. Indigenous peoples have usually proven to be unwilling to acquire national recognition of their community lands, due to the fact that they fear they could lose property rights upon their reserves, thus being no longer free to conduct their religious rituals and traditional lifestyles in isolation.[465] For example, in the Brazilian protected area of Tapajós Xingú in the Amazon moist forest, local communities are menaced by resource extraction activities.[466] Indigenous peoples have built their settlements in proximity to rivers; however, since Tapajós Xingú is a territory rich of minerals, their fishing activities are affected by the fact that national legislation allows extractive companies to work there and construct dams in order to extract gold.[467] Also in the Ecuadorian region of the Yusuni National Park, famous for the extraction of biofuels and hydrocarbons, Indigenous peoples and biodiversity are exposed to severe risks in protected areas, due to the fact that extraction sites invade their territories.[468] Driven by the demands of Indigenous authorities, the Ecuadorian government started to issue "untouchable" areas, or *zonas intangibles*, in order to respect their choice to live isolation.[469] Notwithstanding the legal actions that have been taken by the government to reduce the

462 N. DUDLEY, *Guidelines for applying protected area management categories including IUCN WCPA best practice guidance on recognising protected areas and assigning management categories and governance types*, op. Cit.
463 E. PONCE DE LEÓN, *Áreas protegidas y territorios colectivos de comunidades en la Conservación*, Bogotá, op. Cit.
464 Ibidem.
465 Ibidem.
466M. FINER, C. N. JENKINS, S. L. PIMM et al, *Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples, op. Cit.*
467 *Ibidem.*
468 Ibidem.
469 E. PONCE DE LEÓN, *Áreas protegidas y territorios colectivos de comunidades en la Conservación*, op.cit.

impact of deforestation and resource extraction on Indigenous peoples and biodiversity, mining is hard to outlaw in protected areas, since states have a deep interest in economic initiatives.[470]

Indigenous peoples may be reluctant to receive official recognition of protected lands also because they fear state interference with traditional practices may result in biodiversity loss and gradual abandonment of cultural values. This is particularly true for Indigenous communities that are settled in remote areas of the Amazon and do not seek contact with the outside world in order to protect natural landscapes with a spiritual significance.[471] Indeed they are partly right, since it seems more difficult to include sacred sites in one of the Categories identified by IUNC, for they could potentially fall into any of the six categories, or in none of them, depending on their conformity with biodiversity conservation objectives.[472] Usually, they tend to be excluded from protected area mechanisms for the fact that coordinating environmental protection and spiritual heritage implies the adoption of specific sets of regulations in order to address the great diversity of sacred natural sites worldwide. For example, the Ecuadorian Cayapas Mataje area is currently protected under Category VI as a managed resource protected area for the presence of subtropical mangroves, although the conservation strategies in use do not take account of the spiritual value that mangrove trees have for the local tribes, who in turn are devoted to them and treat them as spiritual guardians of their territories.[473] Instead, the Alto Fragua-Indiwasi National park in Colombia, a Category II protected area, is an example of government recognition of a sacred community conserved area.[474] The park was created in 2002, as a result of negotiations between the authorities of local communities, the Colombian government and the Amazon Conservation Team. It was created with the aim of protecting the vast biodiversity of that part of the moist Colombian Amazon, and it is managed uniquely by the Ingano communities, who are also deeply connected with the endemic flora of the park. In fact, for a long time they had been predicting in their "Life Plan" that one day they would

470 E. PONCE DE LEÓN, *Áreas protegidas y territorios colectivos de comunidades en la Conservación*, op.cit.
471 Ibidem.
472 N. DUDLEY, *Guidelines for applying protected area management categories including IUCN WCPA best practice guidance on recognising protected areas and assigning management categories and governance types*, op. Cit.
473 Ibidem.
474 Ibidem.

have been able to unite their sacred ancestral lands in what they call the "House of the Sun", as a natural outcome of their.[475]

Despite these situations in which Indigenous land rights and biodiversity protection are violated, there are as many cases of successful Indigenous conserved areas with government recognition. The first is that of the Kaa-ya Iya of the Gran Chaco National Park in Bolivia, which was created after the state recognised the Guaraní Izoceño people with the 1993 Agrarian Reform.[476] The adoption of new legislation enhanced the creation of Indigenous reserves, and this one in particular currently represents the largest legally protected dry tropical forest in the hands of Indigenous organisation administration. This has allowed to stop invasive agricultural practices in the territory of the National park, and support the implementation of Indigenous traditional knowledge in agricultural and farming activities, with the aim to protect biodiversity.[477]

Similarly, the Potato Park in Peru, a Category V protected area, has been established by the Quechua and Aymara communities in order to preserve the high biodiversity of potato production, that reaches almost 1500 varieties in the country alone, one third of the world's 4000 varieties.[478] Although the park did not receive national recognition, the state recognises the Indigenous rights, and this case offers most certainly a successful example of Indigenous community conservation, but it also shows that Indigenous communities are deeply collaborative when it comes to attaining biodiversity objectives, since through their management strategies have been reintroduced in domestic agriculture further 200 varieties of potatoes.[479]

In conclusion, protected areas can generate both positive outcomes and risks when it comes to the conservation of biological diversity. For instance, Indigenous peoples are tied to their ancestral territories, but they had to adapt to being sedentary as states began to establish protected areas. However, issuing protected areas does not prevent Indigenous peoples to face risks of deforestation and activities linked to it. For example, the Traomenane and Tagaeri communities – located in the Yusuni national park in Ecuador – should live only in

475 *Ibidem.*
476 N. DUDLEY, *Guidelines for applying protected area management categories including IUCN WCPA best practice guidance on recognising protected areas and assigning management categories and governance types*, op. Cit.
477 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, op. Cit.
478 Ibidem.
479UNEP and WCMC, *The State of Biodiversity in Latin America and the Caribbean: A mid-term review of progress towards the Aichi Biodiversity Targets*, Cambridge, op. cit.

the area they are entitled to, but their presence in outside territories is documented by the local authorities. In fact protected areas are thought to help contrasting the risks that derive from Indigenous being disturbed by non-Indigenous actors, such as resource extraction workers, loggers, and when they exit the protected area they are not protected any more, and if they think they still are in their territory, as one time happened, in one occasion an Indigenous person assaulted a peasant outside the protected area..[480] The issue is that in Indigenous perception the environment is a whole, it is not fractionated into territories, there are no virtual borders.[481] If, on the one hand, positive results are a consequence of holistic approaches to environmental protection, on the other hand, risks instead tend to be amplified when conservation strategies prove inefficient.[482] However, the most important outcome is that there is a framework for the protection of high biodiversity areas, and that consequently there is a degree of protection for native habitats and their cultural heritage.[483] In general, forested areas that are managed with specific protection objectives, do reveal successful in that they providing a shelter for Indigenous communities. Nonetheless, the establishment of protected areas should favour more cooperation with the government and emphasise Indigenous cultures are essential for this scope.[484]

480 Ibidem.
481 N. DUDLEY, *Guidelines for applying protected area management categories including IUCN WCPA best practice guidance on recognising protected areas and assigning management categories and governance types*, op. Cit.
482 Ibidem.
483 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, op. Cit.
484 Ibidem.

3. The role of Indigenous Cultural Legacy and Traditional Land Tenure in Environmental Preservation

This paragraph will provide a proper focus on the cultural sphere of Amazonian Indigenous peoples, and its influence in concrete techniques implemented in forestry and land tenure. Not a long time ago, a conservationist who works for Conservation International, when talking on behalf of a Brazilian alliance for Indigenous Resilience, Tapajas Project, she referred to Indigenous Peoples calling them the "Guardians" of the Amazon, giving the following motivation:

> *"[Nature] is sacred for the communities that have lived here for generations. It is where they get their food and medicine, how they travel, where they take their leisure and where they practice their culture and religion. In return they are guardians of the forest."*[485]

Indeed, Indigenous peoples have lived in natural environments for so long that their lives revolve around nature and its biological cycles. This description is not intended to undervalue the great diversity of Indigenous cultures among every community, but for logical reasons it would be impossible to analyse the folklore of all tribal and Indigenous communities of the Central American continent, so the information provided will not explore in the detail every peculiarity, but will give a general explanation of the Indigenous traditions and techniques in land use and forest resource management.[486]

Before, we should make a distinction between the Indigenous communities of the Amazon and other Indigenous peoples that populate Latin and Central America, namely Andean and South American populations.[487] These latter ones have undergone a different historical path, since they have not been able to preserve their habitats and traditions, and have become involved with the colonisers' culture and their societal structure. They are mostly agricultors (*campesinos* in Spanish*)*.[488] Instead, Amazonian populations have been historically more

485 Video available at: https://www.youtube.com/watch?v=KY0585Pg-9k
486 G. BORRINI-FEYERABEND, A. KOTHARI and G. OVIEDO, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, op. Cit.
487 J. C. TRESIERRA, R*ights Of Indigenous Groups Over Natural Resources In Tropical Forests*, Environment Division Working Paper, 1999.
488 Ibidem.

reluctant to take part in urban environments, mainly due to the remote location of their settlements in forests, that assured them isolation until the recent past.[489]

The societal and organisational structure of Amazonian peoples is developed around small communities or tribes, sometimes even single households, who initially were mostly nomadic, but after the 1970s circa, when states began to destine fixed territories for their settlements, namely reserves and protected areas, they turned into semi-nomadic and sedentary.[490] The most important characters of the communities are the head of the tribe and the shaman, and each household participates and contributes to daily life activities, such as gathering, hunting, fishing, and harvesting.[491]

