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**Indigenous Rights and the Protection of Biodiversity:
A Study of Conflict and Reconciliation in International Law**

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Abstract

Indigenous ways of living are typically described as being harmonious with—if not instrumental for—the protection of the environment. This dissertation moves from the quite different evidence that the protection of biodiversity may encroach on indigenous rights. More specifically, the legal regime of the Convention on Biological Diversity (CBD) establishes obligations for its Parties whose interpretation and/or implementation may lead to the violation of indigenous rights.

In this context, this research identifies potential conflicts between the obligations incumbent on CBD Parties pursuant to the CBD and its Nagoya Protocol on access and benefit-sharing (ABS) and those stemming from human rights treaties and protecting indigenous rights. This thesis also develops an interpretative approach aiming to prevent or solve conflicts failing the applicability of hierarchy, *lex specialis*, or *lex posterior* rules to the relationship between indigenous rights and the protection of biodiversity. This dissertation argues that systemic interpretation offers a valuable interpretative tool to incorporate the rights of indigenous peoples into the CBD regime. Beyond substantive and procedural indigenous rights, another applicable rule between CBD Parties is the principle of self-determination, which this thesis derives from a teleological interpretation of indigenous rights.

The dissertation concludes that conflicts between indigenous rights and obligations established in the CBD regime cannot be solved in the abstract but rather need a case-by-case approach. Evidence from two thematic case studies—one on ABS and the other on conservation—shows that indigenous rights and self-determination allow interpreters both to choose between competing interpretations of the CBD regime and to privilege those interpretations that do not threaten the cultural distinctiveness of indigenous peoples. Successful examples of applying this interpretative approach in the thesis concern issues such as the ownership of genetic resources, the notion of traditional knowledge, and the articulation of concrete forms of participation in the application of CBD-related obligations. These findings have a broader significance for the debate on human rights and the environment, the interplay between self-determination and permanent sovereignty over natural resources, as well as for the harmonization of specialized regimes with the rights of indigenous peoples.

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While inputs and contributions from the people I mentioned above have enriched this thesis, any errors and inaccuracies are attributable only to myself.

This thesis is dedicated to my family and friends (I will not name you, but I am sure you will recognize yourself in this dedication). Grazie ai miei genitori che mi hanno insegnato l'amore per i libri e mi hanno aiutata a costruire il mio cammino. Und danke, Demian, dass du für mich meine Stimme, mein Schutz, mein Heim, mein Herz bist.

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List of selected abbreviations

ABS	Access and benefit-sharing
Addis Ababa guidelines or principles	Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity
African Charter	African Charter on Human and Peoples' Rights
Akwé:Kon guidelines	Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or Which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities
American Convention	American Convention on Human Rights
American Declaration	American Declaration of the Rights and Duties of Men
<i>Apirana Mahuika</i> case	<i>Apirana Mahuika et al. v. New Zealand</i>
Australia's statement	Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, Parliament House Canberra
<i>Awas Tingni</i> case	<i>Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua</i>
Bonn guidelines	Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization
Canada's statement	Government of Canada, <i>Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples</i>
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
COP	Conference of the Parties
COP/MOP	Conference of the Parties Serving as the Meeting of the Parties to the Nagoya Protocol

Abbreviations, treaties and cases

Daes report (2004)	Indigenous Peoples' Permanent Sovereignty over Natural Resources. Final report of the Special Rapporteur, Erica-Irene A. Daes
<i>Dann case</i>	<i>Mary and Carrie Dann v. United States</i>
Decision 1 (68)	Decision on United States of America 1 (68)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
<i>Endorois case</i>	<i>Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya</i>
FAO	Food and Agriculture Organization of the United Nations
<i>Gabčíkovo-Nagymaros case</i>	<i>Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)</i>
General Comment 23	Human Rights Committee, General Comment No. 23 (Art. 27)
General Recommendation 23	CERD, General Recommendation No. 23 on the rights of indigenous peoples
ICCAs	Indigenous and Community Conserved Areas (and Territories)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICOMOS	International Council on Monuments and Sites
ILC	International Law Commission

Abbreviations, treaties and cases

ILC fragmentation report	International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Groups of the International Law Commission finalised by Martti Koskenniemi
ILO	International Labour Organisation
ILO Convention 107	Indigenous and Tribal Population Convention C107
ILO Convention 169	Indigenous and Tribal Peoples Convention C169
IPRs	Intellectual property rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
IUCN	International Union for the Conservation of Nature
<i>Kaliña and Lokono case</i>	<i>Case of Kaliña and Lokono v. Suriname</i>
Ksentini report 1994	Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment, Final report prepared by Mrs. Fatma Zhora Ksentini
<i>Länsman I</i>	<i>Ilmari Länsman et al. v. Finland</i>
<i>Länsman II</i>	<i>Jouni E. Länsman et al. v. Finland</i>
<i>Länsman III</i>	<i>Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee v. Finland</i>
<i>Lovelace case</i>	<i>Sandra Lovelace v. Canada</i>
<i>Lubicon case</i>	<i>Lubicon Lake Band v. Canada</i>
MATs	Mutually agreed terms
<i>Maya v. Belize</i>	<i>Maya Indigenous Communities of the Toledo District v. Belize</i>
METs	Multilateral environmental treaties
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity
New Zealand's statement	Hon. Dr. Pita Sharples, Minister of Maori Affairs, Announcement of New Zealand's support for the Declaration on the Rights of Indigenous Peoples
Operational Guidelines	Operational Guidelines for the Implementation of the World Heritage Convention

Abbreviations, treaties and cases

<i>Poma Poma</i> case	<i>Ángela Poma Poma v. Peru</i>
PoWPA	Programme of Work on Protected Areas
<i>Richtersveld</i> case	<i>Richtersveld Community and Others v. Alexkor Ltd and Another</i>
Rio Declaration	Declaration of the United Nations Conference on Environment and Development
<i>Saramaka</i> case	<i>Case of the Saramaka People v. Suriname</i>
<i>Sarayaku</i> case	<i>Case of the Kichwa Indigenous People of Sarayaku v. Ecuador</i>
Special Rapporteur on indigenous rights	Special Rapporteur on the Rights of Indigenous Peoples
Stockholm Declaration	Declaration of the United Nations Conference on the Human Environment
UN Declaration on indigenous rights or UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNGA	United Nations General Assembly
UNPFII	United Nations Permanent Forum on Indigenous Issues
US statement	Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, <i>Statement on the Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples</i>
VCLT	Vienna Convention on the Law of the Treaties
WGIP	Working Group on Indigenous Populations
WHC	Convention Concerning the Protection of the World Cultural and Natural Heritage or World Heritage Convention
WIPO ICG	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
WTO	World Trade Organisation
<i>Yakye Axa</i> case	<i>Case of Yakye Axa Indigenous Community v. Paraguay</i>
<i>Yanomami</i> case	<i>Yanomami v. Brazil</i>

Xákmok Kásek case

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European Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 4 November 1950, in force 3 September 1953)

Indigenous and Tribal Population Convention C107 (Geneva, 26 June 1957, in force 2 June 1959)

International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965, in force 4 January 1969)

International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, in force 3 January 1976)

Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976)

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980)

American Convention on Human Rights (San José, 22 November 1969, in force 18 July 1978)

Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2 February 1971, in force 21 December 1975)

Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972, in force 17 December 1975)

Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 March 1973, in force 1 July 1975)

Agreement on the Conservation of Polar Bears (Oslo, 15 November 1973, in force 26 May 1976)

Abbreviations, treaties and cases

Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978, in force 6 November 1996)

Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979, in force 1 November 1983)

Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 19 September 1979, in force 1 June 1982)

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African Charter on Human and Peoples' Rights (Banjul, 27 June 1981, in force 21 October 1986)

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INTRODUCTION

Indigenous Peoples and Biodiversity: Problem, Research Questions, and Methodology

1. Indigenous peoples and biodiversity: classic approaches and novelty of present research

This dissertation examines the legal problems stemming from the interaction between two international regimes, namely the protection of indigenous rights and the conservation of biodiversity. The original interest in combining these particular subfields of international law mainly derives from the knowledge of concrete cases where the promotion of biodiversity or related issues has led to the violation of indigenous rights.

A paradigmatic example in this sense is the forced removal of indigenous peoples following on from the establishment of protected areas.¹ The Kaliña and Lokono peoples have for instance seen their access to natural resources curtailed after Suriname had decided to create the Wia Wia, Galibi, and Wane Creek reserves.² In the African regional context, the Endorois people have been evicted from their traditional land around Lake Bogoria pursuant to the decision by Kenyan government to create a natural reserve on the same territory.³

Another recurring example of the violation of indigenous peoples' rights in connection with the sustainable use of natural resources concerns the misappropriation or misuse of either indigenous traditional knowledge or natural resources belonging to indigenous peoples. International case law related to this issue does not exist to date. However, the fight of the San people of South Africa over Hoodia-related patents perfectly illustrates the tensions surrounding this problem. Products derived from Hoodia, a succulent plant traditionally used by San people in Southern Africa, were patented in the form of appetite suppressant drugs without initially involving the communities concerned, notwithstanding the fact that the properties of the plant were discovered through indigenous traditional practices.⁴ The Hoodia case is an illustration of a more generalised tendency to promote

¹ See Chapter 4, section 1 for a brief historical account of the global trends in the establishment of protected areas.

² These facts are documented in *Case of Kaliña and Lokono v. Suriname*, Judgment, Merits, Reparations and Costs, Case No. 12,639 (25 November 2015) (hereinafter *Kaliña and Lokono* case).

³ See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003 (25 November 2009) (hereinafter *Endorois* case). The decisions of human rights treaty bodies are thoroughly analysed in Chapters 1 and 2. A good website documenting inter alia news on land issues of indigenous peoples, also in connection with conservation projects, is <https://www.culturalsurvival.org/news> (last accessed October 2016).

⁴ For background information on the Hoodia case, see Rachel Wynberg, 'Rhetoric, Realism and Benefit-Sharing: Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant' (2004) 6 *Journal of World Intellectual Property* 851. It is interesting to note that San people eventually

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research activities on genetic resources—also known as bioprospecting—with the purpose of product commercialisation, but also with the aim to conduct non-commercial research on the ecological properties of natural resources with a view to understanding ecosystems.⁵

Both the issue of in-situ conservation and that of access to genetic resources and related traditional knowledge are regulated under the Convention on Biological Diversity (CBD),⁶ which is one of the three international regimes emerging from the UN Conference on Sustainable Development held in Rio in 1992.⁷ While climate change has acquired public currency since then, the depletion of biodiversity is a less discussed problem, though not less urgent.⁸ The CBD elevates conservation, sustainable use, and benefit-sharing stemming from access to genetic resources to global environmental problems, labelling the first of the three objectives as common concern of humankind.⁹ However, the perspective adopted in this dissertation is that, as legitimate and urgent as they may be, measures to combat biodiversity loss have human rights implications that need to be fully understood.

The relationship between human rights and the environment has drawn the attention of international legal scholars for more than forty years.¹⁰ Scholarly debate has focused on

obtained a benefit-sharing agreement. On this, see also Harry Jonas, Kabir Bavikatte and Holly Shrumm, 'Community Protocols and Access and Benefit Sharing' (2010) 12 *Asian Biotechnology and Development Review* 49, at 54-57.

⁵ See Chapter 3, section 1.

⁶ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993) (hereinafter CBD).

⁷ The other treaties adopted following the Rio summit are the United Nations Framework Convention on Climate Change (New York, 9 May 1992, in force 21 March 1994) and the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 17 June 1994, in force 26 December 1996). The latter treaty encourages its Parties to promote the use of traditional knowledge. A discussion of these obligations can be found in Annalisa Savaresi, 'Doing the Right Thing with Traditional Knowledge in International Law: Lessons for the Climate Change Regime' [2016] BENELEX Working Paper N 8; Edinburgh School of Law Research Paper No 2016/16 Available at SSRN: <http://ssrn.com/abstract=2780332>.

⁸ Discussions on species depletion at the international level precede the ratification of the CBD. An important step for the mobilisation of international action is represented by the so-called Brundtland report titled *Our Common Future*, adopted by the World Commission on Environment and Development in 1987. The report owes its nickname to the former Norwegian Prime Minister, Ms. Gro Harlem Brundtland, who chaired an ad-hoc expert group made of politicians, scientists, and civil servants, convened under the aegis of the UN. The report pictured a troubled framework for the conservation of the world biodiversity and called for global action to inter alia revert this trend. Most recent reports, however, indicate that biodiversity depletion has not been abated. See IUCN Red List on Threatened Species and IUCN Red List on Threatened Ecosystems at www.iucnredlist.org and <http://iucnrl.org> (last accessed October 2016). See also, CBD, *Global Biodiversity Outlook 4* (Secretariat of the Convention of Biological Diversity 2014). To understand concepts such as biodiversity transformation and biodiversity loss and their implication for human development, see Charles Perring, *Our Uncommon Heritage: Biodiversity Change, Ecosystem Services, and Human Wellbeing* (Cambridge University Press 2014), especially Ch. 4.

⁹ See Preambular para. 3 CBD. See Virginie Barral, 'National Sovereignty over Natural Resources: Environmental Challenges and Sustainable Development' in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016 forthcoming), at 13, where the author shows the implications of considering the conservation of biodiversity rather than biodiversity itself as common concern.

¹⁰ Catalysers of this debate have been the adoption of both the Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), UN Doc. A/CONF.48/14/Rev.1 (hereinafter

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four main aspects, namely the common moral underpinnings of environmental and human rights problems,¹¹ the correlation between environmental degradation and the enjoyment of human rights,¹² the incorporation of environmental concerns into the protection of existing rights by human rights treaty bodies—also known as human rights approach to

Stockholm Declaration) and the abovementioned report *Our Common Future*. See, in particular, Principle 1 and preambular paras. 1 and 2 of the Stockholm Declaration. The latter recognises the importance of the environment for human well-being as well as the consequences that environmental management could potentially have on the right to life. It is interesting to note that the relationship of man and nature is also framed in terms of the duty of men to maintain an adequate level of the environment. On this point, see preambular para. 7 and Principle 4. See also, Ch. 1, para. 8 of *Our Common Future*. For a comprehensive analysis of the legal debates concerning the interaction between human rights and the environment, see Alan E. Boyle and Michael Anderson, *Human Rights Approaches to Environmental Protection* (Oxford University Press; Clarendon Press 1996). See also, Dinah Shelton, 'Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration' [2009] UNEP-OHCHR, High-Level Expert Meeting on the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nairobi (30 November – 1 December 2009) and Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

¹¹ See Alexander Kiss and Antonio A. Cançado Trindade, 'Two Major Challenges of Our Time: Human Rights and the Environment' (1995) 21 *Revista IIDH - Instituto Interamericano de Derechos Humanos* 25, at 28. See also, Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment, Final report prepared by Mrs. Fatma Zhora Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994) (hereinafter Ksentini report 1994), para. 4. On the legal value of the Ksentini report, see Neil A.F. Popovic, 'Human Rights, Environment & Community: A Workshop: Presentation by Neil A.F. Popovic' (1999-2000) 7 *Buffalo Environmental Law Journal* 239, at 245. The report contains a Draft declaration on human rights and the environment. According to Popovic, the legal significance of this document would mainly derive from three factors: the fact that it is cited by judges and scholars; the fact that it constitutes an empowerment mechanism for activists; its role in creating a legal culture where the relationship between human rights and the environment is acknowledged.

¹² See Ksentini report 1994. See also, Analytical Study on the Relationship between Human Rights and the Environment, UN Doc. A/HRC/19/34 (16 December 2011), at 3; Separate Opinion of Vice-President Weeramantry, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (hereinafter *Gabčíkovo-Nagymaros case*), at 91: "The protection of the environment is...a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself". There is also a specific sub-literature on the extent to which environmental degradation negatively affects vulnerable groups, such as indigenous peoples. See e.g., Gregory F. Maggio, 'Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity' (1997-1998) 16 *UCLA Journal of Environmental Law and Policy* 179, at 191 ff.; Ellen Desmet, *Indigenous Rights Entwined with Nature Conservation* (Intersentia 2011), at 59; Sabine Lavorel, 'Le renouvellement du droit des peuples à l'autodétermination face aux changements environnementaux' in Christel Cournil and Catherine Colard-Fabregoule (eds), *Changements environnementaux globaux et Droits de l'Homme* (Bruylant 2012), at 554. These issues are analysed in depth in Chapter 1.

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environmental protection¹³—and the existence of an autonomous right to environment.¹⁴ Notwithstanding the importance of these debates, this section does not aim to explore them in detail. Suffice it here to mention that they share an important common feature, i.e., environmental protection and human rights are mainly conceived as mutually supportive under all of these strands, thus overlooking the possibility for conflict.

Another important point is that, although these debates describe some key characteristics of the relationship between human rights and the environment, they have not covered all possible aspects.¹⁵ In particular, some authors have acknowledged that the human rights

¹³ The European Court of Human Rights (ECtHR) has inaugurated this approach. The technique used by the Court is that of enlarging the scope of existing rights. In this sense, negative environmental impacts have been used as a criterion to ascertain the violation of human rights. The ECtHR has discussed environmental issues under the rubric of the following rights protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 4 November 1950, in force 3 September 1953) (hereinafter ECHR): the right to life (Art. 2 ECHR), the right to respect for private and family life (Art. 8 ECHR), the right to property (Art. 1 of the Protocol No. 1 to the Convention), the right to information (Art. 10 ECHR), the right to a fair trial (Art. 6 ECHR), and the right to an effective remedy (Art. 13 ECHR). See *López Ostra v. Spain*, Application No. 16798/90 (9 December 1994); *Guerra and Others v. Italy*, Application No. 14967/89 (19 February 1998); *Kyrtakos v. Greece*, Application no. 41666/98 (22 May 2003); *Hamer v. Belgium*, Application No. 21861/03 (27 November 2007); *Tatar v. Romania*, Application No. 67021/01 (27 January 2009). For an overview on this expansionary technique, see Richard Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights' (1995) 89 *American Journal of International Law* 263. See also, Lucy Kiousopoulou, 'La dimension écologique de la Convention européenne des droits de l'homme et les limites du contrôle juridictionnel' in Dean Spielmann, Mariaelena Tsirli and Panayotis Voyatzis (eds), *La Convention européenne des droit de l'homme, un instrument vivant: Mélanges en l'honneur de Christos L Rozakis* (Bruylant 2011), at 263-264; CoE, *Manual on Human Rights and the Environment* (Council of Europe 2012), at 8, 60, and 64. In a more recent trend, the public interest to protect the environment has been found to limit the realisation of some rights. On this point, see Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing 2011), at 402. For an in depth analysis of the application of this approach to the case of indigenous peoples, see Chapter 1.

¹⁴ See Ksentini report 1994, paras. 21-46. Although the Special Rapporteur strongly argues in favour of the existence of this right, because of the incremental support by States and of the integration of the environmental dimension into existing human rights, the right to environment is still controversial mainly due to the difficulty to determine its content and to ensure its implementation. To date only two international human rights instruments contain a right to the environment, namely Article 24 of the African Charter on Human and Peoples' Rights (Banjul, 27 June 1981, in force 21 October 1986) and Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (San Salvador, 17 November 1988, in force 16 November 1999). The right to environment is also protected, although in different terms, under the African Convention on the Conservation of Nature and Natural Resources (revised version, Maputo, 11 July 2003, not yet in force), which in its Art. II includes among the Convention's principles "the right of all peoples to a satisfactory environment favourable to their development". For an account of the academic debate on this issue, see e.g., Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law' (2002) 16 *Tulane Environmental Law Journal* 65; Alexander Kiss, 'The Right to the Conservation of the Environment' in Romina Picolotti and Jorge Daniel Taillant (eds), *Linking Human Rights and the Environment* (The University of Arizona Press 2003); Amedeo Postiglione, 'Human Rights and the Environment' (2010) 14 *International Journal of Human Rights* 524; Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stanford Journal of International Law* 103; Janusz Symonides, 'Human Right to a Clean, Balanced and Protected Environment' (1992) 20 *International Journal of Legal Information* 24; Shelton, 'Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration' 2009; Alexander Kiss, 'Définition et nature juridique d'un droit de l'homme à l'environnement' in Pascale Kromarek (ed), *Environnement et droits de l'homme* (UNESCO 1987).

¹⁵ According to Boyle, international lawyers that deal with human rights mostly neglect this debate. See

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approach to environmental protection, that is the incorporation of environmental concerns into existing rights,¹⁶ is not a sufficient theoretical tool to grasp the multiple interactions deriving from the relationship between human rights and the environment, inter alia because the latter is not necessarily an interest to be protected through individual rights.¹⁷

Against this background, this dissertation aims to bring scholarly discussion a step further, as well as covering new ground in the analysis of possible interactions. This is done in two steps. First, this thesis claims that the interplay between international environmental law and international human rights law may generate conflicts between the two bodies of law.¹⁸ The literature so far has limited itself to argue that a conflict may arise in the interplay of two possibly opposing interests,¹⁹ with some notable exceptions.²⁰ In any event, there has never been a systematic attempt to identify conflicts between CBD provisions and the protection of the rights of indigenous peoples. This need of systematisation runs throughout the dissertation.

Second, the core of this thesis aims to understand how to solve or mitigate conflicts *before they arise* by ways of interpretation. The technique used is not that of the human rights approach to environmental protection developed by human rights treaty bodies. The innovative perspective adopted in this thesis, instead, is that of incorporating human rights into multilateral environmental treaties (METs), and more specifically the rights of indigenous peoples into the CBD.²¹

Boyle 2012, at 614.

¹⁶ The human rights approach to environmental protection is explained in more detail in Chapter 1.

¹⁷ Sands argues that one of the limitations of the human rights approach to environmental protection is that environmental degradation cannot be considered a human rights violation *ex se* but is only relevant in connection with the violation of a protected right. See Philippe Sands, 'Human Rights, Environment and the *Lopez-Ostra* Case: Context and Consequences' (1996) 1 European Human Rights Law Review 597, at 597. One of the most interesting remarks in this regard is that made by Francesco Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 European Journal of International Law 41, according to whom the human rights approach bears an individualistic perspective that is not apt to address intrinsically collective problems, such as the conservation of the environment (at 44). See *contra* Kiousopoulou 2011, at 271. The author considers, in fact, that the Court's fragmented approach to the protection of the environment is inherent in the lack of a specific positive obligation to protect the environment in the Convention.

¹⁸ The notion of conflict adopted in this thesis is canvassed in section 5 in this chapter.

¹⁹ See Shelton, 'Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration' 2009, at 29-30; Boyle 2012, at 605. See also, Leena Heinämäki, 'The Right to Be a Part of Nature: Greening Human Rights via Strengthening Indigenous Peoples' (2012) 4 The Yearbook of Polar Law 415.

²⁰ Seminal reflections upon conflict are contained in Leena Heinämäki, 'Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?' (2009) 11 International Community Law Review 3. The author discusses in critical terms "whether and under which conditions the legal recognition of the special rights of indigenous peoples in relation to the environment can be seen as promoting the protection of the planet Earth" (at 1) and highlights that some indigenous practices may be in conflict with agreed objectives of environmental protection.

²¹ These ideas have been developed in Annalisa Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol' in Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Martinus Nijhoff 2013) and Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya*

One of the main problems with this approach is that international environmental law and human rights law are formally two separated regimes. The remainder of this chapter starts with a brief analysis of the latter point. Section 3 explains why the interplay between indigenous peoples and biodiversity represents a meaningful case study with respect to the general problem of coordinating human rights with environmental protection. Section 4 enucleates research questions, delimits the scope of research, and clarifies the methodology used in the thesis. Section 5 gives a definition of conflicts as intended in this dissertation, while section 6 explains the presumption against conflicts in international law as well as the harmonisation tool represented by systemic interpretation. Finally, section 7 illustrates the outline of the dissertation.

2. International environmental law and human rights: interrogating their separateness

The protection of human rights and the conservation of the environment are in principle in the purview of two separated bodies of law in international law, which obey to distinctive logics and have established special institutional systems.²² These differences might be explained through the increasing specialisation of international law, which is intended to respond to different global societal challenges.

International human rights law traces back its origins to the end of the 1940s with the adoption of the Universal Declaration of Human Rights,²³ as a way to respond to the atrocities of WWII.²⁴ International environmental law has developed in its modern form of multilateral regulation during the course of the 1970s-1980s to address increasing challenges following from accelerating industrial development, while the role of the UN has been more prominent starting in the 1990s.²⁵ Although international human rights law and international environmental law address different issues, both have contributed to the evolution of international law towards a post-Westphalian system, challenging the idea that

Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity (Martinus Nijhoff 2014).

²² Desmet 2011, at 157.

²³ UNGA Res. 217A (III), UN Doc. A/RES/3/217 A (10 December 1948).

²⁴ See e.g., Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014), Ch. 2; Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2012), Ch. 2; Dinah Shelton, 'An Introduction to the History of International Human Rights Law' [2007] GWU Law School Public Law Research Paper No 346 Available at SSRN: <http://ssrn.com/abstract=1010489>; Thomas Bürgenthal, 'Human Rights' Max Planck Encyclopedia of Public International Law, Part B.

²⁵ Malgosia Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des cours* 9; Philippe Sands, *Principles of International Law* (2nd edn, Cambridge University Press 2003), Ch. 2; Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010), Ch. 2; Alessandro Fodella and Laura Pineschi (eds), *La protezione dell'ambiente nel diritto internazionale* (Giappichelli 2009), at 9-35.

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international law is only centred upon States.²⁶

Allegedly, the environmental norms and human rights rules also have different underlying rationales and objectives. According to some authors, while environmental treaties aim primarily to protect nature, human rights law embraces an anthropocentric vision of the world.²⁷ Indeed, most modern environmental treaties are increasingly concerned with the protection of nature as a function of human life.²⁸ Furthermore, the anthropocentric approach is part and parcel of the principle of sustainable development as originally elaborated in the Stockholm Declaration on the Human Environment and subsequently developed inter alia by UN intergovernmental conferences.²⁹

When it comes to the mechanisms of monitoring and enforcement, the two bodies of law are extremely different. The application of human rights conventions is demanded to monitoring treaty bodies that exercise both non-judicial (State reports, conclusion on State submissions, and reports/adoption of views on individual petitions) and judicial functions (adjudication of cases).³⁰ The alleged victims of human rights violations—individuals and, in regional systems, groups—have legal standing before human rights treaty bodies. Therefore, rightholders indirectly enforce the respect for the international human rights instruments subscribed by States. On the contrary, international environmental regimes do not usually foresee dedicated compliance mechanisms.³¹ States can in principle resort to the International Court of Justice (ICJ), if the Court's jurisdictional requirements are satisfied,³²

²⁶ Antonio A. Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium (I) and (II)' (2005) 316 and 317 *Recueil des cours* 31, especially Part V. See also, e.g., Thilo Marauhn, 'Changing Role of the State' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007); Maurice Kamto, 'Singularité du droit international de l'environnement' in Michel Prieur and Claude Lambrechts (eds), *Les hommes et l'environnement: Quels droits pour le vingt-et-unième siècle?* (Frison-Roche 1998); Linos-Alexander Sicilianos, 'The Individual as a Catalyst for Change in International Law: Interactions between General International Law and Human Rights' in Dean Spielmann, Mariaelena Tsirli and Panayotis Voyatzis (eds), *La Convention européenne des droits de l'homme, un instrument vivant: Mélanges en l'honneur de Christos L. Rozakis* (Bruylant 2011).

²⁷ Donald K. Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011), p. 131: "Despite a common core of interest, the two topics remain distinct. Environmental protection cannot be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its programme. Ecologists are concerned with the preservation of biological diversity, including species not useful or even harmful to humans... The central concern is the protection of nature".

²⁸ This emerges from Chapters 3 and 4.

²⁹ See also, Declaration of the United Nations Conference on Environment and Development, Earth Summit, UN Doc. A/CONF.151/26 (vol. I) (12 August 1992) (hereinafter Rio Declaration); Declaration of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (4 September 2002); Outcome document of the UN Conference on Sustainable Development 2012, The future we want, UN Doc. A/RES/66/228 (11 September 2012). On the idea of balance under international environmental law, see Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (Cambridge University Press 2015), at 71-87. On the anthropocentric approach and the change of mind produced by sustainable development, see Barral 2016 forthcoming, at 4-7.

³⁰ Philip Alston and Ryan Goodman, *International Human Rights. The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford University Press 2013), Ch. 9.

³¹ Sands, *Principles of International Law* 2003, Ch. 5.

³² Art. 36(1) and (2) Statute of the International Court of Justice (San Francisco, 26 June 1945, in force

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but they have not done so concerning the violation of the CBD.³³ Furthermore, individuals or those who are directly affected by the violation of the international rules established under METs³⁴ are not able to take action to challenge States' non-compliance. Indeed, both human rights and environmental conventions have treaty bodies contributing to the interpretation and development of treaty obligations, a telling example of the latter being the work undertaken by the Conferences of the Parties (COP) of METs.³⁵

Furthermore, differences completely fade away when it comes to the sources of these two subfields of international law.³⁶ Both legal regimes are dominated by treaty law, which of course is true of contemporary international law as a whole. Most importantly, however, soft law plays a fundamental role in the development of both international human rights law, especially in the field of indigenous peoples' rights, and in international environmental law. A patent example of the former that is of relevance to this dissertation is the United Nations Declaration on the Rights of Indigenous Peoples,³⁷ while in the case of international biodiversity law one may refer to COP decisions.³⁸ In this respect, the value of these documents, as well as the interplay between obligations contained in treaties and new standards emerging from treaty practice are complex legal problems that are examined

24 October 1945) (hereinafter ICJ Statute).

³³ See the case law of the ICJ at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last accessed October 2016).

³⁴ Just to provide some examples of potential individuals or groups affected by the violation of METs: citizens who suffer from CO₂ increasing emissions, farmers affected by the degradation of land, indigenous peoples affected by decreasing natural resources, or those who are hit by pollution or natural disasters.

³⁵ Concerning human rights treaty bodies, see Geir Ulfstein, 'Law-making by Human Rights Treaty Bodies' in Rain Liivoja and Jarna Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (Routledge 2014); Andre Nollkaemper and Rosanne van Alebeek, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' [2011] Amsterdam Law School Research Paper No. 2011, at 42-44. Regarding METs, the role of the CBD COP is discussed in detail in Chapters 3 and 4. On the legal value of COP decisions, see Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1. See also, Thomas Gehring, 'Treaty-Making and Treaty Evolution' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007), in particular at 480-482 and 485-495. This author in particular argues that the legal value of COP decisions is not expressly dealt with by State Parties to environmental treaties. This characteristic is a means to ensure the flexibility of the system. The author also explains the different functions of bodies similar to the CBD COP within METs, including constituting subsequent State practice relevant for interpretation and representing internal decision-making systems valid internally as happens in international organisations.

³⁶ On the sources of human rights law, see Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-1989) 12 *Australian Year Book of International Law* 82. Concerning international environmental law, see Sands, *Principles of International Law* 2003, Ch. 4; Fodella and Pineschi, at 61-93.

³⁷ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295, UN Doc. A/61/L.67 and Add.1 (13 September 2007) (hereinafter UN Declaration on indigenous rights in text or UNDRIP in footnote).

³⁸ These can be assimilated to soft law declarations of States, notwithstanding the institutionalised context in which they are taken, since COPs are made of States and they formally adopt non-binding decisions. As an example of what is usually referred of as soft law in the field of international environmental law see the documents elaborated by UN intergovernmental conferences in note 29 *supra*.

throughout the dissertation.³⁹

The arguments on the separateness of the two bodies of law examined above can also be tested by specifically looking at the two regimes that are examined in this dissertation, namely the CBD and the rights of indigenous peoples. This analysis produces three interesting remarks. First, indigenous rights are not contained in a single instrument and are the results of evolutionary interpretations of human rights treaty bodies. In this sense, one of the preliminary challenges, before exploring the interplay with the CBD, is to identify the content and legal value of indigenous rights.⁴⁰ Second, the argument about different underlying values can be substantiated by looking at the different objects and objectives of the CBD and the corpus of indigenous rights. Again, since the latter derives from a combination of multiple instruments, this comparison is not unproblematic. A third element that is not sufficiently emphasised when discussing in general terms the relationship between international environmental treaties and human rights law is the difference in the scope of application of the two regimes, both concerning their Parties and the temporal validity of their obligations.⁴¹

In this light, the issue of the alleged separateness of the international regimes regulating biodiversity protection and the rights of indigenous peoples reveals itself more complex than commonly discussed. This question thus is explored throughout the dissertation.

3. Why indigenous peoples and biodiversity?

The study of the relationship between the rights of indigenous peoples and the conservation of biodiversity can be seen as a case study of the more general question about the interplay between international human rights law and international environmental law. The difficulty then lies in understanding why the former relationship deserves a special case, and to what extent the conclusions reached through this study can be applied to the more general relationship between human rights and the environment in international law.⁴²

Part of the reasons why this case is particularly interesting are to be found in the interrelatedness of the phenomena concerned. As explained, the loss of biodiversity is an extremely worrisome trend that threatens the survival of ecosystems and their value for human life. In parallel, loss of cultural diversity is a problem for indigenous peoples, since they both usually live in natural environments that suffer from degradation and are furthermore intentionally deprived of their land and natural resources.⁴³ In this light, the

³⁹ See also *infra* section 4 in this chapter. Generally on soft law, see Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2003).

⁴⁰ This problem is thoroughly discussed in Chapter 2.

⁴¹ These issues are discussed *infra* in section 5 of this chapter.

⁴² The latter point is explored in the Conclusion.

⁴³ Anja Meyer, 'International Environmental Law and Human Rights: Towards the Explicit Recognition of Traditional Knowledge' (2001) 10 *Review of European Community & International Environmental Law*

salience of this connection lies in the factual relevance of survival as a common dimension of biodiversity conservation and the protection of indigenous rights.

Indeed, what primarily justifies their joint analysis are a number of legal reasons. Before proceeding with illustrating them, it is important to delimit the scope of this research by discussing the notion of indigenous peoples under international law.⁴⁴

3.1. The definition of indigenous peoples

The issue of the definition of indigenous peoples has emerged at the same time as the problem of the protection of indigenous rights under international law. One of the first attempts to find a universal definition is contained in a 1986 UN report denouncing the discrimination of indigenous peoples, issued by the Special Rapporteur Martínez Cobo.⁴⁵ The report has identified three main characteristics, namely the continuity with pre-colonial societies, a sense of distinctiveness from national prevailing societies, and the will to maintain and transmit their distinct culture to future generations. Continuity with the past can be expressed inter alia through a persistent attachment to traditional lands.⁴⁶

Similar elements are echoed in the specialised ILO treaties dedicated to the protection of indigenous groups.⁴⁷ The ILO Convention on indigenous and tribal populations of 1957,

37, at 38-39.

⁴⁴ See Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press 2016), at 143-145; Alexandra Tomaselli, *Indigenous Peoples and Their Right to Political Participation. International Law Standards and Their Application in Latin America* (Nomos 2016), at 32-37; Cathal M. Doyle, *Indigenous Peoples, Title to Territory and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge 2015), at 112 ff.; Federica Cittadino, 'The Balance Between Indigenous Rights and the Protection of Nature: Some Remnants of the Colonial Past' (2013-2014) 20 *African Yearbook of International Law* 223, at 225-231; Siegfried Wiessner and Federico Lenzerini, *Rights of Indigenous Peoples* (International Law Association, The Hague Conference 2010), section 2; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Juris Publishing 2002), at 33 ff.

⁴⁵ José Martínez Cobo, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7 and Add.1-4 (1986), para. 379.

⁴⁶ The Cobo's definition reads as follows: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: Occupation of ancestral lands, or at least of part of them; Common ancestry with the original occupants of these lands; Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); Residence in certain parts of the country, or in certain regions of the world; Other relevant factors".

⁴⁷ On the reasons why these instruments emerged in the context of the ILO, see Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford University Press 2005), at 8-11.

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which is not open to ratifications anymore due to its assimilationist approach, emphasises descent and cultural distinctiveness.⁴⁸ The ILO Convention No. 169 on indigenous and tribal peoples has revolutionised the approach to indigenous issues since it both abandons the assimilationist approach and explicitly adopts the term peoples with its implications in terms of the attribution of collective rights.⁴⁹ Concerning definition issues, the ILO Convention 169 distinguishes between tribal peoples, who are distinct from the rest of society and enjoy a certain form of autonomy in the regulation of their culture, and indigenous peoples, who have pre-colonial descent and maintain “some or all of their own social, economic, cultural and political institutions”.⁵⁰ Most importantly, Article 1(2) establishes that self-identification is the fundamental criterion for determining the scope of application of the rights protected under the Convention.

Self-identification is now the prevalent approach to the issue of the definition, which has been implicitly embraced throughout the process that has led to the adoption of the United Nations Declaration on indigenous rights in 2007. The listing of specific features seemed inadequate in a context where indigenous groups can be very different from one another. Furthermore, the creation of an externally imposed definition was seen as a further attempt by States to patronise the discussion on indigenous rights. For these reasons, the UN Declaration on indigenous rights has avoided adopting a definition with the intent both not to unduly restrict the application of rights and to increase the acceptability for States of the instrument.

Self-identification has also accommodated regional concerns against a concept of indigenous peoples that is restricted to ancestral links with land predating colonial history. In Africa, for instance, the survival of pre-colonial society, as opposed to the destruction of pre-settler societies in Latin-America, has ignited a debate about the extent to which it is possible to identify indigenous groups in this regional context.⁵¹ The African Commission has solved this apparent contradiction by downplaying the importance of ancestry in favour of “constitutive elements”, such as marginalisation and exclusion, cultural distinctiveness, attachment to land, and self-identification.⁵² In the same period, the Inter-American Court

⁴⁸ Art. 1(b) Indigenous and Tribal Population Convention C107 (Geneva, 26 June 1957, in force 2 June 1959) (hereinafter ILO Convention 107).

⁴⁹ Indigenous and Tribal Peoples Convention C169 (Geneva, 27 June 1989, in force 5 September 1991) (hereinafter ILO Convention 169). On the difference between populations and peoples in the ILO Conventions, see Rodriguez-Piñero 2005, Ch. 5. Collective rights are attributed to indigenous peoples by the ILO Convention 169. Art. 1(3), however, specifies that “[t]he use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”.

⁵⁰ Art. 1 ILO Convention 169.

⁵¹ See Cittadino 2013-2014, at 229-230.

⁵² Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples, 41st Ordinary session (May 2007), paras. 12-13. Similar criteria have been adopted in the context of the World Bank’s Operational policy 4.10 (July 2005, revised 2013). The Bank acknowledges the lack of a universally accepted definition, then identifies four criteria: self-identification and recognition of identity by others; collective attachment to land and natural resources;

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has assimilated the Saramaka people, descendants of slaves of African origins transplanted into the American continent by Spanish settlers, to tribal communities holding communal rights to land under the same conditions of other indigenous groups.⁵³

A similar debate is ongoing in Asia but no regional position has been adopted yet *inter alia* because of the lack of a regional human rights system.⁵⁴ Some Asian States have raised the issue of the lack of a definition in the UN Declaration on indigenous rights as a problematic point.⁵⁵ Some others, such as Japan, have recognised the existence of indigenous groups within their national societies.⁵⁶ Asian multifaceted positions are a sign that the debate over the definition of indigenous peoples is tainted with a fundamental dilemma.⁵⁷ On the one hand, the failure to provide with a definition renders the scope of application of indigenous rights more uncertain, thus generating the opposition of some States. On the other hand, sticking to a universal definition, or rather to a nationally determined definition, certainly risks to unduly limit the enjoyment of indigenous rights.

In this context, self-identification appears as a solution that privileges the largest scope of application possible for indigenous rights. In this sense, self-identification is both a criterion for indigenous peoples themselves to identify their members internally⁵⁸ and a standard for the identification of rightholders externally. The latter point is confirmed by the systematic lack of discussions about the identification of groups as indigenous in the decisions of human rights treaty bodies.⁵⁹

Indeed, human rights treaty bodies do not even distinguish between minority rights

separate and culturally distinctive institutions; an indigenous language. On the Operational policy, see Fergus MacKay, 'Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples' (2002) 17 *American University International Law Review* 527.

⁵³ *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Case No. 12,338 (28 November 2007) (hereinafter *Saramaka* case), paras. 79-80.

⁵⁴ See Christian Erni (ed) *The Concept of Indigenous Peoples in Asia: A Resource Book* (IWGIA - AIPP 2008), at 13-25. See also Benedict Kingsbury, "'Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *The American Journal of International Law* 414.

⁵⁵ See declarations of vote on UNDRIP, UN Doc. A/61/PV.108 (13 September 2007), at 4. Indonesia argued that without definition, it is not possible to identify rightholders. A similar argument lies behind the decision of the African Commission to identify constitutive elements *supra*. However, this argument is double-edged; Indonesia and India used it to provide a rigid definition of indigenous peoples according to which the whole population of their countries is indigenous.

⁵⁶ UN Doc. A/61/PV.108, at 15. The Philippines, Taiwan, and India also have a regulatory system in place on indigenous rights, although they define indigenous groups in different ways. On the Philippines, see Country Profile: Philippines in Erni, at 427-434. On India, see Country Profile: India in *ibid.*, at 367-374. On Taiwan, see Country Profile: Taiwan in *ibid.*, at 437-441.

⁵⁷ This is well illustrated in *ibid.*, at 17-18. See also Karin Lehmann, 'To Define or Not to Define - The Definitional Debate Revisited' (2006-2007) 31 *American Indian Law Review* 509, at 523.

⁵⁸ On the issue of membership, see *Sandra Lovelace v. Canada*, Communication No. 24/1977 (31 July 1980), UN Doc. CCPR/C/13/D/24/1977 (hereinafter *Lovelace* case).

⁵⁹ See the cases cited in Chapter 1. On minority rights, see Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991); Jane Boulden and Will Kymlicka (eds), *International Approaches to Governing Ethnic Diversity* (Oxford University Press 2015).

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and indigenous rights when it comes to ensuring protection to groups that self-identify as indigenous peoples.⁶⁰ On the contrary, they have adopted an expansive interpretation of general human rights treaties to extend individual and minority rights to indigenous peoples, including Article 27 of the International Covenant on Civil and Political Rights.⁶¹

The difference between minorities and indigenous peoples mainly emerges from indigenous claims and the UN practice. The former have insisted on the use of the term ‘peoples’ for the implications it has in terms of the right to self-determination.⁶² The UN, starting with the Cobo report, has recognised the particular conditions of marginalisation, poverty, and abuse of rights, from which indigenous peoples suffer. In 1982, the UN established the Working Group on Indigenous Populations (WGIP),⁶³ which elaborated the first Draft to the UN Declaration on indigenous rights.⁶⁴ In the same period, the UN proclaimed the first International Decade of World’s Indigenous Peoples.⁶⁵ In 2000, ECOSOC instituted as one of its advisory bodies the Permanent Forum on Indigenous Issues (UNPFII), which is a mixed organ made of members nominated both by States and in consultation with indigenous organisations.⁶⁶ All of these political steps testify to a particular focus of the UN’s action on indigenous peoples.

As fully argued in Chapter 2, one of the central elements of indigenous peoples’ identity is their special attachment to traditional territories, as well as the causal link between the protection of indigenous land and the respect for indigenous cultural rights.⁶⁷ The centrality of land and natural resources is what makes indigenous rights overlap with the international regime on the conservation of biological diversity. In this sense, the definition that is meaningful to the present investigation is one that emphasises the relationship between indigenous groups and land.

⁶⁰ See the Views adopted by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights (hereinafter CESCR) in Chapters 1 and 2.

⁶¹ International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976) (hereinafter ICCPR). On this point, see Chapter 1, section 2.1.1, and Chapter 2, especially sections 3.1 and 3.3.

⁶² On indigenous peoples and self-determination, see Chapter 2.

⁶³ Commission on Human Rights, Res. 1982/19 (10 March 1982); ESC res. 1982/35 (7 May 1982), Supp. No. 1 26, UN Doc. E/1982/82 (1982).

⁶⁴ See Åhrén 2016, at 86.

⁶⁵ UNGA Res. 48/133, UN Doc. A/RES/48/133 (18 February 1994). The second decade run from 2004 to 2015, UNGA Res. 59/174, UN Doc. A/RES/59/174 (24 February 2005).

⁶⁶ ECOSOC, Res. 2000/22 (28 July 2000). The mandate of UNPFII is to: “(a) Provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council; (b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system; (c) Prepare and disseminate information on indigenous issues” (para. 2).

⁶⁷ See Åhrén 2016, at 84, where the author in drawing the line between indigenous peoples and minorities, emphasises the centrality of land in the protection of indigenous rights. See Chapter 2, section 3.1.

3.2. The special case of indigenous peoples and biodiversity

As said, indigenous rights and the protection of biodiversity in international law may overlap since they both concern the management of natural resources and raise the issue of which subjects can exercise powers over them.⁶⁸ The latter is an underlying question of this dissertation. There are two additional factors that render this relationship particularly meaningful as a special case of the more general interplay between human rights and the environment.

First, the focus on this case study addresses the preoccupation voiced in the literature that the human rights approach to environmental protection reduces environmental protection to a problem of the individual, although in contrast this would be a collective issue by its nature.⁶⁹ When exploring the interplay between the conservation of biodiversity and the protection of indigenous rights two collective interests are at stake, i.e., those of the State, usually associated with a notion of public interest, to protect biodiversity, and those of indigenous peoples representing a group—rather than a collection of individuals—that holds collective rights.⁷⁰ The public interest to the conservation of nature is protected under the CBD and through the sovereignty of States over natural resources, while indigenous rights are protected under human rights treaties and through the principle of self-determination.⁷¹ As illustrated in Chapter 2, the collective rights of indigenous peoples may also create limits to the permanent sovereignty of States over natural resources.

This point is linked to the second element in favour of a special case. It is true that indigenous rights and the conservation of biodiversity can be mutually supportive since both indigenous traditional knowledge may contain important information on the functioning of ecosystems and the conservation of biological resources may benefit indigenous traditional ways of living.⁷² However, this is not the only possible dimension in that the implementation of States' obligations in the field of biodiversity conservation may also

⁶⁸ This is more thoroughly explained in Chapter 2, section 1.1.

⁶⁹ Francioni 2010. See also, *supra* note 17.

⁷⁰ *Kaliña and Lokono* case, para. 103, where the State recognises that indigenous peoples are entitled to collective rights under international law. On the collective nature of indigenous rights, see to Chapter 2, section 3. On the applicability of collective rights to minorities, see Katerina Tsotroudi, 'Ethnic Minorities and Collective Rights in the New Europe: Some Observations' (1993) 46 *Revue Hellenique de Droit International* 225, at 226; Claudia Tavani, 'The Protection of Cultural Identity of Minorities in International Law: Individual versus Collective Rights' (2010) 9 *European Yearbook of Minority Issues* 55, at 78.

⁷¹ See Chapters 1 and 2.

⁷² See *Our Common Future*, at 114-115; Principle 22 Rio Declaration; Agenda 21, UN Doc. A/CONF.151/26 (Vol. I) (12 August 1992), Annex II, Chapter 26, para. 26(1); Johannesburg Declaration on Sustainable Development, UN Doc. A/CONF.199/20 (4 September 2002), para. 25; Preambular paragraph 10 UNDRIP; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment, Case No. 11,577 (31 August 2001) (hereinafter *Awas Tingni* case), para. 149. In support of the role of indigenous peoples in promoting sustainability, see Maggio 1997-1998. See also, Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Taylor and Francis 2016), at 133-138.

lead to the violation of indigenous peoples' rights.⁷³ The establishment of natural reserves on indigenous territories⁷⁴ or the utilisation of traditional knowledge without indigenous peoples' consultation or consent represent concrete examples of these potential conflicts. In this sense, the human rights approach to environmental protection is not sufficient to illustrate the complexity of this relationship and its potential for conflict.⁷⁵

4. Research questions, scope of research, and methodology

This dissertation aims to address two main research questions:

(1) Can legal conflicts arise between States' obligations stemming from the CBD regimes on conservation and access and benefit-sharing (ABS) and the human rights of indigenous peoples as protected under human rights treaties, and what are they?

(2) How can conflicts be avoided or resolved?

Conflicts between international conservation law and the rights of indigenous peoples are usually not discussed in the literature. Therefore, this thesis aims to fill this gap, first demonstrating that conflicts are a relevant dimension when it comes to the interaction between the CBD and the rights of indigenous peoples. This argument is substantiated in Chapter 1, which looks in particular at the tensions that have emerged before human rights treaty bodies between the protection of indigenous rights and the adoption of conservation measures by States. Chapter 1 also explores the conflicts potentially arising from the implementation of Articles 8(a), 8(j), 10 (c), and 15 of the CBD, regulating some aspects of in-situ conservation, sustainable use, and ABS related to genetic resources and traditional knowledge. Conflicts represent a problem because States might be induced to implement their obligations pursuant to the CBD regime to the detriment of the obligations regarding the respect for indigenous rights.

This thesis, however, is not limited to the superficial analysis of the abovementioned CBD provisions but proposes a contextual reading of the CBD and relevant COP decisions.

⁷³ Sebastiaan Johannes Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers 2014), at 418: "more research is needed on how to combine environmental protection and respect for indigenous rights. While it is stressed in all examined documents, cases, and implementation schemes that environmental protection and indigenous peoples' rights should go hand in hand, it is not inconceivable that in some cases environmental and indigenous interests may collide".

⁷⁴ The incidence of this phenomenon is confirmed by the fact that the Special Rapporteur on the Rights of Indigenous Peoples (hereinafter Special Rapporteur on indigenous rights), Ms. Victoria Tauli-Corpuz, has invited indigenous organisations and representatives to contribute to the Dialogue on the issue of indigenous peoples' rights and conservation activities: <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/ConservationActivities.aspx> (last accessed October 2016). See *infra*.

⁷⁵ On the possible conflicts arising between indigenous rights and conservation, see Chapter 1. The notion of conflict adopted in this thesis is explained in section 5 of this chapter.

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The latter provide useful indications on the interpretation of treaty obligations and their development in line with the practice of States. Although not adopting binding standards, COP decisions are the result of deliberations between CBD Parties. Furthermore, the COP's mandate is to promote and guide the implementation of CBD obligations.⁷⁶ In this sense, COP decisions offer relevant indications about the consensus over the interpretation of concerned CBD provisions. One of the main difficulties in utilising them to purposefully make the content of CBD obligations more precise is the fact that they are numerous and often do not represent a coherent set of decisions. Therefore, this dissertation also highlights ambiguities and contradictions deriving from an overall reading of COP decisions.

Concerning the ABS regime, this dissertation also interprets relevant CBD obligations in light of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation to the CBD, adopted in 2010 and entered into force in 2014.⁷⁷ The main caveat is that not all CBD Parties have ratified the Nagoya Protocol. This means that, according to Article 30(4) of the Vienna Convention on the Law of the Treaties,⁷⁸ the Protocol only applies in the relations between its Parties, while the CBD will continue to apply between Parties and non-Parties to the Nagoya Protocol. Indeed, due to its demanding obligations concerning consent and benefit-sharing, the Protocol might be able in the future to influence also the relations between Parties and non-Parties.⁷⁹

For reasons explained in Chapters 3 and 4, this dissertation also examines the multilateral benefit-sharing regime of the International Treaty on Plant and Genetic Resources for Food and Agriculture⁸⁰ and the conservation-related provisions of the Convention Concerning the Protection of the World Cultural and Natural Heritage.⁸¹ Both are global multilateral treaties that partially overlap with the CBD, concerning their object and their Parties. At the same time, this thesis does not consider regional conservation treaties and more resource- or ecosystem-specific conservation conventions, due both to their limited geographical and thematic scope and to feasibility reasons. This dissertation offers an interpretative approach to look at the interaction of indigenous rights with other conservation treaties but, given the specificities and technicalities of other regimes, this approach requires an in-depth analysis to understand potential conflicts and related remedies.⁸²

⁷⁶ On the mandate of the CBD COP, see Chapter 4, sections 2.1 and 3.

⁷⁷ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity (Nagoya, 29 October 2010, in force 12 October 2014) (hereinafter Nagoya Protocol).

⁷⁸ Vienna Convention on the Law of the Treaties (Vienna, 23 May 1969, in force 27 January 1980) (hereinafter VCLT).

⁷⁹ This point is more explicitly discussed in the Conclusion.

⁸⁰ International Treaty on Plant Genetic Resources for Food and Agriculture (Rome, 3 November 2001, in force 29 June 2004) (hereinafter ITPGRFA).

⁸¹ Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972, in force 17 December 1975) (most commonly known as World Heritage Convention, hereinafter WHC).

⁸² These considerations are included in the Conclusion, section 4.

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Furthermore, concerning the thematic scope of States' obligations, this dissertation only investigates the issue of the management of natural resources for the purposes of the objectives embraced by the CBD, namely conservation, sustainable use, and benefit-sharing.⁸³ Other types of uses of natural resources are not analysed in this dissertation, which therefore excludes interactions of indigenous rights with international investment treaties, international trade, and the international regime on intellectual property rights (IPRs). Conflicts in these fields have received more scholarly attention⁸⁴ than the interplay of indigenous rights with the international conservation regime, which is the exclusive object of this thesis because it offers more room for original analysis and, as explained, constitutes an interesting case study of the general relationship between human rights and the environment.

Different selection criteria have been used to identify the scope of relevant human rights treaties. As said, one of the difficulties of this research lies in identifying the corpus of relevant indigenous rights. Like conservation regimes, this dissertation focuses on the

⁸³ Art. 1 CBD. Conservation and sustainable use are jointly examined in Chapter 4.

⁸⁴ For an overview of debates in the field of international investment law and trade law, see Attila Tanzi, 'Reducing the Gap between International Investment Law and Human Rights Law in International Investment Arbitration?' (2013) 1 Latin American Journal of International Trade Law 299; Valentina Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law' (2011) 42 Columbia Human Rights Law Review 797; Judith Levine, 'The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013); Tarcisio Gazzini and Radi Yannick, 'Foreign Investment with a Human Face - with Special Reference to Rights of Indigenous Peoples' in Rainer Hofmann and Christian J. Tams (eds), *International Investment Law and its Others* (Nomos 2012); Kevin C. Kennedy, 'Trade and Foreign Investment in the Americas. The Impact on Indigenous Peoples and the Environment: Introduction' (2006) 14 Journal of International Law and Practice 139; Julinda Beqiraj, 'The Delicate Equilibrium of EU Trade Measures: The Seals Case' (2013) 14 German Law Journal 279. The literature is well developed in the field of intellectual property rights (IPRs): Gerald Carr, 'Protecting Cultural Intangible Resources: Alternatives to Intellectual Property Law' (2013) 18 Michigan Journal of Race and Law 363; David Vivas-Eugui, *Bridging the Gap on Intellectual Property and Genetic Resources in WIPO's Intergovernmental Committee (IGC)* (ICTSD 2012); Jonathan Curci, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property* (Cambridge University Press 2010); Antony Taubman and Matthias Leistner, 'Traditional Knowledge' in Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (Kluwer Law International 2008); Barbara Tedlock, 'Indigenous Heritage and Biopiracy in the Age of Intellectual Property Rights' (2006) 2 The Journal of Science and Healing 256; Mpazi Sinjela and Robin Ramcharan, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights: Issues, Challenges and Strategies' (2005) 12 International Journal on Minority & Group Rights 1; Carolina Lasén Díaz, 'Intellectual Property Rights and Biological Resources' (2005) 151 Wuppertal papers; R. V. Anuradha, 'IPRs: Implications for Biodiversity and Local and Indigenous Communities' (2001) 10 Review of European Community & International Environmental Law 27; Anil K. Gupta, *WIPO-UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge* (IUCN - WIPO 2000); David R. Downes, 'How Intellectual Property Could Be a Tool to Protect Traditional Knowledge' (2000) 25 Columbia Journal of Environmental Law 253; Michael Halewood, 'Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection' (1999) 44 McGill Law Journal 953; Michael Davis, 'Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection' (1999) 4 Australian Indigenous Law Reporter 1; Rosemary J. Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity' (1998-1999) 6 Indiana Journal of Global Legal Studies 59.

obligations incumbent on States pursuant only to treaty provisions. The main reason for that is that limiting the analysis to treaty obligations gives more legal certainty. Debates over the customary nature of indigenous rights are too unresolved and would require an in-depth analysis of States' practice and *opinio juris*, which would deserve a PhD thesis on its own because of the complexity and uncertainty of this undertaking.⁸⁵ Issues related to the customary nature of indigenous rights are nevertheless discussed in Chapter 2 to show emerging trends and possible evolution of the debate.

