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The Rights of Indigenous Peoples

A focus on Latin America

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Abstract

La presente ricerca si prefigge di comprendere non solo la posizione internazionale, ma anche nazionale, che i popoli indigeni attualmente occupano in vari paesi latinoamericani. Partendo da un'analisi dei diritti umani e dei numerosi strumenti internazionali rivolti alla protezione e sviluppo degli stessi, il principale obiettivo di tale studio è quello di fornire al lettore la possibilità di verificare se realmente, nel caso dei popoli indigeni del Sud America, i diritti umani siano rispettati o se la complicata e, a volte, rugginosa macchina dei diritti umani non risulti in grado di fornire protezione a tali popolazioni. Si prenderanno in considerazione gli sviluppi delle richieste dei popoli indigeni e il processo attraverso il quale la comunità internazionale ha affrontato il problema del riconoscimento dei diritti di tali popoli, attraverso un' analisi di quelli che sono i documenti internazionali concernenti tali popolazioni e come, gli stessi popoli indigeni siano stati in grado di far fronte a realtà avverse e contrarie all'effettivo riconoscimento dei loro diritti. Infatti, come la storia ci mostra, i popoli indigeni sono stati spesso considerati semplici gruppi di individui, etichettati a volte come selvaggi, che dovevano esser integrati nel contesto nazionale, dapprima, e in quello internazionale poi, dimenticando in tal modo le loro peculiarità e culture.

Focalizzando la nostra attenzione sui diritti umani, possiamo affermare che il grande passo avanti fatto dalla comunità internazionale per il riconoscimento di tali diritti è rappresentato dalla redazione della Dichiarazione Universale dei Diritti Umani del 1948, seguita successivamente da due importanti convenzioni, la Convenzione sui diritti civili e politici e la Convenzione sui diritti economici, sociali e culturali dell'uomo, entrate in vigore solamente nel 1976, dopo venti lunghi anni di modifiche e trattative tra stati. Indubbiamente, i trattati e i documenti internazionali riguardanti i diritti umani sono numerosi e, nel caso dei popoli indigeni, uno dei documenti fondamentali risulta essere la Convenzione OIL (Organizzazione Internazionale del Lavoro) numero 169 del 1989, come anche la più recente

Dichiarazione delle Nazioni Unite sui Diritti dei Popoli Indigeni del 2007. Oggi, secondo vari esperti, i diritti umani, che vengono considerati universali, interdipendenti e indivisibili tra loro, devono essere garantiti e rispettati soprattutto per assicurare una reale possibilità di sviluppo agli individui o alle comunità. Tuttavia, come potremmo dimostrare nel caso dei popoli indigeni, il rispetto dei diritti umani viene spesso accantonato per rispondere a più impellenti interessi nazionali, economici o politici. Cassese, inoltre, evidenzia una notevole lentezza dell'apparato dei diritti umani e una considerevole confusione che caratterizza quelli che sono gli organi di controllo sul rispetto dei diritti umani, quali, per esempio, la Corte Internazionale di Giustizia e i vari tribunali internazionali. Avremo modo, trattando la questione dei popoli indigeni, di verificare se realmente la comunità internazionale sia in grado di assicurare il rispetto di tali diritti.

Considerando più da vicino i popoli indigeni del Sud America, la nostra ricerca si focalizzerà dapprima sul periodo della colonizzazione, caratterizzato da un'indiscussa supremazia dei colonizzatori spagnoli sulle popolazioni indigene ed originarie di quelle nuove terre. Indubbiamente, come sostiene la maggior parte degli studiosi e degli esperti, il contatto spagnolo con quelle popolazioni indigene determinò la parziale scomparsa di tali comunità, a causa di malattie, razzie degli stessi spagnoli, massacri di gruppo. La colonizzazione di quel nuovo mondo presto mostrò la sete spagnola di oro e di tutte le risorse che quelle terre incontaminate potevano offrire. I popoli originari del nuovo mondo vennero brutalmente impiegati nel lavoro manuale, nelle miniere o nelle piantagioni. La corona spagnola, data la lontananza, faticava ad avere un reale controllo sui colonizzatori. Critiche pesanti arrivavano quindi dal nuovo mondo, attraverso testimoni e rappresentanti del clero, i quali sostenevano che l'obiettivo primo dei colonizzatori non fosse certamente la diffusione della religione cattolica, come scritto nelle numerose bolle papali. Inoltre, molti testimoni criticavano pesantemente il meccanismo dell'*encomienda,* primaria causa di morte di milioni di individui. La corona, preoccupata dalle testimonianze, decise di redarre un gran numero di documenti reali, i quali avevano come scopo quello di garantire ai popoli originari di quelle terre livelli basici di dignità e libertà. Alcuni esempi di documenti reali sono Las Leyes de Burgos del 1512, las

Ordenanzas de Granada del 1526, Las Leyes Nuevas de Indias, la cui stesura fu fortemente influenzata dai racconti a Carlo V di Fra Bartolomé de Las Casas, ed infine la cosiddetta Recopilación de las Leyes de los Reynos de las Indias del 1680. Nonostante la prolifera documentazione legislativa che aveva come obiettivo quello di fermare le stragi dei colonizzatori, possiamo affermare con una certa sicurezza, d'accordo con vari esperti, che la corona non ebbe mai un reale controllo sulle colonie del nuovo mondo, ed è da qui, da questi anni, che inizia la sottomissione dell'indigeno.

Dopo uno studio approfondito della questione indigena sotto le primissime fasi della colonizzazione spagnola, la ricerca si focalizzerà sull'approccio della comunità internazionale al problema indigeno. Alla base della difficile determinazione, a livello internazionale, di tali popoli sta proprio l'apparente impossibilità di trovare una definizione unica e chiara che rispecchi la realtà degli indigeni. È innegabile infatti che molte definizioni fornite dalla comunità internazionale per individuare questi popoli siano state rigettate dalle comunità indigene stesse o dagli stati che essi popolano, mentre altre definizioni sono state scartate perché discriminanti nei confronti di tali popoli. Inoltre, non risulta sempre chiara la differenza che esiste tra questi popoli e le cosiddette minoranze. Secondo alcuni esperti, infatti, questi popoli possono essere definiti come minoranze, mentre, per altri, queste comunità devono essere considerate come gruppi etnici, i quali presentano oltre alle loro peculiarità, un forte, storico e generazionale attaccamento alle loro terre, elemento questo che, secondo Martínez Cobo, Relatore Speciale della Sottocommissione delle Nazioni Unite per la prevenzione della discriminazione e la protezione delle minoranze, differenzia tali comunità indigene dalle minoranze. Nonostante innumerevoli difficoltà per trovare una definizione universale per i popoli indigeni, sono molte le organizzazioni internazionali che hanno formulato una loro propria definizione. Ciononostante, la definizione di popoli indigeni che viene considerata come la più esaustiva a livello internazionale è sicuramente quella fornita da Martínez Cobo.

Una volta affrontata la complicata questione della definizione dei popoli indigeni, lo studio si focalizzerà su come la comunità internazionale, in particolare nell'ambito delle Nazioni Unite, della Banca mondiale e dell'Unione Europea, abbia

affrontato le estreme condizioni di sottosviluppo in cui tali comunità autoctone vivono. Lo studio sottolineerà l'importanza del ruolo rivestito dalle Nazioni Unite con la difficile stesura della Dichiarazione dei Diritti dei Popoli Indigeni del 2007, evidenziando anche quali siano, oggi, le agenzie delle Nazioni Unite che più si occupano di far rispettare i diritti umani, e quindi anche i diritti dei popoli indigeni, a livello internazionale. La nostra attenzione si focalizzerà inoltre sulla Convenzione OIL numero 169, considerata uno dei documenti più importanti riguardanti le comunità indigene. L'attenzione verrà anche richiamata su alcune altre organizzazioni, quali per esempio l' Organizzazione degli Stati Americani, e sul fondamentale ruolo giocato dalla Corte e dalla Commissione Interamericana per la protezione dei popoli indigeni, l' Indigenous Peoples Fund e l'Unione Europea.

Spostandoci da un piano internazionale a un piano puramente nazionale, lo studio si incentrerà sull'America Latina, prendendo a campione due particolari stati, Ecuador e Bolivia e il loro approccio alle comunità indigene. È necessario specificare che negli ultimi decenni, in particolar modo in America Latina, sono stati molti gli stati testimoni di numerose rivolte e manifestazioni da parte delle comunità indigene, intenzionate a rivendicare il loro diritto all'autodeterminazione, considerato da numerosi esperti come il punto di partenza per lo sviluppo di tutti gli altri diritti che interessano tali comunità. Il riconoscimento del diritto all'autodeterminazione in vari documenti internazionali, come le Convenzioni ONU sui diritti civili e politici, economici, sociali e culturali, la Dichiarazione ONU sui Diritti dei Popoli Indigeni o la Convenzione OIL, ha spinto molte comunità indigene a rivendicare questo loro diritto, il cui effettivo riconoscimento alle comunità indigene fu largamente contestato da vari stati durante le sessioni del Gruppo di Lavoro delle Nazioni Unite sulle Popolazioni Indigene. Nel contesto latinoamericano, il percorso svolto per un reale riconoscimento del diritto indigeno all'autodeterminazione parte da una soppressione culturale dei popoli indigeni sotto i regimi militari negli anni '30 del XX secolo, successivamente negli anni sessanta i popoli indigeni subiscono lo sviluppo del cosiddetto *indigenismo integracionista,* il cui principale scopo era quello di integrare i popoli indigeni allo sviluppo della nazione, dimenticando i loro costumi e le loro culture. Inoltre, tale filosofia

diventerà negli anni settanta un mero processo di assimilazione e di acculturamento di tali comunità, che, attraverso dichiarazioni (Declaración de Barbados I e II) e la creazione di varie organizzazioni ed istituzioni, inizieranno a far sentire la loro voce per un reale, effettivo e totale riconoscimento del loro diritto all'autodeterminazione.

L'attenzione, come detto prima, verrà focalizzata particolarmente su due stati, Ecuador e Bolivia. L'Ecuador, come i fatti dimostrano, fu il primo stato capace di integrare i popoli indigeni attraverso un processo di integrazione multiculturale e multinazionale, con il riconoscimento di tali popolazioni direttamente con la riforma della costituzione del 2008 sotto il governo di Rafael Correa. Per quanto concerne il caso boliviano, invece, lo studio si focalizzerà su questo stato proprio perché, secondo dati recenti, la Bolivia è la nazione sudamericana che presenta la maggior percentuale di popolazione indigena, ben il 60 per cento del totale. Anche in questo caso, come nel caso dell'Ecuador, si analizzerà come Evo Morales, attuale presidente della repubblica boliviana, sia stato in grado di garantire una certa protezione a tali comunità e come sia avvenuto, tramite la travagliata riforma della costituzione boliviana del 2009, il riconoscimento del diritto all'autodeterminazione a queste comunità. Infine, si cercherà di richiamare l'attenzione del lettore sul possibile ruolo che le autonomie regionali all'interno degli stati dell'America Latina possono svolgere. Infatti, il gran numero di manifestazioni e rivolte indigene di fronte ai palazzi del potere centrale, devono far sì che i piani alti della politica latinoamericana inizino a pensare ad una riformulazione della democrazia, che sia appunto una democrazia in grado di integrare, e non di soffocare, in un'ottica multiculturale, tali comunità. Insomma, attraverso queste manifestazioni, i popoli indigeni spingono verso una democratizzazione della democrazia, che sappia innanzitutto rispettare quella storica e naturale asimmetria che esiste tra le popolazioni indigene e la maggioranza della popolazione nazionale.

Per concludere, questa ricerca affronterà il diritto fondamentale dei popoli indigeni alle loro terre ancestrali, considerate per lunghi secoli come terre vacanti e quindi possibili oggetti di occupazione e colonizzazione da parte di soggetti esterni o soggetti interni allo stato stesso. Il lettore avrà modo di comprendere l'importanza e il valore delle terre sulle quali le comunità indigene vivono e sulle quali

sviluppano tutte le loro attività economiche, religiose, sociali e culturali in genere. Pertanto, come sottolineato da vari esperti, il diritto al territorio dei popoli indigeni deve essere considerato alla stregua del loro fondamentale diritto all'autodeterminazione. Infatti, è proprio sui loro territori e sulle loro terre natie che i popoli indigeni possono realmente mettere in pratica processi di autodeterminazione. Tuttavia, come si avrà modo di approfondire, i territori dei popoli indigeni, sia nel passato, sia nel presente, sono spesso, sfortunatamente, oggetto di interesse di compagnie multinazionali del petrolio o del legname che, tramite l' appoggio dei governi, riescono ad ottenere permessi per la distruzione e deforestazione dei territori popolati da queste comunità, come probabilmente succederà nel caso del parco nazionale Yasuni in Ecuador. Rimane quindi da chiedersi se l'effettivo riconoscimento costituzionale di questi popoli da parte di molti stati del Sud America ed il gran numero di trattati internazionali sui diritti umani, sulla protezione ambientale e sui diritti dei popoli indigeni stiano realmente funzionando e se siano realmente in grado di proteggere queste comunità da una realtà dominata da un incontrollabile sviluppo che non si può di certo definire sostenibile. Ciononostante, i popoli indigeni continueranno probabilmente a far sentire la loro voce, combattendo, ancora una volta, contro possibili episodi di etnocidio.

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"Tutte le cose che sono accadute nelle Indie, dalla loro meravigliosa scoperta
e fin dagli inizi, quando degli spagnoli vi si recarono pensando
di prendervi dimora alcun tempo, e poi tutto quel che ne è seguito fino
ai giorni nostri, sono stati eventi così straordinari e sotto ogni aspetto
incredibili per chi non li abbia visti, che sembrano aver oscurato e ridotto
al silenzio, sprofondato invero nell'oblio, tutti quelli, per quanto memorabili,
che nei secoli passati si son visti e uditi nel mondo.
Vi sono tra queste cose gli scempi e i massacri
di genti inoffensive, lo spopolamento dei villaggi,
delle provincie e dei regni dove quei crimini
sono stati perpetrati, e altri fatti non meno spaventevoli[1]*."*

1 DE LAS CASAS, B., *Brevissima relazione della distruzione delle Indie*, Mondadori, Milan, 1987, page 23.

Introduction

Human rights, which are today thought to be an essential issue that has to be taken into consideration while dealing with communities and people in general, have begun being deemed as universal and fundamental since the end of the Second World War, with the consequent redaction and elaboration of a large number of international documents concerning them. In fact, currently, several are the treaties dealing with human rights and the obligation of their respect. However, as evident, in a large number of cases, unfortunately, human rights have not been, in the past, and are not today respected. Focusing on indigenous peoples, who are thought to be more or less three hundred million people all around the world according to data of international cooperation organizations and researches of United Nations agencies, they have been forced and are today sometimes obliged to renounce to their own rights and, furthermore, in some other cases, they are forced to leave their ancestral homelands due to economic interests of states, as we will have the opportunity to prove, for instance, dealing with the case of Ecuador[2].

For this reason, in the last decades, at a global level, a specific attention has been focused on indigenous peoples, on their real conditions and on their rights in order to improve and increase their participation not only in the international system, but also in the national context in which they live. The protection of indigenous groups has increasingly seemed to be one of the most problematic post-Cold War issues that states and international institutions and organizations have

2 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

been forced to face. Today, as a great quantity of international treaties and declarations show and explain, indigenous peoples are considered as communities that have their own rights, for instance, the right to self-determination, to land and territory, to culture, as reported, for example, within the ILO Convention No. 169 (1989) or within the UN Declaration on the Rights of Indigenous Peoples (2007). The recognition of all these rights have as main objective the complementation and, in some cases, the achievement of the principle of equality, which all human beings should be beneficiary of. A specific role in order to achieve this result has been also played by those states, especially Latin American states, as well as international cooperation agencies and international organizations, which had and keep having a direct connection with indigenous peoples and their communities. Consequently, those states have driven their attention on all those essential indigenous rights, for which indigenous peoples were calling, such as all those rights related particularly to the territorial ownership, economic development, identity preservation, cultural heritage, environmental protection and self-determination.

As claimed before, one of the most important right for indigenous peoples undoubtedly is the right to self-determination, considered by a large number of experts as the base for the development of all the other indigenous rights, as well as the right to dispose of their ancestral and traditional lands and territories. In the following pages, we will especially take into consideration those indigenous peoples that currently populate Latin America, probably the region of the world with more existing indigenous communities, whose discovery, conquer and colonization after the arrival of Columbus immediately showed their condition of extreme poverty and their numerous and different cultural customs[3]. Consequently, taking into account all the peculiarities, necessities and diversities of indigenous communities all around the world, today international actors and organizations ought to take into account and focus their attention on the fact that, one of the most important resources, probably the only material one for indigenous peoples, is the environment (*Pacha Mama*, the great Mother Earth), on which their own survival

3 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

and their own cultures depend[4]. On the other hand, with regards to the right to self-determination, as the international law underlines, each group of people has the right to decide for its own, without being obliged to be controlled or governed by another community or group of people without its approval[5]. Unfortunately, as we will prove, the largest part of the history of indigenous peoples within Latin America has been characterized by the control and subjugation of other peoples, approximately starting from the discovery of the Americas in 1492. However, today, the situation for indigenous peoples seems to be partially changed in terms of self-determination within Latin America, in fact, several Latin American countries have recognized such right of indigenous communities living within national territories from a legislative point of view, but, as we will notice, the practical recognition of this right is unfortunately more complicated and slower than the legislative or constitutional one. Moreover, considering the fundamental human right to self-determination, in the case of indigenous peoples, it has to be thought as closely related to the right to territorial ownership of such communities, as the reader will have the opportunity to better understand within the following pages.

According to many experts at international law, rights related to indigenous peoples, as well as human rights in general, have to be deemed, interpreted and put in practice in a complementary way, such as the right to self-determination and the right to territorial ownership, therefore, such rights have to achieve an improvement of standards of life style and levels of dignity for such communities[6]. For this simple reason, every human being has to have the opportunity to dispose of these rights, considering them, in this context, as universal, interdependent and fundamental. Undoubtedly, although a great quantity of new international instruments in favour of indigenous peoples have already been approved and are currently in force, also today, in some cases, indigenous peoples in Latin America keep being forced to renounce to their lands and territories and to their own rights, as we will prove in

4 BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

5 FOCARELLI, C., *Lezioni di Diritto Internazionale*, CEDAM, Verona, 2008, page 339-359.

6 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.
ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.

the following pages focusing specifically our attention on a small part of the Amazonian region.

Furthermore, it seems to be interesting to explain and illustrate the new ways of cooperation with indigenous peoples, how national and international legal instruments work and consequently prove whether they are effectively working, and, moreover, we will wonder which are the results that they have already achieved concerning self-development, self-determination and territorial ownership rights of indigenous communities. Furthermore, we will also focus a specific attention on Latin American indigenous movements, developed especially during the second half of the XX century and early XIX century, which have allowed indigenous communities to achieve the recognition of their rights, despite the fact that they are today not often respected. In conclusion, according to a large number of experts at indigenous issues, the development and the survival of these communities seem to be possible not only if states and international entities recognize and promote their rights, preventing possible abuses, but also if there is a process of a real and complete recognition of the existence of these communities, allowing them, in such a way, to enjoy their essential rights and to live in peace within their ancestral homelands[7].

Finally, in order to summarize, within the following pages, after a general history of human rights and a brief explanation of the human rights concept, a specific attention will be focused on Latin America and on rights of indigenous peoples living there. We will consider the period of the colonization of Latin America by Spanish conquerors, focusing the attention also on some specific laws and regulations redacted especially for the control of indigenous peoples and their administration in that period, such as the *Leyes de Burgos,* the *Leyes de los Indias,* the so-called *Recopilación de 1680,* and others. Moreover, we will take into account

7 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.
ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000.
ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.
GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006.

all the improvements of the international community regarding the recognition of indigenous communities and their rights, trying not only to provide a definition of indigenous peoples, but also trying to take into consideration, more specifically, some international instruments concerning indigenous peoples and their rights. To conclude, we will focus a particular attention on two fundamental rights of indigenous peoples, the right to self-determination and the right to territorial ownership, providing in this case some examples of national abuses or claims coming from Latin American indigenous communities. The reader will have the opportunity to understand not only the difficulties that the international community might face while dealing with indigenous issues, but also all the difficulties that indigenous communities themselves have to face in order to make them be recognized as independent communities, with their own specific rights and not only as groups of *savages* that simply ought to be civilized and integrated into the national and international context. In other words, the main objective of this research is to give a general overview of the current indigenous situation, with a specific focus on Latin American indigenous communities, especially Ecuadorian ones, passing through an overview of the institutional organization of the Spanish colonization, listing current different definitions of indigenous peoples, explaining current different approaches of international organizations and concluding by taking into consideration those processes and indigenous movements that allowed the recognition of the rights to self-determination and territorial ownership of indigenous communities. Concluding, we want to report just some sentences pronounced by Marta Silva Vito Guaraní, a Brazilian Guaraní representative, in order to make the reader understand what we are going to deal with and in order to anticipate some specific concepts. She stated: “[t]he lands of my people were occupied by large landowners, who have lands that go as far as the eye can see, full of well-treated and well-fed cattle. On my land, cattle are worth more than Indians. Many Indians in Mato Grosso do Sul are leaving their communities and moving to urban centers. They go to live in the slums, and little by little they start losing their cultural identity and become 'nobodies'. […]. Land is culture and culture is life for us. […]. We are not enemies, we want to live in peace in this country, with enough

land for all, white, black, and yellow. Along with me, all the Indians are dreaming of this moment[8]".

8 LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208, page 188-189.

I CHAPTER

Human Rights, development and protection

1.1. Concept of Human Rights

A large number of current written international instruments regarding human rights are undoubtedly inspired to ancient documents, such as the French Declaration of 1789 or the United States Declarations of 1776 and 1789, which are thought to be the first important texts dealing with human rights. Within these three 'revolutionary' documents, as Cassese defined them, the individual was considered as 'human' only if he was free, considered equal to other individuals and with his own right to property and his other fundamental freedoms. Furthermore, we have to remember the fact that in a great number of ancient documents, human rights were considered just for their individual aspect. In fact, the concept of collective rights, crucial in the case of indigenous peoples, appeared much later, more or less during the second half of 1800[9]. As a result of an historical, as well as of an ideological process, today human rights are deemed to be faculties that are provided not only to mere individuals, but also to human groups, in order to guarantee determinate behaviours by other individuals, public and private institutions and organizations, with the objective to assure to everyone and to every group a standard and minimum level of dignity[10].

As already claimed, the so-called human rights are generally deemed to be universal due to the fact that they affect every individual and group of people, as it can be easily understood reading the first article of the Universal Declaration of Human Rights (UDHR) of 1948:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood[11].

As a consequence to article 1, article 2 underlines the fact that all people are beneficiaries of all the rights and freedoms listed in such Declaration:

9 CASSESE, A., *I diritti umani oggi,* Editori Laterza, Bari, 2007.
10 ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.
11 Article 1, Universal Declaration on Human Rights, 1948.

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty[12].

Moreover, according to article 7 of the same Declaration, "all peoples are equal before the law and entitled to the right to an equal protection by the law[13]". Therefore, it is undeniable that several articles of the Universal Declaration, as for instance article 7, aim to generate a strong anti-discrimination position. Consequently, the same goal was tried to be achieved in other several International Human Rights Treaties, such as, for example, those ones redacted by the Human Rights Committee, the so-called International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in numerous regional Charters on Human Rights redacted in different parts all around the world.

It seems to be important, as reported within the introduction, to underline the fact that human rights have three main aspects. Firstly, they are generally considered and thought to be universal, secondly, indivisible, and finally, interdependent[14]. Considering the first adjective that characterizes human rights, they are universal because they affect every individual or group of people. The universal aspect of human rights is also highlighted in the title of the Declaration of Human Rights of 1948, whose adjective used to define it was, in fact, *universal.* On the other hand, regarding the aspects of indivisibility and interdependence, human rights are thought to be equally important and fundamental. According to Hubert Wieland Conroy, Minister Counsellor in the Permanent Mission of Peru to the United

12 Article 2, Universal Declaration on Human Rights, 1948.
13 Article 7, Universal Declaration on Human Rights, 1948.
14 ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.

Nations in Geneva, the concept of indivisibility underlines the unity of human rights, while interdependence makes possible the inter-influence among rights, therefore, when one changes, all the others are positively or negatively affected by such change. As Nicolás Angulo Sánchez wrote, taking as an example the right to development, also considered to be a universal human right, it is undeniable that it is interdependent on the others, in fact, the elimination or non-respect of one of the fundamental human rights affects, in this case, the possibility of a real development [15].

With regards to the *universal* aspect of human rights, it seems to be interesting to describe another point of view regarding this precise aspect of such rights. Despite the fact that the majority of international experts at international law and human rights defined these fundamental rights as *universal*, there are other experts arguing that human rights are not so universal as reported in a great quantity of manuals concerning international law. Human rights, probably, should today be better thought as regional rights, in fact, as Cassese underlines, if human rights were effectively universal, there would not be so several regional Charters concerning human rights in different parts of the world. For instance, as evident, Europe has its own Human Rights Charter, as well as Africa or Arab countries[16]. Nevertheless, as the researcher Jennifer Schirmer states, today several anthropologists agree with the fact that we should be suspicious of the pretensions of every philosophy dealing with the universality of human rights, especially due to the fact that there is such a great variety of cultural conceptions and forms by which the world is organized and perceived. In other words, anthropologists argue that the universalistic conceptualization of human rights errs because human rights deal with cultural contexts, despite the fact that some commonalities in the field of human rights need obviously to be established. Moreover, Jennifer Schirmer wonders whether such universalism of human rights has its origin in western values, imposing in such a way western concepts and conceptions to other people and to other cultures all around the world[17]. Finally, all these considerations may make the great number of

15 ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.
16 CASSESE, A., *I diritti umani oggi,* Editori Laterza, Bari, 2007.
17 DOWNING, T. E. and KUSHNER, G., *Human rights and anthropology,* Cultural Survival, Inc.,

international actors and jurisprudence think about the real *universality* of human rights and fundamental freedoms. At this point, as suggested by a large number of anthropologists, we should wonder whether the Universal Declaration of Human Rights is effectively cross-culturally meaningful.

On the other hand, concerning the *interdependent* aspect of human rights, in order to show how these rights are related among them, it seems to be useful to report what the General Assembly explained in the Declaration on the Right to Development (1986). This article can make the reader easily understand how human rights are really closely interconnected among them:

> All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development[18].

1.2. Crucial documents and conferences on Human Rights

The historical context in which human rights spread and their internationalization developed was around the end of the II World War[19]. In fact, in 1944, through the Declaration of Philadelphia, it was decided to restart and reorganize all the activities of the International Labour Organization – ILO, which was created in 1919, and, with reference to fundamental rights and freedoms, within the Declaration it was reported that:

> All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity[20].

Cambridge, 1988.

18 Article 2.2, Declaration on the Right to Development (1986)

19 CASSESE, A., *I diritti umani oggi,* Editori Laterza, Bari, 2007.

20 Declaration of Philadelphia (International Labour Organization-1944)

Another important step towards the respect and recognition of human rights, apart from the Declaration of Philadelphia, was taken after the US President Franklin Delano Roosevelt, the British Prime Minister Winston Churchill, and the Russian President Joseph Stalin met at Yalta and agreed with the creation of the United Nations organization. The consequent document that was formulated, the United Nations Charter (1945), was considered by a large number of experts and international actors as a guarantee, for that time, of the recognition of human rights. However, the Conference of San Francisco in 1945 saw, on one side, several Latin American states, such as Brazil, Colombia, Chile, Cuba, Dominican Republic, Ecuador, Mexico, Panama, Uruguay, and other countries, such as Australia, New Zealand and Norway, which firmly supported and highlighted the importance of the international respect of human rights, while, on the other side, the Conference saw the most powerful countries that, in spite of their conviction that human rights were essential and fundamental and had to be respected, did not agree with a possibility of an increasing power of the United Nations organization. At this point, the reader can easily understand that the idea of human rights in the post-war period, apart from being influenced by political reasons, was not so clear, and, moreover, states, during the conference, presented a large number of discordant conceptions and opinions[21].

Consequently, in order to eliminate the increasing number of discrepancies and different opinions among states, the General Assembly opted for the creation of a specific international document on human rights. For this reason, the UN Economic and Social Council, as asked by the General Assembly, instituted the Human Rights Committee, composed by 18 States, selected among the members of the General Assembly, which decided for the redaction of a Declaration and, successively, for the elaboration of a Convention, as well. The Declaration is a crucial document on human rights that was signed in 1948[22]. This international document is the well-known Universal Declaration of Human Rights. The laborious elaboration of such Declaration showed the participation of a large number of countries with different

21 CASSESE, A., *I diritti umani oggi,* Editori Laterza, Bari, 2007.
22 KEANE, D. and McDERMOTT, Y., *The challenge of human rights, past, present and future,* Edward Elgar Publishing, Cheltenham (UK), 2012.

systems of governance, different political, religious, cultural and ideological systems. Considering this vast participation, the Declaration aimed to incorporate diverse habits and values, trying to focus the attention on different religious, cultural, political aspects, as well as on common values among states. However, it is undeniable the fact that the final text of the Declaration was completely influenced by those states deemed to be particularly capitalism-oriented, which gave in such a way more importance to civil and political individual rights than to those economic, social and cultural ones[23]. Finally, the Universal Declaration was adopted by the General Assembly of the United Nations with 48 votes in favour and 8 abstentions.

The Universal Declaration of Human Rights incorporates all those, that for that time, could be defined as human rights, included in more or less thirty simple articles. The first and the second article are related to the universal concept of human rights, article three to article twenty-one deal with civil and political rights, such as the right to life, personal security, freedom of opinion, expression and others. On the other hand, all economic, social and cultural rights are listed from article twenty-two to article twenty-seven. Before the Declaration was adopted, Eleanor Roosevelt, who had previously presided over the Committee on Human Rights, stated that despite the fact that the adoption of the Universal Declaration would have been a great step towards the development of human rights, in order to be efficient and complete, it had been essential that it would have been followed by a Covenant on Human Rights, thought in the form of a treaty, which had to present, moreover, measures for implementation of such human rights[24]. The decision of a Covenant was also supported by a great number of states, which were convinced that some of the principles expressed within the Declaration should have been deemed as obligatory in order to make them be surely respected by the international community and by single states. Consequently, as remembered before, the Human Rights Committee (UN) decided for the elaboration of two international treaties, one regarding civil and political rights and the other one dealing with economic, social and cultural rights. Finally, due to the escalating Cold War and the great number of

23 ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.

24 KEANE, D. and McDERMOTT, Y., *The challenge of human rights, past, present and future,* Edward Elgar Publishing, Cheltenham (UK), 2012.

ideological conflicts between western capitalist democracies towards communist regimes, the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights entered into force only in January 1976, after more or less twenty years of elaboration and modifications. Concerning their contents, the International Covenant on Civil and Political Rights (ICCPR) deals with, for instance, the rights to judgement, the right to liberty and security of person, the prohibition of torture and freedom of opinion. The International Covenant on Economic, Social and Cultural Rights (ICESCR), on the other hand, deals with the right to work and the right to working conditions, the right to strike, the right to take part to cultural life, the right to enjoy and utilize in a fully way natural wealth and resources, and others similar rights.

In addition to these important documents on human rights, which have been taken into consideration above, the Universal Declaration on Human Rights, the Declaration of Philadelphia and the two Covenants, there are other several declarations and conventions concerning human rights. For instance, we ought to remember the International Convention on the Elimination of all Forms of Racial Discrimination adopted in 1965, which prohibits discrimination and exclusion for racial reasons, the Convention on the Elimination of all Forms of Discrimination against Women adopted in 1979, which aims to protect women against exclusion and discrimination. Another important convention is undoubtedly the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, adopted in 1984, which prohibits every form of torture and cruel treatment. Others are, for example, the Convention on Children Rights, adopted in 1989, the International Convention on the Protection of the Rights of all Migrant Workers, adopted in 1990, as well as the Convention for the Prevention and Punishment of the Crime of Genocide and several others[25]. As we can perfectly understand, international documents on human rights are numerous and all have the same objective, they aim to defend and spread human rights all around the globe.

25 FOCARELLI, C., *Lezioni di Diritto Internazionale*, CEDAM, Verona, 2008 page 339-359.

Among the most important conferences, it seems to be fundamental to remember the First International Conference of Human Rights that took place in Tehran in 1968, where it was underlined that it is a fundamental responsibility of the international community to guarantee the achievement of a minimum level of welfare, in order to allow people to enjoy human rights and crucial freedoms all around the world. Moreover, this conference also highlighted the role played by some causes for the non-respect of human rights, such as colonialism, racial discrimination, apartheid, lack of literacy, poverty. Another important Conference was that one that took place in Vienna in 1993, which has been the Second International Conference on Human Rights, during which it was adopted not only a Declaration on Human Rights, but also a specific Plan of Action, specifically redacted taking into consideration and focusing the attention on the Universal Declaration on Human Rights of 1948[26]. Both documents, the Declaration and the Plan of Action, aimed to built a plan in order to internationally increase the level of application of human rights. In addition, the Conference in Vienna is particularly important also for the attention that was driven to those human rights related to the most vulnerable groups and categories, such as women, indigenous peoples, refugees, migrants, children, workers and disable peoples. At the same time, the Declaration considered the level of poverty and the social exclusion as violation of the human dignity and it aimed to favour an increasing participation of poorer social classes in political decisions. As already said before, the majority of these documents, conferences and instruments aim to drive the attention of the international community particularly on specific groups of people, such as women, children, young people, old people, disable people, migrant workers, minorities and indigenous peoples.