Since the population rate in each forested area with Indigenous settlements is low, they decide how to manage communal natural resources under moral principles, thus they tend not to interfere with other communities.[492] Moral beliefs behind their management models start from the assumption that beyond the physicality of every natural element there is a spiritual dweller, hence their settlements are created in the basis of, and the uses they make of their lands is highly dependent on each community's myths of origins. The virtual borders of the reserves as we know them today, were a creation of governmental legislative acts, since in Indigenous cosmovisions, nature is a whole and has with no boundaries.[493] Traditional communities exploit natural resources uniquely for subsistence objectives, rather than to gain income.[494] For this reason they prefer to manage their territories together, in what are known as community protected areas, where collective lands are of property of every member of the community and environmental related knowledge is shared equally.[495] Collective lands reflect the organic structure of Indigenous societies and the fact that they have a holistic vision of the world, that implies equitable sharing and customary land property laws. In practice, this allows them to benefit from a more varied selection of forest products, if for example the yield of a *yuca*[496] field of one household is low in a period of the

489M. QUINTÍN LAME, *Los Pensamientos del Indio que se educó dentro de las Selvas Colombianas,* Cauca, Universidad del Cauca, 2017.
490 Ibidem.
491 K. ÅRHEM, *Ecocosmología Y Chamanismo En El Amazonas: variaciones sobre un tema,* Revista Colombiana de Antropología, 2001, Vol. 37, p. 268-288.
492 P. DESCOLA, *Societies of nature and the nature of society*, London, Routledge, 1992.
493 S. H. DAVIS and A. WALI, (1994) *Indigenous Land Tenure and Tropical Forest Management in Latin America*, op. Cit.
494 P. LAUDERDALE, *Indigenous Peoples in the Face of Globalization*, American Behavioral Scientist, 2008, Vol. 51, N. 12, p. 1836-1843.
495 R. ROLDÁN, *Models for Recognizing Indigenous Land Rights in Latin America*, op. Cit.
496 Native American tuber similar to sweet potatoes, known as batatas in Europe.

year, they can still benefit from *yuca* produced by another household of the community and vice versa.[497]

When Indigenous communities create agricultural settlements, they analyse the soil composition and environmental characteristics beforehand – vegetation, high-land and low-lands, inundations, droughts etc. – as der Hammen noted in his studies in the early 1990s.[498] But the essential feature that guarantees a prolific harvest in the years after the plantations are started, is given by the spiritual evaluation of the shamans. In fact, shamans provide a spiritual tie with spiritual dwellers, that are connected with the cosmology of the given community. A cosmology is the notion that the community has of itself, and the myth of the origins on which the community develops its identity, for example the cosmology of a tribe or community can be linked to water, mountains, trees etc.[499] In Indigenous cosmologies, there is a common myth, the myth of the creation, which develop on the four elements that Mother Earth has created, water, soil, fire and air. The myth says that the goddess who created everything is Pachamama, so they worship nature (Pacha) as if it was a divinity, since it is believed to be the cause of soils fertility. The cult of Pachamama is Andean and Amazonian and South American tradition, is celebrated as an annual festivity by communities and as we have seen it has become a principle of the Ecuadorian and Bolivian constitution.[500]

How do Indigenous communities perform forest management? They apply their TFRK, or Traditional Forest-Related Knowledge, which is the ensemble of strategies and techniques that derive from their ancestors, enriched with expertise gained from historic developments, cultural and natural mutations.[501] Their knowledge stems from the fact that they manage lands organically, which means that territories are not divided based on the activities they are destined to (harvesting, gathering, hunting), they are rather a whole, and the virtue of Indigenous peoples is to preserve biodiversity and habitats from exploitation of natural resources.[502] This is because they believe in regeneration of fauna and flora. For instance, they keenly implement crop rotation, every one to three years, and respect the natural cycles

497 K. ÅRHEM, *Ecocosmología Y Chamanismo En El Amazonas: variaciones sobre un tema, op. cit*
498 H. PARATHIAN, *Understanding Cosmopolitan Communities in Protected Areas: A Case Study from the Colombian Amazon*, op. Cit.
499 Ibidem.
500 K. ÅRHEM, *Ecocosmología Y Chamanismo En El Amazonas: variaciones sobre un tema, op. Cit.*
501 Ibidem.
502 S. H. DAVIS and A. WALI, (1994) *Indigenous Land Tenure and Tropical Forest Management in Latin America*, op. Cit.

of soils; when soils do not yield as before, they move to other fields and let them regenerate without the use of fertilisers. On the same line, they tend to gather nuts and berries seasonally, proportionally with their needs.[503]

Moreover, they fertilise soils naturally with the help of small fauna and insects, which through pollination and seed dispersal favour plants regeneration, and increase food quantity at Indigenous peoples' disposal.[504] Agricultural soils are managed by single households of the community, in particular by women. They clear the selected soil for the creation of a field, cut trees that may absorb soil nutrients and ruin the yield, and they prepare the soils for initial burning of weeds that will fertilise the soil before sowing.[505] They specialise in activities, like harvesting, hunting, fishing and gathering, and hold a set of specific TK for every sphere of action. The set of TK related to forests is dependent on the amount of knowledge they have acquired about the cycles of the Amazon Rainforest (namely the biological cycles of plants and vegetables, the seasonality of weather events, the influence of astronomy on harvesting), and they organised their life accordingly.

They have developed strategies for managing the environment, depending on the use they make of it, always taking the necessary from the Earth without exceeding.[506] In order to make their systems function, they exploit resources without spoiling the environment mutation, and change the forest but never destroy it. The fact that they tend to move settlements from place to place in the reserves, comes in their help, for they manage to control periodically various areas of the forest but never leave them unused.[507] Crop rotation and collective management of lands are the fundamental techniques on which they build management plans in order to guarantee the subsistence of the community every time of the year.[508]

Furthermore, their techniques are built on the assumption that nutrition is not only a physical need, but it is intertwined with cultural beliefs. Every daily activity, from harvesting to eating, is felt as a ritual rather than a necessity, in fact they are guided by spiritual beliefs in the consumption of determined plants – and meats.[509]

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503 S. H. DAVIS and A. WALI, *Indigenous Land Tenure and Tropical Forest Management in Latin America*, Ambio, op. Cit.
504 Ibidem.
505 Ibidem.
506 Ibidem.
507 H. PARATHIAN, *Understanding Cosmopolitan Communities in Protected Areas: A Case Study from the Colombian Amazon*, Conservation & Society, op. Cit.
508 M. RODOLFO and M. RABEY, *Pastores del Altiplano andino meridional: religiosidad, territorio y equilibrio ecológico*, op. Cit.
509 N. DE LA HOZ, *Diversidad Cultural del sur de la Amazona colombiana*, op. Cit.

Therefore, agricultural settlements are seen as cultural hubs, where young adults learn traditional techniques – such as recognising seeds, harvesting – and build new knowledge, as biodiversity undergoes mutations through the centuries. The cultural responsibility of passing knowledge on new generations is fulfilled by women, as it is them who take care of the household crop fields and share their techniques with other households.[510] This concept is also exposed in the Preamble of the CBD, which recognizes the vital role of women in the conservation and sustainable use of biological diversity and affirms the need for their full participation at all levels of policy-making and implementation.[511]

By sharing their land properties, Indigenous communities help each other preserve traditional knowledge and avoid the risk of conflicts and disaggregation.[512] Community cohesion is the key to preservation and protection from external agents, but it must be enhanced by government actions in terms of safety and respect of Indigenous property rights over forests.[513] Research conducted on the Peruvian experience of Indigenous collective lands yield in 1998 showed that Indigenous peoples value natural succession of plants, and this has allowed forests to even increase their percentage of crown cover and enlarge their borders.[514] However, the downside of relying on Indigenous forest-related knowledge for biodiversity conservation is that there are increasing cases of Indigenous persons leaving complete isolation in favour of farming and industrial agriculture in low-lands. In addition to this, when they start to use synthetic fertilisers and antibiotics they surrender to Western market dynamics, and consequently the risk of losing of cultural heritage and TFRK increases. Indigenous education is fundamental for the passing on of traditions, myths and TEK, however, as members of the community decide to leave and join Western lifestyles, children are forced to attend public schools and disengage from their family.

The challenge with guaranteeing the life and dignity of Indigenous peoples and the preservation of their TK, is in conveying cultural and spiritual aspects into legislation.[515]

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510 E. R. ZAFFARONI, *La Pachamama y el humano*, op. Cit.

511 United Nations Environmental Programme, *Convention on Biological Diversity*, op. Cit., Preamble: "*Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components, [...]Recognizing also the vital role that women play in the conservation and sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation*".

512 E. R. ZAFFARONI, *La Pachamama y el humano*, op. Cit.

513 M. RODOLFO and M. RABEY, *Pastores del Altiplano andino meridional: religiosidad, territorio y equilibrio ecológico*, op. Cit.

514 S. H. DAVIS and A. WALI, (1994) *Indigenous Land Tenure and Tropical Forest Management in Latin America*, op. Cit.

515 E. R. ZAFFARONI, *La Pachamama y el humano*, op. Cit.

4. The Brazilian Case

The situation of Brazil is particularly relevant since, differently from other Amazonian states, this country has the largest share of the Rainforest, in fact the federal states comprising the rainforest have been relegated to a unique region, also known as "Legal Amazon", or "Amazônia Legal" in Brazilian Portuguese. The Legal Amazon, is an area of more than five million square kilometres comprising the Brazilian states of Acre, Amapá, Amazonas, Maranhão, Mato Grosso, Pará, Rondônia, Roraima, and Tocantins. This geographic region was created by Brazilian federal law dating back to 1953 in order to promote special protection and development policies for the Amazon area.[516] Hence, the repercussions of deforestation or mismanagement of lands are higher than other states, and the Brazilian Legal Amazon, or BLA, is of international concern.