Treaty provisions include not only the letter of general human rights conventions but also their interpretations as developed by human rights treaty bodies both in their views following individual or group petitions and in concluding observations on individual States. Although these documents are generally not binding, they reflect the interpretation of binding human rights provisions developed by human rights treaty bodies. Their extensive reconstruction of indigenous rights is presumed to be in line with the obligations contained in human rights treaties. In any event, as far as this dissertation has been able to verify, the conclusions reached by human rights treaty bodies have not received the opposition of States.⁸⁶ Furthermore, it must be reminded that the judgments adopted by the Inter-American Court on Human Rights are binding on the State Parties of the American Convention on Human Rights that have accepted the Court's jurisdiction.

What this dissertation examines in particular is the content of indigenous collective rights. The purpose is not to understand the interplay between rights of indigenous individuals and rights of indigenous groups. Instead, the focus is on collective rights as opposed to the public interest of States to protect biodiversity.

Differently from conservation regimes, this dissertation also investigates the regional treaties protecting the rights of indigenous peoples.⁸⁷ The reason behind this choice is that

⁸⁵ See also Chapter 2, section 3.6. See also, Martti Koskenniemi, 'Methodology of International Law' Max Planck Encyclopedia of Public International Law, para. 11, who argues that even the methodologies to assess whether *opinio juris* and practice are in place are difficult to tell apart from one another.

⁸⁶ Tomuschat 2014, at 267: "Generally, there exists a presumption in favour of substantive correctness of such views [those adopted by human rights treaty bodies]. No better expertise as to the scope and meaning of any of the human rights treaties can be found than in the expert bodies set up to monitor their observance by states. If a state disagrees with the views expressed on a given case, it must present detailed observations specifying its counter-arguments". This thesis has limited itself to verify to what extent States' declarations, adopted in connection with the adoption of human rights treaty bodies' views and formalised in States' submissions, have contested the position adopted by human rights treaty bodies. Any other analysis would have been outside the scope of this research, which does not aim to demonstrate that custom has emerged in the field of indigenous rights. For a more detailed study on this point, it is possible to refer to the positions of States submitted to the Committee on the Elimination of Racial Discrimination (hereinafter CERD), the Human Rights Committee, and the CESC. In these reports since 2005 this research could not find any opposition from State Parties, with the exception of the position of the US. See CERD, Reports Submitted by States Parties under Article 9 of the Convention, United States of America, UN Doc. CERD/C/USA/6 (24 October 2007), para. 345; Human Rights Committee, Concluding observation on the United States of America, UN Doc. CCPR/C/USA/3 (28 November 2005), para. 15. These restrictive positions, however, are not reflected in the last report submitted to the Human Rights Committee. See UN Doc. CCPR/C/USA/4 (22 May 2012). This point is also illustrated with reference to specific cases also in Chapter 2.

⁸⁷ However, given their limited scope, it does not examine human rights practice related to treaties that

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regional treaty bodies have tremendously contributed to the development of indigenous rights at the international level. The international body of indigenous rights mainly derives from the expansive interpretation of existing rights by human rights treaty bodies. This technique has received an enormous boost from regional human rights treaty bodies. Furthermore, contamination between different human rights jurisdictions is a common phenomenon in this field of international law, and this is particularly true in the subfield of indigenous rights.⁸⁸

Indigenous-tailored instruments are also examined with a view to reconstructing the content of indigenous collective rights, including the abovementioned ILO Convention 169. This treaty has only been ratified by twenty-two States but its importance goes beyond the direct application of its provisions since it has influenced the interpretation of indigenous rights under general human rights instruments.⁸⁹ Concerning instruments dedicated to the protection of indigenous rights, the UN Declaration on indigenous rights represents a fundamental stepping stone in the international protection of indigenous peoples. Notwithstanding its non-binding value, the Declaration has a fundamental interpretative role to play as explained in Chapter 2.

In light of the above, one of the underlying legal problems of this dissertation is the relationship of treaties with a different object that anyhow overlap in their application because their norms apply to the same factual situation. Again, this issue is linked to the understanding of conflicts embraced in this dissertation.⁹⁰ It is important to highlight at this stage that similar issues are raised in scholarly debates about the fragmentation of international law,⁹¹ the harmonisation of obligations stemming from different treaties, and

are aimed to protect only a specific category of the population, such as the Convention on the Rights of the Child (New York, 20 November 1989, in force 2 September 1990) and the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979, in force 3 September 1981). On the extent to which these conventions have been used to protect indigenous rights, see e.g., Alessandro Fodella, 'Indigenous Peoples, the Environment, and International Jurisprudence' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law Essays in Honour of Tullio Treves* (T.M.C. Asser Press 2013).

⁸⁸ Maria Papaioannou, 'Harmonization of International Human Rights Law through Judicial Dialogue' (2014) 3 Cambridge Journal of International and Comparative Law 1037, especially at 1047. See: Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 European Journal of International Law 165. *Amplius*: Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 International Law and Politics 679.

⁸⁹ See Rodriguez-Piñero 2005 and see also Chapter 2, section 3.

⁹⁰ See section 5 in this chapter.

⁹¹ For an overview of the problem of the unity of international law, see International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Groups of the International Law Commission finalised by Martti Koskenniemi, UN Doc. A/CN.4/L. 682 (13 April 2006) (hereinafter ILC fragmentation report). The literature on the fragmentation of international law is extensive and cannot be fully recounted here. See e.g., Ian Brownlie, 'Problems Concerning the Unity of International Law' in *Le droit international à l'heure de sa codification: études en l'honneur de Roberto Ago*, vol 1 (Giuffrè 1987); Joseph H. H. Weiler and Andreas Paulus, 'The Structure of Change in International Law or: Is there a Hierarchy of Norms in International Law' (1997) 8 European Journal of International Law 545; Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 Yale Human Rights and Development Law Journal 85;

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the role of systemic interpretation and general principles, which are outlined in the following sections and then explored in the whole thesis. This framework of reference permits to clarify another important feature of the research conducted in this thesis. The dissertation is only concerned with States' obligations and does not explore issues regarding the responsibilities of private actors towards indigenous peoples in the context of biodiversity conservation.

The second research question, i.e., how conflicts can be prevented or solved, lies at the basis of the most innovative part of this dissertation. In particular, this thesis engages with the question of which standards can be used when the main rules concerning the resolution of conflicts between treaties—hierarchy, *lex posterior*, and *lex specialis*⁹²—cannot be applied. The need for harmonisation between potentially conflicting obligations is justified in terms of the binding nature of both the CBD and indigenous rights. In the absence of other criteria for the resolution of conflicts, systemic interpretation under Article 31(3)(c) of the VCLT provides a fundamental tool to integrate the rights of indigenous peoples in the application of the obligations stemming from the CBD and the Nagoya Protocol.⁹³ In this respect, this thesis is methodologically indebted to the developing literature on global environmental law, which argues that not only vertical but also horizontal interactions of different legal systems are fundamental for understanding the functioning of any legal regime.⁹⁴

Additionally to formal criteria to solve conflicts, this thesis also turns to substantive criteria, identifying the principle of self-determination as the main normative standard to assess the legitimacy of restrictions to indigenous rights deriving from the application of provisions contained in the CBD regime.⁹⁵

As reminded, looking at the relationship between indigenous peoples and biodiversity allows for exploring an emerging trend, namely the integration of human rights standards in the implementation of international environmental treaties. This research strand is

Martti Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' 15 *Leiden Journal of International Law* 553; Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalization Era: On the "Fragmentation" of International Law' (2007) 1 *European Journal of Legal Studies* 25; Anne Peters, 'Constitutional Fragments – On the Interaction of Constitutionalization and Fragmentation in International Law' [2015] Centre for Global Constitutionalism, University of St Andrews, Working Paper No 2 Available at SSRN: <http://ssrn.com/abstract=2591370>; Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to Be Learned from the Case Law of the European Court of Human Rights' (2015) 28 *Leiden Journal of International Law* 863; Enne-Charlotte Martineau, *Le débat sur la fragmentation du droit international. Une analyse critique* (Bruylant 2015).

⁹² See Art. 30, 41, 53, 59, and 64 VCLT. See section 5 in this chapter.

⁹³ Harmonisation and systemic integration are further discussed in section 6 in this chapter. See also, Chapter 2, section 5.

⁹⁴ See Elisa Morgera, 'Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) 23 *European Journal of International Law* 743; Ellen Hey, 'Common Interests and the (Re)constitution of the Public Space' (2009) 39 *Environmental Policy and Law* 152; Tseming Yang and Robert V. Percival, 'The Emergence of Global Environmental Law' (2009) 36 *Ecology Law Quarterly* 615; Jonathan B. Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 *Ecology Law Quarterly* 1295.

⁹⁵ This is fully explained in Chapter 2, see especially section 5.

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completely underdeveloped and deserves scholarly attention. In this connection, this thesis illustrates possible ways in which this incorporation can be realised. A fundamental problem is that the Parties to the CBD and the Nagoya Protocol do not perfectly coincide with the Parties of the human rights treaties protecting indigenous rights. This problem is further complicated by the fact, already highlighted, that the body of indigenous rights does not derive from a unitary treaty but from a collection of regional and global treaties having different Parties, as well as from the interpretation of human rights treaty bodies.⁹⁶ The problem of different parties also relates to the issue of under which circumstances conflicts may arise between treaties having a different object and is, therefore, explored in the next section.

From a methodological perspective,⁹⁷ the questions asked and the tools used in this dissertation are perfectly in line with a classic approach to international law, as a law made by States for States,⁹⁸ because the thesis is mainly concerned with the classic sources of international law and the conflicting obligations incumbent on States. At the same time, law is not regarded at in a static way but it is rather conceived as a pool of binding norms that may evolve over time in response to pressures from different fields of the law (i.e., the rights of indigenous peoples), from different non-State actors (i.e., indigenous peoples, NGOs, and international organisations), and from non-binding norms (i.e., the UN Declaration on indigenous rights). In this sense, this thesis sees international law as a process.⁹⁹ Furthermore, it is concerned not only with prescriptions pursuant to binding rules, but also with the legal effects produced by non-binding norms on binding norms.

This conception of the law aims to respond to one of the challenges daunting international law as a legal system. Although international law remains as for its sources a law made by States, it is no longer true that international norms only address inter-State relations. Increasingly, and this is particularly true when it comes to human rights and international environmental law, international norms regulate intra-State situations and affect subnational actors. Notwithstanding its broad potential reach, non-State actors cannot create international rules, except in some cases for international organisations.¹⁰⁰

⁹⁶ See Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229 (29 July 2016), at 9: “The rights of indigenous peoples stem from various branches of international law and have developed through international human rights law, international labour law and international environmental law”.

⁹⁷ For an explicit discussion on methodological choices in international law, see Jean D’Aspremont, *Epistemic Forces in International Law: Essays on the Foundational Doctrines and Techniques of International Legal Argumentation* (Edward Elgar 2015). See also, Georges Abi-Saab, ‘Cours général de droit public’ (1987) 207 Recueil des cours 15, at 33-43.

⁹⁸ Gudmundur Alfredsson, ‘The Right of Self-Determination and Indigenous Peoples’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993), at 48-49.

⁹⁹ See Abi-Saab 1987, at 209. See also, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994), at 1 and 8.

¹⁰⁰ See International Law Commission (ILC), Identification of Customary International Law, Text of the draft conclusions provisionally adopted by the Drafting Committee, UN Doc. A/CN.4/L.872 (30 May 2016), Draft conclusion 4(2), at 2.

This imbalance leads to the paradox, for instance, that rules on indigenous peoples are formally created only by States. In this respect, Åhrén observes that “international law is to be deduced from the actions and intent of the same polities the law is supposed to govern”.¹⁰¹

Indeed, this thesis is also aware of the fact that, although the theory of sources of international law has little changed over the last years, there are ways in which international law itself allows for the contamination of formal law-making and broader societal needs. This happens through soft law norms, such as the UN Declaration of indigenous peoples, as well as innovative institutional mechanisms, such as the fact that the UN Declaration has been drafted in collaboration with indigenous representatives. The same is true for the CBD, which allows for the participation of indigenous peoples in the CBD COPs. These innovations are discussed throughout the whole dissertation. In this light, this thesis also purposefully looks at the role of non-State actors such as indigenous peoples.¹⁰² The instruments adopted by indigenous groups are of course not binding on States, but one of the purposes of this thesis is to verify whether indigenous claims are reflected in the developments of binding norms.

5. Conflicts in the absence of hierarchy

It is very important to clarify from the outset which kind of conflicts this dissertation is concerned with since a clear definition of the phenomenon studied may help to fully understand the aims of the present research, as well as the methodology used. International lawyers have canvassed both the complexity and the ambiguity of the very notion of conflicts in international law.¹⁰³ In very general terms, conflicts arise when “[t]he same Act is subject to different types of norms” requiring opposing behaviours.¹⁰⁴ This research, indeed, narrows down the notion of conflicts from tensions between any kinds of norms to clashes between obligations contained in treaties.

The question remains under which circumstances obligations incumbent on States pursuant to different treaties can be in conflict with one another. This thesis distinguishes between “necessary conflicts”¹⁰⁵ and potential conflicts. The first category applies to the case when the very existence of a treaty obligation produces the impossibility for a State to comply

¹⁰¹ Åhrén 2016, at 67.

¹⁰² More generally, on the emergence of non-State actors in international law, see Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015).

¹⁰³ See the seminal work of Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press 2003). See also, Christopher J. Borgen, ‘Resolving Treaty Conflicts’ (2005) 37 *George Washington International Law Review* 573, at 575: “An initial problem is that there is no generally accepted definition of what constitutes a conflict between treaties”.

¹⁰⁴ Seyed-Ali Sadat Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff 2003), at 7-8.

¹⁰⁵ This definition is borrowed from Pauwelyn 2003, at 170. The author uses it to describe Jenks’ notion of conflicts, which he then rejects.

with an obligation stemming from another treaty by which the same State is bound.¹⁰⁶ This would have been the case in the absurd hypothesis that the CBD prescribed that Parties would have had the right to dispossess indigenous peoples when accessing genetic resources in other States. Of course, this is an extreme example but it is useful to illustrate that this research has encountered nearly no necessary conflicts in the study of the interaction between the biodiversity regime and the rights of indigenous peoples. Furthermore, merely focusing on necessary conflicts would be “too restrictive”¹⁰⁷ since it would leave aside a significant portion of reality.¹⁰⁸

This thesis instead analyses several examples of the second type of conflicts, i.e., potential conflicts. Borrowing from Pauwelyn, conflicts do not only arise when obligations are mutually incompatible as such, that is “*if one constitutes...a breach of the other*”, but also when an obligation contained in one treaty “*may lead*” to the breach of one or more obligations contained in another treaty.¹⁰⁹ In this sense, conflicts imply either a certain ambiguity of the provisions concerned or some discretion in their implementation.¹¹⁰ Therefore, breaches may occur when States exercise a faculty or decide to implement a given norm in a certain way.¹¹¹ As explained in Chapters 1, 3, and 4, this is the case for instance with the implementation of Article 8(j) of the CBD. This provision can be interpreted and implemented in a way that either encroaches on indigenous rights or protects and reinforces them.¹¹²

Two additional elements must be present for conflicts to arise. First, potentially conflicting norms must regulate the same factual situation. In this sense, conflicting treaties must not necessarily have the same object, which is not the case for the treaties analysed in this dissertation.¹¹³ Instead, this thesis focuses on what the ILC fragmentation report defines as “parallelism of treaties”, that is when the same problem arises under different treaties.¹¹⁴ For instance, the problem of the creation of protected areas on indigenous territories is relevant under both the CBD and human rights treaties.¹¹⁵

Second, potentially conflicting obligations must be incumbent on the same State.¹¹⁶

¹⁰⁶ Sadat Akhavi 2003, at 5: “A conflict arises when it is impossible to comply with all requirements of two norms”.

¹⁰⁷ Borgen 2005, at 575.

¹⁰⁸ Pauwelyn 2003, at 170.

¹⁰⁹ Ibid., at 175-176.

¹¹⁰ Ibid. talks of discretion at 176. See also, D’Aspremont 2015, at 207: interpretation “produces the law as well as the facts, and the relation (and potential conflicts) between them”.

¹¹¹ See Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003) at 24 and 96. They talk of “implementation conflicts”.

¹¹² The legitimacy of restrictive interpretations is assessed in the Conclusion.

¹¹³ See section 2 in this chapter.

¹¹⁴ ILC fragmentation report, at 210, para. 417.

¹¹⁵ Parallelism of treaties is very frequent at the intersections of nearly any other subfields of international law.

¹¹⁶ Pauwelyn 2003, at 165: “This state (or body) must necessarily be *bound by both rules*”.

This condition does not mean that all Parties of one treaty must coincide with all Parties of the other treaty. Indeed, it is essential that a given State is bound by obligations pursuant to different treaties. In this respect, almost all CBD Parties are party to universal human rights treaties, such as the UN Covenants.¹¹⁷

Theoretical difficulties may arise because the application of the CBD regime on ABS usually implies bilateral relationships between provider and user States that might be bound by different human rights obligations. The question therefore arises of what happens when one State is bound by both conflicting norms, and another State that must interact with the former is not.¹¹⁸ Although interesting, for the purposes of this dissertation this option is mainly theoretical, given that the ICCPR and the ICESCR are virtually globally ratified. Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also protects indigenous rights and has been ratified by most of the States that are not bound by the UN Covenants.¹¹⁹ In the residual hypothesis that one of the States is not bound by these universal human rights treaties,¹²⁰ the more limited CBD/Nagoya Protocol framework applies.¹²¹ However, as shown in Chapters 3 and 4, the CBD regime at least ensures some form of protection for indigenous rights.

Clearly, if national and/or international courts were faced with cases of parallel application of human rights and CBD norms, they would need to carefully discuss the issue of the applicability of both regimes. The concrete adjudication of these obligations, however, is only a residual option at the international level. Concrete conflicts in this field have not arisen yet because of both the deficient compliance mechanisms of the CBD¹²² and the limited scope of human rights law.¹²³ Notwithstanding the absence of concrete conflicts, this dissertation wants to draw attention to some pressing problems when it comes to the overall coherence of States' obligations in the fields of conservation and indigenous rights. In particular, the thesis analyses possible techniques to ensure that obligations arising under the CBD are in line with those arising under human rights treaties concerning indigenous peoples, also with a view to giving indications in case of future developments of the international biodiversity regime .

¹¹⁷ See *infra* section 6 in this chapter and Chapter 2, section 3.6. This thesis refers to the UN Covenants when speaking of the ICCPR *supra* and the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, in force 3 January 1976) (hereinafter ICESCR).

¹¹⁸ This problem is raised by Pauwelyn 2003, at 423.

¹¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965, in force 4 January 1969) (hereinafter ICERD). To compare membership, see <http://indicators.ohchr.org/> (last accessed October 2016).

¹²⁰ For instance, China is not party to the ICCPR and the US is not party to the ICESCR.

¹²¹ On this point, see Conclusion.

¹²² Note that a dedicated compliance mechanism has been instituted under the Nagoya Protocol. This mechanism is analysed in Chapter 3, section 2.4.1.

¹²³ The Inter-American Court, however, has recently decided a case where the CBD was explicitly cited to illustrate to what extent the establishment of protected areas is compatible with indigenous rights. See *Kaliña and Lokono* case, discussed in Chapters 1, 2, and 4.

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In this respect, this thesis is faced with the difficulty that normal techniques of solving conflicts between international norms—hierarchy, *lex posterior*, and *lex specialis*—are not applicable to the special case of the interplay between conservation obligations and indigenous rights.

First, hierarchy does not apply to this relationship.¹²⁴ As said, this thesis does not fully engage with the question whether the norms analysed have reached the status of customary norms. Nor it explores in detail the highly sensible question whether there exists *jus cogens* in the concerned fields of international law. Peremptory norms are the only type of obligations from which treaties cannot derogate. Articles 53 and 64 of the VCLT establish that if treaties conflict with—even supervening—*jus cogens*, they are void. The analysis conducted throughout the dissertation, and especially in Chapter 2,¹²⁵ permits to conclude that hierarchy is far from being established in the relationship between indigenous rights and the conservation of biodiversity.¹²⁶ Furthermore, hierarchy is a very exceptional rule in international law.

Second, the rules established under Article 30 of the VCLT are not applicable either. This provision regulates the case in which successive treaties amend or repel previous ones. However, it only applies to treaties having the same subject matter, which is not the case for the CBD and human rights treaties.¹²⁷

Third, the fact that the objects of the two bodies of law do not coincide but may overlap is not incompatible with the general rule of *lex specialis*, according to which the more specific regime derogates from the more general one.¹²⁸ However, it is very difficult

¹²⁴ Hierarchy is indicated as a possible way to solve conflicts in international law in the ILC fragmentation report, at 168 ff.

¹²⁵ See especially section 3.6 of Chapter 2.

¹²⁶ It is interesting to note that in the *Kaliña and Lokono* case, Suriname has claimed that nature conservation is a “higher interest” that must prevail over the protection of indigenous rights (para. 120). On the absence of hierarchy between the Nagoya Protocol and other international treaties, see Riccardo Pavoni, ‘The Nagoya Protocol and WTO Law’ in Elisa Morgera, Elsa Tsioumani and Matthias Buck (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Martinus Nijhoff 2013), at 206. Concerning indigenous rights, some limited authors have claimed that the cultural genocide applies to indigenous peoples. See Damien Short, ‘Cultural Genocide and Indigenous Peoples: A Sociological Approach’ (2010) 14 *International Journal of Human Rights* 833. See also, Benny Peiser, ‘From Genocide to Ecocide: The Rape of Rapa Nui’ (2005) 16 *Energy and Environment* 513. Cultural genocide, however, is not included in the scope of application of the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948, in force 12 January 1951).

¹²⁷ See Borgen 2005, at 603: “the VCLT is not applicable to the thornier issues of what happens when treaties have different foci but overlapping issue areas”.

¹²⁸ On *lex specialis* as a criterion to solve conflicts, see Pauwelyn 2003, at 385 ff. The author argues that the criterion of *lex specialis* recognizes the contractual liberty of States to change rules previously agreed upon if these apply to a specific context (at 388). See also, at 389: “A norm may be *lex specialis* on one of two grounds: (i) subject matter; or (ii) membership”. Concerning subject matter, the content must be more precise or referred to specific circumstances. Concerning membership, subject matter must be the same, but parties are different (usually more restricted), such as in regional human rights treaties (at 390). See also, Anja Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’ (2005) 74 *Nordic Journal of International Law* 27, at 27, 41-42, and 66. The latter author argues that *lex specialis* is not a suitable criterion for solving normative conflicts between “seemingly independent normative

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to determine which of the two bodies of law analysed in this thesis is the most specific regime in relation to the other.¹²⁹ It is true that rules affecting indigenous rights under the CBD might be seen as derogating from the general regime of human rights in the context of conservation and ABS. At the same time, the opposite argument can also logically hold, namely that human rights law on indigenous rights could also in principle be considered *lex specialis* since they attribute rights to groups of the society that deserve special protection due to past injustices and current marginalisation.¹³⁰ In this sense, the CBD would only apply as it is to situations that involve other sectors of the society.¹³¹ Therefore, it is very difficult to demonstrate in the abstract that one of the two regimes derogates from the other.¹³²

When specifically addressing the hypothesis that the CBD constitutes *lex specialis* of the human rights regime on indigenous peoples, other difficulties emerge. The CBD is not meant to directly regulate indigenous rights, although it refers to indigenous and local communities. Therefore, in principle, the fact that the two bodies of law have different subject matters excludes the applicability of *lex specialis*. This argument, however, can be countered by the fact that both the CBD and human rights law regulate the same factual situations with regards to indigenous peoples, as explained above.

In this light, for *lex specialis* to be applicable, it would be necessary to demonstrate that the CBD regime aims to derogate from the more general protection of indigenous rights granted under human rights law.¹³³ However, the CBD regime does not explicitly derogate from the more general regime on human rights. Quite on the contrary, the Nagoya Protocol takes account of the UN Declaration on indigenous rights in its Preamble. Moreover, some CBD COP decisions acknowledge the need to respect the international framework on indigenous rights.¹³⁴ In addition, both the CBD and the Nagoya Protocol have conflict rules that acknowledge the existence of other treaties connected to conservation without derogating from them.¹³⁵

orders". On the affirmation of *lex specialis* as a legal maxim, see ILC fragmentation report, at 34-47.

¹²⁹ In general terms on the difficulty of identifying special regimes, see ILC fragmentation report, at 35.

¹³⁰ This is the reason why a specific body on indigenous rights emerged in the first place. See difference with minorities in section 3.1 in this Introduction.

¹³¹ For instance, when protected areas affect private individuals or access to genetic resources impinges on private property.

¹³² Indeed, the argument goes that treaties in human rights law and environmental law are *lex specialis* of general international law. See Lindroos 2005, at 31.

¹³³ Pauwelyn 2003, at 240: following from the presumption against conflict, when a new norm seeks to derogate from another one, it must do so explicitly; at 242-243: the State arguing that the presumption is not valid because the new rule seeks to change previous norms, needs to prove this.

¹³⁴ See more in detail Chapters 3 and 4 on these points.

¹³⁵ See Art. 22 CBD and Art. 4 Nagoya Protocol. These provisions are discussed in more details in Chapter 3, section 2.4.1 and Chapter 4, section 2.1, which both highlight the limitations of these rules in terms of providing useful criteria to solve conflicts with obligations arising from other instruments. The ILC fragmentation report explains that Parties to a treaty may be reluctant to state once and for all how a given treaty relates to other applicable regimes. One reason for that might be that concrete situations are too heterogeneous to be addressed in a comprehensive general formula (at 141, para. 277).

Indeed, it is very doubtful that the criterion of *lex specialis* can be used to justify that the CBD regime as a whole can derogate from the whole body of the rights of indigenous peoples as established under human rights law. Such a reasoning would deprive the international regime on indigenous rights of any significance and, therefore, would be against the object and purpose of human rights treaties.¹³⁶ A different point would be to affirm that some provisions of the CBD and the Nagoya Protocol can be interpreted as *lex specialis*.¹³⁷ Concerning this point, the Conclusion of this thesis assesses to what extent the CBD practice points in the direction of derogating from existing indigenous rights.

It emerges from the analysis above that general criteria to solve conflicts are not applicable to the case explored in this dissertation. The question, therefore, arises of what happens when potential conflicts result from the application of the CBD regime. This thesis argues that conflicts in the relationship between biodiversity law and indigenous rights mostly derive from erroneous or too restrictive interpretations of the obligations contained in the CBD regime. In this sense, harmonious interpretation is the proposed methodology to solve conflicts under these two regimes. According to Pauwelyn, if conflicts can be “interpreted away”, they are only apparent—not genuine—conflicts.¹³⁸ Pauwelyn’s conception, however, derives from the different aims of his research. In particular, this author wants to understand “what to do in case such harmonious interpretation is not possible”.¹³⁹ Rather, this research aims to expose potential conflicts and to see to what extent and in what ways harmonious interpretation can help to avoid or solve them. As explained, this objective derives from the acknowledgment that conflicts may also derive from the discretion that some treaties leave in the implementation of their provisions. This discretion, however, finds important limitations in the obligations established under other regimes applicable to the same factual situation.

6. Harmonisation, systemic interpretation (and mutual supportiveness)

The existence of multiple international treaties regulating seemingly separated problems does not imply that each treaty is a legal system completely aloof from other international rules. In contrast, there is a general expectation in favour of harmonisation, meaning that Parties to a given treaty should avoid conflicts when concluding new treaties or interpreting existing ones.¹⁴⁰ The inclusion of provisions on the relationship with existing legal regimes,

¹³⁶ On this point, see also Chapter 3, section 2.3.

¹³⁷ Lindroos 2005, at 43, highlights the “difficulty of designating one area of law as being special with regard to another area of law”.

¹³⁸ Pauwelyn 2003, at 178.

¹³⁹ *Ibid.*, at 6.

¹⁴⁰ *Ibid.*, at 240, explains this presumption against conflict by referring to the fact that States are aware or should be aware of the rules already binding on them. See also, ICJ, *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment (26 November 1957), at 142: “It

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as explained earlier, serves to reinforce the presumption against conflicts in the CBD and the Nagoya Protocol. In particular, Article 4(3) of the Nagoya Protocol explicitly enunciates the principle of mutual supportiveness with other international instruments relevant to the Protocol.¹⁴¹

A duty to seek the harmonisation of international conventional regimes also derives from the application of the more general and well established principle of *pacta sunt servanda*, according to which Parties must honour their obligations, including when applying other treaties, unless it can be demonstrated that these treaties explicitly derogate from other existing obligations.¹⁴² Furthermore, if more than one treaty is applicable to a given factual situation, such as in the case discussed in this thesis, the need for harmonisation becomes inescapable.¹⁴³

This thesis aims to respond to this general need, exploring in which ways harmonisation can be realised in the interplay between the CBD regime and indigenous rights. Given the inapplicability of other conflict-resolution techniques, this dissertation turns to interpretation as a general means to avoid and/or mitigate conflicts.¹⁴⁴ As already claimed, the insurgence of conflicts as intended in this thesis is premised on the openness of the concerned provisions. Similarly, interpretation may identify ways in which certain provisions can be implemented in a manner that avoids conflicts.¹⁴⁵ In this sense, this dissertation proceeds from the understanding both that interpretation is “constitutive” and that it is the function of the interpreter to propose convincing explanations of why a given interpretation is sound.¹⁴⁶

is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it”.

¹⁴¹ On this point, see Morgera, Tsioumani and Buck 2014, at 80 and 82-83. See also, Pavoni 2013, at 207.

¹⁴² This rule is also codified in Art. 26 VCLT. See Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (8th edn, LGDJ 2008), at 238-241; Malcolm N. Shaw, *International Law* (5th edn, Cambridge University Press 2003), at 811-812; Tullio Treves, *Diritto internazionale. Problemi fondamentali* (Giuffrè 2005), at 378. These authors highlight the link between *pacta sunt servanda* and good faith. See also, Nele Matz-Lück, ‘Harmonization, Systemic Integration, and ‘Mutual Supportiveness’ as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation?’ (2006) 17 *Finnish Yearbook of International Law* 39, at 46: “Although the *pacta sunt servanda* rule must be considered part of customary international law, it is questionable whether it follows from this rule that states must adopt a harmonizing approach”.

¹⁴³ See ILC fragmentation report, at 210, para. 418: “it cannot be dependent on how a State chooses to characterize a problem that decides which treaty is applicable”. The report concludes that it is up to international tribunals to characterise facts in order to evaluate what regimes are applicable. Given the abovementioned difficulty for international courts to intervene concerning the application of the CBD, interpreters should try to fulfil this duty.

¹⁴⁴ See Christina Voigt, ‘The Role of General Principles in International Law and their Relationship to Treaty Law’ (2008) 2/121 *Retfærd Årgang* 3, at 21: “the problem of fragmentation may be held to require the introduction of new ideas and approaches to the interpretation of treaties where there is overlapping and conflicting consensus on fundamental value-questions in different social and political sectors”.

¹⁴⁵ ILC fragmentation report, at 207, para. 412: “conflict-resolution and interpretation cannot be distinguished from each other... Rules appear compatible or in conflict *as a result of interpretation*”.

¹⁴⁶ On the constitutive character of interpretation, see Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994), at 144-150; Hans Kelsen, *Pure Theory of Law* (University of

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According to the general rules of interpretation codified under the VCLT, treaties must be interpreted literally, “in accordance with the ordinary meaning to be given to the terms”, teleologically, in the light of “object and purpose”, and contextually.¹⁴⁷ Context is to be determined in relation to agreements and instruments explicitly concluded in connection with the treaty to be implemented.¹⁴⁸ Furthermore, pursuant to Article 31(3) (c) of the VCLT, interpreters must take into account “[a]ny relevant rules of international law applicable in the relations between the parties”.¹⁴⁹ This provision, therefore, identifies systemic interpretation as a required step in the process of treaty interpretation.¹⁵⁰ This does not mean that it must be performed every time interpretation is conducted but when the conditions for its applicability are met.¹⁵¹

A process of interpretation must of course be in place. Contrary to the views of some authors,¹⁵² interpretation does not only take place when rules are particularly ambiguous or obscure¹⁵³ but it is instead the logical step preceding and facilitating the implementation of any treaty rules. In this sense, when States fulfil the obligations contained in the treaties to which they are party, they need to interpret them first. This is not to underestimate

California Press 1967), at 348-356. See also, D’Aspremont 2015, at 202; Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of the Treaties: A Commentary* (Oxford University Press 2011), at 806; Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006), in particular Ch. 1.

¹⁴⁷ Art. 31(1) and (2) VCLT. On the methods of interpretation, see e.g., Daillier, Forteau and Pellet 2008, at 282-291. These authors interestingly point out that the choice of interpretative methods is intimately linked to the conception of international law embraced by the interpreter (see in particular at 289-290). See also, Antonio Cassese, *International Law* (Oxford University Press 2005), at 178-180; Benedetto Conforti, *Diritto internazionale* (9th edn, Editoriale scientifica 2013), at 112-118; Shaw 2003, at 838-844; Treves 2005, at 378-398; Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015), especially Ch. 5 and 6; Jean-Marc Sorel and Valérie Boré Eveno, ‘Article 31 Convention of 1969’ in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of the Treaties: A Commentary*, vol I (Oxford University Press 2011); ILC, Draft Articles on the Vienna Convention with commentaries (1966), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (last accessed October 2016), at 221: the commentary emphasises very much the will of the parties to accept subsequent agreements.

¹⁴⁸ Art. 31(2)(a) and (b) VCLT.

¹⁴⁹ See Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, at 281, on the indeterminacy of this clause. At 290-293, this author briefly illustrates the genesis of Art. 31(3)(c) of the VCLT. The rest of the article discusses how the clause has been used by international tribunals.

¹⁵⁰ See ILC fragmentation report, at 214, para. 425, according to which systemic interpretation is “a mandatory part of the interpretation process” and is not like Article 32 that only applies if the meaning of treaty clauses is ambiguous or unreasonable. This is confirmed in the manuals cited *supra* in note 147.

¹⁵¹ See Pauwelyn 2003, at 254: “not in every situation of alleged conflict must one norm be interpreted with reference to the other, pursuant to Art. 31(3)(c)”. See also, Duncan French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’ (2006) 55 *International and Comparative Law Quarterly* 281, at 301.

¹⁵² See Pauwelyn 2003, at 245: the treaty to be interpreted “must, first of all, include terms that are broad and ambiguous enough to allow for input by other rules”.

¹⁵³ As reminded, these are the conditions for applying subsidiary means of implementation. See Matz-Lück 2006, at 50: “Whether the understanding of a norm is clear depends upon the particular circumstances and cannot be addressed in an abstract manner”. This argument is clearly stated in Robert Jennings and Arthur Watts, *Oppenheim’s International Law* (9th edn, Longman 1992), at 1267.

the fact that some interpretative processes can be much more complex than others. However, notwithstanding specific difficulties, the same interpretative toolbox is available independently from the complexity of the interpretative process. This conclusion is also in line with the above-mentioned principle of mutual supportiveness contained in the Nagoya Protocol, which similarly to systemic interpretation requires a reading of one treaty's obligations that is in harmony with the obligations stemming from other applicable treaties.¹⁵⁴

Another condition, which instead must be verified, is that rules external to the treaty to be interpreted must be “applicable in the relations between the parties”. This clause requires a two-step test aimed to understand (a) which rules are applicable and (b) when they are applicable between the parties.

Concerning the first part of the test, indigenous rights are not relevant when implementing any CBD obligations. Instead, the latter must present some sort of link with indigenous rights.¹⁵⁵ This may happen when provisions of the CBD and the Nagoya Protocol explicitly include a reference to indigenous and local communities, such as in Articles 8(j) and 10(c) of the Convention and, inter alia, Article 5-7 of the Protocol.¹⁵⁶ Moreover, the link with indigenous rights may be established by way of teleological and contextual interpretation, including when CBD provisions are read in light of the Convention's objectives, other CBD rules, and successive CBD COP decisions.

While the language of the CBD maintains a certain degree of ambiguity,¹⁵⁷ important developments testify to a growing tendency for CBD Parties to accept contamination of the conservation regime with indigenous rights. The last CBD COP has adopted a decision where it specifically addresses the issue of the interpretation of the locution “indigenous and local communities”.¹⁵⁸ The failure to refer to indigenous groups as peoples, unlike human rights instruments, has generated doubts concerning the permeability of the CBD to human rights standards and the perfect coincidence between the two categories. COP Decision

¹⁵⁴ See Riccardo Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?’ (2010) 21 *European Journal of International Law* 649, at 650 and 661-666.

¹⁵⁵ Pauwelyn 2003, at 245, makes a similar point with reference to international trade law rules and relevant external rules. In more general terms, Lee explains that relevant rules are those “that address the same facts or grapple with the same type of problem”. Lee Jing, *Preservation of Ecosystems of International Watercourses and the Integration of Relevant Rules: An Interpretative Mechanism to Address the Fragmentation of International Law* (Martinus Nijhoff 2014), at 45. Emphasis on the interpretation of the clauses “relevant” and “applicable” is also put by Sands, ‘Treaty, Custom and the Cross-Fertilization of International Law’ 1998, at 102 (though in the context of the relationship between treaty law and custom in international law). See also, French 2006, at 304-305, who distinguishes between relevance and applicability.

¹⁵⁶ These are fully analysed in Chapters 1, 3, and 4.

¹⁵⁷ The CBD does not refer to indigenous peoples, but to “indigenous and local communities”. Furthermore, free, prior and informed consent is in some cases watered down to indigenous approval and involvement. See Chapter 1, section 3, and Chapters 3 and 4.

¹⁵⁸ The CBD adopts consistently this locution in its Preamble and Art. 8(j). The Nagoya Protocol has not changed the language of the CBD regarding the locution “indigenous and local communities”.

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XII/12 has partially clarified those doubts since, pursuant to it, the new terminology “indigenous peoples and local communities” will be adopted in “future decisions and secondary documents”.¹⁵⁹ The decision also states that the change in terminology cannot be considered as a relevant interpretation or practice for the purpose of the application of Article 31(2), (3)(a) and (b) of the Vienna Convention on the Law of Treaties.¹⁶⁰ It seems, however, that it is not up to the Parties to limit future interpretation of the locution ‘indigenous and local communities’, unless they explicitly agree on the fact that the CBD derogates from the international framework on human rights concerning indigenous peoples. Furthermore, the decision recognises as relevant to the CBD the role of systemic interpretation, thus de facto acknowledging the importance of existing international law for the interpretation of the CBD, including human rights.¹⁶¹ It seems, therefore, that decision XII/12 explicitly supports a systemic interpretation of CBD relevant provisions in light of indigenous rights under international human rights law.

Regarding the intertemporal relationship between CBD provisions and indigenous rights, it could be argued that since the latter were not well established when the CBD was concluded, systemic interpretation would run counter the initial intentions of the Parties. Quite on the contrary, however, the formulation that limited systemic interpretation to the rules in force at the conclusion of the treaty was not retained in the final formulation of Article 31(3)(c).¹⁶² Therefore, the final understanding of this interpretative tool is one that allows for evolutionary interpretation, thus ensuring flexibility to the international legal system.¹⁶³

The second part of the test concerns the issue of membership to the obligations that are applicable in the relations between Parties. The ILC fragmentation report has concluded that systemic interpretation can be performed even in the context of multilateral treaties whose Parties do not perfectly coincide with the Parties of the treaty from which relevant rules are extracted.¹⁶⁴ The only condition is that, when a rule is concretely applied in a

¹⁵⁹ COP dec. XII/12, UN Doc. UNEP/CBD/COP/DEC/XII/11 (13 October 2014), Part F, para. 1.

¹⁶⁰ COP dec. XII/12, Part F, para. 2(c): the COP decides “[t]hat the use of the terminology “indigenous peoples and local communities” in future decisions and secondary documents shall not constitute a context for the purpose of interpretation of the Convention on Biological Diversity as provided for in article 31, paragraph 2, of the Vienna Convention on the Law of Treaties or a subsequent agreement or subsequent practice among Parties to the Convention on Biological Diversity as provided for in article 31, paragraph 3 (a) and (b) or special meaning as provided for in article 31, paragraph 4, of the Vienna Convention the Law of Treaties”.

¹⁶¹ COP dec. XII/12, Part F, para. 2(c): “[t]his is without prejudice to the interpretation or application of the Convention in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties”.

¹⁶² ILC fragmentation report, at 216-217.

¹⁶³ ILC fragmentation report, at 242. See also, McLachlan 2005, at 282. This is also the way systemic interpretation has been used in the ICJ *Gabčíkovo-Nagymaros* case. See e.g., Philippe Sands, ‘Watercourses, Environment and the International Court of Justice: the Gabčíkovo-Nagymaros case’ in Salman M.A. Salman and Laurence Boisson de Chazournes (eds), *International Watercourses: Enhancing Cooperation and Managing Conflict* (World Bank Technical Paper No. 414 1998).

¹⁶⁴ ILC fragmentation report, at 237. See also, McLachlan 2005, at 314: “If complete identity of parties

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bilateral relation, both involved Parties must be bound by the provision that is invoked in the context of systemic interpretation.¹⁶⁵ As rightly pointed out in the ILC fragmentation report, “Article 31(3)(c) refers to ‘the parties’, not ‘all parties’”.¹⁶⁶ According to some authors, moreover, membership is not crucial if the treaty to be interpreted enshrines the principle of mutual supportiveness as the Nagoya Protocol does.¹⁶⁷ Furthermore, while the issue of membership might be relevant when international judicatories are to decide over disputes brought before them, it might be considered less relevant when it comes to the interpretative process which precedes the application and concrete implementation of a treaty by its parties.¹⁶⁸

This means, in the context of the present research, that indigenous rights as interpreted by the Human Rights Committee must serve as an interpretation tool even though CBD Parties do not perfectly coincide with the Parties of the ICCPR. However, if ABS provisions were applied in the context of a bilateral relationship between, for instance, South Africa, which is party to the ICCPR, and China, which is not, systemic interpretation could not be performed with reference to the rights of indigenous peoples protected under that particular human rights instrument. However, as illustrated in Chapter 2, a similar result could be reached if interpreting CBD provisions in light of relevant ICESCR provisions protecting indigenous rights, to which China is indeed bound.¹⁶⁹ Furthermore, South African indigenous peoples could bring their case before the African Commission that, again as explained in Chapters 1 and 2, has recognised that the collective rights of indigenous peoples had been violated in connection with the creation of protected areas and other activities performed with the authorisation of the State.¹⁷⁰ Therefore, it is important to acknowledge that, if conflicts cannot be resolved by ways of systemic interpretation, they might in principle be addressed outside the CBD context in a way that exposes the State’s international responsibility for the violation of indigenous rights.

were required before the other treaty could be regarded as being ‘applicable in the relations between the parties’, it would have the ironic effect that the more membership of a particular multilateral treaty such as the WTO Covered Agreements expanded, the more those treaties would be cut off from the rest of international law”.

¹⁶⁵ ILC fragmentation report, at 238. Pauwelyn 2003, at 257-260, has formulated an additional condition for systemic interpretation to apply in case treaty membership is not perfectly coinciding, namely that other relevant rules of international law must reflect the intentions of all Parties to the treaty that has to be interpreted. As highlighted in the ILC fragmentation report, at 239, this argument has concretely been used by the WTO (World Trade Organisation) Appellate Body. Common intentions, however, do not add much in terms of both legal certainty, because they are difficult to verify, and strict legality, because they do not represent a relevant source in international law.

¹⁶⁶ ILC fragmentation report, at 261.

¹⁶⁷ See Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?’ 2010, at 668.

¹⁶⁸ A hint of this argument is given by French 2006 at 305-307.

¹⁶⁹ Chapter 2 inquires to what extent the interpretation of indigenous rights is convergent under human rights treaties.

¹⁷⁰ See the analysis of the *Endorois* case in Chapters 1 and 2.

Furthermore, systemic interpretation is relevant for interpreters and scholars even outside litigation implying a bilateral relationship. For instance, this thesis assesses through the lenses of systemic interpretation whether a particular reading of CBD-related provisions is in line with the international human rights regime on indigenous rights. This choice can be justified in light of the particular nature of human rights and environmental rules, which *inter alia* regulate purely internal situations in pursuance of a common objective defined in treaties (promotion of certain rights or common concern of humankind). In this sense, systemic interpretation can be used outside litigation to assess whether the implementation of the CBD regime at the national level runs counter the obligations that States have concerning the respect of indigenous rights under international human rights law.

This does not mean that systemic interpretation is without limits. Interpretation, in fact, cannot go so far as to impose new obligations on States but must be aimed to illustrate the meaning of the concerned provisions in light of relevant international law.¹⁷¹ However, it must be reminded here that applicable international rules do not stop at treaty obligations mandatory on the parties of the dispute, but include also general international law, such as custom and general principles.¹⁷² Chapter 2 discusses the emergence of the principle of self-determination from the body of indigenous rights. General principles can be used in the process of systemic interpretation and technically are not subject to the limitations concerning membership in multilateral treaties. In this sense, the principle of self-determination allows for the penetration of substantive and procedural criteria to assess States' behaviour with regard to the respect of indigenous rights irrespective of issues concerning the existence of specific obligations binding CBD Parties under human rights treaty law.¹⁷³

Finally, as suggested by some authors, when conflicts cannot be interpreted away, by virtue of the principle of mutual supportiveness, State Parties might be obliged to cooperate in good faith to amend incompatible rules with a view to ensuring the compatibility between the CBD regime and the human rights of indigenous peoples.¹⁷⁴

7. Research outline

This dissertation is divided into three parts. The first part (Introduction and Chapter 1) sets the scene, making the case for why conflicts between the CBD regime and indigenous rights are relevant. The second part (Chapter 2) illustrates my personal understanding of

¹⁷¹ See Pauwelyn 2003, at 245 and 254; Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' 2010, at 668; French 2006, at 299. The latter author warns against the incorporation of extraneous legal rules into a given treaty in a way that is not acceptable to States in that it might compromise the trust States put in international judicatories.

¹⁷² ILC fragmentation report, at 233-237.

¹⁷³ This argument is fully developed in Chapter 2, section 5.

¹⁷⁴ See Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' 2010, at 668.

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the legal problems illustrated in this thesis and proposes an interpretative approach that is applied in the third part. The last part (Chapters 3 and 4) is constituted of two case studies to verify the approach explained in Chapter 2. They are not geographical case studies, but rather thematic ones, exploring two essential sub-regimes of the CBD, i.e., access to genetic resources and related benefit-sharing and conservation and the creation of protected areas, which both also include issues about sustainable use.

Chapter 1 aims to show how the relationship between indigenous rights and biodiversity conservation has traditionally been framed in international law. First, it illustrates the case law of human rights treaty bodies incorporating environmental protection into the rights of indigenous peoples. This interpretative approach emphasises the mutually beneficial relationship between indigenous rights and environmental protection but overall fails both to recognise possible conflicts between the two and to propose criteria to solve those conflicts. Second, Chapter 1 looks at how the relationship between indigenous rights and the protection of biodiversity has been framed under the CBD. Similarly to what happens with human rights treaty bodies, potential conflicts are visible in the interpretation of the main CBD provisions concerning indigenous and local communities but fail to be addressed in the literature. Chapter 1, therefore, concludes that the interplay between indigenous rights and biodiversity conservation in international law is an understudied case illustrating the possibilities for conflicts between human rights and the environment. This chapter also identifies the interplay of indigenous and States' powers over land and natural resources as one of the main contentious issues in this field.

Chapter 2 claims that this problematic interplay can be explained through a more fundamental conflict between the underlying principles of the international regime laying down the human rights of indigenous peoples and the international regime on biodiversity protection. The latter is founded on the sovereignty of States over natural resources, which regulates the problem of the allocation of natural resources through the criterion of national territory. In other words, States can exercise extensive sovereign powers on the resources located in their territories in a way that must be undisturbed from the actions of other States. The second part of the chapter argues both that several limits derive to this principle from the exercise of indigenous rights, the content of which is carefully detected in light of relevant international treaties, the interpretation of human rights treaty bodies, and relevant soft law instruments. What emerges is an extensive body of rights with both substantive and procedural prerogatives that limit the capacity of States to autonomously regulate the management of national natural resources. In this respect, and drawing from the decisions of human rights treaty bodies, Chapter 2 argues that the self-determination of indigenous peoples, more as an economic than a political right, is the crucial underlying issue to be addressed to unravel the puzzle of the potential conflict between States' powers and indigenous rights over natural resources. The chapter, therefore, discusses the right to self-determination of indigenous peoples in light of the more general debate on self-

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determination under current international law. Under common Article 1 of UN Covenants, self-determination is conceived as a right for all peoples. In the decisions of human rights treaty bodies concerning indigenous peoples, self-determination is framed as an underlying principle that must inform the interpretation of indigenous rights. In this sense, self-determination is presented as a general principle of international human rights law concerning indigenous peoples, which allows for a teleological interpretation of indigenous rights according to which the restrictions imposed by States on indigenous rights cannot go so far as to compromise the distinctiveness of indigenous groups as separated peoples. This finding is used in Chapter 2 to elaborate an interpretative approach for the analysis of the interaction between the CBD regime and indigenous rights in the following chapters. According to this approach, the general principle of self-determination can be used to incorporate the rights of indigenous peoples into the CBD regime.

Chapter 3 analyses the case of the interplay between the international ABS regime under the CBD and the rights of indigenous peoples. It explores developments in the ABS obligations of CBD Parties following the creation of the Working Group on Article 8(j) and, most importantly, the entry into force of the Nagoya Protocol. It does so analysing separately three main issues, i.e., access to genetic resources, access to traditional knowledge, and the benefits arising from the utilisation of both. The study of the ABS regime logically precedes that on conservation since the former illustrates issues that are discussed in the latter, such as the scope of Article 8(j) of the CBD, the meaning of “approval and involvement”, as well as the benefit-sharing implications of conservation. Chapter 3 identifies tools, contained in the CBD, the Nagoya Protocol, or in CBD COP decisions, that allow for the harmonisation of the conflicts between CBD-related provisions and indigenous rights. Furthermore, it identifies potential conflicts that are not addressed within the CBD regime and must be resolved by integrating indigenous rights into the CBD regime, *inter alia* through the principle of self-determination.

Chapter 4 is the second and last case analysed in this thesis. It examines the interplay between the conservation regime of the CBD and the rights of indigenous peoples. It also addresses problems related to the third objective of the CBD, that is sustainable use. To this end, it explores conservation from the perspective of indigenous participatory rights, including the emerging phenomenon of indigenous and community protected areas. It also compares the CBD framework to the establishment of World Heritage sites protecting nature and traditional culture. Similarly to Chapter 3, it then identifies the main harmonisation measures enacted in the CBD and the WHC and the main gaps therein. It finally uses the principle of self-determination to incorporate indigenous rights into the CBD regime on conservation, also highlighting the conflicts that cannot be resolved under the WHC.

CHAPTER 1

Indigenous Rights and the Protection of Biodiversity: State of the Art

1. Introductory remarks

The aim of this chapter is to illustrate how the relationship between indigenous rights and the protection of biodiversity has traditionally been framed in international law. The main point of departure is that, although the areas of intersections between the two elements are numerous, the two underlying regimes are considered as separate since they pertain to two different areas of international law, namely human rights and international environmental law.¹ This is why approaching the relationship between the two means as a first step analysing whether and in what terms this has been framed under each of the concerned regimes.

Under international human rights law, the specific issue of the interplay between indigenous rights and biodiversity conservation as regulated in METs has not been specifically addressed. Instead, there is a copious case law concerning the relationship between the rights of indigenous peoples and the protection of the environment. The approach to this issue is also known as the human rights approach to environmental protection, which has been largely studied by international scholars. Section 2 illustrates this approach, presents the main decisions of human rights treaty bodies dealing with the relationship between indigenous rights and the environment, and argues that this approach suffers from some limitations. The main limitation lies in the recognition of the separateness of claims deriving from human rights and environmental protection, which reverberates on the partial inadequateness of the solutions provided by human rights treaty bodies to balance indigenous rights with the public interest. Furthermore, section 2 shows to what extent the collective rights of indigenous peoples are framed as being in line with the protection of nature.

Under international environmental law, the CBD and its related instruments provide the main terms of reference. Although the CBD directly includes indigenous peoples' issues in its provisions, the relationship of its regime with indigenous rights has been less studied.² Section 3, therefore, illustrates the state of the art in international biodiversity law, while at the same time highlighting the unresolved issues that are examined in the following chapters of this thesis. The main problem lies in the integration of the rights of indigenous peoples as protected under international human rights law into the CBD.

With the analysis of the state of the art in mind, this chapter argues that the main

¹ See Introduction, section 2.

² Notable exceptions are Elisa Morgera and Elsa Tsioumani, 'The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods' (2010) 19 *Review of European Community and International Environmental Law* 150; Elisa Morgera and Elsa Tsioumani, 'Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity' (2011) 21 *Yearbook of International Environmental Law* 1.

limitation encountered in both sectoral approaches is the failure to acknowledge the possibility of conflict between these two bodies of law, i.e., the dimension of conflict.

2. The human rights approach to environmental protection: the case of indigenous peoples

This section examines the human rights approach to environmental protection as applied by the decisions of human rights treaty bodies concerning the rights of indigenous peoples. The focus on indigenous peoples' rights within this relationship constitutes a special case for two main reasons. First, human rights bodies have recognised a number of collective rights, not originally included in human rights instruments, that are inherent in the very existence of indigenous peoples. Second, indigenous rights are often protected through the implementation of procedural standards, recognised in the decisions of human rights bodies, which *de facto* ensure control over resources.

The extensive interpretation of existing rights has been possible through the application of general rules of interpretation contained in Article 31 of the VCLT, and in particular the technique, established in paragraph 3(c), of systemic interpretation.³ According to this technique, treaty provisions should be interpreted taking into account “[a]ny relevant rules of international law applicable in the relations between the parties”.⁴ The Inter-American Court and Commission have often relied on this provision, although they have rarely specified which are the general rules specifically applicable in the relations between the parties.⁵ Other human rights bodies have not justified their expansive techniques in light of systemic interpretation, arguing instead for the comprehensive nature and the open-ended formulation of the rights protected.⁶

The organisation of this section reflects the global-regional divide in the protection of human rights at the international level. The first part deals with the decisions, views, reports, and recommendations adopted by the monitoring systems of the global human rights instruments that are relevant for the analysis of the relationship between indigenous peoples and the environment, i.e., the UN Covenants, the International Convention on the Elimination of All Forms of Racial Discrimination, and the ILO Convention 169. At

³ See Introduction, section 6.

⁴ According to Article 31(3)(a) VCLT, interpreters can also rely on “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, while pursuant to Article 31(3)(b) VCLT interpretation is also done in light of “[a]ny subsequent practice in the application of the treaty”. While the latter element has not been explicitly invoked in the decisions on indigenous peoples and the environment examined below, it can perhaps provide a normative backing to the fact the human rights treaty bodies have sometimes relied on national legislation to support the soundness of a given interpretation.

⁵ For the application of this technique in the Inter-American system, see *infra* section 2.2.1 in this chapter.

⁶ See, e.g., Human Rights Committee, General Comment No. 23 (Art. 27): Rights of minorities, UN Doc. HRI/GEN/1/Rev.1 (26 April 1994) (hereinafter General Comment 23).

the regional level, this section focuses on the *latu sensu* jurisprudence of the Inter-American Court and Commission on Human Rights, the African Commission on Human and Peoples' Rights, and the European Court of Human Rights. In order to give a picture of the regional approaches to the relationship between indigenous peoples and the environment as extensive as possible, this section includes also the most representative decisions taken by the national tribunals of some countries in Asia and Oceania. The lack of a specific international monitoring system on human rights for these countries can in this sense be supplemented by a limited survey on the national judicial practice in the regions indicated.

2.1. The global mechanisms of human rights protection

2.1.1. The Human Rights Committee

The Human Rights Committee can receive individual communications from the subjects that qualify as victims within the scope of the first Optional Protocol to the ICCPR⁷. If admissibility conditions are met, the Committee adopts views on the merits. It is in this framework that the Committee has used Article 27 to assess the interference of States' actions with the rights of individual members belonging to indigenous communities.

Article 27 protects the right of individual members of minorities to enjoy their own culture without undue interference. In this sense, although only individuals can invoke the violation of Article 27 before the Committee, this provision guarantees that individuals belonging to minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."⁸ When it comes to indigenous peoples, culture may take the form of a particular land or resource use.⁹ Therefore, respect for environmental soundness may be recognised as a precondition for the enjoyment of the indigenous right to culture, in that the degradation of land and natural resources may have an impact on the capability of indigenous peoples to exercise their culture.

This does not imply, however, that any interference with the enjoyment of the right to culture amounts to a violation of Article 27 on the part of the State.¹⁰ Indeed, considerations related to the factual context have consolidated in three main trends that are discernible in the views expressed by the Committee. Under the first trend, the Committee operates a balance

⁷ See Art. 2 Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976).

⁸ General Comment 23, para. 1.