With regards to women, they have to have the opportunity to access to public life, as well as to all the economic and social aspects of social life. As a result, probably the most important Convention redacted on the field of gender issues has been the Convention on the Elimination of all Forms of Discrimination against Women adopted in 1979. Considering children, today, unfortunately, more than ten

26 ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.

millions children die every year before being five years old and a large number of them can not enjoy basic levels of development, basic levels of nutrition and health care. In 1989, the General Assembly of the United Nations adopted the Convention on Children Rights, which is in force from 1990, trying to increase in such a way the protection and promotion of all the rights of children that national governments have to take into consideration. Regarding old people, the United Nations system also focused its attention on this category and redacted, as a consequence, the International Plan of Action on Ageing in 1982, in order to decrease all the difficulties or obstacles that old people could find not only in private, but also in public life. With reference to minorities, today people part of so-called minorities are considered to be more or less one thousand millions all around the world, victims of discrimination, marginalization and social exclusion, as well as victims of violence. Among documents and treaties regarding minorities, for instance, it seems to be fundamental to remember the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention against Discrimination in Education of UNESCO, as well as the Declaration on Race and Racial Prejudice of UNESCO. Finally, considering indigenous peoples, it is thought that there are more or less five thousand indigenous communities all around the world and it has been the International Labour Organization that, for the first time, has taken into consideration the situation and condition of these communities and adopted, consequently, the Convention on Forced Labour in 1930. Today, the most important international instrument regarding indigenous peoples is the Convention No. 169 of the International Labour Organization[27], which will be better taken into account in the following pages.

27 ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.

1.3. Principal Human Rights, some examples

In international law, some specific rights play a special role, especially considering the fact that their effect can never be suspended. Apart from the fact that they are part of the international customary law, they have become principles of *jus cogens*, as to say, they can not, in any case, be eliminated through treaties[28]. In this sub-chapter we will analyse some of these rights, which affect every individual and are deemed to be probably the most known among human rights, such as the right to life, the right not to be victim of torture and cruel treatments, the right not to be held in slavery or servitude and, finally, the right of non-discrimination (prohibition of discrimination). Moreover, international law and international actors assure, as well, the respect of other specific human rights, which will be analysed in the following pages, such as, just for instance, the right to a private and familiar life or the right to environment.

a) *The right to life*:

The right to life is specifically well explained within article 3 of the UN Universal Declaration on Human Rights, as well as within article 6 of the International Covenant on Civil and Political Rights (ICCPR) and, moreover, within article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950)[29]. The right to life is deemed to be the most important among human rights, being it the base for the development and realization of all the other human rights. Despite the fact that a large number of international conventions underline the importance of the right to life, in several cases it has not been taken into consideration in this context the problem of death penalty. In fact, what could be thought as contradictory by the reader might be the fact that,

28 CASSESE, A., *I diritti umani oggi,* Editori Laterza, Bari, 2007.

29 MARIÑO MENÉNDEZ, F. M., GÓMEZ-GALÁN, M. and DE FARAMIÑÁN GILBERT, J. M., *Los derechos humanos en la sociedad global: mecanismos y vías prácticas para su defensa*, CIDEAL, Madrid, 2011.
Universal Declaration on Human Rights (1948)
International Covenant on Civil and Political Rights (1976)
European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

according to the International Covenant on Civil and Political Rights, if the individual sentenced to death penalty has been condemned in a correct way, the death penalty do not prejudice the fundamental right to life. Keeping dealing with death penalty, within the European context, death penalty is strictly prohibited by article 2 of the Charter of Fundamental Rights of the European Union (2000). On the contrary, article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome-1950) did not absolutely prohibit death penalty but it permitted its use in some specific cases, as we can note by considering the evolution of the two different articles:

Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection[30].

Differently, within the Charter of Fundamental Rights of the European Union, redacted after the European Convention of 1950 and ratified in 2007, the situation completely changed and all those limits of the right to life seemed to have disappeared:

30 Article 2, European Convention on for the Protection of Human Rights and Fundamental Freedoms,Rome, 1950.

Article 2 – Right to life

1. Everyone has the right to life;
2. No one shall be condemned to the death penalty, or executed[31].

b) The right not to be victim of torture and cruel treatments:

According to the international customary law, every state is forced and obliged by a large number of Human Rights Treaties not to use torture, not to allow that torture would be used in its territories and, moreover, all states, recognized as part of the international community, are forced to use all the instruments at their disposal in order to prevent and avoid the use of torture[32]. Firstly, the prohibition of the use of torture is reported within article 5 of the Universal Declaration on Human Rights:

Article 5 of the UDHR

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment[33].

The prohibition of the use of torture is established by the international law and, being a right of *jus cogens*, it can never be suspended or eliminated. The international law protects in such a way one of the most important human rights, the right to life, and restrictions of every kind are not contemplated. Moreover, in case of torture towards an individual, apart from the person object of torture, are considered to be victims of torture all the relatives of the individual, direct victim of torture, becoming the violation in such a way worse. Despite the fact that it is not so clear which is the right difference between torture and cruel treatments, undoubtedly, torture, apart from physical, can be also psychological, as explained in

31 Article 2, Charter of Fundamental Rights, Europe, 2000

32 MARIÑO MENÉNDEZ, F. M., GÓMEZ-GALÁN, M. and DE FARAMIÑÁN GILBERT, J. M., *Los derechos humanos en la sociedad global: mecanismos y vías prácticas para su defensa*, CIDEAL, Madrid, 2011.
FOCARELLI, C., *Lezioni di Diritto Internazionale*, CEDAM, Verona, 2008, page 339-359.

33 Article 5, Universal Declaration on Human Rights (1948)

the definition of torture provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment:

> The intentional infliction of "mental" pain and suffering is appropriately included in the definition of "torture" to reflect the increasing and deplorable use by States of various psychological forms of torture and ill-treatment, such as mock executions, sensory deprivations, use of drugs, and confinement to mental hospitals. As all legal systems recognize, however, assessment of mental pain and suffering can be a very subjective undertaking[34].

Moreover, the obligation to prevent torture forces states, at a global level, not to devolve or send an individual to his or her own original state already knowing that that person will run the risk of being object of torture. Despite the presence of this principle in a large number of international documents, the Convention relating to the Status of Refugees of Geneva (1951), for instance, underlines the possibility for a state to devolve a person to a third state in case of this person could represent a great danger for the state itself. However, as it can be proved, this is completely not contemplated by the Universal Declaration of Human Rights[35].

c) Right not to be held in slavery:

Article 4 of the Universal Declaration on Human Rights reports that:

Article 4 of the UDHR:

> No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms[36].

34 Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment (1984)

35 MARIÑO MENÉNDEZ, F. M., GÓMEZ-GALÁN, M. and DE FARAMIÑÁN GILBERT, J. M., *Los derechos humanos en la sociedad global: mecanismos y vías prácticas para su defensa*, CIDEAL, Madrid, 2011.
FOCARELLI, C., *Lezioni di Diritto Internazionale*, CEDAM, Verona, 2008, page 339-359.
CONFORTI, B., *Diritto Internazionale*, VIII edition, Editoriale Scientifica s.r.l., Naples, 2010, page 199-226.

36 Article 4, Universal Declaration on Human Rights (1948)

In addition to this, within article 8 of the International Covenant on Civil and Political Rights it has been added that "no one shall be required to perform forced or compulsory labour[37]". According to the notion given by some international documents, slavery is the status of those peoples that are considered and thought to be property and at disposal of someone else. Similarly, servitude is the specific condition in which peoples are forced to live without their fundamental freedoms and, consequently, they are forced to work in a condition of slavery for other people[38].

f) Prohibition of discrimination:

As reported before, it was the Declaration of Philadelphia that firstly underlined the importance of the creation of a sense of non-discrimination among people, directly and indirectly. At this point, we could argue that another important human right is the right not to be discriminated for reasons related specifically to gender, race, religion and sexual or political orientation. For instance, the European Union, focusing its attention on this principal human right, recognizes the principle of non-discrimination as a general principle of the Union, considering it as a direct manifestation of the right of equality between peoples[39]. Within article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Union declares that:

Article 14 – Prohibition of discrimination

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status[40].

37 Article 8, International Covenant on Civil and Political Rights (1976)
38 ILO – Convention on Forced Labour, 1930.
39 MARIÑO MENÉNDEZ, F. M., GÓMEZ-GALÁN, M. and DE FARAMIÑÁN GILBERT, J. M., *Los derechos humanos en la sociedad global: mecanismos y vías prácticas para su defensa*, CIDEAL, Madrid, 2011.
40 Article 14, European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome-

As reported within several manuals dealing with international law, the international community recognizes different kinds of discrimination. Beginning by considering gender discrimination, it is fundamental to remember, as done before, the Convention on the Elimination of all Forms of Discrimination against Women (1979). Moreover, within the Treaty of the European Union, in article 2 it is underlined the fact that the Union favours all those values regarding the respect of the human dignity, freedom, democracy, equality and respect of all human rights, including all those rights related to minorities (women, children, indigenous people, etc.)[41]. As a consequence, all states, members of the European Union, are asked to respect them in order to create a society characterized by a sense of pluralism, tolerance, justice and equality. Nevertheless, in article 3.3 of the European Treaty and within article 8 of the Treaty on the Functioning of the European Union, it is reported that the European Union will be ready and willing to fight every kind of social exclusion, marginalization and discrimination in order to favour the social protection and equality between women and men[42]. In addition, the European Charter of Fundamental Rights (2000), within article 23, keeps highlighting the importance of an equality and non-discrimination between women and men in all fields, such as employment or retribution[43].

Regarding discrimination for racial reasons, it is useful and important to remember the International Convention on the Elimination of all Forms of Racial Discrimination (1965), concerning the application of a principle of equality among peoples, without considering their ethnic or racial origins. Another form of discrimination can be that one related to religion and beliefs. In the International Covenant on Civil and Political Rights (New York, 1966), article 18 sets up the principle according to each person has the freedom of opinion and religion, as well as the freedom to choose his or her own religion and manifest his or her own beliefs, in an individual or collective way, in public or private places, only

1950

41 Article 2, Treaty of the European Union (1992)

42 Article 3.3, Treaty of the European Union, Article 8 Treaty on the Functioning of the European Union (1997-1958)

43 Article 23, European Charter of Fundamental Rights (2000)

respecting the limits imposed by the law[44]. According to the European Convention on Human Rights and Fundamental Freedoms (1950), each person has the right to enjoy his or her own religion and each person has the right and freedom to change it. In the European context, with regards to the discrimination for religious reasons, it is fundamental to take into account also the European Charter of Fundamental Rights of 2000, considering articles 10 and 22, related to the freedom of opinion, religion and cultural diversity of each person.

In relation to disable people and possible forms of discrimination against them, it is worth to underline the importance of the Convention on Rights of Disable People (New York, 2006), as well as the European Charter of Fundamental Rights (2000), in which, at the article 26, it is reported that the European Union not only respects, but also protects all the rights of disable people in order to guarantee their personal autonomy, favouring their social and professional integration and their participation in the social and community life[45].

With regards to discrimination for reasons of age, the Convention on Children Rights (1989) is deemed to be one of the mayor instruments, as well as the European Charter of Fundamental Rights (2000), whose article 24 reports that children have the right of being protected, they have the fundamental freedom of opinion and the right to live and stay with their parents. Moreover, children have to enjoy also the right not to be forced to work and they have to be beneficiaries of education processes[46]. On the other hand, considering old people, the European Union, such as the international community in general, respects all the rights of old people, in order to allow them to enjoy basic levels of dignity and the right to take part to the social and cultural life. As remember before, in this case, it is useful to underline the importance of the International Plan of Action on Ageing (1982).

44 Article 18, International Covenant on Civil and Political Rights (1976)
45 Article 26 European Charter of Fundamental Rights (2000)
46 Article 24 European Charter of Fundamental Rights (2000)

d) Right to private and familiar life:

Apart from these four main human rights, above analysed, which are deemed as the base of human rights and, especially for this reason, they require a particular attention, there are other kinds of human rights that ought to be taken into consideration, for instance the right to a private and familiar life. Private and familiar life are commonly considered to be specific forms of intimacy, despite the fact that there is not yet a common international definition for the concept of intimacy. However, in order to try to give a definition to this concept, we could say that intimacy is the right that every individual has, aimed to create a net limit between what it is considered to be public and what it is considered to be private. In this sense, the role played by states is crucial, in fact, states have to make an effort in order to guarantee and assure this net separation[47]. Moreover, the Universal Declaration on Human Rights highlights the importance that this right has by arguing that:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks[48].

e) Right to environment:

Another important right, deemed to be one of the most important among human rights and probably the most important for indigenous peoples, is the right to the protection of environment, despite the fact that in the Universal Declaration of Human Rights the right to the protection of the environment is not mentioned. This particular attention on environment started developing and spreading due to the increasing number of processes of destruction of the landscape that especially

47 MARIÑO MENÉNDEZ, F. M., GÓMEZ-GALÁN, M. and DE FARAMIÑÁN GILBERT, J. M., *Los derechos humanos en la sociedad global: mecanismos y vías prácticas para su defensa*, CIDEAL, Madrid, 2011.

48 Article 12, Universal Declaration on Human Rights (1948)

characterized the second half of the XX century. It seems to be crucial to wonder why and how the protection of the environment could affect or improve the level of our life but, as evident, if pollution in general, buildings, roads and the massive destruction of woods keep increasing, some specific rights could definitely disappear, such as the right to land of indigenous peoples[49]. We will have the possibility to prove the importance of environment for indigenous peoples within the next pages.

1.4. Instruments to promote and protect Human Rights

All crucial international documents, created in order to achieve a complete efficiency of the totality of human rights, require states a great control over the application of such rights at a global level. However, as we will have the opportunity to note and prove, apart from the fact that not always human rights are respected, often their expected results have not been and are not currently achieved. It is for this reason, moreover, that a great number of international instruments, such as the Declaration and the Plan of Action redacted in Vienna in 1993, underline the importance of the ratification (without reserves) of those treaties concerning human rights, with the aim to guarantee a complete achievement of those results, thought to be possible just with the total respect of human rights. In fact, according to the Declaration of Vienna, states and governments are asked to sign and ratify Human Rights Treaties as they have been formulated without modifying them, in order to guarantee a better precision and integrity of regulations concerning fundamental rights. On the other hand, national governments are firstly asked to incorporate into their national legislations all those legal measures concerning human rights and secondly, they are thought to use all the instruments at their disposal in order to make these treaties be respected by their citizens and internal institutions[50].

Apart from the respect of human rights by national entities and the important

49 BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

50 CONFORTI, B., "*Diritto Internazionale*", VIII edition, Editoriale Scientifica s.r.l., Naples, 2010, page 339-359.
FOCARELLI, C., *Lezioni di Diritto Internazionale*, CEDAM, Verona, 2008, page 119-226.

presence of numerous international courts, it seems to be crucial also the role played by the United Nations. In order to give a general idea to the reader, we could argue that some of the principal institutions of the United Nations, which play a specific and fundamental role in the field of human rights, are especially the General Assembly, the Security Council, the International Court of Justice and the Secretary. In other words, the United Nations could be deemed as the centre of the international community with the scope to spread fundamental values, such as dignity, human rights, sustainable development and other similar concepts. In addition, in the United Nations context, apart from the essential role played by the General Assembly and all the other organs above mentioned, probably the most significant role in the field of human rights is played by the High Commissary for Human Rights, created through the resolution 48/141 of the General Assembly in 1993, after the Convention of Vienna had clearly expressed the necessity of the creation of a specific instrument for the protection of all human rights. Among its main functions, therefore, the High Commissary has to favour all those activities and conventions which favour the development and respect of human rights.

Referring now to the European context, apart from the European Court of Human Rights, also the European Court of Justice, despite the fact that it is not a Court of Human Rights, has to play a specific role of supervision and monitoring on the respect of all human rights within the European Union, according to what has been set up within article 6.2 of the Treaty of the European Union. In fact, as reported, the European Union respects all fundamental rights and freedoms, as expressively guaranteed by the European Convention on Human Rights and Fundamental Freedoms formulated in Rome in 1950. As well as the European Court of Justice, also national judges have to play a fundamental role of control and supervision of the respect of human rights by communitarian institutions[51].

To conclude, as we could have already noted, the United Nations and the European Union have a large number of instruments at their disposal that can guarantee the full respect of human rights and fundamental freedoms. Moreover, in order to complete the list of instruments and organs that contribute to the respect

51 Treaty of the European Union (1992)

and improvement of human rights that the United Nations disposes to, it is worth to mention the United Nations Conference for Trade and Development, the United Nations Program for Development, the United Nations Program for the Environment, the United Nations Fund for Childhood, the United Nations Investigation Institute for the Social Development, the International Labour Organization, the World Health Organization, the Food and Agriculture Organization, the International Fund for Agricultural Development and the United Nations Educational, Scientific and Cultural Organization.

1.5. Conclusions

In conclusion, after having briefly presented and explained what human rights are and which are all those international mechanisms aimed to their respect, we should wonder whether, in future, a global development and improvement of life conditions will be possible. A large number of experts claim that a real development could be possible only with the general respect of human rights. According to Manuel Goméz-Galán, General Director of CIDEAL Foundation (Madrid) and Professor, "la pobreza no es tanto una falta de recursos sino, sobre todo, de falta de derechos[52]". Consequently, in order to put in practice and make possible real development processes, it seems to be fundamental and crucial the construction of abilities of self-management and self-organization of communities. Among those measures that have to be adopted in order to achieve a better respect of human rights, Nicolás Angulo Sánchez underlined the importance of financing projects and programmes in favour of human rights[53].

Although the enormous quantity of legal or non-legal measures that already exist or that can be taken in order to make human rights be respected, there are some experts, such as Antonio Cassese, which are firmly convinced that the current

52 MARIÑO MENÉNDEZ, F. M., GÓMEZ-GALÁN, M. and de FARAMIÑÁN GILBERT, J. M., *Los Derechos humanos en la sociedad global: mecanismos y vías prácticas para su defensa,* CIDEAL, Madrid, 2011, page 315

53 ANGULO SÁNCHEZ, N., *Derechos Humanos y Desarrollo al alba del siglo XXI*, CIDEAL, Madrid, 2009.

international, as well as institutional, situation presents a great variety of difficulties and obstacles that do not contribute to efficiently respecting human rights. Cassese, in fact, highlights that the limitless quantity of human, economic, social, cultural, political and civil rights can not guarantee the full respect of them. Moreover, he denounces the slowness of the enormous number of organs and international mechanisms aimed to control and monitor the respect of such rights. Finally, Cassese thinks that the huge gap existing between developed and developing countries, economic interests of states, the spread of terrorism all around the world due to political or religious causes and the increasing poverty make, unfortunately, human rights quite impossible to be respected and taken into account, as we will note in the case of indigenous peoples within Latin America[54]. With regards to this last cause, as reported by Keane and McDermott, the Committee on Economic, Social and Cultural Rights stated that in order to guarantee a full respect of human rights, it is imperative that urgent measures must be taken in order to reduce poverty levels, remove foreign debts and widening gaps between rich and poor and in order to find a solution for the increasing absence of a multilateral trade, financial and investment systems and sustainable development processes[55].

54 CASSESE, A., *I diritti umani oggi,* Editori Laterza, Bari, 2007.

55 KEANE, D. and McDERMOTT, Y., *The challenge of human rights, past, present and future,* Edward Elgar Publishing, Cheltenham (UK), 2012.

II CHAPTER

The discovery of the Americas and the Spanish legislative approach towards local people

Introduction

After the discovery of the Americas (known in that period as the *Indias*) in 1492, the main intention of Spain and its monarchs was that one to directly shift the Spanish legal system with all its characteristics to the New World, without taking into account the enormous variety of differences that existed, in that time, between Spain and the recently discovered lands. As an obvious consequence, the application within the Americas of the Spanish legal system of that period immediately showed its complete incompatibility. Therefore, the Spanish Crown was forced to invent and formulate a new mechanism of regulations, which had to include, as well, a particular and specific focus on indigenous peoples, the real original citizens of those new and wild unknown lands[56]. However, the advent of the European exploration and the consequent conquest of the Americas following the arrival of Columbus, 'an assuredly worthy man of the highest recommendations', as he was defined by the Pope Alexander VI[57], made a large number of theorists focus their attention on all the relationships that existed between the Americas and Spain, and, consequently, the majority of those theorists, as well as theologians, wondered whether the Spanish Crown was effectively legitimated, through its regulations, to submit the inhabitants of those lands, occupying their territories and exploiting their own natural resources[58].

Returning to take into consideration those new legal systems and those new

56 PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.

57 http://www.danielnpaul.com/Popes.html, The Bull Inter Caetera of Alexander VI, 10/10/2013

58 ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000, pages 9-19, 45-47, 183-184.

groups of laws, which apparently legitimated Spain to control those lands and which had been created in order to make possible for Spanish conquerors and for the Spanish Crown to monitor Latin American lands and people, it is difficult to individuate among those laws and legal instruments some common characteristics, mainly due to a vast presence of regulations which were not directly recognized by the Crown, as well as due to diverse periods in which they have been redacted and approved. Moreover, we ought also to take into account the fact that Spanish local authorities, which directly managed new lands within the American territory on behalf of the Spanish Crown, had a great law-making power, therefore, they had the possibility to legislate, despite the fact that they had always to have the approval of the monarchs before the application of every new regulation. However, as it can be easily understood by the reader, in a large quantity of cases, real interests of the conquerors were not the same for the Spanish Crown and, as a consequence, the Crown was often obliged to intervene against local authorities, fomenting in such a way several internal conflicts[59].

In spite of the great presence of regulations formulated and approved just for the *Indias*, several of them have never come into force and simply remained informal. The impossibility of application of a large quantity of those regulations was mainly due to two principal causes. First of all, native peoples of the Americas did firmly oppose against the application of some Spanish regulations and rules, and second, the great majority of those regulations could not, in any way, be put in practice within the American reality and context, being the Americas too different from Spain. These two important causes can make us understand that the conditions of extreme underdevelopment and poverty in which indigenous peoples in Latin America lived were completely diverse from which Spanish peoples were used to living in.

59 www.gabrielbernat.es/espana/leyes/, 08/10/2013
PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.

2.1 Phases of the *Indias* Legislation during the Spanish colonization

The complex *Indias* Legislation, which was formulated and redacted both by the enormous number of conquerors and the Spanish Crown, can be divided into several phases, each one characterized by fundamental legislative documents, which will be better examined in the following pages. Just to list them, the first phase is that one characterized by the redaction of the Santa Fe Capitulations of 1492 and by the great power obtained by Columbus, who could count on a great power directly provided by the Crown, until approximately 1500. This first phase began, in fact, with the transatlantic journey of Columbus with his ninety fellows and their successive arrival in that island currently known as El Salvador. Then, after 1500, the Spanish Crown started a sort of process aimed to private Columbus of his power, favouring, consequently, the elaboration of administrative, as well as legal, documents with the main objective to manage life of native peoples within the Americas. The second important phase was that one characterized, firstly, by a large number of critics by theologians, who denounced all Spanish barbarities towards natives and, secondly, by the redaction of three fundamental laws, the so-called *Leyes de Burgos* (1512), the *Leyes de Valladolid* and the *Requerimiento* (1513). Moreover, *Las Ordenanzas de Granada* (1526) and the *Leyes Nuevas de Indias* (1542) are thought to represent a crucial part of the so-called middle phase of the Spanish colonization and, finally, *La Recopilación de Las Leyes de Los Reynos de Las Indias*, whose finalization took place in 1680, represents the last phase of such legislative process of the Americas, directed specifically to the administration and management of native peoples and their ancestral lands[60].

60 www.gabrielbernat.es/espana/leyes/, 08/10/2013
PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.

1. The Santa Fe Capitulations (1492) and the *Encomienda* system

Concerning the Santa Fe Capitulations, which can be deemed as the real first legislative approach to the New World, they are a royal chancery document containing the Capitulations that Columbus signed before the catholic monarchs, Ferdinand II of Aragon and Isabella I of Castile, in Santa Fe de la Vega in 1492, a few days after the capture of Granada. The Capitulations dealt with all the conditions and all those measures that Columbus had to respect for the journey and that also involved the discovery of the New World within the same year[61]. However, the discovery and conquer of the Americas, as said in the introduction, showed two main problems. First of all, Spanish conquerors and the Crown were not able to directly and efficiently manage those new lands and, secondly, the conditions in which native peoples were used to living were completely different from those that Spanish colonists were used to. Moreover, the local inhabitants living in those new lands could not understand that language spoken by Spanish conquerors and, as an obvious consequence, the spread of the catholic religion was undoubtedly more difficult. In addition, in order to better understand how the situation changed for indigenous peoples after the arrival of Spanish conquerors, it seems to be useful to nominate some institutions that had been properly created for the Americas, aimed to control those original people and new territories. These institutions, which characterized the greatest part of the Spanish colonization and the approach of Spanish conquerors towards natives and which are today considered to be one of the main causes of slavery of great numbers of natives, are the e*ncomienda* (commission), the r*epartimiento* (distribution) and the *mita*.

Principal cause of servitude, subjugation, physical and psychological destruction of natives, according to Gonzalo Fernandez de Oviedo, author and historian of the Conquest[62], the *encomienda* represented a sort of direct relationship or link between Spanish conquerors and one or more groups of indigenous peoples. The *encomienda* was a grant of Indians workers in a specific geographical region,

61 http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-8/santa-fe-capitulations/, Santa Fe Capitulations, 10/10/2013

62 LIVI BACCI, M., *Conquista, la Distruzione degli Indios Americani,* Il Mulino, Bologna, 2009.

which were received by a Spanish *encomendero,* who was, in fact, not only provided of a grant of a land, but also of a precise number of native peoples in order to work it. Spanish colonists had, according to royal documents, to take care of those groups of natives and, moreover, the *encomendero* had to teach them the pillars of the catholic religion. However, in a large number of cases, indigenous peoples, who were given to an *encomendero,* were forced to work in horrible conditions of servitude. With regards to the other two institutions, starting by considering the *repartimiento,* it is said to be the second pillar on which the Spanish colonial organization of that period was based and its main objective was the allotment of a parcel of land and distribution of indigenous peoples among Spanish conquerors. The activities developed by indigenous were directly decided by Spanish colonists and, as a consequence, this kind of redistribution represented the partial limitation or, in some other cases, the total elimination of native peoples fundamental freedoms and rights. Finally, with regards to the *mita,* it was an institution that selected specific groups of indigenous peoples in order to work for a determinate period of time. In charge of their service, Spanish peoples were forced by the Crown to give indigenous workers food and provide them with educational services. However, these three institutions have never worked as the Crown had thought. The division of natives among Spanish peoples, in fact, only generated an increasing number of possibilities to submit those native peoples for Spanish colonists, who undoubtedly abused of natives conditions of underdevelopment instead of spreading the catholic religion and 'civilizing' them, as required by the Crown and papal bulls, which are considered to be the instruments that more legitimated Spanish colonization processes[63].

63 GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006.

MORELLI, F., *Il mondo atlantico: una storia senza confini (secoli XV-XIX)*, Carocci Editore, Rome, 2013, pages 19-81, 119-176.

PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.

2. Critics against colonization, the Leyes de Burgos (1512), the Leyes de Valladolid and the Requerimiento (1513)

After having briefly explained which was the colonial institutional organization within the New World, we ought to focus the attention on the second important phase of the Spanish legislative process, which began with numerous claims by a great number of theologians, who denounced the enormous quantity of human deaths that such institutional organization and lack of effective legislative instruments were causing. Apart from Francisco De Vitoria and others theologians, whose importance will be highlighted in the following pages, it seems to be crucial now to underlined the fundamental role played by Bartolomé de Las Casas, considered by some experts to be the greatest promoter of the African slavery in favour of indigenous peoples within the Americas[64]. Son of a Columbus' fellow, he touched the American shore in 1502 for the first time. Although he had initially been an *encomendero,* more or less until 1515, he rapidly decided to defend native peoples rights against Spanish abuses. He began, in fact, firmly accusing all the activities developed by Spanish conquerors in the Americas, particularly criticizing the *encomienda* institutional system. In fact, De Las Casas accused conquerors coming from Spain to have completely destroyed communities and villages instead of having spread religion, which was thought by the Spanish Crown and the Pope to be the principal goal that they would have had to achieve[65]. Focusing the attention on one of his most important books dealing with the discovery and conquest of the Americas, entitled *Brevissima relazione della distruzione delle Indie*, De Las Casas reported and described which was the real American situation and how native peoples were forced to work for Spanish conquerors in horrible conditions of servitude. De Las Casas, moreover, tried to describe how those natives effectively were used to living before coming in contact with Spanish conquerors. He stated that all native peoples, who God had created simple and innocent, proud and strongly devoted to their own natural divinities, were peaceful and not interested in

64 http://orbe15.blogspot.it/2008/07/bartolome-de-las-casas-y-la-esclavidud.html?m=1, 03/11/2013

65 LIVI BACCI, M., *Conquista, la Distruzione degli Indios Americani,* Il Mulino, Bologna, 2009. ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000, pages 9-19, 45-47, 183-184.

fighting. Furthermore, he underlined the fact that after the arrival of Columbus and his fellows, Spanish conquerors had kept attacking indigenous peoples without precise reasons and, emphasizing his idea, he stated that "altro non han fatto da quarant'anni a questa parte (e oggi ancora continuano a fare) che straziarli, ammazzarli, tribolarli, affliggerli, tormentarli e distruggerli con crudeltà straordinarie[66]".

Another important historian of the Conquest is undoubtedly Francisco de Vitoria, above mentioned, who is thought to be one of the founders of the international law theory. De Vitoria, primary professor of theology at the University of Salamanca, agreed with De Las Casas and confirmed the incredible humanity and kindness of natives living in the New World. Although he had never travelled across the Atlantic ocean, he was able to provide a clear image of which was the real situation in the Americas and how Spanish conquerors were abusing of those native communities. Differently from what the official historian of the Conquest of Charles V thought, Juan Ginés de Selulveda, who considered native peoples just as *humunculi* who had to be oppressed and tortured because inferior[67], De Vitoria was convinced that Indians possessed specific original autonomous powers and entitlements to their ancestral lands, which the European were asked to respect. De Vitoria, invoking percepts of the Holy Bible, stated that the Indians of the Americas were the only original owners of those lands, and neither the monarch nor the Pope could have the control over the whole globe. Although he was firmly convinced that natives had a specific right on their lands, in his book, *Relecciones sobre los indios y el derecho de guerra,* after having examined the situation in the Americas and the relationship that had been created between Spanish conquerors and native peoples and after having, moreover, criticized the approach of Spanish colonists, he concluded that the possible persistent interference of rebel natives in Spanish efforts to carry out their activities could lead to a 'just' war and conquest of those wild territories[68].

66 DE LAS CASAS, B., *Brevissima relazione della distruzione delle Indie*, Mondadori, Milan, 1987, page 30

67 MAYBURY-LEWIS, D., *Indigenous Peoples, Ethnic Groups and the State,* Allyn and Bacon, Needham Heights, Massachusetts, 1997.

68 GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006.

Apart from the fundamental role played by the two fathers of the Spanish School, as a large number of experts designated De Las Casas and De Vitoria, it seems interesting, at this point, to remember also another claim made by Antón de Montesinos, a Spanish clerk, who directly criticized the intervention of Spanish colonists in the Americas during the celebration of the Advent ceremony in Santo Domingo. Nominated by a large number of historians and experts at the Conquest of the Americas, Antón de Montesinos stated that Spanish conquerors would have been condemned due to the cruelty they kept using against all those innocent native peoples. Moreover, he wondered which had been the right that permitted and allowed Spanish colonists to consider native peoples as slaves or which had been the rights that allowed Spanish colonists to humiliate and kill such a limitless number of peaceful natives. He also criticized, as De Las Casas, the *encomienda* system, which forced indigenous peoples to live in a status of absolute inferiority and servitude[69]. Finally, speaking with conquerors, the clerk said "tenete per certo che a cagione del modo in cui vivete non potrete salvarvi più di quanto lo possano fare i mori e i turchi che ignorano o rifiutano la fede di Gesù Cristo[70]", condemning in such a way Spanish colonists to hell.

The refusal of the clerk Antón de Montesinos to confess Spanish colonists, consequently, obliged the king Ferdinando to invite him to Spain and, being Ferdinando obsessed with justice, he decided to meet in Burgos (Spain) a great number of historians, theologians and politicians in order to create the first great legal document dealing with the Indias and native peoples living there. Such document, known with the name of *Ordenanzas reales para el buen regimiento y tratamiento de los yndios*, is considered to be a mixture of philosophical, theological, juridical and social theories, which probably determined the birth of the international law and could have represented for indigenous peoples the first, but still immature, recognition of their rights, obviously interpreted and thought according to the pillars of the catholic religion and the principles of the doctrine of

ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000, pages 9-19, 45-47, 183-184.

DE VITORIA, F., *Relecciones sobre los indios y el derecho de guerra*, Espasa-Calpe S.A., Madrid, 1975.

69 LIVI BACCI, M., *Conquista, la Distruzione degli Indios Americani,* Il Mulino, Bologna, 2009.

70 DE LAS CASAS, B., *Brevissima relazione della distruzione delle Indie*, Mondadori, Milan, 1987, page 9

natural law (*ius naturae)*, which considered natural and primordial rights and freedoms as superior to all the other laws and forced servitude, imposed, in that case, to natives of the Americas by Spanish colonists[71].