We should acknowledge that, as well as in the vast majority of South American countries, the experience with environmental legislation and management was largely influenced by the presence of a dictatorial regime, for example in Brazil the dictatorship lasted until 1985, affecting the capacity of people to demand rights and the late inclusiveness of human rights. After the improvements of President Lula Da Silva, the situation was completely reversed under Bolsonaro, the current president.[517]

The country has adopted a series of legislations to combat deforestation and favour sustainable management of forest territories, trying to include also Indigenous perspectives, but the efforts seem to differ under the various presidential mandates. Furthermore, it is evident that there has been an intensive deregulation of environmental policies and forest supervision until our days, for which the effectiveness of politics is deeply questioned by the international community and NGOs, for the importance the well-being of the Legal Amazon has for the future generations.[518]

The land management policies and system for sanctions are valid at the federal state, but each nation takes specific strategies in order to address potential risks or damages. Also, each state is encouraged to adopt its own set of policies and programmes against deforestation and for good forest management. For example in the state of Mato Grosso, when there was an emergency for the deforestation rate was too high and forests were

516 B. RICARDO and F. RICARDO (Ed.), *Povos Indígenas no Brasil: 2001-2005*, op. Cit.
517 Ibidem.
518 Ibidem.

converted in soy plantations at an impressive pace, decided to set transition forest percentage at 50% when the president Henrique had set the percentage at 80%.[519]

At the federal level, the Forest Code, established in 1965, is a law that obliges Amazonian landowners to conserve endemic vegetation levels from 35 to 80%, and they can only use 20% of it for industrial plantations and cattle farming.[520] Moreover, under the Brazilian Constitution there are specific provisions that limit the conversion of public owned lands to private actors only for their long-standing presence n such territories, but it also forbids private parties to invade and illegally exploit public soils. This provision is intended to protect the status of public lands and avoiding that land speculators abuse of their powers to exploit lands of historical importance.[521] Also, the Brazilian Constitutions provides that critical forest areas be protected under conservation strategies that variate from biological reserves to national parks, implementing isolation strategies or it sustainable customary use depending on the needs.[522]

Regarding Indigenous lands, the Constitution designates that public lands are of property of the state, however, Indigenous peoples, although not having substantial rights to property, are entitled to live and maintain their settlements on the territories that have historically been Indigenous, especially when they are able to demonstrate the existence of ties with their past and cultural heritage.[523] The state has the function of designating protected areas, which are areas that are destined to the use of Indigenous populations. The studies of 2019 show that in the BLA here are more than 400 indigenous reserves, which are "untouchable" and protected by the governmental authorities.[524] However, there is also another category of public areas, which is that of "non allocated public areas"; this category represent an issue for the increase of deforestation rates. Non allocated public areas are Amazonian territories that have not been recognised as protected areas, and environmental data show that almost half of the BLA forests pertain to this category. Non allocated areas also correspond to the most remote parts of the Amazon, which are hard to safeguard and to physically patrol from external attacks.[525]

519 L. R BARROSO and P. PERRONE CAMPOS MELLO, *In Defense of the Amazon Forest: The Role of Law and Courts,* Harvard International Law Journal*,* 2021,Vol. 62, p. 68-94.
520 Ibidem.
521 Ibidem.
522K. V. CONCEICAO, *Government policies endanger the indigenous peoples of the Brazilian Amazon,* op. Cit.
523 Ibidem.
524 Ibidem.
525 Ibidem.

The state establishes the norms for the exploitation of natural resources in Indigenous reserves, and the status of Indigenous lands can be modified only by means of legislative measures. In theory, creating borders for Indigenous reserves should help to avoid the spread of land grabbing and deforestation, but in practice illegal exploitation of resources and land grabbing are common practices in the BLA countries.[526]

Land grabbing of Indigenous reserves – thus public land grabbing –, is a new challenge for Brazilian authorities. Grabbers invade the lands and threaten the local populations, also with armed conflicts; then they convert the acquired forests into cultivable lands, burn every part inch of forest is useful for plantations and cattle pasture and as a final step, they seek recognition of the government. This is the situation the Xingú populations are experiencing, and apparently it is the same as that of many other populations of the BLA. Indigenous lands are bought by land grabbers, which provide false certificates of property, and government inaction regarding this practice is triggering its spread.[527] In the final stages of land grabbing, after Indigenous populations have been unlawfully removed, invaders resell lands in smaller slots destined to determined agricultural activities or to cattle raising. States do not investigate what are the reasons and the agents behind these practices, but it is quite controversial, since the Federal Constitution has a specific provision that recognise land grabbing as a crime.[528]

On a par with land grabbing, also illegal deforestation represents a crime, punishable with up to five years detention. Also burning wood without allowance is a crime, as being the most acquainted cause of deforestation, punishable with up to four years prison, as well as illegal logging. Nonetheless deforestation is a source of income and illegal logging revenues represents 80% of the current Brazilian GDP. Surprisingly, the foremost cause of deforestation is the government. It is worrying data, since corruption is enlarging its horizons to high government charges and favours unlawful land appropriation.[529]

Law n. 13.465/2017 in fact, allows the state to recognise invaded public lands, which raises not few doubts about the commitments of the state towards environmental protection objectives. These processes trigger also violence against local communities, and guerrillas

526 W. BAER and C. MUELLER, *Environmental Aspects of Brazil's Economic Development*, Luso-Brazilian Review, 1995, Vol. 32, N. 1, p. 83-100.
527 Ibidem.
528 H. W. Jr. MCGEE and K. ZIMMERMAN, *The Deforestation of the Brazilian Amazon: Law, Politics, and International Cooperation*, The University of Miami Inter-American Law Review, 1990, Vol. 21, N. 3, p. 513-550.
529 Ibidem.

are very frequent as organised criminality threatens local communities with the help of paramilitary groups.[530]

The state practice in this regard seems to have taken certain patterns: the state systematically reduces identification and issuing of Indigenous areas, and consequently does not respect land property rights. National governments prefer to give land concessions in order to gain revenues from the logging and extractive nativities, and from the ownership certificates issuing, also if this means undermining the international perception of the legitimacy of the government.[531] The common narrative is that deforestation creates job opportunities in logging and extractive departments, also is profitable also for low-income social classes – but it forces indigenous peoples to engage these activities, losing control of their cultural and land rights. It is a vicious cycle.

Despite this, there are forest management programmes that disincentive deforestation, such as the Soy moratorium, which together with the Cattle Agreement, obtained thanks to the participation of international NGOs, tried to halve cattle farming and the conversion of forests into soy plantations for pasture and international market.[532] The Action Plan for the Prevention and Control of Deforestation in the Legal Amazon, or the Real-Time System for Detection of Deforestation (DETER), which comprise a set of sanctions and limited permits for activities that involve deforestation in the BLA. For instance, the conservation program under the Lula presidency, the Program for the Prevention and Control of Deforestation in the Amazon, fostered the fight against logging organised crime and adoption of stricter environmental regulations in BLA.[533] This program favoured the protection of indigenous reserves disturbed by extraction activities and deforestation, and created a safeguarding bodies to control Amazonian frontiers and protect them in 2008.[534]

Apparently, there is no solution to this situation, since from 2019 deforestation in Brazil has been openly favoured by governmental inactivity. These developments reversed the situation of 2012, when the problem of deforestation had been partly overcome through reforestation and afforestation strategies and the adoption of more effective environmental regulation.[535]

530W. D. CARVALHO, K. K. MUSTIN, R. R. HILÁRIO, I. M. VASCONCELOSE, V. EILERS, M. PHILIP and P. M. FEARNSIDE, *Deforestation control in the Brazilian Amazon: A conservation struggle being lost as agreements and regulations are subverted and bypassed,* Perspectives in Ecology and Conservation, 2019, Vol. 17, p. 122–130.

531 Ibidem.

532 Ibidem.

533 Ibidem.

534A. BEN YISHAY, S. HEUSER, D. RUNFOLA and R. TRICHLER, *Indigenous Land Rights and Deforestation: Evidence from the Brazilian Amazon*, op. Cit.

535 Ibidem.

Until the government decides to meet the international standards on environmental protection and sustainable use of resources, there is little that can be done.

CHAPTER 4. STATE COMPLIANCE WITH INDIGENOUS AND FOREST LAW

1. State Compliance With Indigenous Rights and Forest rights, and the repercussions on the Amazon Rainforest

This final Chapter will expose the analysis of the behaviour of LAC states with regards to the obligations derived from the ratification of International Indigenous and IEL conventions, with the aim to demonstrate that the Amazonian countries have varied perspectives and plans of action when it comes to guaranteeing Indigenous Rights, or have not defined their position in regard – such as in the case of Suriname.[536]

The objective is to show the degree of evolution of IEL and Indigenous Rights, rather than the stalemates, as to highlight that the current situation can be perceived as a starting point for the future improvement of forest protection and the survival of Indigenous ways of life.