⁹ General Comment 23, para. 7: "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law".

¹⁰ See *Lovelace* case, para. 15: "not every interference can be regarded as a denial of rights within the meaning of article 27". It is necessary to read the provision "interfered with" in light of other provisions of the Covenant, as well as the circumstances of the case.

between the rights of the community as a whole with the rights of individual members.¹¹ The first trend, however, can be considered as marginal and does not reveal a lot of the relationship between indigenous rights and the environment.¹² The second trend creates a test for assessing States' interference, thus defining the admissibility of restrictions to the right to culture of indigenous peoples. Under the third trend, environmental degradation is considered to affect the very survival of indigenous communities as distinct peoples.

In decisions corresponding to the second trend, arguments of public interest, including the need to carry out development activities and to protect the environment, have prevailed on the cultural rights of individual applicants. Examples of this line of reasoning are the *Länsman* cases. In *Ilmari Länsman et al. v. Finland*,¹³ the authors of the communication had argued that the quarrying of stone on the flank of a mountain where reindeer herding by Sami was taking place violated their rights under Article 27, especially in light of the on-going negotiations about long-term leases of the land implying inter alia the construction of a road. While the authors insisted on the effects that development would have on the traditional activity of reindeer herding due to the impact on forest ecosystems, the State pointed to the limited effects on the environment linked to the modalities of quarrying that had been agreed upon.¹⁴ The Committee concluded that a violation of Article 27 had not occurred based on the relevant context of the case.¹⁵ Although States' development initiatives are in principle legitimate, these must find a limit in the application of Article 27. In this sense, measures that imply a denial of this right constitute a breach, whereas a limited impact is acceptable.¹⁶ According to the Committee, the impact of the quarrying activity on the enjoyment of Article 27 was very limited. As for the compatibility of future measures, limits to States' actions derive from the community's capability to continue to benefit from their traditional activity.¹⁷

The same reasoning is applied by the Committee, in *Jouni Länsman v. Finland*,¹⁸ which is related to the effect of logging activities on reindeer herding. The Committee

¹¹ In the *Lovelace* case, for instance, the Human Rights Committee discusses the issue of membership and how to balance the community's right to allow for that and the inherent right of individual community members to maintain this membership. For a commentary on the case, see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002), at 361-372.

¹² *Ivan Kitok v. Sweden*, Communication No. 197/1985 (27 July 1988), UN Doc. CCPR/C/33/D/197/1985 (hereinafter *Kitok v. Sweden*), para. 9.8. In *Kitok v. Sweden*, limitations to the carrying out of reindeer herding by Mr. Kitok have been considered reasonable within the meaning of Art. 27 ICCPR since they were meant to preserve reindeer herding for the rest of the Sami community.

¹³ *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992 (26 October 1994), UN Doc. CCPR/C/52/D/511/1992 (hereinafter *Länsman I*).

¹⁴ *Länsman I*, para. 7.

¹⁵ *Länsman I*, paras. 9.3 and 9.6.

¹⁶ *Länsman I*, para. 9.4.

¹⁷ *Länsman I*, para. 9.8.

¹⁸ *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995 (30 October 1996), UN Doc. CCPR/C/58/D/671/1995 (hereinafter *Länsman II*).

reiterated that measures with only a limited impact on the enjoyment of a particular way of life are compatible with Article 27.¹⁹ The fact that a consultation process had taken place, coupled with the impossibility to reach a conclusion on the long-term impact of the forestry activities, made the Committee conclude that a violation had not taken place since the measures approved by the State did not pose a threat to the survival of reindeer herding.²⁰

In the third *Länsman* case,²¹ the authors built their argument on an alleged effect of intensified logging activities on the effective enjoyment of their right to culture. The authors made concrete arguments to substantiate their allegations, such as the fact that the reduction in the allowed population of reindeer had been caused by the logging operations that diminished the number of available pastures. It is interesting to note that the State opposed arguments related to the general interest of preserving nature.²² Although the authors presented several reports to support their arguments, the Committee eventually found no violation of Article 27 since the causes of the low profitability of reindeer herding were not directly attributable to logging and the reindeer population was still very high.

The same kind of reasoning is upheld by the Committee in *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*,²³ where a violation of Article 27 was not found due to the impossibility to reach definitive conclusions, based on the findings of national courts, about the impacts of logging on traditional activities. In the same vein, in *George Howard v. Canada*,²⁴ the Committee was unable to find a violation of Article 27 due to the disagreement on the facts between the parties and the lack of an evaluation of those facts by national courts. Importantly, the Committee reiterated that States can regulate the exercise of the right to culture as long as the regulation does not amount to a denial of this right.²⁵

In *Apirana Mahuika et al. v. New Zealand*,²⁶ the Committee developed the arguments put forward in the *Länsman* cases by identifying further criteria to assess the interference of States' actions with the indigenous right to culture under Article 27. The case is particularly relevant since it concerned the restriction of Maori fishing rights on the basis of a general

¹⁹ *Länsman II*, para. 10.3.

²⁰ *Länsman II*, para. 10.6. It is interesting to note that the Committee retained the possibility to reverse this pronouncement in case the logging activities would intensify or it would be shown that they have an adverse impact on reindeer herding.

²¹ *Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee v. Finland*, Communication No. 1023/2001 (17 March 2005), UN Doc. CCPR/C/83/D/1023/2001 (hereinafter *Länsman III*).

²² *Länsman III*, para. 7.4. The State argued that logging activities had been carried out "for the purposes of thinning forests to ensure proper growth".

²³ *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, Communication No. 779/1997 (24 October 2001), UN Doc. CCPR/C/73/D/779/1997.

²⁴ *George Howard v. Canada*, Communication No. 879/1999 (26 July 2005), UN Doc. CCPR/C/84/D/879/1999 (hereinafter *Howard v. Canada*).

²⁵ *Howard v. Canada*, para. 12.7.

²⁶ *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993 (15 November 2000), UN Doc. CCPR/C/70/D/547/1993 (hereinafter *Apirana Mahuika* case).

measure adopted by New Zealand.²⁷ To this end, a settlement with Maori had been concluded in order to preserve the country's fish stock.²⁸ While a national court, the Waitangi Tribunal, concluded for the incompatibility of the settlement with the indigenous fishing rights protected under the Waitangi Treaty, the Committee found that the interference of the quota system with Maori's right to culture was not unreasonable and, therefore, it did not violate Article 27. In this assessment, it was crucial that an effective process of consultation had been conducted by the State. In the reasoning of the Committee, although some Maori tribes had opposed the settlement, this had been concluded for the benefit of the community as a whole.²⁹ Although the Committee did strike a balance between, on the one hand, the need to ensure the attainment of general conservation goals and the needs of Maori with, on the other hand, the individual positions of the group's members, it seems to adhere to a vision of majoritarian democracy that is not necessarily in line with indigenous culture. At the same time, the reasoning of the Committee is centred on the importance of negotiation and settlement when it comes to the definition of the fundamental rights of indigenous peoples, which goes in the direction of the recognition of a subjectivity of those peoples.³⁰

In some residual, although ground-breaking cases, that are to be subsumed under the third trend, the interference of States' action with resource and land use, due to the environmental degradation caused by development activities, has been considered so extensive as to impair the survival and the profitability of indigenous practices, thus resulting in a violation of Article 27. In *Lubicon Lake Band v. Canada*,³¹ the Committee found a violation of Article 27, based on the argument that the granting of leases for oil and gas and the construction of a pulp mill in the land set aside as a reserve for the Band was

²⁷ The general measure was the adoption of the Fisheries Act (1988), which determined a system of quotas for the commercial exploitation of fishing resources. After negotiations with Maori, the government adopted the Maori Fisheries Act (1989); a Memorandum of understanding was also concluded.

²⁸ The quota system was in contrast respectively with the Fisheries Act, which excludes any effects on Maori fishing rights, and with the Treaty of Waitangi (1840), which affirms Maori's right to self-determination and their control over fishery. A settlement with the government was agreed upon, whereby Maori, with respect to commercial fishing rights, were allocated more quotas than other stakeholders in exchange for the withdrawal of any pending litigations on fishing quotas and the support for the repeal of the provision concerning their fishing rights in the Fisheries Act. As for non-commercial fishing rights, the settlement provided for a change of status of Maori's rights so that these did not give rise to obligations on the part of the government, although they were not formally extinguished. This settlement, however, was approved only by some members of the Maori community (slightly more than 50%). Furthermore, the Waitangi Tribunal concluded that the proposed extinguishment and change of status were contrary to the rights ensured in the Waitangi Treaty. The State argued that the settlement was needed to protect the fish stock from overexploitation, which is a duty of the State with regard to all New Zealanders: "this was based on the reasonable and objective needs of overall sustainable management" (*Apirana Mahuika* case, para. 7.5).

²⁹ The process of consultation has been conducted by taking into account the spiritual role of fishing for Maori. In addition, the settlement provides for "effective possession" of fisheries (*Apirana Mahuika* case, para 9.7). As for non-commercial fisheries, the obligations contained in the Treaty of Waitangi are not extinguished. The same conclusion is reached with respect to the discontinuance of pending cases, since this was done through a settlement with the community.

³⁰ This reasoning is developed in Chapter 2, section 4.2 and in the Conclusion, section 3.

³¹ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990, UN Doc. CCPR/C/38/D/167/1984) (hereinafter *Lubicon* case)

threatening the “right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”.³² The authors had built their argument on the fact that land dispossession was causing the destruction of the environment and of their economy so that the “Band’s existence [wa]s seriously threatened”.³³

More recently, in *Ángela Poma Poma v. Peru*,³⁴ the Committee was called to assess the effects of the diversion of surface and groundwater, carried out without the performance of an environmental impact assessment as required by national law, on the enjoyment of the right of private and family life granted under Article 17 of the ICCPR.³⁵ Furthermore, the author had alleged violation of Article 1(2) on self-determination since her community had been deprived of its livelihood following the degradation of their land caused by the drilling of wells. In the author’s view, “legislation relating to the environment is the only means the indigenous communities have to safeguard their land and natural resources”.³⁶ On the other hand, the State argued for the reasonable nature of the restrictions imposed on the author’s rights, based on the fact that the main aim of the water diversion project was to ensure the availability of drinking water to coastal regions. The Committee considered that it should review the author’s allegation against Article 27, thus excluding the legal bases originally invoked by the parties. In the interpretation of this provision, the Committee innovated, admitting that it could read Article 27 in light of Article 1 on self-determination.³⁷ Self-determination, therefore, becomes a contextual parameter to interpret the scope of the right to culture of indigenous peoples. This interpretative operation is conducted in spite of, and maybe because of, the fact that the right to self-determination cannot be reviewed by the Committee through the procedure of individual complaints.³⁸ Furthermore, the

³² *Lubicon case*, para. 32.2.

³³ *Lubicon case*, paras. 2.3 and 12.

³⁴ *Ángela Poma Poma v. Peru*, Communication No. 1457/2006 (27 March 2009), UN Doc. CCPR/C/95/D/1457/2006 (hereinafter *Poma Poma case*).

³⁵ The Committee found a violation of Art. 17 ICCPR in *Francis Hopu and Tepoaitu Bessert v. France*, Communication No 549/1993 (29 July 1997), UN Doc. CCPR/C/60/D/549/1993/Rev.1 (hereinafter *Hopu and Bessert v. France*). The circumstances were that France had authorised the construction of a touristy resort in a sacred territory of the community that had previously been dispossessed. The Committee could not conclude for the violation of Art. 27 ICCPR since France had made a reservation on the application of this article to its territory.

³⁶ *Poma Poma case*, para. 5.2.

³⁷ The same argument was used by the Committee in *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997 (6 September 2000), UN Doc. CCPR/C/69/D/760/1997 (hereinafter *Diergaardt case*). In para. 10.3, the Committee stated that Art. 1 ICCPR can be relevant in the interpretation of other articles, such as Art. 25, 26 and 27. In this case, however, the Committee found no violation of Art. 27 following from the expropriation of the community’s land. The Committee concluded, indeed, that the authors had failed to demonstrate that the immemorial relationship with their land had contributed to the formation of a different culture.

³⁸ See *Kitok v. Sweden*, para. 6.3; *Lubicon case*, para. 13.3; *Diergaardt case*, para. 10.3; *Apirana Mabuika case*, para. 7.6. See also, General Comment 23, para 3.1: “The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not

Committee found a violation of Article 27, in that the development activities conducted by the State, although legitimate, were substantially interfering with Article 27.³⁹ The admissibility of such interference was further tested by the Committee with reference to the implementation of measures that ensure effective participation in the form of free, prior and informed consent.⁴⁰ In addition, the community must be able to continue to benefit from the traditional activities that are affected by States' actions. The interference must also be proportional in order not to compromise the survival of the people concerned.⁴¹ Further criteria assessed by the Committee were the lack of both impact assessment studies and measures to minimise the negative effects of water diversion.⁴²

2.1.2. *The Committee on the Elimination on Racial Discrimination*

The CERD, although not having a specific mandate on indigenous rights, has been proactive in their defence. In General Recommendation No. 23 on the rights of indigenous peoples, the CERD clearly reaffirms that “discrimination against indigenous peoples falls under the scope of the Convention”.⁴³ The CERD has also adopted a number of decisions on indigenous peoples under its early warning procedure, whereby it can adopt urgent reports to “prevent a serious, massive or persistent pattern of racial discrimination”,⁴⁴ including the “[e]ncroachment on the traditional lands of indigenous peoples or forced removal of these peoples from their lands, in particular for the purpose of exploitation of natural resources”.⁴⁵

a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.”

³⁹ *Poma Poma* case, paras. 7.4 and 7.5: the diversion has caused the lama-raising activity to become unsustainable and it forced the community to abandon its land and their traditional activity.

⁴⁰ On free, prior and informed consent, see Chapter 2, section 3.5.

⁴¹ *Poma Poma* case, para. 7.6.

⁴² *Poma Poma* case, para 7.7. The requirement of an impact assessment is in line with the right of communities to have access to information concerning decisions that might affected them, protected under Art. 27 ICCPR. See General Comment No. 34 (Art. 19): Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (12 September 2011) (hereinafter General Comment 34). In para. 18, the Committee acknowledges that the right to have access to information finds resonance in other provisions of the Covenant. “Under article 27, a State party’s decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.”

⁴³ CERD, General Recommendation No. 23 on the rights of indigenous peoples, UN Doc. A/52/18 (18 August 1997), Annex V (hereinafter General Recommendation 23). The CERD identifies a causal link between deprivation of land and loss of culture (para. 3). In this sense, the CERD calls upon States to return lands and territories that indigenous peoples have been deprived of.

⁴⁴ CERD, Working Paper on the Prevention of Racial Discrimination, Including Early Warning and Urgent Procedures, UN Doc. A/48/18 (15 September 1993), Annex III, para. 10(h). See Fodella 2013, at 351-352. The decisions taken under the early warning procedure can be adopted on the initiative of the CERD itself, of CERD members, or after the procedure is triggered by individuals and groups, thus mirroring the monitoring procedure of other human rights treaty bodies. On this last point, see S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers 2009), at 199.

⁴⁵ CERD, Guidelines for the Early Warning and Urgent Action Procedures, UN Doc. A/62/18 (August 2007), Annex III, para. 12(h).

Chapter 1

In the series of decisions adopted on Suriname,⁴⁶ the CERD specifically highlighted the environmental and health consequences of logging and mining projects initiated without the consultation of indigenous peoples and in spite of their land rights. The Committee explicitly concluded that Suriname should seek to reach an agreement with its indigenous peoples before granting any concessions.⁴⁷ Furthermore, in the decisions regarding the situation of the Western Shoshone people, the United States was called to acknowledge the disruptive effects of measures threatening the environment on the enjoyment of cultural and health rights of the community.⁴⁸ Environmental impacts were identified, in particular, as a consequence of indigenous land privatisation in favour of extractive industries, logging companies, waste storage activities, and nuclear testing initiatives.⁴⁹ The Committee recognised that participation of indigenous peoples in the decisions affecting areas that have cultural and spiritual significance for them is instrumental for the enjoyment of substantive rights.⁵⁰

Finally, recommendations and observations on countries' report when it comes to indigenous rights have reiterated the importance of land rights, cultural practices linked to the use of natural resources, access to justice, environmental impact assessment, and participatory rights in the form of informed consent.⁵¹

⁴⁶ CERD, Decision on Suriname 3 (62), UN Doc. CERD/C/62/Dec/3 (3 June 2003), para. 3; Decision on Suriname 1 (69), UN Doc. CERD/C/DEC/SUR/5 (18 August 2006), paras. 1-2. These decisions stand out inter alia because they concern Maroon tribes on which the Inter-American Court on Human Rights will adopt an unprecedented judgment some years later. See *Saramaka* case, in section 2.2.1 of this chapter. In line with the decisions of Suriname, see also CERD, Decision on New Zealand Foreshore and Seabed Act 2004 1 (66), UN Doc. CERD/C/DEC/NZL/1 (25 April 2005), para. 6, where the Committee criticises, in particular, the discriminatory effects on Maori of the extinguishment of their customary titles over the foreshore and the seabed.

⁴⁷ CERD, Decision on Suriname 1 (67), UN Doc. CERD/C/DEC/SUR/2 (18 August 2005), para. 4.

⁴⁸ See Lorie M. Graham and Nicole Friederichs, 'Indigenous Peoples, Human Rights, and the Environment' [2012] Suffolk University Law School, Legal Studies Research Paper Series, Research Paper 12-01 available at <http://ssrn.com/abstract=1979745>, at 10-12. On the opposition of the US to the conclusions adopted by the CERD, see Introduction, note 86.

⁴⁹ CERD, Decision on United States of America 1 (68), UN Doc. CERD/C/USA/DEC/1 (11 April 2006) (hereinafter Decision 1 (68)), paras. 7, 8, and 10. The CERD also directly referred to the report, adopted by the Inter-American Commission on Human Rights, in the *Mary and Carrie Dann v. United States*, Merits, Case 11,140, Report No. 75/02 (27 December 2002) (hereinafter *Dann* case) (para. 6). On the *Dann* case, see *infra* section 2.2.1 in this chapter.

⁵⁰ CERD, Concluding observations on United States of America, UN Doc. CERD/C/USA/CO/6 (8 May 2008), para. 29. At para. 19, the CERD further reiterates its Decision 1 (68).

⁵¹ CERD Report, UN Doc. A/49/18 (19 September 1994), paras. 187, 192, 200, and 245. Concluding observations on Australia, UN Doc. CERD/C/304/Add.101 (19 April 2000), paras. 8-9. Concluding observations on United States of America, UN Doc. A/56/18 (13 August 2001), para. 400. Concluding observations on Suriname, UN Doc. CERD/C/64/CO/9 (28 April 2004), para 15. Concluding observations on Guyana, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), paras. 15-17. Concluding observations on India, UN Doc. CERD/C/IND/CO/19 (5 May 2007), para. 19. Concluding observations on Canada, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), paras. 17, 21, and 22. Concluding observations on Sweden, UN Doc. CERD/C/SWE/CO/18 (21 August 2008), paras. 19-21. Concluding observations on Philippines, UN Doc. CERD/C/PHL/CO/20 (28 August 2009), paras. 22-25. Concluding observations on Chile, UN Doc. CERD/C/CHL/CO/15-18 (7 September 2009), paras. 16, 20, 21, and 22. In this last paragraph, concerning the activities that are harmful to the environment, the Committee "recommends

2.1.3. *The Committee on Economic, Social and Cultural Rights*

Land and resource rights, as well as consultation with indigenous peoples and their free, prior and informed consent have also been considered as fundamental elements in the relationship between indigenous peoples and the environment in the monitoring activities of the CESCR. These requirements have emerged especially in the concluding observations that the CESCR has adopted for the last ten years.⁵²

The main rights identified in the ICESCR as an operational framework for the protection of indigenous claims are the right to culture under Article 15 and the right to an adequate standard of living under Article 11, which includes the right to food and the right to adequate housing.⁵³ The relationship between culture and living standards is recognised in General Comment No. 21 on Article 15, where the CESCR also emphasised the interplay between those rights and the right to self-determination protected under Article 1.⁵⁴

In this sense, the right to culture is multifaceted since it might include methods of production, food, the economic and social life of groups, and a way of life associated with land, resources and biodiversity.⁵⁵ The CESCR has also recognised the collective nature of indigenous cultural rights. In short, in the view of the CESCR, culture is something tangible, which may be associated with natural resources and with the ownership of a territory on the part of a community.⁵⁶ In this sense, States are invited to protect indigenous rights to

that scientific assessments should be carried out regularly”. Concluding observations on Argentina, UN Doc. CERD/C/ARG/CO/19-20 (29 March 2010), paras. 20-23. To my knowledge there are no individual or group complaints submitted under Art. 14 of the Convention related to indigenous rights to land and natural resources.

⁵² Some previous examples of this approach can be detected already in the Report on the Sixteenth and Seventeenth Sessions, UN Doc. CESCR/E/1998/22 (1997), paras. 100 and 116 (Russian Federation), 140, 156, and 159 (Peru); Report on the Twentieth and Twenty-First Sessions, UN Doc. CESCR/E/2000/22 (1999), paras. 252 (Argentina), 337 (Cameroon), and 387 (Mexico); Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions, UN Doc. CESCR/E/2002/22 (2001), paras. 121, 130, 132, and 151 (Honduras), 450 and 466 (Panama), 761 (Colombia); Report on the Thirtieth and Thirty-First Sessions, UN Doc. CESCR/E/2004/22 (2003), paras. 142, 143, 165, and 166 (Brazil), 403, 416, and 421 (Guatemala), 453 (Russian Federation). It is important to highlight that, until recently, the ICESCR did not have a mechanism of communications to review alleged violations of rights committed by States. With the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (New York, 10 December 2008, in force 5 May 2013), this mechanism has been put in place. The main novelty is that communications can also be submitted by groups.

⁵³ General Comment No. 12: The Right to Adequate Food (Art. 11), UN Doc. CESCR/E/2000/22 (12 May 1999), Annex V, para. 13(b); General Comment No. 7: The Right to Adequate Housing (Art.11(1)), UN Doc. CESCR/E/1998/22 (20 May 1997), Annex IV, para. 11.

⁵⁴ General Comment No. 21: The Right of Everyone to Take Part in Cultural Life (Art. 15(1)(a)), UN Doc. E/C.12/GC/21 (21 December 2009) (hereinafter General Comment 21), para. 2. Concluding observations on Russian Federation, UN Doc. E/C.12/1/Add.94 (12 December 2003), paras. 11 and 39.

⁵⁵ General Comment 21, para. 3: the right to culture is linked to “the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge” and paras. 7, 9, 13, 15(b), and 36. See also, Concluding observations on Norway, UN Doc. E/C.12/NOR/CO/5 (13 December 2013), para. 26.

⁵⁶ General Comment 21, para. 16(a). Appropriateness and acceptability of measures to ensure the protection of the right to culture also implies a special understanding of cultural manifestations for communities.

land and natural resources,⁵⁷ as well as the manifestation of their cultural diversity, which is expressed by the use of traditional knowledge.

Restrictions are admissible if necessary, proportional, and, in a language that mimics the denial test adopted by the Human Rights Committee, compatible with the nature of the rights protected.⁵⁸ In addition, States should respect the free, prior and informed consent of indigenous communities or at least ensure consultation with them with a view to obtaining consent.⁵⁹ In particular, consent is needed when extractive projects are to take place in indigenous territories, given *inter alia* the environmental effects of those projects.⁶⁰

⁵⁷ General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (11 August 2000), para. 27. General Comment No. 15: The Right to Water (Art. 11 and 12) (20 January 2003), UN Doc. E/C.12/2002/11, para. 7. Concluding observations on Brazil, UN Doc. E/C.12/1/Add.87 (26 June 2003), paras. 35-36 and 58-59. Concluding observations on Chile, UN Doc. E/C.12/1/Add.105 (1 December 2004), paras. 13 and 33-34. Concluding observations on Ecuador, UN Doc. E/C.12/1/Add.100 (7 June 2004), paras. 28 and 53. Concluding observations on Norway, UN Doc. E/C.12/1/Add.109 (23 June 2005), para. 26. Concluding observations on Paraguay, UN Doc. E/C.12/PRY/CO/3 (4 January 2008), paras. 23(b), 28, and 29. Concluding observations on Sweden, UN Doc. E/C.12/SWE/CO/5 (1 December 2008), para. 15. Concluding observations on Australia, UN Doc. E/C.12/AUS/CO/4 (12 June 2009), para. 32. Concluding observations on Brazil, UN Doc. E/C.12/BRA/CO/2 (12 June 2009), para. 9. Concluding observations on Argentina, UN Doc. E/C.12/ARG/CO/3 (14 December 2011), para. 8. Concluding observations on Russia, UN Doc. E/C.12/RUS/CO/5 (1 June 2011), paras. 7 and 34. Concluding observations on Cameroon, UN Doc. E/C.12/CMR/CO/2-3 (23 January 2012), paras. 24 and 33.

⁵⁸ General Comment 21, para. 16(c) and (e). Limitations to the right to culture are admissible, as stated in para. 19, as long as they are necessary for the protection of general welfare, have a legitimate aim, are compatible with the nature of the right, and are proportional. See also Concluding observations on Paraguay, UN Doc. E/C.12/PRY/CO/3 (4 January 2008), para. 34.

⁵⁹ General Comment 21, paras. 36-37, 50(c), 55(e). In identifying the rights of indigenous peoples, the CESCR refers to the ILO Convention 169 and to the UN Declaration on indigenous rights. Concluding observations on Colombia, UN Doc. E/C.12/1/Add.74 (6 December 2001), para. 33. Concluding observations on Brazil, UN Doc. E/C.12/1/Add.87 (26 June 2003), para. 58. Concluding observations on Mexico, UN Doc. E/C.12/MEX/CO/4 (9 June 2006), para. 28. Concluding observations on Mexico, UN Doc. E/C.12/MEX/CO/4 (9 June 2006), para. 10, where the CESCR expresses its concern *inter alia* for the environmental effects of a dam project on indigenous rights. Concluding observations on Bolivia, UN Doc. E/C.12/BOL/CO/2 (8 August 2008), paras. 23 and 36. Concluding observations on Finland, E/C.12/FIN/CO/5 (16 January 2008), paras. 11 and 20. Concluding observations on Nicaragua, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 11: the CESCR only recommends to consult with indigenous peoples before granting concessions. Concluding observations on Russia, UN Doc. E/C.12/RUS/CO/5 (1 June 2011), para. 7: free, prior and informed consent is requested for any granting of licences on the territories traditionally occupied by indigenous peoples. Concluding observations on New Zealand, UN Doc. E/C.12/NZL/CO/3 (31 May 2012), para. 11: free, prior and informed consent is to be obtained any time a decision is liable to affect the use of indigenous lands and resources. Concluding observations on Peru, UN Doc. E/C.12/PER/CO/2-4 (30 May 2012), para. 23. Concluding observations on Gabon, UN Doc. E/C.12/GAB/CO/1 (27 December 2013), para. 6: free, prior and informed consent is watered down to a principle of prior consultation.

⁶⁰ Concluding observations on Ecuador, UN Doc. E/C.12/1/Add.100 (7 June 2004), paras. 12 and 35. Concluding observations on Colombia, UN Doc. E/C.12/COL/CO/5 (7 June 2010), para. 9. Concluding observations on Argentina, UN Doc. E/C.12/ARG/CO/3 (14 December 2011), para. 9. Concluding observations on Ecuador, UN Doc. E/C.12/ECU/CO/3 (13 December 2012), para. 9: the Committee refers to the Sarayaku decision of the Inter-American Court of Human Rights (see *infra*). Concluding observations on Indonesia, UN Doc. E/C.12/IDN/CO/1 (19 June 2014), paras. 28-29. It is important to highlight that the right to express consent does not arise automatically any time extractive projects are to take place. Consultation, “with a view to ensuring that these activities do not deprive the indigenous peoples of the full enjoyment of their rights to their ancestral lands and natural resources”, may be a sufficient

In this sense, mining activities are deemed to endanger the enjoyment of indigenous rights to land and natural resources due to the disrupting impact of extractive industries on the environment.⁶¹ In any event, both consultation and free, prior and informed consent are instrumental for preserving the substance of indigenous rights.⁶²

The CESCR has also taken into account the environmental aspects of indigenous rights when development projects concerning the exploitation of natural resources negatively affect either the quality and diversity of natural resources or access to land.⁶³ Importantly, the CESCR has recognised that even national measures aimed to protect nature, such as the establishment of natural reserves, may produce disrupting consequences in terms of access to land for indigenous peoples.⁶⁴

2.1.4. *The ILO monitoring system*

The ILO Convention 169 is the only binding instrument specifically dedicated to the rights of indigenous peoples.⁶⁵ Therefore, the analysis of its monitoring system may help to further clarify the relationship between indigenous rights and the environment.

The ILO Convention 169 is subject, as any other ILO treaties, to a mechanism of ordinary monitoring of its implementation, whereby State Parties prepare periodical reports that are examined by the Committee of Experts.⁶⁶ In addition to that, Article 24 of the ILO

measure. See Concluding observations on Cambodia, UN Doc. E/C.12/KHM/CO/1 (12 June 2009), para. 16. Concluding observations on Chad, UN Doc. E/C.12/TCD/CO/3 (16 December 2009), para. 13. See also Concluding observations on Cameroon, UN Doc. E/C.12/CMR/CO/2-3 (23 January 2012), para. 10: the CESCR refers to the right of indigenous peoples to be involved in projects that affect them. The spectrum of participatory rights and the circumstances requiring consultation and free, prior and informed consent are examined in detail in Chapter 2, section 3.5.

⁶¹ A conflict of laws may arise when extractive activities are promoted by legislative measures that are in contrast with parallel legislative measures protecting indigenous rights. See Concluding observations on Philippines, UN Doc. E/C.12/PHL/CO/4 (1 December 2008), para. 16.

⁶² See Concluding observations on Cambodia 2009 *supra*, para. 16.

⁶³ See Concluding observations on Colombia, UN Doc. E/C.12/1/Add.74 (6 December 2001), para. 12. Concluding observations on Paraguay, UN Doc. E/C.12/PRY/CO/3 (4 January 2008), paras. 16 and 27. Concluding observations on Cambodia, UN Doc. E/C.12/KHM/CO/1 (12 June 2009), paras. 15 and 16. Concluding observations on Chad, UN Doc. E/C.12/TCD/CO/3 (16 December 2009), para. 35. Concluding observations on Democratic Republic of the Congo, UN Doc. E/C.12/COD/CO/4 (16 December 2009), para. 14. Concluding observations on Madagascar, UN Doc. E/C.12/MDG/CO/2 (16 December 2009), para. 33. Concluding observations on Argentina, UN Doc. E/C.12/ARG/CO/3 (14 December 2011), para. 10. Concluding observations on Ethiopia, UN Doc. E/C.12/ETH/CO/1-3 (31 May 2012), para. 24. Concluding observations on Djibouti, UN Doc. E/C.12/DJI/CO/1-2 (30 December 2013), para. 29.

⁶⁴ Concluding observations on Sri Lanka, UN Doc. E/C.12/LKA/CO/2-4 (9 December 2010), para. 11. A more recent trend is the acknowledgment of the negative impacts of climate change on indigenous rights, including the right to food and the right to water. See Concluding observations on Australia, UN Doc. E/C.12/AUS/CO/4 (12 June 2009), para. 27.

⁶⁵ On the origins of this treaty within the ILO system, see ILO, *Indigenous and Tribal Peoples Rights in Practice: A Guide to ILO Convention No. 169* (ILO 2009) at 174 ff. and Rodríguez-Piñero 2005 at 291-331. On the significance of ILO Convention 107, see Introduction, section 3.1.

⁶⁶ Committee of Experts on the Application of Conventions and Recommendations.

Constitution provides for a special mechanism of complaint that is called “representation”.⁶⁷ Through this mechanism, association of workers or employers may submit a complaint alleging the violation of treaty provisions by State Parties that is examined by a Tripartite Committee upon decision of the ILO Governing Body.⁶⁸

The representation procedure was activated several times since the end of the 1990s with regard to the ILO Convention 169.⁶⁹ What has emerged from the reports adopted by the Governing Body is an emphasis on the establishment of mechanisms for the consultation of indigenous peoples any time a development project can impact on their rights. However, this general statement has two caveats. First, consultation is in some cases only formal, meaning that the mere existence of a consultation process is found to meet the requirements on participation that are included in Article 6, even when an inquiry on the effectiveness of consultation processes is not carried out.⁷⁰ The acknowledgement of the existence of a consultation process is a modest undertaking considering that Article 6(2) stipulates that “[t]he 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”.

Second, there is often a mismatch between the innovative force of the provisions contained in the ILO Convention 169 on land and resources and the comments adopted by the Committee of experts,⁷¹ on the one hand, and the mild review of those rights undertaken under the representation procedure, on the other hand. For instance, in a report adopted on

⁶⁷ On the importance of the development of general international law for the monitoring process in the ILO, see ILO, *Monitoring Indigenous and Tribal Peoples' Rights through ILO Conventions: A Compilation of ILO Supervisory Bodies' Comments 2009-2010* (ILO 2010), at 8. Notwithstanding this, the representation procedure presents significant differences compared to the complaint procedures related to other international human rights bodies. First, the ILO procedure does not require the exhaustion of internal remedies. Second, when a representation is made, the Governing Body following the State's allegations may decide whether or not to defer the issue to the Tripartite Body. Third, although individuals and groups other than employers' and workers' associations cannot initiate the procedure, the complainants are not expected to demonstrate a link with the alleged violation. This flexibility, however, is compounded by the abstention in the recommendations eventually adopted by the Governing Body of any concrete solution to the case at hand. See Luis Rodríguez-Piñero, 'Historical Anomalies, Contemporary Consequences: international Supervision of the ILO-Convention on Indigenous and Tribal Peoples (No. 169)' (2005) 12 *Law & Anthropology* 55, at 61, 82-83.

⁶⁸ It is important to highlight that this mechanism does not allow indigenous peoples to present their complaints directly. This runs counter the logic of empowerment that is present in the ILO Convention 169.

⁶⁹ See Fergus MacKay, *A Guide to Indigenous Peoples' Rights in the International Labour Organization* (Forest Peoples Programme 2002), at 26 ff.

⁷⁰ See Rodríguez-Piñero 2005, at 89; Federica Cittadino, 'The Public Interest to Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' in Eva Lohse and Margherita Poto (eds), *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: A Comparative Perspective* (Ducker&Humblot 2015). See also, section 3.5 in Chapter 2.

⁷¹ For a brief overview of these comments concerning land rights, see Mauro Barelli and others, *Minority Groups and Litigation: A Review of Developments in International and Regional Jurisprudence* (Minority Rights Group International 2011), at 33-35. See also Tanja Joona, 'International Norms and Domestic Practices in Regard to ILO Convention No. 169 - With Special Reference to Articles 1 and 13-19' (2010) 12 *International Community Law Review* 213, at 245-258.

Mexico in 1998 concerning the problem of land restitution to indigenous peoples in case private third farmers hold land titles, the Committee concluded that it was not competent to review the adequateness of restitution procedures that are already in place.⁷² In partial mitigation of this, the Committee indicated consultation as a central requirement when a government is to decide on the procedures to adjudicate land.⁷³

More specifically on the relationship between indigenous peoples and the environment, consultation is the recurrent procedural element which is identified by the ILO Committee as a means to balance national development initiatives with indigenous rights. In this respect, the main problem lies in the fact that national projects for the exploitation of natural resources that are conducive to economic development may encroach on indigenous rights. As established by the Committee, timber and mineral resources are often located in the territories that belong to or are traditionally occupied by indigenous peoples.⁷⁴ Furthermore, the exploration and exploitation of these resources has been found to produce direct negative effects on indigenous lands,⁷⁵ which may be aggravated by the environmental degradation resulting frequently from these development projects.⁷⁶ In this context, consultation is a

⁷² Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE) (1998), para. 41.

⁷³ Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP) (1998), para. 31. In para. 30, the Committee clarified that it is not competent to affirm the primacy of collective land arrangements for indigenous peoples. See also Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuteqartut Kattuffiat-SIK) (SIK) (2001), paras. 33 and 40, where the Committee affirms that since the complainants cannot be distinguished from the main indigenous population of Greenlanders, the failure to consult with that specific tribe does not violate the ILO Convention 169.

⁷⁴ Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB) (1999), para. 10. Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) (2001), para. 10. The notion of traditional occupation of indigenous territories is crucial to the definition of the right to land under the ILO Convention 169. On this, see Geir Ulfstein, 'Indigenous Peoples' Right to Land' (2004) 8 Max Planck Yearbook of United Nations Law 1, at 18-19.

⁷⁵ Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) (2001), paras. 28 ff. on the issuing of a petroleum exploration licence. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association (2001), para. 15: the construction of a hydroelectric dam and the consequent deviation of the river Sinù altered the indigenous peoples' livelihood since it affected the population's ability to fish and their traditional relation with the river.

⁷⁶ Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution

means to ensure that indigenous voices are taken into account and are integrated in the process of land and resource adjudication.

The main features of consultation and participation are those identified in Articles 6 and 7 of the ILO Convention 169, in combination with Article 15 when natural resources are concerned. The first requirement is to put in place a regulatory framework which provides adequate means of consultation that are both culturally appropriate⁷⁷ and conducive to reaching agreement or consensus.⁷⁸ Although consent is not a requirement per se, as recalled by the Committee in the totality of its reports, consultation must strive to bring about an agreed solution. This integrates the second requirement for consultation. Good faith is the third requirement, which implies inter alia that consultation should be carried out from the very early stage of project conceptualisation before any project impacting on indigenous peoples is commenced.⁷⁹

In addition, consultation is tightly bound to participation under Article 7, which is used by the Committee to call for the implementation of impact studies to assess the social, cultural, and environmental impacts of development projects.⁸⁰ These studies must

by the Radical Trade Union of Metal and Associated Workers (1999), para. 9: the case concerned the construction of a hydroelectric dam which would flood areas inhabited by indigenous peoples. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), para. 13: the impact on indigenous rights derived from the construction of a highway. Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Metal, Steel, Iron and Allied Workers (STIMAHCS) (2006), para. 14. In para. 36, the Committee recalls article 7(3) [sic 7(4)] according to which "[g]overnments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit". Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC) (2007), para. 13. Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), paras. 12 and 17.

⁷⁷ This means inter alia that consultation is to be conducted with the community's representatives. See Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), paras. 43-44.

⁷⁸ Representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by nine workers' organizations (2004), para. 89.

⁷⁹ Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers, para. 41. Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 38.

⁸⁰ Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB), paras. 38-39. Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City

be undertaken with the collaboration of the indigenous peoples concerned. Moreover, they should be the basis for compensation when indigenous lands or practices are affected.⁸¹ Furthermore, as far as natural resources are involved, consultation within the meaning of Article 15 is the central element even when States retain property over subsoil resources.⁸² Finally, the Committee has recommended the implementation of measures that ensure the participation of indigenous peoples in the benefits deriving from development activities carried out on their territories.⁸³

Although these requirements are clearly affirmed in the Committee's reports, ambiguities remain as for the ascertainment of the violation of those standards. While in some cases the lack of sufficient information by the government on the respect of consultation requirements may result in a declaration of the violation of the ILO Convention 169, in some other cases insufficient or contradictory information provided by the parties make the Committee refrain from finding any violation.⁸⁴ At the same time, while in some cases the Committee goes so far as to affirm that consultation and participation must be effective,⁸⁵

Workers (FTCC), para. 51: the conduct of impact studies should not replace consultation.

⁸¹ Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers, para. 40.

⁸² Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), para. 48.

⁸³ Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB), para. 40. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), para. 91.

⁸⁴ Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers, para. 43. Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Metal, Steel, Iron and Allied Workers (STIMAHCS), paras. 41 ff. Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), para. 33.

⁸⁵ Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), para. 90. In Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 40: the Committee affirms that consultation is instrumental for the right of indigenous peoples to decide their developmental priorities. Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), paras. 42-44: although the Committee requires effective consultation and participation, it concludes that the lack of provisions on the need to perform impact studies does not breach the standards on consultation.

in some other cases it limits itself to assess whether a consultation process is in place.⁸⁶ Notwithstanding ambiguities, the requirement of consultation remains central to the ILO regime and has been enriched by other procedural requirements, such as the performance of impact assessments.

2.2. The regional mechanisms of human rights protection

2.2.1. *The Inter-American system*

The Inter-American system of human rights protection is centred on the monitoring and adjudicatory role of the Inter-American Commission and the Inter-American Court of Human Rights. The former may receive individual or group complaints alleging the violation of the rights contained in the American Declaration of the Rights and Duties of Men.⁸⁷ The latter's jurisdictional role is activated on the initiative of the Commission and examines the alleged violations of the American Convention on Human Rights.⁸⁸ Together these bodies have contributed enormously both to the regional and the global protection of indigenous rights. Their decisions have crystallised a number of rights, including the right to land and natural resources, drawing from both hard and soft law instruments.⁸⁹

What is peculiar about the conclusions reached within the Inter-American system is that a system of indigenous collective rights is derived from the catalogues of individual rights contained in the Declaration and in the Convention.⁹⁰ The general techniques of contextual and systemic interpretation have been (consciously) used to expand the scope of existing rights,⁹¹ in line with the precept that "human rights treaties are live instruments

⁸⁶ Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, paras. 59-61. See also, Representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by nine workers' organizations, para. 106, where the Committee concludes that although more consultations would have been appropriate, they were not necessary to fulfil the ILO Convention's requirements. Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Education Workers Union of Río Negro (UNTER), local section affiliated to the Confederation of Education Workers of Argentina (CTERA) (2008), paras. 68-69.

⁸⁷ American Declaration of the Rights and Duties of Men, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948 (hereinafter American Declaration).

⁸⁸ American Convention on Human Rights (San Jose, 22 November 1969, in force 18 July 1978). On issues of jurisdiction, see Jo M. Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 Human Rights Law Review 281, at 282-283. On the functioning of both the Commission and the Court, see also Jorge Daniel Taillant, 'Environmental Advocacy and the Inter-American Human Rights System' in Romina Picolotti and Jorge Daniel Taillant (eds), *Linking Human Rights and the Environment* (University of Arizona Press 2003), at 126-144.

⁸⁹ See Chapter 2, section 3.

⁹⁰ Isabel Madariaga Cuneo, 'The Rights of Indigenous Peoples and the Inter-American Human Rights System' (2005) 22 Arizona Journal of International and Comparative Law 53, at 54.

⁹¹ On the relevance of contextual and systemic interpretation to the Inter-American system of human rights, see Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at

whose interpretation must adapt to the evolution of the times”.⁹²

As for the environmental dimension of indigenous rights, this has to be found once again in the interplay between the rights of indigenous peoples and the projects implemented at the national level that may affect both indigenous livelihood and the environment in which they live.⁹³ The central elements of this relationship are the right to land and natural resources, as well as the procedural and substantive limits that are identified within the Inter-American system to the restriction of those rights.⁹⁴

While the *Yanomami* case did not discuss the relevance of the right to property to the allegation that a mining project in the territory of Yanomami was violating the Declaration,⁹⁵ the decision of the Inter-American Court in the *Awás Tingni* case has established for the

the Service of the Unity of International Law’ (2010) 21 European Journal of International Law 585, at 597-598. According to this author, article 29(b) of the American Convention is used to incorporate national and international standards in the interpretation of the rights protected by the regional instrument. See also, *Dann* case, paras. 124-125, where the Inter-American Commission argues that the American Declaration should be interpreted in light of the “broader corpus of international law”. This interpretative technique has been also used in the *Yanomami v. Brazil*, Merits, Case 76/15, Resolution No. 12/85 (5 March 1985) (hereinafter *Yanomami* case), paras. 3, 5 and 7 of the Commission’s decision; in *Maya Indigenous Communities of the Toledo District v. Belize*, Merits, Case 12,053; Report No. 40/04 (12 October 2004) (hereinafter *Maya v. Belize*), paras. 87, 95, and 97; in *Saramaka* case, paras. 92-94; in *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Case No. 12,465 (27 June 2012) (hereinafter *Sarayaku* case), para. 161. The argument is also teleological, since the Inter-American Commission also refers to the purpose of the American Declaration. See *Dann* case, para. 131.

⁹² See *Awás Tingni* case, para. 146. See also *Case of Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Series C No. 125 (17 June 2005) (hereinafter *Yakye Axa* case), paras. 125-126. The reference to the possibility to adapt the catalogue of fundamental rights to present times is in line with the ECtHR’s doctrine that portrays the ECHR as a living instrument. See S. James Anaya and Claudio Grossman, ‘The Case of Awás Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples’ (2002) 19 Arizona Journal of International and Comparative Law 1, at 12. See also, Pasqualucci 2006, at 285; Cuneo 2005, at 56. The system of collective rights influences the regional protection of indigenous rights in Africa, see *infra* section 2.2.2 in this chapter.

⁹³ It is important to highlight that, similarly to the environment-related case law before the ECtHR, petitioners must have a direct interest in pursuing their claim. In line with this, the Inter-American Commission has rejected the Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005), since it regarded the effects of climate change and related inaction of the State with regard to the rights of indigenous peoples. See Dinah Shelton, ‘Human Rights and Climate Change’ (2009) 09-002 Buffet Center for International and Comparative Studies - Working Paper Series 1, at 16-19; Sheila Watt-Cloutier, ‘Global Warming and Human Rights’ [2013] available at <http://ieenvironment.org/wp-content/uploads/2013/05/CIEL-and-Earthjustice.pdf>, available at <http://ieenvironment.org/wp-content/uploads/2013/05/CIEL-and-Earthjustice.pdf> (last accessed October 2016). The petition is available at: http://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf (last accessed October 2016).

⁹⁴ See Chapter 2, section 3.

⁹⁵ *Yanomami* case. The Commission did not discuss the right to property invoked by the petitioners, as highlighted by Efrén C. Olivares Alanís, ‘Indigenous Peoples’ Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights’ (2013) 5 Goettingen Journal of International Law 187, at 195. The Commission, however, found a violation of the right to life under Art. I of the American Declaration. See Heinämäki 2012, at 449. Further elements of interest in this case are the following points. Brazilian national law protects indigenous rights to property at constitutional level. Moreover, a national law creates an obligation to demarcate indigenous lands, while establishing that the right to permanent possession shall not depend on demarcation. In reaching its decision, the Commission considered those elements in conjunction with Art. 27 ICCPR.

first time the centrality of indigenous land rights. In this case, failure to demarcate the land and to ensure the respect for indigenous property was aggravated by the granting of logging licences without the consent of the community.⁹⁶ The Court found inter alia a violation on the part of Nicaragua of Article 21, which protects the right to property and, by means of the evolutionary interpretation of the content of this right, also safeguards the “communal form of collective property” that is practiced by indigenous peoples.⁹⁷ This form of property includes the resources traditionally used by the communities. Furthermore, property goes beyond the concept of material possession, since it encompasses the centrality of land for the physical, cultural, and spiritual survival of indigenous peoples so that land becomes key to cultural integrity and to the very existence of indigenous peoples as separated communities.⁹⁸ Therefore, any action threatening the environment and thus affecting indigenous lands and resources may pose a significant risk for the cultural integrity of indigenous peoples.⁹⁹

The violation of Article 21 in the *Awes Tingni* case was also ascertained by considering the impact that logging licences would have on the rights of indigenous peoples to enjoy their resources. The granting of licences for the exploitation of natural resources was considered, together with the failure to demarcate, as violating the right to property protected under the American Convention on Human Rights.¹⁰⁰ In this sense, the Court found that Nicaragua should abstain from engaging in any activities aimed at the exploitation of natural resources until traditional land would be demarcated.¹⁰¹ The main goal here was to prevent the State

⁹⁶ For background information on the case, see S. James Anaya, ‘The Awes Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua’ (1996-1997) 9 *St Thomas Law Review* 157. See also, S. James Anaya, ‘The Mayagna Indigenous Community of Awes Tingni and its Effort to Gain Recognition of Traditional Lands. The Community’s Case before the Human Rights Institutions of the Organization of American States’ in Romina Picolotti and Jorge Daniel Taillant (eds), *Linking Human Rights and the Environment* (University of Arizona Press 2003).

⁹⁷ *Awes Tingni* case, para. 149. On the evolutionary interpretation of Art. 21 of the American Convention on Human Rights in this case, see Mauricio Iván del Toro Huerta, ‘El derecho de propiedad colectiva de los miembros de comunidades y pueblos indígenas en la jurisprudencia de la Corte Interamericana de Derechos Humanos’ (2010) 10 *Anuario mexicano de derecho internacional* 49, at 60.

⁹⁸ See *Maya v. Belize*, paras. 120 and 154-156; *Yakye Axa* case, paras. 131, 135, and 154. *Case of Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Series C No. 146 (29 March 2006) (hereinafter *Sawhoyamaxa* case), para. 118. *Kuna Indigenous People of Madungandi and Embera Indigenous People of Bayano and Their Members v. Panama*, Merits, Case 12,354, Report No. 125/12 (13 November 2012), para. 208. Although property goes beyond material possession in the sense illustrated above, possession intended as a manifestation of ownership may suffice to determine indigenous property rights. See *Awes Tingni* case, para. 151. This is in line with the legal pluralism embraced by the Inter-American Court, whereby indigenous customary law is integrated in the interpretation of the international human rights of indigenous peoples. A reference to the “customary land tenure system” is also made by the Inter-American Commission in the *Dann* case, para. 45, in the *Maya v. Belize* case *infra* para. 107, 115, 129; by the Inter-American Court in the *Sawhoyamaxa* case, para. 128, in the *Saramaka* case, para. 95. On the sui generis character of indigenous traditional property and its anchoring in the national jurisprudence of some States, see S. James Anaya and R. A. Williams Jr., ‘The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources under the Inter-American Human Rights System’ (2001) 14 *Harvard Human Rights Journal* 33, at 43-48. See also Chapter 2, especially sections 3.1 and 3.3.

⁹⁹ This argument is supported in the *Dann* case, para. 60.

¹⁰⁰ Anaya and Williams Jr. 2001, at 38.

¹⁰¹ *Awes Tingni* case, paras. 153 and 164. It is relevant to note that the titling and demarcation must be

from negatively affecting the enjoyment of indigenous rights, by excluding any activities that might produce any relevant interference, including projects carried out by private actors with the acquiescence of the State. A reference to the environmental aspects of national developmental activities is not explicit but can be derived from the insistence of the Court on the need to preserve the land and resources of the indigenous peoples concerned.¹⁰²

With different nuances the granting of licences for the exploitation of natural resources was found to integrate the violation of Article 21 in a number of other cases. In the *Dann* case, the expropriation of indigenous lands was accompanied by the authorisation of gold prospecting activities, which had produced negative effects on the environment.¹⁰³ In the decision taken by the Commission in the *Maya of the Toledo District v. Belize*, the granting of logging and oil concessions and the resulting environmental damages played a decisive role in the ascertainment of the violation of the right to property.¹⁰⁴ Important elements of this decision were also the granting of precautionary measures to suspend the activities

carried out “in accordance with the customary law, values, customs and mores of the Community” (para. 138). Once again, property is a broader notion than the Western conception of individual property. This is reiterated in para. 144, where the Court gives a definition of property, including “incorporeal elements and any other intangible object capable of having value”, and in para. 151, which emphasises the role of indigenous customary law.

¹⁰² The stewardship role of indigenous peoples towards the preservation of natural resources is highlighted in the Joint Separate Opinion of Judges Cançado Trindade, Pacheco Goetz and Abreu Burelli to the *Awas Tingni* case, para. 9: “Hence the importance of the strengthening of the spiritual and material relationship of the members of the Community with the lands they have occupied, not only to preserve the legacy of past generations, but also to undertake the responsibilities that they have assumed in respect of future generations. Hence, moreover, the necessary prevalence that they attribute to the element of conservation over the simple exploitation of natural resources.”

¹⁰³ According to the petitioners’ allegations, the mining activity had “affected the Dannels’ use of their ancestral lands and has contaminated the ground water” (para. 40). The establishment of land titles by the State was indicated as a way to remedy violation of the right to property (para. 171), as well as the right to equality (para. 143). Furthermore, the Commission stressed the obligation for States to take special measures to remedy past wrongs (para. 125). On the environmental aspects of the *Dann* case, see also Deborah Schaaf and Julie Fishel, ‘*Mary and Carrie Dann v. United States* at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment’ (2002) 16 *Tulane Environmental Law Journal* 175.

¹⁰⁴ *Maya v. Belize*, para. 2, the petitioners argued that “the State’s contraventions have impacted negatively on the natural environment”. In line with the *Awas Tingni* case, the Commission further recommended that the State should “abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area occupied and used by the Maya people until their territory is properly delimited, demarcated and titled” (para. 6). At para. 136, the Commission added: “the Commission considers that the right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the State, affect the existence, value, use or enjoyment of that property without due consideration of and informed consultations with those having rights in the property. In this regard, other human rights bodies have found the issuance by states of natural resource concessions to third parties in respect of the ancestral territory of indigenous people to contravene the rights of those indigenous communities. In the *Awas Tingni* Case, for example”. At para. 148, the Commission went so far as saying that environmental damage had exacerbated the violation of the right to property. See Cuneo 2005, at 58.

that posed a risk to indigenous livelihood,¹⁰⁵ the emphasis on consultation rights,¹⁰⁶ and the unprecedented order to repair the environmental damage caused by the logging and drilling activities.¹⁰⁷ More recently, in the *Garifuna v. Honduras*, the Inter-American Commission went so far as to establish a direct link between development activities and resource exploitation, on the one hand, and the negative impact on indigenous territories and the violation of land rights, on the other hand.¹⁰⁸

A change of paradigm came with the Inter-American judgment in the case of the *Saramaka People v. Suriname*.¹⁰⁹ The case does not alter the well-established link between the granting of licences for the exploitation of natural resources and the violation of indigenous property rights. What is really innovative instead is the identification of the procedural undertakings that the State must perform to lawfully restrict the rights of indigenous peoples to land and natural resources while being in compliance with the Inter-American Convention on Human Rights. The case concerned the granting of gold-mining and logging concessions in the territory of the tribal community of Saramaka without prior consultation. The activities following from these concessions had caused environmental damages, thus impacting on the capacity of the Saramaka people to use their resources.¹¹⁰

Since the right to land implies also a right to use the natural resources that are traditionally employed and necessary for the survival of indigenous peoples,¹¹¹ it is necessary in the view of the Court to verify to what extent restrictions placed on resource rights may amount to a violation of Article 21. This does not mean that those rights are absolute, as previously established in the *Yakye Axa* decision;¹¹² however, there are limits to the possibility of States to restrict them, the respect of which should be evaluated by the judiciary. Those limits are the establishment of any restrictions by law with a view to pursuing a legitimate

¹⁰⁵ As for the granting of precautionary measures, see also the decision of admissibility of the Inter-American Commission in the case *Community of San Mateo de Huancho and its members v. Peru*, Petition 504/03, Admissibility, Report No. 69/04 (15 October 2004), paras. 11-13. The measures had been requested to protect the indigenous community affected by the pollution produced by a field of toxic waste sludge. For a general view on the precautionary measures granted by the Inter-American Commission and the provisional measures ordered by the Inter-American Court, see Olivares Alanís 2013, at 207-208.

¹⁰⁶ *Ibid.*, at 199.

¹⁰⁷ *Maya v. Belize*, para. 3 of the recommendations. At para. 49, the Commission refers to the Ogoni decision by the African Commission on Human and Peoples' Rights, *infra*.

¹⁰⁸ *Garifuna Community of 'Triunfo de la Cruz' and its Members v. Honduras*, Admissibility, Petition 906-03, Report No. 29/06 (14 May 2006).
(hereinafter *Garifuna v. Honduras*), para. 252.

¹⁰⁹ For a comment on the *Saramaka* case, see Lisl Brunner, 'The Rise of Peoples' Rights in the Americas: The *Saramaka People* Decision of the Inter-American Court of Human Rights' (2008) 7 *Chinese Journal of International Law* 699.

¹¹⁰ *Saramaka* case, para. 154.

¹¹¹ *Saramaka* case, para. 122.