The document, called simply *Leyes de Burgos,* was promulgated in 1512 by Ferdinando the Catholic and it is a complex document that presented 35 simple and essential dispositions. After the government of Columbus, characterized by a strong slavery for indigenous communities, the main objective of these regulations was that one to assure and guarantee more freedoms to indigenous peoples and to try to limit all the activities of slavery put in practice by the first wage of colonists. In reality, they did not completely changed the situation in which indigenous were forced to live in the first years of the Spanish colonization, in fact, the *Leyes of Burgos* reaffirmed that indigenous peoples had to be submitted, in a positive sense, to Spanish peoples. One of the most important themes that are often reported in these regulations was the conversion of natives, the main aim of the Crown, which had been legitimated by the Pope to spread the catholic religion within the new lands, as we can note by focusing our attention on some specific articles[72].

Several articles of the *Leyes of Burgos* reported, in fact, that Spanish peoples, who were asked by the Crown to take care of indigenous peoples, had to build a church for native peoples where there had to be the imagine or the statue of the Holy Virgin and a bell, in order to make everybody know the beginning of religious ceremonies. Moreover, Ferdinando ordered that everyday Spanish peoples had to provide indigenous with food, and on Sundays, at Eastern and on other significant days for the catholic religion, such as Christmas, they had to provide natives with pieces of meat. Furthermore, it was a precise task of Spanish peoples to make indigenous inhabitants understand that they could not have more that a woman and that they had to respect her for the rest of their life. Finally, Ferdinando and Isabella

71 http://www.historiadelnuevomundo.com/index.php/2011/01/las-leyes-de-burgos-de-1512/ Leyes de Burgos de 1512, 11/10/2013
http://www.juragentium.org/topics/rights/profiles/it/lascasas.htm, 26/10/2013
ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000, pages 9-19, 45-47, 183-184.
MORELLI, F., *Il mondo atlantico: una storia senza confini (secoli XV-XIX)*, Carocci Editore, Rome, 2013, pages 19-81, 119-176.

72 PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.

required the presence of a specific royal representative that, every week, had to visit all villages in order to control and report how indigenous peoples were improving their religious knowledge and in order to inform the Crown about the real conditions of life of natives. Moreover, general concepts that can be found in these dispositions are, for instance, that indigenous peoples had to be threaten as free individuals, they had to be taught the pillars of the catholic religion, as reported in several bulls from the Vatican, and, furthermore, natives had the right not to be obliged to work all day long but they had to have the opportunity to enjoy free hours[73].

In other words, it seems to be clear that the main aim of the *Leyes of Burgos* was that one to regulate what the *encomienda* system was generating and causing, although, as said before, the Crown did not have a direct, effective and real control over the right application of those regulations within the New World and, as a result, today we can state that the *Leyes of Burgos* have never efficiently worked as they were expected to work. In fact, although it is undoubtedly less significant, the complex of laws known as *Leyes de Valladolid,* which was approved in 1513, is deemed to be the legislative instrument that highlighted the evident inefficiency of the *Leyes de Burgos*. The continuous claims coming from the clergy, settled in the New World, forced the Crown to redact this new legal document, which focused the attention more on women and children, whose conditions, according to a large number of witnesses, were disastrous[74].

Another response of the Crown to the reaction of the Dominican clerk De Montesinos and the clergy in general, was the redaction in 1513 of the document known as the *Requerimiento*, which is deemed to be one of the first legal instruments that had as main aim that one to justify the war against natives. The elaboration of the document, which was modified several times, was probably asked to Juan López de Palacios Rubios, judge and adviser of the Crown. The document contained specific regulations and obligations that native peoples were asked to respect. In fact, firstly, they had to respect the Catholic Religion, to venerate the

73 PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.

74 http://www.historiadelnuevomundo.com/index.php/2011/01/las-leyes-de-burgos-de-1512/ Leyes de Burgos de 1512, 11/10/2013.
PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., above mentioned.

Pope and the Monarchs, Philip and Juana and, secondly, they had to be ready and willing to learn and accept all the principles and pillars of the catholic religion. However, as can be easily understood, also the *Requerimiento* did not work especially due to the fact that natives were not willing to give their lands to Spanish conquerors and, furthermore, they were not able to understand what Monarchs really wanted because they did not speak the same language of the Crown. Finally, as a result, the *Requerimiento* was formally abolished in 1542, with the successive elaboration and redaction by Charles V of the *Leyes Nuevas*[75].

3. Las Ordenanzas de Granada (1526) and the Leyes Nuevas (1542)

Concerning *Las Ordenanzas de Granada*, in November 1526, the Crown decided to manage through twelve new simple regulations all those relationships that already existed between Spanish conquerors and native peoples. As the *Leyes of Burgos* and the *Leyes of Valladolid,* this document mainly had as objective that one to teach the principles of the catholic religion to natives and to eradicate all those habits of indigenous peoples that were considered by the Pope and the Spanish Crown as immoral. Moreover, such *Ordenanzas* had also as objective that one to regulate how Spanish colonists had to behave towards indigenous peoples. In fact, as reported within this legal document, firstly, conquerors were obliged not to used measures of torture against natives, secondly, there had to be a firm control over the *encomienda* system by the clergy and, finally, the Crown also confirmed the importance of the prohibition to oblige natives to become slaves[76].

Taking now into consideration the crucial importance of the so-called *Leyes Nuevas*, whose entire name was *Leyes y ordenanzas nuevamente hechas por su Majestad para la gobernación y conservación de los indios,* but also known as *Las 40 Leyes*, they were formulated and promulgated on the 20th November 1542 by Charles V, grandson of Ferdinando. Undoubtedly, the situation in 1542 was

75 DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997 http://www.gabrielbernat.es/espana/leyes/requerimiento/requerimiento.html, Requerimiento, 1513, 12/10/2013

76 www.gabrielbernat.es/espana/leyes/odg/odg.html, Las Ordenanzas de Granada, 1526, 11/10/2013

completely different from that one that king Ferdinando had had to face, especially due to the increasing number of difficulties generated by all the exasperate relationships existing between Spain and the New World. The increasing territorial expansion of Spain into the American territories made the situation for Charles V, and successively for his son, Philip II, more complicated, in fact, colonies had begun to be practically impossible to be entirely and effectively controlled and the political-administrative organization seemed to be incredibly difficult to be managed in an efficient way. As happened for the *Leyes of Valladolid* and *Las Ordenanzas de Granada,* the *Leyes Nuevas,* in numerous cases, reported a large quantity of dispositions that had already been presented in the *Leyes of Burgos*. However, several changes have now also to be taken into account, especially if we focus the attention on the great influence on such regulations of Bartolomé de Las Casas, who is considered by a large number of experts to be the clerical character who more called for the creation of this new group of laws. In fact, having been De Las Casas himself an *encomendero,* it is undeniable the fact that he had had the possibility to verify what Spanish colonists were really and effectively doing in the Americas, although he has been often highly criticized by several experts, who argue that a great number of information reported within many of his bibliographies can be thought as incorrect or exaggerated. However, according to his experience, De Las Casas decided to write the *Razonados memoriales sobre las insuficiencia de la vigente legislación en Indias y abusos a que daba lugar*, which Charles V had the opportunity to read. As a consequence, the issue was debated by De Las Casas before the king, Charles V of Spain, and a council composed by fourteen theologians, who met in Valladolid in 1540 in order to hear the clerk arguing the case for indigenous rights. De Las Casas kept claiming that the Spanish condemnation of indigenous communities and their habits was "ill-informed, prejudiced and, as we would now say, ethnocentric[77]". The influence of De Las Casas has seemed to be crucial. He was firmly convinced that natives had not to be obliged to allow Spanish conquerors to become the owners of their own lands and,

77 MAYBURY-LEWIS, D., *Indigenous Peoples, Ethnic Groups and the State,* Allyn and Bacon, Needham Heights, Massachusetts, 1997, page 13.

moreover, he called for a total suspension of the *encomienda* system[78].

In other words, the main dispositions of the *Leyes Nuevas* can be summarized in the reorganization of the governance within the New World, the recognition of the freedom of native peoples and the partial limitation of the *encomienda* system, which could no longer, in fact, be considered as a right that could be inherited[79]. The monarch, more specifically, focused his attention on the real condition of natives as asked by De Las Casas in 1542, partially abolishing, as a result, the servitude of those communities, the *encomienda* system and limiting the huge number of wars for the conquest. Some articles of the *Leyes Nuevas* dealt with the will of the Crown of conversion and education of indigenous peoples, with a particular attention on the good governance and the good treatment of the *indios.* Moreover, Charles V stated that no one had the power to force indigenous to work as slaves for the Crown against their will. According to the Crown, in fact, indigenous peoples had to be deemed as free persons and they just had to be educated according to the principles of the catholic religion. However, after the redaction of the *Leyes Nuevas*, colonizers, who thought that their power was going to be surely limited by such regulations, protested against the decisions of the Crown, as well as against De Las Casas. As a consequence, the application of those regulations resulted to be quite impossible, as happened thirty years before with the *Leyes of Burgos* of Ferdinando and Isabella[80].

78 http://www.gabrielbernat.es/espana/leyes/ln/ln.html, Leyes Nuevas, 1542, 11/10/2013

79 MORELLI, F., *Il mondo atlantico: una storia senza confini (secoli XV-XIX)*, Carocci Editore, Rome, 2013, pages 19-81, 119-176.

80 PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.
http://www.gabrielbernat.es/espana/leyes/ln/ln.html, Leyes Nuevas, 1542, 11/10/2013

4. Recopilación de Leyes de Los Reynos de las Indias (1680)

The undeniable inefficiency of the *Leyes Nuevas* and the continuous creation of new regulations and laws concerning the management of the Americas provoked a situation of increasing confusion. Consequently, the Crown thought that it was necessary a sort of legislative reorganization for those new discovered territories. In fact, after a great number of documents that had not been able to achieve the expected results, Charles II decided to collect and unify all those several previous legislative documents and to promulgate in 1680 the *Recopilación de Leyes de los Reynos de Indias,* whose main redactor was probably Antonio de León Pinelo, an important historian of the Spanish colonization. Such document is today deemed to be the most complete and complex among Spanish legislative documents regarding indigenous communities and their ancestral territories within the New World[81].

The *Recopilación*, whose redaction, as said before, began under Charles II, can be deemed as a sort of collection or a mixture of regulations redacted in different periods of the colonization. In fact, it contained all the *pragmáticas* and the *cédulas reales*, the o*rdenanzas* and all the other royal legislative instruments concerning the Americas, starting from those formulated under the Catholic Monarchs. The *Recopilación* was divided into nine books, which totally presented more or less 6.400 among laws and regulations. The first book dealt with all the religious issues and the conversion of natives, the second one dealt with the governmental structures by which the Americas had to be organized. On the other hand, the third, the fourth and the fifth books concerned with the administration and management of the new lands, the sixth focused a specific attention on natives peoples, whose situation seemed to have increasingly negatively changed and, finally, the seventh, the eighth and the ninth referred to the political, economic and legislative administration of the *Indias*[82].

Particularly considering the sixth book, which is the one that more focused the attention on indigenous peoples and their human conditions, taking into

81 PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998..

82 http://www.gabrielbernat.es/espana/leyes/rldi.html, Recopilación de Leyes de los Reynos de las Indias, 1680, 12/10/2013

consideration some specific articles, it is evident that the Crown was trying, as had already tried within all the other past legislative instruments, to make the last great effort in order to defend natives communities from abuses and subjugation of Spanish conquerors. In fact, the first law concerned with the protection of indigenous guaranteed by the Crown and the ecclesiastic power, the second one was regarded the right of indigenous peoples to get married, without any kind of limit imposed by the Crown. Moreover, the Crown stated, as already done in other several previous documents, that natives had to be considered as free individuals and they had not to be forced to work as slaves for the conquerors. It seems to be more interesting what it was reported within the law No. 21 (Libro VI, Título X), in which it was argued that every violent attack or action committed towards native peoples, expressively prohibited by the Crown itself and the Pope, had to be more rigorously punished than it had been committed towards a Spanish conqueror or a Spanish royal representative[83].

83 PECES-BARBA MARTÍNEZ, G. and FERNÁNDEZ GARCÍA, E., *El Derecho de Indias,* pages 713-743*, in Historia de los Derechos Fundamentales,* JAKARYAN, S.A., Madrid, 1998.

2.2. Conclusions

To conclude, considering the situation of indigenous peoples living in the new lands recently discovered by Spanish conquerors and the impossibility to put in practice all the regulations existing in Spain within the New World, the Spanish Crown was forced not only to reorganize the legal system, but also to create a specific one for the Americas. As a consequence, the Crown completely invented new legislative codes, which unfortunately have never achieved the expected results, especially due to the distance, all those differences that existed between the Spanish and the American reality and the evident impossibility of an efficient control by the Crown. However, all those documents and groups of laws signed by the Spanish Crown, which have been taken into consideration within the previous pages, clearly demonstrate that the Crown had a real interest in the preservation and respect of the rights of indigenous peoples and, moreover, monarchs were also really interested in the improvement of life conditions of those local inhabitants of the Americas. In other words, all those legislative documents can effectively be considered as first steps towards the recognition of human rights for indigenous peoples.

However, what in reality happened within American territories was incredibly different. In fact, the increasing expansion of the Spanish colonial power led to the total subjugation of native peoples. According to Maybury-Lewis, anthropologist and professor, the demographic consequences of the Spanish territorial expansion for natives were incredibly disastrous and, undoubtedly, native peoples were conquered mainly by the superior Spanish weaponry. In a great number of cases, local peoples were forced to abandon their ancestral territories due to the arrival of Spanish conquerors, who did not surely have as first aim the conversion of natives. The consequences of the lack of control by the Crown, in spite of the presence of numerous legislative documents, were not only the increasing impoverishment of those lands, but also the starvation of those original peoples[84]. According to the anthropologist Paul L. Doughty and others, the European conquest and colonization,

84 MAYBURY-LEWIS, D., *Indigenous Peoples, Ethnic Groups and the State,* Allyn and Bacon, Needham Heights, Massachusetts, 1997.

and in particular the first Spanish colonization process, brought death by terrible diseases, war and massacres, disorientation and dislocation in social and cultural terms, forced removal of those people from their ancestral territories, high levels of racial discrimination, physical and psychological destruction, political and economic disorder, corruption and, finally, deprivation[85].

To sum up, considering all this and focusing the attention on how the Spanish colonization legislative system effectively worked, being the Crown too far from the Americas and the colonists too much interested in knowing indigenous communities not as persons, but as "objects of 'scientific' curiosity"[86], all the regulations that were formulated have never evidently achieved the expected results. Although the Crown had always tried to drive the attention of colonists on the importance of the respect of freedoms of native peoples, conquerors have always considered indigenous communities as simple slaves, who had to be, consequently, deprived of their lands and of their fundamental freedoms. As reported in a large number of manuals, the Spanish Crown has probably never been able to control colonists and slavery in an efficient way. However, in conclusion, we ought to wonder whether all those legislative documents have really not been able to work or, on the contrary, whether, in those first centuries of the colonization, the enormous number of colonists settled in the Americas had as priority gold and richness or the spread of the catholic religion.

85 DOWNING, T. E. and KUSHNER, G., *Human rights and anthropology,* Cultural Survival, Inc., Cambridge, 1988.
IVISON, D., PATTON, P. and SANDERS, W. (edited by), *Political Theory and the Rights of Indigenous Peoples,* Cambridge University Press, New York, 2002.

86 KEAL, P., *European Conquest and the Rights of Indigenous Peoples,* Cambridge University Press, Cambridge, 2003, page 63.

III CHAPTER

Definition of Indigenous Peoples and international organizations

Introduction

Within the next chapter, we will deal with the problem of the correct definition of indigenous peoples and their communities, taking into consideration a large number of definitions that have been provided not only by experts, but also by international organizations. As we will clearly understand, at an international level, a unique, clear and exact definition for such communities, unfortunately, does not exist yet. The absence or apparent impossibility to find a single definition is due to a great quantity of causes, such as, for instance, the refusal of some original communities to be defined as indigenous, the unwillingness of some states and governments, all around the world, to recognize the presence of such native communities within their territories, the enormous number of differences that exist between diverse indigenous peoples and communities, their geographical distribution, the level of assimilation and adaptation to the globalization process of such populations or the apparent difficulty to distinguish indigenous peoples from minorities and stateless nations.

Moreover, today the recognition of collective rights of indigenous peoples keep being a difficult and complicated international issue especially due to a lack of a specific and unique definition of them, which can practically explain who indigenous peoples are and which are those communities that we are referring to, as well as due to a lack of criteria for their denomination and determination. In spite of all these complications, a definition, which is thought to be the most representative and most complete at an international level, according to international organizations, exists. We are referring, in fact, to the definition elaborated by Martínez Cobo, the

Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. As a natural consequence to the apparent impossibility to find a specific and unique definition for such communities, accepted not only by the international community, such as that one of Cobo, but also by indigenous peoples themselves, it is difficult to favour and develop those necessary collective human rights that identify and characterize indigenous realities and contexts. In fact, while speaking about indigenous peoples, we have always to take in consideration that the greatest part of their rights (territorial, juridical, cultural, social, economic and political rights) have to be deemed as collective rights, which affect, in other words, all the members of a community.

Moreover, within this chapter, we will list some specific international organizations or inter-American institutions that deal with indigenous communities and their current problems, especially generated by globalization processes and environmental destruction and exploitation. During the last decades, in fact, indigenous peoples have undoubtedly been objects of a large number of international instruments and international projects, aimed to safeguard and protect from the disappearance their cultures and traditions. In order to better understand the efforts made by the international community, we will particularly focus our attention on the United Nations system and the ILO Convention No. 169, considered to be the most important international document regarding indigenous peoples, apart from the fundamental UN Declaration on the Right of Indigenous Peoples, adopted just in 2007. Then, we will have the opportunity to take into account the great number of efforts made by the Organization of American States and, furthermore, we will consider the change of the World Bank politics with regards to indigenous issues. Moreover, we will focus our attention on the great role played by the Indigenous Peoples Fund and the European Union, which particularly deals with the protection of tropical rainforests, which constituted, in the majority of cases, the natural habitat of indigenous peoples all around the world.

3.1. A definition for Indigenous Peoples

It is effectively difficult to exactly define who indigenous peoples are, especially due to the fact that, currently, no international documents concerning indigenous rights or international instruments redacted by cooperation agencies or international organizations present a specific definition for indigenous communities, which can be deemed as globally accepted or internationally representative. The reasons of this lack are numerous, such as, for instance, the refusal of some communities to be defined as *indigenous*, the geographical distribution or the level of assimilation of such communities, the approach of these populations to globalization or the conviction of indigenous representatives that a definition for *indigenous peoples* is not necessary[87]. In some cases, in fact, all the provided definitions formulated for indigenous communities have been completely rejected by indigenous peoples themselves or by states, whose territories are partially populated by these original populations. These states, in other words, have in some cases neglected the presence of indigenous communities within their territories and, as a consequence, they have refused specific definitions for them. Moreover, the impossibility to find a unique definition for indigenous peoples is also complicated by difficult relationships that often exist between states and indigenous communities themselves[88]. Finally, we ought also to considered the fact that the lack of a specific, unique and clear definition for these communities could, in some cases, probably represent a problem for the effective recognition of their individual and collective rights, as well as of their fundamental freedoms.

As said before, there are some groups of indigenous peoples in Latin America that firmly refuse to be defined as *indigenous,* especially because this denomination is still thought to be particularly related to the Spanish colonial period. As a result, these local groups prefer the denomination of *original* groups or *Indias* groups, complicating in such a way the possibility to find a common or unique international

87 AIKIO, P. and SCHEININ, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination,* Institute for Human Rights Åbo Akademi University, Åbo, Finland, 2005.

88 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

definition. At this point, we ought to take into account that the term *indigenous* comes from the Latin term *indigena,* which referred to individuals from a specific place or to strangers[89]. The English term *indigenous*, in addition, comes from the French word *indigène*, which is a term that identifies those peoples that were settled in a country before the colonization process, developed by European powers[90]. According to Maybury-Lewis, furthermore, today the term *indigenous* can, in some cases, be confused due to the fact that a great number of peoples all around the world are considered by their own countries as *indigenous* because, firstly, they were born in their territories and, secondly, because they are descendant from peoples who were born within such countries[91].

As a result, some experts at international law and indigenous issues wonder whether *indigenous* is effectively the right and more appropriate way to define these original communities. There are, in fact, several other denominations that are indifferently used by the international community, such as *aboriginal*, *natives*, *ethnic minorities*, *tribal populations*, *ethnic groups*, *non-civilized populations*, *non-integrated populations*, *original citizens* or simply *indios peoples*[92]. However, we have always to take into consideration that all these terms "do not come from the lexicon of those whom are today label 'Indigenous Peoples', but from the vocabulary utilized by the "discoverers"/conquistadores/colonizers and their descendants, to differentiate themselves […] from the original inhabitants of the new territories[93]".

In addition to the terminological problem, it is sometimes problematic also to distinguish indigenous peoples from minorities or stateless nations. At this point, we should wonder whether indigenous communities could effectively be considered as they were minorities or stateless nations. Focusing the attention on the definition of

89 MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000

90 AIKIO, P. and SCHEININ, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination,* Institute for Human Rights Åbo Akademi University, Åbo, Finland, 2005.
WHEATLEY, S., *Democracy, Minorities and International Law,* Cambridge University Press, Cambridge, 2005.

91 MAYBURY-LEWIS, D., *Indigenous Peoples, Ethnic Groups and the State,* Allyn and Bacon, Needham Heights, Massachusetts, 1997.

92 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005

93 http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/696c51cf6f20b8bc802567c4003793ec, Study on Treaties, Agreements and Other Constitutive Arrangements between States and Indigenous Populations, page 22, 22/10/2013.

minority formulated by Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, he stated that a minority is constituted by a group numerically inferior to the rest of the population within the national territory, and such group obviously presents its own characteristics in linguistic, cultural and religious terms[94]. On the other hand, according to Deschénes, Canadian Superior Court Judge and member of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is a group of citizens of a country, which presents different characteristics from the majority of the population and they have the desire to achieve a real equality with the rest of the population. Martínez Cobo, on the contrary, underlined in his definition that, although indigenous peoples present a great number of characteristics in common with minorities, they are also characterized by a strong historical continuity with their ancestral lands[95]. In other words, Cobo stated that indigenous peoples should essentially be deemed as 'ethnic groups', descendant of communities that were previously settled within the same territories[96]. Therefore, focusing the attention on the element of the historical continuity, indigenous peoples could not be deemed as minorities, but as ethnic groups, considering in this context the concept of *ethnicity* in terms of common culture and descent and considering, furthermore, that it underlines a sort of social integration. As Maybury-Lewis well explained, "the ethnicity of such a group is their idea of their own distinctiveness from others. It is invariably based on a sense of common history, usually combined with other characteristics, such as the fact of sharing the same race, religion, language or culture[97]". On the other hand, with regards to the difference between indigenous peoples and stateless nations, we have to underlined the fact that both types of group reject the idea to be considered

94 CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000.
http://www.ohchr.org/EN/Issues/Minoroties/Pages/internationallaw.aspx, Minorities and International Law, United Nation Human Rights, 20/10/2013

95 WHEATLEY, S., *Democracy, Minorities and International Law,* Cambridge University Press, Cambridge, 2005.

96 MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

97 MAYBURY-LEWIS, D., *Indigenous Peoples, Ethnic Groups and the State,* Allyn and Bacon, Needham Heights, Massachusetts, 1997, page 59.

simply as 'minorities' within a larger national context, but they fight in order to achieve their self-determination rights within the national territory. Moreover, these two different types of communities could not be considered as the same, especially because the international community and a large number of international documents concerning indigenous peoples never refer to such original communities as they were stateless nations[98].

However, apart from all these complications and the consequent evident impossibility to find a unique and clear denomination, several are the definitions, aimed to represent and describe these communities, that already exist at an international level, such as, for instance, that one proposed by the Convention No. 107 (1957) of the ILO, which was then modified in 1989 in order to eliminate its 'integrationist approach' and which is today known as ILO Convention No. 169, thought to be the most important international document regarding indigenous communities, as stated within the introduction. In fact, listing who are the beneficiaries of such convention, article 1 provides a sort of definition for these communities:

> 1. This Convention applies to:
> (a) *tribal peoples* in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> (b) peoples in independent countries who are regarded as *indigenous* on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

98 IVISON, D., PATTON, P. and SANDERS, W. (edited by), *Political Theory and the Rights of Indigenous Peoples,* Cambridge University Press, New York, 2002.

> 2. Self-identification as *indigenous* or *tribal* shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply[99].

Moreover, this Convention, which was ratified by fourteen Latin American states, four European and eleven among Asian and African, reports that in three specific cases also *marginal* or *isolated* communities, which in the past have not been victim of colonization, have to considered themselves taken into account by such convention. First of all, a *marginal community* is included within such convention when it is directly descendant from an ethnic group that previously populated the same territories, second, if the *marginal community* has still intact ancestral traditions and habits and, third, if the *isolated* or *marginal community* is under the control of a national state but it presents different specific social and cultural values[100]. At this point, just considering the vague definition provided by the ILO, it is undeniable that we could not yet have a precise idea of who indigenous peoples and which their main characteristics really are.

According to Martínez Cobo, who was appointed to conduct the first UN study of the condition and situation of indigenous peoples all around the world (*Study of the problem of discrimination against indigenous populations-1986*)[101], on which also the UN Declaration on Rights of Indigenous Peoples of 2007 is based, he stated 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 sector of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their

99 Article 1, Convention No. 169, International Labour Organization – ILO http://whc.unesco.org/uploads/activities/documents/activity-496-6.pdf, The Concept of Indigenous Peoples, 07/10/2013

100 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE_C169, Convention No. 169, International Labour Organization - ILO

101 WHEATLEY, S., *Democracy, Minorities and International Law,* Cambridge University Press, Cambridge, 2005.

> ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems [102].

Trying now to focus the attention on the definition that can be found within the Constitutive Agreement of the Indigenous Peoples Fund, which is deemed to be the result of the agreements and consensus of four previous meetings and of all the advices and opinions coming from states, as well as from indigenous communities, international organizations and international experts at human and indigenous rights, it reports that indigenous communities, within the American context, are those collective groups, descendant from original American communities, that still have specific social, economic, cultural and political characteristics and peculiarities[103].

In addition, also the World Bank, within the Operative Directive (OD) No. 4.20 on Indigenous Peoples, formulated its own definition:

> **Indigenous Peoples (IP).** As used in OD 4.20, this term describes "social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process;" these groups may be referred to as "indigenous peoples," "indigenous ethnic minorities," "tribal groups," or "scheduled tribes." Since no single definition can capture all of these groups, the OD states that these groups "can be identified in particular geographical areas by the presence in varying degrees of the following characteristics: (a) close attachment to ancestral territories and to the natural resources in these areas; (b) self-identification and identification by others as members of a distinct cultural group; (c) an indigenous language, often different from the national language; (d) presence of customary social and political institutions; and (e) primarily subsistence-

102MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000, page 115.
CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000, page 7.
http://whc.unesco.org/uploads/activities/documents/activity-496-6.pdf, The Concept of Indigenous Peoples, 07/10/2013.
Estudio del Problema de la discriminación contra las poblaciones indígenas: http://www.infoandina.org/sites/default/files/recursos/Estudio_Cobo2.pdf, 10/08/2013.

103OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

oriented production[104].

Furthermore, another specific definition of indigenous peoples has been provided by the Inter-American Commission on Human Rights, which, through the Draft Inter-American Declaration on the Rights of Indigenous Peoples, declared that:

> In this Declaration indigenous peoples are those who embody historical continuity with societies which existed prior to the conquest and settlement of their territories by Europeans. […], as well as peoples brought involuntarily to the New World who freed themselves and re-established the cultures from which they have been torn. […] as well as tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regarded wholly or partially by their own customs or traditions or by special laws and regulations[105].

Nevertheless, also single indigenous communities themselves provided their own definition but, obviously, every social indigenous group could present it with a different or preciser representative definition. As a consequence, before its dissolution due to internal conflicts in 1996, the World Council of Indigenous Peoples, which dealt with social, economic, cultural and political rights of indigenous communities, tried to formulate a general definition in which indigenous peoples were deemed to be populations who assisted to the colonization process and continued to live in the same ancestral territory and, moreover, they were not controlled by the government of the country they live in. According to the Council, they had to present their own social traditions and their own communication codes, their own languages and their original characteristics[106].

104http://uobdu.files.wordpress.com/2011/05/world-bank-od-4-20.pdf, Operative Directive 4.20, World Bank, 13/10/2013

105MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000. http://ankn.uaf.edu/iks/iachr.html, Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, Article 1, 18/10/2013

106OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid,

As the reader can have already understood, at an international level there are several definitions for indigenous peoples but all are different or stress diverse aspects of the indigenous reality[107]. In order to find just one unique definition for these communities, we should probably take into consideration some main elements, such as all those racial elements, the net diversity that exists between indigenous peoples and minorities, the position of past subjugation due to colonization, the obligation to be integrated into states, the common linguistic, cultural and historic elements that these communities share, or the particular interrelation that exists between them and the environment. Considering all these elements, Juan Daniel Oliva Martínez tried to provide a definition that partially clarify who indigenous peoples are and which their main characteristics are. Probably influenced by the definition provided by Cobo within his *Study*, he stated that indigenous populations are those peoples that have been victim of colonization processes, characterized by high levels of subjugation, forced assimilation and subordination. He also underlined the fact that those communities, which can be defined as *indigenous,* have been integrated against their will to national states but they keep maintaining, within the present, distinctive linguistic, cultural, economic, political and religious characteristics[108]. Moreover, highlighting the strong connection with their territories and regarding their relation with globalization, he stated that:

> […] mantienen, en la práctica o en el imaginario colectivo, un apego especial a unos territorios ancestrales. A su vez, los pueblos indígenas sufren o han sufrido una situación de pobreza y subdesarrollo y de especial vulnerabilidad frente al progreso y manifiestan, en el presente, una actitud de resistencia y solidariedad interétnica, identificándose con las luchas de otros pueblos indígenas que habitan otras partes del mundo, frente a las dinámicas globales envolventes y la imposición de modelos en el lano económico, político, social y

2005

107 http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.AC.4.1996.2.Add.1.EN?Opendocument, Standard Setting Activities: Evolution of Standard concerning the Rights of Indigenous People: the Concept of "Indigenous Peoples", 19/10/2013

108 OLIVA MARTÍNEZ, J. D., above mentioned.

cultural, de la que todavía hoy son objeto[109].

In conclusion, as we have had the opportunity to notice and understand, there is a large number of diverse definitions, whose main aim is the identification of such distinct national communities. Numerous international organizations, as well indigenous institutions, have tried to provide their own definitions for such human groups, however, as said before, difficulties and complications for the determination of the indigenous reality are several. Moreover, it is sometimes complicate to distinguish minorities from indigenous groups or, in other cases, as said before, several definitions have been refused or rejected by states or by indigenous groups themselves because discriminatory. According to Oliva Martínez, the main causes that do not favour the acceptance of a specific, universal, common and clear definition for indigenous peoples are, firstly, the impossibility to define which are the social groups that have all the characteristics to be considered as *indigenous,* secondly, the absence of a specific institution or group of people that can explain who *indigenous peoples* really are, thirdly, the great number of diversities that exist between those several groups that define themselves as *indigenous* or *original,* fourthly, the terminological confusion, which is created by the great quantity of existing terms, such as *indios, indigenous, original communities, indigenous communities.* Furthermore, legal or social definitions and denominations for these peoples are, in some cases, considered to constitute a sort of racial discrimination or, in other cases, some states, as affirmed before, avoid to recognize the presence of indigenous peoples within their territories, not accepting in such a way any definition which could define such communities[110]. Considering all this, we are forced to admit that a specific definition for indigenous peoples not only does not exist in the present, but it also might not be formulated within the near future, as well due to the fact that indigenous peoples today populate several territories in a large number of states all around the world, in America, Africa, Asia and Oceania, and, as a consequence, these communities present a large variety of different

109OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005, page 66

110OLIVA MARTÍNEZ, J. D., above mentioned.

characteristics, as well as different level of assimilation to the occidental globalization processes and different cultural levels, which do not allowed the international community to find or formulate a unique definition for them. However, apart from all this, today, in the case of the concept of 'indigenous peoples', the prevailing idea is undoubtedly that no formal universal definitions of the term are considered to be really necessary or essential. To conclude, simply for practical reasons, the understanding of the term commonly recognized and accepted, at an international level, is that one provided in the *Study* of Martínez Cobo.

3.2. Indigenous Peoples and international organizations

Within this sub-chapter, we just want to provide an overview regarding the approach of international agencies and organizations dealing with the international indigenous situation, in order to allow the reader to understand how the international community has faced indigenous issues during the last decades.

a) United Nations

It is undeniable that the situation of indigenous peoples, as said other several times in the previous pages, has begun progressively being considered important within the international context especially starting from the second half of the XX century. We should particularly consider the process that began in 1972, when José R. Martínez Cobo himself was asked to elaborate the *Study of the problem of discrimination against indigenous populations*, concluded in 1986. The objective of the *Study* was the collection of as many as possible information about all kinds of possible discrimination against indigenous communities and the analysis of the concept and term *'indigenous'*. The elaboration process of this *Study,* as well as the interest demonstrated by non-governmental development organizations, generated the perfect situation for the creation of the so-called Working Group on Indigenous Populations in 1982, which is exactly the year in which the United Nations agencies particularly began focusing their attention on indigenous communities all around the world[111].