Firstly, it is important to note that the fact that many states have intensified their commitments regarding the protection of Indigenous communities and natural reserves is a positive sign that Indigenous and forest rights have been taken as serious objectives. This is certainly due to the development triggered by the wave of constitutionalism that spread in the continent starting from the 80s-90s, after the end of dictatorial regimes.[537]

Based on the findings of the Special Rapporteur discussed in the report of 2018, we affirm that Colombia is the state that has showed to be compliant with Indigenous rights in most cases, and has contributed consistently to the evolution of nature rights in the region in the recent years.[538]

Many other countries, on the same line as Colombia, have joined and uniformed to the international standards relatively in delay, but they are now playing a leading role in the evolution of Indigenous Rights, and of the recognition of the legal rights of the Amazon Rainforest. Still, other countries, following the lead of Brazil, Venezuela, and Guyana, have

536 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
537 S. WIESSNER, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges,* The European Journal of International Law, op. Cit.
538 UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/39/17*, 10th August 2018, HRC, available at: https://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.pdf

found more difficult to overcome domestic obstacles in introducing land property rights in their Constitutions, given their colonial burden.[539]

The general regional framework, as the Special Rapporteur underlines, brings to light there is widespread violence against Indigenous communities, which usually end in guerrillas and massive denigration of the representatives of the communities who raise their voices.[540] As we saw, the problem of criminal activities in the field of resource extraction and development is a plague which, among others, can also be fuelled by the government itself, reason why the international obligations towards Indigenous communities and the forests are bypassed, as they are not yet considered a state *priority*.[541]

However, what emerges from the jurisprudence of the IACtHR is that states do not really have a choice when it comes to deciding about matters of environmental protection for the sake of Indigenous communities. For example, if a state-sponsored activity in a gold mine represents an opportunity for the state from the financial point of view, but on the other hand it may cause water pollution, displacement from ancestral lands and health repercussions on the communities, the state is more likely to de-prioritise human rights repercussions. This paradox is emblematic of how the system works and why a change is so urgent.[542]

The fact is that unless Indigenous customary law does affect the prosperity of state in economic affairs, hence the state may not feel compelled to respect Indigenous rights, since they are not considered fundamental for the subsistence of the overall population.[543] This suggests that there is a slight misperception of the role of biodiversity protection and Indigenous communities customary law, which might become the fundamental tools in the hands of the state in order to deal with the uncertainties linked to the future.

Though, the interests of minorities are not felt as a priority since they reflect a different set of societal needs and cultural values, and must be coherent to the interests of the state in order to be correctly addressed, otherwise they are not accepted.[544] In a deeper thinking process,

539 UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/39/17, op. Cit.*

540 Ibidem.

541 Ibidem.

542 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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*, IACHR, December 2009, available at: https://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf

543 Ibidem.

544 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*

the failure to provide respect for Indigenous rights also impairs the performance of other duties with regards to human rights, as it is going to be demonstrated in the next paragraphs.[545]

How do states behave before their responsibilities regarding the well being of Indigenous communities and their enjoyment of culture and traditional environments? Practice is so much varied that there is not a single trend. For example, there are recent cases like in Brazil, where the community of Ituna-Itatà in northern Amazonia has recently been discovered to be living in isolation, but the federal government decided to obscure information related to the existence of said community in order to acquire land rights to exploit and deforest the territory.[546] General practice shows that there is a gap between constitutional law and government compliance with human rights norms, which means that in theory LAC states share evolution in Indigenous rights compliance, but on the other hand they do not they do not respect the commitments they take to guarantee rights and freedoms to Indigenous communities.[547]

545 Ibidem.

546 Survival International Website, available at: https://www.survival.it/tribuincontattate

547 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*

2. Right to self-determination

As it was highlighted in the Report of the Special Rapporteur on the rights of Indigenous peoples in 2019, the right to self-determination has been positively implemented in the region, although it has been introduced through unilateral proposals, without consultation and inclusion of views of the concerned peoples. In many cases, this resulted in a fragmented approach to letting Indigenous peoples control the communities' institutions and administration, and the exclusion of Indigenous representatives from negotiation rounds has resulted in limited concessions to the right to self-determination.[548]

For instance, Colombia has taken seriously its commitment to favouring cooperation between the central government and Indigenous institutions, but it was so keen on correctly implementing Indigenous rights and comply with their duties, that the government did not even consult on Indigenous higher authorities before establishing the regulations and the ways which the communities would exercise control over their territories, which is quite reductive of the diversity of Indigenous customary frameworks of law and identity. Consequently the laws that were passed did not turn out to totally favour the free choice of the concerned communities over the organisation of the government, institutions and land administration.[549]

Self-determination is granted to Indigenous peoples of the countries of LAC, exception made for Suriname, although there seems to be a scarce implementation of measures to guarantee its respect. Moreover, the right to self-determination is interdependent to land property and cultural rights, since in order to be enjoyed, also customary land rights and freedom of manifestation of culture – and traditional knowledge – must be attained.[550] Some states have shown reluctance to accept to confer control over natural resources to Indigenous peoples, since their empowerment is seen as the deprivation of the state from acquiring Indigenous reserves and licenses to exploit natural resources and marketable forest products. This however does not mean that the situation has not improved, but in order to improve the performance of the right to self-determination, a renewed approach to territorial rights is essential.[551]

548 UN General Assembly, *Report of the Special Rapporteur on the rights of indigenous peoples: Rights of indigenous peoples , A/74/149,* UNGA, 17th July 2019, available at: https://www.undocs.org/A/74/149
549 Ibidem.
550 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*
551 Ibidem.

Both ILO 169 and UNDRIP state the right to self-determination is a fundamental prerogative for the implementation of the rights to culture and life and dignity – as stressed by the IACHR – although this depends widely on the possibility of the concerned peoples to be physical living on their territories.[552] This issue was brought to attention when we analysed the *Saramaka case*, in which the IACtHR openly addressed the state's behaviour as representing a violation of the right to land and self-determination, recognising that every Indigenous people, or minority, is entitled to have control over their ancestral territories.[553] Most commonly, in Latin America the problem of self-determination and granting autonomy to Indigenous peoples was overcome with constitutional reform, through formal recognition of the prerogative of self-determination and all the rights linked to it, including full control and ownership of ancestral lands. For example, in Ecuador, Colombia, Brazil and Bolivia, Indigenous peoples have been granted *de facto* exercise of their right to autonomy of government, and in addition the state has the duty to not interfere with Indigenous ways of life especially if they decide to live in isolation.[554]

Nonetheless, the right to self-determination cannot be said to have been respected ever since it was included in domestic legislation. The mere fact that the constitution recognises this fundamental rights is not always an adequate representation of reality, since in cases where the states put private interests before those of the Indigenous peoples, their lives are at stake.[555] The paradox that the Special Rapporteur noted is that in states with less economic interests, Indigenous peoples are left free to enjoy their rights, either if they have formal recognition or not, and this paradigm is the most successful, for the concerned peoples are able to perform their effective control and customary activities, and they also do not depend on the state for protection from invaders and land-grabbers.[556]

The consequence in the Amazon Basin is that there is a growing wave of Indigenous peoples which are not willing to obtain official recognition of the state, since they fear to lose autonomy over their properties and institutions, and they issue a "statute of autonomy", a document in which the community communicates its intention to become independent from the state, as did the *Wampis* community in Peru in 2015.[557]

552 UN General Assembly, *Report of the Special Rapporteur on the rights of indigenous peoples: Rights of indigenous peoples, A/74/149,* op. Cit.
553 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
554 UN General Assembly, *Report of the Special Rapporteur on the rights of indigenous peoples: Rights of indigenous peoples, A/74/149,* op. Cit.
555 Ibidem.
556 Ibidem.
557 Ibidem.

Instead, in order to avoid these situations, some LAC states have decided to change the nature of the state structure, becoming "plurinational" or "multicultural" states, which the Special Rapporteur claimed to be the most advanced form of Indigenous rights compliance internationally.[558] This allows to all of the different ethnicities which live in the country's territory to acquire the same rights under domestic law, since the constitution is a guarantee of the right to self-determination and consequently the right to exercise autonomy on the community's lands.[559] These are the examples of Colombia, which changed the nature of its constitution in 1991, introducing Indigenous rights, and has facilitated the creation of Indigenous reserves, on a par with the Republic of Ecuador and Bolivia, as we already saw, which have implemented full recognition of Indigenous rights and self-determination principle respectively since 2008 and 2009.[560]

Becoming "plurinational" means that the central government recognises the government's fragmentation at the local level, but through coordination and cooperation with territorial institutions of Indigenous settlements they manage to have a unitary state. This means that the state communicates with Indigenous authorities, and Indigenous representatives are active actors in the decision-making rounds, plus they have the powers to decide about territorial matters inside their community.[561] They have thus the possibility to follow customary norms, to implement their judicial system and institutions, thus enjoying the right to life and freedom of expression and other cultural rights, which would not be possible without self-determination. Of course, in order to work, the government has to favour communication between customary bodies and state ones, but most importantly Indigenous governments shall reflect the traditional way of life of their ancestors, as suggested by the Special Rapporteur.[562]

The basic problem with the application of this Indigenous right is that states lack implementation structures, monitoring infrastructure and dialoguing bodies with Indigenous representatives. This translates systematically into general misinterpretation of the application of the right and its repercussions on the Indigenous communities. If state practice is not accompanied by monitoring bodies that enhance cooperation with the concerned

558 UN General Assembly, *Report of the Special Rapporteur on the rights of indigenous peoples: Rights of indigenous peoples, A/74/149,* op. Cit.
559 Ibidem.
560*Constitución Politica del Estado de Colombia*, 4th July 1991, available at: https://pdba.georgetown.edu/Constitutions/Colombia/colombia91.pdf ; *Constitución Politica del Estado del Ecuador, op. Cit.; Constitución Politica del Estado de Bolivia, op. Cit.*
561 UN General Assembly, *Report of the Special Rapporteur on the rights of indigenous peoples: Rights of indigenous peoples, A/74/149,* op. Cit.
562 Ibidem.

communities, and not if effective control of ancestral lands remains in the hands of the state, we can say that the provision of self-determination is partly if not at all complied with.[563]