¹¹² *Yakye Axa* case, para. 149, according to which the right over natural resources has to do with the survival of indigenous peoples. However, this does not mean that indigenous rights must necessarily prevail over other rights or needs. In any case, the evaluation on the prevalence of indigenous rights over other interests must be performed by the State judiciary. See *Sawhoyamaya* case, para. 136.

interest in a democratic society, as well as the necessity and proportionality of the national measures aiming to restrict indigenous rights.¹¹³

Furthermore, those restrictions should not translate into a denial of indigenous rights, including the adoption of any measures that might impinge on the physical and cultural survival of indigenous peoples.¹¹⁴ Therefore, in order for national development activities not to amount to a denial of indigenous rights, the State must ensure the effective participation of indigenous peoples in any decision-making process that might affect their rights,¹¹⁵ the sharing of the benefits deriving from the development activities, and the performance of impact studies to evaluate the effect of those activities on indigenous livelihood.¹¹⁶ Although the community has not traditionally used subsoil resources, these conditions are to be applied also in the case of mining concessions, since mining may negatively affect the use of traditional resources on the part of the indigenous community concerned.¹¹⁷

In the *Xákmok Kásek* case,¹¹⁸ the community had suffered from progressive displacement and expropriation at the end of the nineteenth century. The complaint before the Inter-American system, therefore, was aimed to recover traditional land. Unlike other decisions, in this case the State of Paraguay further interfered with the property of traditional land, by establishing a private protected nature reserve.¹¹⁹ This allegedly conservationist measure implied a prohibition for the community to live on the protected area or to use the natural resources therein located. In concluding inter alia for the violation of the right to property, the Inter-American Court took into account the lack of participation of the indigenous community affected in the decision of establishing a nature reserve, together with the fact that this establishment constituted an obstacle to the process of land recovery.¹²⁰

The decision in *Sarayaku v. Ecuador* offers new elements for clarifying the relationship between the environment and the rights of indigenous peoples in the Inter-American system.

¹¹³ These conditions were already enunciated in the *Yakye Axa* decision, at the paras. 144-146. Moreover, those limits are usually used by the European Court of Human Rights to assess the legality of the restrictions imposed on individual rights. See CoE 2012, at 51. The main difference lies maybe in the margin of appreciation that is left to public authorities when applying those guarantees within the European system of protection of human rights.

¹¹⁴ *Saramaka* case, paras. 122, 128. See Fodella 2013, at 355; Olivares Alanís 2013, at 204.

¹¹⁵ This implies at least a right of consultation. The obligation for the State to obtain the prior, informed consent of the peoples affected may arise under special circumstances, indicated in paras. 133-134 of the *Saramaka* decision.

¹¹⁶ *Saramaka* case, para. 129.

¹¹⁷ See Beyerlin and Marauhn 2011, at 405; Heinämäki 2012, at 447. The Court also made reference to the continuity of its decision with the report adopted by the Human Rights Committee *Apirana Mahuika* case (para. 130). These standards are not surprising given the fact that the *Saramaka* decision was issued only three months after the adoption of the UNDRIP.

¹¹⁸ *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Case No. 12,440 (24 August 2010) (hereinafter *Xákmok Kásek* case).

¹¹⁹ *Xákmok Kásek* case, paras. 80-82. The establishment of a nature reserve was found to impinge on indigenous land rights also in the *Garifuna v. Honduras* case, paras. 264 and 266.

¹²⁰ *Xákmok Kásek* case, paras. 157 and 169.

The case concerned the alleged violation of the rights of the Kichwa nation following the granting of licences for oil exploration and exploitation on their traditional territory with neither consent nor consultation. Unlike other cases, the land tenure of indigenous peoples was well established. The Court eventually established that the granting of oil licences had violated indigenous property rights by reason of the State's failure to respect the requirement of prior consultation.¹²¹

The complainants further alleged the violation of their right to culture under Article 26.¹²² The Court found that the right to consultation is inter alia grounded in the cultural rights of indigenous peoples.¹²³ Furthermore, it concluded that the obligation to consult is a general principle of international law.¹²⁴ Consultation in this sense is instrumental not only for protecting property rights in the narrow sense, but also for ensuring that the cultural component of land rights is effectively fulfilled.¹²⁵ The Court upheld the criteria included in the ILO Convention 169 to evaluate the effectiveness of consultation; this must be done timely, in good faith, with the appropriate means, and with the aim of achieving an agreement.¹²⁶

Most recently, the *Kaliña and Lokono* case has innovated in the matter since it has explicitly considered the compatibility of conservation measures with indigenous rights.¹²⁷ While in principle the two interests are not incompatible, the restrictions on indigenous rights stemming from the persistence of nature reserves on indigenous territories must be evaluated, beyond considering participation and benefit-sharing, also with reference to the continued possibility for indigenous peoples to have access to their resources.¹²⁸ The Court has also acknowledged that indigenous peoples might be entitled in this case to restitution, although not reaching definitive conclusion on this point.¹²⁹ In any event, the Court has not only explicitly recognised that conservation may encroach on indigenous rights, but it has also provided criteria for addressing those conflicts in a way that is compatible with indigenous rights.

This analysis of recent cases concludes that the Inter-American system places great emphasis on the procedural aspects of land rights, as well as on cultural integrity, which constitutes a broader concept encompassing land rights. Therefore, land rights can be

¹²¹ Reparation in this case took inter alia the form of restitution. Ecuador was ordered to remove the explosives the private company had placed to carry out explorative activities and to proceed to the reforestation of the affected lands. See *Sarayaku* case, paras. 289-295.

¹²² *Sarayaku* case, para. 137.

¹²³ *Sarayaku* case, para. 159.

¹²⁴ *Sarayaku* case, para. 164.

¹²⁵ *Sarayaku* case, paras. 171 and 212 ff.

¹²⁶ *Sarayaku* case, para. 177. There is an ambiguity, which is discussed in Chapter 2, section 3.5, between the need to hold consultations as opposed to the need to seek consent. See Olivares Alanís 2013, at 209, 212.

¹²⁷ *Kaliña and Lokono* case, paras. 161-198.

¹²⁸ *Kaliña and Lokono* case, para. 181.

¹²⁹ *Kaliña and Lokono* case, para. 168.

infringed indirectly, even when land tenure is ensured, if activities that have an impact on the cultural integrity of indigenous peoples are carried out without the consultation of the peoples affected.

Once again what appears central in the reasoning of the Court is the recourse to contextual and systemic interpretation, with the incorporation into the Inter-American system of standards extraneous to the inter-American system, such as the ILO Convention 169 or the UN Declaration on indigenous rights,¹³⁰ and/or of national standards derived from national constitutions, internal laws, and national jurisdictions.

This contamination can be explained in two ways. First, the reference to national standards testifies of a regional consent on a number of rights.¹³¹ The dialogue between courts is multidirectional in the sense that national courts also apply international standards when adjudicating indigenous rights. Second, international treaty obligations that are outside the scope of the Inter-American system, such as those contained in the ILO Convention 169, can be invoked by the Inter-American Court in view of their ratification by the members of the Organisation of Latin American States by virtue of Article 29(b) of the American Convention on Human Rights¹³² and, more generally, Article 31(3)(c) of the VCLT. Indeed, there is an ambiguity in these patterns since, while in some cases the Court made reference to the ratification of the international instrument invoked, in other cases the integration of international standards was not justified by the ratification of those standards by the respondent State.¹³³ A similar result could have been produced if the Inter-American Court had considered other international norms in the application of the American Convention, such as general principles of international law or international customary law. The Court, however, has never explicitly referred to these sources, except for the general principle of consultation in the *Sarayaku* case.

¹³⁰ See Heinämäki 2012, at 447-448. See *Saramaka* case, paras. 92-93, 131 and 138, note 137; *Sarayaku* case, paras. 160, note 178, 166, note 217 and 185, note 242. See also, *Endorois* case, para. 154.

¹³¹ See Gerald L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101. See also, ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America* (ILO 2009), and Adriana Fabra and Eva Arnal, 'Review of Jurisprudence on Human Rights and the Environment in Latin America' (2002) 2 *Yearbook of Human Rights & Environment* 153. On the constitutional framework in Latin America with respect to indigenous peoples' rights, see Alexandra Tomaselli, 'Tutela dei popoli indigeni in America Latina: equilibrismi tra costruzioni costituzionali e standard internazionali' in Giovanni Poggeschi (ed), *Le iperminoranze* (Pensa editore 2012), at 31-49.

¹³² Art. 29(b) of the American Convention on Human Rights reads as follows: "No provision of this Convention shall be interpreted as... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party". See Lixinski 2010, at 597. Most of Latin American States have ratified the ILO Convention 169. See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (last accessed October 2016).

¹³³ An example of the former case is the decision in *Yakye Axa* case, while an example of the latter is the *Saramaka* case.

2.2.2. *The African Commission*

The monitoring system of the African Charter on Human and Peoples' Rights has provided a useful forum for African indigenous peoples to claim their rights.¹³⁴ The Commission is competent to receive individual and group complaints alleging the violation of the African Charter. The Commission may hereby draw conclusion on the merits of a complaint and, when it finds that a State violated the African Charter, makes recommendations on the advised course of action.¹³⁵

So far the complaint mechanism before the African Commission has only produced two decisions where the issue of the relationship between indigenous peoples and the environment clearly emerges.¹³⁶ In the *Ogoni* case, the complainants alleged violation of the African Charter due to the oil licences granted by the Nigerian government to private companies and the consequent eviction of the Ogoni people from the area of the Niger delta.¹³⁷ In the *Endorois* decision, unlawful restrictions to indigenous peoples' rights stemmed

¹³⁴ African Charter on Human and Peoples' Rights, (Banjul, 27 June 1981, in force 21 October 1986) (hereinafter African Charter). On the relevance of the discourse on indigenous peoples in Africa, see Kealeboga N. Bojosi and George Mukundi Wachira, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 382, at 387-400; Thornberry, *Indigenous Peoples and Human Rights* 2002, Ch. 10; Willem van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 American Journal of International Law 29, at 35-49; Jérémie Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the Africa Commission on Human and Peoples' Rights' (2011) 60 International and Comparative Law Quarterly 245, at 245-254; Maria Victoria Cabrera Ormazá, 'Re-thinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation' (2012) 4 Goettingen Journal of International Law 263, at 275 ff.; Cittadino 2013-2014. As explained in section 3.1 of the Introduction, the African Commission has elaborated criteria to identify indigenous peoples in Africa that go beyond the notion of ancestry. These are marginalisation and exclusion, cultural distinctiveness, attachment to land, and self-identification.

¹³⁵ On the competence, jurisdiction and functions of the African Commission, see Morne van der Linde and Lirette Louw, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication' (2003) 3 African Human Rights Law Journal 167, at 170-173 and 180-186.

¹³⁶ It is important to highlight that a case concerning the Ogiek indigenous people is pending before the African Court on Human and Peoples' Rights. See *African Commission on Human and Peoples' Rights v. the Republic of Kenya*, Application 006/2012, available at: http://en.african-court.org/images/Cases/Case%20Summaries/APPLICATION_006_OF_2012_CASE_SUMMARY.pdf (last accessed October 2016). On the Court's jurisdiction, see Art. 3 and 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou, 9 June 1998, in force 25 January 2004).

¹³⁷ *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (27 October 2001) (hereinafter *Ogoni* case). On the *Ogoni* case, see Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 International and Comparative Law Quarterly 749; Dinah Shelton, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/COMM/A044/1' (2002) 96 American Journal of International Law 937; Justice C. Nwobike, 'African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria' (2004-2005) 1 African Journal of Legal Studies 129; Solomon A. Dersso, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights' (2006) 6 African Human Rights Law Journal 358, at 369-373.

from the gazetting by the Kenyan government of the Lake Bogoria area, traditionally owned by the Endorois community, as a game reserve.¹³⁸

Some aspects of the relationship between indigenous peoples and the environment as emerges from the African system are drawn from other regional and global human rights bodies, with a particular reliance on the part of the African Commission on the jurisprudence of the Inter-American Court.¹³⁹ In this respect, land rights are framed as the necessary link between environmental protection and cultural integrity. The *Endorois* decision, for instance, stresses the link between land, culture, and the peoples.¹⁴⁰ Since land ownership is the precondition for cultural rights to be fulfilled, the environmental preservation of land and natural resources is the *sine qua non* for the respect of other rights. In the same vein, any restrictions to the rights protected under the African Charter related to the right to land, such as the right to property, the right to freely dispose of resources, and the right to development are subject to the same cautions that are identified by the Inter-American Court in the *Saramaka* decision. Therefore, for State interferences to be in line with the protection of these rights, they should be in accordance with law, necessary, and proportional to the realisation of a general need or a public interest.¹⁴¹ Furthermore, the requirements of participation in the form of consultation or free, prior and informed consent, benefit-sharing, and the performance of impact studies are required also within the African system.

It is interesting to note that these procedural safeguards applied in the decision concerning the *Ogoni* case in relation to the right to freely dispose of resources under Article 21 of the African Charter. In this decision, the Commission does not refer to the Ogoni as indigenous peoples. Notwithstanding this, the failure on the part of Nigeria to consult the people affected, to ensure their participation in the benefits deriving from the oil exploitation, and to conduct impact studies prior to the oil exploration was used by

¹³⁸ As it emerges from the decision, the game reserve progressively gave way to ruby mining licences, as well as alienation of land to private owners. On the environmental implications of the *Endorois* case, see Cynthia Morel, 'Conservation and Indigenous Peoples' Rights: Must One Necessarily Come at the Expense of the Other?' (2010) 17 Policy Matters 174.

¹³⁹ The Commission refers to other international instruments as subsidiary sources of international law under Art. 61 of the African Charter.

¹⁴⁰ In the *Ogoni* case, the Commission, falling short of a reference to the collective rights to land, emphasizes the link between environmental degradation and the violation of some rights, including the right to health under Art. 16 of the African Charter (paras. 50-51).

¹⁴¹ *Endorois* case, paras. 172-173, 215-216, 227, and 266-267. It is interesting to note some remarkable peculiarities. First, the encroachment on the right to life should be part of the test assessing the public interest threshold. Second, compensation is often overlapping with the requirement of ensuring the sharing of the benefits of large-scale projects implemented on indigenous territories. Third, the respect for the right to freely dispose of natural resources under Art. 21 of the African Charter is subject to the tripartite test elaborated in the *Saramaka* case, since the African Commission interpretatively connects it to the right to land protected under article 14 of the Charter. This last element is particularly significant because Art. 14 protects in principle only individual property rights in a context where the African Charter protects both individual and collective rights. In the absence of a collective right to property, the Commission interprets Art. 14 so as to encompass indigenous collective ownership rights over land.

the Commission to assess the violation of both Article 21 and Article 24 on the right to a satisfactory environment.

Although the African Commission refers to the standards elaborated by other human rights bodies, the African system is also characterised by a good degree of autonomy and a number of innovative elements. For instance, the African Commission in the *Ogoni* case is cautious in framing the right to property as a collective right to land. Indeed, the Commission recognised the collective nature of the right protected under Article 14.¹⁴² However, it found a violation only due to the destruction of houses by the Nigerian militia, thus failing to consider the expropriation of land in light of Article 14. Other violations connected to the right to land were then recognised, such as the right to freely dispose of natural resources under Article 21 and the right to food as derived from extensive interpretation of the same provision. In this way, the African Commission highlighted the importance of rights that are closely connected to the right to land, while at the same time paving the way for the recognition of collective property rights in the *Endorois* case.¹⁴³

Some of the innovations of the African system are linked to the intrinsically different nature of the rights protected under the African Charter, which inter alia includes collective rights. The right to a satisfactory environment is part of the catalogue of collective rights.¹⁴⁴ In this sense, it is no surprise that the African Commission, in the *Ogoni* decision, was able to frame environmental degradation as a separate violation of the Charter under Article 24. The Commission, however, has gone further than this, operationalizing the right to environment through the identification of the obligation of Nigeria to proceed to a clean-up of the area devastated by the oil drills. In line with this, the Commission has acknowledged precise obligations that require the State to perform a number of duties, including the monitoring of environmental conditions, the performance of impact studies whenever a major development project is to be undertaken, and the spreading of the results of those studies.¹⁴⁵ Significantly, this set of obligations is very much in line with the standards identified in the Inter-American system, which does not explicitly protect the right to environment.¹⁴⁶

Another element that is worth analysing is the ambivalent nature of the relationship between indigenous rights and the protection of the environment. As already reminded, in the *Endorois* case, the eviction from traditional lands and the denial to access those lands

¹⁴² *Ogoni* case, para. 63.

¹⁴³ See Fodella 2013, at 358.

¹⁴⁴ This is even more striking if compared with the other international human rights systems that, as reminded, do not include a right to environment. See *supra* note 14 in Introduction.

¹⁴⁵ *Ogoni* case, paras. 52-53. On the implications of the application of Art. 24 of the African Charter, see van der Linde and Louw 2003, at 173-180; Kaniye S.A. Ebeku, 'Right to a Satisfactory Environment and the African Commission' (2003) 3 African Human Rights Law Journal 149.

¹⁴⁶ As reminded, Art. 11 of the Additional Protocol to the American Convention on Human Rights contains a provision protecting the right to the environment, but this Protocol has not been invoked yet by the Court for the purposes of ascertaining a violation of this right.

was consequent to the decision of the Kenyan government to establish a nature reserve aimed at the conservation of some animal species. Notwithstanding the potential conflict between this measure and the enjoyment of rights by indigenous peoples, the Commission took up the complainants' arguments that indigenous lifestyles are in line with conservation purposes.¹⁴⁷ Most innovatively, it made the argument that the creation of a natural reserve does not necessarily require the eviction of indigenous peoples from their lands, thus implying that there is a possibility for the State to implement its conservation duties while respecting indigenous peoples' rights.

A further element that may have a bearing in the relationship between indigenous rights and the environment is the interpretation of the right to development under Article 22 of the Charter given by the African Commission in the *Endorois* decision. This right has both a substantive and a procedural content.¹⁴⁸ While the procedural component is once more related to the requirements of consultation,¹⁴⁹ the substantive component may offer a different perspective. Development implies both free choice, intended as the capacity to decide on development options, and empowerment, linked to improvement of living conditions. This opens up the way to an interpretation of the relationship between indigenous rights and the environment that is biased towards indigenous peoples. Their right to choose development options, in fact, may foreshadow the possibility for a conflict between indigenous ways of life and the conservation of the environment.

2.2.3. *The European Court of Human Rights*

The European Court of Human Rights has played an important role in singling out the main elements of a human rights approach to environmental protection.¹⁵⁰ This section aims to understand whether the case law specifically related to indigenous peoples presents some elements of innovation with respect to the trends already highlighted.

The main tenets of the human rights approach to environmental protection in the European regional context are two. First, environmental degradation may trigger the application of some rights protected in the European system, including the right to private and family life under Article 8 of the ECHR. Second, environmental degradation is only relevant insofar as it directly affects the particular enjoyment of rights protected in the European Convention.

Similarly to minorities, indigenous peoples within the European Convention do not enjoy a special status. Although minorities have progressively affirmed their rights building on Article 8,¹⁵¹ the condition of indigenous peoples has not received the same attention

¹⁴⁷ *Endorois* case, paras. 235 and 249. See Graham and Friederichs 2012, at 13.

¹⁴⁸ *Endorois* case, para. 277.

¹⁴⁹ *Endorois* case, paras. 290-291.

¹⁵⁰ See note 13 in the Introduction.

¹⁵¹ On the evolution of the Strasbourg Court's jurisprudence on minority rights, see Gaetano Pentassuglia,

so far.¹⁵² In dealing with cases concerning indigenous peoples, the Strasbourg Court relied again on Article 8. However, the approach taken by the Court is merely negative in the sense that the Court has not identified positive measures to be taken by States to respect indigenous rights. On the contrary, the Court has limited itself to identify admissible restrictions imposed by States on those rights.¹⁵³

Unlike the cases concerning individual complaints related to the environment, the decisions related to indigenous peoples set a higher threshold for the violation of Article 8 to be ascertained. An example of this can be found in the decision of the European Commission on the *G. and E. v. Norway* case.¹⁵⁴ The case concerned the construction of a hydroelectric dam that had resulted in the inundation of part of the applicants' territory of Lapp origin. In relation to Article 8, the Commission asserted that the right to private and family life might be applicable to the protection of a particular lifestyle, especially in light of the environmental consequences of a dam construction project.¹⁵⁵ However, when it comes to the assessment of the alleged interference of the dam project with the enjoyment of Article 8 by the applicants, the Commission concluded that, given the limited impact on the applicants' rights, the interference was admissible. In this vein, the portion of the land submerged was so small that the interference was deemed proportional. Furthermore, the project also met the requirement of necessity since it was justified by the political goal of pursuing the economic well-being of the country. It is, therefore, clear that the Commission failed to consider the cultural impact of development activities in connection with foreseeable environmental impacts.

In line with the Strasbourg Court's reluctance to consider the cultural implication of the restrictions imposed on indigenous rights, no interference with the rights protected under the European Convention has ever been found in the judgments concerning indigenous peoples. Perhaps this is also related to the fact that the link between the environmental consequences of development projects and indigenous rights is not well established in the case law of the European Court. This clearly emerges from the abovementioned *G. and E. v. Norway*.¹⁵⁶ In the *Johtti Sapmelacat Ry and others v. Finland* case, the Court considered

'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' (2012) 1 International Journal on Minority and Group Rights 1. See also, Thornberry, *Indigenous Peoples and Human Rights* 2002, Ch. 12, at 290 ff. On the scope of Art. 8 for the purpose of minority protection, see Tavani 2010, at 68-72.

¹⁵² On the reasons of this neglect and on the definition of indigenous peoples in Europe, see Rainer Grote, 'On the Fringes of Europe: Europe's Largely Forgotten Indigenous Peoples' (2006-2007) 31 American Indian Law Review 425.

¹⁵³ Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' 2012, at 10-12.

¹⁵⁴ *G. and E. v. Norway*, Applications No. 9278/81 and 9415/81 (3 October 1983).

¹⁵⁵ See Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' 2012, at 3.

¹⁵⁶ See Timo Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospects and Prospects' (2011) 18 International Journal on Minority and Group Rights 1, at

that there was no interference with Article 8 and Article 1 of Protocol No. 1 protecting property of the measures affecting the fishing rights of Sami.¹⁵⁷ In the view of the Court, the applicants had failed to demonstrate the adverse consequences of the new provisions on their fishing rights.¹⁵⁸

This means that, unlike the other human rights bodies, the Strasbourg Court did not infer the violation of indigenous rights from the potential impact of national measures on the cultural identity of indigenous peoples. In contrast, it required the applicants to demonstrate such link. The shift of the burden of proof is confirmed in the case *Handölsdalen Sami Village v. Sweden*,¹⁵⁹ where the Court concluded that the existence of immemorial reindeer herding rights should be demonstrated by the Sami. Therefore, the burden of proof in national legal proceedings was legitimately placed on the Sami. This conclusion was contested by the dissenting Judge Ziemele, who emphasised the developments in international law concerning indigenous rights, together with the importance of the right to land to preserve culture. In the view of the dissenting judge, these elements should have led the Court to additionally find a violation of access to Court under Article 6.

Ultimately, the failure to recognise the link between environmental problems generated by development projects and indigenous rights is closely related to the lack of recognition of indigenous land rights in the European system.¹⁶⁰ Article 1 of Protocol No. 1, protecting the individual right to property, has been invoked in almost every indigenous-related case before the European Court. However, in no case there has been either the ascertainment of its violation or any recognition of collective land rights encompassing indigenous claims. Nor was the link between property and culture acknowledged. In the already cited case of *G. and E. v. Norway*, traditional use of resources, exemplified by reindeer herding, fishing, and hunting, were not found to fall under the purview of Article 1 of Protocol No. 1.¹⁶¹

Closely related to that is the strong reliance of the Court on domestic authorities and national remedies for the definition and adjudication of indigenous land rights. In this sense, absent in the European Convention, the concept of indigenous property rights

9-11.

¹⁵⁷ *Johtti Sappmelaccat Ry and others v. Finland*, Application No. 42969/98 (18 January 2005). National measures established the extension of fishing rights to non-Sami people.

¹⁵⁸ Additionally, the provision requiring the exclusion of some fishing equipment was considered to be in line with the public goal of protecting the fish stock.

¹⁵⁹ *Handölsdalen Sami Village v. Sweden*, Application No. 39013/04 (17 February 2009).

¹⁶⁰ On this, see Nigel Bankes, 'The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments' (2011) 3 *The Yearbook of Polar Law* 57, at 62-63 and 84: "the cases coming out of the European Court suggest that it will be difficult for an indigenous community to establish the element of a successful case. The biggest challenge is caused by the duty to exhaust local remedies combined with the reluctance of the Court to look behind the judgment of a domestic court".

¹⁶¹ *G. and E. v. Norway*, *The Law*, para. 3. See also, Barelli and others 2011, at 40. The authors contend that the denial of the cultural consequences stemming from the violation of property rights is mitigated in the cases concerning rural minorities.

should be derived from national rules and through national procedures.¹⁶² The margin of appreciation doctrine both justifies and corroborates this attitude of the Court towards indigenous land rights.¹⁶³ The *Hingitaq 53 and others v. Denmark* case is instructive in this sense.¹⁶⁴ The case concerned the eviction of an Inuit tribe due to the expansion of a military air base run by the American forces.¹⁶⁵ The Court concluded that it had no jurisdiction as for the alleged violation of the right to property under Article 1 since the eviction happened one year before the entry into force of Protocol No. 1 for Denmark. Therefore, unlike other international human rights bodies, the Court did not consider the ongoing effects of the original act. On the contrary, it claimed that expropriation was an instantaneous act that should be interpreted in light of the guarantees provided by national law. In this respect, since national jurisdictions had found that the original expropriation was both justified by the public interest and duly compensated, the Court could proceed not to examine the applicants' claims.¹⁶⁶

Furthermore, the failure to recognise indigenous substantive rights is compounded by the absence of procedural guarantees, such as the consultation requirements elaborated in the other regional and global mechanisms of international human rights protection. Participation is only broadly framed by the European Court as the individual right to take part in political life.¹⁶⁷ This mild conception of participation is ill suited to respond to the

¹⁶² See Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' 2012, at 10; Koivurova 2011, at 21.

¹⁶³ According to Koivurova 2011, a way to protect indigenous peoples in the European system would be to "diminish the margin of appreciation afforded to states to interfere with the traditional lifestyle and livelihoods of northern indigenous minorities" (p. 35). In partial contradiction with this, in the *Halvar From v. Sweden* case, the margin of appreciation doctrine was used in favour of indigenous rights to argue that the decision to grant exclusive hunting licences to the Sami in the territory of the applicant was justified under domestic law. See Application No. 34776/97 (4 March 1998).

¹⁶⁴ *Hingitaq 53 and others v. Denmark*, Application No.18584/04 (12 January 2006).

¹⁶⁵ The same case has been examined through the ILO representation procedure. See the Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsuteqartut Kattuffiat-SIK) (SIK) *supra*.

¹⁶⁶ Other cases testify of an excessive reliance of the ECtHR on domestic remedies. In *Könkämä and 38 other Saami villages v. Sweden*, Application No. 27033/95 (25 November 2006), the Commission should determine whether the Sami fishing rights were exclusive. Hunting and fishing rights were framed as possessions under the right to property protected by the Protocol. However, the application was considered inadmissible for the non-exhaustion of domestic remedies. The Commission furthermore referred to the national normative framework to conclude that exclusive rights are in any case not admissible. In the *Chagos Islanders v. UK*, Application No. 35622/04 (11 December 2012), the relocation of the islanders due to defence projects was compensated following the settlement of the dispute at the national level. In light of these, the Court rejected any violation for the failure of the applicants to qualify as victims. It is interesting to note, however, that with reference to the facts of the *Hingitaq 53 and others v. Denmark* case, a year before the ECtHR released its judgment, Denmark had submitted a periodic report to the CERD, where it apologized for the removal of the Inughuit tribe from their territory. See CERD, Reports Submitted by States Parties under Article 9 of the Convention, Denmark, UN Doc. CERD/C/496/Add.1 (2 September 2005), para. 218.

¹⁶⁷ See Desgagné 1995, at 287; Shelton, 'Human Rights and Environment: Past, Present and Future

need of protection of indigenous peoples. As emerges from the other human rights bodies examined in this section, the consultation of indigenous peoples whenever a project that may affect them is decided is particularly warranted to protect their cultural integrity. The absence of procedural rights is particularly striking if one compares the cases concerning indigenous peoples with the decisions taken in other environment-related cases regarding individual complainants. In *Guerra v. Italy* and *Öneryıldız v. Turkey*, for instance, a right to information was granted to the applicants. On the contrary, In the *Johetti Sappmelaccat Ry and others v. Finland* case, the mere fact that indigenous peoples had their own representative bodies, such as the Sami Parliament, was a sufficient fulfilment of participation guarantees for the Court.¹⁶⁸ In *Hingitaq 53 and others v. Denmark*, the Court did not even uphold the allegation that the Sami people had a right to consultation, thus failing to consider this issue.

2.2.4. *Asia and Oceania: national cases and contamination*

The lack of a regional instrument for the protection of human rights in Asia and Oceania does not account for the fact that international standards are primarily applied by national courts.¹⁶⁹ This section, therefore, aims to present some of the major judgments, issued by national courts in Asia and Oceania touching upon the relationship between the rights of indigenous peoples and environmental protection.¹⁷⁰ However, a word for caution is needed. The review of national cases is far too limited to draw any conclusions on regional emerging trends or on the legal status of some standards in Asia. This subsection limits itself to provide a partial illustration of how some international standards pertaining to indigenous rights and the environment have permeated national systems in Asia and Oceania.

The decisions that may have a bearing in the relationship between indigenous rights and the environment belong to two groups. The first group comprises the decisions dealing with the establishment of indigenous land tenure. One remarkable example is the case *Mabo v. Queensland (No. 2)*, where the Supreme Court of Australia concluded that the acquisition of sovereignty on the part of a State entity does not imply the automatic transfer of land ownership for the purposes of the application of internal law.¹⁷¹ These decisions are relevant because land rights are at the juncture between indigenous cultural integrity and the environmental protection of natural resources. These issues, however, are examined in

Linkages and the Value of a Declaration' 2009. On participatory rights, see Chapter 2, section 3.5.

¹⁶⁸ *Johetti Sappmelaccat Ry and others v. Finland*, at 16.

¹⁶⁹ See Shyami Fernando Puvimanasinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Martinus Nijhoff 2007), at 208-209.

¹⁷⁰ For an account of the debate on the definition of indigenous peoples in Africa, see Benedict Kingsbury, 'The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia' in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press 1999).

¹⁷¹ *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.

detail in Chapter 2, to which this section refers for full examination.

The second group of decisions are those cases where the environment plays a role in the awarding of indigenous rights. In the *Minors Oposa v. Philippines* case, the Supreme Court of Philippines accepted the *locus standi* of a group of minors who were representing unborn generations in the name of intergenerational equity.¹⁷² The group was pleading against the concession of timber licences in a rainforest that is both rich in biodiversity and home to indigenous peoples. In light of the constitutionally protected right to a balanced and healthful ecology, the Court derived a negative duty for the State to refrain from impairing the environment, thus eventually granting the revocation of the licences. The case is instructive because the need to protect the environment goes hand in hand with the secondary objective of protecting indigenous culture. The Court, however, was not asked to pronounce itself on the infringement of indigenous rights.

In the case of *Kayano et al. v. Hokkaido Expropriation Committee*, the Sapporo District Court of Japan was called to assess the legality of a dam project that had resulted in land expropriation in light of the consequences that this project might produce on the rights of the Ainu.¹⁷³ Independently from the recognition of any land rights, the Court recognised the applicability of cultural rights stemming inter alia from Article 27 of the ICCPR. In the view of the Court, the Minister of Construction in charge of the authorisations for the dam failed to consider the environmental and cultural implication of the project. In particular, the Minister should have required the enterprises concerned with the project to carry out impact studies. In this respect, this case echoes the decisions reached by the international human rights bodies illustrated above.

Therefore, environmental protection emerges mainly as a way to enhance indigenous rights, both as a precondition for their enjoyment and as standard for ascertaining their violation.

2.3. Main common trends and differences

What emerges from the above discussion is a set of common trends, as well as important

¹⁷² Supreme Court of Philippines, *Minors Oposa v. Secretary of Department of the Environment and Natural Resources* 33 ILM 173 (1994). On the principle of intergenerational equity, see Gregory F. Maggio, 'Inter/intra-Generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources' (1997) 4 Buffalo Environmental Law Journal 161; Maggio, 'Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity' 1997-1998; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers 1989); Laura Pineschi, 'La rappresentazione degli interessi delle generazioni future tra proposte del passato e recenti manifestazioni della prassi internazionale' in *Studi in onore di Umberto Leanza* (Editoriale Scientifica 2008).

¹⁷³ *Kayano et al. v. Hokkaido Expropriation Committee* (27 March 1997), (1999) 38 ILM 397. On the case, see Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis* (Wolters Kluwer 2008), at 254-256. The decision is landmark inter alia because it takes a decisive step in the recognition of the Ainu as indigenous peoples in Japan. For an overview of the situation of the Ainu people in Japan, see Yoko Tanabe, 'The UN Declaration on the Rights of Indigenous Peoples and the Ainu of Japan: Development and Challenges' (2014) 24 Indigenous Policy Journal.

differences as regards the relationship between indigenous rights and the environment in the decisions of the international human rights bodies.

As for the common elements, there are four main trends that it is worth highlighting. First, the protection of the environment comes often to the fore in connection with the rights of indigenous peoples when development projects are undertaken. In those cases, the two elements are reinforcing each other, in the sense that indigenous peoples claim that they contribute to preserve the environment that is threatened by development projects. Furthermore, a good state of the environment is the precondition for the enjoyment of a number of rights on the part of indigenous peoples. This picture is incomplete since it mostly fails to consider the cases where other kinds of projects, such as the creation of nature reserves, may have an impact on indigenous rights.¹⁷⁴

The second trend concerns the concrete interaction between indigenous rights and any other elements that may affect them. Indigenous rights are in many cases protected through the extensive interpretation of rights such as the right to private and family life, the right to culture, the right to development, and the right to property. Restrictions to protected rights are admissible in the human rights systems illustrated in the previous sections. A general common threshold for the assessment of potential violations is the limit of the denial of the protected rights. In other words, restrictions are admissible in so far as they do not result into the complete impairment of indigenous rights.¹⁷⁵ This is clear also in the cases, such as those of the Human Rights Committee, where the rights of indigenous people are found to succumb.

Third, although the denial test is a common element, the way in which it is assessed may differ greatly. The assessment of denial is given in some cases against the fulfilment of procedural guarantees, such as the performance of consultation processes.¹⁷⁶ In some other cases, what counts is the evaluation of the capacity of indigenous peoples to maintain their livelihood.¹⁷⁷ In this sense, the reference to the notion of benefit might be read as a way to ensure that indigenous peoples' way of life is sustainably carried out. Factual circumstances do also play a role in the evaluation of restrictions. Suffice it to think of the reports of the Human Rights Committee or of the margin of appreciation doctrine in the European system.

Fourth, there is a high level of cross-fertilisation between human rights bodies, which

¹⁷⁴ As said, a notable exception is represented by the *Kaliña and Lokono* case.

¹⁷⁵ The main exception to this trend is perhaps represented by the ECtHR, which applies the normal proportionality/necessity test to restrictions without taking into consideration the impact of restrictions on essential elements such as the preservation of a distinct culture. The denial test is also discussed in Chapter 2.

¹⁷⁶ See *Länsman II*; *Apirana Mahuika* case. See also, ILO representation procedures in section 2.1.4 in this chapter. In the *Saramaka* case the denial of indigenous rights is assessed against procedural parameters.

¹⁷⁷ See the decisions of the Human Rights Committee in section 2.1.1 in this chapter. The requirement of ensuring benefit-sharing in the *Saramaka* case may also reinforce the idea that indigenous livelihoods should be maintained.

can explain the common elements highlighted above. The circulation of legal paradigms is facilitated by the nature of human rights treaties that are, as repeatedly pointed out by human rights bodies, living instruments, subject to the evolution of societal needs.¹⁷⁸

Concerning the main differences that have a bearing on the relationship between indigenous rights and the environment, there are three points that it is important to make.

First, indigenous rights are protected more traditionally as the individual rights of the community members within the global human rights systems.¹⁷⁹ Conversely, collective rights are recognised in all regional systems except for the European one. Although this divide is important and produces some consequences in the effectiveness of the protection of indigenous rights, it is not a decisive element. As recalled, for instance, the ILO Convention 169 is extremely far-reaching in terms of the articulation of indigenous rights. Their implementation, however, is by far less effective than in the Inter-American system. Furthermore, the circulation of standards of protection favours the incorporation of all-encompassing standards even in human rights systems that are not originally provided with them.

Second, the interplay between indigenous rights and the environment lies in the centrality of land and natural resources for the preservation of indigenous communities as distinct peoples.¹⁸⁰ Some human rights bodies have mainly relied on cultural rights to incorporate indigenous needs in the purview of their judicial or quasi-judicial review. This is the case both for the Human Rights Committee with Article 27 and for the European Court of Human Rights that has framed culture as the manifestation of private and family life. Ultimately, however, culture is framed in broad terms since it includes a particular relationship with the land and natural resources. Conversely, it can be argued that land does not merely boil down to the establishment of land tenure for indigenous peoples. In contrast, the effectiveness of land rights must be functional to the preservation of cultural diversity.¹⁸¹ In this framework, the requirement of consultation has both procedural and substantive connotations. As for the latter, consultation is to be activated any time a project may affect indigenous peoples as a way to ensure that the cultural component is integrated in the management of land. Concerning the former, the performance of consultation is a way to assess whether indigenous rights are taken into account.

¹⁷⁸ See Beyerlin and Marauhn 2011, at 399. In partial contradiction with this, see Mauro Barelli, 'The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime' (2010) 32 Human Rights Quarterly 951, at 960. The author argues that the different degree of indigenous rights' protection reflects the regional peculiarities of each human rights system.

¹⁷⁹ This has been done by the monitoring bodies of the UN Covenants, by the Committee on the Elimination of Racial Discrimination and in the European system.

¹⁸⁰ See General Comment 23, paras. 3.2 and 7; General Recommendation 23; the Inter-American jurisprudence, including e.g., *Saramaka* case, para. 128. On this issue, see more in Chapter 2, sections 3.1 and 3.3.

¹⁸¹ General Comment 23, para. 7; *Awas Tingni* case, para. 149; *Yakye Axa* case, para. 135; *Endorois* case, para. 156.

Third, the extent to which the link between land and culture is taken for granted within the different human rights systems may change considerably. This link is not established and must be demonstrated by the applicants in the European system. The Human Rights Committee has taken into consideration factual circumstances in the determination of the relationship between culture and land. In the Inter-American system, land is absolutely necessary for the preservation of indigenous culture.

To sum up, access to land and natural resources seems central in the interaction of indigenous rights with environmental protection.¹⁸² As argued by the African Commission in the *Endorois* case, only land ownership may guarantee that indigenous peoples are actors rather than mere beneficiaries of prerogatives.¹⁸³

2.4. An assessment of the traditional approach: the dimension of conflict

The review of the human rights approach to environmental protection as far as the rights of indigenous peoples are concerned confirms some general views. In spite of normative texts elaborated before the 1990s and thus not including within their scope more recent issues such as environmental protection, this approach has been highly creative and innovative because it has allowed for the integration of environmental consideration into the protection of human rights. In this sense, since human rights treaties are living instruments, the adjudication of rights may adapt to circumstances so that their scope is enlarged to include environmental problems. In the case of indigenous rights, this integration has contributed to the empowerment of indigenous peoples because environmental degradation has been used as a further element to ascertain the violation of indigenous rights. Therefore, this approach represents a concrete way in which international human rights law and international environmental law can be connected and coalesce.

The open-ended question, indeed, is whether the human rights approach to environmental protection is the only available framework for the relationship between human rights and the environment. An analysis of the more recent debates, as well as of the critical aspects of the approach, corroborates the idea that it is necessary to go beyond it.

First, it is important to remind that the object of human rights protection and environmental conservation remains fundamentally different.¹⁸⁴ It is true that environmental soundness is a precondition for the enjoyment of human rights. However, the normative goal of protecting the environment does not boil down simply to the purpose of creating an enabling environment for the enjoyment of human rights. This aspect is not sufficiently

¹⁸² See Shawkat Alam, 'Collective Indigenous Rights and the Environment' in Shawkat Alam and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013), at 585. This author argues that "environmental destruction has particular implications for indigenous peoples' rights, due to their close affiliation with the land".

¹⁸³ *Endorois* case, paras. 204-206.

¹⁸⁴ See Shelton, 'Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration' 2009, at 30.

acknowledged in the monitoring work of human rights bodies, whose mandate instead is only concerned with the implementation of human rights treaties. The truism that “human rights law does not protect the environment *per se*”¹⁸⁵ is reinforced by the fact that, failing the existence of a right to environmental protection, environment-related allegations are found to integrate a violation only when the applicants can demonstrate a direct interest.¹⁸⁶ This means that international judicial and quasi-judicial bodies in the field of human rights consider the environment only as a dimension of human rights protection. For instance, in the cases concerning indigenous peoples within the Inter-American system, the environmental soundness of territories and resources is merely instrumental for the protection of the right to property (“abstain to act...until land is demarcated”).

Second, the human rights approach to environmental protection in the decisions of human rights treaty bodies is neither the sole nor the main way to look at the relationship between indigenous rights and the environment. Scholars have failed to fully explore another important part of the debate, that is the integration of human rights law into the adoption and implementation of international multilateral environmental treaties.¹⁸⁷ A hybrid example of this integration may be found in the Aarhus Convention, a regional treaty that creates obligations for State Parties to provide information, ensure participation, and guarantee access to justice in environmental measures.¹⁸⁸ The Convention is neither a purely environmental treaty nor a human rights instrument. However, it provides an exemplification of how human rights may permeate environmental issues.

The issue of the integration of human rights standards into environmental treaties is more complex than what may appear at first sight. The problem is that the scope of environmental treaties may overlap with that of human rights law. This is far from being unproblematic because, as illustrated in the Introduction to this dissertation, the relationship between international human rights law and international environmental law

¹⁸⁵ Boyle 2012, at 605 (quote), and 627-628.

¹⁸⁶ See also Desgagné 1995, at 282: “the scope of environmental protection that can be achieved through human rights litigation is narrow because environmental harm is not in itself a cause for complaint, but must be linked to a protected right. Human rights and environmental protection admittedly have common objectives, but not all environmental issues can be formulated in terms of human rights violations”.

¹⁸⁷ See Analytical study on the relationship between human rights and the environment, Report of the United Nations High Commissioner, UN Doc. A/HRC/19/34 (16 December 2011), at 6. See also, Anton and Shelton 2011, at 130 ff. According to these authors, “[h]uman rights and environmental protection interrelate at present in four different ways”: 1) considering human rights when drafting environmental treaties; 2) human rights approach to environmental protection; 3) the creation of a human right to environment; 4) the protection of the environment is not a right, is a duty of all human beings. Resolution 2005/60 of the UN Human Rights Commission, Human Rights and the Environment as a Part of Sustainable Development, UN Doc. E/CN.4/RES/2005/60 (20 April 2005), further suggests that human rights should be taken into account “when promoting environmental protection”, as part of sustainable development.

¹⁸⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998, in force 30 October 2001). On the Convention, see e.g. Marc Pallemmaerts, ‘Proceduralizing Environmental Rights: The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context’ [2004] Human Rights and the Environment Proceedings of a Geneva Network Roundtable 14.

is not regulated by *lex posterior*, *lex specialis*, or hierarchical criteria. In this context, when environmental norms are potentially in contrast with parallel obligations that State Parties have contracted in the field of human rights, other criteria for the resolution of conflict should operate

Furthermore, a comprehensive reading of the rights of indigenous peoples shows that these rights underlie issues pertaining to access and management of natural resources. In this respect, Chapter 2 argues that the powers of indigenous peoples are so extensive that they may interfere with the State's sovereignty over natural resources, which lies at the basis of the international regime of biodiversity as enshrined in the Convention on Biological Diversity. This tripartite dimension of conflict is often ignored both in human rights case law and in the literature and therefore deserves more attention since it lies at the core of the relationship between indigenous rights and conservation.

3. The integration of indigenous rights into the Convention on Biological Diversity: state of the art and underlying problems

The CBD explicitly addresses the relationship between indigenous peoples and biodiversity. While the Preamble recognises “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources”, the body of the Convention regulates some aspects of the use of traditional knowledge by Parties. Article 8(j) creates a legal framework for preserving indigenous peoples' traditional culture while protecting biodiversity. In this respect, Parties shall respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge.

Furthermore, the same provision creates an obligation for Parties to “encourage the equitable sharing of the benefits arising from the utilization” of traditional knowledge. Intra-State benefit-sharing is, therefore, framed as an instrument to acknowledge the contribution of indigenous and local communities to conservation and sustainable use.¹⁸⁹

¹⁸⁹ See Morgera and Tsioumani, ‘The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods’ 2010, at 167. These authors have coined the category of intra-State benefit-sharing, in relation to which they identify different functions in the context of the CBD. These functions are analysed in Chapter 3. See also, Lyle Glowka and *et al.*, *A Guide to the Convention on Biological Diversity* (IUCN 1994), at 4. An isolated interpretation is put forward by Maggio, according to whom “[a] careful reading of the text of Article 8j) does not say that the equitable sharing will necessarily include the local communities”. See Maggio, ‘Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity’ 1997-1998, at 213. This interpretation, however, does not seem to be grounded on solid arguments. In their Guide to the CBD (above), Glowka and other authors already recognise that “the [preambular] paragraph implies that such communities should receive benefits when techniques or knowledge from their traditional practices become more widely used” (at 11). In addition, Morgera and Tsioumani (*ibid.*) have carefully demonstrated that “a clear trend seems to emerge from the multitude of

Although representing an important step for the incorporation of indigenous issues into the CBD regime, Article 8(j) is problematic due to some deficiencies concerning its interpretation, scope, implementation, and legal nature.

Regarding the interpretative blind spots of this provision, Article 8(j) is conditioned upon national legislation. The locution “subject to its national legislation” oscillates between two possible interpretations. One of these is that national legislative frameworks on indigenous peoples should be taken into account¹⁹⁰ so as to preserve national agreements concluded between State Parties and indigenous peoples located in their territory, thus having a protective function with respect to established indigenous rights. While this is a laudable policy objective, it does not take into account that treaties between States and indigenous peoples have often been imposed on the latter during colonisation times and they frequently imply the loss of sovereign prerogatives on the part of indigenous peoples.¹⁹¹ When these treaties contain instead provisions that are favourable to indigenous peoples, their implementation is oftentimes flawed. According to the second interpretation of the locution “subject to its national legislation”, the prevalence of national standards over the obligations contained in Article 8(j) implies that the protection of traditional knowledge, its use, and the obligation to encourage intra-State benefit-sharing should succumb to contrary national laws.¹⁹²

Another interpretative blind spot concerns the locution “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles *relevant for the conservation and sustainable use of biological diversity*”.¹⁹³ Some authors have argued that the obligation to protect indigenous traditional knowledge only applies to those contents and practice that are instrumental for the conservation of biodiversity.¹⁹⁴ This interpretation

decisions adopted by the CBD COP in referring to the concept of State- to-community benefit-sharing in the context of various programmes of work” (at 34).

¹⁹⁰ According to some commentators, this was the original purpose of some of the negotiating countries, such as the United States. See Melinda Chandler, ‘The Biodiversity Convention: Selected Issues of Interest to the International Lawyer’ (1993) 4 Colorado Journal of International Environmental Law and Policy 141, at 154; Glowka and *al.* 1994, at 48; Maggio, ‘Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity’ 1997-1998, at 212: “It has been suggested that the above qualifier in the CBD was actually inserted at the behest of countries such as the United States, where the government’s relationship with the nation’s indigenous communities is governed by federal treaties”. Maggio correctly points out that this clause is not appropriate for the application of the CBD by countries where there is no recognised status for indigenous peoples. Furthermore, even in countries where some tribes are protected, others may be neglected.

¹⁹¹ See Gudmundur Alfredsson, ‘Indigenous Peoples, Treaties with’ Max Planck Encyclopedia of Public International Law. See also note 121 in Chapter 4.

¹⁹² Glowka and *al.* 1994, at 48: “Strictly speaking, however, the paragraph’s objectives could be defeated, since the wording implies that all national legislation, including future rules, will take precedence”.

¹⁹³ Emphasis added.

¹⁹⁴ See Maggio, ‘Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity’ 1997-1998, at 210: “The language “embodying traditional lifestyles” is controversial. The IUCN commentary to the CBD implies that these words would exclude groups recently descended from “indigenous and local communities embodying traditional lifestyles,” but which at present do not maintain “traditional lifestyles””. See also, Morel 2010, at 176.

would imply that the right to culture of indigenous peoples is unduly restricted under the CBD and would represent a case of overt conflict of norms between the standards of the CBD and international human rights.¹⁹⁵ However, this interpretation is not supported by subsequent CBD practice on traditional knowledge, which is examined in Chapter 3. In this sense, the specification that traditional knowledge should be relevant for conservation is a natural consequence of the limited scope of the provision, which only deals with the conservation of biodiversity. A similar locution is found in Article 10(c) on sustainable use and the same considerations apply thereon.¹⁹⁶

A last interpretative doubt is related to the expression “approval and involvement” of indigenous and local communities, which according to Article 8(j) should constitute the precondition for the “wider application” of traditional knowledge. This locution does not provide a sufficiently clear framework to understand what participatory duties are required from State Parties.¹⁹⁷ This dissertation aims to verify in Chapters 3 and 4 to what extent subsequent CBD practice has managed to solve these apparent ambiguities.

The failure to adopt a human rights language on indigenous issues is also related to the second of the deficiencies about Article 8(j), which concerns the limited scope of the provision. With respect to the obligation to preserve and use traditional knowledge for conservation purposes, the CBD does not specify that indigenous culture and traditional practices are intimately linked to the possibility for indigenous peoples to access and manage their lands and natural resources. Furthermore, the obligation to encourage benefit-sharing is only triggered when the use of traditional knowledge is concerned, thus leaving aside the issue of access to genetic resources that are traditionally owned or used by indigenous peoples. These concerns are partially reflected in subsequent CBD practice, including the Nagoya Protocol, and are therefore analysed and further expanded in Chapters 3 and 4, as previously.

Interpretative uncertainties and the failure to include human rights language in the CBD have contributed both to create obstacles to the implementation of Article 8(j) and to generate doubts about the legal value of this provision. These constitute the third and fourth categories of deficiencies about Article 8(j). Regarding the lack of implementation, the creation of a specific Working Group to favour the application of this provision testifies to this deficiency.¹⁹⁸ Concerning the legal nature of the obligations contained in Article 8(j), special doubts have arisen with respect to the obligation to “encourage” intra-State benefit-

¹⁹⁵ The right to culture emerges from the decisions examined in section 2 of this chapter. For a full analysis of this right, see Chapter 2, section 3.3.

¹⁹⁶ Article 10(c) CBD reads: “Each Contracting Party shall, as far as possible and as appropriate...Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”.

¹⁹⁷ This point is discussed in more details in Chapter 3, section 2.1.2.

¹⁹⁸ See Morgera and Tsioumani, ‘The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods’ 2010, at 160. For more information on the Working Group on Article 8(j), visit <https://www.cbd.int/convention/wg8j.shtml> (last accessed October 2016).

sharing. While the provisions of a treaty are normally per se binding on its parties, the difficulty to identify the content of this obligation may generate doubts about the concrete value of its binding nature. However, one must distinguish between the obligatory nature of an international obligation and its self-executing nature. It should be reminded that the CBD is a framework treaty, which demands to subsequent Protocols the specifications of some of its obligation.¹⁹⁹

The Nagoya Protocol, which has recently entered into force, has introduced some relevant innovations when it comes to the issue of access to traditional knowledge and related benefit-sharing. The Protocol makes express reference in its Preamble both to the UN Declaration on the Rights of Indigenous Peoples and the rights of indigenous peoples, thus partially remedying to the failure to embrace a human rights language.²⁰⁰ Among these rights, indigenous peoples are entitled to “identify the rightful holders of traditional knowledge”. Most importantly, the protocol creates an obligation for its Parties to adopt legislation “with the aim of ensuring” the sharing of benefits “arising from genetic resources that are held by indigenous and local communities”.²⁰¹ This introduces at least two fundamental novelties. First, the Nagoya Protocol creates a specific and unmistakable obligation incumbent on State Parties, that is to adopt national legislation on benefit-sharing.²⁰² This obligation partially dissipates the vagueness of Article 8(j) CBD on benefit-sharing. Second, benefit-sharing is to be ensured not only for the use of traditional knowledge associated with genetic resources,²⁰³ but also for the access to genetic resources themselves, when these are “held” by indigenous peoples. Furthermore, in relation to access to traditional knowledge, this is conditioned upon “the prior and informed consent or approval and involvement of these indigenous and local communities”, as well as the establishment of mutually agreed terms.²⁰⁴

With all due differences, however, the Nagoya Protocol suffers from the same deficiencies as the CBD in that it does not fully acknowledge the whole body of international human rights concerning indigenous peoples. For instance, indigenous peoples are referred to as “indigenous and local communities” and the free, prior, and informed consent is watered down to prior informed consent or approval.²⁰⁵ These language ambiguities reflect

¹⁹⁹ See Maggio, ‘Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity’ 1997-1998, at 214-215. This author describes the institutional functioning of the CBD and the role of the CBD COP in the interpretation and evolution of the Convention’s provisions. See also Morgera and Tsioumani, ‘Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity’ 2011, at 4-11. On these points, see Chapters 3 and 4.

²⁰⁰ Preambular para. 26 Nagoya Protocol. Reference to the rights of indigenous peoples are made in preambular paras. 24 and 27.

²⁰¹ Art. 5(2) Nagoya Protocol.

²⁰² See Morgera and Tsioumani, ‘Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity’ 2011, at 15.

²⁰³ See Art. 5(5) Nagoya Protocol.

²⁰⁴ Art. 7 Nagoya Protocol. Other novelties are explored in Chapter 3, which also delves in the interpretation of these provisions.

²⁰⁵ See Elisa Morgera, Matthias Buck and Elsa Tsioumani (eds), *The 2010 Nagoya Protocol on Access and*

the disagreement of some Parties about the relevance of indigenous rights within the international regime of biodiversity conservation. The issue of to what extent States are free to limit the application of the rights of indigenous peoples, together with other problems resulting from the interaction of these two regimes, are therefore explored in detail in the following chapters.²⁰⁶

In addition to the concerns illustrated about Article 8(j) and the Nagoya Protocol, problematic issues for the interaction of the CBD with indigenous rights may be linked to the implementation of Article 8(a). In the context of in-situ conservation, this article creates the obligation for CBD Parties to establish protected areas to realise the objective of conservation.²⁰⁷ In the practice, when nature reserves are established, indigenous peoples are often excluded from land and resource access. Even when indigenous peoples are not fully excluded from land management, they are often not free to decide, or they cannot contribute to decide, over the destination of land.²⁰⁸ Restrictions on resource use may also come from the more general obligation contained in the CBD to conserve biodiversity and realise the sustainable use of its resources.²⁰⁹ In this sense, indigenous peoples might be prohibited from or restricted to carry out their traditional activities, such as hunting and fishing.²¹⁰ Measures that are intended as a means to ensure the conservation of nature and biological diversity may encroach on indigenous peoples if these are excluded from land management.²¹¹

Although the implementation of Article 8(a) may encroach in numerous ways on the protection of indigenous rights, the CBD does not provide criteria to solve these conflicts. Once again, however, the text of the CBD must be interpreted in the context of subsequent practice. To this end, Chapter 4 examines the COP decision adopting the Programme of Work on Protected Areas (PoWPA),²¹² as well as other relevant decisions. The PoWPA

Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges (Martinus Nijhoff 2013). On the locution “indigenous and local communities”, see recent CBD COP practice in Introduction, section 6.

²⁰⁶ For a reading of the Protocol that is in line with the human rights regime on indigenous peoples, see Savaresi, ‘The International Human Rights Law Implications of the Nagoya Protocol’ 2013. See also, Elisa Morgera, ‘Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law’ in Dennis Alland and others (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff 2013).

²⁰⁷ See section 3.

²⁰⁸ Sophie Lavallée, ‘Le Protocole de Nagoya sur l’accès et le partage des avantages découlant de l’utilisation des ressources génétiques (APA): brève présentation’ (2016) 1 Liason Énergie-Francophonie 9. On this point, see Chapter 4, section 3.

²⁰⁹ Art. 1 CBD.

²¹⁰ Conflict might be avoided, for instance, by creating exceptions to conservation-related obligations tailored on indigenous peoples. See Alexander Gillespie, *Conservation, Biodiversity and International Law* (Edward Elgar Publishing 2011), Ch. 9 titled “Exceptions for indigenous peoples, science and the military”.

²¹¹ See Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (2005), at 20.

²¹² Established by COP dec. VII/28, UN Doc. UNEP/CBD/COP/DEC/VII/28 (13 April 2004).

encourages the involvement of indigenous peoples in the creation of protected areas and it can thus be seen as the basis for a synergic interpretation of the CBD with human rights standards. In this context, Chapter 4 investigates to what extent this practice is able to fill the gaps contained in the CBD and in which measure it can solve practical conflict between the implementation of the CBD and the need for CBD Parties to respect, protect and fulfil indigenous rights.