Another important year for indigenous communities is undoubtedly 1989, in fact, as said before, it was in this year that the International Labour Organization (ILO), agency of the United Nations, adopted the Indigenous and Tribal Convention No. 169. Moreover, other fundamental years are undoubtedly 1992 and 1993, in which a large number of events, such as the adoption of the Rio Declaration on

111 http://www.infoandina.org/sites/default/files/recursos/Estudio_Cobo2.pdf, Study of the problem of discrimination against indigenous populations, 10/08/2013.
OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.
VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

Environment and Development in 1992 and the proclamation of the International Year of Indigenous Communities in 1993, took place. Furthermore, also 1995 can be deemed as an important moment for indigenous communities, especially due to the fact that this year was declared to be the first year of the decade effectively dedicated to indigenous peoples all around the world (1995-2014)[112]. Apart from the attention that particularly the International Labour Organization focused on indigenous peoples, we can notice that especially starting from the last decades of the XX century the situation of indigenous communities began being seriously taken into account within the United Nations system. Furthermore, the organizations and programmes that have driven a specific attention towards indigenous communities and their rights are, for instance, the United Nations Development Programme, the World Bank, UNESCO, UNICEF, the World Health Organization (WHO) and others. Moreover, in the United Nations context, with regards to the protection of indigenous rights, an important role has been played by some specific organs, such as the Working Group on Indigenous Populations, the Special Rapporteur on the rights of indigenous peoples and the United Nations Permanent Forum on Indigenous Issues.

Referring to the Working Group on Indigenous Populations, it was created by a Resolution of the Economic and Social Council in 1982. This Working Group is composed by five independent experts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (at the time of its creation, the participating experts were Erica-Irene Daes, Miguel Alfonso Martínez, Volodymyr Boutkevitch, Ribot Hatano and Said Naceur Ramadhane), who organize open meetings, to which representative people of indigenous organizations can take part. The main roles of the Working Group on Indigenous Populations are, firstly, the examination of events of promotion and protection of rights and fundamental freedoms of indigenous peoples and, secondly, the permanent control of the development of international legislations in relation to indigenous communities[113].

112 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

113 BAMONTE, G. and CONSIGLIO, V. (a cura di), *Popoli indigeni e Nazioni Unite,* Bulzoni Editore, Rome, 2003.

The Working Group on Indigenous Populations, moreover, is the only instrument that can influence in a decisive way the evolution or preparation of specific new rules in favour of indigenous peoples. In fact, as a result of this third crucial role, the Working Group on Indigenous Populations, in 1985, began the preparation of a draft Declaration on indigenous peoples, particularly taking into account all the advises and suggestions coming from representative members of indigenous communities. The Working Group on the Draft Declaration on the Rights of Indigenous Peoples, established in 1995 in accordance with the Commission on Human Rights and the Resolution 1995/32 of the Economic and Social Council, it is a subsidiary organ of the Commission on Human Rights and it is composed by all the representatives of States parties[114]. The Declaration (currently composed by 45 articles), which was be the result of the efforts of such Working Group, was the product of meetings and negotiations between representatives of indigenous communities, indigenous organizations and political representatives of countries. In 1993, despite numerous difficulties that we will explain within the following pages dealing with the right to self-determination of indigenous peoples, the Declaration was finally adopted, after having been revised by the Working Group on the Draft Declaration on the Rights of Indigenous Peoples within its eleventh session, which took place from the 5th to 16th December 2005. After the final revision by the Working Group, the final version of the Declaration was finally accepted and then adopted on the 29th June 2006 by the Human Right Council and by the UN General Assembly on the 13th September 2007, during its 61st regular session[115], (such Declaration was finally ratified by 143 countries, 4 votes were against – Australia, Canada, United States, New Zealand – and 11 were simply abstentions – Azerbaijan, Bangladesh, Buthan,

VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

http://www2.ohchr.org/english/issues/indigenous/groups/wgip.htm, Working Group on Indigenous Populations, 22/10/2013.

114BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

VAN DE FLIERT, L., above mentioned.

115OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

BERRAONDO, M. (Coord.), above mentioned.

VAN DE FLIERT, L., above mentioned.

http://www2.ohchr.org/english/issues/indigenous/groups/groups-02.htm, Working Group on the draft declaration on the rights of indigenous peoples, 22/10/2013

Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Somoa and Ukraine). Apart from the organization of meetings dedicated to all those rights of indigenous peoples, the Working Group on Indigenous Peoples also plays an important role for the redaction of documents referring to the protection of indigenous rights. Several fundamental instruments that have been redacted are documents often signed by Erica-Irene Daes, the Founding Chairperson and Special Rapporteur of the United Nations Working Group on Indigenous Populations, who is considered to be one of the most important international characters who fought for indigenous rights and for their effective recognition all around the world[116].

Referring now to another important organ of the United Nations dealing with indigenous peoples, the Special Rapporteur on the rights of indigenous peoples, currently Professor James Anaya, within the fulfillment of his mandate, he has some main roles. Firstly, he promotes new laws, government programmes and plans and constructive agreements between indigenous peoples and governments, he reports human rights situations of indigenous communities all around the world, denounces specific cases of violations of indigenous rights and abuses and, finally, promotes and favours studies especially for the promotion and protection of indigenous rights and freedoms. Moreover, it seems to be important also to underline the fact that the Special Rapporteur on the rights of indigenous peoples regularly visits countries in order to create and favour opportunities of dialogue with governments mainly on the protection and preservation of indigenous communities within their ancestral and original territories[117].

Finally, the last organ that we should analyse is the United Nations Permanent Forum on Indigenous Issues, whose creation was officially proposed during the World Conference on Human Rights that took place in Vienna in 1993. However, it was just with the Resolution E/RES/2000/22 of the Economic and Social Council that the United Nations Permanent Forum on Indigenous Issues began effectively

116http://whc.unesco.org/uploads/activities/documents/activity-496-6.pdf, The Concept of Indigenous Peoples, 07/10/2013.
CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000

117BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
http://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx, Special rapporteur on the rights of indigenous peoples, united nations Human Rights, 20/10/2013

existing. It is an advisory body to the Economic and Social Council, with the objective to discuss indigenous issues mainly related to economic and social development, cultural and environmental issues, health, education, as well as human rights in general. With regards to its members, the United Nations Permanent Forum on Indigenous Issues is composed by sixteen independent experts, eight of them are proposed by national governmental authorities and the other eight are selected by the President of the Economic and Social Council. Undoubtedly, meetings are the most important part of the role played by the United Nations Permanent Forum. In fact, the first meeting took place in 2002, and from that year the main issues managed by this organ have especially dealt with indigenous childhood and youth, indigenous women and gender issues in general, indigenous development and, finally, self-development of indigenous communities[118].

With regards to other United Nations mechanisms of human rights particularly important for indigenous peoples, we should also remember the so-called conventional organs, which are, for instance, the Committee on Human Rights and the Office of the High Commissioner for Human Rights. These conventional organs are created through conventions and their main aim is the control of the respect of those conventions by which they have been instituted. These conventional organs are practically instruments of control and they are composed by independent experts, who are considered to be independent because they do not depend on states or national institutions.

Firstly, it is particularly important to highlight the role played by the Human Rights Committee, which is an organ formed by independent experts that monitor implementation of the International Covenant on Civil and Political Rights (signed in 1966 and in force from 1976) by the State parties. The major role of the Committee is the evaluation of reports (related to human rights and in some cases also to indigenous peoples), coming from States, and, through the so-called concluding observations, it gives advises to state parties[119].

118BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
http://undesadspd.org/IndigenousPeoples.aspx, UN Permanent Forum on Indigenous Issues, 22/10/2013

119http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx, Human Rights Committee, 22/10/2013

Secondly, another important conventional organs that has particularly focused its attention on the situation of indigenous peoples is the Committee on the Elimination of Racial Discrimination (CERD), which is an institution of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination (1965) by state parties. In fact, all states parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States have to initially report one year after having acceded to the Convention and then every two years. The Committee, as a result, examines each report and addresses its advises and recommendations to the state party in the form of concluding observations[120].

Thirdly, it is also really important in the field of indigenous peoples the Committee on the Rights of the Child (CRC), which is a body of independent experts that monitors implementation by state parties of the Convention on the Right of the Child. All states parties are, in fact, asked to submit regular reports to the Committee concerning all the methods through which such rights are going to be implemented. States have to initially report two years after having acceded to the Convention and then every five years. The Committee, as it happens in the case of the other two Committees already taken into consideration, examines each report and send its recommendations to the state party in the form of concluding observations[121].

Finally, the Office of the United Nations High Commissioner for Human Rights (OHCHR) represents the international agency dealing with universal ideals of human dignity. Its mandate, in accordance with the aspirations of the international community, is that one to protect and spread human rights. Furthermore, it supports all the United Nations human rights initiatives and mechanisms, such as the Human Right Council, and it also promotes especially the right to development, organizes and coordinates United Nations human rights activities and favours the respect and protection of human rights within the United Nations system. Moreover, it ensures the enforcement and the improvement of

120 http://www2.ohchr.org/english/bodies/cerd/, Committee on the Elimation of Racial Discrimination, 22/10/2013

121 http://www2.ohchr.org/english/bodies/crc/, Committee on the Rights of the Child, 22/10/2013

human rights regulations, recognized at an international level, through the promotion not only of the universal ratification and implementation of human rights treaties, but also the respect for the rule of law[122].

b) The ILO Convention No. 169

As said several times while considering international documents regarding indigenous peoples, the most important and most complete international instrument dealing with their rights is undoubtedly the Convention No. 169 (previously known as ILO Convention No. 107) of the International Labour Organization - ILO, whose final redaction took place in 1989 and which was ratified by several states, such as Norway and Mexico (1990), Colombia and Bolivia (1991), Costa Rica and Paraguay (1993), Peru (1994), Honduras (1995), Denmark and Guatemala (1996), the Netherlands, Fiji and Ecuador (1998), Argentina (2000), Venezuela, Dominica and Brazil (2002), Nepal and Spain (2007) and the Central African Republic (2010), among others[123]. This international instrument is thought to be one of the most important concerning indigenous peoples especially because it is one of the first documents that took into account not only individual rights of indigenous peoples, but also those collective rights of such communities, considering as collective rights those that benefit, directly or indirectly, all the members belonging to a group[124].

Concerning its structure, the Convention No. 169 is composed by a Preamble, in which the reader can find an explanation of all the considerations that have been taken into account during the redaction of such Convention. The Convention, apart from the Preamble, is divided into other eight crucial parts, without considering the last two parts, represented by General and Final Dispositions. Part one is entitled "General Policy", the second one "Land", the third "Recruitment and Conditions of

122BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=OHCHR, UN High Commissioner of Human Rights, 22/10/2013

123http://www.gfbv.it/3dossier/diritto/ilo169-it.html#r3, States parties ILO Convention No. 169, 22/10/2013.

124MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000.
ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000, pages 9-19, 45-47, 183-184.

Employment", the fourth "Vocational Training, Handicrafts and Rural Industries", the fifth "Social security and Health", the sixth "Education and means of communication", the seventh "Contacts and co-operation across borders" and, finally, the last one is entitled "Administration".

Considering the first part of the Convention, dedicated to the issue of General Policy, from article 8 to 12, it rules the role played by indigenous communities within the international context and deals with the administration of justice. According to article 8 of the Convention, there are some limitations that have to be taken into account by states while putting in practice the national legislation dealing with indigenous peoples. In fact, as reported within article 8:

> **1.** In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
>
> **2.** These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
>
> **3.** The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties[125].

On the other hand, while article 8 forced the application of the national law to respect traditions and habits of indigenous communities, article 9 specifies that if those indigenous traditions are incompatible not only with the national legal system of the state, but also with the internationally recognized human rights, they should not be accepted by the state. In fact, as we notice by reading article 9:

> **1.** To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by

125Article 8, Convention No. 169, 1989, ILO

the peoples concerned for dealing with offences committed by their members shall be respected[126].

Moreover, It seems curious and interesting the fact that it is not so common for indigenous individuals to be confined in prison, in fact, they are in many cases condemned to useful social works or, in other cases, it is the judge that decides for an appropriate methods of punishment. The reluctance of the Convention to confine indigenous peoples in prison can be explained with the complete estrangement that these individuals would have to suffer far from their territory and community.

Secondly, part two of such Convention deals with territorial issues, one of the most fundamental element for indigenous communities. Within the Convention, when referring to ancestral lands, the reader should not only focus his attention on territories, but he should also consider the totality of the indigenous habitat, composed by rivers, lakes, air, environmental elements in general, lagoons, and those deemed as holly places. In fact, article 13 of the Convention reports that:

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term ***lands*** in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use[127].

Therefore, as the reader can easily understand from these articles, the loss of territories or lands for indigenous peoples represents probably the loss of one of the

126Article 9, Convention No. 169, 1989, ILO
127Article 13, Convention No. 169, 1989, ILO

most fundamental of their elements, on which their entire existence is based. While considering territories and lands, in general, we have also to focus the attention on the fact that natural resources, as well, are thought to be fundamental elements for indigenous communities. As a consequence, article 15 explains that:

> **1.** The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> **2.** In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities[128].

As a result, according to the Convention, indigenous communities will have the opportunity to take part to processes of use, management and conservation of existing natural resources within their lands. Moreover, states will have to take into account all those damages that could effectively affect indigenous communities, using or completely destroying their territories or simply disposing of their natural resources.

Thirdly, referring now to the right to consultancy, this principle consists in the active participation of indigenous and tribal communities in making-decision processes, with a specific attention on their opinions in order to improve those

128Article 15, Convention No. 169, 1989, ILO

results of development programmes, which could directly affect such communities. The main aim of these procedures of consultancy is the possibility for indigenous peoples to maintain their territories intact with the consequent obvious possibility to preserve them for future generations. According to article 6 of the Convention, in fact, governments shall:

> **1.** a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
>
> b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
>
> c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
>
> **2.** The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures[129].

It is undeniable, according to a large number of experts at indigenous reality and rights, that a good consultancy can effectively favour the right to self-determination of these communities. For instance, according to Lee Swepston, author of a great quantity of articles on indigenous rights, she said that self-determination represents a sort of autonomy inside the country and, although the Convention never deals with the right to self-determination, it is oriented to it. Moreover, Russel Lawrence Barsh, current director of the Research Programme of the Samish Indian Nation in Human Ecology, Archaeology and Marine Biology in the San Juan Islands of Washington State, explained that, despite the fact that the

129Article 6, Convention No. 169, 1989, ILO

Convention does not directly deal with the principle of self-determination, it aims to achieve it. Furthermore, as specified by Barsh, the use of the word 'populations' is now referred to the fact that these communities are recognized as having their own identity, organized in a complex social structure, and they are no longer deemed to be simple groups of individuals sharing the same racial or ethnic characteristics[130].

c) The World Bank

Another fundamental institution, not only for the protection, but also for the promotion of indigenous rights, is undoubtedly the World Bank, which is a financial institution that mainly operates in Africa, Far East, Europe and Middle East, South America, North Africa and South Asia. During the first meetings of the Working Group on Indigenous Peoples, some non-governmental organizations and indigenous representatives criticized the activities of the World Bank, accusing it to favour through its invasive projects not only the environmental destruction, but also the cultural disintegration of indigenous communities[131]. In fact, the World Bank has been the first multilateral organization that has put in practice specific mechanisms of protection of indigenous peoples, through development programmes and other similar plans from 1982, with the directive under the title T*ribal People in Bank-financed projects*. Undoubtedly, the main aim of the World Bank has been that one to try to reduce levels of poverty and marginalization of indigenous communities all around the world, through a process of inclusion of these communities within the political dialogue. In other words, the World Bank aimed to promote the development and a slow and gradual acculturations of these communities, which ensured in such a way that the development processes foster full respect for their dignity, human rights and uniqueness[132].

130 BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

131 VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

132 http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/11/14/000012009_20031114144132/Renderer/PDF/272050WB0and0Indigenous0Peoples01public1.pdf, The World Bank and Indigenous Peoples, 23/10/2013
BERRAONDO, M. (Coord.), above mentioned.

However, highly criticized by indigenous communities, as said before, the World Bank in 1997-1998 revised, through the Operational Directive 4.20 on Indigenous Peoples, its original approach to such communities, favouring active participation of these peoples to development projects[133]. As a consequence, the World Bank adopted two main measures for all those projects directed to those populations. First of all, it highlighted the important role played by the fact that indigenous communities, through their representatives, advised and helped the World Bank in order to create projects as much as possible adequate to their specific situations. Second, one of the main aim of the World Bank in relation to such communities was, and it is within the present, the total mitigation of all negative or unexpected results or effects of its projects.

d) The Organization of American States (UN regional agency)

As said before, indigenous, tribal, native peoples exist in every region of the world, but they are perhaps more present in the Americas. The majority of indigenous peoples, as said in the previous pages, have not only been attacked, but they have also seen their cultures and traditions systematically assaulted. Today, when we speak about rights of indigenous peoples in the Americas, we ought undoubtedly to take into consideration the fundamental role played by the American system of human rights[134]. In fact, the Organization of American States (OAS) Human Rights system, also known as the Inter-American system for the protection of human rights, today includes 35 American states and it is considered to be a UN regional agency. It is sustained by three international legal instruments, firstly, the Charter of the Organization of American States, secondly, the American Declaration on the Rights and Duties of Man and, finally, the Inter-American Convention on Human Rights. The Charter of the Organization of American States clearly declares

133VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.
http://uobdu.files.wordpress.com/2011/05/world-bank-od-4-20.pdf, Operative Directive 4.20, World Bank, 13/10/2013

134HANNUM, H., *The protection of Indigenous Rights in the Inter-American System*, in HARRIS, D. J. and LIVINGSTONE, S. (eds.), *The Inter-American System of Human Rights*, Oxford, Clarendon Press, 1998, page 322-343.

that "the American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence[135]". However, the Charter of the Organization of American States never refers to rights of indigenous peoples and it was for this precise reason that, in 1989, there was the elaboration of a specific document on indigenous rights, the Convention No. 169 of the ILO. Despite the complete and absolute absence of an explicit recognition of collective indigenous rights within the Charter, the Inter-American system has never avoid taking into account indigenous reality closely linked to its collective peculiarity[136].

Focusing now the attention on the main organs of the Inter-American system, those that are deemed as the most important, undoubtedly, are the Commission and the Court, which are responsible for the application of the American Declaration of Human Rights (1948), as well as of the American Convention on Human Rights (1969). With regards to the Court, it is the most important organ of the Inter-American system and it counts on seven members proposed by the States parties of the Convention. On the other hand, the Inter-American Commission was created in 1959 and was recognized as specialized organ of the Organization of American States. Its main role is the control over the defence of human rights and it serves as consultative organ of the Organization dealing with these specific issues. It is composed by seven members, elected by states parties of the Organization of American States[137].

Beginning by considering the Court, it does not have the same generic role of protection of human rights that the Commission has. In fact, the Court has three main precise objectives to achieve. Firstly, it judges all the cases of individual violations of human rights, secondly, it gives authorized interpretations of the

135http://www.oas.org/en/iachr/mandate/what.asp, Organization of American States, 22/10/2013
http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm, Charter of the Organization of American States, 22/10/2013

136BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

137BERRAONDO, M. (Coord.), above mentioned.
http://www.oas.org/en/iachr/mandate/what.asp, Organization of American States, 22/10/2013

American Convention and, finally, it answers to all those doubts concerning the internal legislation of American states. Moreover, differently from the Commission, which is a specialized organ of the Organization of American States, the Court is considered to be an international tribunal, whose sentences have to be deemed as compulsory.

As said before, the American Convention, as well as the American Declaration, do not deal with the rights of indigenous peoples. As a consequence, the right normative and legislative interpretation of Inter-American organs is fundamental for rights of indigenous communities and, in fact, in order to give an exact interpretation to the rights of such peoples, Inter-American organs have especially and often consulted the fundamental Convention No. 169 of the International Labour Organization. As a result, Inter-American organs have sentenced in a large number of cases concerning abuses and violations of individual indigenous rights, as the right to life, the right to personal freedom, in some cases of genocide and other numerous massive violations of rights in Guatemala, Peru and Suriname, basing their decisions mainly on the ILO Convention[138].

With regards to the rights to life, Inter-American organs, especially the Court, have taken more and more into account the multilateral aspect of collective violations after a specific case. The most significant one was the case of the *Masacre Plan de Sánchez v. Guatemala,* which was considered to be an horrible case of genocide that caused the death of more or less 88 peoples, especially Mayan, killed by Guatemalan soldiers and Guatemalan paramilitary forces. Guatemalan government did not deny its responsibility, however, the Court did not consider this case as a specific case of genocide. In fact, the Court considered the case just from the point of view of the damages caused, not only to individuals, but also to the entire community and to their cultural values. Taking into account all this, the Court pronounced its sentence and condemned the Guatemalan government not only to repair families in a monetary way, but also to repair the community of Plan de Sánchez, which had been literally destroyed by the suffering of the damages and

138http://www.hrea.org/index.php?base_id=150#bodies, Inter-American Court of Human Rights, 22/10/2013
HANNUM, H., *The protection of Indigenous Rights in the Inter-American System*, in HARRIS, D. J. and LIVINGSTONE, S. (eds.), *The Inter-American System of Human Rights*, Oxford, Clarendon Press, 1998, page 322-343.

abuses against their own language, their territories and their own culture[139].

Concerning the right to territory and natural resources, which is deemed to be one of the most fundamental rights for indigenous peoples, the Inter-American system has undoubtedly given great importance to this collective right of indigenous communities. The right to territory and natural resources was the central point of the Awas Tingni case, whose sentence, which took place in 2001, has been the first in relation to a collective right of indigenous peoples. Briefly, the case began in 1995, when the Awas Tingni community, which is a small indigenous community living in Nicaragua, was informed that the Nicaraguan government had previously permitted to a transnational company the total exploitation and destruction of a great and considerable area of rainforest (more or less 60,000 hectares), which was exactly the centre of the ancestral territory in which the community of Awas Tingni lived. As a consequence, the case was brought before judges of the Court, who provided a revolutionary interpretation of the article 21st[140] of the American Convention (1969). In fact, judges did not take into consideration the individual aspect of property explained within the article, but, on the contrary, they interpreted the article just considering the collective property of indigenous peoples of lands and territories they lived in. Finally, the government was obliged to leave indigenous territories and to avoid in future other cases of destruction of indigenous lands. It is for this simple reason that we can declare that the Court, with this sentence, perfectly developed the fundamental element of collective property of indigenous communities, elaborating in such a way a legislation more and more complete and reliable[141].

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139 http://www.iidh.ed.cr/comunidades/diversidades/docs/div_indinteresante/caso%20guatemala.htm, Caso Plan de Sánchez, 22/10/2013

140 Art. 21, Right to Property:
1. 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. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law. (American Convention on Human Rights, Costa Rica, 1969).

141 http://muse.jhu.edu/login?auth=0&type=summary&url=7journals7human_rights_quarterly/v018/18.2anaya.html, Indigenous Peoples, The Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua, S. James Anaya and S. Todd Crider, 20/10/2013.
HANNUM, H., *The protection of Indigenous Rights in the Inter-American System*, in HARRIS, D. J. and LIVINGSTONE, S. (eds.), *The Inter-American System of Human Rights*, Oxford, Clarendon Press, 1998, page 322-343.

Referring now to the right to political participation, it is thought to be the less noticeable violation by States of indigenous rights. However, the Court can provide several examples of sentences concerning the violation of this right and among them we can remember the significant sentence regarding the case of YATAMA v. Nicaragua. The case began in 2000 with the exclusion from election of the YATAMA party (*Yapti Tasba Masraka Nanih Asla Takanka*, which means "sons of the Great Mother Earth – Pacha Mama). Originally, this party had been simply thought as an association but, due to the new Nicaraguan Electoral Law of 2000, it was forced to transform itself into a party. Moreover, this new reform asked parties to be composed by at least 80% of candidates coming from both Atlantic regions in order to be allowed to take part to the elections. However, for a great number of oppositions and an apparent lack of candidates from both regions, the YATAMA party was obliged to renounce to the elections. This case of YATAMA can be deemed as a perfect example of how general rules and regulations can be discriminatory in the case of indigenous communities and other ethnic groups in general. For this specific case, the Inter-American Court concluded that the Nicaraguan government had clearly violated the right to political participation of the candidates of YATAMA, having introduced within the group of regulations a specific norm that preferred the apparent political effectiveness to the real political participations of all kinds of people[142].

The other important organ of the Inter-American system is undoubtedly the Commission. Although the Commission has discussed indigenous rights in the context of a large number of reports on human rights within specific states, the Commission has reached written conclusions dealing with indigenous rights in only very few cases, which represent the most important approaches between states and indigenous communities. In fact, the first case considered by the Commission concerning indigenous peoples, which was related to the Guahibo Indians settled in the eastern part of Colombia, early showed all the difficulties that the Commission

http://www.escr-net.org/docs/i/405047, Case of the Mayagna (Sumo) Awas Tingni Community v. Guatemala, 22/10/2013

142BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
http://opil.ouplaw.com/view/10.1093/law:ihrl/1511iachr05.case.1/law-ihrl-1511iachr05, Case of the Yatama v. Nicaragua, 22/10/2013

had to face, mainly due to a lack of proves or the impossibility to ascertaining the facts. Moreover, the Commission have always had the tendency to accept the explanations provided by governments. In fact, in the case of Colombia, the Commission accepted the explanations of the Colombian government, which reported that the Colombian army was just restoring the public order and denounced as false any allegations of human rights violations[143].

The second case was related to an alleged genocide against the community Aché Indians within Paraguay. In 1974, the community of Aché denounced some abuses and violations of human rights against their community by settlers within their original territories. The Paraguayan government never focused its attention on indigenous complaints and, as a consequence, the Commission decided, in accordance with its regulations, to presume that all the events, which had been denounced, had to be considered as real and, as a result, it recommended that the government adopted, as soon as possible, measures aimed to provide effective and complete protection for the rights of the Aché Indians community. Finally, the Commission concluded that there had been very serious violations of the rights to life, security, liberty and health[144].

The third individual case leaded the Commission to redact a specific resolution. The case that was brought before the Commission by a large number of non-governmental organizations dealt with the case of the Yanomami community in Brazil. The main cause of the complaints was the protection of the Yanomami community, considered to be the largest illiterate indigenous community within Latin America, from the destruction, began in 1973, of their territories, especially due to increasing national economic interests and a great number of miners. Due to this disastrous situation, the Brazilian government actively participated in the case and proposed a large number of initiatives in order to preserve and defend those territories of the Yanomami. The Commission seemed to believe in all the assurances of the government, which declared that the situation had already being effectively addressed. Finally, the Commission concluded that the exploitation and

143HANNUM, H., *The protection of Indigenous Rights in the Inter-American System*, in HARRIS, D. J. and LIVINGSTONE, S. (eds.), *The Inter-American System of Human Rights*, Oxford, Clarendon Press, 1998, page 322-343.

144HANNUM, H., above mentioned.

destruction of natural resources and indigenous habitat within the Amazonian zone had often forced a huge part of the Yanomami populations to leave their villages and that the civilian invasions had spread without a previous protection and preservation of the health and safety of the Yanomami. In other words, the Commission underlined that indigenous peoples might have been guaranteed additional specific rights, such as the right to territory, when it noticed that the Brazilian national law and national regulations just recognized the right of ethnic groups to protection on the use of their language, religion and cultural identity, without mentioning the right to territory[145].

Considering now the last case on which the Commission focused its attention, it was an individual compliant which leaded the Commission to the redaction of the document entitled "*Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*". Despite the fact that the main cause of complaints was the brutal violence of Nicaraguan government towards Miskito Indians, the case became more difficult and complicated when there was a net separation between the original complainants and a sort of expansion of the complaints, aimed to include other issues of indigenous rights to autonomy and self-development. However, apart from all these difficulties and complications, the Commission reported that the Miskito community had the right to enjoy their territories and that they also had to have the opportunity to enjoy additional political rights due to their status of indigenous populations, especially referring to the right to self-determination[146].

To sum up, the Inter-American system has manifested an increasing interest for the requests and complaints coming from indigenous communities, mainly for the recognition of their individual rights, as well as those considered to be collective rights, such as the right to territory. This development of the Inter-American system has been possible due to indigenous populations and their organizations, which have

145http://www.escr-net.org/docs/i/412519, The Case of Yanomami, 22/10/2013

146HANNUM, H., *The protection of Indigenous Rights in the Inter-American System*, in HARRIS, D. J. and LIVINGSTONE, S. (eds.), *The Inter-American System of Human Rights*, Oxford, Clarendon Press, 1998, page 322-343.
http://news.bbc.co.uk/2/hi/8181209.stm, The case of Miskito, 22/10/2013

been effectively able to favour the recognition and evolution of such rights, especially from the last decades of the XX century. Moreover, the activity of the Inter-American organs, such as the Commission and the Court, in relation to indigenous issues, shows the real will of the Inter-American system to achieve a full respect and a complete recognition of such indigenous rights. However, reluctance of states to completely recognize the presence of indigenous communities within their territories, as well as, unfortunately, the incredible and dangerous levels of poverty reached by some indigenous communities within South America, made, in the past, and make today the mission of the Inter-American system more and more difficult, more complicated and, in some cases, inconclusive[147].

e) The Indigenous Peoples Fund (IPF)

The creation in 1992 of the Indigenous Peoples Fund (IPF), also known as Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, is the result of an agreement made by a large number of Latin American countries with Spain and Portugal. The proposal for the foundation of such institution came firstly from the government of Bolivia, which was particularly supported by the Inter-American Development Bank and by other several international agencies. With regards to its internal organization, the Fund guarantees a free participation of indigenous representatives and it presents a General Assembly composed by indigenous representatives of each member state, representatives of regional governments and also representatives of extra-regional governments. Furthermore, the Fund disposes also of an executive organ, the Board of Directors, and all the activities of the organization are managed by the Secretariat, located in La Paz (Bolivia), whose staff is composed by a large number of representatives of indigenous communities.

The Fund has as main aim the reduction of poverty among indigenous

147HANNUM, H., *The protection of Indigenous Rights in the Inter-American System*, in HARRIS, D. J. and LIVINGSTONE, S. (eds.), *The Inter-American System of Human Rights*, Oxford, Clarendon Press, 1998, page 322-343..
VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

communities in Latin American countries and the Caribbean, favouring in such a way development projects and plans in order to integrate indigenous representatives into decision processes. In other words, the Fund has as main objective that one to create necessary self-development conditions among indigenous communities, monitoring technical, financial, economic and social conditions of such populations. Furthermore, the Fund is also thought to play an important role in order to favour positive and peaceful relationships between states and local indigenous peoples, increasing in such a way not only the efficiency, but also the transparency, of all those programmes aimed to promote self-development and improvement of indigenous life conditions. The Fund supports, in fact, projects concerning resources for sustainable development, organisational strengthening and training and all those projects that focus their attention on indigenous rights, culture and identity[148].

In order to summarize, the guiding principles, which lead all the activities and projects of the Fund, are the firm conviction that indigenous peoples, living within specific countries, are surely entitled to rights as original inhabitants, and the state has to guarantee their protection, as well as the preservation of their ancestral territories. Indigenous peoples, furthermore, should be guaranteed the right to manage and use all the natural resources coming from their ancestral territories, favouring in such a way not only the maintenance of biodiversity, but also the improvement of their conditions, in accordance with their own social and economic initiatives and proposals.

f) The European Union

Starting by considering the important role of the European Parliament dealing with developing countries and indigenous issues, it has undoubtedly adopted a great quantity of resolutions in favour of such original communities. According to Lydia Van de Fliert, numerous resolutions regarding indigenous peoples, which have been adopted by the European Parliament, had as main aims the protection, for example, of indigenous communities in Malaysia against deforestation, Yanomami and Awa

148VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

Guaja communities in Brazil and Tuareg peoples in Nigeria and Mali against human rights violations, Mohawks and Inuit in Canada, the Paez Indians in Colombia, the Siona, Secoya, Cofan, Quiscuah, Shiwiar, Achuar, Huaorani and Quischua peoples in Ecuador[149]. Moreover, it seems interesting to remember two particular resolutions adopted by the European Parliament. Firstly, it was in 1987 when the European Parliament appointed a rapporteur, for the first time, with the main aim to monitor indigenous peoples conditions all around the world. The study of such rapporteur leaded to the adoption within the following year of the resolution *on the position of the world's Indians*. Secondly, another important resolution, entitled *the Implementation of International Legislation on the Environment and the Rights of Indigenous Peoples*, was the result of the study leaded by another rapporteur nominated by the Committee on Foreign Affairs and Security. The particular attention that the European Parliament drove towards indigenous peoples focuses on violations of human rights, the protection of the environment and, finally, on the development and improvement of such communities[150].

With regards to the European Council, it adopted a large number of resolutions and regulations concerning indigenous communities, especially within the fields of human rights, environment and development. For example, some of such resolutions are the *Resolution on Tropical Forest development aspects*, which underlined the fundamental importance of the preservation, sustainable management and rehabilitation of tropical forests, particularly affected by deforestation, promoting in such a way plans and programmes of intensive reforestation, or the regulation No. 443/92 on *financial and technical assistance to, and economic cooperation with the developing countries of Latin America and Asia*, which proposed a kind of development that has to respect all cultural characteristics of indigenous communities included within such regulation.

Considering now the role played by another important organ of the European Union, the Commission, it is considered to be the organ that more has the control over the coordination of activities and projects concerning human rights, including

149VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

150http://eeas.europa.eu/human_rights/ip/index_en.htm, European Union and Indigenous Peoples, 23/10/2013.

as well indigenous conditions[151]. With regards to indigenous peoples, in fact, the Commission adopted three main reports, in October 1990, concerning the environmental difficulties and indigenous problems within the Amazonian region and all those possible measures that could be adopted in order to protect the ecology and the conservation of tropical forests. The European Commission, in other words, particularly supports all those projects that present as main objective the protection of indigenous rights and fundamental freedoms, the conservation of tropical rainforests, which, in the majority of the cases, constituted the original habitat of Latin American indigenous communities, and the sustainable development of indigenous peoples.