Being physically and governmentally free to control ancestral forested lands could help biodiversity protection of Amazon, since Indigenous customary norms are likely to have a positive impact. This of course depends on the degree of control the community exercises on its reserves, but it also depends on the states' ability to respect community land property, which will be discussed in the next paragraphs.[564]

The only exception to the regional positive feedback on the implementation of self-determination is represented by Suriname. As it was noted, the country has not signed nor ratified the ILO 169 yet, despite the numerous efforts to start discussions at the international level with other UN members.[565]

The constitution of Suriname, amended in 1992, recognises the rights of tribal communities and other minorities, but not the rights of Indigenous peoples.[566] The state practice reflects the burden of the Dutch colonial empire, which at the time allowed recognition of native populations under the "concordance principle", which is to say the colonial government and the colonised population agreed on paying obedience to the Dutch, and the empire guaranteed constitutional rights to individuals, notwithstanding the cultural and traditional divisions of the traditional societies.[567]

However, discrimination and disregard of internationally agreed standards of Indigenous rights are amplified by the fact that the rights that are guaranteed to all non-Indigenous people in the country cannot apply to Indigenous peoples. For instance Article 8 of the Constitution on the right to equal protection of private property does not automatically entail that Indigenous peoples have the right to own their traditional lands, as well as Article 41 on the right to own and use natural resources.[568] This discrimination makes Suriname very much

563 Ibidem.
564 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
565 Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Suriname, A/HRC/WG.6/39/SUR/1*, UNGA, 23rd August 2021, available at: https://undocs.org/A/HRC/WG.6/39/SUR/1
566 Ibidem.
567 Ibidem.
568The Constitution Of The Republic Of Suriname (Bulletin Of Acts And Decrees 1987 NO. 166), available at: http://www.oas.org/juridico/pdfs/mesicic4_sur_const.pdf
Article 8.1 "*All who are within the territory of Suriname shall have an equal claim to protection of person and property*". 8.2 "*No one shall be discriminated against on grounds of birth, sex, race, language, religion, education, political opinion, economic position or any other status*."
Article 41: "*Natural riches and resources are the property of the nation and shall be used to promote economic, social and cultural development. The nation has the inalienable right to take complete possession of*

distant from meeting international standards of human rights provided by the UN. Accordingly, the state retains the right to exploit natural resources located in ancestral lands, as they are formally of state property, since collective rights are inconsistent with the constitution.[569]

The CEASCR had urged the Surinamese government to begin talks for ratification, but the state has repeatedly ignored every effort. Indeed, Indigenous communities claims of violation of self-determination, especially in the territories of the *Maroon*, are connected to forced removal from reserves. Of course, forced removal from lands and relocation is a violation of Indigenous land rights, and self-determination, but in this case it is not unlawful since the constitution does not even recognise Indigenous peoples.[570]

its natural resources in order to utilize them to the benefit of the economic, social and cultural development of Suriname".

569 Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Suriname, A/HRC/WG.6/39/SUR/1*, op. Cit.

570 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.

3. Right to participation and consultation

The right to participation to decision-making processes is deeply interconnected with the right to consultation, and the prerogative of free prior and informed consent. In this paragraph we will take into consideration also the duty of the state to conduct EIAs, enshrined in the CBD, since it contributes to the state compliance with the responsibility to inform the concerned populations about the status of environmental healthiness and possible damages linked to state-led activities in Indigenous territories.[571] The duty of the state to conduct EIAs, also lies in the state responsibility to guarantee a safe environment to Indigenous peoples and to consult them prior to any R&D project.[572]

These rights are implicitly connected to the problem of resource extraction, logging and economic interests in Amazonian marketable goods and agricultural commodities. In general, standards of both UN and ILO instruments regarding consultation and participation are not met.[573] The IACHR has noted that states conduct their activities notwithstanding the existence of specific regional norms, and sometimes their local policies and regulations are even unlawful domestically. Also, in the report of 2013 of the Special Rapporteur was underlined that both resource extraction and violence are results of state policies that are not developed in light of Indigenous rights.[574] By being parties to ILO 169, ICCPR, but also CBD, states acquire *duties* of making the standards accorded being respected. Also, what was noted in the reports of UNDRIP supervisory bodies and the Special Rapporteur himself, is that FPIC is a widely respected norm when it comes to decision-making and information delivery regarding public policy and development, but not regarding the exploitation of Indigenous reserves.[575]

In the more recent Report of 2020, it comes to the eye that what is missing is infrastructure that allows Indigenous representatives to reach high government seats and be heard.[576] This problem arises also because Indigenous representatives, in order to participate in governmental decision-making processes, have to leave their reserves, and this causes a

571 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
572 Ibidem.
573 Ibidem.
574 Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, A/HRC/24/41, HRC, 1st July 2013, available at: https://undocs.org/A/HRC/24/41
575 Ibidem.
576 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples:Rights of indigenous peoples, A/HRC/45/34*, HCR, 18th June 2020, available at: https://undocs.org/en/A/HRC/45/34

detachment from their traditional ways of life, hence it becomes harder to report the real problems experienced by the community due to the fact that they do not actually live there.[577] Hence Indigenous participation is hardly ever effective, since on the one hand it implies that the government has to make concessions and cooperate with Indigenous populations, and on the other hand Indigenous authorities must abandon traditional customs and ways of life in order to physically stand for Indigenous rights at the national level.[578]

Moreover, the provisions on FPIC in Indigenous rights instruments at the international level are usually vague, as well as the degree of effectiveness that derives from the obligation itself. The process of introducing international binding norms in domestic legislation implies that many passages are made, and most importantly it has to be established which bodies will monitor the compliance of the government with the norm at the domestic level. The lack of the step is in most cases the reason why International Indigenous law is not complied with in LAC countries.[579]

The Special Rapporteur in 2013 has made a comprehensive study of the situation in LAC regarding the application of the right to consultation and participation when the exploitation of ancestral territories is involved for the development of extraction projects. Mostly, as ILO Convention 169 represents the only source of binding law for Indigenous rights, the result has been limited in some countries, given that ILO is first of all an organisation for labour rights, and UNDRIP does not have the features of binding law.[580] The Special Rapporteur has found that states use this norm at their advantage, since they tend to implement the consultation norms in order to acquire Indigenous lands and relocate the communities. They then compensate Indigenous communities, but this does not mean that they respected the norms of prior and informed consent, since they used their power to bypass the interests of the responding communities, despite there are certain boundaries that the constitution recognises. Moreover, when states use this technique to acquire lands and natural reserves rich in resources, they also expropriate the concerned communities of their properties and cultural identity.[581]

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577 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples: Rights of indigenous peoples, A/HRC/45/34, op. Cit.*

578 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.

579 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples: Rights of indigenous peoples, A/HRC/45/34*, op. Cit.

580 Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, A/HRC/24/41, op. Cit.

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Moreover, the right to consultation and participation are, among other provisions, part of self-determination, and the lack of these two prerogatives can bring to huge losses in terms of culture, traditions, and ties with the past.[582] Also, the right to life and dignity can be impaired if states do not comply with consultation norms, since physical damages to territories – namely deforestation and extraction – affect the communities' well-being and decrease the liveability of forests.[583]

States usually fail to interpret FPIC and participation rights, as the Special Rapporteur noted in 2020, since they wrongly apply it to cases of projects that were already initiated, but it should be a means through which Indigenous peoples participate in *first* person and decide upon their destinies instead.[584] In order to do so, Indigenous authorities must be involved in decision-making, hence it is necessary that the state provides proportionate space for them in the governmental infrastructure.

The common mistake however is that the states unilaterally decide upon the shape and degree of power of Indigenous bodies, and the result is that the process of consultation is not shaped by customary law and traditional beliefs.[585] Instead, the correct interpretation of FPIC implies that prior and informed consent must be implemented in respect of Indigenous cultural identity and social and governmental structures. In fact, states have to work on gathering and providing transparent information regarding their activities that could potentially damage Indigenous communities.[586] Through communication and commitment to EIA obligation, assure that the state has a positive intention and seriously embraces Indigenous rights.

A continuative dialogue between governmental infrastructures is a necessary step for guaranteeing the rights to consultation and participation. On the practical level, this is far from reached, but some countries have made more progress than others in this path towards the creation of effective communication and cooperation with Indigenous communities.[587] In some countries in LAC has been made the most innovation and evolution of the rights, such as Peru, where the government tried to deal with the controversial application of FPIC by constituting an *ad hoc* monitoring body – administered in turn by the Ministry of Culture. As Special Rapporteur Anaya noted back in 2013, the right to consultation was applied to

582 Ibidem.
583 Ibidem.
584 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples:Rights of indigenous peoples, A/HRC/45/34*, op. Cit.
585 Ibidem.
586 Ibidem.
587 Ibidem.

several cases of domestic unlawful prosecution of Indigenous protesters carried out by the police, in the occasion of environmentalist protests.[588] What was discovered by the monitoring body is that there was a pact between the police and mining companies for which officers had agreed to stop Indigenous rebels in order to minimise the risks for the owners of the mining companies in demonstrations and revolts.[589]

Again, in Peru there is also a Law on of Prior and Informed Consent, issued in 2011, which established that the government has the duty to inform Indigenous peoples of the intention to initiate mining projects in their territories if those activities are likely to affect them.[590] The law has helped to deal with cases of missing FPIC, despite some recent cases, such as the case of Lot 192, a territory in which was renewed an agreement with the Argentinian petrol company Pluspetrol in 2015, even if the disastrous effects of the activities of this company, which protracted for almost half century back, had harmed the local communities.[591]

Differently, in Colombia, the government has implemented the most advanced system of domestic norms on prior consultation, for instance one measure was enabled through means of a directive of the government in 2013, with the aim to help Indigenous peoples when the state concludes agreements with extraction companies in order to exploit natural resources.[592] Despite being a signal of evolution of domestic legislation towards more transparency regarding Indigenous issues, still this measure is not applicable to cases that date back to when the state was not a party of ILO Convention 169 yet, hence many of the unlawful appropriation and degradation of lands have not been restored, but on the other hand more than 150 recent cases have been solved thanks to the use of this measure.[593]

However, the country in question has one of the most advanced approach to FPIC, including more than forty legal measures in force. For example, regarding the ownership of territories, the constitution claims that collective lands are of property of Indigenous peoples, who are fully entitled to control their affairs through ancestral customary means, thus they are also owners of natural resources that lay within their territories.[594] This implies that if the state

588 Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, A/HRC/24/41, op. Cit.
589 Ibidem.
590 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
591 Ibidem.
592 Ibidem.
593 G. AMPARO RODRIGUEZ, *De La Consulta Previa Al Consentimiento Libre, Previo E Informado A Pueblos Indígenas En Colombia*, Universidad del Rosario, 2011.
594 Ibidem.

has economic interests in exploiting such natural resources, Indigenous governments must be previously informed and must approve the realisation of such activities.