All difficulties highlighted so far have to do with the fact that the relationship between indigenous peoples and conservation encompasses complex issues, such as the role of traditional knowledge for indigenous peoples, its link with traditional use of natural resources, the enormous economic potential of the exploitation of traditional knowledge, and issues about sovereignty over the resources to which indigenous traditional knowledge relates.²¹³ Some other difficulties are linked to the fact that, notwithstanding the incorporation of indigenous issue in the international regime on biodiversity, conservation and indigenous rights continue to have different rationales. This difficulty is common to the human rights approach to the environment applied by human rights treaty bodies to indigenous issues.

With this background in mind, this dissertation aims to verify to what extent the consideration of indigenous and local communities within the CBD regime is sufficient to realise an integration of the rights of indigenous peoples into the CBD regime. In analysing the CBD some years later its adoption, Maggio concluded that conservation regimes were inadequate at that time to ensure a synthesis of indigenous rights and conservation.²¹⁴ The purpose of subsequent chapters is to verify whether this conclusion still holds true and, to the extent that the CBD regime is still inadequate, how its deficiencies can be remedied in light of current international law.

In any event, it is worth highlighting that Maggio has identified three main gaps in the CBD, namely the lack of clear obligations to ensure benefit-sharing with communities, the need to ensure access to land and resources by indigenous peoples, and the need to secure “effective participation of local communities over resource management decisions and in the implementation of legal instruments”.²¹⁵ While the first issue has been partially resolved through the adoption of the Nagoya Protocol, the other two problems still need to be addressed.

²¹³ See Jona Razzaque and Manisuli Ssenyonjo, ‘Protection of Traditional Knowledge and Human Rights Obligations: The Status of Discussion in International Organisations’ (2007) 25 *Netherlands Quarterly of Human Rights* 401.

²¹⁴ Maggio, ‘Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity’ 1997-1998.

²¹⁵ See *ibid.*, at 226.

4. Indigenous peoples and biodiversity: a case study for conflict

The way in which the relationship between indigenous rights and environmental protection has been conceptualised in the case law of human rights bodies corresponds to a vision where environmental protection and the advancement of indigenous rights may be mutually supportive. In other words, a sound environment has been often framed as the precondition for the enjoyment of indigenous rights. Although this approach may hold true when development projects are concerned, it is only one part of the story.²¹⁶ As illustrated in this chapter, there are situations where indigenous rights and the protection of the environment may be at odds.²¹⁷ This potential for conflict is scantily reflected in the decisions of human rights treaty bodies.²¹⁸ The previous section has illustrated that the CBD regime presents critical elements that overshadow such conflict. However, the dimension of conflict is not sufficiently reflected in international legal scholarship. When the issue of the potential conflict between the international regime on conservation and indigenous rights is addressed, the problem too quickly leads to two opposite and mutually exclusive conclusions, namely either that biodiversity conservation inevitably leads to conflicts or that conservation and indigenous rights are always supportive of one another. On the contrary, this dissertation aims to present a comprehensive analysis of conflict, as well as indications on the possible ways to reconcile these two international regimes.

This is not an easy task and two caveats should be retained. First, when the collective interest to the protection of the environment poses a strain to the collective human rights of indigenous peoples, the human rights monitoring bodies are ill-placed to balance the contrasting interests at stake.²¹⁹ The solution of these conflicts, therefore, should frequently be found outside the realm of international human rights. This is due to the fact that issues going beyond the realm of human rights are involved, including the exercise of sovereignty over natural resources. Furthermore, political choices are often implied so that political processes such as negotiations among the relevant actors would produce sounder, although not necessarily fairer, results than the mere balance of rights with the notion of public interest on the part of human rights bodies.

Second, the presumption that indigenous rights and conservation should always go hand in hand fails to recognise that the interaction between these two elements should be framed in light of the possibility for indigenous peoples to decide over their development priorities.²²⁰

²¹⁶ See Heinämäki 2009.

²¹⁷ See throughout section 2 *supra*: *Apirana Mahuika* case; CESCR, Concluding observations on Sri Lanka (2010); *Xákmok Kásek* case; *Endorois* case; *Johtti Sappmelaccat Ry and others v. Finland*.

²¹⁸ See *Xákmok Kásek* case; *Endorois* case.

²¹⁹ In this sense, Shelton argues that it is easier to use a human rights approach to environmental protection when environmental pollution is at stake. See Dinah Shelton, 'The Environmental Jurisprudence of International Human Rights Treaties' in Romina Picolotti and Jorge Daniel Taillant (eds), *Linking Human Rights and the Environment* (The University of Arizona Press 2003), at 16.

²²⁰ See Cherie Metcalf, 'Indigenous Rights and the Environment: Evolving International Law' (2003-2004) 35 *Ottawa Law Review* 109, at 127-128.

Chapter 1

The refocusing on the problem under these terms gives sufficiently account of the dimension of conflict. In this respect, Chapter 2 shows that the international regimes on the human rights of indigenous peoples and the conservation of biodiversity are based on a conundrum centred on the access to natural resources and the exercise of sovereignty over them. If these issues are not analysed, the disruptive dimension of conflict that characterises the interaction of the two regimes cannot be solved. Therefore, the aim of the following two chapters is to propose an interpretative approach where issues such as sovereignty over natural resources are sufficiently taken into account. This approach is tested against the cases of both the regime on access and benefit-sharing to genetic resources and the conservation of natural resources in the form of the institution of protected areas in Chapters 3 and 4.

CHAPTER 2

The Principles Governing Access to Natural Resources between the State and Indigenous Peoples: An Interpretative Approach

1. Introductory remarks

Rights over lands and resources have emerged as a central aspect of the relationship between indigenous peoples' rights and the environment. Chapter 1 has revealed that conflicts may arise between the regimes of international human rights and biodiversity protection that are applicable to the management of natural resources. This chapter argues that these conflicts can be explained through a more fundamental conflict between the underlying principles of the international regime laying down the human rights of indigenous peoples and the international regime on biodiversity protection. While the management of territory and natural resources for environmental purposes is mostly regulated on the basis of the fact that States exercise exclusive sovereign powers on these aspects,¹ the exclusivity of these powers is challenged in this study by reference to the principle of self-determination, which—this chapter argues—underlies the international body of indigenous rights.

In this light, the following of this chapter first clarifies what is problematic about the relationship between the sovereign powers of States over natural resources and the self-determination of indigenous peoples. Second, it investigates the content of these two principles. Finally, it goes back to the issue why their parallel application may cause a conflict to answer the question of how this conflict can be resolved.

The conceptualisation of the research problem under these terms might be regarded as problematic. While the sovereignty of States over natural resources is a well-established principle in international law, the self-determination of indigenous peoples has characterised indigenous vindications from the very beginning but remains contentious. The aim of this chapter, therefore, is to propose a method to assess the content and status of the principle of self-determination as applicable to indigenous peoples. The approach chosen is to derive this principle inductively from the established corpus of indigenous rights. These rights, in turn, are explored by looking at the classic sources of international law. Although international treaties dedicated to the protection of indigenous rights are limited in number and their geographical scope of application, a decisive boost to the recognition of indigenous rights has come from the decisions and reports adopted by the treaty bodies of both international and regional human rights treaties. This chapter therefore recognises the auxiliary role of international cases and jurisprudence in the

¹ Barral 2016 forthcoming, at 6, shows how sovereignty and environmental objectives are mutually constitutive.

ascertainment of legal sources.²

The result is the elaboration of an interpretative approach that is used in the following substantive chapters on ABS (Chapter 3) and nature conservation and protected areas (Chapter 4) to guide the analysis over the relationship between indigenous peoples' rights and the protection of biodiversity. What this research intends as an interpretative approach and how this is relevant to respond to the research questions already illustrated is explained in section 5. Suffices it to say at this stage that looking at the interaction between the sovereignty of States over natural resources and the self-determination of indigenous peoples is instrumental for dealing with the question of how conflicts between the international regime on indigenous rights and the regime on biodiversity protection can be solved.

1.1. The relationship between the permanent sovereignty of States and indigenous peoples' self-determination

The relationship between the permanent sovereignty of States over natural resources and the rights of indigenous peoples over the same resources is characterised again by the dimension of conflict. Control over resources is an aspect of the sovereignty of States over their national territory. At the same time, self-determination in its human rights dimension, as enshrined in the UN Covenants, contains an aspect of economic empowerment that is closely linked to the right of peoples to exercise control over the determination of their destinies.³ Therefore, the dimension of conflict emerges in that the permanent sovereignty of States and peoples' right to freely dispose of resources under human rights law insist, at least partially, on the same material objects, i.e., the resources located on any national territory.⁴ This aspect is relevant since, as analysed in

² On these methodological issues, see more in the Introduction of this study, section 4. E.g. see Abi-Saab 1987, at 129-131 and 134, where the author recognises that international case law may contribute to the development of international law in so far as judges play a pivotal role when it comes to the definition of the content and status of any international rule.

³ See common Art. 1 UN Covenants. Art. 1(2) reads: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." For arguments in support of the interconnectedness of the political, economic and social aspects of self-determination contained in paragraph 1 and the control over natural resources contained in paragraph 2, see Jérémie Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Rights?' (2013) 31 *Netherlands Quarterly of Human Rights* 314, at 315-316. See also, Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011), at 334.

⁴ See Indigenous Peoples' Permanent Sovereignty over Natural Resources. Final report of the Special Rapporteur, Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/2004/30 (13 July 2004) (hereinafter Daes report (2004)), para. 18. Daes argues against the existence of a potential conflict by maintaining that indigenous peoples are not placed at the same level as States. The merits of this argument are discussed in the following sections. See also Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' (2006) 38 *George Washington International Law Review* 33, at 50. According to the latter author, the State's permanent sovereignty over resources ambiguously overlaps

next sections, the rights of indigenous peoples include prerogatives over land and natural resources that are similar to the economic component of self-determination. Hence, the possibility of conflict.

Schrijver offers a classical interpretation on this potential conflict with its seminal work on sovereignty over natural resources.⁵ In his understanding of the problem, although permanent sovereignty and indigenous rights to land and resources may seem to overlap, the main difference between the two lies in the fact the indigenous peoples are not subjects of international law. The State, notwithstanding its duty to respect and protect indigenous peoples' rights, holds the "ultimate authority" on the exploitation of natural resources.⁶

In contrast with this argument, this chapter contends that the problem of conflict is still relevant for two main reasons. First, the scope of indigenous rights has expanded in such a way that these rights may constitute a substantive limit to the way in which the sovereignty of States is exercised; the constraints imposed are so profound that its content may even be challenged by indigenous rights. Second, and again following from the strengthening and widening of indigenous peoples' rights, indigenous peoples might not be mere objects of international law. Instead, the existence of a number of rights, as well as indigenous peoples' ever-growing presence in international fora to discuss issues that directly concern them, represents a factor in the direction of an emerging "actorness" of indigenous peoples in international law.⁷

Sovereignty implies duties, alongside with rights, for States.⁸ These may derive for instance from the respect of fundamental rights, including the rights of indigenous peoples.⁹ These rights are more extensive than originally claimed and their content, as well as their legal status, is analysed so as to verify whether they have a bearing on the way

with self-determination.

⁵ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

⁶ See *ibid.*, at 318-319.

⁷ Both the premises and the implications of this claim are discussed in the following sections. As a general reference, see Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Transnational Publishers 2006). The Conclusion of this dissertation also contains further considerations on the role of indigenous peoples in current international law (see section 3).

⁸ Pertile shows that duties are inherent in the notion of sovereignty as formulated in UNGA resolutions and case law, especially when it comes to the existence of a duty of vigilance on private actors. See Marco Pertile, 'On the Financing of Civil Wars through Natural Resources: Is There a Duty of Vigilance for Third States on the Activities of Trans-National Corporations?' in Francesca Romanin Jacur, Angelica Bonfanti and Francesco Seatzu (eds), *Natural Resource Grabbing: An International Law Perspective* (Martinus Nijhoff 2016), at 401-406. See also, Francesco Francioni, 'Human Rights: Natural Resources and Human Rights' in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016 forthcoming), especially at 83-87.

⁹ See Schrijver 1997, at 390: "the interests of peoples, indigenous peoples and humankind are receiving increasing attention in international instruments in the sense that States are under an obligation to exercise permanent sovereignty on behalf and in the interests of their (indigenous) peoples". Indeed, the author is silent as to the way in which this objective may be realised.

in which permanent sovereignty over resources is exercised.

The conflict between conservation and indigenous peoples' rights in international law becomes even more fundamental for the present research since the sovereignty of States over natural resources is the cornerstone of environmental treaties. This founding principle in the design of many multilateral environmental treaties, including the CBD, must be balanced against the bodies of rights of indigenous peoples protected under current international law.

2. The permanent sovereignty of States over natural resources

2.1. The evolution of the principle

Sovereignty is one of the founding principles of modern international law.¹⁰ This principle is indirectly enshrined in Article 2(1) of the UN Charter as a consequence of the sovereign equality of States. It also lies at the basis of principles such as the duty not to interfere with the internal affairs of other States. Furthermore, it entails the supreme authority of the State over its national territory, which is related to the allocation of natural resources to States. The problem of the allocation of natural resources under international law, however, cannot be entirely subsumed under the principle of sovereignty and lacks a unitary regime.¹¹ Instead, the principle of permanent sovereignty over natural resources can offer a more suitable framework to understand the economic powers exercised by States over the natural resources located under their territorial sovereignty.¹²

Although permanent sovereignty is deemed to have reached the status of customary

¹⁰ For an extensive bibliography on the principle of sovereignty in international law, see *ibid.* On the content and evolution of the principle, see James N. Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50 *American Journal of International Law* 854; Karol N. Gess, 'Permanent Sovereignty over Natural Resources: An Analytical Review over the United Nations Declaration and its Genesis' (1964) 13 *International & Comparative Law Quarterly* 398; Ian Brownlie, 'Legal Status of Natural Resources in International Law' (1979) 162 *Recueil des cours* 245. See also Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Rights?' 2013, at 2013; Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 *Melbourne Journal of International Law* 451, at 462-463, where the authors refer to the main ICJ decisions affirming the fundamental character of the principle. It is to be reminded here that sovereignty has also been qualified as a mere fact rather than a principle in international law. For an account of that view, see Treves 2005, at 243. This view however refers more to sovereignty intended as the capacity to control the territory, thus being connected to the idea of effectivity. See Conforti 2013, at 205. Moreover, the view of sovereignty as a fact presupposes a conception of international law as a legal system completely dominated by States, which is not embraced in this dissertation. See Introduction, section 4.

¹¹ See Marco Pertile, *La relazione delle risorse naturali e conflitti armati nel diritto internazionale* (CEDAM 2012), at 47. See also, Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge University Press 2015), at 49: "For States, the principle of permanent sovereignty over natural resources must be regarded as an attribute of State sovereignty".

¹² On the relationship between sovereignty and permanent sovereignty, see *Abi-Saab* 1987, at 331-334. See also, *Dam-de Jong* 2015, at 47-48: "the principle of permanent sovereignty over natural resources is one of the organising principles of international law relating to natural resources".

international law,¹³ its precise content has evolved to respond to different societal needs (i.e., development, decolonisation, environmental concerns) so as to determine an underlying ambiguity both as for the meaning and the addressees of the principle.¹⁴

The consolidation of permanent sovereignty as a customary rule in international law has mainly taken shape through the UN resolutions that have referred to this principle interchangeably as an attribute of peoples, States, or developing countries.¹⁵ Therefore, the main problem is to understand in which circumstances and to what extent permanent sovereignty empowers States concerning the management of natural resources.

Contrary to the principle of sovereignty that predates the State-centric organisation of the international society, the origins of permanent sovereignty over natural resources can be traced back to the decolonisation movements of the 1960s and the formation of new States emerging from the ashes of previous colonies.¹⁶ In this sense, permanent sovereignty was an articulation of the economic conception of self-determination, according to which peoples shall freely dispose of their resources to be able to freely determine their status.¹⁷ In a group of resolutions that run across the 1950s up to the 1970s, permanent sovereignty was intended as the right of “under-developed” or “developing countries” to use their natural resources for achieving economic development.¹⁸ This trend partially mirrored the agenda of developing countries, first emerging from decolonisation and then struggling to build a strong economic position in the international arena.¹⁹

¹³ See ICJ, Dissenting Opinion of Judge Weeramantry, *Case concerning East Timor (Portugal v. Australia)*, Judgment (30 June 1995), at 124. See also, ICJ, *Case concerning Armed Activities in the Territory of the Congo (DRC v. Uganda)*, Judgment (19 December 2005), para. 244: “The Court recalls that the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974). While recognizing the importance of this principle, *which is a principle of customary international law...*” (emphasis added). The customary nature of the principle is also affirmed in *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic* (1977), 53 ILM 422, paras. 84-91. See Nico Schrijver, ‘Permanent Sovereignty over Natural Resources’ Max Planck Encyclopedia of Public International Law, at paras. 18-19, 23: “The principle of sovereignty over natural resources did not evolve through conventional methods of international law-making such as the evolving State practice or treaty-making...As far as legal doctrine is concerned, hardly any contemporary international lawyer would deny the principle of permanent sovereignty legal value”.

¹⁴ Concerning the evolution of the principle in international law, see Dam-de Jong 2015, at 35-46.

¹⁵ Although the resolutions adopted within the UN General Assembly are not per se binding, they may concur to the formation of customary international law, by the crystallisation of State practice and opinio juris. For a deeper discussion on that, see section 3.6 in this chapter.

¹⁶ See Schrijver 1997, at 1, 3, and 255 ff.

¹⁷ See *Abi Saab* 1987, at 335.

¹⁸ See UNGA Res. 523 (VI), UN Doc. A/RES/523(VI) (12 January 1952), first preambular para.: under-developed countries for purposes of economic development have a “right to determine the use of natural resources”. See also, UNGA Res. 2158 (XXI), UN Doc. A/RES/2158 (XXI) (25 November 1966), preamble: in order to ensure the realisation of permanent sovereignty the highest possible rate of growth of developing countries must be ensured; UNGA Res. 2625 (XXV), UN Doc. A/RES/25/2625 (24 October 1970), para. 74: full exercise over their natural resources on the part of developing countries.

¹⁹ Indeed, there is also a paternalistic thread recognisable in some resolutions. This paternalistic view

When the agenda of developing countries became prominent with the advent of the New International Economic Order (NIEO), development was framed as a general objective of any States. In this context, permanent sovereignty over natural resources was seen as an attribute of the State, aimed to achieve economic development.²⁰ The priority for the newly formed States or States in the process of emerging from colonisation was to be able to affirm their sovereign powers over national resources against both foreign States and foreign companies.²¹ Therefore, a second group of resolutions conferred permanent sovereignty to all States. In the exercise of sovereign powers, however, States should be guided both by national development and the well-being of the national people.²² In this sense, the State's permanent sovereignty appears to be qualified by the objective of promoting the interests of the people.²³

The apparent convergence of the notion of permanent sovereignty over natural resources towards a State-centric conception of resource management is complicated by the intrinsic ambiguity of the principle's formulation in some of the most widely

relates the State's permanent sovereignty to the objective of the full and proper use of natural resources. This renders permanent sovereignty conditional upon the notion of an acceptable degree of development. See UNGA Res. 626 (VII), UN Doc. A/RES/626(VII) (21 December 1952), whose preamble contains a reference to the need to encourage under-developed countries "in the proper use" of their resources.

²⁰ See UNGA Res. 3171 (XXVIII), UN Doc. A/RES/3171(XXVIII) (17 December 1973), preamble: right of each State to national sovereignty; again an intrinsic condition is that the full exercise is ensured in order to achieve development objectives. See also UNGA Res. 3201 (S-VI), UN Doc. A/RES/S-6/3201 (1 May 1974) (NIEO declaration), para. 4(e): among the tenets of the NIEO, the permanent sovereignty of States over resources and economic activities plays a major role. UNGA Res. 3281 (XXIX), UN Doc. A/RES/3281(XXIX) (12 December 1974) (Charter of economic rights and duties of States), Art. 2: "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities". For a viewpoint on the value of the Charter of economic rights and duties, see Pereira and Gough 2013 at 457: the Charter was adopted by a majority of developing countries with virtually no favourable developed countries; in this sense, its legal significance should be limited since it does not reflect the legal views of a significant portion of States. See also UNGA Res. 1515 (XV), UN Doc. A/RES/1515(XV) (15 December 1960): States are indicated as holders of sovereign powers as concerns natural resources, in the context of a resolution aimed to address the problems of less developed countries. See Dam-de Jong 2015, at 38-40.

²¹ The problem here was to guarantee that States emerging from decolonisation could freely dispose of their natural resources without the risk of incurring into international responsibility for the infringement of international investment treaties. For early reflections on the issue of the control of foreign investments, see *Abi-Saab* 1987, at 338-351. On the rationale behind NIEO, see *Schrijver* 1997, at 96-100.

²² See UNGA Res. 2158 (XXI), para. 1: "inalienable right of all countries...in the interest of national development". See also, UNGA Res. 1803 (XVII), UN Doc. A/RES/1803(XVII) (14 December 1962), para. 1: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned"; UNGA Res. 3281 (XXIX), Art. 7: "Every State has the primary responsibility to promote the economic, social and cultural development of its people."

²³ Note that permanent sovereignty is also an unqualified attribute of States; it has been used to specify the extent and scope of States' territorial sovereignty over resources that are physically located beyond the terrestrial portion of States' territory. The notions of sea-bed and superjacent waters are relevant in this sense. See UNGA Res. 3016 (XXVII), UN Doc. A/RES/3016(XXVII) (18 December 1972), para 1: right of States "over all their natural resources, on land within their international boundaries as well as those found in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters"; UNGA Res. 3171 (XXVIII), para. 1: inalienable rights of States to permanent sovereignty over natural resources, land, sea-bed etc.

accepted UN resolutions concerning the exercise of sovereign powers over resources. The UN General Assembly (UNGA) Resolution 1803 (XVII) of 1962 is emblematic in this sense.²⁴ This Declaration refers to a tripartite pool of subjects as potential addressees of permanent sovereignty. On the one hand, States have an “inalienable right...freely to dispose of their natural wealth and resources in accordance with their national interests”.²⁵ On the other hand, both peoples and nations should exercise permanent sovereignty “in the interest of their national development and of the well-being of the people of the State concerned”.²⁶

Although States and peoples are different legal subjects in international law, one solution to this ambiguity would be to argue that the reference contained in resolution 1803 to “the people of the State concerned” may qualify the interpretation of this ambiguous clause in favour of a State-centric articulation of permanent sovereignty. In other words, peoples and nations would be entitled to sovereign powers in the field of natural resources when they are constituted in a State-form.²⁷ This interpretation, however, does not fully respond to the additional ambiguity of the reference to the UN Charter, which indicates both the equality of States and self-determination as its founding principles.²⁸ Moreover, the reference to permanent sovereignty as a right of peoples is not isolated,²⁹ so that the ambivalence of the principle as a right of both peoples and States cannot be fully resolved by reference only to the principle as it has developed in the UN practice.

The ambiguity in the subjects may be better explained as a result of the parallel evolution of the principle in two different bodies of law. While the principle is often

²⁴ Res. 1314 (XIII) of 1958 had originally called for a full survey of both the right to self-determination and permanent sovereignty. This call has resulted in Res. 1803. The resolution of 1958, however, already contained the seeds of the ambiguity between peoples and States that is fully reflected in Res. 1803. See preamble: “noting that the right of peoples and nations to self-determination...includes “permanent sovereignty””. On the relationship between the two resolutions see, Schrijver, at para. 9.

²⁵ UNGA Res. 1803 (XVII) , preamble.

²⁶ UNGA Res. 1803 (XVII), para. 1.

²⁷ See Arhén 2016, at 32; Cassese 1995, at 99-100; Crawford in Alston 2005, at 22.

²⁸ UNGA Res. 1803(XVII), para 7: the violation of the rights of peoples and nations to permanent sovereignty runs counter the UN Charter.

²⁹ See UNGA Res. 626 (VII), preamble: “right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty”; operative part: “Member States, in the exercise of their right freely to use and exploit their natural wealth and resources”. See also, UNGA Res. 1514 (XV), UN Doc. A/RES/1514(XV) (14 December 1960) (Declaration on the granting of independence to colonial countries and peoples), preamble: “affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources”. See further, Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978, in force 6 November 1996), Art. 13; Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983, not yet in force), Art. 15(4) and 38. The ambiguity between peoples and States emerges again in the African regional context. Art. 21 of the African Charter ambiguously refers to the rights of “all peoples” to “freely dispose of their wealth and natural resources”, while affirming in the same article the duty of States to exercise their “right to free disposal of their wealth and natural resources” with a view to strengthening the “African Unity”. See African Charter, Art. 21(1) and (4).

conceived as the natural corollary of States' sovereignty,³⁰ it is also very much related to the parallel evolution of self-determination in the human rights realm.³¹ Both the sovereignty aspect and the self-determination aspect have been used for decolonisation purposes. In this sense, decolonisation contains within itself a duality of subjects, i.e., the peoples that need to exercise self-determination and the States formed through the exercise of self-determination.³²

Therefore, the ambiguity about the subjects entitled to exercise permanent sovereignty is ultimately linked to the historical development of the principle. As argued by Schrijver, the diversified formulations of permanent sovereignty can be traced back to different historical moments where insisting on peoples rather than States, or vice-versa, reflected both different political backgrounds and purposes.³³ Along these lines, the resolutions of the 1950s and the beginning of the 1960s were imbued with decolonisation ideals. In this sense, permanent sovereignty was instrumental for the nationalisation of resources with the aim to achieve self-determination. The inclusion of economic self-determination in common Article 1(2) of the UN Covenants may be also read in those terms.³⁴ The emphasis on peoples was subsequently set aside starting from the mid-1960s

³⁰ Schrijver, at para. 3. See also, Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Rights?' 2013, at 318.

³¹ See Pertile, *La relazione delle risorse naturali e conflitti armati nel diritto internazionale* 2012, at 79-80: "il principio in oggetto [permanent sovereignty] si pone...sia come elemento costitutivo del principio di autodeterminazione dei popoli, sia come attributo inerente della sovranità statale". See also, Dam-de Jong 2015, at 34; Duruigbo 2006, at 50: "'Sovereignty,' as used in framing PSNR indicates an intent to vest control in the state. Yet sovereignty is only one aspect of the origin of the principle of PSNR, which is twofold: the sovereignty of states and the self-determination of peoples"; Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Rights?' 2013, at 316: "there is a fundamental dichotomy in international law when it comes to control over natural resources since two legal personalities are entitled to some form of control over the resources: States and peoples. This dichotomy is the result of the development of two branches of international law that focus on different actors but address the same right: the right to dispose of the natural resources." See, furthermore, Federica Violi, 'Land Grabbing e sovranità territoriale: spunti critici di riflessione' in Adriana Di Stefano (ed), *Un diritto senza terra? Funzioni e limiti del principio di territorialità nel diritto internazionale e dell'unione europea; A Lackland law? Territory, effectiveness and jurisdiction in international and EU law Atti e contributi del X incontro di studio fra i giovani cultori delle materie internazionalistiche Catania, 24-25 gennaio 2013* (Giappichelli 2015), section 2.

³² See UNGA Res. 1803 (XVII), preamble para. 2: the right to permanent sovereignty over natural resources is "a basic constituent of the right to self-determination". See also Dissenting Opinion of Judge Weeramantry, *Case concerning East Timor (Portugal v. Australia)*, at 111: "Sovereignty over their economic resources is, for any people, an important component of the totality of their sovereignty. For a fledgling nation, this is particularly so." ICJ, Dissenting Opinion of Judge Skubiszewski, *Case concerning East Timor (Portugal v. Australia)*, at 242: "The status of the Territory of East Timor as non-self-governing, and the right of the people of East Timor to self-determination, including its right to permanent sovereignty over wealth and natural resources, which are recognized by the United Nations, require observance by all Members of the United Nations" (emphasis added).

³³ For a detailed discussion on that, see Schrijver 1997, Ch. 2, especially at 49 ff. and 3.

³⁴ See Art. 1(2) and 47 ICCPR; Art. 1(2), 11(2)(a), and 25 ICESCR. For a full analysis of these articles, see sections 4.1 and 4.2. in this chapter. The already cited Res. 626 (VII) and Res. 1514 (XV) also go in this direction. See also, *ibid.*, at 57: "In 1954, the Commission on Human Rights had recommended that the General Assembly, through ECOSOC, establish a Commission with the task of conducting a full survey of the right of peoples and nations to 'permanent sovereignty over their natural wealth and

when the States emerging from decolonisation started to claim a right to development. Within this framework, permanent sovereignty over resources was conceived mainly an instrument to realise a new international economic order.³⁵

Most recently, permanent sovereignty emerges clearly as an attribute of States.³⁶ This is the case when the principle is qualified by obligations concerning the protection of the environment at the international level. Suffices it to think of Stockholm Principle 21 and Rio Principle 2 that, while presupposing the sovereignty of States over resources, proclaim the prohibition of transboundary environmental harm in the use of national resources.³⁷ The State's permanent sovereignty lies also at the foundation of the CBD, where it is reaffirmed both in relation to the obligation not to cause harm when utilising natural resources and with respect to access to genetic resources.³⁸ In environmental instruments, therefore, the right to exploit natural resources is framed as an attribute of the sovereignty of States. Of course, this right finds inherent limitations in the objective to protect environmental resources contained in METs.³⁹

In sum, the principle of permanent sovereignty has served a number of purposes in international law. Hence, its multifaceted content cannot come as a surprise. Instead, when permanent sovereignty is at stake, it must be contextualised within the legal framework of reference. Although the principle of sovereignty over resources has evolved

resources', which they labelled a 'basic constituent of the right to self-determination'. Schrijver, at 58, highlights the strong opposition of Western States to the understanding that self-determination and permanent sovereignty should be read together.

³⁵ In the words of Schrijver 1997, at 83: "Since it had 'proved impossible to achieve an even and balanced growth of the international community under the existing international economic order', according to the NIEO Declaration, the developing countries set out to change the rules of the game in order to put a halt to the widening of the gap between rich and poor nations and to promote the redistribution of wealth and power. Permanent sovereignty was perceived as an essential component of these efforts".

³⁶ See Marco Pertile, 'Economic Self-Determination in the 21st Century: Tracing the Origin and the Evolution of a Chamaleonic Concept' in Peter Hilpold (ed), *Autonomie und Selbstbestimmung in Europa and im internationalen Vergleich* (Nomos, Dike and facultas 2016), at 357-387, for the new tendencies. See also Francioni, 'Human Rights: Natural Resources and Human Rights' 2016 forthcoming for the qualification of sovereignty in light of human rights and the well-being on the people.

³⁷ Declaration of the United Nations Conference on the Human Environment, Principle 21: "States have, in accordance with the Charter of the United Nations and the principles of international law, the right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Rio Declaration on Environment and Development, (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. I), Principle 2 (same text as Principle 21 above). On the legal status and content of this principle and the corresponding rule, see e.g., Dinah Shelton, 'Stockholm Declaration (1972) and Rio Declaration (1992)' Max Planck Encyclopedia of Public International Law; Sands, *Principles of International Law* 2003, at 235-246; Bodansky 2010, at 200-202; Dupuy and Viñuales 2015, at 55-58.

³⁸ Preambular para. 4 CBD: "States have sovereign rights over their own biological resources"; Art. 3 reiterates what is affirmed in Stockholm Principle 21 and Rio Principle 2 *supra*; Art. 15(1): "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation". These rules are transposed in equal terms in the Nagoya Protocol, preambular para. 4 and Art. 6.

³⁹ See Barral 2016 forthcoming.

in parallel with that of States' sovereignty and with the principle of self-determination, it is important not to equate them since these legal principles have been used to different ends.⁴⁰ For the purposes of the present research, when it comes to the protection of biological diversity at the international level, the sovereignty of States over natural resources is strongly affirmed in the CBD and constitutes the relevant framework for reference.⁴¹

2.2. The limits to permanent sovereignty

In the field of biodiversity conservation, the powers of States over natural resources are mainly an attribute of sovereignty. This sovereignty, however, does not come unqualified and is subject to a number of limits.⁴² It would be ingenuous to conclude that these limits diminish the nature of the State's sovereignty or the relevance of States in the international arena.⁴³ However, this section argues that these limits qualify the content of sovereignty to the extent that its exercise is very much constrained and its content is thus abundantly regulated.⁴⁴

The limits to States' powers over resources are classified in this research into four categories: (1) limits stemming from other founding principles of international law; (2) intrinsic limits deriving from the content of the principle of sovereignty over natural resources; (3) so-called practical limits descending from the nature of the problems underlying international legal regimes; and (4) limits imposed by sub-disciplines of international law.

⁴⁰ In this sense, Dam-de Jong 2015, at 58, argues: "The principle of permanent sovereignty accrues both to States and to peoples. For States, the right to freely dispose of their natural resources is an attribute of their sovereignty, while for peoples, the right to freely dispose of their natural resources is an inherent part of their right to self-determination". For a contrary view, see Daes report (2004): throughout her report, Daes refers indifferently both to permanent sovereignty and self-determination, thus blurring the lines between these two principles.

⁴¹ Indeed, Barral 2016 forthcoming, at 3, stresses that there is "an inherent tension between the organization of the international society of States on the basis of territorial sovereignty and the interconnected and interdependent nature of the resources of the biosphere".

⁴² See Schrijver 1997, at 255.

⁴³ For a debate on the absolute character of sovereignty, apart from the already cited contributions by Barral 2016 and Francioni 2016, see Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania 1990), at 15, 19-22: in the view of this author, self-imposed limitations to sovereignty deriving from the ratification of multilateral treaties do not diminish the absolute character of sovereignty; on the contrary, they are a confirmation of this. See also, Nico Schrijver, 'The Changing Nature of State Sovereignty' (1999) 70 *British Yearbook of International Law* 65, who argues that States remain indispensable actors. See, Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' 41 *Vanderbilt Journal of Transnational Law* 1141, at 1148: "The limitations that international law places on sovereigns largely emanate from self-restraint".

⁴⁴ Some authors argue that these limits are inherent in the principle of permanent sovereignty that is to be exercised in the interest of the people. See Dam-de Jong 2015, chapters 3 and 4, where the author stresses the fact that peoples are also beneficiaries of permanent sovereignty as exercised by States (see conclusion at 152).

Chapter 2

First, the sovereignty of States does not imply the absence of any limitations. States' liberty, in fact, is most naturally limited by the sovereignty of other States.⁴⁵ This is expressed through some of the founding principles of international law, namely State equality and non-intervention in other States' internal affairs. Both principles are at the core of the UN Charter and have been elaborated on in the UN resolution on friendly relations.⁴⁶

Second, the exercise of sovereign rights over natural resources presents intrinsic limits that derive from the content of the principle as formulated in the UN resolutions. These limits consist in the conditionality that is usually attached to the exercise of permanent sovereignty, namely that the free disposal of natural resources is aimed to the well-being of the national people.⁴⁷ In this sense, the use of natural resources on the part of the State, as well as national development initiatives, should be qualified by and assessed through their impact on the whole population of a State. In the view of Schrijver, this aspect emerges first from the UN resolutions on permanent sovereignty, which aim to strike a balance between ensuring national development and ensuring that this is done

⁴⁵ The exercise of sovereignty on the part of other States may also create limits. See Jona Razzaque, 'Resource Sovereignty in the Global Environmental Order' in Elena Blanco and Jona Razzaque (eds), *Natural Resources and the Green Economy: Redefining the Challenges for Peoples, States and Corporations* (Martinus Nijhoff 2012): throughout the chapter, the author suggests that the sovereignty of States is anyway limited by the extraterritorial effects of some other States' measures.

⁴⁶ See Charter of the United Nations, (San Francisco, 26 June 1945, in force 24 October 1945) (hereinafter UN Charter), Art. 2(1) (State equality) and 2 (7) (non-intervention of the UN in the internal affairs of States). See also, UNGA Res. 2625 (XXV), affirming both the "principle of sovereign equality of States", and the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter". For an account of the historical evolution of the principle, see Juliane Kokott, 'States, Sovereign Equality' Max Planck Encyclopedia of Public International Law, Part B. Concerning the latter, non-intervention has been affirmed in the *Case concerning the Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment (25 March 1948), para. 35, as well as in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res. 2131 (XX), UN Doc. A/RES/2131(XX) (21 December 1965), paras. 1-3, 5, and 8. The principle is also contained in Art. 19 of the Charter of the Organization of American States, (Bogotá, 30 April 1948, in force 13 December 1951). See also, Hellen Keller, 'Friendly Relations Declaration (1970)' Max Planck Encyclopedia of Public International Law, paras. 18-19.

⁴⁷ See note 22 in this chapter. See also, Pereira and Gough 2013, at 458, 460: the sovereignty of States should be exercised for the well-being of peoples, thus there are limits to its exercise and duties for the State; Lila Barrera-Hernandez, 'Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation' (2006) 12 Annual Survey of International and Comparative Law 43, at 44; Duruigbo 2006, at 65-67: the author specifically makes reference to the fact that in the *Ogoni* case, the African Commission on Human and Peoples' Rights derived State duties from article 21 of the African Charter; Errico 2011, at 341-342: the author makes the argument that the duty for States to benefit the whole population is also closely linked to the emergence of a right to development. In this sense, she refers to the Declaration on the Right to Development, UNGA Res. 41/128, UN Doc. A/RES/41/128 (4 December 1986), Art. 2(3) and the World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (25 June 1993), para. 10. Another intrinsic limit to the State's sovereign rights over natural resources is given by the diminished importance of one of the premises of the exercise of sovereignty, i.e., territoriality. On this, see Austen L. Parrish, 'Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights' 31 American Indian Law Review 291.

in the interests of peoples. These limits are also contained in treaty law, such as the UN Covenants that establish a duty not to deprive peoples of their means of subsistence.⁴⁸ Within this framework, participatory rights in decision-making can be seen as one of the practical consequences of this qualification.⁴⁹

Third, there are some practical limits deriving from the acknowledgment that sovereign States are not self-sufficient anymore when it comes to the conduct of their internal affairs. This argument is particularly strong when it comes to the governance of natural resources. States are increasingly aware that they “have become” more and more “interdependent” as for the management of natural resource—the limitation of sovereignty is therefore practical and is exemplified by the need to cooperate in certain areas.⁵⁰ In this vein, States conclude international treaties in the field of environmental protection, whose aim may be for instance to avoid negative transboundary impacts of States’ activities on the natural environment of other States, to commonly manage transboundary natural resources, or to ensure that some species, habitats, ecosystems, or functions of the natural environment are preserved. At the same time, cooperation between States is possible by virtue and as an expression of the State’s sovereignty.⁵¹

Fourth, and as a consequence of the previous trend, the State’s sovereignty intended as the liberty of States to manage their own affairs is restricted by the emergence of detailed rules in many sub-fields of international law.⁵² The sub-disciplines of interest to the present research are mainly international environmental law and international human rights law. These are very much representative of the limits imposed on the sovereignty of States in that they create both constraints and positive duties for States. Although these limits are self-imposed and, thus, an expression of sovereignty, they may affect sovereignty in different ways depending on the nature of limits that States agree to. In this sense, it is important to distinguish between limits deriving from international environmental law and limits imposed by human rights law.⁵³

⁴⁸ See Schrijver 1997, for the first aspect, at 308; for the second aspect, at 309.

⁴⁹ See Barrera-Hernandez 2006, at 57. See also, Errico 2011, at 345; Francioni, ‘Human Rights: Natural Resources and Human Rights’ 2016 forthcoming.

⁵⁰ Schrijver 1997, at 249; Barral 2016, at 8-15.

⁵¹ This argument needs to be qualified. Although it is true on a formal level that sovereignty is what allows States to conclude agreements in the field of environmental cooperation, it is important to remind that this cooperation is not necessarily the expression of the unilateral self-interest of the State. States tend to enter into multilateral agreements that go beyond the mutual concessions of one State to the other. Instead, these agreements are the expression of the “common concern of humankind”, that is problems that supersede actual national impacts. See Stephen Stec, ‘Humanitarian Limits to Sovereignty: Common Concern and Common Heritage Approaches to Natural Resources and Environment’ (2010) 12 *International Community Law Review* 361, at 364.

⁵² More broadly, the State’s sovereignty has been restricted by the emergence of common values. See Federico Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’ (2006-2007) 42 *Texas International Law Journal* 155, at 159.

⁵³ Some authors argue that alleged limits to the sovereignty of States may derive from the nature of the problems regulated. In this sense, environmental protection would not constitute a limit to sovereign

Concerning international cooperation in matters related to the protection of the environment, this can be framed first as a reaffirmation of sovereign equality.⁵⁴ In line with this view, the sovereignty of States lies at the basis of the main UN resolutions dealing with the environment, as well as of most multilateral environmental treaties.⁵⁵ In this sense, environmental norms do not constrain sovereignty; they merely qualify it.⁵⁶ This is the case, for instance, for the prohibition to cause transboundary harm while exploiting natural resources.⁵⁷ Although *de facto* restricting the ways in which resources are managed,⁵⁸ this norm primarily aims to protect the mutual interests of neighbouring States.

Second, and in a more nuanced way, indeed, the values underlying environmental treaties pose limits that may supersede the “logic behind the primacy of the law of sovereign states” and that have repercussions on the way in which activities affecting the national environment are regulated internally.⁵⁹ This is the case when States’ activities are so dangerous that they threaten human survival.⁶⁰

Third, there are environmental treaties that impose obligations that need to be implemented nationally in order to achieve objectives agreed upon at the international level. This is the case of most international conservation treaties, including the CBD.

Although in the last two examples States’ powers on natural resources are limited by international obligations, it is important to remind that the ultimate foundation of these obligations remains the sovereignty of States. The CBD, in particular, is premised on the

powers. Rather obligations restraining the liberty of States to dispose of their natural resources would derive from considerations of opportunity and mutual interest. Limits stemming from the need to protect the environment to the advantage of human beings would therefore represent an “acceptable constraint”. On this point, see Barral 2016 forthcoming, at 4 and 26. Similarly, the protection of human rights can be seen as mutually supportive with respect to realising the permanent sovereignty of States in the interest of people. On this point, see Francioni, ‘Human Rights: Natural Resources and Human Rights’ 2016 forthcoming, at 82-83. The latter author shows how sovereignty has been pivotal in the development of human rights.

⁵⁴ See André Nollkaemper, ‘Sovereignty and Environmental Justice in International Law’ in Jonas Ebbeson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009), at 255-258.

⁵⁵ See e.g. Stockholm Declaration, Principle 21; Institutional and financial arrangements for international environmental cooperation, UNGA Res. 2997 (XXVII), UN Doc. A/RES/27/2997 (15 December 1972), preambular para. 4; World Charter for Nature, UNGA Res. 37/7, UN Doc. A/RES/37/7 (28 October 1982), preambular para. 5 and para. 22; Principle 2 Rio Declaration; Art. 3 CBD.

⁵⁶ See Schrijver, ‘Permanent Sovereignty over Natural Resources’, para. 24. See also, Dam-de Jong 2015, at 40-43.

⁵⁷ See note 37 in this chapter on Principle 21. See also, Trail Smelter Arbitration (United States v. Canada); ICJ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), para. 29; ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment (20 April 2010), para. 72.

⁵⁸ See Pereira and Gough 2013, at 457.

⁵⁹ Stec 2010, at 364.

⁶⁰ *Ibid.* The author in particular refers to the effects of nuclear weapons on the survival of humankind.

principle of national sovereignty over biological and natural resources.⁶¹ In this context, sovereignty may be seen first as a means for developing countries not to be deprived of their resources while granting access to them for conservation purposes. Second, as long as States are the main holders of biological diversity, they are also the main duty-bearers when it comes to its conservation. Furthermore, the fundamental role of the State is compounded by the legal recognition that “the conservation of biological diversity is a common concern of humankind”.⁶² Unlike common heritage, the common concern category presupposes sovereignty and calls for the cooperation of States for achieving common objectives.⁶³

Regarding the limits to sovereignty deriving from human rights law, the main argument, in short, is that human rights constrain States’ behaviour with regard to their nationals and peoples subject to their jurisdiction.⁶⁴ In the case of indigenous peoples, the limitations posed on States have an effect on the latter’s permanent sovereignty over natural resources.⁶⁵ This is related to the fact that indigenous peoples hold extensive rights on their territories and the natural resources therein located. Since these territories are under the jurisdiction of national States, there is a problem of overlapping authorities on lands and resources held by indigenous peoples in various forms. Moreover, indigenous territories are often rich in terms of the natural and subsoil resources that they contain. As has emerged in the case-law of human rights bodies, the abundance of natural and mineral resources may create situations in which a State’s rights to exploit these resources for the purposes of national development conflict with indigenous peoples’ rights on the same lands and resources. Finally, the overlapping of legal titles may be problematic also when States’ conservation policies are at stake, since the obligation to create protected areas or restrictions on resource use deriving from international law may similarly encroach on the rights of indigenous peoples.

For these reasons, and with a view to study the relationship between conflicting legal norms, it is fundamental to analyse the content and legal status of indigenous peoples’

⁶¹ Art. 3 and 15 CBD.

⁶² Preambular para. 3 CBD.

⁶³ See e.g., Barral 2016, at 12-15. On the difference between common concern and common heritage, see e.g., Dupuy and Viñuales 2015, at 84-86.

⁶⁴ See Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press 2015), at 33-34; William J. Aceves, ‘Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation’ (2002) 25 *Hastings International and Comparative Law Review* 261; Michael K. Addo, *The Legal Nature of International Human Rights, Series: International Studies in Human Rights* (Martinus Nijhoff 2010), at 20-22; Louis Henkin, ‘Human Rights and State “Sovereignty”’ (1996) 25 *Georgia Journal of International and Comparative Law* 31, at 32-33. For a more nuanced view of this argument, see Francioni, ‘Human Rights: Natural Resources and Human Rights’ 2016 forthcoming; Jack Donnelly, ‘State Sovereignty and International Human Rights’ (2014) 28 *Ethics & International Affairs* 225, at 235.

⁶⁵ See Razzaque 2012, at 84-87; at 86, this author argues that the rights of indigenous peoples are shaping the sovereignty of States.

rights. Arguing, as some authors have done,⁶⁶ that indigenous rights do not conflict with permanent sovereignty over resources since the latter belongs to peoples is of little practical use because it does not provide guidance on the interaction between States and indigenous peoples over natural resources. Instead, the main claim of this chapter is that indigenous peoples' rights are especially restricting the sovereignty of States over natural resources.⁶⁷ Although the link between the permanent sovereignty of States over natural resources and indigenous peoples' rights is rarely spelled out in legal documents,⁶⁸ a joint reading of the two in light of human rights law may confirm this view. By virtue of indigenous rights, States must not only restrict their sovereign powers but also act to ensure the respect for those rights.

3. The rights of indigenous peoples

The rights of indigenous peoples are a multifarious body of individual, as well as group rights that have emerged mainly within the UN framework. The survey conducted in Chapter 1 on the main decisions concerning indigenous peoples and the environment gives a clear idea of the global significance of indigenous rights. The Human Rights Committee, the CESCR, the CERD, as well as regional human rights bodies have found violations of indigenous peoples' rights, mainly by interpreting in an extensive way individual rights that were not directly concerned with the indigenous struggle. This equals to say that there is an approach according to which indigenous peoples are safeguarded through the general body of human rights law.⁶⁹ Thus, the decisions of human rights bodies are once again relied upon in this section with a view to identifying the content and assessing the status of indigenous rights.

In addition to case law, this section is also directly relying on primary sources, i.e., the analysis of treaties and relevant legal documents on indigenous peoples' rights. This trend corresponds to a second, complementary, approach whereby legal instruments are

⁶⁶ See Pereira and Gough 2013, at 454: these authors purport that there is no contradiction between the sovereignty of States over natural resources and self-determination of indigenous peoples, since both belong to peoples.

⁶⁷ See Malgosia Fitzmaurice, 'Tensions between States and Indigenous Peoples over Natural Resources in Light of the 1989 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 Declaration on the Rights of Indigenous Peoples (Including Relevant National Legislation and Case-Law)' (2012) 4 *The Yearbook of Polar Law* 227, at 236: the State's permanent sovereignty is limited by the collective rights of indigenous peoples.

⁶⁸ See, at the regional level, the Amazon Declaration (Manaus, 6 May 1989), para. 4: "sovereign right of each country to manage freely its natural resources, bearing in mind the need for promoting the economic and social development of its people and the adequate conservation of the environment". See also, Daes report (2004).

⁶⁹ See Katja Göcke, 'Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level' (2013) 5 *Goettingen Journal of International Law* 87, at 126. See also, Bankes 2011, at 59. According to the latter author, the main advantage of relying on general human rights treaties is that they are widely ratified.

specifically designed to protect indigenous rights.⁷⁰ As reminded, there are two main legal instruments that deal specifically with indigenous rights, namely the ILO Convention 169 and the UN Declaration on indigenous rights. In principle, both documents are tainted with formal limitations to their universal applicability. The former, while being a binding treaty, has been ratified only by twenty-two States.⁷¹ Indeed, some of the rights enshrined in the Convention text have been relied upon by human rights treaty bodies outside the ILO framework and with reference to cases involving States that are not party to the ILO Convention.⁷² The latter is a non-legally binding document officially endorsed by the UNGA. Notwithstanding these limitations, both documents have been used as interpretative tools in the case law of international human rights bodies and national courts. Furthermore, the Declaration has contributed to the consolidation of the rights of indigenous peoples in a way that is explained throughout this section.⁷³ At this stage, suffices it to mention that the resolution adopting the Declaration has been voted, after more than two decades of negotiations, almost unanimously by UN member States. The original opposition of Australia, Canada, New Zealand, and the United States has been most recently reversed so that a consensus can be deemed to have consolidated on the content of the rights contained in the UN Declaration.⁷⁴ It is important to note that, although the Declaration has clarified the content of some rights, fundamental

⁷⁰ Göcke 2013, at 124-125.

⁷¹ On the state of ratifications, see http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (last accessed October 2016).

⁷² See Göcke 2013, at 125. See also *Endorois* case, para. 154, where the African Commission refers to the ILO Convention 169 “even though many African countries have not” ratified it. See also, S. James Anaya, ‘International Human Rights and Indigenous Peoples: The Move toward the Multicultural State’ (2004) 21 *Arizona Journal of International and Comparative Law* 13, at 40: “government statements to the U.N. Working Group on Indigenous Populations and other international bodies confirm general acceptance of at least the core aspects of the land rights norms expressed in the Convention No. 169”. Some of these statements are listed at 41, note 114. In line with this interpretation, the ILO Convention 169 has been invoked as an interpretative instrument or as a benchmark to define the content of land rights also in cases where the respondent State has not ratified the ILO treaty. See Separate Opinion of Judge Sergio García Ramírez, in *Awas Tingni* case, paras 7-9; *Dann* case, para. 130, note 89. See also, ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America* 2009.

⁷³ For a more focused analysis on the nature of the UN Declaration on indigenous rights, see section 3.6. For a general appraisal of soft law instruments within this dissertation, see Introduction, section 4.

⁷⁴ On the supervening endorsement of the Declaration on the part of Australia, Canada, New Zealand and the United States, see, Pereira and Gough 2013, at 473, note 128. See in particular, Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House Canberra, 3 April 2009 (hereinafter Australia’s statement); Hon. Dr. Pita Sharples, Minister of Maori Affairs, *Announcement of New Zealand’s support for the Declaration on the Rights of Indigenous Peoples*, Ninth Section of the United Permanent Forum on Indigenous Issues, 19 April 2010 (hereinafter New Zealand’s statement); Government of Canada, *Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, 12 November 2010 (hereinafter Canada’s statement); Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, *Statement on the Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, New York, 16 December 2010 (hereinafter US statement). In the following sections, it is clarified that these endorsement declarations present fundamental differences as for the recognition of indigenous rights. On the relevance of the UN Declaration, see, Wiessner and Lenzerini 2010.

disagreements on some key rights, such as the right to land, remain.⁷⁵

This section focuses exclusively on group rights, as they have consolidated in international human rights law, since these have the potential to challenge the State's prerogatives over natural resources. The rights analysed in the following sections are the right to land, the right to natural resources, cultural rights, participatory rights, and the right to autonomy. These rights have been selected because they are the clusters around which the discussion between States and indigenous peoples has taken shape. As argued by Lenzerini, these rights are profoundly interconnected to one another so that the realisation of one of them cannot be fully realised in the absence of the others.⁷⁶ In light of this, this section focuses in particular on land rights. Land rights are both essential to indigenous peoples' physical survival and to their existence as distinct peoples. Furthermore, these rights are potentially the most intrusive in terms of the impact they can produce on the sovereignty of States. For these reasons, the other collective indigenous rights are examined only to the extent that they are connected to land rights.

The aim of the following subsections is to verify around which of these rights both the acceptance of States and indigenous claims have gathered. To this end, beyond looking at the relevant human rights instruments, indigenous peoples' views are taken into account to see to what extent they align with the obligations currently undertaken by States. Whereas the obligations of States are assessed against the traditional sources of international law, as a matter of discourse indigenous peoples' voices are considered an indispensable element in the shaping of the legal debate around their rights. States' practice, indeed, is assessed not only against States' individual behaviour and declarations; reports of the Special Rapporteur on the rights of indigenous peoples are also used since they reflect the consolidation of the continuous dialogue with both States and indigenous peoples and provide an independent source of States' behaviour regarding the respect for indigenous rights.⁷⁷

⁷⁵ See Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz, UN Doc. A/HRC/27/52 (11 August 2014), para. 23.

⁷⁶ Siegfried Wiessner and Federico Lenzerini, *Rights of Indigenous Peoples* (International Law Association, Sofia Conference 2012), at 43 (the section referred to has been elaborated exclusively by Federico Lenzerini).

⁷⁷ The mandate of the Special Rapporteur on indigenous rights has been established in Human Rights Council Res. 15/14, UN Doc. A/HRC/RES/15/14 (6 October 2010). Accordingly, the Special Rapporteur must "gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples" and "work in close cooperation and coordination with other special procedures and subsidiary organs of the Council, in particular with the Expert Mechanism on the Rights of Indigenous Peoples, relevant United Nations bodies, the treaty bodies and regional human rights organizations" (para. 1(b) and (d)). In this sense, the activities carried out by the Special Rapporteur are an opportunity for States and indigenous peoples to present their views on thematic and/or country-specific issues. The Special Rapporteur in turn takes into account those views to inform his/her recommendations on the issues at stake. Concerning the ways in which States and indigenous peoples may interact through the work of the Special Rapporteur, see Victoria Tauli-Corpuz and Eryln Ruth Alcantara, *Engaging the UN Special Rapporteur on Indigenous People: Opportunities and*

3.1. The right to land

The relationship of indigenous peoples with their territories is quintessential in that it is both central to the identification/self-identification of groups as indigenous⁷⁸ and to the protection of indigenous rights. Land represents, in this sense, the fundamental link between indigenous peoples and their cultural specificity, which is not easily accommodated within the legal paradigm of individual property. Indigenous peoples do not only hold land in physical possession, but they also establish spiritual and religious ties with land. In this regard, land is not simply a commodity that can be alienated.⁷⁹ Instead, it belongs to indigenous peoples in a mutual relationship in which indigenous culture and customs are nurtured through the management of land,⁸⁰ while the land also provides the physical space in which the life of indigenous peoples takes place.⁸¹ In the words of some indigenous representatives, indigenous peoples “belong to the land”.⁸²

Challenges (Tebtebba and DANIDA 2004), at 24-31. Although these recommendations have no binding value and are mostly intended as pursuing fact-finding and monitoring functions, they contribute in ways that are similar to judicial bodies to the progressive development of international law in the field of indigenous rights. This contribution can be explained by the consideration that every time Special Rapporteurs perform monitoring functions, they are interpreting existing human rights to assess what violations, if any, have been committed by concerned States. On the functions of Special Rapporteurs in the UN system, see Surya P. Subedi, ‘Protection of Human Rights through the Mechanism of UN Special Rapporteurs’ (2011) 33 *Human Rights Quarterly* 201, at 203-204. On the role of Special Rapporteurs in the development of international law, Surya P. Subedi, ‘The UN Human Rights Special Rapporteurs and the Impact of their Work: Some Reflections of the UN Special Rapporteur for Cambodia’ (2016) 6 *Asian Journal of International Law* 1, at 3. For a general discussion about the normative role of judicial bodies in international law, see Introduction, section 4.

⁷⁸ For a detailed account of the debate over the definition of indigenous peoples and the dichotomy between identification and self-identification, see Introduction, section 3.1. On the importance of land rights, see Wiessner and Lenzerini 2010, at 20.

⁷⁹ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 (11 December 1997), at 1014: “It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown”.