To conclude, we have also to highlight a particular aspect of all these instruments and results that have been achieved by the European Union dealing with indigenous communities all around the world. According to Lydia Van de Fliert, it is not so easy to determine and evaluate the real impact of a large number of regulations and resolutions of the European Union regarding indigenous rights, especially due to the fact that indigenous peoples are effectively precise targets only when the European Union deals with indigenous communities within Central and South America. On the contrary, referring to indigenous communities within Asia and Africa, European organs prefer using different terms, such as *forest dwellers*, *rural* or *urban poor,* or simply *peasants*, complicating in such a way an effective evaluation of those results in favour of indigenous peoples that could have effectively been achieved, in the past, by European regulations or resolutions within these two continents[152].

151VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

152VAN DE FLIERT, L., above mentioned.

IV CHAPTER

The indigenous right to self-determination,

a focus on Latin America

Introduction

Without considering the long American decolonization process that took place during the XIX and the first decades of the XX century, which allowed the Americas to become independent from the European hegemony, and just focusing the attention on the last few decades and on those native communities that still today populate Latin American territories, such indigenous peoples have undoubtedly been object of normative, institutional and practical innovations within their national systems, whose main result has been the recognition of their rights, in terms, for instance, of self-development and self-determination. All these rights particularly aim to complete and develop the equality principle that all human beings have to be beneficiaries of and, moreover, such rights have as principal objective that one to create a condition of non-discrimination among people living in the same country. In other words, we will have the opportunity to verify that several national processes, within Latin America, have been put in practice in order to achieve these crucial objectives, with a specific role obviously played by institutions, indigenous organizations and Latin American governments.

After having provided a definition of the concept of self-determination from an international point of view, the chapter will particularly deal with the indigenous right to self-determination within the Latin American context, focusing the attention on its evolution and spread, from the cultural suppression of indigenous communities by Latin American military regimes in the first half of the XX century to the democratization process that has affected Latin American during the last decades. A specific attention will be focused on two particular countries, Ecuador, thought to be the first country whose constitution recognized the ethnic and cultural

plurality of the country, and Bolivia, which is considered to be the Latin American country with the highest percentage of indigenous peoples within its territory. A specific attention will be also focused on an important right of indigenous peoples, the right to development, since it is undeniable that, especially in the second half of the XX century, indigenous peoples have been witnesses of an increasing exploitation of their territories, as in the case of those indigenous communities living within the Amazonian region. In other words, we will take into account the so-called self-development right of indigenous peoples, which is a specific kind of development considered to be a mixture of cultural, ethnic and political participative elements.

To conclude, as we will prove focusing our attention especially on indigenous communities that today populate several territories of Latin America, the effective and complete recognition of indigenous rights is a process that seems not to be finished yet. It is undeniable that international organizations, as well as states and governments, have made great efforts in order to assure a complete and global recognition of indigenous rights but, probably, this process has not come to an end yet. Indigenous peoples are, in fact, still calling for a complete recognition of their rights and their fundamental freedoms, as well as for regional autonomies, deemed to be a possible solution for indigenous necessities. Furthermore, not only are indigenous communities calling for a recognition of their freedoms by international organizations, but also by their countries, whose territories are partially occupied by such communities. In fact, as we will try to explain within the following pages, these countries have still to make great efforts in order to integrate, in a multicultural and pluralistic way, several of these original communities, recognizing in such a way their individual, as well as fundamental collective rights, such as the right to self-determination, the right to manage their own natural resources and the right to dispose of their own ancestral territories.

4.1. The right of indigenous peoples to self-determination

The right to self-determination is undoubtedly one of the most important collective rights for indigenous peoples. Generally speaking, according to international law, it is considered to be a fundamental principle of international customary law and a *jus cogens* right of international application, which, as a large number of experts state, has its origins from the American Declaration of Independence (1776) and the French Revolution (1789). Moreover, it is undeniable that its original meaning has completely changed, several times, after the colonial era[153]. *Free determination*, *self-determination*, *autonomy* are, according to several experts, all terms that can be used in order to refer to the same concept. While considering this right to self-determination, it must be underlined that this concept has effectively appeared for the first time at the end of the First World War (by Woodrow Wilson), with the advent of the so-called decolonization process, and the same concept was later reported and better defined and explained within articles 1, 55 and 56 of the Charter of the United Nations (1945). Focusing the attention just on the indigenous context, the self-determination right, as stated before, has to be thought as their most important collective right, which constituted the base for the effective realization and development of all the other indigenous individual and collective rights, as a large number of experts think. As claimed before, human rights, including also the right to self-determination, are not only rights attributed to mere individuals, but they also are directed to groups of peoples and collective subjects, in general. From this point of view, some examples of collective rights for indigenous peoples can be the right to use their own languages, the right to be protected by the state and the government, the right to control their territories or,

153AIKIO, P. and SCHEININ, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination,* Institute for Human Rights Åbo Akademi University, Åbo, Finland, 2005.
MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000.
http://www.unhchr.ch/Huridocda.nsf/TestFrame/8e97ee60cde3805e80256774004b9928?Opendocument, Economic and Social Council, Commission on Human Rights, Discrimination against Indigenous Peoples, E/CN.4/Sub.2/1993/26/Add.1, 12/11/2013
GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006.

simply, the right to develop and maintain their own cultures and traditions[154].

Consequently, collective rights require the presence of a group of people, with their own different and specific interests and necessities. Moreover, the affirmation of self-determination not only as a peremptory norm, but also as a human right, presents a great number of implications. In fact, firstly, the self-determination right affects each individual, as well as each group of people, secondly, without a doubt, its application has to be thought as universal, and finally, such right is interconnected with other fundamental human rights, as underlined within the first chapter, therefore, as a result, it can not be considered and taken into account in isolation from the other human rights. As already argued within the first chapter, the right to self-determination expressively requires that the institutional and governance order be a process coming from the generality of people living within the same territory, and, furthermore, it requires that people could live under this institutional order in a freely way. Considering the right to self-determination as a composition of a large number of necessities of people, and focusing the attention on the right to self-determination of indigenous peoples, this right, in other words, can effectively be deemed as a mixture, which includes the right to territory and environmental preservation, the right to cultural security and protection, the so-called right to self-development, the right to economic self-reliance, and the right to be recognized as active agents of development, at a national and international level [155]. As claimed by Marie Léger, expert at indigenous issues, "el derecho a la libre determinación es el primer derecho colectivo que permite ejecer todos los demás. Queda reconocido en los instrumentos internacionales como atributo de todos los pueblos y es considerado como un herramienta esencial para la supervivencia y la integridad de sus sociedades y culturas[156]".

With regards to the recognition of this right at an international level, the right

154BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

155AIKIO, P. and SCHEININ, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination,* Institute for Human Rights Åbo Akademi University, Åbo, Finland, 2005.

156Léger, M., "El reconocimiento del derecho a la libre determinación de los pueblos indígenas: ¿Amenaza o ventaja?, in a electronic publication of the Derecho a la Libre Determinación de Los Pueblos Indígenas. Ponencias de los partecipantes y síntesis de las discusiones. New York, 18th May 2002, in BERRAONDO, Mikel (Coord.), above mentioned, page 408.

to self-determination, as we can prove, has been reported in a large number of international treaties and human rights covenants, such as the Covenant on Civil and Political Rights, as well as within the Covenant on Economic, Social and Cultural Rights, whose article 1 reports that:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development[157].

Therefore, the concept of self-determination involves the possibility of communities to manage their own political and juridical organizations and institutions, their relations and links with other social and political organizations, as well as their development conditions. Considering indigenous peoples, the right to self-determination has obviously to involve the effective and efficient defence of their life styles and cultures, as well as the control of their natural resources and territories, deemed as essential elements for their survival. The respect of all these rights allows, in such a way, indigenous communities to consider themselves as distinctive groups from the rest of the nation, with the guarantee of power and protection by international human rights instruments and organizations. Finally, referring specifically to indigenous peoples, it is important to remember that those fundamental elements for which indigenous peoples call, for the recognition of the right to self-determination, are the political autonomy, the delimitation of their territories and a complete change of the relations that they have with national institutions[158].

An important document concerning all these quests, made by indigenous communities, is the Declaration of Quito of 1990, during whose redaction a large number of indigenous representatives coming from the whole American continent

157Article 1, International Covenant on Civil and Political Rights.
Article 1, International Covenant on Economic, Social and Cultural Rights.

158BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000

argued that:

> La autodeterminación es un derecho inalienable e imprescriptible de los pueblos indígenas. Los pueblos indígenas luchamos por el logro de nuestra autonomía en los marcos nacionales. La autonomía implica el derecho que tenemos los pueblos indios al control de nuestros respectivos territorios, incluyendo el manejo de todos los recursos naturales del suelo, subsuelo y espacio aéreo. […]. Por otra parte, la autonomía significa que los pueblos indios manejaremos nuestros propios asuntos, para lo cual constituiremos democráticamente nuestros propios gobiernos (auto-gobiernos)[159].

Moreover, as reported by the Working Group on Indigenous Population during its 1991 session concerning the right to self-determination, it was affirmed that indigenous peoples have to be beneficiary of the right to self-determination, according to what have been stated within several instruments of international law. By virtue of this right, they could, in a free way, determine and develop their relations with states and governments and, in a spirit of coexistence, they could also develop relations with other citizens, often the national majority. Furthermore, they could freely enjoy their economic, cultural, political and social activities, in accordance with their cultural and social integrity[160].

With regards to the United Nations system, the principle of self-determination can be found in the United Nations Charter within article 1.2. Moreover, in 1960, the General Assembly adopted the resolution 1514 (XV), known as *Declaration on the Granting of Independence to Colonial Territories and Peoples.* As reported in such Declaration, all peoples have to enjoy the right to self-determination and, as a result, they have to freely determine their political status and freely enjoy their social, cultural and economic development. Furthermore, considering the international document redacted by the Working Group on Indigenous Populations,

159First Continental Meeting of Indigenous Communities "500 años de resistencia indígena, negra y popular", Resoluciones, CONAIE-ECUARUNARI-CDDH, Comisión de Prensa, Quito, 1990 in BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006., page 411.

160BERRAONDO, M. (Coord.), above mentioned.

another important international instrument within the United Nations context is undoubtedly the Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly just in 2007). Within article 3 of the draft Declaration, indigenous peoples were entitled the right to self-determination. However, several states and governments, during the Working Group conference in 1993, thought that such article should have been redrafted in order to better explain what the international community meant with the expression 'self-determination of indigenous peoples'. The problem seemed difficult to be solved, especially due to the fact that indigenous representatives kept calling for an effective and complete recognition and attribution to their communities of this fundamental right, which, as said before, is the base for all their other rights linked to natural resources, culture, economy and traditions. Apart from this, government representatives initially demonstrated a strong reluctance against article 3 of the Working Group Declaration, concerning this right for indigenous peoples, especially considering the problem of national integrity, which was thought to run a great risk, as we will explain in the following pages[161].

Still focusing the attention on the UN Declaration on the Rights of Indigenous Peoples, article 3 could be thought as a pillar, from which all the other articles are formulated. As we can read, article 3 underlines that:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development[162].

As a consequence, for a complete realization of the right to self-determination, indigenous peoples have to develop and articulate their own interests, as highlighted

161 AIKIO, P. and SCHEININ, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination,* Institute for Human Rights Åbo Akademi University, Åbo, Finland, 2005.
MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000.
IVISON, D., PATTON, P. and SANDERS, W. (edited by), *Political Theory and the Rights of Indigenous Peoples,* Cambridge University Press, New York, 2002.

162 Article 3, Un Declaration on the Rights of Indigenous Peoples

by article 31st of the same Declaration:

> Indigenous peoples have the right to maintain, control and protect their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions[163].

Nevertheless, article 32nd of the same Declaration underlines and stress the importance of the role that states and governments have to play in favour of indigenous peoples:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representatives institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources. [...][164].

Taking into consideration such articles of the final version of the UN Declaration (2007) and focusing the attention on complaints coming from states, the recognition process of the right to self-determination for indigenous peoples has not been so easy, in fact, as said before, during the 1993 session of the Working Group on Indigenous Populations, several states and governments did not agree with

163Article 31, UN Declaration on the Rights of Indigenous Peoples
164Article 32, Declaration on Rights of Indigenous Peoples (UN)

decisions of the Working Group and with quests of indigenous peoples. Nevertheless, the 'self-determination struggle' had already begun some months before during the II International Human Rights Conference in Vienna, concerning the disappointment of a large number of indigenous participants and indigenous representatives, who argued that the use of the term *indigenous people,* instead of the plural *indigenous peoples*, would have eliminated the possibility for indigenous communities to be entitled the right to self-determination, because both UN covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights, specifically referred to *peoples* when dealing with such right. Similarly, during the conference in 1989 on the ILO Convention No. 169, the question was whether such Convention had to adopt the term *peoples* or the term *populations* in order to designate such original communities. Finally, the ILO Convention opted for the term *peoples,* taking into consideration that such term would have had great consequences for the recognition of the right to self-determination for indigenous peoples all around the world. As a result, the term *peoples* won over the term *populations*[165].

As remembered before, during the conference in 1993 of the Working Group on Indigenous Populations, when article 3, reported in the previous pages, began being examined, a large number of countries manifested their support, others, on the contrary, rejected it, some other states asked for a reformulation of such article and others argued that indigenous peoples could not have also the right to secede or the right to external self-determination, due to the fact that all this would have made the whole country run a great risk in terms of territorial and political integrity. Several countries approached the Declaration with their usual political positivism, forcing the Working Group on Indigenous Populations to clarify and redefine some specific terms adopted within the Declaration. With regards to article 3, it received a net support by Norway, Finland, Australia, Cuba, Fiji and Denmark. Others states, such as El Salvador, Chile, Colombia and Indonesia, were more interested in all those possible consequences of the recognition of such right to indigenous peoples in terms of national integrity. Some other states, such as Sweden, Canada and New

165CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000.

Zealand, completely accepted the principle of self-determination for original communities but did not accept its practical application. Finally, the last group of states, which included Brazil, Argentina, United States, India, France, Japan and Bangladesh, rejected the term *self-determination* in favour to the term *autonomy.* With a specific reference to United States, they refused the use of the term *self-determination*, underlining the fact that international law did not effectively recognize collective rights that particularly characterized such communities, and that indigenous peoples could not be identified as *peoples*[166].

In addition to all these complications, as said before, we ought to underline the fact that international law and jurisprudence have never provided, from a sociological, cultural or political point of view, a clear and unique definition of the term *people(s).* According to the Commission on Human Rights, as reported in 1993 on the document concerning discrimination against indigenous peoples, in order to recognize the right to self-determination, external or internal, to peoples, they have to share, firstly, ethnic, religious, linguistic and cultural elements, secondly, all the members of such social group have to share a sense of identity, who identify themselves with the group and the identity itself of the same group. At this point, in order to make the reader better understand the concept we are dealing with and after having tried to briefly explain the concept of *peoples* within the international context, we ought to explain the simple difference that exist between internal and external self-determination. When referring to internal self-determination, it is the right of a group of people in a larger national state to govern and decide for itself or to make specific representatives decide for itself with its consent, having the possibility, in such a way, to develop its own culture, religion, traditions and to manage its natural and non-natural resources. While, with regards to the right to external self-determination, it is the right that allow peoples to free themselves from a dominant society within their country, in order to create their own national state[167].

166MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000.
CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000.

167IVISON, D., PATTON, P. and SANDERS, W. (edited by), *Political Theory and the Rights of Indigenous Peoples,* Cambridge University Press, New York, 2002.

To conclude, as a result of all these considerations, indigenous peoples have undoubtedly to be deemed as *peoples* "in every political, social, cultural and ethnological meaning of the term[168]". In fact, indigenous peoples maintain their specific languages, share traditions, moral laws, values, identities and their histories as distinct nations and societies[169]. With regards to such right and the indigenous reality, Erica-Irene Daes, Founding Chairperson and Special Rapporteur of the UN Working Group on Indigenous Populations (from 1984 to 2001) and current Member of the UN Sub-Commission on the Promotion and Protection of Human Rights, said that:

> El proceso de lograr la libre determinación es continuo, tanto para los pueblos indígenas como para todos los pueblos. Las condiciones sociales y económicas evolucionan constantemente en nuestro complejo mundo, como evolucionan también las culturas y las aspiraciones de todos los pueblos. Para que pueblos dinstintos puedan vivir juntos y en paz, sin explotación ni dominación – sea dentro de un mismo estado o entre dos estados vecinos – tienen que renegociar constantemente los términos de sus relaciones[170].

168http://www.unhchr.ch/Huridocda.nsf/TestFrame/8e97ee60cde3805e80256774004b9928?Opendocument, Economic and Social Council, Commission on Human Rights, Discrimination against Indigenous Peoples, E/CN.4/Sub.2/1993/26/Add.1, 12/11/2013

169WHEATLEY, S., *Democracy, Minorities and International Law,* Cambridge University Press, Cambridge, 2005.

170Daes, E.I., "El artículo 3 del Proyecto de Declaración de las Naciones Unidas sobre Los Derechos de los Pueblos Indígenas: Obstáculos y consensos" , in the electronic publication "Derecho de la Libre Determinación de los Pueblos Indígenas. Ponencias de los partecipantes y síntesis de las discusiones. New York, 18th May 2002, in BERRAONDO, Mikel (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006, page 421.

4.2. *Indigenismo Integracionista*, Multiculturalism and Indigenous Peoples in Latin America

Indigenous peoples all around the world are thought to be more or less three hundred millions and, according to several reports, the majority of them live in situations of extreme poverty and underdevelopment mainly due to the phenomena of globalization. The worst situation for indigenous peoples seems to be within Latin American territories, which count more or less fifty millions indigenous peoples, who, as a result of their history and their past conditions of colonization and servitude, keep living in situations of marginalization and isolation. In fact, in several Latin American countries, indigenous peoples are currently victim of violence and abuses by states, which do not respect their rights and do not recognize them as independent communities. We are referring especially to those countries in which indigenous peoples were forced in the past to incorporate to, without having taken into consideration the enormous number of differences between them and the rest of the population and their diverse numerous necessities.

Starting from these assumptions, we ought to focus our attention on how the globalization process affected and affects, also in the present, such communities. With regards to the economic aspect of globalization, probably all the difficulties that indigenous communities are forced to face are directly generated by this complex process, which is thought to be a current fledged reality that, in several cases, has affected and keep affecting indigenous communities, undoubtedly and unfortunately, in a negative way[171]. As said before, globalization is considered to be a really complex process, especially focusing the attention on its economic aspects. Apart from being deemed as the base of free market, it is thought to be one of the main causes of fixed economic models, social insecurity, privatization, increasing levels of inequality among communities and peoples, marginalization, environmental destruction, low sustainable levels and non-respect of human rights[172], and, as a result, in a great number of cases, according to Makkonnen,

171KEANE, D. and McDERMOTT, Y., *The challenge of human rights, past, present and future,* Edward Elgar Publishing, Cheltenham (UK), 2012.

172OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid,

"ethnic minorities and indigenous peoples not bending before the market logic, as well as ethnic affiliations in general, are largely dysfunctional from the viewpoint of the state and national economy[173]."

In spite of all these phenomena generated by globalization processes, on the contrary, in some other rare cases, globalization has also been a great positive opportunity for Latin American indigenous populations, in a context of regional nets of development. In fact, some communities within Latin American countries have had and keep having the opportunity to enjoy global mechanisms of international trade, selling their typical products, promoting their culture, traditions and their territories, favouring, in such a way, that kind of tourism that is particularly interested in ethnology and ecology[174]. In all these cases, without a doubt, indigenous peoples have always promoted a sort of sustainable development. In other words, they have always promoted a socio-economic and cultural development, which is thought to be integrative and participative, which can count on several institutional mechanisms of elaboration, management, evaluation and training, in order to assure a possible development for indigenous peoples, without forgetting their main basic characteristics, constituted by numerous human resources and socio-cultural peculiarities.

On the contrary, as stated before, it is also undeniable that a large number of indigenous communities all around the world, especially within Latin America, are trying to face globalization and all its negative effects of homogenization calling for a reaffirmation of cultural integration, considering not only their traditions and identity, but also a sort of improvement concerning the control over their territories, respect of their ethnic communities and international juridical recognition of their collective rights as different communities with their own specific and autonomous kind of development[175]. All this can be effectively possible just through the reaffirmation of identities, the recognition of cultural aspects and indigenous

2005.

BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

173MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000, page 36.

174BERRAONDO, M. (Coord.), above mentioned.

175ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.

traditions[176]. Unfortunately, we ought to highlight that, in some cases, local resources and traditions are not sufficient or useful in order to create a community identity. However, Anthony Smith, Professor of Nationalism and Ethnicity at the London School of Economics, explained that in the last decades we can notice a sort of ethnic reaffirmation, in which the great number of cultural identities that exist all around the world, considering indigenous communities as well, have fought for an improvement of the concept of ethnicity and cultural differences[177].

Focusing now our attention on the political approach of several Latin American countries towards indigenous peoples, with the development of the so-called social constitutional process, which particularly spread from the second decade of the XX century, Latin American governments began taking more into consideration social and collective rights of these peoples. Recognizing the necessity of such numerous rights, governments were obliged to consider indigenous communities as part of their countries, guaranteeing in such a way specific rights to protection and development of those original communities[178]. This specific context favoured the spread and development of the so-called *indigenismo integracionista,* whose main aim was the complete and unconditioned integration of indigenous communities into the national context and into the international economic system. Just to clarify, when we speak about *indigenismo,* we are referring to all those decisions and measures adopted by Latin American governments with regards to indigenous peoples, with the fundamental objective to completely integrate such original and local communities into the national context[179], as we will better explain in the following pages.

The spread of the so-called *indigenismo integracionista* began with the organization of two fundamental continental conferences, the first one in Montevideo (Uruguay) in 1933 and the second one in Lima (Peru) in 1938, which

176OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

177BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

178http://www.globalautonomy.ca/global1/servlet/Glossary.pdf?id=CO.0027, Indigenism, 24/10/2013
http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013

179BERRAONDO, M. (Coord.), above mentioned.
http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013, above mentioned.

are deemed to be those conferences that more influenced the creation of the Inter-American Indian Institute in 1940. It was during the first conference in Montevideo, in fact, that some members of the Mexican Delegation proposed the organization of an American Indian Congress. The proposal was accepted by other members of the conference and, furthermore, it was during these two important conferences, especially during that one in Lima, that governments declared that indigenous peoples had the right to be protected and their culture preserved by public institutions, in order to allow them to improve the level of their precarious conditions of life. In other words, these two important conferences highlighted the importance of taking into account the enormous problems and difficulties presented by indigenous communities, especially within the Latin American context. Briefly, they aimed to favour the development and the economic, social and cultural integration of indigenous communities[180].

As a consequence of these two crucial conferences, it is especially from the adoption of the Convention of Pátzcuaro (Mexico) during the I Inter-American Indigenous Congress in 1940 and the consequent creation under the same Convention of the Inter-American Indian Institute (became during the IX Pan-American Conference in 1948 a specialized agency of the Organization of American States, whose current states parties are Argentina, Bolivia, Colombia, Chile, Costa Rica, Peru, Colombia, Venezuela, Paraguay, Guatemala, Honduras, Mexico, Guatemala, El Salvador, Ecuador, Nicaragua and Panama) that the *indigenismo integracionista* inter-continentally developed[181]. Referring to this first Inter-American Indigenous Congress, it was in this occasion that a large quantity of indigenous issues began being taken into account by Latin American governments. In fact, firstly, during the conference it was highlighted the imminent necessity of stability within the American context, considering also indigenous communities situations. Secondly, American countries explained that, despite the fact that indigenous conditions in diverse states were really precarious, indigenous realities

180OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

181OLIVA MARTÍNEZ, J. D., above mentioned.
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

within different Latin American countries were effectively similar. Thirdly, governments recognized the necessity of favouring the development of these indigenous communities in order to allow the whole American continent to develop itself. Moreover, governments highlighted the importance of the protection and respect of indigenous communities and focused a specific attention on the crucial role they had to play in the field of indigenous communities protection. The necessary and guided progress of indigenous peoples became, in other words, the base for the integration of these communities, which had to be promoted by states and governments themselves[182].

As the reader might have already understood, Latin American governments wanted to specify that the indigenous reality had to be thought as a public interest. Moreover, indigenous reality had to be taken into consideration forgetting racial or ethnic aspects, but simply focusing the attention on economic, social and cultural aspects. Finally, governments underlined the fundamental role that they had to play in order to protect, favour and defend indigenous rights. As a consequence, as explained before, during the I Inter-American Indigenous Congress, all these goals were transcribed in a new international treaty with the main objective to create in 1940 a continental organization, the so-called Inter-American Indian Institute. In the first years of its existence, the Inter-American Indian Institute worked practically and specifically for the creation of a sort of collaboration with indigenous communities and, as a result, after some years, the Institute became particularly famous for its efforts in order to fight against discrimination and segregation of indigenous communities, as well as for its efforts made in order to integrate indigenous communities to national societies[183].

This new approach towards indigenous peoples, as said before, favoured the spread of the doctrine of *indigenismo integracionista,* which considered indigenous

182OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013

183DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997.
OLIVA MARTÍNEZ, J. D., above mentioned.
http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013

peoples as communities that, due to their sociocultural complexity and their vulnerable conditions, caused especially by intensive progress, modernization and globalization, showed particular necessities that had to be taken into account by states and international cooperation agencies. The main aim of this new political philosophy was the complete and, in some cases, forced integration of indigenous peoples to the national majority, providing all the educational and cultural instruments to indigenous peoples in order to integrate them into the national political and cultural system, despite the fact that frequently indigenous peoples showed a great variety of differences from the rest of the national society and, in other cases, they were also deemed as obstacles for the national development. In other words, the principal objective of this new philosophy was the defence of the rights of such communities, and their inclusion was thought to be the better instrument for the achievement of the indigenous participation in the public political and social life[184].

Therefore, this kind of integration proposed and favoured by the Inter-American Indian Institute was thought not only in economic, but also socio-cultural and political terms. However, first of all, the economic integration of indigenous peoples soon highlighted the difficulties faced by those communities and the enormous number of differences that existed between national majorities and small indigenous communities. Indigenous economies were, in fact, undoubtedly really fragile compared to national economies and, without a doubt, indigenous economic systems were characterized by few possibilities of diversification and low levels of production. For these reasons, in order to put in practice a sort of economic integration, the Inter-American Indian Institute proposed several agricultural reforms, with the consequent elimination of traditional sectors and the increase of the production, apparently generating in such a way more employment[185]. Second, considering the socio-cultural integration of indigenous communities, several of these communities showed low levels of literacy. In the period that the Inter-

184http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013, above mentioned.
http://www.ugr.es/~pwlac/G06_01Jose_Alcina_franch.html, El indigenismo en la actualidad, 25/10/2013
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

185BERRAONDO, M. (Coord.), above mentioned.

American Indian Institute developed its measures, the level of knowledge of Spanish language among Latin American indigenous communities was really low and, furthermore, health conditions among these populations were really precarious. The main aim of the Inter-American Indian Institute was that one to better understand necessities of different indigenous communities through the essential help of sociologists, economists, social and cultural anthropologists. However, obviously, socio-cultural integration had firstly to reach basic levels of literacy, starting from the spread of simple western concepts and measures, trying to make indigenous peoples leave old traditional and ancestral methods[186]. Finally, with regards to the political integration, the Inter-American Indian Institute wanted to achieve a full recognition of indigenous rights, putting in practice international development plans and programmes in favour to these communities.

However, indigenous communities, only considering the Latin American context, have always had obvious difficulties in order to achieve a sort of political integration eliminating their cultural elements, as we will have the opportunity to prove. In fact, it is just in the last decades that the international community can prove to have reached some positive and effective results in terms of political integration of indigenous peoples. According to a large number of experts, the political integration of indigenous communities could be achieved just through the recognition of civil and political rights of these peoples, educating their leaders and favouring a full recognition of their realities and conditions passing through a multicultural process[187]. However, although the Inter-American Institute favoured the recognition of indigenous rights, for such Institute 'integrate' meant to eliminate all those negative elements of such communities and all those obstacles for the economic development of the country, favouring all those positive methods and instruments in order to improve indigenous situations, with the principal objective to

186OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.
http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013
MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000.

187OLIVA MARTÍNEZ, J. D., above mentioned.
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

literally absorb indigenous communities into their own countries[188]. Nevertheless, as underlined by several experts, we should not confuse the term *integration* with the term *assimilation*. Referring to the inclusive programmes and plans of the Inter-American Indian Institute, Jef Rens, author of *Le Programme andin* (a contribution for the International Labour Organization – ILO), claimed that:

> Esta doctrina implica el reconocimiento de los valores culturales propios de las poblaciones indígenas, lejos de querer destruir estos valores, tiende a vencer los prejuicio que existen con respecto a ellos. Mientras que para esas poblaciones la asimilación significa el abandono de sus características peculiares, la integración les da el derecho de entrar en la vida nacional del país en que viven, al mismo tiempo que salvaguarda su personalidad propia. La doctrina de la integración no se limita, sin embargo, solamente a los derechos así definidos, sino que responde también a las necesidades de orden económico, así como a las aspiraciones y a las necesidades de las masas populares. Efectivamente, la integración de las poblaciones aborígenes en la vida de sus naciones respectivas responde a un doble imperativo: por una parte, dicha integración representa las aspiraciones de esos pueblos desfavorecidos que en todas partes del mundo han iniciado la marcha hacia la conquista de un destino mejor; por otra, responde a la necesidad que experimentan los países insuficientemente desarrollados, en que viven esas poblaciones aborígenas y que aspiran a organizar una economía moderna, de superar en forma radical las barreras que separan todavía a los aborígenes de otros sectores de la población y que, por tal causa, obstaculizan la introducción de nuevas formas de producción. […] No obstante, el problema que se plantea exige esfuerzos gigantescos; se trata, en efecto, de que la población andina -que vive todavía muy por debajo de lo que se entiende por condición humana- se eleve a un nivel de civilización que hasta la actualidad ha sido en estos países patrimonio exclusivo de otros sectores de la población […]. La doctrina de la integración constituye la antítesis de las teorías racistas y representa, en cierto modo, una expresión moderna y práctica del humanismo […], no se limita únicamente a proclamarse la igualdad de derechos, a reconocer la validez de las necesidades sociales y económicas y la

188OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

legimidad de las aspiraciones culturales sino que insiste sobre ciertos aspectos de la acción a desplegar con vistas a aplicar estos derechos a la realidad cotidiana [...][189].

From the Sixties, some Latin American countries controlled by military regimes, such as Argentina, Colombia, Nicaragua, El Salvador, Chile and Guatemala, became particularly famous for their cultural suppression of independent indigenous communities. Therefore, from the second half of the XX century, the integration progress of indigenous communities changed and rapidly became within some of these Latin American states a sort of assimilation process, with a consequent exploitation of indigenous resources and an increasing number of indigenous peoples that were obliged to leave their own ancestral territories due to national interests, generating in such a way another sort of (internal) colonization, particularly influenced by the so-called *neoliberal revolution,* which spread in a decisive way in Chile with Pinochet. In other words, agrarian reforms, the transformation of indigenous communities into workers or farmers communities and numerous land reorganizations and repartitions soon showed that governments were no longer considering indigenous peoples as communities that had to be protected and preserved[190]. As a great number of experts claim, indigenous peoples were victims and suffered a sort of suppression of all their traditions and the loss of their ancestral territories. In a large number of cases, in fact, they were forced to be included into an homogenization process, through the adoption of specific strategies, programmes and plans in order to be effectively and totally considered as parts of the national context, without focusing the attention on their real interests. As an obvious consequence, the main results obtained from the Sixties by these measures, proposed by the first *indigenismo integracionista,* were the increasing level of poverty for those communities, which were previously used to living in

189Jef Rens, *El Programa Andino,* Ginevra, pages 12-14, in OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005, page 183.

190http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013
http://www.ugr.es/~pwlac/G06_01Jose_Alcina_franch.html, El indigenismo en la actualidad, 25/10/2013
http://liportal.giz.de/fileadmin/user_upload/oeffentlich/Ecuador/Dosch_UKM_LASA_2012.pdf, Understanding Latin American indigenous movements: From marginalisation to self-determination and autonomy?, 10/11/2013

isolation, and the consequent increasing sense of racism and discrimination towards those original communities by the rest of the national population. The cultural dimension, which had been completely forgotten by all the assimilation processes of that period, returned to be the fundamental element for the integration of indigenous communities[191].

As a consequence, after having taken into consideration all the negative methods and measures of development proposed by the first approach of the so-called *indigenismo*, some experts, who had already collaborated with the Inter-American Indian Institute in the first years of its existence, met with anthropologists and indigenous representatives in order to redact the First Declaration of Barbados in 1971, considered to be the first crucial step for the recognition of indigenous communities as independent populations[192]. The First Declaration of Barbados expressed the necessity for indigenous peoples to have the self-control over their culture, their traditions and their economic systems. The role that had to be played by states, according to the Declaration, was a simple role of support and assistance. Indigenous communities, as the Declaration highlighted, had the right to organize and manage their own development. As a consequence, opposed to the forced integration and development concepts proposed by the *indigenismo integracionista*, the Declaration opted for what is generally known as *self-development*. In other words, *self-development* was and it keeps being deemed as an alternative kind of development that respects interests of ethnic populations and provides specific development plans with a particular attention on all those real necessities and conditions of communities and, as in this case, conditions of indigenous peoples[193].