In a study conducted by legal expert Gargarella, the author claims that the next step of the state will likely be that of decreasing Indigenous independence in matters related to their territories in order to protect them at the best of their means.[595] In fact, the state has implemented a strong approach to consultation rights, maybe too much strict. This means that in order to guarantee Indigenous right to participation and FPIC, the government believes that it is better for them if the state intervenes directly in order to avoid any risk for the future, but without previous consultation with Indigenous representatives, or worse, in time periods for consultation established by the central government.[596] However, the CEASCR has advised that these excessively regulatory measures would represent a violation and a misinterpretation of ILO 169 provisions.[597]

Instead, in Brazil, which ratified ILO only in 2002, after continued requests of the international community, is now trying to better the situation in regards to Indigenous rights recognition. For example, in the famous case of the Belo Monte dam project, after the IACHR intervened with drastic measures, imposing the government to consult and favour participation before and during extraction projects conducted alongside Indigenous lands.[598] After the Special Rapporteur analysed the situation of the country back in 2016, what came to the eye was that consultation was not implemented and FPIC was thus not required in order to proceed with state-led projects, such as in the São Luiz do Tapajos dam, where the *Munduruku* populations were subject to substantial human rights violations due to government inertia.[599] This goes back to constitutional problems of Brazil, but also shows the country's opposition to creating Indigenous reserves and the fact that when there is international pressure the government decides to suspend projects but not to cease them or find practical solutions for Indigenous peoples involved.[600]

Even worse is the situation in Venezuela, which has been inert regarding its ILO 169 obligations, until the state ratified the treaty in May 2002. Since then there has been no

595 R. GARGARELLA, *The legal foundations of inequality: constitutionalism in the Americas, 1776-1860*, Cambridge University press, Cambridge, 2010.

596 G. AMPARO RODRIGUEZ, *De La Consulta Previa Al Consentimiento Libre, Previo E Informado A Pueblos Indígenas En Colombia*, op. Cit.

597 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.

598 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples:Rights of indigenous peoples, A/HRC/45/34*, op. Cit.

599 Ibidem.

600Ibidem.

attempt to implementing legislation and no guarantee of Indigenous rights, especially in cases of oil investment projects.[601] In general, the failure in complying with International Indigenous rights to FPIC and participation at the domestic level lies in governmental infrastructure, due to the inefficacy, if not at all the absence of monitoring systems and cooperation.[602]

Even so, Suriname still represents the worst case scenario, being the only country to have not implemented any consultation and participation norm in favour of Indigenous peoples, and trying to exclude Indigenous representatives and hide information on extraction activities and impact assessments.[603] This makes the country even more distant from achieving the minimum standards of international environmental law, apart from Indigenous law, since the violation of FPIC reverberates on deforestation, which continues to go uncontrolled. In fact what the monitoring bodies of CBD have noted in a report from the Working Group on Article 8j, is that in countries such as Suriname there is massive violation of the right to information and the duty of the state to conduct impact assessments before initiating projects.[604] Moreover, destruction of natural endowments without consent of the concerned populations, despite being a violation of an international norm, is not punished adequately, since the country repels any advise and communication from human rights monitoring bodies.[605]

601 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples A/HRC/39/17*, HRC, 10th August 2018, available at: https://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.pdf
602 Ibidem.
603 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples A/HRC/39/17*, op. Cit.
604 Forest People Program, *The Republic of Suriname and its compliance with the International Covenant on Civil and Political Rights Articles 1, 26 and 27: The Rights of Indigenous Peoples and Maroons in Suriname. Submission of the Forest Peoples Programme concerning the Republic of Suriname and its Compliance with the International Covenant on Civil and Political Rights*, FPP, 2002.
605 Ibidem.

4. Right to land property and ownership over natural resources

The issue of Indigenous ownership over ancestral lands and resources has been recently discussed by the IACtHR, which stated that:

> The close ties of Indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. […]
> The relationship with the Earth is not merely a question of possession and production but rather a material and spiritual element to be fully enjoyed, including to preserve their cultural heritage and to transmit it to future generations.[606]

The Inter-American framework of Indigenous rights, Through the help of ILO Convention 169 and UNDRIP, has favoured the spread of internationally agreed standards in LAC countries. The fact that the IACHR affirmed in many of its decisions and statements that ancestral territories are part of cultural heritage and the right to own them is a fundamental feature of Indigenous identity, represents an innovation.[607] For instance, the continent was unfamiliar with the notion of territorial rights, since until the recent past, private property was certified by a written document of possession, the states did not accept to grant land property based on spiritual ties; indeed, the fact that communities had been living in those territories since the time of European colonisation was not enough.[608] Before the introduction of territorial rights, natural resources – water sources, forests, fossil fuels, minerals and gold – were of property of the state which retained control and was allowed to sell public soil in slots to third parties for economic, agricultural or extraction aims, notwithstanding the cultural and spiritual linkage of the concerned communities who inhabited the lands.[609]

We acknowledge that, in the perspective of Indigenous peoples, territories are not seen for their exploitative function, but they are felt as the part of something bigger, of a spiritual project in which land and identity merge. Collective land rights have demonstrated difficult

606 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*
607 Ibidem.
608 Ibidem.
609 Ibidem.

to apply in domestic legislation, nonetheless the regional framework of the OAS has urged states to adapt their domestic legislation to the sphere of collective rights.[610]

How have states complied with the right to collective lands in the Amazon region? Almost every country – the only exception is given by Suriname – has positively implemented territorial rights, with more or less success, but this generality shows at least the effort to take this commit to Indigenous rights. Courts are slowly changing their domestic jurisprudence regarding land rights, since they have been urged by the OAS bodies to meet international standards, and a new sensibility has emerged, which recognises Indigenous fundamental rights as strictly linked to the affirmation of cultural identity.[611]

For land rights we mean the right to own ancestral land, to exploit resources that lie within the community borders, the right to control and establish their land administration based on customary law, but also the right to compensation and to restitution – in cases of forced removal.[612] Most of all, the right to land ownership has been linked also to the right to culture and the protection of traditional knowledge, ant the right to self-determination.

If we analyse the current situation, we can notice that in general state compliance is positive in terms of national efforts, or at least has contributed to the changes of national jurisprudence on the matter.[613] Only in Ecuador, Bolivia and Colombia however, territorial rights have achieved the rank of constitutional norms, whereas in other states international standards are far from being reached.[614]

The reports of the UN Special Rapporteur in the period from 2009 to 2013 have identified recurrent patterns in state compliance with Indigenous territorial rights and recognitions of international provisions in domestic legislation. For example, in countries with unclear land property rights and norms on restitution and compensation, the recurrent issue to deal with was the problem of extractive and mining activities. The most common consequence of unclear legislation is the spreading of conflicts between Indigenous peoples and criminal companies, but they can be exacerbated by the intervention of paramilitary groups.[615]

610 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*

611 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.

612 R. ROLDÁN, *Models for Recognizing Indigenous Land Rights in Latin America*, op. Cit.

613 Ibidem.

614 Ibidem.

615 Ibidem.

The denial of land ownership impairs Indigenous enjoyment of culturally important lands, such as spiritual hubs, ancestral settlements, particular vegetation – such as mangroves, where communities conduct rituals and worship the trees as spiritual dwellers – and the impossibility of living in their ways of life or the removal from their countries affects the survival of Indigenous traditions.[616]

It was not until the constitutional reforms that the third category of land was introduced in domestic administration in the majority of the states which experienced dictatorial regimes: before the 1980s, there were only public or private lands, whereas with the affirmation of territorial rights, namely community reserves – or collectively managed lands.[617] However, despite land property rights assure Indigenous communities some privileges with respect to the past and the colonial experiences, this has not halted deforestation and unlawful appropriation of ancestral lands. Important actions have been taken to safeguard the existence of Indigenous communities, for examples directives and land laws on reserves demarcation, patrol, and autonomy in the management of issues connected to the cultural sphere of ancestral lands.[618]

Despite it, experts have some concerns on the degree of effectiveness of land rights applied to Indigenous communities, since the Amazon region is acknowledged to some of the most difficult sites to explore. There are still parts of the rainforest and the basin that have not been visited, neither with satellites images, hence we can imagine how poorly states intervene in such remote places in order to guarantee collective lands rights if they do not know the natural capacities of such forests.[619]

In the recent times, states have created Indigenous reserves in the Amazon up to 500 thousand kilometres, but still one of the most recurrent issue states have to deal with is the question of "unoccupied lands".[620] Natural endowments are traditionally considered public property, and with the advent of land property rights some of them have been transferred to Indigenous peoples or have been finally recognised as Indigenous property.[621] LAC states