⁸⁰ The Human Rights Committee has clearly spelled out the link between the exercise of cultural rights and the practices of land and resource management. See General Comment 23, para. 7: “With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.”

⁸¹ See José Martínez Cobo, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations, Final Report (last part), UN Doc. E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983), para. 509: “for indigenous populations, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, tradition and culture”. See Victoria Tauli-Corpuz and Joji Cariño, *Reclaiming Balance: Indigenous Peoples, Conflict Resolution and Sustainable Development* (Tebtebba Foundation 2004), at 45. See also, Jeremie Gilbert and Cathal Doyle, ‘A New Dawn over the Land: Shedding Light on Collective Ownership and Consent’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011), at 291 and 293.

⁸² See Indigenous Peoples Earth Charter, Kari-Oca Conference (25-30 May 1992), para. 31. At the same international conference, indigenous peoples also adopted the Kari-Oca Declaration, available at <http://www.forestpeoples.org/nl/node/3454> (last accessed October 2016).

The decisions of the human rights monitoring bodies have spelled out these elements most clearly,⁸³ with the *Awes Tingni* case of the Inter-American Court being paradigmatic in this sense: “[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations”.⁸⁴ The *Saramaka* decision is also instructive since it affirms that the limits imposed on indigenous land rights should not result in the denial of the cultural integrity of the indigenous peoples concerned.⁸⁵ In the African system, the African Commission has highlighted the defining nature of the relationship between indigenous peoples,

⁸³ Apart from the decisions listed in the text, see also, UN Doc. CERD/C/USA/DEC/1, para. 8: “The State party is urged to pay particular attention to the right to health and cultural rights of the Western Shoshone people, which may be infringed upon by activities threatening their environment and/or disregarding the *spiritual and cultural significance they give to their ancestral lands*” (emphasis added). The US has opposed this position in UN Doc. CERD/C/USA/6, para. 345.

⁸⁴ *Awes Tingni* case, para. 149. The rest of the paragraph reads as follows: “some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival”. It is interesting to note that Nicaragua has officially acknowledged the need to comply with this judgment. See CERD, Reports submitted by States Parties under Article 9 of the Convention, Nicaragua, UN Doc. CERD/C/NIC/14 (17 October 2007), paras. 147-169. These elements are incorporated in the subsequent case law. A good example of this is the judgment in *Yakye Axa* case, para 131: “the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations”; para. 154: “land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values.” See also, *Xákmok Kásek* case, para. 85: “This Court has considered that the close relationship of indigenous peoples to their traditional lands and the natural resources relevant to their culture that are found there, as well as the intangible elements resulting from them, must be safeguarded under Article 21 of the American Convention”. See further, *Sawhoyamaya* case, para. 118: “Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity”; *Dann* case, para. 128; *Maya v. Belize*, para. 114.

⁸⁵ *Saramaka* case, para. 128: “in analyzing whether restrictions on the property right of members of indigenous and tribal peoples are permissible, especially regarding the use and enjoyment of their traditionally owned lands and natural resources, another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.” It is interesting to note that Suriname has always officially stated that it is willing to implement the judgments and never contested the scope of the rights adjudicated by the Inter-American Court. See CERD, Consideration of reports submitted by States parties under article 9 of the Convention, Suriname, UN Doc. CERD/C/SUR/13-15 (11 April 2014), paras. 13-19. See also, Human Rights Committee, Concluding observations on Suriname, UN Doc. CCPR/C/SUR/3 (7 March 2014), paras. 101-147.

culture, and land.⁸⁶ Moreover, the Human Rights Committee has broadly interpreted Article 27 of the ICCPR on minority cultural rights to include particular forms of land management.⁸⁷

This relationship is reaffirmed in the legal texts dedicated to indigenous rights. While the ILO Convention 169 creates an obligation for States to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories”,⁸⁸ the UN Declaration on indigenous rights couches the relationship between land and culture in the language of a right to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands”.⁸⁹ Furthermore, Article 8 of the UN Declaration assimilates land dispossession to an activity aimed at the “assimilation or destruction” of indigenous culture.⁹⁰

Another important element of indigenous peoples’ relationship with land is that material occupation and possession of a territory, as well as the conduct of activities such as hunting, fishing, or even the performance of spiritual rituals, are oftentimes the expression of customary land tenure.⁹¹ In this sense, although indigenous peoples

⁸⁶ *Endorois* case, para. 154: “there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture”; para. 156: “Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands”.

⁸⁷ General Comment 23, para. 3.2: “one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources”; para. 7: “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law”.

⁸⁸ ILO Convention 169, Art. 13.

⁸⁹ Art. 25 UNDRIP. Preambular para. 7 clearly spells out “the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”.

⁹⁰ Art. 8 UNDRIP reads as follows: “1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for... (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources”.

⁹¹ The term “customary” refers to usually unwritten and traditional forms of law that regulate community life. See Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights - Why Living Law Matters* (Routledge 2014), at 29: “Indigenous peoples’ worldview or cosmovision and distinct epistemologies underlie their systems of law, custom and tradition, which are rooted in land spirituality and culture”. Law, therefore, is embedded in traditional practices and traditional visions of the world. The relationship between customary law, as a general category of law, and positive law is explored throughout Tobin’s volume. See also, Anaya and Williams Jr. 2001, at 43-44 and 46. According to Anaya and Williams, customary law is central in the identification of indigenous land: “An increasing number of state legal systems now recognize indigenous peoples’ oral history and their own documentation and mapping of their lands as evidence in legal proceedings determining land rights. In addition, expert testimony from anthropologists, geographers and other qualified scholars with relevant knowledge of indigenous peoples’ customs and culture is also recognized by domestic legal systems as relevant to establishing indigenous

may lack any formal titles to their territories, their relationship with land is in itself a form of traditional ownership or aboriginal title that has been recognised by human rights bodies,⁹² while being frequently ignored by States. The alleged lack of a formal title to land that could be framed within the Western standards of land tenure has been consistently used throughout history to deprive indigenous peoples of their territories and natural resources. The doctrine of *terra nullius* is only one example of the multiple techniques used by colonisers to acquire property over indigenous territories.⁹³ The lack of statutory titles is still used in present times to justify eviction practices or alienation of property to third actors.

In overt contrast with the practices of dispossession and denial of indigenous title, human rights bodies have indicated traditional or ancestral possession as a sufficient element to establish property.⁹⁴ Possession, in turn, is not strictly couched in Western legal terms as an uninterrupted control over land. Rather, it is founded on traditional occupation and traditional use, which better reflect indigenous peoples' ways of life—i.e., nomadic lifestyles or low-intensive uses of land and natural resources.⁹⁵ The UN Declaration on indigenous rights has consolidated a consensus on this issue since possession is recognised in Article 26(2) as a form of “traditional ownership or traditional occupation or use”, thus encompassing all possible practices that amount to possession. Moreover, possession is invoked as a right in Article 14 of the ILO Convention 169. This right can be exercised “over the lands which they [indigenous and tribal peoples]

peoples' property rights based on traditional systems of land tenure.” At 47 ff., the authors cite a number of national cases where oral testimony of indigenous peoples has been used to prove indigenous land title.

⁹² *Awas Tingni* case, para. 151 and 164. The value of customary law has been affirmed in other cases that are not related to land rights. See Anaya, ‘International Human Rights and Indigenous Peoples: The Move toward the Multicultural State’ 2004, at 48-49.

⁹³ On the doctrine of *terra nullius* and the other legal techniques used to justify colonisers' encroachment on indigenous land, see S. James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004), Ch. 1. See also, Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2007), at 243-244; Marine They, *Le contrôle des communautés autochtones sur leurs terres et ressources naturelles traditionnelles* (Pedone 2013), at 24; Federica Cittadino, ‘Applying a UNDRIP Lens to the CBD: A More Comprehensive Understanding of Benefit-Sharing’ (2014) 24 *Indigenous Policy Journal*, at 227-228. See also, Åhrén 2016, at. 16-18 and 24-26.

⁹⁴ *Awas Tingni* case, para. 151: “As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property”. *Case of the Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Case No. 11,821 (15 June 2005) (hereinafter *Moiwana v. Suriname*), para. 131.

⁹⁵ See Mattias Åhrén, ‘The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction’ in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009), at 204 and 208. See also, Göcke 2013, at 140-141: “possession and control are not to be defined solely according to the European concept but indigenous views are also to be taken into account”; “if a nomadic people permanently and exclusively ranges a definite area of land, thereby visiting religious sites, using natural resources in accordance with their culture and way of life, and returning annually to good campgrounds they can claim ownership rights to land”. More generally on nomadic peoples, see Jérémie Gilbert, ‘Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights’ (2007) 7 *Human Rights Law Review* 681; Jérémie Gilbert, *Nomadic Peoples and Human Rights* (Routledge 2014).

traditionally occupy’.

The lack of possession does not automatically result into the extinguishment of any rights to land for indigenous peoples. It is not uncommon that indigenous peoples are deprived of their lands without their consent and in violation of their rights. Given these practices, the exclusion from the enjoyment of land rights by reason of the lack of traditional occupation or use in such cases would constitute an unacceptable discrimination.⁹⁶ Legal responses, in this respect, have been relatively diversified. International human rights bodies in the Inter-American and African systems have found that continuous possession is not necessary to establish property when indigenous peoples have been forced to leave their land.⁹⁷ The possibility to claim land rights also in the absence of possession is an acknowledgment of the fact that, although the physical occupancy has been interrupted, the spiritual and cultural bonds of indigenous peoples with their lands remain unaffected.⁹⁸

National cases have also marginally touched upon the issue of possession in some paradigmatic cases, concurring with the views expressed by international bodies. The Supreme Court of Canada, in *Delgamuukw v. British Columbia*,⁹⁹ was called to examine a claim for aboriginal title. As the Court put it, the establishment of this title closely depends on the proof of possession. Possession should in principle refer to an uninterrupted period going from the acquisition of sovereignty on the part of Canada on the claimed territories up to present times. The Court, however, has found three caveats to this general principle on the establishment of possession. First, the proof of possession can be given also by providing evidence of current possession in the form of traditional occupation or use. Second, possession can also regard an area that is different from the pre-sovereignty area. Third, possession should not be exclusive but can be shared with other communities.¹⁰⁰

The lack of possession is addressed in rather different terms in those instruments spelling out indigenous land rights. Article 14(1) of the ILO Convention 169 establishes that in case of non-exclusive occupation, rights to use lands to which indigenous peoples

⁹⁶ See Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, at 171-174.

⁹⁷ See *Sawhoyamaxa* case, para. 128: “the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof [sic], maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith”; *Xákmok Kásek* case, para. 109; *Endorois* case, para. 209.

⁹⁸ *Xákmok Kásek* case, para. 112: “Regarding the possibility of recovering the traditional lands, on previous occasions, the Court has established that the spiritual and physical foundations of the identity of the indigenous peoples are based, above all, on their unique relationship with their traditional lands, so that as long as this relationship exists, the right to claim those lands remains in force. If the relationship ceases to exist, so would this right”.

⁹⁹ *Delgamuukw v. British Columbia*, at 1017-1020.

¹⁰⁰ *Delgamuukw v. British Columbia*, at 1020. See also Oliver de Schutter, ‘The Emerging Human Right to Land’ (2010) 12 *International Community Law Review* 303, at 313-314.

“have traditionally had access” shall be ensured.¹⁰¹ Furthermore, although the ILO Convention bans any form of dispossession by means of forced relocation under Article 16, this provision does not in principle extend to cases of evictions that preceded the entry into force of the treaty. However, the ILO Committee of Experts has clarified that the application of the Convention 169 extends to the effects of past actions that are continuing in the present.¹⁰² This means that the responsibility of States for violating the right to land as protected under the ILO Convention 169 can be found also in cases that would not formally fall under the purview of the Convention if a formalistic approach to dispossession as a one-time event of the past were applied. In contrast, the ILO Committee focuses on the consequences of past actions that still produce effects on the enjoyment of rights in the present.¹⁰³

The UN Declaration regulates the case of forced dispossession under Article 28. Contrary to the ILO Convention, this provision applies to the “lands, territories and resources...traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior, and informed consent”. In such cases, remedies such as restitution or compensation are available, so that the lack of possession is indirectly recognised as not extinguishing land rights. The

¹⁰¹ See Göcke 2013, at 130, who draws a distinction between exclusive occupation, which gives rise to full ownership, and non-exclusive possession, which instead only amount to the recognition of rights to use.

¹⁰² See ILO Committee of Experts, Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers, para. 36: “This being the case, the Committee considers that the provisions of the Convention may not be applied retroactively...However, the effects of the decisions that were taken at that time continue to affect the current situation of the indigenous peoples in question, both in relation to their land claims and to the lack of consultations to resolve those claims. The Committee therefore considers that the Convention does currently apply with respect to the consequences of the decisions taken prior to its entry into force”. Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuqartut Kattuffiat-SIK) (SIK), para. 29: “the Committee notes that the effects of the 1953 relocation continue today, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding”. Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 30. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT) and the Colombian Medical Trade Union Association, para. 56.

¹⁰³ See Rodríguez-Piñero 2005, at 83. This interpretation by the ILO Committee supports the idea that there exist violations of a continuing character, as codified in Article 14(2) of the Draft Articles on State Responsibility, elaborated in 2001 by the International Law Commission. What characterises dispossession as a continuing violation, however, is not the endurance of its material consequences, but the continued failure to recognise, protect, and enforce indigenous land rights. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at 60, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed October 2016).

general duty to return traditional lands in case of forced dispossession had been affirmed prior to the adoption of the UN Declaration, also by the CERD Committee, as well as regional human rights bodies.¹⁰⁴

Although the extent of land rights is not well defined and it may vary according to the circumstances, it seems clear that land rights must be based on indigenous customary law.¹⁰⁵ While the extent of recognition of aboriginal title may vary widely across countries,¹⁰⁶ the variety of national paradigms for the recognition of land rights is irrelevant for the purposes of international law.¹⁰⁷ Traditional ownership lies at the core of indigenous rights to “own, use, develop and control the lands” under Article 26(2) of the UN Declaration. This formulation is in accordance with the decisions taken by human rights treaty bodies, thus confirming the declaratory nature of the UN Declaration with respect to pre-existing land rights under international law. Furthermore, in light of national jurisprudence, indigenous title to land has not been extinguished by the acquisition of sovereignty on the part of colonising powers.¹⁰⁸

¹⁰⁴ General Recommendation 23, para. 5: “The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation.” See also, *Sawhoyamaxa* case, para. 131; *Endorois* case, paras 209-210. For a contrary view, see They 2013, at 28. This author argues, without much support for this claim, that a broad formulation of the right to restitution is not supported by national practice. Although national provisions on the return of lands are not widespread, it must be noted that it is not the case that remedies are denied at national level. Therefore, it cannot be said there is a consistent State practice against the remedial restitution of indigenous lands. In contrast, there are cases where this restitution is established by law. See the Treaty of Waitangi Act of New Zealand (1975), Section 6(3), available at <http://www.legislation.govt.nz/act/public/1975/0114/latest/DLM435368.html> (last accessed October 2016). On this see, Göcke 2013, at 116; Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, at 194-195.

¹⁰⁵ This is also true when determining the extent of indigenous rights at the international level. See *Yakye Axa* case, para. 124: “In its analysis of the content and scope of Article 21 of the Convention in the instant case, the Court will take into account, in light of the general rules of interpretation set forth in Article 29 of that same Convention, as it has done previously, *the special meaning of communal property of ancestral lands for the indigenous peoples*” (emphasis added). See national case law: Supreme Court of Belize, *Aurelio Cal, in his own behalf and on behalf of the Maya Village of Santa Cruz, et al. v. The Attorney General of Belize and the Minister of Natural Resources and the Environment*, Claim No. 171/2007 (18 October 2007) (hereinafter *Aurelio Cal* 2007), at 101 and 136; Supreme Court of Sweden, *Nordmaling* case, Case No. T 4028-07 (27 April 2011), 109 NJA 2011, paras 5-10, 12, and 56. See Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, at 184-186.

¹⁰⁶ See Göcke 2013, at 99-100. The author provides examples of different understanding of indigenous titles within the legal systems of Australia, Canada, New Zealand, the US.

¹⁰⁷ See *ibid.*, at 127. Of course, this may cause relevant problems in the practice when it comes to the application of land rights. As a point of principle, however, aboriginal title, that must be determined according to the traditions and uses of the indigenous people concerned, is sufficient to establish land rights.

¹⁰⁸ See Supreme Court of Canada, *Calder v. Attorney-General of British Columbia*, [1973] SCR 313, at 328, 375, and 390; Constitutional Court of South Africa, *Richtersveld Community and Others v. Alexkor Ltd and Another*, Case No. CCT 19/03 (14 October 2003), [2003] ZACC 18 (hereinafter *Richtersveld* case), para. 68; *Mabo v. Queensland (No. 2)*, paras. 39 and 62; High Court of New Zealand, *Tē Weehi v. Regional Fisheries Officer* (19 August 1986), [1986] 1 NZLR 680, at 687. On this, see *ibid.*, at 97-98.

Another point that emerges in a consistent way from both international case law and State practice is the collective dimension of indigenous property.¹⁰⁹ This can also be partially derived from Article 26(3) of the UN Declaration of indigenous rights since the recognition of indigenous customary regimes over land encompasses the collective dimension of indigenous land rights. The content of these collective rights over land comprises both strictly speaking property rights, including ownership, control, and rights to use, as well as cultural rights in the form of the rights to exercise and preserve indigenous culture.¹¹⁰ The joint reading of Article 26(1) of the UN Declaration, which refers broadly to the “right to lands, territories and resources”, with the already cited Article 25 on the “spiritual relationship” of indigenous peoples with land, confirms the interdependency between property and cultural aspects of land rights.¹¹¹ As recalled, this interconnection has also emerged in the case law of human rights bodies, thus confirming the functional nature of indigenous land tenure systems to the preservation of unique indigenous peoples’ culture.

Given the extensive recognition of indigenous land rights, it remains to explore the extent of the powers that indigenous peoples may exercise on their lands. The precise determination of those powers, however, is uncertain.¹¹² Article 14 of the ILO Convention

¹⁰⁹ See e.g. Anaya and Williams Jr. 2001, at 45: “the ownership of land is vested in the indigenous community or group as a whole”. See *Yakye Axa* case, para. 143; *Moiwana v. Suriname*, para. 133; *Sawhoyamaxa* case, para. 120; *Dann* case, para. 128; *Maya v. Belize*, para. 114; *Kaliña and Lokono* case, para. 103; Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples’ Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), para. 32(b); Supreme Court of Canada, *Delgamuukw v. British Columbia*, paras. 194, 199, and 201; *Richtersveld* case, para. 62. See also, Report of the Special Rapporteur on the right to food, UN Doc. A/65/281 (11 August 2010), para. 12: “Property, as protected under article 21 of the American Convention on Human Rights, is considered to constitute a collective right of indigenous people, since land ownership is often centred not on the individual, but rather on the group and its community”, and para. 26. Collective ownership is also reflected in the declarations made by indigenous peoples. See e.g., Charter of the Indigenous and Tribal Peoples of the Tropical Forests (Penang, 15 February 1992), Art. 16; Indigenous Peoples’ Earth Charter, Kari-Oca Conference, (25-30 May 1992), para. 2; Indigenous Peoples’ Plan of Implementation on Sustainable Development (Johannesburg, 2 September 2002), para. 6; Kimberley Declaration, International Indigenous Peoples Summit on Sustainable Development Khoi-San Territory, (Kimberley, 20-23 August 2002), para. 7; Corobici Declaration (San José, 6-7 December 2004), General Principle 1. Output document, Indigenous Peoples International Conference on Sustainable Development and Self Determination (Rio de Janeiro, 17-19 June 2012), principle 2; Alta Outcome Document, Global Indigenous Preparatory Conference for the United Nations High Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples (Alta, 10-12 June 2013), Theme 1 that reaffirmed indigenous land tenure systems.

¹¹⁰ See Åhrén, ‘The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction’ 2009, at 209.

¹¹¹ This is also highlighted in national case law. See Anaya and Williams Jr. 2001, at 44.

¹¹² Wiessner and Lenzerini 2010, at 23. See also Åhrén, ‘The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction’ 2009, at 203: “Today, international law recognises that the intrinsic connection between indigenous peoples and their traditional territories results in their holding certain material rights to LTRs [lands, territories, and resources] traditionally occupied and used. How far these rights stretch has been subject to intense debate. But some general conclusions can be drawn”.

169 distinguishes between “the rights of ownership and possession” that indigenous peoples may exercise “over the lands which they traditionally occupy” and “the right...to use lands not exclusively occupied by them”. As for the latter, ownership and possession encompass the broadest range of property powers so that what is not expressly forbidden is otherwise permitted.¹¹³ Rights to use are not as exclusive as full property rights.

Notwithstanding these differences, two elements serve to characterise the scope of rights to use in a way that is as protective as full ownership rights.¹¹⁴ First, in the case of nomadic peoples, that are explicitly referred to in Article 14(1), traditional use of land and resources may constitute sufficient elements to prove traditional occupation.¹¹⁵ Second, the scope of the right to use should be determined by bearing in mind the functional importance that land rights play for the safeguard of indigenous culture.¹¹⁶ As emerges from the ILO Guide to the Convention 169, the emphasis on occupation as a basis to protect indigenous ownership rights is to be intended in opposition with the irrelevance of the formal recognition of land titles by the State.¹¹⁷ Furthermore, non-exclusive occupation only points to the fact that the land might be shared among different communities.¹¹⁸ The basis for protection is in any event provided by traditional occupation.¹¹⁹ What happens when indigenous lands are covered by third parties’ formal titles is examined in the following with respect to acceptable restrictions to indigenous land rights.

Along the same lines, the UN Declaration on indigenous rights does not differentiate between exclusive and non-exclusive occupation. In contrast, Article 26(2) confers “the right to own, use, develop and control the lands, territories and resources that” indigenous peoples have in possession or “have otherwise acquired”. Under Article 26(1), these rights are to be ensured also on the lands that have been traditionally used by indigenous peoples.

Notwithstanding the need to distinguish between different factual situations, the property component of indigenous land rights cannot be framed as a mere privilege to use. This is confirmed by the decisions of the human rights bodies that have elaborated on the content of land rights both in the Inter-American and African systems. In the *Saramaka* decision, the Inter-American Court held that for land rights to be meaningful, the property title granted to indigenous peoples should ensure that indigenous peoples

¹¹³ See Ulfstein, ‘Indigenous Peoples’ Right to Land’ 2004, at 20-22.

¹¹⁴ The ILO Committee has not elaborated on the right to use in the context of representation procedures.

¹¹⁵ See *supra* notes 96-97.

¹¹⁶ Wiessner and Lenzerini 2012, at 28.

¹¹⁷ ILO, *Indigenous and Tribal Peoples Rights in Practice: A Guide to ILO Convention No. 169* 2009, at 94.

¹¹⁸ See Anaya and Williams Jr. 2001, at 45: “Indigenous communities, for example, may migrate over time and may have overlapping land use and occupancy areas”.

¹¹⁹ ILO, *Indigenous and Tribal Peoples Rights in Practice: A Guide to ILO Convention No. 169* 2009, at 96: “such non-exclusive land rights are established on the basis of traditional occupation”.

can “effectively control their territory without outside interference”.¹²⁰ In the *Endorois* case, the African Commission found that ownership, as a requirement imposed by international law, ensures that indigenous peoples are not “vulnerable to further violations/dispossession by the State or third parties”, thus becoming “active stakeholders” rather than “passive beneficiaries” of rights.¹²¹

Furthermore, the content of indigenous right to land can be grasped by looking at the obligations it imposes on States.¹²² These can be classified into two main general categories, namely negative and positive obligations. The former mainly concerns States’ duties to abstain from carrying out activities that directly or indirectly deprive indigenous peoples of their land rights. An important example of negative obligations of States when it comes to land rights is the duty to refrain from carrying out development activities on the same territories upon which indigenous claims are pending.¹²³ The latter category, that of positive obligations, includes specific actions to be carried out by States and deserves a deeper analysis.

States are equally obliged to adopt positive measures, including recognising national legal safeguards, in order to ensure the protection of and the respect for indigenous peoples’ land rights. This obligation has been both repeatedly affirmed by human rights bodies, whether global or regional, and crystallised in human rights instruments. The Human Rights Committee, in connection to the cultural manifestations of land rights, has emphasised the importance for the State to adopt positive measures to ensure indigenous peoples’ participation in decisions that affect their rights.¹²⁴ The CERD Committee has spelled out that States’ positive duties imply the adoption of national legislation to protect the rights of indigenous peoples.¹²⁵ Furthermore, the obligation to

¹²⁰ *Saramaka* case, para. 115.

¹²¹ *Endorois* case, para. 204. Kenya has formalised its will to implement the African Commission’s recommendations. See CESCR, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Kenya, UN Doc. E/C.12/KEN/2-5 (26 February 2014), para. 33.

¹²² Some limitations of an approach that is merely concentrated on States may lie on the fact that most indigenous peoples have been dispersed throughout different national territories or they have found themselves “trapped” in the borders of newly created nation-States. In this sense, a State-centric protection of indigenous rights might not duly take into account the cultural integrity of communities. See Tauli-Corpuz and Cariño 2004, at 21-22. These authors contend that the same difficulty arises for the recognition of the right to self-determination since some indigenous peoples are subject to different States’ jurisdiction.

¹²³ See e.g. *Awás Tingni* case, paras. 153 and 164. *Saramaka* case, para. 115. *Xákmok Kásek* case, para. 291.

¹²⁴ General Comment 23, para. 7; *Apirana Mahuika* case, paras 7.1, 9.5; *Poma Poma* case, para. 7.2. The CESCR Committee refers in more general term to the States’ duty to adopt “positive action”. See CESCR, General Comment No. 21: Right of everyone to take part in cultural life (Art. 15), UN Doc. E/C.12/GC/21 (21 December 2009), para. 6. See also, CESCR, UN Doc. E/C.12/BRA/CO/2, para. 9; CESCR, UN Doc. E/C.12/RUS/CO/5, para. 7.

¹²⁵ CERD, Concluding observations on Argentina, UN Doc. CERD/C/65/CO/1 (10 December 2004), para. 16. It is interesting to note that the CERD recommended the adoption of national legislation to implement the ILO Convention 169.

“give legal recognition” to land rights is also central to the UN Declaration on indigenous rights, while the ILO Convention 169 calls for the adoption of “special measures” to ensure inter alia the protection of indigenous property rights.¹²⁶ In the Inter-American system, national measures must ensure the effectiveness of indigenous land rights, as well as bringing about the legal recognition of indigenous land titles, for instance through demarcation.¹²⁷ The African Commission links positive discrimination in favour of indigenous peoples, through the recognition of legal titles to land, to the realisation of indigenous rights and the redress of past injustices.¹²⁸

As convincingly argued by Göcke, the recognition of a legal status to indigenous land rights does not automatically translate into the conferral of formal titles to land, provided that the substance of indigenous rights to land is protected.¹²⁹ In this sense, the right to land is substantially protected when it both implies control over land and resources on the part of indigenous peoples and it ensures the preservation of indigenous distinctiveness, whatever practical form it takes to reach these objectives.

One of the cornerstones of the legal recognition of indigenous land rights is the duty, incumbent upon States, to demarcate indigenous territories. As established in Article 14(2) of the ILO Convention 169, demarcation means first of all the identification of indigenous territories. Furthermore, the UN Declaration on indigenous rights creates an obligation for States to “establish a process” in order to “adjudicate the rights of indigenous peoples pertaining to their lands”.¹³⁰ This process must ensure the participation of indigenous peoples. In addition, the duty to demarcate must be read in light of Article 26(3) of the UN Declaration, which establishes that the recognition of indigenous land rights must be done in accordance with indigenous peoples’ “customs, traditions and land tenure systems”. The obligation to demarcate is also reflected in the decisions of human rights bodies,¹³¹ as well as in the observations concerning individual countries.¹³²

¹²⁶ Art. 26(3) and Art. 38 UNDRIP. See also, Art. 4 ILO Convention 169.

¹²⁷ Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Paraguay, Doc. OEA/Ser.L/V/II.110 (9 March 2001), The rights of indigenous peoples, Ch. IX, para. 13. See also, *Moiwana v. Suriname*, para. 133; *Dann* case, para. 130; *Maya v. Belize*, para. 115; *Yakye Axa* case, paras. 124 and 155. *Saramaka* case, paras. 85, 98, and 115; *Sarayaku* case, para. 146.

¹²⁸ *Endorois* case, para. 196: “It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance”; para. 205: recognition of “*de jure* ownership”.

¹²⁹ Göcke 2013, at 147-150. The requirement of a legal title is neither warranted in legal texts, nor affirmed by human rights bodies. Furthermore, it “is also not required from a teleological point of view” (at 148).

¹³⁰ Art. 27 UNDRIP.

¹³¹ *Awes Tingni* case, paras. 153, 164, and in the operative part; *Moiwana v. Suriname*, paras. 209 (duty to demarcate) and 210 (“with the participation of the victims”); *Yanomami* case, recommendations, point 3(b); *Maya v. Belize*, paras. 132, 152, 193, and 197.

¹³² Human Rights Committee, Concluding observations on Brazil, UN Doc. CCPR/C/79/Add.66 (24 July 1996), para. 32; CESCR, UN Doc. E/C.12/1/Add.94, para. 11. For an overview of national demarcation processes in New Zealand, Canada, and the US, see Wiessner and Lenzerini 2010, at 23.

Another central duty that the State may be called to fulfil is the obligation to return those lands taken without the consent of indigenous peoples. Under Article 28 of the UN Declaration on indigenous rights, indigenous peoples are entitled to restitution in case of dispossession of or damages to their lands in the absence of their free, prior and informed consent.¹³³ The UN Declaration on indigenous rights also establishes a general prohibition of forced eviction, as well as the requirement of the free, prior and informed consent in case of relocation. The possibility of return, instead, is only framed as an option in case relocation is agreed between the parties.¹³⁴ The requirement of consent in case of relocation is confirmed by Article 16(2) of the ILO Convention 169.¹³⁵ Under Article 16(3), moreover, indigenous peoples have the “right to return” when the causes for relocation “cease to exist”.¹³⁶ This right has been construed more clearly as a duty of the State in some decisions within the Inter-American and African systems.¹³⁷ The Inter-American jurisprudence, in addition, has dealt with the difficult case of dispossessions taking place before the entry into force of instruments protecting indigenous rights. In those cases, an evaluation of the effects of past wrongs must be carried out. In particular, in cases indigenous territories have been transferred to *bona fide* third parties, lost properties can be replaced with lands having similar characteristics.¹³⁸

It may be inferred that there are commonalities in the way in which indigenous rights to land are defined both in the instruments dedicated to indigenous rights and from the interpretative process of the more widely ratified global and regional human rights treaties. Article 27 of the ICCPR, Article 21 of the American Convention on Human Rights, and Articles 14 and 22 of the African Charter have been interpreted as implying at a minimum the intangibility of indigenous customary title to land. Furthermore, a cluster of common obligations is imposed on ratifying States so that the legal recognition of indigenous rights can be deemed global.¹³⁹

See also, Göcke 2013, at 144-151.

¹³³ The issue of the free, prior and informed consent is examined in section 3.5 in this chapter.

¹³⁴ Art. 10 UNDRIP.

¹³⁵ Human rights bodies have also concurrently affirmed the requirement of consent in case of relocation. CERD, General Recommendation 23, para. 5; *Dann* case, paras. 130-131, 141, 165; *Endorois* case, para. 226. See Göcke 2013, at 135: the author argues that this requirement is providing a higher protection to indigenous peoples than it is usually granted in the case of individual property where consent is not needed for expropriation.

¹³⁶ Both the UN Declaration and the ILO Convention 169 establish that, in case restitution is impossible or too burdensome, indigenous peoples may alternatively be granted with compensation. See Art. 16(4) of the ILO Convention 169; Art. 28 UN Declaration.

¹³⁷ See *Xákmok Kásek* case, paras. 281, 283. See also, *Endorois* case, paras. 232-234. See also, Report of the United Nations High Commissioner for Human Rights on indigenous issues, UN Doc. A/HRC/4/77 (6 March 2007), para. 8.

¹³⁸ *Yakye Axa* case, paras. 131 and 137. *Sawhoyamaya* case, para. 128. *Xákmok Kásek* case, para. 109. *Kaliña and Lokono* case, para. 131.

¹³⁹ A broader discussion on the legal status of indigenous peoples’ rights is conducted in section 3.6 in this chapter.

Although imposing clear duties upon States, indigenous land rights are not absolute. Indigenous collective rights to land might either conflict with individual property titles¹⁴⁰ or, more significantly for the purposes of the present research, be threatened by development projects promoted, initiated, or carried out by States. This last occurrence has been thoroughly examined in the case law of human rights bodies, with the *Saramaka* case being particularly instructive in this sense.¹⁴¹ In line with the *Saramaka* doctrine, restrictions to land rights should be established by law, pursue a legitimate aim in a democratic society, and be necessary and proportional to the pursued objective.¹⁴² The requirement that restrictions should be in accordance with law has been interpreted as implying inter alia that national policies affecting indigenous peoples should be in line with international law standards.¹⁴³

The Inter-American Court has translated this argument into reality by placing a teleological limit to the restrictions that can be deemed acceptable. Since land rights are intended to protect the cultural distinctiveness of indigenous peoples, any restrictions cannot go so far as to result into a denial of land rights.¹⁴⁴ This means that the mere respect of formal criteria is not sufficient to ensure the protection of indigenous land rights from external interference. The rationale for this teleological interpretation can be found in the quasi-totality of the Inter-American decisions, i.e., that land rights are instrumental for the survival of indigenous groups as distinct peoples.¹⁴⁵ The Inter-American Court, therefore, implicitly recognises the link between land rights and indigenous self-determination.

As reminded in Chapter 1,¹⁴⁶ the so-called denial test has been operationalized by the Inter-American Court through the recognition of procedural obligations that States need to fulfil in order not to violate the substance of land rights, namely consultation

¹⁴⁰ On the conflict between individual rights to property and the collective title of indigenous peoples, see *Yakye Axa* case, paras. 146-151. To sum up the arguments of the Court, whenever possible, indigenous land rights should be given precedence over individual rights. This is due to the fact that land rights are instrumental for the protection of indigenous distinctive culture. As well noted by They 2013, at 34, the priority given to indigenous rights would be justified in terms of redressing a situation of historical and ongoing discrimination against indigenous property.

¹⁴¹ For a deeper discussion of the case, as well as a contextualisation of this decision in the jurisprudence of the Inter-American Court, see Chapter 1, section 2.2.1.

¹⁴² *Saramaka* case, para. 127. See also, *Sawhoyamaya* case, paras. 137-139.

¹⁴³ This has been an argument put forward by the complainants in the *Endorois* case, para. 113.

¹⁴⁴ *Saramaka* case, paras. 122 and 128. The parameter of the denial of rights as a threshold limit to any restrictions has also been upheld by the Human Rights Committee with respect to the right to culture: *Länsmann I*, paras 9.4 and 9.5; *Länsmann II*, para. 10.7; *Apirana Mahuika* case, para. 9.4.

¹⁴⁵ *Kaliña and Lokono* case, para. 130: “the protection and guarantee of the right to use and enjoyment of their territory is necessary in order to safeguard not only the survival of these communities, but also their development and evolution as a people”. See also *Yakye Axa* case, para. 124; *Garifuna v. Honduras*, para. 194.

¹⁴⁶ See Chapter 1, section 2.2.1.

and seemingly veto powers when it comes to extractive projects,¹⁴⁷ impact assessments, and benefit-sharing.

Most recently, the Inter-American Court has elaborated a specific test for the case in which indigenous land and cultural rights are restricted due to the creation of protected areas. While the ultimate standard is to ensure that indigenous rights are not substantively compromised, this threshold must be appraised against specific criteria. Beyond effective participation and the sharing of benefits, the Inter-American Court has concluded that indigenous peoples must be able to continue to access and use their traditional territories.¹⁴⁸ In evaluating this last standard, the Court found that, although certain restrictions on access and use are admissible, indigenous lands must not be affected in their entirety.¹⁴⁹ Furthermore, States must ensure that indigenous peoples participate not only in the decision concerning the establishment of natural reserves, but also in their management.¹⁵⁰ Co-management is also an abstract possibility since the Court refers to the role of States as possibly providing supervision. The Court has not discussed the possibility that protected areas are managed solely by indigenous peoples. This possibility, however, seems to be compatible with the supervisory role of the State.

The African Commission has espoused the same teleological reasoning.¹⁵¹ Although conceding, in the *Endorois* decision, that development and conservation are public interest objectives, it has concluded for the violation of cultural and land rights¹⁵² since the reference to public interest cannot justify any encroachment on “the very essence of the right”.¹⁵³

Once again, the link between land and the survival of indigenous distinct culture is crucial. In this sense, the need to ensure indigenous survival can pose important limits to the sovereignty of States. The State can dispose of its natural resources by virtue of its sovereign rights. At the same time, indigenous peoples are holders of rights so encompassing, due to their instrumental role for the preservation of indigenous peoples, that any infringements of these rights stemming from the exercise of States’ sovereign powers find an insurmountable limit, that is the preservation of the substance of indigenous rights.

This reasoning is particularly topical when it comes to land rights. The substance of land rights is to ensure that indigenous peoples can exercise control over their land

¹⁴⁷ See *infra* section 3.5 in this chapter.

¹⁴⁸ *Kaliña and Lokono* case, para. 181. See also Chapter 1, section 2.2.1, and Chapter 4, section 2.1.2.

¹⁴⁹ *Kaliña and Lokono* case, para. 189.

¹⁵⁰ *Kaliña and Lokono* case, para. 192. This objective needs a certain and well-established legal framework, according to the Inter-American Court (para. 194).

¹⁵¹ *Endorois* case, para. 172: “such a restriction must be established by law and *must not be applied in a manner that would completely vitiate the right*” (emphasis added).

¹⁵² *Endorois* case, para. 173.

¹⁵³ *Endorois* case, para. 215. Other relevant passages are contained in the paras. 211-214.

and resources with a view to preserving their culture. In this sense, the exercise of States' sovereignty in the form of development or conservation projects may encroach on the right of indigenous peoples to control their lands and resources.¹⁵⁴ Significant examples of States' activities that may clash with the rights of indigenous peoples are the disposal of hazardous materials and the conduct of military activities in indigenous territories. The UN Declaration on indigenous rights, respectively in Articles 29(2) and 30, bans these activities unless an agreement with the affected indigenous peoples can be reached. Extractive activities (sometimes in combination with the creation of protected areas) have similarly emerged in the decisions of human rights treaty bodies as heavily affecting the enjoyment of indigenous land rights.¹⁵⁵

The effects of this potential conflict might be limited when traditional occupation cannot be demonstrated and only use rights are awarded.¹⁵⁶ However, even if a bold dividing line is struck between full ownership rights and use rights, it should be reminded that the exercise of the latter must also be functional to the preservation of indigenous distinctiveness. This would imply that, even in the absence of ownership, States might have a limited margin of manoeuvre when it comes to the exploitation or disposal of territories and resources that interfere with the use rights of indigenous peoples. Furthermore, although the distinction between ownership rights and use rights serve the purpose of giving a differentiated response to two seemingly different situations, this distinction might not be meaningful for indigenous peoples in that their conception of ownership does not necessarily coincide with the Western notion of property.¹⁵⁷ Therefore, since indigenous land rights must be determined in accordance with indigenous customs and tenure systems, a too strict distinction between ownership and use prerogatives might infringe international law standards.

Some authors have interpreted the pervasiveness of land rights as implying sovereignty. The recognition of sovereign powers is mainly framed as a compensation for the historical wrongs suffered by indigenous peoples.¹⁵⁸ In this sense, sovereignty is intended as the acknowledgment of the fact that indigenous peoples have the right to exercise some powers over land and natural resources. The problem with this conceptualisation is not only terminological, but it also touches upon substance. The term "sovereignty" in modern international law is historically bounded to the State, mainly referring to the absolute powers of States as the legal foundation of the modern international society.

¹⁵⁴ See Pereira and Gough 2013, at 475.

¹⁵⁵ See *infra* sections 3.2 and 3.5. in this chapter.

¹⁵⁶ For this distinction, see above. See also Göcke 2013, at 130.

¹⁵⁷ On this point, see Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 171: "When the right to property was understood against the backdrop of a right to non-discrimination that merely required that equal cases be treated equally, the way in which the intensity, continuity, and exclusivity criteria were applied rendered it difficult for indigenous communities to establish property rights over land in practice."

¹⁵⁸ See Lenzerini 2006-2007, at 182.

Although limits have been posed to States' sovereignty as illustrated in the previous section, sovereignty continues to be conceptualised as a term corresponding to States' powers and prerogatives. Also, in international documents sovereignty is almost exclusively attached to States. In this context, using the term "sovereignty" to indicate indigenous peoples' powers may generate confusion, as well as being considered unacceptable for both States and indigenous peoples.¹⁵⁹

Furthermore, sovereignty is not the only term of reference when it comes to describe the nature and effects of indigenous powers to their lands. Self-determination, as a right that belongs to peoples, may represent a more suitable term of reference for reasons that are explored in the following sections. Suffices it here to mention that economic self-determination under Article 1(2) of the UN Covenants offers a suitable legal framework to conceptualise indigenous land rights and their consequences for the sovereignty of States.¹⁶⁰

3.2. The right to natural resources

Natural resources are an essential component of both land and cultural rights. First, land rights are instrumental for the exercise of control over natural resources.¹⁶¹ In other words, land rights would be meaningless if they did not ensure parallel rights over the natural resources located in indigenous territories.¹⁶² Second, the exercise of rights to natural resources is fundamental to the preservation of indigenous culture. Many traditional practices involve the utilisation of natural resources; in addition, the management of resources is an essential aspect of indigenous peoples' cosmology. In this context, the provisions protecting indigenous peoples' rights to natural resources in global and regional human rights instruments are the same as those identified for the right to land.

¹⁵⁹ With regard to the latter aspect, Wiessner argues that indigenous sovereignty, which is mainly linked to the need to ensure cultural integrity, may be extremely distant from the Western conceptualisation of sovereignty. See Wiessner 2008, at 1167 and 1170 ff. On the historical divarication of sovereignty and property rights, see Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 18. According to this author, the doctrine of *terra nullius* has produced the distinction between sovereign rights and private property rights, which originally did not exist in indigenous conceptions of land ownership. While this doctrine was elaborated to justify the occupation and dispossession of indigenous lands on the part of colonizers, it has equally produced longer term effects in that it has imposed a normative discourse that is not able to depict indigenous peoples' relationship with their lands and the related powers following on from this relationship. Åhrén also highlights that this distinction carries positive legal effects because it means that, even if States exercise sovereign rights on indigenous lands, they do not automatically acquire property rights on the same lands.

¹⁶⁰ See Xanthaki 2007, at 239; Göcke 2013, at 128; Heather A. Northcott, 'Realisation of the Right of Indigenous Peoples to Natural Resources under International Law through the Emerging Right to Autonomy' (2012) 16 *International Journal of Human Rights* 73, at 74; Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' 2004, at 36.

¹⁶¹ See Wiessner and Lenzerini 2010, at 21. See also, ILO, *Indigenous and Tribal Peoples Rights in Practice: A Guide to ILO Convention No. 169* 2009, at 107.

¹⁶² *Saramaka* case, para. 122. *Yakye Axa* case, para. 140: "nor is there any discussion of the fact that hunting, fishing and gathering are essential components of their culture".

Natural resources are also protected in pair with land rights in the instruments dedicated to indigenous peoples. The ILO Convention 169 adopts a broad definition of land that includes “the total environment of the areas which the peoples concerned occupy or otherwise use”.¹⁶³ Natural resources are, therefore, comprised in this definition. Moreover, Article 15 is specifically dedicated to the protection of the “rights of the peoples concerned to the natural resources pertaining to their lands”. This article draws a sharp distinction between surface and subsoil resources, which seems to reflect the state of the art as for the development of international rules concerning indigenous rights to natural resources. Therefore, the following of this subsection is organised according to this divide.

Concerning the resources that can be found on the surface, the ILO Convention 169 does not specify the precise extent of those rights. As follows from a contextual interpretation of the international treaty, however, these rights are to be considered very extensive since they cover in principle all resources located in their lands. In this respect, Article 15(1) establishes that “[t]he rights of the peoples concerned to the *natural resources pertaining to their lands* shall be specially safeguarded” and Article 13(2) as reminded gives a broad definition of lands as also encompassing natural resources.¹⁶⁴

Concerning the concrete powers that indigenous peoples can exercise on these resources, these might include in principle a wide range of prerogatives. The lack of an exhaustive list of prerogatives, as well as the use of the locution “these rights include” supports this conclusion, although it also seems to leave some leeway to States. However, when comparing this provision on surface resources with the regime delineated for subsoil resources, it seems that States’ manoeuvring space cannot go so far as to retaining ownership since this is an option explicitly contemplated only for mineral resources.¹⁶⁵ In this light, participation in the use, management and conservation of surface resources are only instances of the activities that indigenous peoples may undertake with their resources. Indeed, these procedural rights represent the most frequent expression of the protection of resource rights within the ILO framework.¹⁶⁶ The practice within ILO has, therefore, enacted resource rights in a way that seems more restrictive than what would be actually required from a textual interpretation of the ILO Convention 169.

Regarding subsoil resources, the ILO Convention 169 strikes a balance between States’ powers and indigenous rights as follows. While States can legitimately retain

¹⁶³ Art. 13(2) ILO Convention 169.

¹⁶⁴ Emphasis added. See ILO, *Indigenous and Tribal Peoples Rights in Practice: A Guide to ILO Convention No. 169* 2009, at 107. See also, MacKay, *A Guide to Indigenous Peoples’ Rights in the International Labour Organization* 2002, at 17.

¹⁶⁵ Art. 15(2) ILO Convention 169.

¹⁶⁶ ILO, *Indigenous and Tribal Peoples Rights in Practice: A Guide to ILO Convention No. 169* 2009, at 112. For further decisions by the ILO Committee on participatory rights when resource rights are restricted, see *infra* section 3.5 in this chapter.

the ownership of these resources, they need to guarantee the respect for a number of standards when they “undertak[e] or permit[...] any programmes for the exploration or exploitation of such resources” on indigenous territories. First, they must consult with indigenous peoples prior to the commencement of development activities. Second, they are obliged to conduct studies in cooperation with indigenous peoples with a view to establishing the impacts of development activities on the communities affected. Third, they need to guarantee “whenever possible” the sharing of the benefits stemming from the exploitation of resources with the indigenous peoples concerned. Fourth, they must compensate these peoples “for any damages which they may sustain as a result of such activities”.¹⁶⁷ The ILO Committee has specified that these standards apply even to projects that have commenced before the entry into force of the ILO Convention 169 to the extent that the effects of such policies continue in the present.¹⁶⁸

Under the UN Declaration on indigenous rights, the legal regime on natural resources is assimilated to that of land rights. In other words, the Declaration recognises the cultural significance of natural resources,¹⁶⁹ as well as framing resource rights in terms of a range of powers, from full ownership to access prerogatives, that can be adapted to circumstances.¹⁷⁰ The case of subsoil resources is not explicitly contemplated in the Declaration. This omission, however, is per se very telling since it reflects the difficulties incurred by indigenous peoples and States in agreeing upon new international standards on subsoil resources.¹⁷¹ During the negotiations on the UN Declaration, States could not accept the position that indigenous tenure should be extended to mineral and extractive resources.¹⁷²

National practice confirms the trend for States to retain ownership rights over subsoil resources even in the presence of indigenous rights to land.¹⁷³ In residual cases,

¹⁶⁷ For a comment on these duties, see *ibid.*, at 107-108. Some of these standards will be analysed more closely in the following subsections.

¹⁶⁸ The ILO Guide provides a useful example, by referring to the representation procedure of 2001 concerning Ecuador, *ibid.*, at 109-112 and 183-184. See Rodríguez-Piñero 2005, at 83. See also *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*.

¹⁶⁹ Art. 24(1) and 25 UNDRIP.

¹⁷⁰ Art. 26(2) UNDRIP. The same reasoning is applicable to land rights, see section 3.1 in this chapter. See also, Daes report (2004), para. 41.

¹⁷¹ See Göcke 2013, at 131-132. See also at 99, 112, 113, and 118-119. At 131: “Under international law, the inherent ownership rights of indigenous peoples do not necessarily have to comprise sub-surface rights”.

¹⁷² See Daes report (2004), para. 43. See also, Errico 2011, at 340.

¹⁷³ See *ibid.*, at 337: “international, regional and national practice suggest that, at present, States do retain ownership of subsoil resources”. See High Court of Australia, *Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust* (30 July 2008), [2008] HCA 29, para. 128. In *Commonwealth v. Yarmirr* (11 October 2001), [2001] HCA 56, the High Court of Australia had to determine whether indigenous claims could extend beyond internal waters, up to the sea-bed, to the exclusion of others. After finding that this is in contrast with common law, it also established that “the claimants had never

however, States might be obliged to recognise indigenous rights over subsoil resources, in observance of the principle of non-discrimination. In other words, when rights over subsoil resources are granted to other landowners, indigenous peoples might benefit from the same legal protection.¹⁷⁴ Openings to the recognition of indigenous rights over subsoil resources may also derive from the circumstance that indigenous peoples have traditionally practiced extractive activities.¹⁷⁵ This argument is in line with the finding of the Inter-American Court in the *Saramaka* case that “the natural resources found on and within indigenous and tribal people’s territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life”.¹⁷⁶ Furthermore, the Indigenous Peoples Rights Act, adopted in the Philippines, gives indigenous peoples priority in the exploitation of mineral resources to be found in their ancestral areas.¹⁷⁷

Even when States retain ownership of mineral resources, it may happen that these are located in the subsoil of indigenous territories. In this case, the same procedural limits applicable to the restrictions placed on land rights apply.¹⁷⁸ When the exploitation of extractive resources is at stake, more restrictive standards limit the capacity of States to encroach on indigenous peoples’ rights. Given their potentially disruptive impacts on indigenous rights, extractive projects would not only require consultation aimed at consent, but also the obtainment of free, prior and informed consent. Section 3.5 on participatory rights problematizes the meaning of this requirement in more depth. Suffices it here to say that the reason for this enhanced guarantee is the acknowledgment that extractive industries may result in the denial of indigenous substantive rights to land and natural resource. Therefore, the rationale is again to ensure that indigenous peoples do not lose their distinctive relationship with land.

sought in any way to exploit any minerals or other valuable resources that might lie beneath the sea-bed. They were never, in short, of any interest to them and their pursuit never formed part of any particular custom or practice such as could give rise to a native title right or interest in them, or any right to deny others access to them” (para. 338). Federal Court of Australia, *Attorney-General of the Northern Territory v. Ward* (9 December 2003), [2003] FCAFC 283, para. 7.

¹⁷⁴ See Anaya, ‘International Human Rights and Indigenous Peoples: The Move toward the Multicultural State’ 2004, at 39: “Pursuant to the norm of non-discrimination, however, indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded to landowners”. The same argument is shared by Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, at 215.

¹⁷⁵ *Richtersveld* case, paras. 62-64.

¹⁷⁶ *Saramaka* case, para. 122. A similar reasoning has been voiced by the Court in the most recent *Kaliña and Lokono* case, para. 139.

¹⁷⁷ See Indigenous Peoples Rights Act (IPRA), Republic Act No. 8371 (29 October 1997), section 57. Claims of individual petitioners to challenge the rights granted under the IPRA were dismissed by the Supreme Court of the Philippines in *Isagani Cruz and Cesar Europa v. Secretary of Environment and Natural Resources, Secretary of Budget and Management and Chairman and Commissioners of the National Commission on Indigenous Peoples*, GR No. 135385 (6 December 2000).

¹⁷⁸ Errico 2011, at 341. See *supra* section 3.1 in this chapter.

3.3. Cultural rights

Cultural rights are as central to the preservation of indigenous distinctiveness as land and resource rights. In the words of Wiessner, the safeguarding of indigenous culture is the “*telos*” that should be duly taken into account while giving content to other indigenous rights.¹⁷⁹ In this sense, the special attachment to land is instrumental for the preservation of indigenous peoples’ distinct culture. Furthermore, it represents the distinguishing cultural element that tells apart indigenous peoples from other groups and communities.¹⁸⁰ This mutually reinforcing relationship has been recognised in human rights law.¹⁸¹

Apart from the strong connection with land rights, cultural rights are independently protected in human rights instruments. First, the foundation of cultural rights, as far as indigenous peoples are concerned, lies in the well-established norm of non-discrimination.¹⁸² Indigenous peoples have been discriminated against by reason of their diversity. In this sense, the principle of non-discrimination requires both the prohibition to interfere with indigenous culture and the need to adopt positive measures to redress discriminatory practices. The latter includes the adoption of measures that positively discriminate indigenous peoples, by ensuring them a preferential treatment.¹⁸³

¹⁷⁹ Siegfried Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ (2011) 22 *European Journal of International Law* 121, at 129.

¹⁸⁰ *Ibid.*, at 121, 129, and 134. The special link between land and culture is emphasised in Art. XIII of the American Declaration on the Rights of Indigenous Peoples, Doc. AG/doc.5537/16 (8 June 2016), where cultural integrity is protected mainly through the restitution of property. The American Declaration has been adopted by the General Assembly of the OAS on 15 June 2016. See press release at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16 (last accessed October 2016).

¹⁸¹ *Yakye Axa* case, para. 135: “The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity”. For a full analysis of the relationship between land and culture for indigenous peoples, see section 3.1.

¹⁸² Art. 1(3) UN Charter; Art. 2 Universal Declaration of Human Rights; Art. 2(1) ICCPR; Art. 2(2) ICESCR; Art. 1(1) CERD; Art. II American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, Doc. OAS/Ser.L/V/I.4 Rev. 9 (31 January 2003); Art. 1(1) American Convention on Human Rights; Art. 2 African Charter on Human and Peoples’ Rights; Art. 14 ECHR. On the link between culture and non-discrimination, see Anaya, ‘International Human Rights and Indigenous Peoples: The Move toward the Multicultural State’ 2004, at 16-19.

¹⁸³ On positive measures, see section 3.1 in this chapter. Art. 1(4) of the CERD, explicitly establishes the legality of positive discrimination. More specifically on cultural rights, see Xanthaki 2007, at 202 ff.: the author maintains that the need for the State to adopt positive measures to realise cultural rights is mandated by Art. 27 ICCPR. Xanthaki, at 202-203, also cites a number of concluding observations adopted by the Human Rights Committee in the sense of recognising the obligation for States to adopt positive measures. See also, Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ 2011, at 133, who also reads General Comment 23 on Art. 27 as implying positive duties for the State. According to this author, however, positive duties would not be mandated under customary international law. See Siegfried Wiessner, ‘The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012’ (2013) *Festschrift für Eckart Klein zum 70. Geburtstag Der Staat im Recht* 1357, at 1366. See also, Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, Ch. 7,

Second, the need to positively discriminate in favour of indigenous peoples may be also read between the lines of the decisions of human rights treaty bodies where general human rights concerning individuals are extensively interpreted so as to include indigenous peoples' cultural features. The interpretation of Article 27 of the ICCPR according to which culture "manifests itself in many forms, including a particular way of life associated with the use of land resources" is an example of this trend.¹⁸⁴ The interpretation of the right to culture as protected under Article 15 of the ICESCR is even more expansive, since its scope has been extended to include the cultural heritage and traditional knowledge of indigenous peoples.¹⁸⁵

Third, non-discrimination standards and techniques are accompanied by more specific rules contained in the specialised instruments on indigenous rights, which address the multiple aspects of indigenous peoples' culture. In Article 5 of the ILO Convention 169, cultural practices and values are to be taken into account when implementing other treaty provisions.¹⁸⁶ Therefore, cultural integrity is couched as the linking thread in the protection of indigenous rights under the Convention. Furthermore, Article 8 creates an obligation to consider indigenous customs and customary law in the implementation of national laws. The same provision protects the right of indigenous peoples "to retain their own customs".¹⁸⁷ In addition, Article 23 specifically qualifies the protection of

where the author explains how the interpretation of the equality principle has evolved with reference to indigenous peoples to include the possibility of a differential treatment in order to mitigate the effects of discrimination and marginalisation of indigenous groups.

¹⁸⁴ General Comment 23, para. 7. See Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' 2004, at 32: the author also refers to the *Hopu and Bessert v. France* case, where the Human Rights Committee interprets the right to family (Art. 17 ICCPR) and the right to privacy (Art. 23 ICCPR) so as to include indigenous peoples' attachment to their burial sites. For a complete analysis of this technique, see section 3.1 in this chapter, which explains how indigenous land rights have been derived from other well-established rights, such as the right to property, the right to development, and the right of minorities to enjoy their culture and others.