191 http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013
http://www.ugr.es/~pwlac/G06_01Jose_Alcina_franch.html, El indigenismo en la actualidad, 25/10/2013

192 First Declaration of Barbados (1971), Introduction: "Los antropólogos participantes en el Simposio sobre la Fricción Interétnica en América del Sur, reunidos en Barbados los días 25 al 30 de enero de 1971, después de analizar los informes presentados acerca de la situación de las poblaciones indígenas tribales de varios países del área, acordaron elaborar este documento y presentarlo a la opinión pública con la esperanza de que contribuya al esclarecimiento de este grave problema continental y a la lucha de liberación de los indígenas."

193 http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013, above mentioned.
http://www.ugr.es/~pwlac/G06_01Jose_Alcina_franch.html, El indigenismo en la actualidad, 25/10/2013, above mentioned
BAMONTE, G. and CONSIGLIO, V. (a cura di), *Popoli indigeni e Nazioni Unite,* Bulzoni Editore, Rome, 2003.
OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

Differently from the *indigenismo integracionista,* which was based on the conviction that the indigenous reality simply and effectively could represent an obstacle for the development of the whole nation, the concept proposed by the philosophy of the *self-development* underlined the importance of culture, thought to be a crucial element for the development of these ancestral communities. Moreover, while the mature concept of the *indigenismo integracionista* also considered indigenous habits as obstacles, *self-development* highlighted their enormous role for the potenciality and power they have in order to generate changes and transformations. With the First Declaration of Barbados, all the participating indigenous representatives, experts and eleven anthropologists, primarily Latin American, had as main intention that one to change the conditions of indigenous peoples, trying to eliminate all those measures that had put in practice by the *indigenismo integracionista,* recognizing indigenous cultural differences and peculiarities, as well as indigenous rights, and all those fundamental elements, such as the territory, for indigenous peoples, and, furthermore, suggesting that indigenous peoples did not have to be treathen as object of study, as had happened in the past[194]. As we can read within the Declaration, redacted in Spanish, apart from the crucial role of religious missions and anthropologists in the field of indigenous rights, governments and states, in which indigenous peoples live, had a large number of specific roles to play, such as:

> **1)** El Estado debe garantizar a todas las poblaciones indígenas el derecho de ser y permanecer ellas mismas, viviendo según sus costumbres y desarrollando su propia cultura por el hecho de construir entidades étnicas específicas.
>
> **2)** Las sociedades indígenas tienen derechos anteriores a toda sociedad nacional. El Estado debe reconocer y garantizar a cada una de las poblaciones indígenas la propiedad de su territorio registrándolas debidamente y en forma de propiedad colectiva, continua, inalienable y suficientemente extensa para

BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

DOWNING, T. E. and KUSHNER, G., *Human rights and anthropology,* Cultural Survival, Inc., Cambridge, 1988.

194DOWNING, T. E. and KUSHNER, G., above mentioned.

asegurar el incremento de las poblaciones aborígenes.

3) El Estado debe reconocer el derecho de las entidades indígenas a organizarse y regirse según su propia especificidad cultural, lo que en ningún caso puede limitar a sus miembros para el ejercicio de todos los derechos ciudadanos, pero que, en cambio, los exime del cumplimiento de aquellas obligaciones que entren en contradicción con su propia cultura.

4) Cumple al Estado ofrecer a las poblaciones indígenas la misma asistencia económica, social, educacional y sanitaria que al resto de la población; pero además, tiene la obligación de atender las carencias específicas que son resultado de su sometimiento a la estructura colonial y, sobre todo, el deber de impedir que sean objeto de explotación por parte de cualquier sector de la sociedad nacional, incluso por los agentes de la protección oficial.

5) El Estado debe ser responsable de todos los contactos con grupos indígenas aislados, en vista de los peligros bióticos, sociales, culturales y ecológicos que representa para ellos el primer impacto con los agentes de la sociedad nacional.

6) Los crímenes y atropellos que resultan del proceso expansivo de la frontera nacional son de responsabilidad del Estado, aunque no sean cometidos directamente por sus funcionarios civiles o militares.

7) El Estado debe definir la autoridad pública nacional específica que tendrá a su cargo las relaciones con las entidades étnicas que sobreviven en su territorio; obligación que no es transferible ni delegable en ningún momento ni bajo ninguna circunstancia[195].

As a consequence, starting from the Seventies, it is with the advent of the so-called democratization process of Latin America, which was characterized in some countries, according to some political experts, by populist campaigns aimed to indifferently include into political processes all categories of human groups, for

195http://www.scribd.com/mobile/doc/136999250?width=320, First Declaration of Barbados (1971)

instance in Argentina, Bolivia, Ecuador and Venezuela, that indigenous movements could rapidly develop. In fact, Latin American indigenous peoples extended, at the international level, their efforts through a series of conferences, organizations and legislative instruments, also supported by transnational organizations, environmentalist groups and the clergy[196]. We ought to remember, therefore, the creation of the Working Group for Indigenous Affairs, which was founded by a group of anthropologists in 1968 and it is today based in Copenhagen. It is also important to remember the *Primer Parlamento Indio Americano del Cono Sur*, whose last meeting was forty years ago in San Bernardino, in Paraguay, from the 8th to the 14th October 1974. Within the following year, in 1975, the World Council of Indigenous Peoples was created in Port Alberni (Canada) during the Assembly of the National Indian Brotherhood, with the participation of a large number of indigenous representatives from Latin America. Its main objective until 1996, year of its dissolution for internal conflicts, was the protection of all those economic, cultural, political and social rights of indigenous communities. Moreover, in 1977 the *Primero Congreso Internacional Indígena de América Central* took place in Panama and it was in the same year (1977) that a new Declaration of Barbados (known as Second Declaration of Barbados) was signed by eighteen indigenous representatives and seventeen anthropologists, who particularly focused their attention on all those strategies and instruments that could effectively protect and preserve indigenous traditions, values and culture[197]. In 1980, in Ollantaytambo (Cuzco, Peru) another important indigenous organizations was created, the *Consejo Indio de América del Sur.* Nevertheless, it is crucial to underline also the importance of the United Nations International Conference of No-Governmental Organizations about Local Peoples and Land, which took place in Geneva in 1981. The conference

196ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000, pages 9-19, 45-47, 183-184.
http://liportal.giz.de/fileadmin/user_upload/oeffentlich/Ecuador/Dosch_UKM_LASA_2012.pdf, Understanding Latin American indigenous movements: From marginalisation to self-determination and autonomy?, 10/11/2013
http://www.plataformademocratica.org/Publicacoes/Publicacao_214_em_30_04_2008_18_56_50.pdf, The Resurgence of Radical Populism in Latin America, Carlos de la Torre, 10/11/2013.

197http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013
http://www.ugr.es/~pwlac/G06_01Jose_Alcina_franch.html, El indigenismo en la actualidad, 25/10/2013
CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000

undoubtedly consolidated cooperation among several different organizations and generated new relations between different indigenous communities all around the world[198]. Not only the United Nations International Conference in 1981 has to be taken into consideration dealing with the development of indigenous movements, but we should also focus our attention on other fundamental international documents that favoured the improvement of indigenous conditions, such as the so-called Agenda 21, which was redacted in 1992 and it undoubtedly increased the international role of indigenous peoples and also increased their role in terms of sustainable development within the national and international context[199].

The creation of such a great quantity of indigenous organizations from the Seventies can make the reader understand that the concept of the *indigenismo integracionista* had completely failed. The creation of such an enormous number of organizations and redaction of international documents made the international community focus its attention more on necessities of these communities, which began appearing more and more before UN human rights bodies in order to defend their rights and freedoms[200]. As a consequence, in those years, a new concept was spreading, the so-called *indianismo*, which opposed against the occidental capitalism, characterized by unsustainable development and environmental destruction. In other words, the concept of *indianismo* proposed a sort of *self-development* for indigenous communities, which had the possibility to control and manage their ancestral territories and their natural resources, organizing themselves also from a political point of view. The concept of *self-development* was thought as a process that had to respect political, social and cultural identites of each community, as well as individual and collective human rights[201]. Furthermore, it seems to be particularly important to explain the different approach to the landscape and the nature of the *indigenismo integracionista* and the approach of the self-development concept. While for the *indigenismo integracionista* land just offers

198 BAMONTE, G. and CONSIGLIO, V. (a cura di), *Popoli indigeni e Nazioni Unite,* Bulzoni Editore, Rome, 2003.

199 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

200 ANAYA, S. J., *Indigenous Peoples in International Law,* Oxford University Press, New York, 2000, pages 9-19, 45-47, 183-184.

201 http://pendientedemigracion.ucm.es/info/eurotheo/diccionario/I/indigenismo.htm, Indigenism, 27/10/2013 http://www.ugr.es/~pwlac/G06_01Jose_Alcina_franch.html, El indigenismo en la actualidad, 25/10/2013

resources for development, for the *self-development* philosophy, territoriality was, and is in the present, a fundamental element for the right development of a community. The philosophy of *self-development* also focuses the attention on the preservation and protection of the landscape, biodiversity and ecosystems in general, thought to be crucial elements not only for these communities, but also for the whole planet[202].

With regards to the development of indigenous communities, according to the European Commission, as well as to United Nations, the process of development of indigenous communities should consist in a process that does not isolate indigenous peoples from modernization processes, but it should be a mechanism that gives them the possibility of a full and complete participation. In order to create positive development processes it will be necessary to completely recognize indigenous peoples as independent communities, recognizing as well their rights and considering them as active agent of their own development. Therefore, the most important objective for the international cooperation will be the contribution to the recognition of indigenous rights in order to put in practice processes of social, economic and political development. Moreover, international cooperation organizations will have to focus their attention on the indigenous participation in all those processes aimed to take decisions that directly affect indigenous communities, such as those decisions related to territory, natural resources or related to the so-called sustainable development. Finally, the self-development concept consisted in a new kind of intervention, particularly taken into account today, proposed by international development programmes[203]. For this new philosophy, all that can be thought as linked to ethnical, communitarian and identitarian aspects has to be the main central element. Therefore, self-development, according to a large number of experts, has to be considered as an autonomous ability and skill of a community to manage its own development[204].

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202 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

203 VAN DE FLIERT, L., *Indigenous Peoples and International Organisations,* Spokesman, Nottingham, 1994.

204 OLIVA MARTÍNEZ, J. D., above mentioned.
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

Concerning the reorganization of indigenous institutions and the consequent process of change after the elaboration and spread of this new concept of self-development, the turning point was the VII Indian Congress that took place in Brasilia from 7th to 11th August 1972. The VII Indian Congress has to be considered as particularly crucial also for the Resolution that was adopted by the General Assembly of the Organization of American States (OAS). In fact, the General Assembly of the OAS, within the Resolution AG/RES.422, invited the Inter-American Indian Institute to create a five-years plan with the aim to improve indigenous conditions, allowing them to put in practice mechanisms of self-development (organic reorganization of the political-administrative system, training and organization of ethnic local groups, new regulations of property, organization of indigenous farmers communities and relative institutional organizations). Finally, the document redacted by the Inter-American Indian Institute was evaluated by indigenous leaders and it was successively approved[205].

According to Adolfo Colombres, Argentinian writer, anthropologist and lawyer, comparing the two approaches that have been explained within this chapter, he reported that:

> La autogestión se afirma en la participación y el autogobierno. La aculturación, en mecanismos de dominio, como el control político y otros. Para la autogestión, el aporte de Occidente es un incentivo. En el proceso aculturativo, lo occidental irrumpe con una violencia descentralizadora de la vida social. En la autogestión, toda conciencia política pasará por el reconocimiento de la identidad étnica. […] Finalmente en el proceso autogestionado es el grupo étnico el que selecciona las pautas y elementos que habrá de incorporar a su vida social, […]. En el proceso aculturativo es el opresor quien decide que elementos de la sociedad indígena conserverá momentaneamente, mientras impone, por medio de mecanismos compulsivos, toda su cultura y concepción

205 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

del mundo como un bloque indiferenciado[206].

To sum up, from the Sixties the concept of *indigenismo integracionista*, whose main aim was the complete integration, acculturation and, in some cases the assimilation of indigenous communities to the national context, stopped working due to the large number of critics and complaints coming from indigenous peoples representatives. This concept was finally substituted by the theory of the so-called *self-development*, particularly favoured and diffused by Indian Congresses and by the Inter-American Indian Institute from the Seventies. This complex process of reorganization of cooperation and all these new considerations of indigenous communities force international cooperation agencies to redefine their fundamental objectives and to reformulate new strategies for such communities. Moreover, this new conception for indigenous peoples, who are no longer considered as individuals that have to be integrated, asked states and international cooperation agencies, as well, to make an effort in order to be ready and willing to incorporate indigenous communities, without eliminating their culture, traditions and freedoms.

206Adolfo Colombres, *Hacia la autogestión indígena,* Editorial del Sol, Quito, 1977, pages 31-32, in OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005, page 206.

Finally, considering now, from a political point of view, the last few decades within Latin American states, after the long democratization process that affected Latin American countries, we should focus our attention on those democracies that could been defined as *democracias excluyentes*. They are democracies that have been created in the last decades and that especially have not been able to integrate, in a social, pluralistic and multicultural way, some sectors of the population. Among these population sectors that have been excluded from democratization processes, in some cases, we can find also indigenous peoples. As a consequence, indigenous peoples, who prefer self-determination and self-management instead of centralized power, denounced that democracies should firstly focus their attention on political diversity and participation and secondly, on autonomies, starting from basic organizations or from primary communities. Therefore, indigenous peoples are practically calling for a *democracia incluyente*, which includes each community considering cultural diversities and different necessities, which incorporate institutions that give salience not only to the interests of the majority, but also to interests of other groups, such as indigenous peoples (the first democracy that recognized the multicultural aspect of its state was Ecuador, whose constitution, in 2008, defined itself as a *plurinational state)*[207].

Marginalized and isolated, more or less thirty years ago within Latin America, indigenous peoples, in order to solve this situation, decided to denounce their conditions and protested in order to be recognized as actors at a national and international level, as well as in order to be considered as active agents of their own development. Moreover, they claimed that the majority of the great number of the existing international development plans had to be modified and adapted to indigenous realities. In other words, this new kind of inclusion, which indigenous peoples were calling for, had to be thought as pluralist and multicultural, considering in this context multiculturalism as "the politically correct way of

207OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.
IVISON, D., PATTON, P. and SANDERS, W. (edited by), *Political Theory and the Rights of Indigenous Peoples,* Cambridge University Press, New York, 2002
http://liportal.giz.de/fileadmin/user_upload/oeffentlich/Ecuador/Dosch_UKM_LASA_2012.pdf, Understanding Latin American indigenous movements: From marginalisation to self-determination and autonomy?, 10/11/2013

ethnicity management[208]". Multiculturalism, in fact, has to mainly take into account not only differences or similarities between communities, but also peculiarities of each community, as in the case of indigenous communities. Within Latin America, however, in some cases, this multicultural process has been developed as an aggression against indigenous populations, in fact, indigenous cultural and social differences have been literally borrowed in several cases, without taking into account their past, particularly characterized by suppression and cultural violence. Cultural indigenous processes, in other words, have to be the fundamental element that allow these communities and their organizations to develop, as happened in the case of the Confederation of Indigenous Nationalities in Ecuador (CONAIE), founded in 1986, which is today considered to be the most dynamic and powerful indigenous movements in Latin America[209].

In fact, according to many experts, cultural indigenous processes are the base for the recognition of indigenous civil, social and political rights, all considered to be individual rights. In addition, cultural indigenous processes are also the base for the recognition of all those collective rights related to territory, resources, natural and cultural heritage. Nevertheless, the past and current lack of a real will of states to recognize indigenous peoples rights, from a multi-dimensional pluralistic point of view, make us understand that probably this multicultural process is not working as it should do. "The fact that a society is multicultural, then, means that democratic state is going to have to take special steps to try and establish the equal and full contestatory power of those in minorities groups[210]".

Therefore, for a complete recognition of indigenous peoples as international and national actors of development, this multicultural process should firstly focus its

208MAKKONNEN, T., *Identity, Difference and Otherness: the concept of 'People', 'Indigenous Peoples' and 'Minority' in International Law,* Helsinki University Press, Helsinki, 2000, page 25.

209OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
http://liportal.giz.de/fileadmin/user_upload/oeffentlich/Ecuador/Dosch_UKM_LASA_2012.pdf, Understanding Latin American indigenous movements: From marginalisation to self-determination and autonomy?, 10/11/2013
http://www.plataformademocratica.org/Publicacoes/Publicacao_214_em_30_04_2008_18_56_50.pdf, The Resurgence of Radical Populism in Latin America, Carlos de la Torre, 10/11/2013.

210IVISON, D., PATTON, P. and SANDERS, W. (edited by), *Political Theory and the Rights of Indigenous Peoples,* Cambridge University Press, New York, 2002, page 213.

attention on the fact that each multicultural process is the result of a social fight. In fact, indigenous movements have often underlined the social situation in which they live, highlighting a specific will of recognition of their particular identity. Secondly, the complete recognition of the presence of indigenous peoples within the national territory does not make states run any risk in terms of integrity. In other words, what states have to put in practice is the total elimination of racism and discrimination, trying to maintain that asymmetry that distinguishes the majority from those ethnic groups. As a consequence, not only is it impossible to speak about a complete participation of these communities without a total recognition of them, but it will be also impossible in the future to speak about a cultural recognition of indigenous peoples without considering the possibility to create inter-cultural economic systems and mechanisms[211].

The international community, as well as single states and governments, should begin taking into account more seriously the concept of multiculturalism and pluralism, especially due to the fact that indigenous communities are increasing in demographic terms. As a consequence, such original populations are developing regional, national and international strategies, useful to organize their own social and political participation. Indigenous communities are, in fact, trying to improve their participation in global markets, their participation in ethnic projects and their relationships with governments. Latin American governments, as a result, could not avoid taking into consideration all the quests coming from indigenous communities and they ought to abandon, as a result, their own ancient multiculturalism concepts, influenced by the philosophy of *indigenismo integracionista*, and consequently try to promote a specific and efficient development of indigenous communities through the so-called sustainable *self-development*. Governments should finally favour kinds of democracies that recognize a full citizenship and a complete and effective pluralism of indigenous peoples[212]. Rodolfo Stavenhagen, the first United Nations

211 OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.
BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
DOWNING, T. E. and KUSHNER, G., *Human rights and anthropology,* Cultural Survival, Inc., Cambridge, 1988.

212 IVISON, D., PATTON, P. and SANDERS, W. (edited by), *Political Theory and the Rights of Indigenous Peoples,* Cambridge University Press, New York, 2002.

Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples before S. James Anaya, concerning multiculturalism, claimed that:

> La ciudadanía multicultural […] en cuanto a pueblos indígenas se refiere, incluye el reconocimiento de éstos como personalidad jurídica y con derechos a la libre determinación; de las comunidades indígenas como entes de derecho público y con derechos autonómicos; […] la delimitación de territorios propios y protegidos, el derecho al manejo de sus recursos y sus proyectos de desarrollo, el respeto a sus normas internas de gobierno local y sus usos y costumbres o derecho consuetudinario […][213].

In order to achieve all the expected results from the inclusion of indigenous peoples, a strong relation between equality, freedom and diversity has to exist. Therefore, it seems to be necessary a civil democracy that, preserving the right to diversity, would favour the participation and the incorporation of indigenous peoples not only in economic, but also in cultural and political terms. In the last decades, indigenous communities, generally speaking, not only have been able to enjoy the global context, but they have also been able to contribute with their own experience to the development of human rights, as well as to the juridical and international institutional systems. Moreover, indigenous peoples that have taken part to globalization processes are now internationally considered to be the most dynamic actors. In other words, in spite of socio-cultural and economic diversities, several of these Latin American indigenous communities have been able, through their own institutions and organizations, to confirm their own position as international and national agents of development, entering in the sphere of the national and international political power, arguing, as a result, that the principles of direct democracy, transparency, dialogue, equilibrium, respect for differences, cultural recognition and collective cooperation effectively characterize indigenous politics[214].

213Rodolfo Stavenhagen, *Derechos Humanos de Los Pueblos Indígenas.* Comisión Nacional de Derechos Humanos, Mexico, 2000, page 9 in OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005, page 95.

214 http://www.plataformademocratica.org/Publicacoes/Publicacao_214_em_30_04_2008_18_56_50.pdf, The Resurgence of Radical Populism in Latin America, Carlos de la Torre, 10/11/2013.

All their quests were, and are today, in close relation not only with the constitutional, but also with the real recognition of indigenous communities as effective subjects of development with their own specific rights, such as the right to the protection of the territory, the right to material and social *self-development*, the right to culture and cultural participation, the right to justice and, finally, the fundamental right to self-determination[215].

http://liportal.giz.de/fileadmin/user_upload/oeffentlich/Ecuador/Dosch_UKM_LASA_2012.pdf, Understanding Latin American indigenous movements: From marginalisation to self-determination and autonomy?, 10/11/2013

215OLIVA MARTÍNEZ, J. D., *La cooperación internacional con los pueblos indígenas*, CIDEAL, Madrid, 2005.

4.3. The quest for self-determination, the case of Ecuador and Bolivia

In the last decades of the XX century, just few indigenous communities of Latin America expressed the desire to be entitled the right to self-determination, or the right to autonomy. However, these few and immature quests have been able to spread among indigenous communities of Latin America, in general, a process of mobilization for self-determination, in order to allow these populations to achieve a complete autonomy, which could favour the control over their own cultures and territories. It was particularly with the Declaration of Quito (1990), already mentioned within the previous pages, that the right to self-determination acquired the specific aspect of indigenous *autonomy*[216]. At this point, we think that it would be useful to remember an important event that took place in Mexico in the last decades of the XX century, which is considered to be one of the greatest social manifestations that also included indigenous peoples, who agreed with a real and efficient change of the structure of the state.

In 1989, the same year of the creation of the ILO Convention No. 169, the Mexican government decided to appoint a commission, formed just by indigenous intellectuals and bureaucrats (within the commission there were not indigenous representatives), in order to present to the president, Carlos Salinas de Gortari, by mid-1990, a proposal concerning the development and improvement of indigenous conditions within Mexico. Briefly, the commission proposed to the president the addition of a specific part to the existing article 4 of the constitution. According to several experts, this part, which was highly criticized by indigenous communities and organizations, was too unclear and, moreover, it did not specify all those economic, political and social rights of indigenous peoples. Moreover, the proposal did not justify the use of a large number of terms applied for its formulation, such as, for instance, the terms 'practices and juridical customs' of indigenous peoples. As we can effectively note and prove, terms used and adopted by the proposal were too vague to be able to guarantee a real autonomy to Mexican indigenous communities,

216BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

composed by a majority of Mayan peoples. Furthermore, if such proposal of constitutional reform, made by the commission, had not effectively included specific rights of indigenous peoples, any other national legal instrument in the country would have recognized such rights to those original populations[217].

As a consequence, after having taken into consideration all these complications and all the doubts that the constitutional article 4 could created if modified, as suggested by the commission, Carlos Salinas the Gortari, in 1990, presented his own proposal to the Congress, which was immediately accepted without being modified. The proposal made by the president dealt with the effective constitutional recognition of the existence of indigenous peoples within the national territory. That has been the very first time that an independent country effectively put in practice, through its constitution, a mechanism of recognition of indigenous peoples in its territories, considering in such a way indigenous populations as part of the national process of development. However, this recognition was soon seen and perceived by indigenous communities as another effort of the government to absorb indigenous populations, eliminating the greatest part of their social, economic, political and cultural rights, just in order to favour the interests of the state. As Professor Díaz Polanco underlines "[i]t was an illusion to expect that the recognition of the pluricultural composition of the nation would lead to a new multiethnic foundation of the state[218]".

Consequently, the event that not only followed the adaptation of the Mexican constitution, but also allowed within the following years a real recognition of indigenous communities within the national territory, was the armed rebellion of Tojolabal, Chol, Tzeltan and Tzotzil indigenous communities in the Mexican region of Chiapas (in the southern part of the country), which took place on the 1st January 1994. These indigenous peoples, who protested against the intensive exploitation of their territories, were soon embodied by the Ejército Zapatista de Liberación

217DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997.
http://www.rivistaindipendenza.org/movlibnaz/chiapas_una_guerriglia_moderna.htm, Una guerriglia moderna: l'Esercito Zapatista di Liberazione Nazionale, 19/11/2013

218DÍAZ POLANCO, H., page 132, above mentioned.

Nacional (EZLN) and, as a result, this social movement became a mixture of indigenous requests for recognition of their rights and general national claims, which we will not take into account. The Zapatistas, with indigenous communities, firstly asked for the recognition of *autonomy*, secondly they called for a real indigenous, communal, municipal and regional self-determination, in political, economic and social terms. The dialogue between the government, the Zapatistas and indigenous peoples was soon suspended. In order to face this unstable political and social situation, in February 1995, the government decided to attack Zapatistas within their territory and, as a result, the Zapatista army fell down. In September 1995, the government finally accepted the negotiations proposed by the Zapatistas. The first working group, after having discussed indigenous autonomy and rights, argued that indigenous peoples and their support could have allowed the country to develop a real and efficient transition to democracy. Furthermore, in 1996, in San Cristóbal de las Casas, one of the most important cities of the Chiapas region, the proposal for autonomy of indigenous peoples was ratified at the Indigenous Peoples Forum, sponsored by the EZLN. In other words, on the base of the requests made by the EZLN regarding indigenous peoples, autonomy was contemplated in terms of political and territorial self-determination, self-government, political decentralization and protection of traditions, competences and environment. Added to the claims of the Zapatistas, who not only called for communal and regional autonomy, but also criticized the national agrarian situation and the inefficiency of juridical and political instruments, the recognition of regional autonomy represented a little step in Mexico for an effective and efficient recognition of indigenous peoples rights, not only from a constitutional point of view, but also from an effective one[219].

However, focusing the attention on the real autonomy of indigenous peoples and on Mexican municipalities, as underlined by some experts, the political constitution of Mexico, with article 115, clearly refers to the division of the state

219DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997.
http://www.rivistaindipendenza.org/movlibnaz/chiapas_una_guerriglia_moderna.htm, Una guerriglia moderna: l'Esercito Zapatista di Liberazione Nazionale, 19/11/2013

PRICE COHEN, C., *Human rights of indigenous peoples*, Transnational Publishers, Inc., New York, 1998.

into municipalities[220]. Differently from what the reader could probably expect, these municipalities do not have the power to associate and cooperate among themselves, because they are effectively submitted to the central power of the state. However, the state recognition of the autonomy right, in juridical and political terms, of such municipalities, especially those with the greatest majority composed by indigenous peoples, could help the state to more efficiently manage indigenous issues. On the contrary, it is also true that it is not so easy, not only in Mexico, but also within other Latin American countries, to exactly and precisely demarcate territories occupied by different societies, especially those populated by indigenous communities. Without a doubt, this difficulty ought not to be underestimated, but governments should find a solution in order to allow these municipalities to be autonomous from the central government, guaranteeing in such a way a sort of autonomy also to indigenous communities within their territories. According to Díaz Polanco, "[i]n order to attempt to transcend deeply rooted ethnic inequalities, at the same time ensuring individual rights and the unity of the nation, autonomy must be founded upon four basic principles: *the unity of the nation, solidarity and fraternity* among the diverse ethnic groups and regions of the country; *equal treatment* for every citizen, regardless of social position or ethnic group, and *equality among ethnic communities*[221]".

Ecuador

After having taken into account the very first great manifestation including indigenous peoples within Latin America and referring now to the Ecuadorian reality, in 1990, indigenous communities, who lived in the Ecuadorian Sierra, began protesting against decisions of the government. The protest, which was favoured and particularly supported by the CONAIE (Confederación de Nacionalidades

220 Article 115, Mexican Constitution: "For their internal government, the States shall adopt the popular, representative, republican form of government, with the free Municipality as the basis of their territorial division and political and administrative organization", http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf, 20/11/2013.

221 DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997, page 142.

Indígenas del Ecuador), arrived also in Quito, the capital. The president, Rodrigo Borja, and his Social Democratic government were caught by surprise and, as a consequence, the president took the decision to use the army in order to stop the indigenous mobilization. The so-called *Ecuadorian Levantamiento,* as a large number of experts and anthropologists define it, had as main objective that one to make the government focus its attention on real conditions and necessities of indigenous peoples within the country, whose population is currently composed more or less by the 43 percent of indigenous peoples. Moreover, together with the indigenous communities of the Sierra, also original indigenous populations of the Amazonian region participated to the *Levantamiento,* although their contribution to the mobilization was effectively marginal[222].

We should specify that Ecuador entered the second half of the XX century as an agrarian country. The majority of the agrarian production essentially came from the Sierra region, and more precisely, from *Sierra haciendas.* Indigenous peoples were literally marginalized and isolated. Furthermore, during the 1980s, the government proposed development plans and programs in order to firstly improve indigenous conditions, secondly, to favour actions of the CONAIE and other indigenous organizations within the country, thirdly, to spread a bilingual education and, finally, to renegotiate territorial divisions with Amazonian indigenous communities. Indigenous peoples were effectively interested in developing, but "[w]hat they really want is a different kind of modernity: one that would provide self-determination, a space of their own to try to be what they are discovering they want to be. The ultimate irony is that if the Indians are allowed to do so, they may end up fulfilling for themselves the original emancipatory project of modernity that liberals, reformers, and socialists failed to accomplish[223]".

More interesting seems to be the development of relations between the Ecuadorian state and indigenous peoples on the 21st and 22nd January 2000 (known as 'coup of 2000'), when indigenous communities took part, together with the army, to one of the greatest manifestation within the contemporary political history of

222LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208.
223LANGER, E. D. and MUÑOZ, E., page 58, above mentioned.

Ecuador, in order to overtake the president, Jamil Mahuad, whose politics were thought to be the main cause of the enormous economic crisis that Ecuadorian people had to face. Moreover, indigenous peoples of Ecuador criticized the constitution of 1998, which recognized territorial right to indigenous communities but, all the decisions concerning territories and communal lands had to be taken by the government, in fact, as said by Luis Macas, the main problems that indigenous peoples had to face were mainly in relation with the territorial ownership. The president, taking into considerations all the numerous critics coming from the populations and considering all the protests, was obliged to renounce to its mandate. As a consequence to the resignation of Mahuad, Antonio Vargas, president, at that time, of the CONAIE, argued that the so called 'bloodless revolution' would have brought radical changes in terms of indigenous rights recognition and political participation. Therefore, Antonio Vargas himself, the president of the Supreme Court Carlos Solórzano and the General Carlos Mendoza decided to found the bases for a government of national salvation. However, the triumvirate, unfortunately, did not work and the position of president was occupied by the vice-president of Mahuad, Gustavo Noboa, who continued developing the politics that had been previously put in practice by his predecessor[224]. At this point, we ought to underline the fact that not only the indigenous mobilization was supported by the 71 percent of the Ecuadorian population, but also by the army and, furthermore, several political parties began considering more seriously the national role played by the CONAIE, created in 1986[225]. Probably, as some experts argue, this excellent support to the indigenous mobilization of 2000 was probably the result of centuries of suppression of indigenous peoples in Ecuador, starting from the period of colonization to the period of identification and political participation in the XIX century. In other words, the coup of 2000, according to Langer and Muñoz, "showed that indigenous peoples remained at the forefront of debates and struggles to consider more closely the purpose of democracy and the definition of the term 'nation'[226]".

224ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.
225http://www.conaie.org/, CONAIE, 19/11/2013
226LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly

As a result of the coup of 2000, CONAIE founded a political party, known with the name of *Pachakutik* (which symbolized a new country generated through the revolution)[227], which soon gained significant representation within the parliament. As a result of this success, in 2002, *Pachakutik* representatives were placed at the head of some ministers, such as that one of foreign affairs and that one of agriculture. Unfortunately, as often happens, the party soon presented internal divisions, in fact, on one side there were those who supported the candidacy of Macas (candidate of the *Pachakutik*), who was not particularly supported by indigenous movements, and on the other side there were those who supported the candidacy of the leftist Rafael Correa. The political programmes of the two candidates were, more or less, similar, in fact, their programmes were mainly based on the refusal of the possibility to make trade agreements with the United States, the refusal of imperialism and the will of favouring extensive agrarian reforms. Finally, after the elections, Correa became the president of Ecuador in 2007, and during its acceptance speech on the 15th January 2007, he announced that his political programme would have firstly changed the constitution by means of a Constitutional Assembly, it would secondly joined the Organization of Petroleum Exporting Countries (OPEC) and, finally, it would have surely rejected and refused every possible agreement with the United States of America[228].

It is undeniable that, as evident, Ecuadorian indigenous movements played an important role as example for other several indigenous mobilizations for the quest for self-determination. Moreover, considering now the Ecuadorian constitution and the incredible development and success of indigenous movements, on the 28th September 2008, Ecuador became the first Latin American country with its twentieth new constitution, wanted by Correa, that finally recognized its status as a multicultural and multi-national state. In fact, article 57 of Ecuadorian Constitution claims that "se reconoce y garantizarán a las comunas, comunidades, pueblos y nacionalidades indígenas, de conformidad con la Constitución y con los demás

Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208, page 76.