616 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*

617 S. H. DAVIS and A. WALI, *Indigenous Land Tenure and Tropical Forest Management in Latin America*, op. Cit.

618 Ibidem.

619 L. R BARROSO and P. PERRONE CAMPOS MELLO, *In Defense of the Amazon Forest: The Role of Law and Courts, op. Cit.*

620 S. H. DAVIS and A. WALI, *Indigenous Land Tenure and Tropical Forest Management in Latin America*, op. Cit.

621 Ibidem.

have assigned those lands with no property status to Indigenous communities – even though the lands in question are not abandoned or deserted, if anything they are inhabited by Indigenous peoples and have been since the ancient times, but due to the absence of territorial rights in domestic legislation, they were not given the status of Indigenous reserves. In Colombia alone were created almost three hundreds native reserves through the assignation of "unoccupied lands".[622]

Is the overall state practice in compliance with internationally agreed Indigenous land rights? On the one hand yes, for the fact that numerous Indigenous reserves have been creates, and they represent safe spaces for communities who have fought for the recognition of their rights and identity. On the other hand, the balance is negative, for the fact that only few countries have taken concrete measures, such as Ecuador and Bolivia, Peru and Colombia.[623] Moreover, there is another unclear issue regarding protected areas and how their creation influences Indigenous control over their lands, since most of protected reserves are issued on Indigenous territories. Of course conservation objectives enshrined in UNDRIP and CBD should be applied together with consultation and participation of Indigenous peoples involved when protected areas are enabled, and land rights should not be denied, but rather be coupled in more comprehensive measures.[624] However, in the majority of the cases, solutions are easily found in the creation community conserved reserves, where TFRK helps in biodiversity preservation and the communities are free to administrate their lands with out state interference.[625]

Regarding the rights over natural resources, the question is more fragile. We should look at regional mining and extraction legislation in LAC countries in order to understand the actual situation and how difficult it is to introduce new measures for Indigenous protection when economic interests are involved. In most cases, the state possesses rights over exploitation of subsoil resources, and Indigenous rights to use natural resources are limited.[626] Though, international norms in force pose limits to states' discretionary actions and oblige states to comply with their consultation and participation duties. For instance, as the CEASCR noted, ILO Convention 169 has a series of provisions on fair compensation of Indigenous peoples,

622 S. H. DAVIS and A. WALI, *Indigenous Land Tenure and Tropical Forest Management in Latin America*, op. Cit.
623 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
624 Ibidem.
625 Ibidem.
626 J. C. TRESIERRA, R*ights of indigenous groups over natural resources in tropical forests*, op. Cit.

but the signatories also have the duty to allow participation and equal share of revenues they gain from the exploitation of natural resources of Indigenous reserves, and the duty to conduct EIAs prior to the realisation of extraction projects in order to assess if Indigenous well-being is impaired.[627]

Despite this, general practice has brought to light that states tend to overshadow their duties and ignore their responsibilities with regard to Indigenous peoples. This inertia leads Indigenous peoples to face territorial conflicts with companies and illegal actors that invade their lands as a consequence of the lack of supervision and regulations of license issuing.[628]

But these repercussions are also connected to other fragilities of LAC national governments, such as the fact that domestic laws on mineral extraction and non-renewable energy sources assure the state as the primary actor in exploitation of resources.[629] For instance, in Colombia, Indigenous representatives have overturned mineral laws and finally obtained control over mineral extraction and started to cooperate with mining companies according to their needs and territorial management, in this way companies and third parties can still obtain economic gains, but it is responsibility of Indigenous communities to protect sacred lands and exploitation is conceded only in small parts of the landscape.[630]

In Peru instead, the state owns mineral rights, but is bound to compensate the concerned populations for the damages caused by extraction and must obtain Indigenous consent in advance. Plus, the government is obliged to share income from exploitation of natural resources with the concerned communities. Despite the recognition of collective rights has improved the situation, the state is the legal owner of resources and can decide upon it. There is duty to consult with the concerned populations, but these rules are vague and difficult to interpret.[631] Moreover, the constitution classifies Indigenous land property as "inalienable and inviolable" in Article 70, but it was documented that the lots assigned to the communities are not sufficient for their subsistence, and this may also represent a violation of the right to customary sustainable use of resources enshrined in the CBD, as it was noted in the reports of the Working Group for the application of Article 8 j.[632]

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627 Ibidem.
628 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples A/HRC/39/17*, op. Cit.
629 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
630 Ibidem.
631 J. C. TRESIERRA, R*ights of indigenous groups over natural resources in tropical forests, op. Cit.*
632 *Constitution of the Republic of Peru of 1993 with Amendments through 2021*, available at: https://www.constituteproject.org/constitution/Peru_2021.pdf?lang=en

A contradictory case is that of Brazil, where constitutional tools have adjusted to ILO and UNDRIP provisions on land rights, but natural resources underground such as water pools, minerals and fossil fuels and renewable energy sources, are property of the state.[633]

Regional environmental regulations say that if a state decides to exploit resources, especially non-renewable, the impacted populations must be compensated for the biodiversity loss. The real question is: is this system of payments for environmental services helping forest conservation? It does not seem to, since there extreme consequence of this system is that there is no limit to the issuing of pollution licenses, even if consultation rights are fully respected.[634]

The same thing however does not happen in Colombia, where compensation and sharing revenues are decided depending on the economic value of the resources that the company intends to exploit.[635]

Differently, in the administration of renewable resources, states have implemented good practices, because Indigenous groups become sort of part of the public administration bodies and act accordingly to the state regulations in the limits and concessions of the exploitation of renewable resources.[636]

However, the biggest problems remains that if the system of natural resources exploitation does not recognise the rights of Indigenous peoples to control and manage them without external pressures, forest resources are at risk too, since the state has the final say over deforestation of Indigenous forests and licenses issuing. This applies also in the case in which forests are protected areas, which is the most common situation in the current management system of biodiversity protection.[637]

633 M. RAFTOPOULOS and J. MORLEY, *Ecocide in the Amazon: the contested politics of environmental rights in Brazil,* The International Journal of Human Rights, 2020, Vol. 24, N.10, p. 1616-1641.
634 Ibidem.
635 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.
636 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*
637 Ibidem.

5. Concluding observations on the right to a healthy environment

In LAC the countries which have been recognised as the most advanced in matter of the right to a healthy environment are Colombia, Ecuador and Bolivia. The matter of a healthy environment and sustainable development are deeply connected to the fundamental rights of Indigenous peoples, as it was specified in the Advisory Opinion of the IACtHR in 2017.[638] The two topics are very intertwined for the fact that Indigenous right to ownership of land and resources – particularly in forested territories – cannot be complied with if forest resources are curbed and if the state is not able to guarantee such fundamental provisions. On the other hand, the right to a healthy environment, apart from being in force in the OAS member states, is first of all a human right.[639]

It was in the Advisory Opinion under the request of Colombia that the IACtHR asserted the significance of applying human rights to protect the environment and its components, among which there are rivers, lakes and forests.[640]

In the opinion of the Court, human rights and environmental rights are interconnected. Specifically, the Court made the point about the severity of environmental damages for Indigenous peoples, who are experiencing in first person the consequences of pollution and climate change due to deforestation.[641] The discussion goes deeper, since the court notes that the right to a healthy environment, is not only a prerogative of every human being in the Inter-American context, but it is also the direct expression of the right to life and dignity enshrined in Article 4 of ACHR and the right to personal integrity. Hence, the violation of this provision translates into violation of other fundamental human rights.[642]

Although we said that the Inter-American framework of rights does not properly address the rights of Indigenous peoples, the Court considered the issue under discussion as directly affecting the fundamental rights of all peoples, hence the right to a healthy environment is applicable to Indigenous peoples too.[643]

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638 Inter-American Court Of Human Rights, *Advisory Opinion Oc-23/17, The Environment And Human Rights*, November 15th, 2017, available at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf

639 *Using human rights laws may be most effective way of harnessing international legislation to protect the Amazon*, 2021, University of Exeter, available at: www.sciencedaily.com/releases/2021/02/210222124659.htm

640 Inter-American Court Of Human Rights, *Advisory Opinion Oc-23/17, The Environment And Human Rights*, op. Cit.

641 Ibidem.

642 Organization of American States, *American Convention on Human Rights, "Pact of San Jose",* op. Cit.

643 ECLAC, *Guaranteeing indigenous people's rights in Latin America Progress in the past decade and remaining challenges*, op. Cit.

In fact, in many occasions the Court analysed cases of violation of the right to a healthy environment in community lands due to extraction and mining. Collective land rights violations, together with the consequent pollution and its repercussions on the health of the communities that live in the near proximities of mines and dams hamper the right of Indigenous peoples to enjoy a healthy environment, but most importantly the right to life and dignity[644]. Unhelpful to cite the innumerable cases of violation due to mining activities, state-led projects of excavations and fossil fuel R&D on Indigenous territories, reason for what the only necessary thing to say is that all those activities make the state responsible fro non-compliance with fundamental human rights to dignity and to live in a healthy environment.[645] Every country is more or less responsible of such violation of environmental rights, reason for which the Court concluded the Advisory Opinion by claiming that natural resources cannot be spoilt without expecting no consequences on Indigenous communities livelihood. Moreover, this aspect was not very much stressed, but according to other opinions connected to this discussion, these non-compliant practices may impact the Indigenous right to culture and freedom of expression, since the HRC noted in similar cases connected to Indigenous peoples that in the long run the traditional ways of life may end up being disrupted due to the degradation of ecosystems and sacred sites.[646]

In fact, the collective sphere of Indigenous rights, their spiritual ties with territorial dwellers and customary activities depend on environmental healthiness.[647] For example, in the case of *Mutatis Mutandi* (Sarayaku vs Ecuador), the collective perspective of land rights was considered a basic prerogative of the people of Sarayaku.[648] This brings us back to the issue of multiculturalism and plurinationalism, which are the best solutions to guarantee Indigenous rights and the rights of the environment. Most importantly, the Court notes that the notion of the environmental healthiness itself is connected to the evolution of the belief that the environment and natural components should have legal personality, hence it explains that nature rights and the consideration of the environment as a living entity are significant steps in the preservation of biodiversity.[649]

644 Inter-American Court Of Human Rights, *Advisory Opinion Oc-23/17, The Environment And Human Rights*, op. Cit.
645 Ibidem.
646 Human Rights Committee, *General Comments Adopted By The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights*, op. Cit.
647 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs)*, op. Cit.
648 Ibidem.
649 Inter-American Court Of Human Rights, *Advisory Opinion Oc-23/17, The Environment And Human Rights*, op. Cit.