¹⁸⁵ CESCR, General Comment No. 17: Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15(1)(c)), UN Doc. E/C.12/GC/17 (12 January 2006) (hereinafter General Comment 17), para. 32 and General Comment 21, para. 37. On this point, see Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 100.

¹⁸⁶ Art. 5 ILO Convention 169 reads as follows: "In applying the provisions of this Convention: (a) the social, cultural, religious, and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected" (letter c has been omitted).

¹⁸⁷ Indigenous customs should also be taken into account "in regard to penal matters" (Art. 9(2) ILO Convention 169), "in imposing penalties" (Art. 10(1) ILO Convention 169), to communicate their rights to indigenous peoples (Art. 30 ILO Convention 169). "Cultural conditions" are to be taken into account also when providing health services to the communities (Art. 25(2) ILO Convention 169). Furthermore, education programmes should be couched so as to "incorporate" the "histories", values and "cultural aspirations" of indigenous peoples (Art. 27(1) ILO Convention 169). Participation of indigenous communities in the formulation and implementation of these policies, as well as the creation of autonomous institutions are, therefore, central elements. On participatory rights, see section 3.5 in this chapter. On the right to autonomy, see section 3.4 in this chapter. Art. 28-29 ILO Convention 169 also concerns cultural aspects; however, they are not examined because they go beyond the scope of this

activities such as “hunting, fishing, trapping and gathering” as “important factors in the maintenance” of culture that should be “strengthened and promoted”, including through “technical and financial assistance”.¹⁸⁸ It is also significant that the ILO Convention 169 creates an obligation for governments to encourage cross-border cooperation among indigenous peoples living in different States.¹⁸⁹

The UN Declaration on indigenous rights is also very much centred upon the significance of the preservation of the cultural distinctiveness of indigenous peoples. The centrality of culture is boldly affirmed in Article 7, which recognises the right of indigenous peoples “to live in freedom, peace and security *as distinct peoples*”.¹⁹⁰ More specifically, Article 8 establishes a prohibition of “forced assimilation and destruction” of indigenous culture, identifying land dispossession as one of the actions that States should prevent in order to abide by the general prohibition.¹⁹¹

The extensive notion of indigenous cultural rights is confirmed in the decisions of human rights bodies. The African Commission has probably adopted an isolated approach in accepting almost no restrictions to cultural rights.¹⁹² Indeed, limits in other human rights systems are also couched in very cautious terms. The Human Rights Committee, for instance, has only allowed for restrictions to Article 27 that do not amount to a denial of the right to culture. Similarly to the case of land rights, setting such a demanding threshold for States to ensure the acceptability of the restrictions posed on cultural rights is significant in that it testifies to the intangibility of indigenous identity.¹⁹³

research.

¹⁸⁸ Art. 23 ILO Convention 169 reads as follows: “1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their culture and in their economic self-reliance and development. Governments shall, with the participation of these peoples and whenever appropriate, ensure that these activities are strengthened and promoted. 2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development”.

¹⁸⁹ Art. 32 ILO Convention 169.

¹⁹⁰ Art. 7(2) UNDRIP, emphasis is added. This article also establishes the prohibition of genocide, whose meaning can be retrieved with reference to the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention is deemed to have reached customary status and to represent *jus cogens*. Since genocide indicates a very specific practice in international law, it is not possible to enlarge the scope of Art. 7 so as to include cultural genocide. See Wiessner and Lenzerini 2010, at 17.

¹⁹¹ See Art. 8(2)(b) UNDRIP. The scope of this prohibition is very extensive since any action potentially affecting indigenous culture is to be prevented by States. On this point, see Art. 8(2)(a) UNDRIP: “(a) Any action which has the aim or the effect of depriving them of their integrity as distinct peoples, or of their cultural values and ethnic identities”. The rest of the article reads as follows: “(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them”.

¹⁹² *Endorois* case, para. 249: “the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people’s right to culture”.

¹⁹³ See Wiessner and Lenzerini 2010, at 16: “The recognition of the rights of indigenous peoples to determine their own identity and maintain and develop their cultures is deeply rooted in indigenous self-

In light of the UN Declaration of indigenous rights, States must also adopt positive measures to ensure the fulfilment of indigenous cultural rights, namely by providing for “redress” opportunities, facilitating the restitution of “ceremonial objects and human remains”, concretely protecting indigenous languages, and adopting measures to ensure non-discrimination.¹⁹⁴ Specific positive measures, however, have rarely been addressed by human rights treaty bodies that, as reminded, have rather focused on both the material implications of culture¹⁹⁵ and the link between cultural preservation and the enjoyment of land rights.¹⁹⁶

Culture manifests itself in material terms, as attachment to land, resources, religious sites, and the object connected to traditional practices.¹⁹⁷ At the same time, sufficient protection must be ensured to the intangible elements of culture, such as histories, cosmovisions, spiritual and religious traditions, and the practices therein related. The dual nature of indigenous culture is expressed in Article 31 of the UN Declaration on indigenous rights, which affirms the right to safeguard indigenous “cultural heritage” together with “the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora”.¹⁹⁸ Therefore, culture is more intended as the evolving expression of indigenous peoples’ relationship with their lands than conceived in a static way. Furthermore, the practical implementation of cultural rights depends on the extent to which indigenous peoples can both freely exercise their traditional practices and participate in the protection

determination”.

¹⁹⁴ See Art. 11-13 and 15-16 UNDRIP. Art. 24 also protects a specific aspect of indigenous culture, namely “health practices”.

¹⁹⁵ General Comment 23.

¹⁹⁶ See section 3.1 in this chapter.

¹⁹⁷ The protection of the material elements of indigenous culture potentially intersects with the 1972 WHC. In this respect, the inscription of sites into the World Heritage List may create conflicts with the rights of indigenous peoples since their role is not taken into account in the Convention. See Wiessner and Lenzerini 2012, at 17. A conflict may arise in three cases. First, the inscription might be done by the State without seeking the consent of indigenous peoples. Second, the State might refuse to undertake the inscription procedure in case indigenous peoples have requested it. Third, the management of resources after inscription might exclude indigenous peoples. These aspects are explored in Chapter 4, section 2.2.

¹⁹⁸ The immaterial elements of indigenous culture also fall in the purview of the Convention for the Safeguarding of the Intangible Cultural Heritage, (Paris, 17 October 2003, in force 20 April 2006). This international treaty, which is widely ratified, is aimed to protect the intangible cultural heritage of humanity defined as immaterial cultural products, “as well as the instruments, objects, artefacts and cultural spaces associated therewith”, that communities, groups, and individuals identify as such (Art. 2). The 2003 Convention creates a system of listing of intangible heritage that is mainly centred on States, which are the only subjects responsible for the identification of the cultural elements that deserve international protection. States, however, must also “endeavour to ensure the widest possible participation of communities” and any other actors responsible for the creation and maintenance of intangible heritage (Art. 11(b) and Art. 15). Although the obligatory language of this provision is weak, recent developments have stressed the importance of communities and groups for the inscription of the intangible cultural heritage in the lists created under the Convention. See Federico Lenzerini, ‘Intangible Cultural Heritage: The Living Culture of Peoples’ (2011) 22 *European Journal of International Law* 101, at 107-118.

and management of their cultural products.¹⁹⁹

3.4. The right to autonomy

The right to autonomy, although largely undefined under general human rights law,²⁰⁰ acquires a specific dimension when it comes to indigenous peoples. The foundation of such a right would lie once again in the cultural distinctiveness of the peoples;²⁰¹ hence, the need to recognise a special legal framework that protects as well as enhancing this diversity. In fact, indigenous peoples already possess an autonomous legal system in the form of their customary law. These diverse customs, which regulate the life of communities, are the expression of indigenous peoples' special relationship with their lands. In the words of Tobin, "law is not only linked to the land it comes from the land".²⁰²

The UN Declaration on indigenous rights recognises the right to autonomy of indigenous peoples in its Article 4. This article is important for its drafting history that has led to the recognition that the right to autonomy is part and parcel of indigenous peoples' self-determination.²⁰³ Moreover, and most remarkably, autonomy in the form of self-government has been explicitly recognised as a right.²⁰⁴ Although framing the scope of this right in broad terms, self-government on "internal and local affairs", as well as financial autonomy have been identified as the main elements of autonomy. Scholars have emphasised that the broad framing of the right of autonomy allows for the flexibility needed in its implementation.²⁰⁵ In practical terms, the definition of autonomous

¹⁹⁹ See Wiessner, 'The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012' 2013, at 1367. On participatory rights, see section 3.5 in this chapter.

²⁰⁰ See Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 227-231. In particular, at 227-228, the author compares the lack of recognition of autonomy as an independent right by the Human Rights Committee and the instances of recognition of this right within the Council of Europe and OSCE systems. See also, Geoff Gilbert, 'Autonomy and Minority Groups: A Right in International Law' (2002) 35 *Cornell International Law Journal* 307, at 308 and 319-325. For a seminal study on autonomy, see Hannum 1990.

²⁰¹ Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' 2011, at 126.

²⁰² See Tobin 2014, at xix. See also, Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 226: autonomy and land rights are "two sides of the same coin".

²⁰³ The link with self-determination is explored in section 4.2 in this chapter.

²⁰⁴ Anaya, *International Human Rights and Indigenous Peoples* 2009, at 66. The right to self-government for indigenous peoples is also recognised in Art. XXI of the American Declaration on the Rights of Indigenous Peoples.

²⁰⁵ Northcott 2012, at 84. See also, Gilbert 2002, at 340: without referring to the UNDRIP, the author argues that "autonomy is a continuum, providing an appropriate degree of control to each group within society over its own affairs". The same author at 353 contends: it "is wrong to assert that the content of autonomy is indeterminate, for it is no more indeterminate than the acknowledged right to freedom of religion. What is indeterminate is its implementation. However, the fact that the right can only be concretized by reference to local facts does not mean that the right itself is uncertain; merely that its implementation must be case specific".

arrangements is a matter of negotiation between indigenous peoples and the State.²⁰⁶

The UN Declaration further specifies the different nuances of the right to autonomy for indigenous peoples. This right is buttressed by the recognition of and the support for autonomous indigenous institutions. Under Article 5, indigenous peoples have the right “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”.²⁰⁷ In this sense, autonomous institutions are instrumental for the conduct of self-government over a number of issues. Furthermore, the safeguarding or the establishment of these diverse institutions may be read as a precondition for the exercise of land and cultural rights. Articles 14 and 16 protect the right to “establish and control” cultural institutions, such educational bodies and media. Articles 18 and 20 establish a connection between the creation of indigenous institutions and, respectively, the furtherance of their decision-making and the conduct of their development activities. Indigenous land tenure systems can also be read as autonomous institutional arrangements to be recognised by the State under Article 27.

Although the ILO Convention 169 does not explicitly recognise a right to autonomy for indigenous peoples, this is reflected in a number of provisions. While autonomy cannot be considered absolute, the multiple references to indigenous institutions and practices confirm the need for States to recognise a variable degree of autonomy to indigenous peoples. Articles 4, 5, and 6 create an obligation for States to safeguard inter alia indigenous institutions. The Convention also confirms the importance of indigenous customs in dealing with criminal matters concerning indigenous individuals.²⁰⁸ In addition, some form of autonomy is recognised with regard to educational matters.²⁰⁹ Article 7 also establishes a link between “the right to decide their own priorities for the process of development” and the effects that development may have on indigenous institutions.²¹⁰ Albeit an indirect recognition of indigenous autonomous institutions, this provision highlights two elements. First, autonomous institutions are not isolated from the development choices that are taken at the State level and that affect indigenous

²⁰⁶ Anaya, *International Human Rights and Indigenous Peoples* 2009, at 66.

²⁰⁷ A similar right is protected under Art. 34 UNDRIP, which also specifies the limits of these autonomous arrangements: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”.

²⁰⁸ Art. 9 ILO Convention 169 establishes that “the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected”. In addition, para. 2 of the same article reads as follows: “The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases”.

²⁰⁹ See Art. 27(3) ILO Convention 169.

²¹⁰ The link between autonomy and development under Art. 7 of the ILO Convention 169 is recognised by Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 230. More generally, on the link between indigenous rights and the right to development, see Joshua Castellino, ‘Indigenous Rights and the Right to Development: Emerging Synergies or Collusion?’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011), at 367 ff.

peoples. Second, even when development priorities are decided by indigenous peoples, these have an effect on the traditional organisations of the community.

In line with the model of cultural autonomy, intended as the creation of autonomous institutions for regulating indigenous matters,²¹¹ both the UN Declaration on indigenous rights and the ILO Convention 169 emphasise the role of indigenous institutions. Only the UN Declaration, however, provides explicitly both for the devolution of powers, synthesized in the concept of “self-government in matters relating to their internal and local affairs”,²¹² and for financial autonomy, intended as the need that autonomous functions must be financially sustained in an autonomous way.²¹³ In this sense, the link between the practical realisation of autonomy and the need to ensure that indigenous peoples may financially provide for self-government reinforces the argument that autonomous arrangements are closely related to the full realisation of land and resource rights by indigenous peoples. The latter rights may guarantee both indigenous livelihood and the capacity to sustain indigenous ways of living, including as expressed in their institutions.

The requirements provided by the UN Declaration do not say much of the concrete model to be promoted at the national level. In other words, it is left to the flexibility of local needs to implement either a model that is more leaned on the devolution of powers towards thematic institutions or a territorial arrangement where more autonomous powers are granted to territorially-based indigenous peoples.²¹⁴ Both models are widely

²¹¹ See Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 232 ff. Cultural autonomy implies the granting of indigenous institutions with the regulation of cultural affairs through a devolution of powers that is often promoted via constitutional arrangements (at 234). The problem with this model is that powers over land and resources are usually not devolved as part of these arrangements (at 240). It suffices to think of the Sami parliaments that mostly exercise consultative functions (at 236) and of the Panchayat system in India, where the decisions taken by indigenous bodies can be subverted by the upper government levels (at 238).

²¹² Art. 4 UNDRIP.

²¹³ Northcott 2012, at 86-87, argues that financial autonomy is essential to realise other forms of autonomy (cultural and participatory autonomy). This reinforces the link between autonomy and the right to land and resources.

²¹⁴ The distinction between cultural and territorial autonomy is illustrated by Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 232 ff. Territorial autonomy is defined as the granting of powers over a territory to “a territorially defined group” (at 240). The main problem with this model lies in the fact that some forms of autonomy are imposed (at 241-244). Anaya also distinguishes between cultural and territorial forms of autonomy. See Anaya, *International Human Rights and Indigenous Peoples* 2009, at 67. Other authors adopt different categorisations of the models of autonomy. See John B. Henriksen, ‘Implementation of the Right of Self-Determination of Indigenous Peoples’ (2001) 3 *Indigenous Affairs* 6, at 18 ff. He distinguishes between four types of autonomous arrangements to be applied to five case studies: Philippines (regional autonomy), Finland (Sami Parliament), Greenland (overseas territory, delegated powers), Canada (regional autonomy), Panama (indigenous territorial base). Other authors also introduce the category of participatory autonomy, thus arguing for the interconnectedness of autonomy and participatory rights. See Tauli-Corpuz and Cariño 2004, at 34: self-government may be made effective either by devolving jurisdiction on a number of matters or by ensuring effective participation in decision-making on the same matters. See also, Wiessner and Lenzerini 2010, at 12. On the difference between territorial and non-territorial autonomy, see also, Tove H. Malloy and Francesco Palermo (eds), *Minority Accommodation through Territorial and Non-Territorial Autonomy* (Oxford University Press 2016).

implemented in the practice of autonomous arrangements recognised by States to indigenous peoples.²¹⁵

Territorial arrangements may also imply the devolution of sovereign powers over a well-identified territory. This is the case of the 1993 Nunavut arrangements in Canada.²¹⁶ After years of negotiation, part of the Nunavut territory was demarcated and has acquired territorial autonomy, thus mirroring the legal status of Autonomous Provinces in Canada. The agreement also regulates the exercise of indigenous powers over natural resources—both surface and subsoil. Apart from the functioning of the autonomous arrangement, it is interesting to note that the Nunavut agreement was the result of mutual concessions on the part of the governmental and indigenous actors involved. While Canada surrendered part of its sovereignty on the resources located in the Nunavut territory, the Inuit communities of the Nunavut area surrendered their land rights on any territories going beyond the Nunavut Settlement Area.²¹⁷ The example of Nunavut in Canada teaches two main lessons. First, autonomous models do not imply a fixed arrangement on land and resource rights; the parties of the autonomy agreement must negotiate the concrete declination of those rights.²¹⁸ Second, the extent of land rights does not necessarily depend on the level of institutional autonomy that is guaranteed to indigenous peoples.

3.5. Participatory rights

The duty to consult indigenous peoples when carrying out projects that may affect them has emerged as a procedural requirement that is transversal to most of the rights analysed so far. Participatory rights have been correctly indicated as a means to “protect

²¹⁵ For an extensive analysis of national practice, see Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 231 ff. See also, Alexandra Tomaselli, ‘Autonomía Indígena Originaria Campesina in Bolivia: Realizing the Indigenous Autonomy?’ (2012) 1 European Diversity and Autonomy Papers. See also, Alexandra Tomaselli, ‘Exploring Indigenous Self-governments and Forms of Autonomies’ in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016).

²¹⁶ See Nunavut Land Claims Agreement, Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, available at http://www.tunnngavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf (last accessed October 2016). For further references, see Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 244-246.

²¹⁷ Art. 2(7)(1) Nunavut Land Claims Agreement Act: “In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby: (a) cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada”.

²¹⁸ In this sense, see Northcott 2012, at 89: autonomy is a “solution to ease the tension between state sovereignty and indigenous rights”. The ILA report on indigenous peoples' rights, however, proposes a teleological interpretation of the right to autonomy for indigenous peoples, according to which “the recognition of autonomy” must come in pair with some form of “control by indigenous peoples of the lands and territories that they have traditionally owned, occupied or otherwise used or acquired”. See Wiessner and Lenzerini 2010, at 13.

indigenous peoples' land rights against infringements threatening their cultural or physical survival".²¹⁹ Human rights treaty bodies have emphasised the instrumental link between, on the one hand, the right of indigenous peoples to be consulted and to participate in the decision-making process and, on the other hand, land and cultural rights.²²⁰ In particular, the lack of participation has been used as a parameter to assess the infringement of land and cultural rights. Suffices to mention here the *Saramaka* case, where the Inter-American Court has indicated effective participation, together with the sharing of the benefits deriving from development activities and the performance of impact studies, as requirements that States should meet in order not to incur in the denial of indigenous rights.²²¹ In this sense, participation has both procedural and substantive effects, since it is used to operationalized substantive rights.

Furthermore, the instrumental role of participation for the fulfilment of substantive rights is only one part of the story. Several provisions in human rights instruments confer an autonomous status to participatory rights. In other words, participation is not only an indirect requirement to fulfil other rights, but it is also an independent right. Although some authors have argued that this right has reached a customary status,²²² the precise content of participatory rights has been object to heated debates. Some guidance as to the definition of this right comes from a range of legal documents, going from legal documents such as the reports of the UN Special Rapporteur on indigenous rights²²³ to the hard law rules contained in the ILO Convention 169.

Special Rapporteur Anaya has rightly identified the main precondition for the application of the safeguards concerning consultation and participation.²²⁴ While potentially any governmental decisions in the form of a legislative act or development project may have an effect on indigenous rights, the duty to consult is triggered every

²¹⁹ Göcke 2013, at 138.

²²⁰ Cesare Pitea, *Diritto internazionale e democrazia ambientale* (Edizioni Scientifiche Italiane 2013), at 110.

²²¹ *Saramaka* case, paras. 129 ff. The Inter-American Court refers to a similar approach adopted by the Human Rights Committee in the *Apirana Mahuika* case, while the African Commission has used the same safeguards in the *Endorois* case. See also section 3.1 in this chapter and Chapter 1, section 2.

²²² See S. James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 *Arizona Journal of International and Comparative Law* 7, at 7: "the norm of consultation...has become part of customary international law"; Pereira and Gough 2013, at 477. In a different way, the Inter-American Court of Human Rights in the *Sarayaku* case, para. 164, has recognised that "the obligation to consult, in addition of being a conventional standard, is a general principle of International Law". The issue of the legal status of indigenous rights is treated in the next section.

²²³ Concerning their legal significance, see *supra* note 76.

²²⁴ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, UN Doc. A/HRC/12/34 (15 July 2009). It is interesting to note that participation has been discussed also in the context of the relationship between armed conflict and environmental protection. See Third report on the protection of the environment in relation to armed conflicts, Submitted by Marie G. Jacobsson, Special Rapporteur, UN Doc. A/CN.4/700 (3 June 2016), paras. 121-129.

time States' actions affect indigenous peoples "in ways not felt by others in society".²²⁵ This precondition should be interpreted in broad terms as any circumstances that may affect indigenous peoples in a particular way, including when States' actions only affect interests of indigenous peoples rather than formally recognised rights. This interpretation stems inter alia from the letter of Article 6(1)(a) of the ILO Convention 169, where consultation is warranted "whenever consideration is being given to legislative or administrative measures which may affect them *directly*".²²⁶ Concurrently, Article 19 of the UN Declaration on indigenous rights establishes that consultation must occur "before adopting and implementing legislative or administrative measures that may affect them".

Three basic requirements in the conduct of consultations are also identifiable from a closer exam of both legal texts and the legal practice of human rights treaty bodies.²²⁷ First, good faith is required in the conduct of consultations as a way to establish an effective and purposeful dialogue with indigenous peoples.²²⁸ This implies that indigenous peoples must be involved in the early stages of legislative or administrative procedures.

Second, this mindful effort must be directed to possibly obtaining the consent of indigenous peoples regarding projects that affect them.²²⁹ Although consent usually does not imply a duty for States to achieve an agreement with indigenous peoples,²³⁰ both the ILO Convention 169 and the UN Declaration indicate the reaching of a consensus as the objective of any consultation. Indeed, as explained in the following, the requirement of free, prior and informed consent has also been interpreted as the obligation to obtain consent under certain—exceptional—circumstances.

Third, consultations shall be conducted in a manner that is culturally appropriate, by involving indigenous peoples' legitimate representatives in line with indigenous customs and traditional patterns.²³¹ Furthermore, in light of the conclusions of human rights treaty bodies, the requirement of conducting impact studies may complement

²²⁵ UN Doc. A/HRC/12/34, para. 43.

²²⁶ Emphasis is added. Under Art. 7(1) of the ILO Convention 169, indigenous peoples "shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly".

²²⁷ See e.g. Olivares Alanís 2013, at 205.

²²⁸ See Art. 6(2) ILO Convention 169; Art. 19 and 32 UNDRIP.

²²⁹ Art. 6(2) of the ILO Convention 169 establishes that consultations should be carried out "with the objective of achieving agreement or consent to the proposed measures". The UN Declaration is more precise since it indicates the objective of obtaining the "free, prior and informed consent" of indigenous peoples, thus specifying the characteristics of this consent (Art. 19 and 32). See Report of the Special Rapporteur 2009, UN Doc. A/HRC/12/34, para. 46.

²³⁰ UN Doc. A/HRC/12/34, para. 46: "This provision of the Declaration [Art. 19] should not be regarded as according indigenous peoples a general "veto power" over decisions that may affect them". The argument that an absolute veto would undermine national constitutional systems and the principle of equality has been used by Australia, Canada and New Zealand when voting against the UNDRIP. See Official record of the 107th UNGA plenary meeting, UN Doc. A/61/PV.107 (13 September 2007).

²³¹ Art. 6(2) ILO Convention 169: "in a form appropriate to the circumstances". Art. 19 UNDRIP: "through their own representative institutions".

participation in order to preserve indigenous cultural distinctiveness when indigenous rights are restricted in such a way that they can be substantively compromised.²³²

The argument appears circular since the extent of impacts cannot be fully evaluated without performing an impact assessment. The Inter-American Court has found that this requirement was to be met for large-scale, extractive projects.²³³ The denial test suggests that it would at least be prudent for States to conduct assessments when projects are likely to impact significantly on indigenous peoples. Indeed, the threshold for considering impact assessments obligatory also for smaller projects might be lower. In this respect, Article 7(3) of the ILO Convention 169 considers impact studies “as fundamental criteria for the implementation” of development activities likely to affect indigenous peoples. Furthermore, informed consent under Article 32(2) of the UN Declaration on indigenous rights would certainly be diminished if information provided to indigenous peoples were not based on independent assessments.²³⁴ Moreover, Article 19 of the UN Declaration requires informed consent also when States intend to adopt “legislative and administrative measures” affecting indigenous peoples. This means that not only development projects may require impact assessment since legislative measures might be hardly understandable without accompanying studies that assess their meaning and policy impacts.

Beyond these uniform requirements, the content of participatory rights is flexible depending both on the legal framework that is applicable and the contextual circumstances of the case. In the practice of human rights bodies, participation and consultation, as interchangeable facets of the same right,²³⁵ can be classified along a spectrum that contains four main categories: political rights, formal participation, effective participation, and the duty to obtain consent.²³⁶

²³² *Poma Poma* case, para. 7.7; Human Rights Committee, General Comment 34, para. 18; *Saramaka* case, para. 129; *Endorois* case, paras. 227-228. On the teleological interpretation of these requirements, see section 3.1 in this chapter. Art. 7(3) of the ILO Convention 169 also refers to the duty of States to conduct impact studies, “whose results shall be considered as fundamental criteria for the implementations of these [development] activities”.

²³³ See *Saramaka* case, para. 129; *Sarayaku* case, paras. 204-207; *Kaliña and Lokono* case, para. 201.

²³⁴ For an interpretation that is in line with this argument, see *Sarayaku* case, para. 208.

²³⁵ While participation and consultation are different concepts in the legal texts, they are not easily told apart in the practice of human rights.

²³⁶ This section draws from previously published work, Cittadino, ‘The Public Interest to Environmental Protection and Indigenous Peoples’ Rights: Procedural Rights to Participation and Substantive Guarantees’ 2015. Several other classifications have been put forward. It is worth citing Tobin 2014, at 45-46. This author identifies four forms of participation: 1) participation to the cultural, political, economic life of the State, which includes participation in the decisions that affect indigenous rights and the adjudication of lands; 2) the State’s duty to consult indigenous for matters concerning them; 3) the duty to obtain the free, prior, and informed consent of indigenous peoples; 4) the right to remedy when intellectual or material property is taken without free, prior and informed consent or in contrast with indigenous traditions or customs. Furthermore, drawing from 2009 Anaya’s report as Special Rapporteur (UN Doc. A/HRC/12/34), Tobin argues that consultation must be carried out by the State and must not be devolved to private actors.

Political rights are a standard according to which indigenous peoples—as groups or individuals—are entitled to participate in the political life of the State. This can be done either by exercising their voting rights or by elective representative bodies, such as the Sami Parliament in Finland, which can be consulted by the State on certain subject matters. This approach, taken up by the European Court of Human Rights,²³⁷ is probably in contrast with international standards on indigenous peoples' participation and consultation. Indeed, these standards call for the recognition of the special position of indigenous peoples and the adoption of special measures to protect their rights. Since participation is instrumental for the safeguarding of land rights and, ultimately, of indigenous cultural distinctiveness, the mere exercise of voting prerogatives seem to go against the general standard according to which land and cultural rights can be restricted only to the extent that these restrictions do not result into a denial of rights.

The same considerations may be appropriate in the case of the second model along the participation spectrum, i.e., formal participation. Although the adoption of legislative measures establishing a legal framework on indigenous participation may respond to the need of adopting special measures to fulfil indigenous rights, the mere acknowledgment that these measures are in place may not suffice to preserve the substance of land and cultural rights. In some cases, however, this has happened in the decisions and reports of the ILO Committee concerning the application of the ILO Convention 169. While this treaty is very advanced in the protection of participatory rights, the application of these standards in the work of the ILO Committee has been ambiguous.²³⁸ The practice of the ILO Committee, however, cannot overshadow the letter of the Convention that, under Article 6(1)(a), prescribes instead consultation for any “legislative and administrative measures which may affect” indigenous peoples. Moreover, Article 15(2) establishes that consultation must be guaranteed even for projects concerning subsoil resources, although indigenous peoples do not have property rights on them.²³⁹ In other cases the ILO Committee has indeed given application to those principles.²⁴⁰

²³⁷ See Chapter 1, section 2.2.3.

²³⁸ See the detailed analysis carried out in Chapter 1, section 2.1.4.

²³⁹ This is in line with the interpretation given by Special Rapporteur Anaya in 2009 (UN Doc. A/HRC/12/34) that consultation must be performed even when indigenous peoples cannot formally claim any rights on the land concerned by States' projects. This requirement is meant to ensure that States cannot disregard international human rights obligations, by eluding international standards through the lack of land titling or demarcation. This last circumstance would amount to admit that national circumstances can exclude the State's international responsibility for the violation of international norms. Art. 27 VCLT: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

²⁴⁰ Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB), paras. 39-40; Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), para. 34; Report of the Committee set up to examine the

The third model—effective participation—implemented by a number of human rights bodies, is in line with international standards since effectiveness is operationalized by the reference to a number of specific standards, i.e., good faith, cultural appropriateness, and the qualification that participation must be accompanied by the substantive protection of land and cultural rights.²⁴¹ With reference to these standards, the Inter-American Court concluded that, given the widespread State practice and implied *opinio juris*, the norm of consultation is “a general principle of International Law”.²⁴² Although the reference to general principles is ambiguous when it comes to the identification of the duties imposed on States, the Court has highlighted that consultation standards are relevant beyond treaty regimes.

Consent is the fourth model of participation.²⁴³ It has already been reminded that it is not to be intended as a general veto power, i.e., as the right of indigenous peoples to stop any project affecting them.²⁴⁴ Indeed, the provisions on free, prior and informed consent contained in the UN Declaration on indigenous rights have been heatedly debated within the Human Rights Commission’s Working Group on the draft declaration, due to the opposition of States to a formulation of this right as conferring indigenous peoples the power to unilaterally reject any States’ projects or legislative interference.²⁴⁵ In contrast, indigenous peoples see the duty to obtain their consent as a manifestation of their right

representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), paras. 43-44.

²⁴¹ *Apirana Mabuika* case, paras. 9.5-9.8; *Poma Poma* case, paras. 7.6-7.7; *Saramaka* case, paras. 129-137; *Sarayaku* case, paras. 180-220.

²⁴² *Sarayaku* case, para. 164: “Various Member States of the Organization of American States have incorporated these standards into their domestic legislation, and through their highest courts”.

²⁴³ On free, prior, and informed consent, see as a general background, Doyle 2015. See also, Errico 2011, at 357-363.

²⁴⁴ See also national case law. Supreme Court of Canada, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, at 520: “Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement”; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, at 562: “the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty”; “The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN”.

²⁴⁵ See Wiessner and Lenzerini 2010, at 24: “Article 32 was contentious because it brings to the fore some of the most pressing contemporary concerns for indigenous peoples: competing States’ and indigenous peoples’ claims to natural resources”. See also Mauro Barelli, ‘Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead’ (2012) 16 *International Journal of Human Rights* 1, at 11: some States (New Zealand, Canada, Australia) explicitly rejected the interpretation of free, prior and informed consent as implying any veto power. See CESCR, Concluding observations on Colombia, UN Doc. E/C.12/1/Add.74, paras. 12, 33; Concluding observations on Brazil, UN Doc. E/C.12/1/Add.87, para. 58; Concluding observations on Ecuador, UN Doc. E/C.12/1/Add.100, paras. 12 and 35.

to self-determination that is included in the declaration.²⁴⁶ The result is a compromise between the two opposing views. However, an overly restrictive interpretation is unwarranted since the provision is a compromise between States' and indigenous peoples' views, which have both eventually rejected a formulation that imposes on States a duty merely to seek consent.²⁴⁷ Indeed, what States firmly oppose is an "unqualified right to veto".²⁴⁸

The rejection of unqualified veto powers does not exclude that under certain circumstances States are in fact obliged to obtain the consent of indigenous peoples. This argument is confirmed by the fact that the Declaration on indigenous rights explicitly recognises two cases under which consent must be obtained.²⁴⁹ First, under Article 10, "[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned".²⁵⁰ The same obligation is mandatory on the Parties of the ILO Convention 169, under Article 16(2), which also establishes further obligations in case consent cannot be obtained. Second, Article 29(2) of the UN Declaration foresees the same duty of States to obtain consent in case hazardous materials are stored on indigenous territories.

Furthermore, participation in the specific form of consent may be pivotal to the realisation of land and natural resources rights under certain circumstances.²⁵¹ Barelli argues that free, prior and informed consent must be interpreted in line with the general purposes of the UN Declaration on indigenous rights, that is to safeguard indigenous

²⁴⁶ See Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012, at 9; Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 219: "Indigenous peoples' right to self-determination is at the heart of the emergence of such a right to free, prior and informed consent"; Report of Special Rapporteur Anaya of 2009 (UN Doc. A/HRC/12/34), para. 41. The right to self-determination is examined in section 4.2 in this chapter.

²⁴⁷ See Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012, at 11: "Representatives of indigenous peoples sat at the negotiating tables on an equal footing with states. This means that states could hardly imposed their uncompromised views on any provision of the UNDRIP. This per se calls for a balanced interpretation of each article of the document".

²⁴⁸ Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012.

²⁴⁹ Doyle implicitly calls for a third case based on Art. 28 UNDRIP, which confers a right to redress whenever indigenous lands are "confiscated, taken, occupied, used or damaged without their free, prior and informed consent". This argument, however, cannot be retained since it does not distinguish between a very different set of options going from dispossession, which is comparable to relocation, to use, under which cases more nuances apply. See Doyle 2015, at 140.

²⁵⁰ Other requirements are an agreement on compensation and the possibility to return dispossessed lands. Consider that indigenous peoples can be relocated also due to the creation of protected areas. This case is examined in Chapter 4.

²⁵¹ See Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012, at 9: "it would seem difficult to reconcile the right of indigenous peoples to pursue freely their economic, social and cultural development with the fact that development projects could take place on their lands without their consent"; and 11.

lands and culture.²⁵² This relationship is *inter alia* recognised in the jurisprudence of national bodies²⁵³ that have elaborated on this point, by identifying cases in which effective consultation requires not only that the consent of indigenous peoples is sought, but also that it is obtained.²⁵⁴ Significantly, the CERD has noted that

[a]s to the exploitation of the subsoil resources of the traditional land indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought.²⁵⁵

Based on the decisions of human rights treaty bodies, large-scale development projects, with a particular focus on extractive industries, are considered as such since they bear extensive environmental, economic, and social consequences.²⁵⁶ Under these circumstances, the only means to preserve indigenous peoples' rights is to provide indigenous peoples with the possibility to have a final say on those projects.

The Inter-American Court in the *Saramaka* decision is extremely clear on this point. While restrictions on indigenous land rights normally only require the performance of consultations, in case of large-scale development projects that are likely to have a major impact, States must obtain the consent of the indigenous peoples concerned.²⁵⁷ The

²⁵² Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012, at 11.

²⁵³ See Supreme Court of Canada, *Delgamuukw v. British Columbia*, at 1113: "Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands".

²⁵⁴ See General Comment 21, paras. 33 and 55.

²⁵⁵ CERD, Concluding Observations on Ecuador, UN Doc. CERD/C/62/CO/2 (2 June 2003), para. 16. See also General Recommendation 23, para 4(d). In spite of this bold statement on the need to obtain consent, some ambiguities emerge from subsequent practice. See Concluding observations on Australia, UN Doc. CERD/C/AUS/CO/14 (14 April 2005), paras. 11 (obligation to obtain informed consent) and 16 (obligation to seek informed consent; Concluding observations on Guatemala, UN Doc. CERD/C/GTM/CO/11 (15 May 2006), para. 19: "endeavour to obtain their informed consent"; Concluding observations on India, UN Doc. CERD/C/IND/CO/19, para. 19: "The State party should seek the prior informed consent of communities affected by the construction of dams"; Decision 1(67) on Suriname, UN Doc. CERD/C/DEC/SUR/2, para. 4: "Strive to reach agreements with the peoples concerned, as far as possible, before awarding any concessions"; Decision 1(69) on Suriname, UN Doc. CERD/C/DEC/SUR/5, para. 2. For other references to reports where ambiguities as to the existence of an obligation to obtain consent emerge, see Wiessner and Lenzerini 2012, at 5.

²⁵⁶ For a discussion on the possible relevance of small projects, see *infra* in this section.

²⁵⁷ *Saramaka* case, paras. 134-137. According to Barelli, the conditions laid down in the *Saramaka* decision can be used to define the scope of the free, prior, and informed consent obligations contained in the UNDRIP. See Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012, at 14. It is remarkable that the Court further clarified that until demarcation and titling of indigenous lands are not completed, States must obtain consent for every act that can interfere with indigenous property rights. See *Case of the Saramaka People v. Suriname*, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations, and Costs, Judgment, Case No. 12,338 (12 August 2008). This interpretative judgment falls in the jurisdiction of the Court under Art. 67 of the American Convention on Human Rights. See Rombouts 2014, at 270-273.

African Commission, in reviewing the alleged violation of the right to development under Article 22 of the African Charter, has recognised that consent must be obtained for “any development or investment projects that would have a major impact within the Endorois territory”.²⁵⁸ However, ambiguities emerge on the requirement of consent when property rights under Article 14 of the African Charter are at stake, since the Commission only spelled out the obligation “to consult and to seek consent”.²⁵⁹ Indeed, whatever is the legal basis under which the obligation of obtaining consent arises, the factual circumstance that a major impact is likely to happen on the territories of indigenous peoples is clearly identified by the African Commission as a situation in which mere consultation is not sufficient. Consent is also conceived as the right of indigenous peoples to have a final say on the realisation of extractive projects in the concluding observations of the CDESCR and CERD, thus beyond the regional framework.²⁶⁰

Moreover, the same human rights treaty bodies have concluded that States also have obligations to monitor, ensure the enforcement, and provide remedies for the implementation of free, prior and informed consent when extractive projects are conducted by corporations.²⁶¹ These conclusions are in line with both States’ duty to

²⁵⁸ *Endorois* case, para. 291.

²⁵⁹ *Endorois* case, para. 226.

²⁶⁰ See CDESCR, Concluding observations on Ecuador, UN Doc. E/C.12/EQU/CO/3, para. 9, and UN Doc. E/C.12/1/Add.100, para. 12; CDESCR, Concluding observations on Colombia, UN Doc. E/C.12/COL/CO/5, para. 9, and UN Doc. E/C.12/1/Add.74, para. 33. CERD, Concluding observations on Guatemala, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11(a); CERD, Concluding observations on Chile, UN Doc. CERD/C/CHL/CO/15-18, para. 22; CERD, Concluding observations on Ecuador, UN Doc. CERD/C/62/CO/2, para. 16. See also, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, UN Doc. A/HRC/21/47 (6 July 2012), para. 65: “As established by the Inter-American Court of Human Rights, consistent with the United Nations Declaration on the Rights of Indigenous peoples and other sources, where the rights implicated are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations. It is generally understood that indigenous peoples’ rights over lands and resources in accordance with customary tenure are necessary to their survival. Accordingly, indigenous consent is presumptively a requirement for those aspects of any extractive operation that takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival”.

²⁶¹ In the *Sarayaku* case concerning oil concessions, the Inter-American Court has confirmed the active role of the State in para. 164: “the State must ensure that the rights of indigenous peoples are not disregarded in any other activity or agreement reached with private or third parties, or in the context of public sector decisions that would affect their rights and interests. Therefore, where applicable, the State must also carry out the tasks of inspection and supervision of their application and, when appropriate, deploy effective means to safeguard those rights through the corresponding judicial organs”. In the *Ogoni* case, the African Commission upheld a similar notion of care. See *Ogoni* case, para. 54: “Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken”; para. 57: “Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties”. The CDESCR has also adopted a similar reasoning. See CDESCR, Concluding observations on the initial report of Indonesia, UN Doc.

protect and the standard of due diligence as recognised in the UN Report on business and human rights, adopted by Special Rapporteur John Ruggie and endorsed by States through a resolution of the Human Rights Council.²⁶² Beyond extractive projects, the Human Rights Committee has recently concluded that consent is warranted with respect to any “measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community”.²⁶³

Therefore, a teleological approach seems to characterise the protection of indigenous participatory rights. This teleological approach has allowed human rights bodies to derive consent obligations from generic participatory rights, based on the argument that consultation and consent are fundamental procedural requirements for the preservation of indigenous land and cultural rights and, ultimately, for indigenous peoples’ very existence as distinct peoples.²⁶⁴ Thus, it is not sufficient merely to look at the scale of

E/C.12/IDN/CO/1 (19 June 2014), paras. 28; CESCR, Concluding observations on Ecuador, UN Doc. E/C.12/1/Add.100 (7 June 2004), para. 35. See also CERD, Concluding observations on Canada, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), para. 17. For a concurrent view, see also Anaya’s report 2012, UN Doc. A/HRC/21/47 (6 July 2012), para. 67, as well as James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, Extractive industries and indigenous peoples, UN Doc. A/HRC/24/41 (1 July 2013), paras. 44-46. See also Expert Mechanism on the Rights of Indigenous Peoples, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, UN Doc. A/HRC/EMRIP/2012/2 (30 April 2012), para. 26 and World Bank’s Operational Policy 4.10, at 18: conditionality on funds meaning that the Bank “does not proceed further with project processing if it is unable to ascertain that support exists” on the part of indigenous peoples (para. 11). For the history of the human rights approach to development within the Bank and the incorporation of the concerns of indigenous peoples, see Fergus MacKay, ‘The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?’ (2005) 22 *Arizona Journal of International and Comparative Law* 65; Stefania Errico, ‘The World Bank and Indigenous Peoples: the Operational Policy on Indigenous Peoples (O.P. 4.10.): Between Indigenous Peoples’ Rights to Traditional Lands and to Free, Prior, and Informed Consent’ (2006) 13 *International Journal on Minority and Group Rights* 367, at 368-371.

²⁶² Human Rights Council, UN Doc. A/HRC/17/31 (21 March 2001), endorsed by Res. 17/4, UN Doc. A/HRC/RES/17/4 (6 July 2011). The Special Rapporteur Anaya has recognised that companies concurrently have a duty of due diligence to respect indigenous rights, i.e., corporate responsibility. See Anaya’s report 2012, UN Doc. A/HRC/21/47, para. 67. For an overview of the legal problems posed by the recognition of corporate responsibility in international law, see Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press 2009). On the relevance of the debate on corporate responsibility for the present dissertation, see Introduction, section 4.

²⁶³ *Poma Poma* case, para. 7.6. This approach adopted by the Human Rights Committee does not reflect the more prudent stance adopted in previous reports. See HRC, Concluding observations on Panama, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008), para. 21; Concluding observations on Nicaragua, UN Doc. CCPR/C/NIC/CO/3 (12 December 2008), para. 21(c); Concluding observations on Mexico, UN Doc. CCPR/C/MEX/CO/5 (17 May 2010), para. 22; Concluding observations on Colombia, UN Doc. CCPR/C/COL/CO/6 (4 August 2010), para. 25. Barelli, ‘Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead’ 2012, at 8. On this decision, see also Katja Göcke, ‘The Case of Ángela Poma Poma v. Peru before the Human Rights Committee: The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples’ Rights’ (2010) 14 *Max Planck Yearbook of United Nations Law* 337, at 357.

²⁶⁴ In support of this argument, see the Report of Special Rapporteur Anaya of 2009 (UN Doc. A/HRC/12/34), para. 47: “the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved”; para. 65: “The specific characteristics of the required consultation procedures will vary depending on the nature of the proposed measure, the scope

the measures concerned to determine which grade of participation States must ensure. Instead, the potential effects of the concerned measures as well as the substance of the rights protected must be taken into due account.²⁶⁵ This is the approach adopted by the Human Rights Committee in the *Jouni Länsman* decision. Although not dealing specifically with consent, the Committee has concluded that

if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27.²⁶⁶

Hence also small-scale projects, if reiterated in time and incrementally affecting indigenous rights, must be intended as requiring indigenous peoples' consent since they are likely to significantly impinge on indigenous peoples' distinctiveness.²⁶⁷

Substantive impacts may come not only from development projects, but also from the creation of nature reserves and protected areas,²⁶⁸ as well as from access to natural resources located in indigenous peoples' territories.²⁶⁹ In acknowledging this issue, the COP of the CBD has endorsed the PoWPA,²⁷⁰ which both calls for the full respect of indigenous rights when establishing protected areas and requires States to obtain free, prior and informed consent when indigenous peoples are relocated following the establishment of protected areas.²⁷¹ These requirements are very innovative, especially

of its impact on indigenous peoples, and the nature of the indigenous interests or rights at stake. Yet, in all cases in which the duty to consult applies, the objective of the consultation should be to obtain the consent or agreement of the indigenous peoples concerned. Hence, consultations should occur early in the stages of the development or planning of the proposed measure, so that indigenous peoples may genuinely participate in and influence the decision-making".

²⁶⁵ On these points, see also Doyle 2015, at 149-155.

²⁶⁶ *Länsman II*, para. 10.7.

²⁶⁷ See Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012, at 15.

²⁶⁸ Expert Mechanism on the Rights of Indigenous Peoples, Progress report on the study on indigenous peoples and the right to participate in decision-making, UN Doc. A/HRC/EMRIP/2010/2 (17 May 2010), para. 34: "Particular emphasis is placed on free, prior and informed consent for projects or measures that have a substantial impact on indigenous communities, such as those resulting from large-scale natural resource extraction on their territories or *the creation of natural parks, reserved forests, game reserves* on indigenous peoples' lands and territories" (emphasis is added).

²⁶⁹ These issues are explored in full in Chapter 4.

²⁷⁰ See Chapter 3.

²⁷¹ COP dec. VII/28, para. 22: the COP "Recalls the obligations of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and notes that the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations". See also, Goal 2.2: "To enhance and secure involvement of indigenous and local communities and relevant stakeholders" in management and establishment of protected areas "in full respect of their rights and recognition of their responsibilities" by implementing specific plans and initiatives (suggested activity 2.2.2) and involvement in decision-making (2.2.4); suggested activity

compared to the human rights treaty bodies' decisions that have not articulated so far the requirement of free, prior and informed consent with respect to the creation of protected areas. Indeed, the Inter-American Court in the *Kaliña and Lokono* case does refer to the duty to seek consent in order to ensure effective participation when creating nature reserves but it does not say whether and when consent must be obtained.²⁷² In the same case, the Court also acknowledges that the creation of protected areas on indigenous territories is not threatening indigenous rights per se, especially when indigenous peoples can effectively participate in the decisions concerning nature reserves, can have access to their lands and resources, and can benefit from conservation projects.²⁷³

This reasoning is justified by the fact that indigenous rights are not absolute and may legitimately be restricted. Even when fundamental rights are at stake—land and cultural—safeguards must be proportional to expected restrictions. In this light, consent cannot be but an exceptional requirement. Apart from the hypotheses when consent is explicitly required, the UN Declaration frames consent as an objective of consultation.²⁷⁴ Concurrently, former Special Rapporteur Anaya has clarified that, even in those cases where consent is required, indigenous peoples' decisions on developments that might affect them cannot be framed as veto powers. This is due to the fact that indigenous peoples' will cannot be imposed on legitimate and important societal needs.

Therefore, in case consent cannot be reached on activities that do not put in danger the basic needs of indigenous peoples, States should not necessarily stop their projects. This might be true when States create protected areas for the purpose of protecting nature, while at the same time they ensure the above-mentioned safeguards to indigenous peoples. In contrast with that, in the case of extractive industries Special Rapporteur Anaya has specified that it is difficult to demonstrate that the requirements of necessity and proportionality for valid restrictions to indigenous rights have been met when

1.4.1: in order to ensure effective planning and management, Parties should “Create a highly participatory process, involving indigenous and local communities and relevant stakeholders”; suggested activity 2.1.5: Parties should “Engage indigenous and local communities and relevant stakeholders in participatory planning and governance, recalling the principle of the ecosystem approach”. See also suggested activity 2.2.5: “Ensure that any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations”.

²⁷² *Kaliña and Lokono* case, at 49, note 230.

²⁷³ *Kaliña and Lokono* case, paras. 173 and 181.

²⁷⁴ Art. 11(2) UNDRIP establishes that effective redress should be guaranteed in case indigenous “cultural, intellectual, religious and spiritual property” is taken without free, prior and informed consent. Restitution, however, is only one of the available remedies. This obligation is mirrored in Art. 27 as concern the “lands, territories and resources...which have been confiscated, taken, occupied, used or damaged” without free, prior and informed consent. Again, if restitution is not possible, compensation should be provided. Art. 32(2) reads as follows: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

consent is not sought and obtained.²⁷⁵

In any event, it is important to highlight here that even when consent is not to be obtained, States bear a number of demanding obligations connected to participatory rights, since they need to engage with indigenous representatives in good faith and at an early stage, to minimise the impact of new development activities, and to provide for compensation.²⁷⁶ “These principles are designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement”.²⁷⁷

Both in the sense of an objective for consultation and as an obligatory requirement, free, prior and informed consent must be intended as process rather than a static concept. This process should start at the earliest stages of any decision-making process (prior) and must seek for the mindful (informed) agreement of indigenous peoples without coercive measures (free).²⁷⁸ In this sense, consultation and consent are logically linked to one another, the former being the precondition for the latter.²⁷⁹ Consultation, indeed, allows for the acknowledgement of the interests at stake, the foreseen impact, the importance of the land for specific indigenous cultures, and the relevance of undisturbed and non-competitive resource use for indigenous peoples concerned. At the end of this spectrum, consent is required when the integrity of indigenous peoples is at stake, either for the nature of the project concerned (extractive) or for the scale of possible impacts on the ability of indigenous peoples to enjoy their land and cultural rights in a way that preserves their integrity as a group.

A last form of participation is worth exploring in this section, i.e., participation in the benefits deriving from activities that are conducted on indigenous territories, make use of indigenous peoples’ resources, or employ traditional knowledge.²⁸⁰ Although benefit-sharing is not specifically related to participation in decision-making, it has emerged

²⁷⁵ Report of Special Rapporteur Anaya, Extractive industries and indigenous peoples, UN Doc. A/HRC/24/41, para. 36.

²⁷⁶ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, UN Doc. A/HRC/9/9/Add.1 (15 August 2008), Annex I, Observaciones del Relator Especial sobre la situación de derechos humanos y libertades fundamentales de los indígenas acerca del proceso de revisión constitucional en el Ecuador, paras. 33-40.

²⁷⁷ Special Rapporteur Anaya’s report 2009, UN Doc. A/HRC/12/34, para. 49.

²⁷⁸ Barelli, ‘Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead’ 2012, at 2. For a complete review of the diffusion of free, prior and informed consent in international instruments and reports of human rights treaty bodies, see Rombouts 2014, at 195-218.

²⁷⁹ See Lisl Brunner and Karla Quintana, ‘The Duty to Consult in the Inter-American System: Legal Standards after *Sarayaku*’ (2012) 16 American Society of International Law: Insights, available at <http://www.asil.org/insights/volume/16/issue/35/duty-consult-inter-american-system-legal-standards-after-sarayaku>: “The [Inter-American] Court appeared to find it unnecessary to make specific reference to the requirement of consent in *Sarayaku* because Ecuador did not satisfy the preliminary obligation to consult”.

²⁸⁰ Benefit-sharing is analysed in depth in Chapter 3, section 2.3.

in conjunction with it within human rights law. Furthermore, likewise the other forms of participation, the sharing of the benefits has both a procedural component and a substantive effect. From a procedural point of view, human rights bodies must verify the undertaking of this obligation to assess the legitimacy of restrictions imposed by States on protected rights. From a substantive perspective, benefit-sharing can be intended both as an instrumental element for the realisation of indigenous rights and as a remedial requirement to compensate for the compression of indigenous rights. Although, these elements are explored in more detail in Chapter 3, the main components of benefit-sharing are delineated here as they emerge both from human rights law and biodiversity law.

Article 15 of the ILO Convention 169 protects indigenous peoples' right to natural resources. As stated in paragraph 1 of this provision, "[t]hese rights include the right of these peoples to participate in the use, management and conservation of these resources". Thus, participation is intended as a form of co-management.²⁸¹ In paragraph 2 concerning subsoil resources, indigenous peoples "shall participate in the benefits" of explorative and exploitation activities. From this scant provision, two elements emerge. First, benefit-sharing is not defined and is subject to the circumstances of the case ("wherever possible"). Second, benefit-sharing is different from compensation; while compensation is only due when damages are produced, the sharing of the benefits must be ensured under any circumstances.

The Human Rights Committee has concluded that, whenever a restriction of cultural rights occurs, consultation alone is not sufficient. In addition, States must ensure that indigenous peoples continue to benefit from their traditional activities.²⁸² Although the Committee does not mention any positive action of the State to ensure that benefits are shared with indigenous peoples, there emerges a material component of participation that is linked to the underlying rationale of benefit-sharing. The sharing of benefits comes either as a result of consultation or as an additional requirement for an agreement cannot be reached.

In the *Saramaka* case, the Inter-American Court identifies benefit-sharing as one of the elements to assess the acceptability of restrictions on indigenous peoples' land rights, together with effective consultation and the conduct of impact studies.²⁸³ The

²⁸¹ See Göcke 2013, at 151. The author argues that, in a residual meaning, participation is aimed to ensure co-management of lands and resources when only usage rights on resources are guaranteed.

²⁸² *Apirana Mahuika* case, para. 9.5: "In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy".

²⁸³ The Court speaks of "[s]afeguards against restrictions on the right to property that deny the survival of the Saramaka people", title preceding paras. 129ff. See Anaya and Williams Jr. 2001, at 83: "The right of indigenous peoples to benefit from economic activities conducted on their lands is an essential element of their right to property".

formulation used by the Court is vague in that it only refers to the need that States ensure that indigenous peoples “receive a reasonable benefit from any such [development, investment, exploration, or extraction] plan within their territory”.²⁸⁴ Benefits here seem to be couched in very generic terms as any beneficial consequences stemming from the development activities concerned. The Court further elaborates on benefit-sharing in the same decision, by connecting this requirement to the right to fair compensation protected under the American Convention on Human Rights as a remedial restriction of the right to property. Inherent in this notion of compensation is not the production of damages but the mere imposition of restrictions on land rights.²⁸⁵ The Court explicitly refers to the fact that the requirement of ensuring the equitable sharing of the benefits has also been used by the CERD with reference to extractive activities.²⁸⁶

The African Commission in the *Endorois* case concludes that benefit-sharing “serves as an important indicator of compliance for” both property and development rights of indigenous peoples.²⁸⁷ In this sense, benefit-sharing is a procedural requirement for courts or monitoring bodies to verify the fulfilment of indigenous peoples’ rights. The other rationale for granting benefit-sharing is to ensure that fair compensation is guaranteed in case indigenous rights are restricted.²⁸⁸ A fair form of compensation is represented by the granting of new substitutive lands to conduct traditional activities.²⁸⁹ In the final recommendations, the Commission has indicated practical ways in which benefit-sharing may be put in practice, namely the payment of compensation “for the loss suffered”, the payment of royalties “from existing economic activities”, and the granting of job opportunities to community members.

Under the CBD, Article 8(j) establishes that the contracting Parties should “encourage the equitable sharing of the benefits arising from the utilization” of indigenous traditional knowledge and practices “relevant for the conservation and sustainable use of

²⁸⁴ *Saramaka* case, para. 129.

²⁸⁵ *Saramaka* case, paras. 138-140.

²⁸⁶ CERD, Concluding Observations on Ecuador, U.N. Doc. CERD/C/62/CO/2, para. 16. In Concluding observations on India, UN Doc. CERD/C/IND/CO 19 (5 May 2007), para. 19, the CERD speaks of “compensation” rather than benefit-sharing in relation to the construction of a dam.

²⁸⁷ *Endorois* case, para. 294.

²⁸⁸ *Endorois* case, paras. 295-296: benefit-sharing “may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community”. In para. 297, the Commission recounts the material losses suffered by the Endorois community as a consequence of the deprivation of their rights.