227http://www.llacta.org/organiz/pachakutik/, 19/11/2013

228ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.

pactos, convenios, declaraciones y demás instrumentos internacionales de derechos humanos los siguientes derechos colectivos: […][229]". Such right refers to collective rights of indigenous peoples, such as the right to maintain, strengthen, and develop all their social, cultural, political and economic activities, favouring in such a way they real identity, the protection of the environment and the holding of communal territories[230]. Moreover, Ecuador, in 2008, became one of the few countries that included within their educational system indigenous languages, such as Quechua and Shuar, recognizied by the state itself to be national official languages for intercultural relations. As one of the most important and articulate indigenous leaders in modern Ecuador, Nina Pacari, argued, "[i]n the indigenous movement there is no real uniformity. Among indigenous peoples of Ecuador there exist various nationalities. That is undeniable. That is why we see ourselves as indigenous. We believe that we have an identity. But I believe that we should not keep on saying that we are 'indigenous peoples' without overcoming the homogenizing reductionism and develop ourselves as much as we can as the collective idntities that we have as the Shuar, Chachi, or Quechua people. And it is this multiplicity and multiculturalism that begins to become visible from the way we use language[231]". However, in order to conclude, as we will have the opportunity to prove within the next chapter, indigenous peoples have also, in some few and specific cases, criticized some decisions taken by the president Correa, especially regarding environmental issues.

229http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf, Article 57, Constitution of Ecuador, 2008, 19/11/2013

230ANDERSEN, M. E.,*Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.. http://link.springer.com/article/10.1007/BF02732707#page-1, Explaining Ethnic Regional Regimes in Latin America, Donna Lee Van Cott, 21/11/2013

231LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208, page 204.

Bolivia

Bolivia, according to recent surveys, is probably one of the countries in Latin America that presents very high percentages of indigenous population within their territories. According to several experts, in fact, the indigenous populations, especially composed by Guaraní peoples (the largest indigenous population in the eastern part of the country), settled in the Bolivian territory, are thought to constitute, more or less, the 60 percent of the total population of the country. As a result of these numbers, in a country with so many indigenous peoples, it is undeniable that the role that, in some cases, have been played by these communities themselves, has been fundamental in order to change political assets or simply in order to improvement their own conditions. Bolivia and its current government, with the crucial help of indigenous organizations, have been probably able to face, just from an institutional point of view, indigenous conditions, trying to sanction new laws, especially in the last decades, in order, firstly, to recognize the pluralism of the country and, secondly, to recognize more autonomy to these original communities, in economic, political, social and cultural terms.

With reference to the Guaraní indigenous population, as already said, they especially populate the eastern part of the country, near the bound with Argentina[232]. This area is one of the richest part of the country in terms of natural resources, in fact, oil, gas and timber are present here in large quantities. Not until the 1970s, indigenous peoples of this area have never been taken into account in political decision-making processes, ignoring in such a way their desires and wills and their attachment with the territory and its resources. However, despite the unconditioned control over the territory by the state, the government has never neglected the possibility to non-governmental organizations to develop and favour national projects in order to train indigenous leaders and representatives, with the aim to allow these communities to create and organize their own political parties.

232 http://www.guarani-campaign.eu/landen/engeland/gcontinente.htm, Guarani Peoples, Great People, 20/11/2013

Therefore, it is in this context that a large number of indigenous organizations or parties began existing, for instance, CIDOB, a pan-Indian organization, or the Asemblea del Pueblo Guaraní[233].

However, while in other countries in Latin America this kind of indigenous organizations spread from the 1960s and the 1970s, in Bolivia this specific process has been slower. In fact, the development of such indigenous organizations began just in the 1980s, when they have been able to achieve significant levels of political unity and efficient institutionalization. According to a large number of experts and indigenous representatives, these indigenous organizations could not have been created earlier for some particular reasons, such as high levels and percentages of migration from these original communities, political oppression and repression, a huge enmity between different indigenous communities, the oppressive control by the Catholic Church and fundamentalist sectors of the Bolivian society. Despite all these difficulties, some Bolivian indigenous communities have, in any way, been able to develop, maintaining traditional aspects of political organization, which allowed them to have a firm control over their lands and their own resources.

Referring to the diversity that exists between indigenous communities within the eastern Bolivian territory, we can individuate three main groups, settled in the departments of Santa Cruz, Tarija and Chuquisaca, that formed the Guaraní population. In fact, first of all, we ought to remember the Ava, who live near the Andean mountains, second, the Simba, who live in small zones of the departments of Tarija and Chuquisaca, and, finally, the Izoceño, who populate the Izozo region. These three different groups, which form the group of Guaraní itself, especially the Izoceños, were historical enemies of the Ayoreos, another indigenous group settled within the eastern part of Bolivia[234]. In order to solve this situation and in order to give a possibility of political participation to these two groups, Riester and Fischermann, two anthropologists, decided to organize a meeting in which indigenous representatives of the two groups could meet and negotiate a peaceful

233LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208.

234http://www.guarani-campaign.eu/landen/engeland/gcontinente.htm, Guarani People, Great People, 20/11/2013

coexistence within the region. The meeting effectively worked and, as a result, in 1980 Riester and other several anthropologists founded the so-called APCOB (Ayuda para el Campesino Indígena del Oriente Boliviano), based in Santa Cruz. Just two years later, in 1982, the APCOB organized another important meeting, to which representatives of the different indigenous communities of the area, the Ayoreos, Avas, Izoceños, Chiquitanos and the Guarayos took part. It was the very first time that all the indigenous communities from the same region met together. The main result of this meeting was undoubtedly the important creation of the so-called CIDOB (Central de Pueblos Indígenas del Oriente Boliviano), whose main aim was that one to put together indigenous desires, aspirations and all the goals they wanted to achieve[235].

As claimed before, the Bolivian government has never particularly focus a specific attention on indigenous conditions and realities, but it was the CIDOB, consequently, that tried to achieve those results, which were expected by indigenous communities. Without a doubt, we can not admit that economic results achieved by the CIDOB have been extraordinary or incredible, but, surely, we can affirm that with the support of a large number of non-governmental organizations, CIDOB today is able to achieve great social results and, furthermore, it has also been able, in the past, to become an important national organization, interested as well in broader activities. Undoubtedly, CIDOB has been the main promoter of the so-call Bolivian Indigenous Law and it also supported the promulgation of the Popular Participation Law in mid-1990s, which is considered to be the law through which the state recognized the multi-ethnic and multicultural nature and condition of Bolivia[236]. Moreover, with the participation of CIDOB and other several indigenous organizations, in 1987, there was the creation of the APG (Asemblea del Pueblo Guaraní), which today incorporates indigenous representatives of the Avas, Simbas and Izoceños, with the main objective to improve socio-economic conditions of

235LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208. http://link.springer.com/article/10.1007/BF02732707#page-1, Explaining Ethnic Regional Regimes in Latin America, Donna Lee Van Cott, 21/11/2013

236ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204. http://www.cidob-bo.org/, CIDOB, 20/11/2013

such communities and to guarantee a protection for these communities, with the collaboration of other several national indigenous organizations and associations[237].

After having approximately explained how, during the last decades of the XX century, Bolivian indigenous movements and institutions developed, and focusing now the attention on the XIX century, we have now especially to focus our attention on the period after the election of the president Evo Morales, in 2005. Despite the fact that Morales won the election with the majority of votes, the Bolivian society always remained polarized with huge political, economic, social, ethnic issues dividing the Bolivian population. We should, at this point, underlined the fact that, considering the high percentage of indigenous peoples within the Bolivian territory, Bolivian indigenous activists have been those who most called for their recognition and for their rights, taking also into account the fact that, as a large number of experts argue, Bolivia is one of the most unequal countries within Latin America, in fact, it presents weak governmental institutions, social exclusion, low social party identification and political corruption. After the election of Morales, moreover, levels of violence due to ethnic and regional tensions increased.

With regards to the the presidential election of Morales, the day before he took office on the 22nd January 2006, he was crowned supreme leader (*Apu Mallku,* in the Aymaran original language) by Aymara indigenous peoples, who are an indigenous population that lives near the Titicaca lake between Chile, Bolivia and Peru. After the ceremony, he promised that during its mandate he would have made all those possible efforts in order to recuperate all the territories and natural resources belonging to indigenous communities. According to Andersen, "Morales' indigenous politics were viewed by Bolivians - even by many Indians themselves - as possessing greater symbolism than a narrowly indigenous appeal, a calculated electoral 'neo-indigenismo'[238]". The Morales' Movement Towards Socialism (MAS - party of the new elected president) did not promote ethnic social separatism, on the contrary, it tried to promote a regional and national cooperation in order to mix

237LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208.

238ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204, page 100.

together indigenous and non-indigenous necessities. However, it is undeniable that the party presented a great division within its internal structure, in fact, there were those who firmly supported the recognition of indigenous rights and, on the other side, those that simply agreed with the activities and values of the parties in order to reach, probably, in future, the position of president[239].

Briefly, Morales proposed and firmly supported a reconstruction of the Bolivian state and of its institutional organization. For instance, after having taken office in 2006, he cut salaries by more or less 60 percent and increased minimum wages by 50 percent. Concerning indigenous peoples, he supported the development of illicit coca plantations and he also promoted a new law that guaranteed that the greatest part of the extracted hydrocarbon would have remained within the national territory. Moreover, in July 2006, Morales began a process of institutionalization in order to allow indigenous peoples, who, as said before, constitute the majority of the Bolivian population, to vote for a national assembly, aimed to change the national constitution. In fact, in December 2007, a constitutional assembly voted in order to change the constitution, to assure special individual and collective rights to indigenous peoples, specifying as well the multicultural characteristic of the Bolivian state, as it would have been put in practice by the Ecuadorian government just a year later, in 2008. However, the project of a new constitution was soon blocked by internal divisions within the coalition of Morales. In fact, in August 2007, some radical indigenous organizations asked Morales to expel from the government non-Indians moderates and, furthermore, some of the eastern non-Indians regions started to call for a decentralization of the power. Moreover, at the beginning of 2008, some eastern regions began criticizing the constituent assembly of the draft constitution. Morales was effectively losing some of his main closed allies and the political context that the president had to face was becoming increasingly difficult. A large number of non-indigenous peoples compared the MAS of Morales with the Nazis (obsessed with the Arian race), criticizing the fact

239http://link.springer.com/article/10.1007/BF02732707#page-1, Explaining Ethnic Regional Regimes in Latin America, Donna Lee Van Cott, 21/11/2013
ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.

that Morales was more interested in the conditions of indigenous peoples than in those of the non-indigenous population[240].

Despite all these complications during the first years of the mandate of the president, the constitution, which had been firstly proposed by Morales, was effectively ratified and came in force starting by the 25th January 2009, a year after the redaction of the Ecuadorian constitution. The new constitution officially recognized the multicultural formation of the state and, as happened the year before in Ecuador, declared that some indigenous languages had to be deemed as official languages of the state. According to Felipe Quispe Huanca, one of the most radical Bolivian leaders, the use of their languages has to be considered as an essential element for their survival and their cultural freedom, in fact, during an interview he argued that "[w]e are Aymaras and only in that way should we speak in *Kollasuyu.* If not, we are lost[241]". Moreover, the new constitution entitled indigenous communities the right to autonomy, in other words, the right to self-determination and the right to self-government, as reported within the Declaration on the Rights of Indigenous Peoples of 2007; in fact, we have to specify that Bolivia, during the redaction of such Declaration, was one of the countries that most supported the recognition of the right to autonomy for original communities[242]. As reported within article 2 of the new Bolivian constitution, "Given the pre-colonial existence of Nations and native peasant indigenous peoples and their ancestral dominion over their territories, it is guaranteed their self-determination within the framework of the unity of the State, which consists of their right to autonomy, self-government, their culture, recognition of their institutions and the consolidation of their territorial entities, in accordance with this Constitution and the Act[243]."

However, although Morales keeps being the most popular politician within the country, anti-Morales coalitions, mainly composed by wealthy local elites, and the racism towards indigenous peoples are making the political situation for Morales

240ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.
241LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208, page 208.
242ANDERSEN, M. E., above mentioned.
243http://jorgemachicado.blogspot.it/2012/02/cpetext.html, Bolivian Constitution, 20/11/2013

more difficult. Some experts at policy and anthropologists warned that the increasing power that indigenous peoples are gaining and the enormous political participation that indigenous organizations and party have within Bolivia could lead to the election of an indigenous president within the near future. Nevertheless, in 2009, the president signed a new law that allowed his own re-election and the creation and recognition of other two great electoral districts, mainly populated by Quechua and Aymara communities, in order, probably, to guarantee a new his own victory[244]. Finally, concerning the critics collected by the Morales presidency, the big debate is whether to support a democratic liberal state or a multi-ethnic, social, cooperative and multi-national state, which supports communal property, as reported within the new constitution, which defines the Bolivian country as a state whose mixed economy is divided between state, privates and communal economy. As several experts and Bolivian politicians think, it remains to see how far this government and its politics can go in view of the enormous number of forces working against them.

4.4. Regional autonomy: a possible solution for Latin American indigenous necessities

Regional autonomy has been often taken into account by a large number of Latin American countries as one of the greatest solutions for indigenous necessities and quests. In fact, several indigenous organizations, also today, keep underlining the importance of the role that regional autonomies could play while dealing with indigenous necessities. Regional autonomy, as many experts and indigenous organizations argue, has to be thought as a sort of institutional, economic, social and political reorganization of the national central power, which could reflect the real aspirations of the population, and particularly those aspirations of ethnic groups, such as indigenous communities. In other words, regional autonomy can probably be the solution against the development and spread of ethnic-national conflicts.

244ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.

According to Professor Díaz Polanco, regional autonomy can present two different meanings. First of all, it can be considered as a condition of *laissez-faire.* In this case, regional autonomy of some Latin American countries could represent the great possibility for ethnic groups to maintain their own traditions and customs. However, this first interpretation of the concept of regional autonomy could lead to an indeterminate situation, especially because the power would keep being hold by a central institution, which could decide how long this freedom of indigenous peoples within a regional autonomy could last. Second, the other meaning of regional autonomy implies the creation of a specific political and juridical structure, in order to create an effective political collectivity within the nation. In this last case, as a consequence, indigenous communities could choose their own authorities and exercise their legal responsibilities, maintaining and developing their right to self-determination[245].

We ought to highlight the fact that autonomy tries not only to satisfy the necessities and aspirations of specific small parts of the national society, such as in the case of indigenous communities, but it also aims to favour conditions of social integration and coalition among the rest of the national society. It is undeniable, moreover, as the reader might have already understood, that the regime of regional autonomy would completely change the organization and distribution of territorial powers of the state, in fact, regional autonomy would imply a decentralization of the central power of the state[246]. Within such regime, ethnic groups, in this case indigenous peoples of Latin American countries, could freely determinate their own ways of life and being in the condition of conserving their traditions, religion, language and customs[247]. According to a large number of Latin American politicians, sociologists and anthropologists, necessities of the major part of the population have to be considered as partial or less important if the majority itself does not take into account the necessities and requests of other smaller groups,

245http://link.springer.com/article/10.1007/BF02732707#page-1, Explaining Ethnic Regional Regimes in Latin America, Donna Lee Van Cott, 21/11/2013
DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997.
246DÍAZ POLANCO, H., above mentioned.
247BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

which effectively constitute a fundamental part of the national society, due to the simple reason that majority and ethnic groups share the same national territory. According to Francisco López Bárcenas, mentioned by Andersen, the largest quantity of indigenous demands within Latin America "require a profound transformation of national states and institutions that would practically lead us to a re-founding of national-states in Latin America […]. Indigenous peoples in Latin America struggle for autonomy because in the twenty-first century, they still are colonies[248]".

However, trying to compensate the asymmetry that exists between majority and ethnic groups by creating a socio-political symmetry could not lead to positive results for the whole population. According to Díaz Polanco, in fact, "[t]o decree equality among the unequal without establishing the conditions that effectively compensate for the de facto disadvantages only deepens the inequality[249]". In order to achieve a sort of equality condition among different sectors of the national society, it is fundamental and crucial that the majority and the entire institutional organization recognize to ethnic groups, in this specific case to indigenous peoples, their specific rights, freedoms, guaranteeing support, resources and protection against abuses. In other words, the inequality remains between these different groups, majority and ethnic populations, but it is the spirit of communal fraternity that can allow these population to live in a condition of permanent but stable asymmetry. Moreover, it is in this precise context that indigenous peoples could affectively enjoy their right to self-determination[250].

Furthermore, within this precise context, we do not have to confuse the term autonomy with the term self-determination. Autonomy is, in fact, a specific way that allows indigenous communities to dispose of their right to self-determination within

248López Bárcenas, "Indigenous Movements in the Americas: From Demand for Recognition to Building Autonomies", Center for International Policy, 26/02/2008, in ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204, page 23.

249DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997, page 97.

250ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204. http://link.springer.com/article/10.1007/BF02732707#page-1, Explaining Ethnic Regional Regimes in Latin America, Donna Lee Van Cott, 21/11/2013

their ancestral territories. Latin American indigenous peoples, today, are not calling for a separation between their original communities and the state, on the contrary, what indigenous populations want is the possibility to develop their own activities and their rights within the national context. Latin American democracies (those considered to be *incluyentes* by Oliva Martínez), recognizing regional autonomies and recognizing also the presence of indigenous communities within their territories through legislative acts or constitutions, should allow indigenous peoples to reorganize and manage their own culture, having the possibility to choose how participate and integrate themselves to the national and majority context, without considering the fact that in a large number of cases these states would avoid a great quantity of internal conflicts that threaten not only the political, but also the social stability of the country[251]. Finally, as Díaz Polanco argued, "[i]ndigenous peoples' right to self-determination is meaningless if they do not have the capacity to decide what kind of political organization is in their own best interest; how they want to be reintegrated (assuming that they want to) into the broader society in which they have been immersed for historical reasons, and what kind of political, economic, social, and cultural relations they wish to establish with the other groups of the national formation[252]".

In conclusion, as we have had the opportunity to demonstrate within this chapter, focusing our attention just on two crucial countries in terms of indigenous populations, Ecuador and Bolivia, a large number of indigenous organizations have been able, within the last decades, to develop and to achieve those necessary results, which were and are considered to be essential in order to guarantee the right to self-determination and autonomy to indigenous communities. Considering this recent massive indigenous mobilization in these two specific countries, some experts argued that these states present the spectrum of 'failing states', as they have been defined by Andersen. In other words, despite the huge and crucial institutional

251BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.
ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.

252DÍAZ POLANCO, H., *Indigenous Peoples in Latin America: The Quest for Self-Determination,* Westview Press, Boulder (Colorado), 1997, page 100.

recognition of indigenous communities within these two countries, they are considered to be states that have not been able to effectively control their territories, their populations and that have not been able, furthermore, to put in practice real processes for an effective recognition of a large number of social problems. Therefore, indigenous mobilizations have to be considered as evident and important factors of internal political and social conflicts, which somehow could destabilize the international community equilibrium, apart from the national one. However, it is also undeniable that the enormous number of mobilizations developed by native peoples, especially in the Andean region, represents the possibility for Latin American democracies to redefine their structure, by *democraticizing* the already existing democracies[253].

Although the complete recognition of indigenous autonomies and collective rights can be still deemed as a 'work in progress', the indigenous mobilization process that interested Latin America countries in the last decades and the achievement of all those few results have been effectively permitted just by favourable international conditions and by the efforts that numerous Latin American indigenous organizations, grouping together, have been able to make. According to Donna Lee Van Cott, Professor and author of a large number of books dealing with indigenous autonomies within Latin America, "[...] autonomies claims succeed only when indigenous organizations are able to insert them into larger regime bargains and when temporary changes in the political opportunity structure- opened access to decision making spheres and the emergence of an influential ally- favour indigenous claims. Autonomous claims are unlikely to succeed when they are advanced in isolation, outside the context of a regime bargain, where claimants are not empowered to reject the entire bargain, and where they lack the support of an influential ally[254]".

253ANDERSEN, M. E., *Peoples of the Earth: Ethnonationalism, Democracy, and the Indigenous Challenge in "Latin" America*, Lexington Books, Plymouth (UK), 2010, pages 1-51, 93-137, 166-200, 203-204.

254http://link.springer.com/article/10.1007/BF02732707#page-1, Explaining Ethnic Regional Regimes in Latin America, Donna Lee Van Cott, 21/11/2013

4.5. Conclusions

Within this long chapter we have focused our attention on an important, probably the most important, right of indigenous communities, the right to self-determination. This right is considered by international organizations and by indigenous populations themselves as the essential base for the development of all the other collective rights that a large number of international and also national legal instruments recognize to indigenous peoples. Such right, in fact, has been reported and explained within a large number of human international treaties and covenants, such as within both UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as within the UN Charter. The right to self-determination can be considered, in other words, as a human right that could not be taken into account in isolation from other human rights, on the contrary, it has to be considered as the starting point for the recognition of all the other collective indigenous rights and freedoms. With regards to international instruments concerning indigenous peoples, it is undeniable the fact that the redaction of the Declaration on the Rights of Indigenous Peoples, by the Working Group on Indigenous Populations, has not been a simple and easy process. A large number of states criticized the adoption of the term *peoples* in order to defined these native populations, or they simply contrasted the recognition of the right to self-determination to such communities, which could have made the state run the risk of losing its political integrity.

Then, we have taken into consideration the development of the effective recognition process of the right to self-determination within Latin America. The *indigenismo integracionista* of the first half of the XX century had as main objective the inclusion and acculturation of indigenous peoples, who in some specific cases were considered as obstacles for the development of the whole country. In fact, a large number of Latin American countries tried to integrate such communities, promising the recognition of their rights, but, in reality, those state were effectively trying to absorb and assimilate such communities, eliminating their characteristic

customs and their traditions. The forced acculturation and inclusion were thought by indigenous peoples as a threat for their own cultures. The inclusion process became later, during the Sixties, an assimilation process, which presented as main aim the cultural suppression of indigenous diversities.

It is only in the Seventies that a large number of indigenous communities began criticizing the activities developed by governments against indigenous cultures. As a consequence, with the fundamental help of anthropologists, indigenous peoples started a long process of reorganization, with the creation of a great quantity of indigenous institutions and documents, especially staring from the redaction of the first Declaration of Barbados in 1971. The principal objectives of such organizations and documents were the protection of indigenous rights and the preservation of indigenous territories, where indigenous peoples can effectively develop their own economies and traditions. The creation of this enormous number of indigenous organizations within Latin American countries make us understand that indigenous peoples were calling for a multicultural society, which had to be able to recognize the asymmetry that existed, and today still exists, between the majority of the population and these ethnic groups. Latin American countries, in other words, in order to integrate these communities, without the elimination or submission of their cultures to the central power and to the majority, ought to thought themselves as multi-national and multi-cultural.

Starting from the indigenous revolution within the Mexican Chiapas region in 1990, which was able to change the organizational structure of the country, other revolutions and indigenous movements widely spread. Within the chapter we have taken into consideration just two countries, which, in our opinion, are the most significant in terms of indigenous rights recognition. In fact, we focused our attention especially on Ecuador, which is the first Latin American country that, through its constitution, recognized its multicultural composition, and Bolivia, whose population is formed by, more or less, according to recent data, the 60 percent of indigenous peoples. Moreover, we have highlighted the development of indigenous mobilization and the creation of indigenous organizations (for instance, CONAIE in Ecuador, CIDOB in Bolivia) within both countries and, furthermore,

we focused the attention on the political context of the last decades, characterized by the election of Rafael Correa in Ecuador and Evo Morales in Bolivia. Both presidents have been able, apart from difficulties that have been explained within the previous pages, to redact constitutions that recognize the presence of indigenous peoples in the national territory, the importance of the use of their own languages and the importance of the attachment to their territories. However, the institutional and legislative recognition of indigenous communities and their rights is not always a real and effective recognition of such populations, as we will notice within the following chapter dealing with the indigenous right to territory.

In conclusion, we have taken into consideration a possible solution for indigenous necessities: regional autonomies. These regional autonomies are deemed by some states as threats for their national integrity. However, in accordance with a large number of politicians, sociologists, anthropologists and experts at indigenous issues, regional autonomies could be the solution for indigenous quests for self-determination. The state, without forgetting the cultural diversity that characterizes indigenous peoples from the rest of the population, ought to re-create democracies that essentially should be able and willing to integrate indigenous peoples in a multicultural way, respecting in such a way their right to self-determination. Finally, we could conclude by highlighting the fact that this activism should and can no longer be ignored, therefore, states and their governments, as a consequence, have to think on a reformulation of Latin American states, through a democratization of democracies, with the huge and important contribution of indigenous communities.

V CHAPTER

The indigenous right to land, territory and natural resources:

the importance of ancestral homelands

Introduction

After having taken into account within the fourth chapter the importance of the right to self-determination for indigenous peoples, within this next chapter we want to focus our attention on the right to territory of indigenous peoples, also called indigenous right to territorial ownership. Facing indigenous issues, the reader might have already understood that the right to self-determination has to be thought as complementary to the right to territory, in fact, indigenous communities could effectively enjoy their right to self-determination only if they populate a territory that they can effectively consider as ancestral. In other words, there is a strong relation between the right to self-determination and the indigenous right to territorial ownership, in fact, it is only within their territories that indigenous communities can fully develop all their economic, religious, social and cultural activities. However, despite the numerous indigenous movements that interested Latin American countries in the last decades, Latin American countries keep threatening indigenous territories, although governments, through laws and also constitutions, have recognized the right to self-determination of such communities.

In many cases, according to a large number of experts at indigenous issues, one of the causes that make states threaten indigenous territories is the lack of a precise definition for the term territory. Differently, in our opinion, the main reason for which governments keep damaging and making indigenous peoples run the risk of dislocation are national economic interests of states. Indigenous territories have been considered, along the history, as vacant territory, due to a lack of recognition

by the international community and by single states of indigenous peoples themselves. Therefore, as we will have the opportunity to prove within the following pages, indigenous territories, have been often occupied without taking into account the presence of such communities. Despite the numerous international instruments that have been redacted for the protection of indigenous territories and the protection of the environment, indigenous peoples of Latin America, as reported for example within the important Declaration of Kari-Oca II, want to directly protect their homelands, considered essential for the effective good and positive development of their economic and cultural activities. In other words, the Latin American struggle of indigenous peoples seems not to be finished yet.

Finally, within this chapter, we will focus a specific attention on Ecuador, on agrarian reforms and on the economic policy that characterized Ecuador in the XX century, underlining, especially, that the eastern part of the country, known as the *Oriente,* has been often witness of deforestation processes and indigenous dislocation. However, with the election of Rafael Correa in 2007 and the redaction of the new constitution in 2008, which recognized a great quantity of rights to indigenous peoples, something seemed to have changed. In fact, dealing with the threat of oil drilling within the Yasuni National Park, situated within the eastern part of the country, Correa guaranteed that such example of biodiversity and homeland of a great number of indigenous peoples would have been surely protected from oil drilling and deforestation if the international community had significantly contributed. Unfortunately, the international community, despite the huge quantity of international documents dealing with the protection of the environment at a global level, did not contribute as it was expected and, as a result, Correa, in the summer 2013, declared that the Yasuni will be partially damaged in the near future. The country needs direct liquidity from oil, but that direct liquidity is under the feet of indigenous peoples living within the park, who will be probably forced to dislocate and to see their trees burning.

5.1. Lands and territories, crucial elements for the indigenous survival

In order to put in relation human rights with the indigenous conception of land or the indigenous conception of territory, it seems to be fundamental to try to explain the importance of land and territory for indigenous communities all around the world. Unfortunately, the exploitation of indigenous lands developed by states is one of the mayor problems that indigenous communities, also today, are forced to face. As said several times before, territories belonging to indigenous communities are considered as crucial elements by them, in fact, those territories are undoubtedly the base for the development of all indigenous cultural, as well as religious activities and, moreover, lands and territories have to be thought as the base for the indigenous communities own survival[255]. Firstly, a special relation between territory and indigenous communities undoubtedly exists, in fact, as already stated, territory is the centre of all their economic, social, spiritual and political activities. Secondly, the international and national protection of indigenous territories has to be deemed as fundamental especially because this particular and precious interrelation that exists between indigenous peoples and territory should be maintained and cultivated through the consequent recognition of three crucial rights: the right to land, the right to use and manage natural resources and, finally, the right to territory. These three important rights for indigenous peoples can be respected just by guaranteeing the respect of all the environmental rights, which have been often reported within a large number of international and American conventions, as well as within Latin American national legislative instruments, in general[256].

However, as reported by a great number of experts, there is a terminological confusion between the term *land* and the term *territory*. Firstly, this confusion is sometimes generated by indigenous communities themselves, which are not used to utilizing occidental terms in order to refer to their lands and territories and, moreover, this necessity to differentiate the two terms does not exist in their

255 http://www.landcoalition.org/sites/default/files/publication/1517/IndigenousPeoplesSynthesis_0.pdf, Synthesis Paper on Indigenous Peoples' Rights to Lands, Territories and Resources, ILC, 26/11/2013.

256 BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

realities. Probably, the main cause of this lack of differentiation between the two terms, land and territory, among indigenous peoples is due to the fact that both elements are considered to be equally important and indivisible. However, this lack of differentiation has, in some cases, caused problems for indigenous communities, which have been forced to find a correct translation or to simply carry out the two different concepts in order to allow international institutions to adopt specific measures for the protection of both elements. Secondly, in other cases, this terminological confusion is generated by occidental societies. This possibility of confusion seems to be more relevant especially due to the fact that a large number of states consider territory and land simply and generically as *environment*, consequently, this approximation can eliminated all the diverse shades that characterized these two terms within indigenous contexts. In fact, some occidental states do not recognize this difference, considering both terms at the same level and as the same concept, eliminating in such a way all the political, economic, cultural and social diversities elaborated by indigenous peoples. According to some experts at indigenous issues and indigenous representatives themselves, this confusion can be perfectly thought as a will of states and governments to deny the strong interrelation that exists between indigenous peoples, territories and lands, with the specific aim to deny, consequently, the indigenous right to property of the territory or the right to use and manage natural resources[257].

Having taken into account the existence of the differentiation between the term *land* and the term *territory* and all the forms of confusion generated by this differentiation, we should try to provide a clear and precise definition of both terms, although it could seem difficult. The main objective is to try to differentiate the two terms and try to relate them to human rights, despite the fact that in few international instruments this differentiation is evident or relevant. Probably, the American instrument in which the reader could find the best differentiation between the two terms is the Inter-American Declaration of the Rights of Indigenous Peoples, formulated and redacted by the Inter-American Commission on Human

257BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

Rights in 1995[258]. This declaration, in fact, considered as different the right to land from the right to territory, assuring a sort of autonomy one from the other and underlining the efficiency and existence of both rights. Therefore, the reader can easily find within article 13 of such declaration an explanation of the right to the protection of the environment, and, moreover, included within the same article, the reader can be provided of an explanation of the the right to land and other related rights. On the other hand, within article 18, the reader can find the right to territory, with all its related rights, such as the right to territorial property. We think that it could be useful to report article 13, in order to show how the Inter-American approached to the importance of territory and environment for indigenous peoples. In fact, as we can noticed, article 13 declares that:

1. Indigenous peoples are entitled to a healthy environment, which is an essential condition for the enjoyment or the right to life and well-being.
2. Indigenous peoples are entitled to information on the environment, including information that might ensure their effective participation in actions and policies that might affect their environment.
3. Indigenous peoples shall have the right to conserve restore and protect their environment and the productive capacity of their lands, territories and resources.
4. Indigenous peoples shall participate fully in formulating and applying government programmes of conservation of their lands and resources.
5. Indigenous peoples shall be entitled to assistance from their states for purposes of environmental protection and may request assistance from international organizations[259].

With the word *land*, indigenous communities refer to all those numerous physical places where communities themselves live, where they can develop all their agricultural activities and where they can spend their communitarian life. We

258BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

259http://ankn.uaf.edu/iks/iachr.html, Inter-American Declaration of the Rights of Indigenous Peoples, 26/11/2013

could define the term *land* as the environmental space, traditionally occupied by these communities. It seems to be important to underline the fact that when we refer to land or environmental spaces, we have always to take into account that we are speaking not only about mountains, hills and forests, but we are also speaking about seas, lakes, rivers, drops and lagoons. For this reason, we could affirm that the right to land could probably be thought as the right to environment, which is expressed in a large quantity of international projects and instruments. This right to environment aims to assure a non-contamination of the environment itself, which has to be free of external negative agents. Furthermore, the right to environment also aims to defend and favour the protection of the health of those peoples, contributing in such a way to improve levels of indigenous dignity and levels of life. On the other hand, considering the right to territory, it is difficult to be explained especially due to the fact that it involves several different aspects that the term *territory* itself has absorbed along the history. According to some experts, the term *territory* has often changed in meaning and connotation and, on the other hand, for other experts, such term and its definition, related to indigenous communities, have to be considered as emergent[260].

In order to provide some interesting definition of the term *territory*, we could focus our attention on the definition provided by the CONAIE in Ecuador, which argued that what we call *territory* is "[a]quel espacio físico y determinado que comprende la totalidad del habitat de los pueblos y nacionalidades indígenas ocupamos. Es el espacio donde los pueblos y nacionalidades desarrollamos nuestras culturas, leyes, formas de organización y economías propia.[261]". Furthermore, according to Rodolfo Stavenhagen, expert at indigenous rights, he stated that "[...] Indigenous communities maintain historical and spiritual links with their homelands, geographical territories in which society and culture thrive and which therefore constitute the social space in which a culture can reproduce itself from generation to generation. Too often this necessary spiritual link between indigenous

260BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

261http://www.yachana.org/earchivo/conaie/proyectopolitico.pdf, Proyecto Político CONAIE, 1997, 26/11/2013.

communities and their homelands is misunderstood by non-indigenous persons and is frequently ignored in existing land-related legislation[262]". According to Jesús Piñakwe, a native Páez, "el territorio no es simplemente el espacio geográfico delimitado por convenio...El territorio es algo que vive y permite la vida, en él se desenvuelven la memoria que nos cohesiona como unidad de diferencias. El territorio, ambito especial de nuestra vida, es el mismo que debe ser protegido por nuestros pueblos del desequilibrio, pues necesitamos de él para sobrevivir con identidad. Existe una reciprocidad entre él y nosotros [...][263]". Finally, we could conclude by underlining what have been reported by the International Land Coalition (ILC - created in 1995 with the name The Popular Coalition to Eradicate Hunger and Poverty, which currently has as main aim that one to favour the access to land of rural people) within the Synthesis Paper on Indigenous Peoples' rights to Lands, Territories and Resources (2013), "[r]ights to lands, territories and resources based on traditional occupation, ownership or use meaning that it is *the traditional occupation and use which is the basis for establishing indigenous peoples' land rights* [...][264].