Hence we can say that the contribution of the Inter-American Court has contributed to the advancements of environmental rights with a human rights perspective, although further development is needed and not all states have responded to the call of the Court. In this regard, the Court notes there is a minority of states in which the recognition of legal personality of the nature has become a salient matter in the state practice.[650]

However, the belief that the Amazon Rainforest should be retaining legal rights in the jurisdiction of the countries in which it is extended is not recent. The long-standing requests of environmental defenders and NGOs, not only at the national level, but by all the actors of the international community, consider it necessary to protect the Rainforest, since it is bound to be the biggest source of oxygen and food and natural resources for the future generations.[651] We should look at the examples of the Atrato River, the Whanganui River and many other cases of nature rights recognition worldwide.[652]

650 Inter-American Court Of Human Rights, *Advisory Opinion Oc-23/17, The Environment And Human Rights*, op. Cit.

651 Inter-American Commission on Human Rights, *Indigenous And Tribal Peoples' 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, op. Cit.*

652 C. D. STONE, *Should Trees Have Standing? Law, Morality, and the Environment*, Oxford University Press, Oxford, 2010.

CONCLUSION

As it was already specified, the objective of this thesis was to acknowledge that there is a connection between IEL and Indigenous law, since the well being of the surrounding environment is vital for the subsistence and livelihood of Indigenous peoples in their settlements. Specifically in the case of Indigenous communities that live in the Amazon – especially those that have decided to live in isolation – they have experienced huge violations of their rights due to unlawful invasions and grabbing of their territories and the states have fatigued at monitoring the guarantees of the constitution.[653]

According to the issues exposed in Chapter two, there is no internationally binding agreement on the preservation of forests, but only agreements that safeguard forest products and native flora and fauna for economic aims. This makes the situation more difficult, since states do not feel compelled to respect the duties that they derive from international law agreements.[654] But in many cases, the innovative approaches of courts or the HRC for example have shown that applicants who report violations to the supervisory bodies such of international organisations bodies, express deep concerns about the environment and the repercussions of pollution on their livelihood.

Despite this, the cases proposed by this dissertation show that international courts and supervisory bodies do not agree on the fact that environmental degradation is a substantial violations of the human rights of Indigenous peoples. This shows that even the most innovative approach does not get the connection between Indigenous and Environmental laws in the international context, despite national and international courts' jurisprudences have sometimes shown the opposite.[655]

It was always reminded how Indigenous cultural heritage and customs are fundamental, and this shall be one of the reasons, if not the most important, why forest rights should be better envisaged, and states shall consider forest and biodiversity protection a duty under their jurisdiction.

Given the variety of cultural backgrounds, and natural environments, every state shall elaborate its solution to these problems. In some cases, we have seen that LAC states have

653 L. R BARROSO and P. PERRONE CAMPOS MELLO, *In Defense of the Amazon Forest: The Role of Law and Courts,* Harvard International Law Journal*,* 2021,Vol. 62, p. 68-94.
654 S. H. DAVIS and A. WALI, *Indigenous Land Tenure and Tropical Forest Management in Latin America*, Ambio, 1994, Vol. 23, N. 8, p. 485-490.
655 HRC, *Jouni Länsman I* and *Jouni Länsman II, op. Cit.*

started to put into practice Indigenous customary principles, such as *sumak kawsai* in Bolivia, Ecuador and Colombia, which have made possible for these states to apply legal personality to natural components, but most of all in the case of rivers and lakes.[656]

The problem of deforestation remains the most relevant, together with land management policies, which at the regional level, still fatigue to include collective views and integrative approaches to biodiversity preservation and Indigenous traditional techniques, but still there are positive examples of cooperation in Peru, Colombia etc. The framework is, however, underpinned by violations, illegal activities and inaction of state authorities.[657]
Even before the IACtHR has emerged that there is much to be achieved in terms of measures, support to Indigenous peoples and policy changes, as it emerges in the Advisory Opinion of 2017.

To conclude this, is important to acknowledge that the Amazon Rainforest becoming a subject of legal rights is a possibility, but it is not welcomed unanimously by all states. The positions on this regard are varied, ranging from states that still have not matured a comprehensive approach to environmental rights to governments that believe in a system of payment for environmental services.[658] In Colombia, the case of *Future Generations vs The Ministry on Environment and others*, filed by 25 young plaintiffs before the Supreme Court in 2018 brought to light that new generations are deeply concerned about the future of humankind and their possibility to live in a healthy environment.

During the proceedings emerged relevant legal questions regarding the status of Amazonia under domestic legislation, and the role of the state in protecting the forest from climate change and degradation.[659] The Court response was quite emblematic:

> In order to protect this vital ecosystem, the Supreme Court recognized the Colombian Amazon as an *entity subject of rights*, just as the Constitutional Court did with the Atrato River last

656 I. VARGAS-CHAVES, G.A. RODRÍGUEZ, A. CUMBE FIGUEROA and S.E. MORA-GARZÓN, *Recognizing the Rights of Nature in Colombia: the Atrato River case*, op. Cit.
657 K. BISHOP, N. DUDLEY, A. PHILLIPS and S. STOLTON, *Speaking a Common Language. The uses and performance of the IUCN System of Management Categories for Protected Areas*, op. Cit.
658 Inter-American Court Of Human Rights, *Advisory Opinion Oc-23/17, The Environment And Human Rights*, op. Cit.
659 *Future Generations vs. Ministry of Environment and Others*, N. 11001-22-03-000-2018-00319-01, Bogota, Supreme Court of Justice of Colombia, 5th April 2018, available at https://www.informea.org/sites/default/files/court-decisions/Colombia%20-%20Future%20Generations%20v%20Ministry%20of%20Env%20and%20Others_0.pdf

year. This means that the State has a duty to protect, conserve, maintain, and restore the forest.[660]

The Court concluded that the state was not complying with the duty to preserve the environment, and to curb deforestation as established by the Paris Accord in 2015, the repercussions of environmental damages impair fundamental collective and individual rights, such as the right to culture, to life, dignity and to live in a healthy environment.[661] Moreover, it was specified that the duty to protect is not generated by unconditional love for the Earth, but by the fact that the environment is *owned* by the people living in it in a more metaphoric sense, but it must be preserved for the future generations.[662]

This issue, other than in Colombia has been addressed in Ecuador first, and then in Bolivia, where nature rights have been included successfully in the constitutional legislation. The principle of *"Buen Vivir",* or Good Living, summarises Indigenous belief that life is a whole with nature and the environment, insofar it must be safeguarded by humankind. But have the concerning states implemented this principle in good faith or is it just mere political rhetoric?[663]

For what concerns nature rights matter in Bolivia and Ecuador, it is important to acknowledge that thanks to the introduction of the principle of Sumak Kawsai, or Buen Vivir, Indigenous traditional beliefs have been emphasised up to becoming important provisions on the basis of which domestic affairs are regulated.[664] But the question many experts posed is: will it favour a more inclusive and respectful approach to environmental protection and Indigenous rights guarantee? The period in which the principle of Buen Vivir has been most used in public policy plans and international from 2009 to 2013, which corresponds to the period of the presidency of Correa in Ecuador and Morales presidencies in Bolivia.[665] But with the following presidencies Buen Vivir was not any more part of the national policy plans.

660 *Future Generations vs. Ministry of Environment and Others*, N. 11001-22-03-000-2018-00319-01, op. Cit.
661 Ibidem.
662 Ibidem.
663 R. LALANDER, *Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador*, Iberoamerican Journal of Development Studies, 2014, Vol. 3, N. 2, p. 148-173.
664 R. SERRANO, *The Rights of Nature. Theoretical and Practical Analysis, the Ecuadorian Perspective*, op. Cit.
665 Ibidem.

Does it represent a potential solution for protection and the establishment of duties with regards to the Amazon Rainforest? Certainly, the project to implement Indigenous customary law to national affairs – in particular to the exploitation of natural resources – is a signal that Indigenous rights and the future of the Amazon have been taken seriously.[666] However, in the vision of the IACtHR this an example of good practice in terms of compliance with Indigenous rights to culture, sustainable use of resources and healthy environment.[667]

The court jurisprudence may help better understand Indigenous law principles, such as *Buen Vivir*, and how positive can it be if applied to national issues related to the forests – and to the environment protection in general. It helped to understand and implement the perspectives of Indigenous peoples and the customary principles, and this is a good example of the efforts to change the current system of exploitation of natural resources.[668]

666 R. LALANDER, *Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador, op. Cit.*
667 Inter-American Court Of Human Rights, *Advisory Opinion Oc-23/17, The Environment And Human Rights*, op. Cit.
668 Ibidem.

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