262http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.2002.97.En, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Stavenhagen Rodolfo, submitted pursuant to Commission resolution 2001/57, E/CN.4/2002/97, paragraph 49, 26/11/2013.

263Jesús Piñakwe, J., *Del Olvido surgimos para traer nuevas esperanzas. La jurisdicción especial indígena*. Imprenta nacional, Dirección general de asuntos indígenas DGAI – Ministerio del Interior, Consejo Regional Indígena del Cauca y Ministerio de Justicia y del derecho, Santa Fe de Bogota, 1997, page 34, in BERRAONDO, M. (Coord.), *Pueblos indigenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006. page 484.

264http://www.landcoalition.org/sites/default/files/publication/1517/IndigenousPeoplesSynthesis_0.pdf, Synthesis Paper on Indigenous Peoples' Rights to Lands, Territories and Resources, ILC, 26/11/2013

5.2. Acquisition of indigenous territories: a long history of deprivation and the approach of international organizations

Regarding acquisition processes, developed by external colonizers, that affected indigenous territories, we have to distinguish two main approaches. The first one considered indigenous peoples as *savages*, and, consequently, they were not recognized by the international law. The second approach did not recognize indigenous peoples from a legal point of view, therefore, their territories could be effectively and completely colonized, occupied and exploited. At the end of the XVIII century and early XIX century, indigenous peoples were considered as communities that were not legally and internationally recognized. As an obvious result, they could not enjoy the right to territorial ownership. This approach to indigenous peoples, the effective inhabitants of those ancestral territories, especially developed from the spread of the *terra nullius* doctrine (this doctrine refers to those territories that are not objects of sovereignty or have been simply abandoned) and the decolonization process, with the consequent passage of territories from European colonizers to new independent Latin American states, without taking into account the presence of indigenous peoples. The main preoccupation of the decolonization process was the maintenance of the order, with the creation of new boundaries between new states. This process inevitably brought to the negation of a real and effective decolonization of indigenous peoples, which passed from the subjugation of European colonizers under the control of the 'mestizos' and Latin American national states. In other words, this process of control over indigenous territories developed through the spread of three main theories: the *terra nullius* concept, the *effective occupation* of the territory and the *uti possidentis* doctrine. These three theories, as the reader might have already well understood, considered indigenous peoples just as populations that were not sufficiently 'civilized' to be allowed to control their own territories[265].

Trying to explain the theory of *terra nullius,* it has its origin in Roman law and

265GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006.

it became one of the most important principles of territorial occupation during the modern period. Therefore, *terra nullius* territories were those that did not present a settled civilized society or a specific and recognizable government. Accordingly, from a mere legal point of view, territories with the New World had to be considered as vacant, and, consequently, referring to Latin America, they could be occupied by Spanish colonizers. Without a doubt, the original definition of such theory changed with the evolution of colonization and the creation of few new independent states within Latin America, which began emerging as a result of the first wages of independence. Furthermore, as claimed before, other two theories denied the possibility for indigenous peoples to manage their own territories: the *effective occupation* and the *uti possidentis* doctrine. Starting from the principle of *terra nullius*, its consequent step, from the XVIII century, was the *effective occupation* of the empty territory by discoverers. However, the emergence of new national entities within Latin America during the decolonization process, especially in the first decades of the XIX century, forced the international community to redefine this concept. Nevertheless, indigenous communities kept being deemed as not capable of occupation of specific territories, in fact indigenous peoples had to be simply thought as peoples remaining 'under control'. Furthermore, during the decolonization process, the doctrine of *uti possidentis* was particularly utilized in order to justify the negation to indigenous peoples of their right to territorial ownership. As the *terra nullius* doctrine, the theory of *uti possidentis* had its origin in Roman law, but its meaning partially changed with the advent of the decolonization process. As Steven Ratner suggested, "uti possidentis did not address the final disposition of the property but, rather, shifted the border of proof during the proceedings to the party not holding the land[266]". As a result, according to this doctrine, territory was just deemed as a mere portion of land, rather than as a specific space where a group of people or a precise population could develop their own culture. In other words, such doctrine did not recognize the importance that territory had for indigenous peoples. Finally, in order to conclude, all these theories

266Steven Ratner, *Drawing a Better Line: uti Possidentis & the Borders of New States,* 90 AM. J. INT'L L. 590 (1996), in GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006, page 38.

dealing with occupation processes, were simply interested in the control over the territory, in order to avoid possible internal conflicts and lack of territorial control, for instance during the passage from the European hegemony to the democratization process of several Latin American countries. In other words, this passage did not represent for indigenous communities the expected possibility to achieve the right to self-determination and the right to control their territories, but, on the contrary, it simply represented a change in institutions and subjects that effectively controlled their territories[267].

However, as often underlined in the previous chapter, the last past decades have been mainly characterized by a great number of indigenous movements, calling for the recognition of their individual and collective rights. Among collective rights, apart from the right to self-determination, we have to underlined the fundamental importance of the right to territorial ownership. The territorial ownership has been, in the recent past, taken into account at an international and national level. The ILO Convention No. 169 (1989), within articles 13 and 14, highlighted the fundamental role that territories play for indigenous peoples. In fact, article 13 reports that "(1) [i]n applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. (2) The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use[268]", while article 14 underlines the fact that "(1) [t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting

267GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006.
268Article 13, ILO Convention No. 169

cultivators in this respect. (2) Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession[269]". After having taken into consideration both articles, we can affirm that it is undeniable that the ILO Convention recognizes to indigenous peoples the right to collective territorial ownership, in fact, as evident, the ILO Convention aimed to highlight the deep interrelation that exists between indigenous communities and their territories, which undoubtedly are the centre of all their activities.

Considering that the ILO Convention No. 169 recognizes to indigenous peoples the right to territorial property, it also seems to be essential to affirm that, apart from this fundamental recognition, indigenous peoples should also enjoy the right to use their own natural resources. In fact, the ILO Convention, within article 15, reports that "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources[270]". Furthermore, it seems to be useful to remember that the majority of indigenous peoples all around the world are often situated in portion of lands characterized by a concentration of natural, especially mineral, resources, for instance indigenous communities within the Yasuni National Park in Ecuador. It is for this reason, that the International Labour Organization, within the Convention, wanted to specify (article 15.2) that national governments, before using or exploit natural resources belonging to indigenous territories, have to consult indigenous communities themselves and, only with the approval of indigenous populations, countries can dispose of such resources.

Nevertheless, more recently, the UN Declaration on Human Rights of Indigenous Peoples (2007), within article 26, evidently influenced by Martínez Cobo, underlines that "[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have

269Article 14, ILO Convention No. 169
270Article 15(1), ILO Convention No. 169

otherwise acquired[271]". As the reader might have already noticed, also the UN Declaration of 2007 recognized and underlined the importance of this sort of traditional and historical relation that exists between indigenous communities and territories. Furthermore, the Proposed Inter-American Declaration on the Rights of Indigenous Peoples reports that "[r]ecognizing that in many indigenous cultures, traditional collective systems for control and use of land, territory and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being; and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the states in which they live[272]". Moreover, apart from some fundamental continental and international instruments aimed to the protection of the environments, such as the Convention on Nature Protection and Wild Life Preservation, signed in Washington in 1940 (known as Declaration of Washington, aimed to favour the creation in the American continent of national parks for the protection of biodiversity)[273], the Declaration of the United Nations Conference on the Human Environment, signed in Stockholm in 1972 (aimed to protect the environment in order to allow each individual to enjoy a good life in contact with a healthy nature), the famous Declaration of Rio de Janeiro (1992)[274], we should probably focus a specific attention on the Report of Mrs. Fatma Zohra Ksentini, special Rapporteur on Human Rights and the Environment for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Within her report, she underlined the fact that indigenous peoples have the right to control their territories, lands and natural resources, and they also have the right to be efficiently protected by national states and by the international community from environmental destruction. Furthermore, another really important document that highlights the crucial role that indigenous peoples have to play in order to protect the environment and favour a sustainable development is the Agenda 21, whose article 26

271 Article 26(2), UN Declaration on the Rights of Indigenous Peoples

272 http://www.cidh.oas.org/indigenas/chap.2g.htm, Proposed Inter-American Declaration on the Rights of Indigenous Peoples, paragraph 5, 26/11/2013

273 http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE000085.txt, Declaration on Nature Protection and Wild Life Preservation, 27/11/2013.

274 BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

is completely dedicated to indigenous communities[275]. Finally, we think useful and interesting to remember also another important document, often forgotten, that, in our opinion and according to a large number of experts, might be considered as one of the most significant indigenous documents that had as main objective that one to drive the attention of the international community, met in Rio de Janeiro in 1992, on the disastrous global environmental destruction. We are referring to the Declaration of Kari-Oca II (Brazil), which is a document signed by more that five hundred indigenous peoples, who wanted to stress the important role that they could play in order to protect the environment, underlining in such a way the deep relation between them and the great Mother Earth[276]. Marcos Terrena, a Brazilian indigenous leader and one of the promoters of the Declaration of Kari-Oca II, said "[t]his document is a wind that will enter the doors of Rio+20 to open the minds of the politicians, to show them that we are not merely the Indigenous Peoples that live in their countries, we are sons and daughters of the Mother Earth[277]". To conclude, as the reader might have already understood, as a natural consequence to all these international documents dealing with the right to territorial ownership and environmental protection by indigenous peoples, a large number of Latin American countries, within the last decades, have added, within their constitutions, specific articles concerning rights for indigenous communities to manage their own lands and to use natural resources produced by such territories, for instance, the Ecuadorian Constitution of 2008. In other words, Latin American constitutions increasingly recognize such right as a fundamental collective right for indigenous peoples and their communities. However, unfortunately, as argued before, the practical, real and effective recognition of this right is sometimes slower than the simple constitutional or legislative recognition, as we will prove within the following pages.

Nevertheless, dealing with environmental destruction, we think that it is also important to highlight the fact that the effective recognition of the right to territorial ownership of indigenous peoples could represent a benefit not only for indigenous

275 http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf, Agenda 21, UNEP, 27/11/2013.
276 http://climateandcapitalism.com/2012/06/19/kari-oca-2-declaration/, Kari-Oka 2 Declaration, 27/11/2013
277 http://climate-connections.org/2012/06/19/declaration-of-kari-oca-ii-adopted-by-five-hundred-indigenous-representatives-in-sacred-ceremony/, Declaration of Kari-Oca II adopted by five hundred Indigenous representatives in sacred ceremony, Jeff Conant, paragraph 4, 27/11/2013.

communities themselves, but also for the whole international community, as anticipated before. Increasing levels of pollution and the increasing destruction of pluvial and tropical rainforests all around the world, especially within the Amazonian region, could make the whole planet run a great risk[278]. As evident, a large number of developing countries, also in Latin America, are promoting and favouring rapid economic systems, with high levels of impact on environment and on the indigenous attachment to lands, defined by Surrallés and García Hierro as an "animal territoriality sense"[279]. In other words, according to Cynthia Price Cohen, expert at indigenous issues, "[...] environmental degradation may have international consequences even when it is 'local' in origin, as when, for example, poisons buried in one country seep into groundwater and cross borders or enter the oceans, or when one country's factories release gases that deplete the entire Earth's ozone layer[280]". For this simple reason, considering the fact that indigenous peoples are thought by a large number of international organizations as the protectors of the biodiversity and environment, "[t]he concept of indigenous peoples may provide the key link in the law to a shape and form for enforceable environmental rights[281]". As a consequence to these possible devastative effects of the environmental destruction and to indigenous manifestations, several Latin American countries have instituted a great quantity of national parks and natural reserves in order to protect the environment.

However, the simple recognition of territorial ownership of indigenous peoples by states and governments does not seem to be enough, in fact governments have still to make great efforts in order to firstly stabilize indigenous territories and secondly to guarantee a complete and efficient protection of indigenous territories, allowing in such a way these communities to develop themselves and allowing them, moreover, to develop all their cultural activities, which directly depend on an effective territorial ownership and on the existence of this deep interrelation between nature and peoples, who, such as in the case of the Huaorani in Ecuador, considered trees and rivers as

278BERRAONDO, M. (Coord.), *Pueblos indígenas y Derechos humanos,* Universidad de Deusto, Bilbao, 2006.

279SURRALLÉS, A. and GARCÍA HIERRO, P., *The land within: Indigenous Territory and the Perception of Environment,* International Work Group for Indigenous Affairs, Skive (Denmark), 2005, page 232.

280PRICE COHEN, C., *Human rights of indigenous peoples*, Transnational Publishers, Inc., New York, 1998, page 217.

281PRICE COHEN, C., page 217, above mentioned.

they were human beings[282]. At this point, it is important and useful to underline the fact that, in many cases, the right to collective territorial ownership can be considered to represent the same concept of the right to self-determination of indigenous peoples[283]. Both are, in fact, thought to be collective rights. Consequently, national governments ought to pay attention on the fact that the indigenous self-determination right could be enjoyed just by respecting indigenous lands, in which they can fully dispose of their cultural integrity as communities. However, as we have argued several times within the previous pages, in many cases, indigenous communities within Latin America, as underlined by Cynthia Price Cohen, notice that the recognition of their rights runs slower compared to the frenetic speed of national interests, despite the great quantity of peace agreements that have been signed during the last decades between Latin American national governments and indigenous communities[284] and, furthermore, according to Clech Lâm, the international community, on the other hand, remains slow in taking effective decisions against the spread of invasive destruction processes of environment[285].

In conclusion, in order to summarize and clarify, the right to territorial ownership of indigenous peoples has, according to many international documents and according to several experts at indigenous issues, to include the autonomous control over their territories and lands, a national jurisdiction that allows the development of an indigenous internal regulation for the control and management of ancestral territories, lands and natural resources, the spread of sustainable development programmes, as reported within the Declaration of Kari-Oca II, a sort of effective social, economic, spiritual control over lands and territories, which can permit the efficient protection of the environment and of the biodiversity by indigenous communities and, finally, the development of ethic economic mechanisms. “There is no doubt that the uses of the water, fire-wood, timber or the resources of the forests are, in themselves, of vital

282SURRALLÉS, A. and GARCÍA HIERRO, P., *The land within: Indigenous Territory and the Perception of Environment,* International Work Group for Indigenous Affairs, Skive (Denmark), 2005.

283AIKIO, P. and SCHEININ, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination,* Institute for Human Rights Åbo Akademi University, Åbo, Finland, 2005.

284GILBERT, J., *Indigenous Peoples' Rights under International Law, From Victims to Actors,* Transnational Publishers, Inc., New York, 2006.

PRICE COHEN, C., *Human rights of indigenous peoples*, Transnational Publishers, Inc., New York, 1998.

285CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000

importance to indigenous peoples, but we base ourselves on the hypothesis that, among indigenous peoples, these represent much more than a mere combination of resources. From the indigenous perspective, water, living beings and forest resources are not just material, but symbolic elements, […]. To dissociate the treatment of forest, fauna, water and genetic resources from the space that they belong, is an attack similar to the one suffered by the Andean indigenous peoples during the conquest[286]".

5.3. Deforestation, Indigenous Peoples dislocation and the Yasuni National Park in Ecuador

Ecuador is one of the smallest countries of Latin America, from a geographical point of view, however, according to a large number of experts and geologists, it is one of the richest countries in terms of natural resources. Not only does the globalization process cause difficulties to Ecuador economic growth, but also the radical change of the monetary politic, in fact, Ecuador adopted the dollar in 2002, causing in such a way increasing levels of poverty among the population. As a consequence, the government of Ecuador was forced to use natural resources, its main profitable resource, in order to earn money. As happened within a large number of Latin American countries, in fact, the most direct resources that they can sell in order to dispose of direct liquidity are lands and territories, which most of the time are sold to international companies for timber, oil-drilling and other similar activities. However, it is not only in the last few decades that Ecuador has taken advantage of its natural resources and of the environment, having denied for many years the indigenous possibility to enjoy their homelands.

For hundreds of years, the most exploited zone of Ecuador has been the so-called *Oriente,* which is an Ecuadorian area that presents a large number of indigenous communities and an incredible variety of biodiversity, in terms both of fauna and flora. This national area is part of the so-called Amazonian forest, and it is undeniable that

286SURRALLÉS, A. and GARCÍA HIERRO, P., *The land within: Indigenous Territory and the Perception of Environment,* International Work Group for Indigenous Affairs, Skive (Denmark), 2005, page 273.

such area, along the history, has been several times victim of deforestation and, as a natural consequence, indigenous peoples have been often forced to dislocate. According to a recent study, from the mid-1960s, we can note a great presence of oil companies within the zone, which occupied more or less 681 hectares, and other 3.734 hectares had been also used in order to build access roads. Moreover, within the zone other 240.888 hectares had been, by 2000, occupied by intensive agricultural settlements, favoured by the national state through agricultural reforms. In other words, by 2000, the 54.4 percent of the area was completely occupied and environmentally destroyed. The conversion of tropical rainforests into pasture and agricultural fields was one of the main aspirations of the Ecuadorian government during the first years of the XX century[287].

However, the extreme isolation and inaccessibility of this environmental paradise made a large number of economic and development programmes fail, and, as a result, the Ecuadorian government, in the first decades of the XX century, decided to drive the attention of companies on the coastal zone of the country, which rapidly became an important source of cacao at an international level. However, it is in the 1970s that, with the redaction and promulgation of specific laws regulating territories and lands in the *Oriente* and with the formulation of a large variety of agricultural reforms that the greatest part of the *Oriente* was practically delivered to the so-called spontaneous settlers, as they were nominated by the Special Law for Awarding Vacant Lands to Spontaneous Settlers (1973). However, in the case of this specific law, it had devastative effects on indigenous homelands, populated especially by Cofán, Huaoroni, Shuar, Achuar, Siona-Secoya and Quichua communities. In other words, unfortunately, it is from the 1970s that Ecuadorian indigenous peoples have been witnesses of an increasing deforestation and exploitation of their ancestral territories within the *Oriente*[288]. Nevertheless, we have to underline the fact that this intensive deforestation that characterized the second half of the Ecuadorian XX century, despite the fact that the Ecuadorian territory and indigenous peoples have often been victim of the unscrupulous activities of oil companies, especially coming from the United States,

287http://terra-group.net/pdfs/LASA.pdf, Oil Development, Deforestation, and Indigenous populations in the Ecuadorian Amazon, Douglas Southgate, Robert Wasserstrom and Susan Reider, 28/11/2013.
288http://terra-group.net/pdfs/LASA.pdf, above mentioned, 28/11/2013.

was not only caused by oil companies activities, but also by increasing numbers of governmental regulations and national integration efforts (*indigenismo integracionista*), which had as main objective the unconditioned integration of indigenous peoples, considered as obstacles for the national development, without taking into account their necessities and their cultural peculiarities, undoubtedly far from national economic internal interests.

Only during the decade of the 1980s, the international community began considering in a more serious way the incessant problem of Amazonian deforestation, which not only directly interested Ecuador, but, for example, also Brazil and Nicaragua, with the famous case of Awas Tingni. In fact, as reported before in order to explain the approach of the Inter-American Court with regards to the collective territorial property right of indigenous communities, in 1992 MADENSA (Madera y Derivados de Nicaragua), which was a small company that particularly operated in the coastal zone of Nicaragua, focused its attention on a large percentage of tropical rainforests, part of the Awas Tingni community territory. Initially allowed by the Awas Tingni community to carry out timber, using members of the community as workers, MADENSA proposed to the community to sign an agreement in order to gain necessary exclusive rights to property of those tropical forests, previously belonged to this indigenous community. Unfortunately, the Awas Tingni leaders, without juridical assistance, signed the agreement, and it was just a year later, in 1993, when the World Wildlife Fund (WWF) incited the indigenous community to reformulate the agreement, taking into account their real interests. The case interested also a large number of experts, who tried to warn the indigenous community of the possible disastrous effects for their homeland. MADENSA, without taking into account claimants coming from WWF and several experts, made with the Nicaraguan government, in early 1993, an agreement that stipulated a contract of 30 years between MADENSA itself and the signing Ministry. Just in December, the Awas Tingni indigenous community was informed by the MADENSA that the government had allowed the destruction of a great part of the zone, threatening in such a way the environmental habitat of the community. Moreover, the government argued that the territorial portion of the indigenous community was not precisely demarcated and, as a

consequence, despite the fact that the Nicaraguan constitution of 1987 recognized communal lands of indigenous peoples, the Awas Tingni had no instruments to demonstrate that that territory was part of their homeland. However, despite an attempt of peaceful collaboration between MADENSA, the government, the community and experts, the fundamental problem was the lack of an effective definition of territorial rights of indigenous peoples in Nicaragua[289]. At the end, the case was brought before the Inter-American Court and the Court itself declared that the indigenous community, as indigenous peoples in general, had to benefit of the right to collective territorial ownership or property, taking into account the enormous importance of territories for such communities and their survival.

With reference to Ecuador, just as an example dealing with the importance of territory for indigenous peoples, in 1986, Conoco, a oil company, signed an agreement with the Ecuadorian government in order to be allowed to drill within the Block 16, which is an area of the Yasuni National Park, situated in the eastern part of the country (*Oriente*), characterized by immense rainforests. In 1990, the government allowed the company to dispose of an enormous part of the homeland of Huaorani communities, more or less 2 millions hectares. A large number of Latin American and United States environmentalist organizations, such as Acción Ecologica, Fundación Natura, Rainforest Action Network (RAN) and others, began highly criticizing the decision of the government. According to the executive director of RAN, Randy Hayes, "[u]nlike most of our U.S. forestlands, the tropical rainforest is inhabited. Their destruction not only raises questions of land rights and biodiversity – of monkey, of trees. It also raises questions of people. The fate of the indigenous communities [is] deeply connected to the fate of the forest, raising profound human rights issues if their homelands are to be destroyed. If you destroy the forest, you destroy these people. In the rainforests, ecological and human rights issues are therefore deeply interlinked[290]". Finally, despite the fact that the Huaorani community had innocently signed an agreement with

289http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/human_rights_quarterly/v018/18.2anaya.html, Indigenous Peoples, The Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua, S. James Anaya and S. Todd Crider, 20/10/2013.

290http://terra-group.net/pdfs/LASA.pdf, Oil Development, Deforestation, and Indigenous populations in the Ecuadorian Amazon, Douglas Southgate, Robert Wasserstrom and Susan Reider, 28/11/2013, page 12.

Conoco, the company was forced to leave the area due to a large number of protests and manifestations of environmental activists and claimants of the Ministry[291].

At this point, it is undeniable that, considering the extraordinary biodiversity of Ecuador, the Ecuadorian environment has been often threaten by national economic interests, making indigenous peoples run a great risk of losing their homelands. In fact, the second half of the XX century has been particularly characterized, within the Ecuadorian state, by a large number of agreements signed with oil companies, but, in several cases, indigenous peoples and activists movements have been able to maintain this paradise partially untouched. On the other hand, focusing the attention on the recent national economic attitude towards the environment, it is undeniable that a large percentage of multinationals and oil companies have relinquished their contracts within the country. In fact, with the election of the president Rafael Correa in 2007 and the reformulation of the constitution, which drove its attention more on real necessities of indigenous communities and on environment, the attitude of the state has completely changed. However, within the next paragraph, apart from taking into account the Ecuadorian situation mainly because the Ecuadorian constitutional approach to indigenous issues could be considered as a fundamental example for other several Latin American countries, we will focus our attention on the fact that Ecuador and its current government, leaded by Correa, seem to be no longer able to efficiently protect indigenous peoples from dislocation and from destruction of their homelands.

Briefly, the new constitution wanted and commissioned by the government of Rafael Correa, which was signed in 2008, underlines the importance of nature and biodiversity, as important instruments for the growth of the country. The constitution, therefore, contains a large number of dispositions dealing with the protection of the landscape and, especially, the protection of environment related to the survival of original indigenous communities. Focusing our attention on article 14 of the constitution, it states that:

"The right of the population to live in a healthy and ecologically balanced

291CLECH LÂM, M., *At the edge of the State: Indigenous Peoples and Self-Determination,* Transnational Publishers, Inc., New York, 2000.

environment that guarantees sustainability and the good way of living (sumak kawsay), is recognized.

Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest [292]".

For this simple reason, in order to protect the Yasuni National Park, situated in the eastern part of the country, the Yasuni Ishpingo Tambococha Tiputini Trust Fund (known as Yasuni ITT Trust Fund) was signed with the Agency for the Development (NATO) in 2011. The main objectives of this project was those ones to avoid the emission of 407 million metric tons of dioxide and the maintenance of the area, preserving in such a way the landscape of Yasuni from drilling and Tagaeri-Toromenane indigenous peoples living there, with the scope to favour artificial reforestation, natural reforestation and possibilities of scientific research. With regards to the structure of the project, the Yasuni ITT Trust Fund was divided into two main parts, the Capital Fund Window, which was financed by international contributions coming from the international community in general, and the Revenue Fund Window, which was replenished by annual revenue payments received from national entities for the use of the Capital Fund Window funds. In other words, president Correa had asked the international community to financially contribute to the maintenance of the national park, avoiding in such a way the threat of oil drilling and preserving biodiversity and indigenous communities from dislocation.

In 2011, as a result, Correa claimed that Ecuador was a country of responsible people and, despite the fact that oil constituted the most important part of their economy, the Ecuadorian population and the government would have been ready and willing to leave that oil unexploited if the international community would have contributed. However, the international community reaction was timid. Considering the amount of financial contributions received from the international community since august 2013, according to The Guardian, Ecuador could count just on 13 million

292http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html, Ecuadorian constitution, 28/11/2013.

dollars (mainly coming from United States, United Kingdom, Australia, Japan, Canada, Spain, Italy, Ireland, France and Germany), instead of 3.6 billion dollars, which was considered to be the effective goal to achieve[293]. In other words, contributions from the international community have been not so many, and, consequently, in 2013, the president declared that the project had failed and that the Ecuadorian government was considering the possibility to allow oil drilling within the region. Moreover, the president specified that just one percent of the territory will be destroyed, but according to a large number of activists, the project will damage a great part of the park, forcing indigenous peoples to leave their lands and territories, and threatening in such a way the so-called indigenous *sumak kawsay*, the good way of living, as reported within the new constitution.

At this point we ought to focus our attention on the reaction of the international community, in fact, the evident lack of contributions for the protection of the park, considered to be one of the greatest example of biodiversity in the world, lead us to wonder why, despite the numerous international instruments regarding the protection and the preservation of the environment, the international community itself remained impassible to the possible partial or complete destruction of that park. Moreover, considering the reaction of the president Correa, it is evident, as unfortunately happens in many cases today within Latin America, that real conditions of indigenous peoples are probably not considered by Latin American governments, in this case Ecuador, as crucial issues for the nation. Despite the presence of several articles dealing with the protection not only of nature, but also of indigenous peoples, the national government of Ecuador will be probably ready to damage or completely destroy the Yasuni environment. Probably, the activism of indigenous movements will never finish if states keep forgetting rights of these original communities and, since indigenous activism has been able in the past to achieve important results in term of rights recognition, in the future, indigenous movements will also probably be able to achieve other positive results, in terms of territoriality and protection of the environment, at a national, but also at an international level. To conclude, according to Luis Macas,

293http://www.theguardian.com/world/2013/aug/16/ecuador-approves-yasuni-amazon-oil-drilling, Ecuador approves Yasuni Amazon Oil Drilling, 28/11/2013.
http://mptf.undp.org/yasuni, 28/11/2013.

lawyer, who has also been president of the CONAIE in Ecuador, during an interview dealing with Ecuadorian environmental destruction, oil companies and indigenous territorial ownership, he stated:

> "The oil companies have not only caused the decomposition of our communities and the decomposition of our culture but also the destruction of the ecology. The fight for land is thus extended to the struggle for maintaining ecology. […]. Despite the fact that indigenous lands are legalized – with written land title – the government still hands over the rights to take oil out of these lands to multinationals, claiming government ownership of what is under the land. […]. Indigenous and environmental organizations have managed to make people in Ecuador aware of the necessity to defend the environment and also national sovereignty, because it runs against our national interest to hand over a vast area […] to multinationals[294]".

294LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208, page 196, 197 and 199.

Final considerations

We want to conclude this research by wondering whether indigenous movements and indigenous activism have been really able to achieve significant results in terms of recognition of their rights. The answer would undoubtedly be positive if we, for instance, take into consideration the enormous indigenous process of protest that took place during the second half of the XX century within Latin America, which allowed indigenous peoples to free themselves from the subjugation condition that had lasted from the discovery of the Americas until the democratization process of independent Latin American countries. It is probably this democratization mechanism of several Latin American states that allowed indigenous peoples to make their voice be heard, not only at a national, but also at an international level. Due to they convictions and their determination, in fact, indigenous peoples have been able to achieve the effective recognition of their own right to self-determination, with the fundamental help of a large number of international organizations and international human rights instruments, as well as national laws and constitutions. However, the reader might wonder whether this recognition of indigenous peoples rights can be considered as a complete and efficient recognition, despite the lack of a unique and clear definition of indigenous peoples, the lack of a demarcation of their territories and the lack of an international indigenous union and of a united activism.

Moreover, the crucial role played by current economic interests of states should not be underestimated, in fact, although indigenous peoples in Latin American countries have been recognized as independent communities, with their own specific individual and collective rights, indigenous populations, in several cases, keep being

forced to leave their territories, better defined by indigenous peoples as 'homelands', and to move in search of other 'vacant' territories. Therefore, considering the fragility of this indigenous rights recognition by national constitutions, we could think that these states, as happened during the period of the *indigenismo integracionista*, despite the recent inclusion of indigenous communities within multicultural societies and multinational states, keep threatening fundamental freedoms and the equilibrium of such communities. In other words, the national recognition of the rights of indigenous communities, favoured especially by the large number of international instruments dealing with indigenous peoples and also indigenous movements themselves, seems to be just a face that hides huge economic and financial interests of states.

One of the main consequences of these national interests are indigenous dislocation and massive deforestation. In the last decades, the Amazonian rainforest has been victim of a large number of multinationals companies not only interested in timber, but also in oil, being the Amazonian region rich of oil deposits. Incredibly, in a large number of researches and surveys dealing with the destruction of Latin American rainforests, scientists and experts just focus their attention on the environment, without mentioning the consequent step of deforestation: the cultural suppression of indigenous communities living in closed interrelation with their trees and with animal species. In other words, deforestation is not only a huge international and national environmental problem but it also involves human rights of such communities, who are obliged to dislocate, to find new homelands, to rebuild a new equilibrium and to re-establish their cultures. As in the case of the Yasuni National Park, previously protected from possible oil-drilling and now threaten due to a lack of contributions from the international community, this park represents the homeland of a large number of indigenous peoples, that are constantly forced to protest and fight in order to see their right respected and their territories left untouched. Therefore, is effectively working such constitutional mechanism of recognition of indigenous rights within Latin America? Are international organizations and the whole international community willing to help these communities and to protect them from the loss of their territories? Should indigenous peoples fight all by themselves against the invasion of their lands? All the answers for these questions will be surely provided in the near future.

As a result, we wonder if the international community, international law, the international system of human rights are really working as they should. Probably, as Cassese argued, the limitless quantity of international and continental documents, covenants and treaties on human rights are not able to stop abuses and violations. In the case of indigenous peoples, as we have tried to demonstrate within the previous pages dealing with the cases of the Awas Tingni and Miskito in Nicaragua, the Tagaeri-Toromenane in Ecuador, the Yanomami in Brazil, the Aché Indians in Paraguay, the Guaraní in Bolivia, we can argue that, in our opinion, human rights instruments are not working, and the national constitutional recognition of single countries of such local and original communities is not enough, a fundamental and important role has to be played by the international community and by contributions that rich countries can offer to developing countries, such as in the case of Ecuador and the protection of the Yasuni. In conclusion, agreeing with Cassese, human rights instruments are not able to guarantee an effective protection from violations, and indigenous peoples of Latin America would surely agree. It is probable that this activism for the respect of indigenous communities rights will never end, and its ways of expressions will not only be developed through manifestations and protests as in the past decades, but also with struggles through several social networks and internet, as in the case of Almir Surui, a Latin American indigenous man, belonging to the Surui community, who informed the international community about the disasters produced in his forest by multinationals through internet and social networks. In order to conclude, we want to report some words of Augustín Cueva, expert at indigenous issues, who, in 1912, stated that "[m]ost of the time, [the Indian] lacks confidence, is as timid as an eternal child, and has a profound and unveiled aversion to those whom he justly considers his executioners; such is the nature of his character[295]", but, we just want to add that probably his character is the result of his past and current experience and his efforts made in order to survive to numerous threats of ethnocide.

295LANGER, E. D. and MUÑOZ, E., *Contemporary Indigenous Movements in Latin America,* Scholarly Resources Inc., Wilmington (USA), 2003, pages 37-101, 187-189, 195-208, page 65.

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