²⁸⁹ *Endorois* case, para. 298: “The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process”. This obligation must be interpreted in light of the remedial provisions contained in the both ILO Convention 169 (Art. 16) and the UNDRIP (Art. 28). See also *Yakye Axa* case, para. 151: “Selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law”.

biological diversity”. Article 5 of the 2010 Nagoya Protocol creates an obligation for State Parties to take measures to ensure that the fair and equitable sharing of the benefits is ensured from the utilisation both of genetic resources held by indigenous peoples and traditional knowledge associated with genetic resources, based on mutually agreed terms. Chapter 3 clarifies to what extent these standards are in line with the human rights obligations of contracting Parties and how human rights obligations can feed into the interpretation and application of these provisions. It is interesting to note at this stage that, compared with human rights standards, the Nagoya Protocol identifies in its Annex some concrete manifestations of the material and non-material benefits that can be provided to indigenous peoples. Furthermore, the scope of benefit-sharing in the Nagoya Protocol is different from that of international human rights law since it is not necessarily connected to the restrictions on indigenous peoples’ rights, as explained in Chapter 3.²⁹⁰

3.6. The legal status of indigenous peoples’ rights

The above analysis of indigenous rights as emerged from human rights law has reinforced the argument that indigenous land rights are central in the preservation of indigenous communities as distinct peoples. In particular, previous sections have shown that a teleological approach is underlying both human rights instruments on indigenous peoples and international practice. In this respect, the recognition of other rights, such as cultural rights, autonomy rights, or participatory rights, is either instrumental for or the product of the recognition of land rights.

Collective land and resource rights, including the duty to demarcate indigenous peoples’ territories, cultural rights, which comprise both the right to exercise culture and the right to have indigenous peoples’ relationship with land preserved, the right to autonomy, and the right to free, prior and informed consent declined either as an objective or an obligation to reach consensus, are at the core of indigenous peoples’ identity. These rights, to which indigenous peoples are specifically entitled, have both been included in human rights instruments and applied by universal and regional human rights treaty bodies.²⁹¹ In particular, previous sections have shown that all of these rights have been interpreted in a teleological way so as to guarantee indigenous peoples’ very existence as distinct groups. Consequently, the interconnectedness of indigenous peoples’ rights²⁹² is to be taken into account when assessing their legal status.

As reminded, land and resource rights occupy a prominent role, both for they have been widely relied upon by human rights treaty bodies and play a central role in

²⁹⁰ Morgera, Tsioumani and Buck 2014, at 105.

²⁹¹ See Siegfried Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis’ (1999) 12 Harvard Human Rights Journal 57, at 109.

²⁹² Wiessner and Lenzerini 2012, at 43-44.

the fulfilment of other rights. Anaya and Williams have indicated a “consistent pattern of international and domestic legal practice that recognizes indigenous peoples’ rights to lands and natural resources”.²⁹³ Furthermore, it has been pointed out that the formulation of land rights of the draft UN Declaration on indigenous rights has not been renegotiated within the General Assembly that has agreed to the version previously elaborated within the Working Group on the draft declaration and agreed upon by the Human Rights Council.²⁹⁴ This would testify to the broad recognition of these rights. Therefore, there is a strong expectation that core indigenous rights must be protected, respected, and fulfilled by States.²⁹⁵ In addition, some authors maintain that customary international law concerning these rights has already emerged.²⁹⁶ The remaining of this section aims to verify the legal status of indigenous rights.

From a purely positivist legal perspective, indigenous rights can have a mandatory nature either for those States that are party to international treaties whereby indigenous rights are protected or through customary international law. Concerning obligations deriving from treaty law, it must be underlined that indigenous property rights over lands and natural resources and participatory rights are protected under all universal and regional human rights treaties. The only exception is represented by the practice of the European Court of Human Rights, which only assimilates indigenous rights to the cultural rights of minorities, as illustrated in Chapter 1.²⁹⁷ Indeed, virtually all European States are also bound by general human rights treaties. This means that a more restrictive interpretation of indigenous rights could only apply to the regional European context,

²⁹³ Anaya and Williams Jr. 2001, at 53. Concerning international practice, these authors refer to the adoption of both the ILO Convention 169 and the UNDRIP, as well as the negotiations on the American Declaration on indigenous rights (at 55-58). At 57-58, they state boldly, “Every major international body that has considered indigenous peoples’ rights during the past decade has acknowledged the crucial importance of lands and resources to the cultural survival of indigenous peoples and communities”. These authors also refer to the relevance of national legislative and constitutional reforms (at 59ff.). See also, S. James Anaya and Siegfried Wiessner, ‘The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment’ [2007] JURIST. See Fitzmaurice, ‘Tensions between States and Indigenous Peoples over Natural Resources in Light of the 1989 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 Declaration on the Rights of Indigenous Peoples (Including Relevant National Legislation and Case-Law)’ 2012, at 259: “The right of indigenous peoples to natural resources on the territories they live is undisputed by human rights law”. Furthermore, see Mauro Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International & Comparative Law Quarterly* 957, at 973. This author identifies as undisputed rights the right not be subjected to genocide, the right to exercise culture, the right to participation, and the right to land, including the aspect of an existing spiritual link between indigenous peoples and their lands.

²⁹⁴ Wiessner and Lenzerini 2010, at 20.

²⁹⁵ Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ 2009, at 960: “in the light of the context in which it has been established and its very normative content, the Declaration has important legal effects and generates reasonable legal expectations of complying behaviour”.

²⁹⁶ Wiessner, ‘The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012’ 2013, at 1362.

²⁹⁷ Chapter 1, section 2.2.3.

both within European States and in the reciprocal relations of European States. However, it has to be reminded that the European Court has adopted a denial test that is comparable to that utilised by other human rights treaty bodies to assess the legitimacy of restrictions on indigenous rights. In this light, it is not unthinkable that in future cases the European Court may apply this test in a way that is more favourable to indigenous prerogatives. Furthermore, the existence of a denial test has consequences on the discussion about the emergence of the principle of self-determination explored in section 5 in this chapter.

Another consideration is to be made here on the relevance of treaty law for the emergence of general international law. Although international treaty law might be considered as evidence of State practice for the purposes of the formation of customary international law, this dissertation does not aim to reach conclusions on the issue of whether or not indigenous rights have reached the status of customary international law. This assessment would be too burdensome as it would require the analysis of widespread—although not universal—State practice, as well as the problematic evaluation of their *opinio juris*. This study would be extremely complex not only in terms of the amount of materials that must be evaluated, but also because the nature of customary international law and its constitutive elements are still very much discussed and difficult to apprehend.²⁹⁸ Although the binary conception—*usus* and *opinio juris sive necessitatis*—is consolidated, the evaluation of the two constitutive elements is far from being settled.²⁹⁹ Therefore, truly engaging with such debates would probably require a dissertation on its own.

The other argument not to concentrate on the assessment of the customary nature of indigenous rights is that this analysis would also be not decisive. Indeed, the mandatory nature of indigenous core rights, as demonstrated in previous sections, can be motivated

²⁹⁸ See e.g., Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010), at 9-10. For a non-exhaustive overview on the theoretical debates on the nature, function and development of customary international law, see Anthony A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971); Luigi Ferrari Bravo, 'Méthodes de recherche de la coutume internationale dans la pratique des Etats' (1985) 192 *Recueil des cours* 233; Frederic L. Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146; Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988-1989) 12 *Australian Year Book of International Law* 22; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999); Andrew T. Guzman, 'Saving Customary International Law' (2005) 27 *Michigan Journal of International Law* 115; Gaetano Arangio-Ruiz, 'Customary Law: A Few More Thoughts about the Theory of "Spontaneous" International Custom' in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon* (Bruylant 2007); Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 *The Law and Practice of International Courts and Tribunals* 195.

²⁹⁹ See Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *European Journal of International Law* 417, who argues that even when the ICJ concludes for the existence of rules of customary international law, its methodology is indefinite and its finding are determined by assertion. As an acknowledgment of this complexity, the UNGA has mandated the International Law Commission to conduct a thorough study on the constitutive elements of customary international law. The initial mandate was to explore the formation and evidence of customary international law, subsequently changed in 2013 into "Identification of customary international law". See note 100 Introduction.

by the membership of States to international human rights that recognise and protect such rights. In particular, although ICCPR,³⁰⁰ ICESCR,³⁰¹ ICERD,³⁰² the American Convention³⁰³ and the African Charter³⁰⁴ do not specifically protect indigenous rights, they have been interpreted as providing a suitable legal basis for the recognition of legal obligations of States as to the protection of indigenous rights. The legal bases for such protection have been found mainly in Article 27—sometimes in combination with Article 1³⁰⁵—of the ICCPR, Article 15 of the ICESCR, Articles 1 and 2 of the CERD, Article 21 of the American Convention, and Articles 21 and 22 of the African Charter. Those limited States having ratified the ILO Convention 169 also derive their obligations from this specialised treaty.³⁰⁶

The almost universal membership of some of these treaties makes it so that the obligation to protect indigenous rights can be considered widespread. Depending on the combination of particular treaties and the jurisdiction that is called to decide on particular cases, these rights may have slightly different contents that must be examined on a case-by-case basis. Although there cannot be doubts over their mandatory nature for the contracting Parties of the human rights treaties cited above, some issues can be raised as to the lack of review or enforcement mechanisms. A case in point is the fact that the Optional Protocol to the ICCPR, which establishes a system of individual communications to the Human Rights Committee, has not been ratified by a significant number of countries.³⁰⁷ These limitations in the enforcement of indigenous rights,

³⁰⁰ For the parties of the ICCPR, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last accessed October 2016). An important non-party is China. The adjective important is used here and in the following notes to indicate that the lack of ratification may have a significant impact on the protection of indigenous peoples.

³⁰¹ For the parties of the ICESCR, see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last accessed October 2016). An important non-party is the United States.

³⁰² For the Parties of the ICERD, see <http://indicators.ohchr.org/>. An important non-party is Malaysia.

³⁰³ For the Parties of the American Convention on Human Rights, see http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm. Important non-parties are Belize, Canada, and the United States. These countries however are subject to the non-judicial review mechanism of the Inter-American Commission since they have endorsed the American Declaration of Human Rights.

³⁰⁴ For the parties of the African Charter on Human and Peoples' Rights, see <http://www.achpr.org/instruments/achpr/ratification/>. The only non-party is South Sudan.

³⁰⁵ On this, see section 4.2 in this chapter.

³⁰⁶ On the legal value of the ILO Convention 169 beyond its mandatory status for its State Parties, see Göcke 2010, at 359: "since it is often referred to by international bodies, its contribution goes beyond the limited number of ratifications and therefore it is an appropriate starting point for investigations on recognised indigenous peoples' rights". Similar points are made by Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' 2004, at 13 ff. and Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' 2009, at 958.

³⁰⁷ See <http://indicators.ohchr.org/>. Particularly problematic is the lack of ratification by the United States and a number of Asian countries.

however, do not affect the mandatory nature of these rights under the abovementioned human rights treaties. Furthermore, this research has also verified that States have not opposed the concluding observations and the views adopted by human rights treaty bodies on the content and scope of indigenous rights. As explained in the Introduction, this has been done by looking at the States' declarations submitted periodically to human rights treaty bodies, which have been analysed starting from 2005. It emerges from these declarations that States rather tend either to illustrate examples of national measures complying with human rights treaties' obligations or to provide justifications for their non-compliance.³⁰⁸ This practice proves that States fundamentally adhere to the extensive interpretation of indigenous rights provided for by human rights treaty bodies.

Notwithstanding the decision not to engage with the debate whether or not indigenous rights have reached the status of customary international law, it is worth discussing in the remaining of this section some elements that may contribute to the emergence of customary international law in the field of indigenous rights in order to anticipate possible future developments. One of these elements concerns the role of the UN Declaration on indigenous rights. The other is related to the specificities of international human rights law.

The UN Declaration on indigenous rights represents a fundamental step towards the global recognition of indigenous peoples' rights. The document is not binding per se,³⁰⁹ indeed, some authors argue that it has a declaratory function of custom, since some indigenous rights have already reached a customary status.³¹⁰ While this argument is not

³⁰⁸ Some footnotes in this chapter specifically refer to examples of declarations where States formally accept the interpretation of human rights treaty bodies. Footnotes have also referred to the isolated opposition of the US but has not included the reference to the documents proving the acceptance of the rest of global human rights treaties. These constitute the rest of the declarations examined since 2005.

³⁰⁹ Barelli argues that the choice of a soft law instrument may have some advantages in terms of acceptability of the norms and the practical impact. See Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' 2009 at 964-966: increased possibility to reach a consensus on more defined content and to produce a document whose impact is not based on the number of ratifications or on the need to wait for the entry into force; participation of non-State actors.

³¹⁰ On this point, see Dwight G. Newman, 'Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?' in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen (eds), *International Law in the New Age of Globalization* (Martinus Nijhoff 2013), at 282: "The relevant practice of states and international institutions establishes that, as a matter of customary international law, states must recognize and protect indigenous peoples' rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns". See also, Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' 2006-2007, at 186: "the recent evolution of international law concerning indigenous peoples demonstrates that a principle has emerged requiring States to recognize a given degree of sovereignty in favor of such peoples. The fact that nearly all States concerned have adjusted their relevant internal law to the above principle and have accepted rules which often go against their own interests (since the recognition of indigenous autonomy may generate serious obstacles to the exercise of certain governmental prerogatives, such as the exploitation of natural resources), confirms that they actually feel themselves bound to conform to such international obligation". See Wiessner and Lenzerini 2012, at 23: "indigenous peoples' land rights...have attained the status of customary international law". See further Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International

discussed in its merits for the reasons above, other arguments can be plausible.

Some authors for instance maintain that the Declaration has favoured the crystallization of international custom as for the rights reiterated in the international practice of human rights treaty bodies.³¹¹ This argument, however, simply shifts the duty to provide proofs on the customary nature of indigenous rights to the treaty-related practice of States. In particular, if it cannot be demonstrated that the conclusion of human rights treaties and subsequent human rights reports can be considered as a general practice of States accepted as law, the customary nature of indigenous rights cannot be legitimately concluded. This proof, indeed, is certainly a difficult one for two main reasons. First, human rights treaties protecting indigenous rights have a general scope and have not been originally conceived to protect indigenous rights. Second, it might be particularly difficult to reconstruct State practice in relation to the reports, decisions, and judgments adopted by human rights treaty bodies and courts. Similarly, the endorsement of the UN Declaration by UN bodies³¹² or within other treaties, such as the Nagoya Protocol³¹³ might provide evidence of State practice but it can also be argued that it is not sufficiently conclusive. One of the major obstacles to the ascertainment of custom could be represented by the argument that treaty practice only concerns the content of treaty rules and not its binding nature as general international law.³¹⁴

Another strand of arguments points to the fact that the Declaration can be and has been used to interpret existing indigenous rights protected under human rights treaties.³¹⁵ In this sense, in the long term this interpretative function can contribute to

Legal Analysis' 1999; Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' 2008; Anaya and Wiessner 3 October 2007; Anaya and Williams Jr. 2001. As said, this dissertation is not concerned with proving or disproving the customary nature of indigenous rights.

³¹¹ S. James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment' [2007] JURIST; Erica-Irene Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011), at 38.

³¹² On this point, see Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 105 ff.

³¹³ Preambular para. 26 Nagoya Protocol.

³¹⁴ See Conforti 2013, at 40, who argues that the existence of *opinio juris sive necessitatis* is fundamental to ascertain whether the conclusion of a number of treaties can be intended as establishing relevant practice for the formation of international custom. This reasoning can be also extended to the relevance of soft law for the formation of custom. The dilemma described by Conforti is also known as the Baxter paradox, from the name of the scholar that has fully illustrated the problem of treaty ratification as an expression of State practice for the purpose of the emergence of customary rules. See Richard R. Baxter, 'Treaties and Custom' (1970) 129 *Recueil des cours* 27, at 64: "as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law *dehors* the treaty". See also, Gaetano Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations' (1972) 137 *Recueil des cours* 419, at 476-479; Treves 2005, at 286-287; Daillier, Forteau and Pellet 2008, at 366; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997), at 40.

³¹⁵ Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27, at 27, where the author argues that the UNDRIP provides an interpretation of pre-existing rights that has received the consensus of

the emergence of customary international law as long as it stimulates State practice and/or *opinio juris*. In this respect, it is important to highlight that, notwithstanding the non-binding nature of the Declaration, this is already playing a role in the interpretation of other instruments by enlarging the scope of existing rights.³¹⁶

Furthermore, some authors highlight the special nature of the UN Declaration on indigenous rights. This Declaration has undergone an exceptionally long negotiation process that has lasted for more than twenty years.³¹⁷ The length of the process indicates a thorough negotiation and the coming to agreed positions on a number of otherwise contested rights. The consolidation of a consensus on far-reaching rights has been possible inter alia due to the structure of negotiations that was characterised by the participation of indigenous representatives in the drafting process. A first draft of the Declaration had been elaborated within the WGIP. At that stage, only indigenous peoples were involved in the elaboration of the text that would be used as the basis for negotiation. The involvement of both indigenous peoples and States in the operations of the abovementioned Working Group on the draft declaration starting from 1995 has allowed for the formulation of a truly shared text.³¹⁸ Hence, the negotiation process has resulted in a full endorsement of the General Assembly, which on 13 September 2007 has adopted the Declaration with a resolution.³¹⁹ An overwhelming majority, with only four oppositions and eleven

States. See also, Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 103; Patrick Thornberry, 'Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011). See further, CERD, Concluding observation on the US, UN Doc. CERD/C/USA/CO/6, para. 29; Committee on the Rights of the Child, Comment on Article 11, UN Doc. CRC/C/GC/11 (2009), para. 82; CESCR, Concluding observation on Nicaragua, UN Doc. E/C.12/NIC/CO/4, para. 35.

³¹⁶ See *infra* note 336.

³¹⁷ Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' 2009, citing the Chairperson of the UN Permanent Forum on Indigenous Issues, Victoria Tauli Corpuz, at 969-970: "the Declaration has been one of the most extensively discussed and negotiated texts in the history of the UN". On the drafting history of the Declaration, see Stefania Errico, 'The UN Declaration on the Rights of Indigenous Peoples Is Adopted: An Overview' (2007) 7 Human Rights Law Review 756. See also, Daes 2011; Kenneth Deer, 'Reflections on the Development, Adoption and Implementation of the UN Declaration on the Rights of Indigenous Peoples' in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich Publishing 2010).

³¹⁸ Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges ahead' 2012, at 10: the participation of indigenous peoples' organisations in the drafting stages both within the Working Group on Indigenous Populations and within the Working Group on the Draft Declaration is quite uncommon by UN standards. This makes the UNDRIP a *sui generis* soft law instrument. See Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' 2009, at 960, arguing that there are different kinds of soft law instruments. These arguments highlighting the importance of context, however, are not decisive when it comes to assessing the legal nature of the Declaration or its role on the formation of corresponding customary rules. On this point, see Abi-Saab 1987, at 160-161. This author argues that contextual elements, such as the degree of agreement, the extent to which content is detailed, and the existence of compliance mechanisms, are more revealing of the probability that a given resolution will be implemented than its intrinsic legal value.

³¹⁹ It is also relevant that UNDESA (United Nations Department of Economic and Social Affairs)

abstentions, has voted for the resolution adopting the Declaration.

Given that the opposition to the Declaration came from Australia, Canada, the US, and New Zealand, this has casted a shadow over the universal value of the Declaration.³²⁰ It is equally relevant, however, that all of these countries have reversed their opposition and eventually endorsed the Declaration.³²¹ Whereas this late endorsement has virtually recomposed the consensus that could not be found in 2007, the terms of this endorsement are telling of remaining tensions and are briefly explored in the following.

A first cluster of statements concern the legal value of the Declaration. Australia has explicitly stated that the Declaration contains “important international principles” that reflect “Australia’s existing obligations”.³²² At the same time, the Declaration has been defined as only containing “aspirations”.³²³ This ambiguity concerning the legal impact of the Declaration can similarly be found virtually in all declarations of vote attached to the adoption of the UNGA resolution in 2007 and later.³²⁴ In this respect, it is interesting to note that, notwithstanding the clear status of UNGA resolutions in international law as non-binding legal documents, States have specified what legal consequences may derive from the Declaration. In some cases, however, like for Australia, they have done so in contradictory terms. It seems therefore that the capacity of the Declaration to influence the development of international law with respect to indigenous rights would not depend

has started a dialogue over an additional protocol to UNDRIP. See <http://www.un.org/esa/socdev/unpfii/documents/EGM/2015/Concept-note.pdf> and <http://www.un.org/esa/socdev/unpfii/documents/EGM/2015/Experts-papers/James-Anaya.pdf> (last accessed October 2016).

³²⁰ Barelli highlights that, concerning the value of a UNGA resolution for the formation of customary international law, the fact that the majority of the States affected by any resolution vote in favour should suffice as a proof of a generalised *opinio juris*. This would be the case also for the UNDRIP, since “these four States represent only a minority of States specifically affected by the Declaration. In fact, indigenous peoples live in more than sixty States”. Moreover, other States (except for New Zealand) have a higher proportion of indigenous peoples living in their territories. See Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ 2009, at 967-968.

³²¹ See *supra* note 73.

³²² In particular, Australia has emphasised the importance of the principle according to which indigenous peoples should “maintain and strengthen their distinctive spiritual relationship with land and waters”, as well as the principle of equality. On participation, Australia has not dismissed the importance of the free, prior and informed consent, stating instead that “[w]hile there is continuing international debate about the meaning of ‘free, prior and informed consent’, we will consider any future interpretation in accordance with Article 46”. Article 46 of the UNDRIP protects the territorial integrity of States. Finally, the Australia’s declaration also explicitly recognises “the right of Indigenous Australians to practice, revitalise and sustain their cultural, religious and spiritual traditions and customs”. Article 46 lays down the terms under which indigenous peoples’ self-determination can be recognised. “Through the Article on self-determination, the Declaration recognises the entitlement of indigenous peoples to have control over their destiny and to be treated respectfully. Article 46 makes it clear that the Declaration cannot be used to impair Australia’s territorial integrity”.

³²³ Australia’s statement. A similar ambiguity is contained in the US statement, at 1 and 2: “while not legally binding or a statement of current international law—has both moral and political force”; “[t]he United States aspires to improve relations with indigenous peoples by looking to the principles embodied in the Declaration”.

³²⁴ UN Doc. A/61/PV.107 and A/61/PV.108 (13 September 2007).

so much on the contradictory declarations of vote made by States on the occasion of their endorsement, but rather on subsequent and/or parallel practice and *opinio juris*. Another conclusion is that the Declaration may contain different types of legal standards going from mere aspirations to customary obligations and/or general principles.³²⁵

Second, and in connection with the previous point, late supporters have insisted on the prevalence of their national legal framework on indigenous peoples.³²⁶ Similarly to what has been argued above, the impact of the Declaration on national laws will not depend that much on these statements, but rather on the level of consolidation of indigenous rights under international law. Whereas it is still contentious whether these have reached customary status, it seems that national standards cannot ignore international obligations stemming from treaty law, as illustrated above. In this sense, therefore, the principled assumption that national standards would prevail over international ones does not seem legally sound or particularly convincing, unless it can be demonstrated that a parallel custom derogating from treaty law has developed. Another approach could be that foreshadowed by New Zealand according to which its national system has developed independently from international law. In addition, municipal law better reflects indigenous customs and is grounded on bilateral treaties concluded with Maori.³²⁷

Third, Australia, Canada, New Zealand, and the US have offered useful indications on the nature of indigenous rights. Australia has recognised the special status of indigenous peoples in international law.³²⁸ Furthermore, all statements emphasise that partnership lies at the foundation of indigenous rights. In particular, the US have also highlighted that the decision to eventually endorse the Declaration came about after consultation with indigenous tribes.³²⁹

Fourth, concerns over the formulation of specific rights have not disappeared. This

³²⁵ See for instance New Zealand's statement: "New Zealand now adds its support to the Declaration both as an affirmation of fundamental rights and in its expression of new and widely supported aspirations".

³²⁶ Australia's statement: "Australia's laws concerning land rights and native title are not altered by our support of the Declaration". Canada's statement: "Although the Declaration is a nonlegally binding document that does not reflect customary international law *nor change Canadian laws*, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada" (emphasis added); Canada can "interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework"; the national legal framework "will continue to be the cornerstone of our efforts to promote and protect the rights of Aboriginal Canadians". Indeed, reference to national law is also made in various declarations of vote also to demonstrate that those countries are protecting indigenous rights nationally. See US statement and UN Doc. A/61/PV.107 and A/61/PV.108.

³²⁷ New Zealand's statement: "where the Declaration sets out aspirations for rights to and restitution of traditionally held land and resources, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach"; "That approach respects the important relationship Māori, as tangata whenua, have with their lands and resources both currently and historically, and the complementary principles of rangatiratanga and kaitiakitanga that underpin that relationship".

³²⁸ Australia's statement: the UNDRIP "reflects and pays homage to the unique place of Indigenous peoples and their entitlement to all human rights as recognised in international law". New Zealand's statement: "The Declaration acknowledges the distinctive and important status of indigenous peoples".

³²⁹ US statement, at 2.

is clear, for instance, in Australia's insistence on the principle of territorial integrity that is in any event included in the UN Declaration. Moreover, Canada has explicitly stated that the concerns expressed when voting against the Declaration in 2007 remain but can be overcome through interpretation.³³⁰

In contrast with the qualified support on the part of those States, some authors have highlighted that the UN Declaration reflects the "recent normative developments related to indigenous peoples' rights in the context of international human rights".³³¹

In this connection, it is worth briefly touching upon the more general debate concerning the legal value of general resolutions by the UNGA since it can shed some light on the influence that the UN Declaration on indigenous rights may have on the emergence of customary international law. International scholars rightly point out that, although resolutions of the UNGA are neither legally binding nor international custom per se, they have a strong legal value in that they can stimulate practice and *opinio juris*.³³² In particular, Abi Saab defines the resolutions of the UNGA as initial steps in the international law-making process, which is cumulative by its very nature.³³³ In this sense, UN resolutions can represent a reinforced form of *opinio juris* that precedes State practice, thus contributing to the formation of international customary law.³³⁴

³³⁰ See A/61/PV.107, at 12. These concerns regard "the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties".

³³¹ Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' 2009, at 962.

³³² See as general reference to this topic, Arangio-Ruiz 1972. On the legal value of UNGA resolutions see also, Abi-Saab 1987, at 158-160.

³³³ Abi-Saab 1987, at 167-169: "La résolution représente dans un tel cas une première approximation rapide d'une réponse juridique, un premier pas ou une première étape, ainsi qu'une mesure provisoire ou conservatoire (stop-gap), jusqu'à ce qu'une réponse normative plus complète et définitive soit prête"; "Nous retrouvons ici le processus cumulatif qui caractérise la fonction législative internationale".

³³⁴ Ibid., at 171: "les résolutions ont inversé l'ordre chronologique et l'importance relative des deux éléments de la coutume". See also, Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995), at 69. According to this author, concerning the consolidation of a customary rule on self-determination in the case of decolonisation, the formation of customary rules did not initially conform with the two-pronged theory according to which customary rules are the result of the repetition of a practice accompanied by *opinio juris*. Instead, the political will took precedence through the adoption of resolutions of the UNGA. "Strictly speaking, these resolutions are neither *opinio juris* nor *usus*. Rather they constitute the major factor triggering (a) the taking of a legal stand by many Member States of the UN (which thereby express their view on the matter) and (b) the gradual adoption by these States of attitudes consistent with the resolutions". See further, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, para. 70: "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule". In support of these arguments, ILC draft conclusions on the identification of custom (UN Doc. A/CN.4/L.872) confirm that the resolutions adopted by international organisations can provide proof

To this argument it is possible to oppose at least one significant counterargument, i.e., that States may cast votes in favour of resolutions by the UNGA precisely because they know these legal documents are not binding.³³⁵ Therefore, in order to assess the role of the Declaration on indigenous rights on the emergence of customary law, the declarations of vote associated to the Declaration may be revealing. Indeed, as reminded, statements have been mixed so that it is not possible to conclude that a univocal *opinio juris* has emerged from the declarations that States have made on the occasion of the adoption of the Declaration or its subsequent endorsement.³³⁶ Another element concurring with this conclusion is that the Declaration has not been adopted by consensus as usually happens with the resolutions of the UNGA of some significance.

Notwithstanding these theoretical limitations, some elements indeed suggest that State practice and *opinio juris* might already be evolving. The Declaration has not only been referred to in the decisions and reports of human rights treaty bodies,³³⁷ but

for the two elements: “conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference” is a form of State practice and *opinio juris*” (Draft conclusion 6 and 10). In Draft conclusion 12, although the ILC argues that resolutions cannot “of itself” create custom, at the same time they “may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development”.

³³⁵ See Emmanuel Voyakis, ‘Voting in the General Assembly as Evidence of Customary International Law?’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011), at 209: “On the one hand, it seems sensible to take States’ attitudes towards the propositions stated in a given Resolution as a defeasible indicator of whether they would accept those propositions as law. On the other hand, just as participation in a treaty does not necessarily allow inferences about the views of States parties regarding customary international law, we have some reason to doubt whether GA votes can tell us that much about the views of voting States on international custom”. See also, Pellet 1988-1989, at 32: “These factors are certainly relevant - but not crucial in the present context. They can (and must) be taken into consideration to establish if the rule enunciated in the resolution is an expression of customary law - as the International Court did in the Nicaragua case in 198655 - but the reinforced legal value of the norm is not based on the resolution itself but on the custom of which the resolution is either an expression or a constitutive element”.

³³⁶ It is interesting to note that New Zealand in its original declaration of vote implied that the Declaration is not aspirational and must be taken seriously. This is why they voted against in the first place. At the same time, the Declaration was considered too divisive to be considered as State practice or the basis for general principles (UN Doc. A/61/PV.107, at 15). A similar argument was made by Namibia (UN Doc. A/61/PV.108, at 3). Although many States highlighted the non-binding nature of the Declaration, some have stressed its legal value (Guyana: “potential legal implications”; Suriname: “the international community came to agreement on principles to govern the rights of indigenous peoples”).

³³⁷ For instance, in the *Saramaka* case, para. 131, Art. 32 UNDRIP on free, prior and informed consent is relied upon, by saying that Suriname has endorsed the Declaration, to reinforce the procedural requirement of effective participation in decisions concerning development projects. In the *Kaliña and Lokono* case, para. 122, the Court states: “As established by this Court in 2007 in the case of the *Saramaka People v. Suriname*, the domestic laws of Suriname do not recognize the right to communal property of the members of its tribal peoples and it has not ratified ILO Convention 169. However, Suriname has ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples”. UNDRIP Articles are then referred upon along the whole judgment. In *Endorois* case, para. 232, the African Commission refers to the UNDRIP even though Kenya has abstained in the vote about the resolution. On the decisions of the CERD, see also, Thornberry, ‘Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice’ 2011. See also, Tobin 2014, at 36

also in international treaties such as the Nagoya Protocol, States' submissions before international human rights courts,³³⁸ and national case law and legislation.³³⁹ In this last respect, national practice is burgeoning in the direction of progressively recognising indigenous peoples' rights within national systems. Worldwide, indigenous peoples have been recognised as separate groups within national societies that deserve special protection.³⁴⁰ Furthermore, there is an increasing recognition of indigenous land rights with measures ranging from the set-up of procedures to recognise land rights to the acknowledgment of customary collective property.³⁴¹ This has happened either via the

³³⁸ In the *Sarayaku* case, the Inter-American Court considers Ecuador's argument, according to which: "the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention 169 and a wide range of collective and comprehensive constitutional rights were implemented as of 1998" (para. 133). This means that Ecuador had invoked the implementation of the UNDRIP as proof that it had respected the rights of the Kichwa indigenous people.

³³⁹ See also Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, UN Doc. A/HRC/9/9 (11 August 2008), para. 41: "Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law. In any event, as a resolution adopted by the General Assembly with the approval of an overwhelming majority of Member States, the Declaration represents a *commitment on the part of the United Nations and Member States to its provisions*, within the framework of the obligations established by the United Nations Charter to promote and protect human rights on a non-discriminatory basis" (emphasis added).

³⁴⁰ Notable exceptions are represented by China and India. See Chidi Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime' (2004) 30 *Queen's Law Journal* 348, at 383. Furthermore, some African States are reluctant to recognise the existence of indigenous peoples within their societies.

³⁴¹ On the consolidation of State practice concerning land rights, see Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' 1999, at 67-92. This author analyses State practice globally, by looking at legal developments in Canada, New Zealand, Australia, the US, Brazil, Colombia, Venezuela, Peru, Bolivia, Chile, Nicaragua, Belize, Guatemala, Japan, India, and Papua New Guinea. See also, Anaya and Williams Jr. 2001, at 47-48, on the *Mabo v. Queensland* case, in which the High Court of Australia dismisses the *terra nullius* doctrine. The same authors, at 59-74, illustrate State practice in both Latin-America, including Mexico, and North-America, as well as Australia, Malaysia, and Philippines; at 80-81, they are concerned with State practice concerning participatory rights. See Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' 2004, at 38, where the author criticises the institutional settlement in the US, where indigenous land rights can be extinguished unilaterally by the Federal State. The same is reported by Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' 2006-2007, at 167, and by Göcke 2013, at 101. The latter author specifies that in the US there exists a system of "tribal trust land", which grants indigenous peoples powers that are equivalent to ownership. In this author's analysis, this system satisfies the demands of American Indian tribes and is thus in line with international law standards. This is due inter alia to the fact that indigenous land rights, as recognised at the international level, are flexible enough to include any form of arrangement that satisfies indigenous peoples' needs. Concerning land rights, it is important to remind that these do not coincide with the Western concept of property. Therefore, differentiated legal arrangements can fulfil the implementation of these rights at the national level. Wiessner and Lenzerini 2010, at 22-23, list a number of legislative and constitutional reforms, as well as national cases that recognise indigenous land rights, in Mexico, Honduras, Colombia, Ecuador, Bolivia, Venezuela, Chile, Paraguay, Costa Rica, Nicaragua, Canada, Belize, and South Africa. Constitutional and legislative reforms in Colombia, Panama, Greenland, Norway, Finland, and Sweden are also examined by Tauli-Corpus and Cariño 2004, at 35-38. More

adoption of constitutional or legislative measures or in national case law. National practice has also converged on the need to ensure to indigenous peoples some form of autonomy and participatory rights in national decision-making. Most recently, innovative forms of recognising and implementing self-determination have been recognised in Europe, such as the Draft Nordic Saami Convention.³⁴² In this process, the UN Declaration has indirectly influenced these processes; more overtly, the Declaration has both been transposed into national legislation in Bolivia³⁴³ and been used as a benchmark for the adoption of the IPRA in the Philippines.³⁴⁴ The Declaration has also been relied upon by the Supreme Court of Belize, which has *inter alia* recognised the customary nature of indigenous peoples' rights.³⁴⁵

Notwithstanding practice and *opinio juris* that may be stimulated by the UN Declaration, a last remark on the special nature of international human rights law concludes this review over the possible crystallisation of custom in the field of indigenous rights. The very *telos* of human rights instruments is to protect individual rightholders and groups from the unilateral *dominium* of States. In this sense, human rights norms aim to limit the unrestricted exercise of States' sovereign powers on their citizens to ensure the respect for human dignity and the corollaries that have developed in human

on this can also be found in Barelli and others 2011, at 354-355, concerning Brazil, Venezuela, Bolivia, Philippines, Taiwan, Greenland, and Nicaragua. More recently, see Jernej Letnar Čerňič, 'State Obligations Concerning Indigenous Peoples' Rights to Their Ancestral Lands: *Lex Imperfecta*' (2012-2013) 28 *American University International Law Review* 1129, who analyses the practice in Bolivia, Paraguay, Japan, Kenya, Peru, and Malaysia. At the regional level, see also the Amazonia Declaration of 1989, made by the Presidents of the State Parties to the Treaty for Amazonian Co-operation (Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, Venezuela), para. 3: "we reiterate our full respect for the right of indigenous peoples to have adopted all measures aimed at maintaining and preserving the integrity of these human groups, their cultures and their ecological habitats, subject to the exercise of that right which is inherent in the sovereignty of each State". It can be classified as practice also the use of ILO Convention 169 into national case law in Latin-American countries. See ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America* 2009. On the extent to which the UNDRIP has been incorporated into national legislation, see Jackie Hartley, Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich Publishing 2010); Elvira Pulitano, *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012).

³⁴² On the Draft Nordic Saami Convention, see Mattias Åhrén, Martin Scheinin and John B. Henriksen, 'The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions' (2007) 3 *Gáldu Čála – Journal of indigenous Peoples Rights* 8; Timo Koivurova, 'The Status and Role of Indigenous Peoples in Arctic International Governance' (2010) 3 *The Yearbook of Polar Law* 169, at 205-207; Grote 2006-2007, at 436-442. More in general on the practice of Scandinavian countries related to indigenous peoples' rights, see Fitzmaurice, 'Tensions between States and Indigenous Peoples over Natural Resources in Light of the 1989 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 Declaration on the Rights of Indigenous Peoples (Including Relevant National Legislation and Case-Law)' 2012, at 244; Else Grete Broderstad, 'The Promises and Challenges of Indigenous Self-Determination: The Sami Case' (2010-2011) 66 *International Journal Canadian Institute of International Affairs* 893, at 903.

³⁴³ Ley No. 3760, Gaceta Oficial No. 3039 (7 November 2007).

³⁴⁴ See Tauli-Corpuz and Cariño 2004, at 25: the draft UNDRIP in 1993 inspired the Filipinos national act, IPRA (note 176 *supra* in this chapter).

³⁴⁵ Supreme Court of Belize, *Aurelio Cal* 2007, paras. 127, 131 and 132.

rights treaties. The very purpose of human rights law makes it so that States are not the only relevant actors that participate in human rights law formation.³⁴⁶ In light of this, when it comes to the formation of customary norms in human rights law, the way in which *diuturnitas* and *opinio juris* are to be assessed might be evaluated in different terms.

Concerning the interplay between practice and *opinio juris*, if States' violation of human rights' norms agreed at the international level were to be taken as the sole parameter of customary law-making, the risk would be to nullify the value of human rights norms. When human rights standards are both generally affirmed in treaty law and in human rights international practice, relying only on States' misconduct to ascertain the customary value of certain human rights standards would run counter the very logics of both the rights protected and the mechanisms designed for their protection.³⁴⁷ In this sense, some authors argue that *opinio juris* must weigh more than State practice, when it comes to assessing the customary nature of international human rights. This revised version of the binary theory on customary law, therefore, proposes in line with the ICJ's judgment in the *Nicaragua* case that when *opinio juris* is well affirmed, State practice can also be very limited. Moreover, if *opinio juris* is strong, "there must be evidence of sufficient coherent contradicting State practice to deprive a declaration of its legal implications".³⁴⁸

Furthermore, the role of non-State actors in the shaping of human rights norms must not be underestimated. In particular, the UN and indigenous representatives have played a pivotal role in determining the content of indigenous rights. Equally, it must be recognised that the same actors will heavily influence State practice and *opinio juris* in the future. In this sense, the reliance on soft law instruments to develop human rights norms on indigenous rights may be already considered as a means to include indigenous peoples in the international norm-making process.³⁴⁹

³⁴⁶ See Anaya and Williams Jr. 2001, at 54.

³⁴⁷ Wiessner and Lenzerini 2012, at 27. See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (27 June 1986), para. 186: "In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".

³⁴⁸ Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 63. See again *Nicaragua v. United States of America*. In paras. 184-206 of this decision, the ICJ also gives precedence to *opinio juris*, demonstrated mainly by UNGA resolutions. Only once it has established *opinio juris*, the Court starts looking for confirmative practice, which—the Court concludes—can also be very limited.

³⁴⁹ Newman 2013, at 278-280. This author proposes a new methodology for ascertaining customary law concerning indigenous peoples' rights, according to which the formation of customary international law must only be judged against *opinio juris*, thus disregarding State practice. This new theorization would be justified by the fact that a State-centric approach would be "at theoretical odds with the very norm at issue", particularly given the legal pluralism that is necessary when approaching indigenous issues. The "pluralisation of processes of norm formation" is also closely linked to the diversification of international law fields. See Lepard 2010. In Part Five of the book, the author applies his new theory on customary law formation to "international rules for allocating income for tax purposes" and human rights law. At

Notwithstanding these developments in theory and practice, the ascertainment of custom would require an analysis that is not conclusively carried out in this thesis. The evolution of human rights treaty practice, as well as the considerations made about the UN Declaration of indigenous rights might be used to assess the existence of other sources of international law. The rest of this chapter analyses to what extent a general principle of self-determination can be derived from indigenous rights and which role this principle can play in the interplay between indigenous rights and the protection of biodiversity under current international law.

4. From collective rights to self-determination

The link between the rights of indigenous peoples under international human rights law and self-determination stems, first, from the *telos* underlying indigenous peoples' rights. Previous sections have underlined that the recognition of these rights serves the purpose of preserving indigenous peoples' distinct culture, as well as their specific ways of living entrenched with land tenure.³⁵⁰ Along the same lines, the right to self-determination as recognised in the UN Covenants is centred upon the autonomous determination of one people's status. In this sense, indigenous collective rights and the right to self-determination are mutually bound to one another by a common underlying purpose.³⁵¹

An operationalization of indigenous peoples' rights requires a discussion on self-determination for two additional reasons.³⁵² First, indigenous peoples have "articulated their demands" in this way.³⁵³ The introductory chapter of this dissertation has already explained why indigenous peoples' claims are to be taken into account in the reconstruction of the legal framework applicable to them.³⁵⁴ Second, although some authors maintain

8, the author summarises this theory as follows: "A customary international law norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct. This belief constitutes *opinio juris*, and it is sufficient to create a customary law norm. It is not necessary in every case to satisfy a separate "consistent state practice" requirement. Rather, state practice can serve as one source of evidence that states believe that a particular authoritative legal principle or rule is desirable now or in the near future".

³⁵⁰ See Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' 2005, at 137.

³⁵¹ See Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 200: "Self-determination contains all the aspirations of freedom and represents the ideal of a people entitled to pursue its own destiny. Regarding territorial rights, because indigenous peoples' land rights are often understood as rights to collective territorial ownership, they are frequently linked to the right of peoples to self-determination. In this regard, for many indigenous representatives, self-determination appears as the best vehicle to embark upon the recognition of their right to live on their lands".

³⁵² Northcott 2012, at 75.

³⁵³ Anaya, *Indigenous Peoples in International Law* 2004, at 97.

³⁵⁴ See Introduction, section 4. Furthermore, the previous section in this chapter has shown how indigenous peoples have influenced the content of indigenous rights in the UN context.

that the legal principle of self-determination is not applicable to indigenous peoples,³⁵⁵ it is argued in the following that self-determination is to be framed as a right attributable inter alia to indigenous groups. In contrast with the traditional approach, according to which the scope of the right to self-determination should be examined with respect to the qualification of people attributable to a given group, the following sections argue that the right to self-determination of indigenous peoples can be derived inductively from the body of collective rights of indigenous peoples protected under international human rights law.

In order to corroborate these claims, the first subsection deals with the origins and the established notion of self-determination, while the second unravels the specificities of this right when it comes to indigenous peoples. The third subsection explores the extent to which the attribution of self-determination to indigenous peoples adds to the debate on how indigenous peoples' rights interact with State sovereignty. This last point is the underlying question that hold together the whole section. In this sense, self-determination is analysed to the extent it can be relevant to solve the conflict between indigenous rights and the sovereignty of States over natural resources, which lies at the basis of the CBD.

4.1. The right to self-determination: origins, content, and emerging trends

Although this subsection does not purport to be exhaustive in presenting the traditional content of self-determination, it aims to give an overview of how this right has emerged and what is its consolidated content in order to put this research in context. Also, this subsection presents emerging trends of scholarly analysis that are relevant to the right of self-determination as referred to indigenous peoples.

The first point to be made concerns the legal nature of self-determination, which has consolidated from its inclusion in the UN Charter. The Charter was the first binding treaty that has included self-determination among the principles upon which “friendly relations among nations” should be based.³⁵⁶ In the years following the adoption of the

³⁵⁵ A further argument is that the logic underlying self-determination is incompatible with the framing of the principle within the realm of human rights. The argument goes that while self-determination posits itself in direct contradiction with the sovereignty of States, human rights law is a body of law that is grounded on this sovereignty. See Ulfstein, ‘Indigenous Peoples’ Right to Land’ 2004, at 3. This approach fails to acknowledge both the inclusion of self-determination in the UN Covenants. Furthermore, as shown in this chapter, there is hardly a contradiction between the sovereignty of States and the qualifications and limits applicable to this principle. See especially, section 2.

³⁵⁶ Art. 2 and 55 UN Charter. See Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 42-43, where the author highlights that the principle of self-determination boils down to self-government and it is more intended as a negative concept excluding secession for minorities, decolonisation, democratic regimes, and national purism. The same point is made by Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, at 28-29. On the history of the principle, see also Ian Brownlie, ‘An Essay on the History of the Principle of Self-Determination’ in Charles H. Alexandrowicz (ed), *Grotian Society Papers: Studies in the History of the Law of the Nations* (Martinus Nijhoff 1968). Hannum 1990, at 27 ff., gives account of the evolution of self-determination from a political principle to a right. At 37, this author highlights that the right has been applied inconsistently, even in colonial cases. On the affirmation

UN Charter and throughout the 1960s, the principle of self-determination has evolved in an unexpected way through the decisive adoption of resolutions of the UNGA.³⁵⁷ Indeed, it is through these resolutions, and in particular resolutions 1514 (XV) of 1960, 1541 (XV) of 1960,³⁵⁸ and 2625 (XXV) of 1971,³⁵⁹ that self-determination has become the legal provision to which actions to “bring a speedy end to colonialism” has been anchored. The unexpected turn, however, was not really represented by the qualification of self-determination as an anti-colonial principle; instead, the focus on the end-result of decolonisation has put an emphasis on statehood that was originally not included in the UN Charter.³⁶⁰

As to the content of the principle, the instrumental use of self-determination for decolonisation purposes makes it so that independence has been the most common consequence deriving from the exercise of the right. However, the content of the right to self-determination goes beyond secession and independence. As highlighted by Cassese, external self-determination, which implies independence and is to be attributed to a limited number of subjects,³⁶¹ must be distinguished from internal self-determination, which refers instead to the capacity for peoples to determine their destiny within an existing State.³⁶² Furthermore, it is important to note that there is a difference between the “precept of the norm”, its core, and its “remedial prescriptions” that may vary depending on the context and on the subjects that exercise self-determination. In this sense, secession and independence would represent only one of the multiple remedial options to be activated when self-determination is violated.³⁶³

of this principle as an international custom, see Abi-Saab 1987, at 391-399.

³⁵⁷ Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 44. Relevant early resolutions are: UNGA Res. 545 (VI), UN Doc. A/RES/545(VI) (5 February 1952) (Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination), 637 (VII), UN Doc. A/RES/637(VII) (16 December 1952) (The right of peoples and nations to self-determination), and 837 (IX), UN Doc. A/RES/837(IX) (14 December 1954) (Recommendations concerning international respect for the right of peoples and nations to self-determination).

³⁵⁸ Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter, UNGA Res. 1541 (XV), UN Doc. A/RES/1541(XV) (15 December 1960).

³⁵⁹ Indeed, the scope of this resolution is much broader than the need to end colonialism, and mirrors the letter of common Art. 1 of the UN Covenants. See Thornberry, *Indigenous Peoples and Human Rights* 2002, at 91-97.

³⁶⁰ See Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 45. See also, Hannum 1990, at 46-47, who argues that the right to self-determination is traditionally limited to colonial peoples so that self-determination is in fact attributed to States rather than peoples. This is due to the fact that self-determination needs to be balanced against territorial integrity.

³⁶¹ Entire populations of sovereign States, colonial populations, and populations living under foreign military occupation. See e.g., Cassese, *International Law* 2005, at 61.

³⁶² Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 352 ff., the author explores internal self-determination as applied to minorities.

³⁶³ Anaya, *Indigenous Peoples in International Law* 2004, at 103-104. The author emphasises that self-determination does not coincide with independence, which is mainly an attribute of statehood, while self-determination is a universal principle. On the same vein, see James Crawford, “The Right of

This research does not aim to fully account for the issue of external self-determination since this remedial aspect is not relevant to the puzzle of the interaction between States' powers and indigenous peoples' rights over land and natural resources. In fact, the main objective of this chapter is to elaborate an interpretative approach for the interaction of parallel rights when coexistence between States and indigenous peoples is in act or potentially relevant. Notwithstanding the limited applicability to indigenous peoples of external self-determination,³⁶⁴ the potential attainment of independence would wipe out

Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press 2001), at 66: "self-determination and the cognate right to democratic self-government...are critical standards; they do not themselves determine particular institutions or outcomes. They can be used to disqualify institutions or outcomes which are evidently inconsistent with self-determination or democratic rule, and to justify attempts to remedy them". This argument is also implied in Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995 when he talks of a possible evolution and broadening of the principle, as well as when it analyses the implications of external self-determination in chapter 4. See also, Ian Brownlie, 'The Rights of Peoples in Modern International Law' in James Crawford (ed), *The Rights of Peoples* (Oxford University Press 1988), at 6; Northcott 2012, at 75; Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' 2011, at 139; Mauro Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions' (2011) 13 *International Community Law Review* 413, at 414; Gerry J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255, at 258, 275, and 285; Marco Pertile, 'Self-Determination Reduced to Silence: Some Critical Remarks on the ICJ's Advisory Opinion on Kosovo' in Maurizio Arcari and Louis Balmond (eds), *Questions de droit international autour de l'avis consultatif de la Cour internationale de justice sur le Kosovo - International Law Issues Arising from the International Court of Justice Advisory Opinion on Kosovo* (Giuffrè 2011), at 120-125.

³⁶⁴ See Anaya, *Indigenous Peoples in International Law* 2004, at 104: Anaya recognises that "the remedial regime developing in the context of indigenous peoples is not one that favors the formation of new states"; Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 131. See also, Erica-Irene A. Daes, 'An Overview of the History of Indigenous Peoples: Self-determination and the United Nations' (2008) 21 *Cambridge Review of International Affairs* 7, at 23-24: as emerges from the drafting history of the UNDRIP, indigenous peoples have no right to secession. The debates of the possibility for indigenous peoples to exercise external self-determination are rich and touch upon various aspects of this right. On the applicability of remedial secession to indigenous peoples, see Martin Scheinin, 'Indigenous Peoples' Land Rights under the International Covenant on Civil and Political Rights' [2004] available at <http://irlibuwo.ca/cgi/viewcontent.cgi?article=1249&context=aprci>, at 9-10: after describing the criteria elaborated by the Canadian Supreme Court in *Reference re Secession of Quebec* (20 August 1998, (1998) 2 SCR 217), the author argues that there are forms of external self-determination other than secession, for instance the right for indigenous peoples to participate in negotiations taking place in international fora. On remedial secession, see also Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions' 2011, at 423, and Northcott 2012, at 83. On the justifications for granting indigenous peoples with external self-determination, see Alfredsson, 'The Right of Self-Determination and Indigenous Peoples' 1993. At 47, the author argues that it is a question of decolonisation although not in overseas territory; at 48-49, he concedes that there are limitations in recognising external self-determination to indigenous peoples. Among these, international law is made by States for States; the principle of territorial integrity must be preserved; and uncontrolled secession could jeopardise the maintenance of peace. For these reasons, at 50, he concludes that indigenous peoples do not have a right to external self-determination. See also, Tauli-Corpuz and Cariño 2004, at 33-34, who maintains that the fight for independence is still a viable option for some communities, depending on their special circumstances and the history of their struggle. At 39: "Armed revolution and uprisings still remain viable forms of struggle for some indigenous peoples, especially in Asia". In this sense, the failure to recognise indigenous peoples and their claims may lead to violent clashes. At 40: in any case, the option of "independent statehood...should not be barred". Finally, see Pereira and Gough 2013, at 470, who purport that there is no reason why indigenous peoples should not be recognised a right to external self-determination, given that they are peoples subject to oppression and subjugation.

the possibility for the sovereignty of States and indigenous self-determination to interact. Therefore, this hypothesis falls beyond the scope of this research. Furthermore, it needs to be highlighted that independence is not particularly relevant in practical terms since indigenous peoples do not generally seek to secede from the States of which they are citizens.³⁶⁵

Another scholarly conundrum is the issue of defining who are the peoples entitled to exercise the right to self-determination. Although in the practice the most common end-form of self-determination coincides with statehood,³⁶⁶ the right to self-determination is a rule that goes beyond the State.³⁶⁷ This interpretation emerges clearly from the codification of the right to self-determination in common Article 1 of the UN Covenants.³⁶⁸ This article significantly reads, “[a]ll peoples have the right to self-determination”. Any attempts to circumscribe the scope of this provision to colonial peoples have failed from the outset. India had made a reservation to Article 1, interpreting the term “peoples” as only encompassing entire populations under foreign domination. France, Germany, and the Netherlands, however, strongly opposed this restrictive interpretation, by appealing

³⁶⁵ See Alexandra Xanthaki, ‘The Right to Self-Determination: Meaning and Scope’ in Nazila Ghanea and Alexandra Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Martinus Nijhoff 2005), at 32-33: secession is not an issue because indigenous peoples’ understanding of self-determination does not imply statehood; Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* 2006, at 220; Wiessner, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples’ 2008, at 1160; Pereira and Gough 2013, at 468. See also, Robert T. Coulter, ‘The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples’ (2010) 15 *UCLA Journal of International Law and Foreign Affairs* 1, at 13: the author reports that there were no secession claims in the negotiation of the UNDRIP concerning the right to self-determination. See Sharon H. Venne, ‘Self-Determination Issues in Canada: A First Person’s Overview’ in Donald Clark and Robert Williamson (eds), *Self-Determination: International Perspectives* (Macmillan Press 1996), at 292, where she explains that indigenous peoples in Canada are not claiming independence. This is confirmed by Benedict Kingsbury, ‘Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law’ in Philip Alston (ed), *Peoples’ Rights* (Oxford University Press 2001), at 91.

³⁶⁶ On the link between self-determination and statehood, see Martti Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 *International and Comparative Law Quarterly* 241. According to this author, self-determination buttresses national patriotism, while at the same time being a challenge to States.

³⁶⁷ Hurst Hannum, ‘Self-Determination in the Post-Colonial Era’ in Donald Clark and Robert Williamson (eds), *Self-Determination: International Perspectives* (MacMillan Press 1996), at 27-28.

³⁶⁸ On the history of the inclusion of common Art. 1 into the UN Covenants, see Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 47 ff. The inclusion of self-determination was a result of the diplomatic effort of the Soviet countries backed by developing countries. The author delves into the meaning of this right, by highlighting the nature of “continuing right”, that is a permanent right that “does not end with independence” (at 54-55). The nature of continuing right has been challenged by the subsequent practice for the external self-determination of colonial peoples, where the creation of an independent State satisfied the conditions for the realisation of self-determination (at 73). Regarding internal self-determination, the continuity of the right still holds (at 101). See also, Pereira and Gough 2013, at 459. These authors interpret the inclusion of self-determination in the UN Covenants as an element of State practice confirming the fact that permanent sovereignty must be referred to peoples. However, this argument is ill founded since sovereignty is a specific concept related to States. In this sense, it would be better to frame the formulation of self-determination in the UN Covenants as a practice that reinforces the argument that self-determination is to be attributed to all peoples.

inter alia to the “clear language of the provision”.³⁶⁹ Therefore, Article 1 has been conceived from the very beginning as a right that applies to all peoples.³⁷⁰

Although the scope of the right is sufficiently broad to go beyond colonial peoples, it should not be inferred that national minorities can be considered peoples under Article 1. In identifying the categories of peoples within the meaning of Article 1, Cassese traditionally refers to entire populations of sovereign States, colonial populations, and populations living under foreign military occupation, thus firmly excluding minorities from the realm of *de lege lata*.³⁷¹ This reading, however, is warranted if self-determination is intended mainly as conferring a right to independence. Indeed, Cassese recognises *de lege ferenda* the need to combine self-determination with the protection of minorities through a renewed emphasis on internal self-determination in an attempt for States to “compensate past injustices”.³⁷²

Indeed, an argument in favour of self-determination for all peoples comes from the need to trace back the right to the underlying values of the principle, which are equality and legitimacy.³⁷³ According to Anaya, the principle of self-determination has two main aspects. First, the “constitutive aspect” requires that the formation of any government reflects the will of peoples. In this sense, although a particular result is not mandated—e.g., a democratic form of government—participation in the formation of government should be ensured. Second, the “ongoing aspect” highlights the importance that the constituted government should be instrumental for peoples’ life and development. Accordingly, peoples must be able to make choices about their destiny.³⁷⁴ In light of

³⁶⁹ Tauli-Corpuz and Cariño 2004, at 32. See also, Pereira and Gough 2013, at 467, note 95.

³⁷⁰ See Tauli-Corpuz and Cariño 2004, at 29. See also, Christian Tomuschat (ed) *Modern Law of Self-Determination* (Martinus Nijhoff 1993), at 2. However, at 16, not all peoples in the ethnic sense should be entitled to self-determination intended as a right to secession because this would entail disruptive consequences. In his view a proceduralisation of self-determination could be a solution. Crawford in Alston 2001 at 27 ff.: peoples “in general sense”, not limited to colonial peoples. Beyond a restricted colonial interpretation of self-determination, see Gilbert 2002, at 327 ff.

³⁷¹ See Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 59-62. His reading is based on a comprehensive interpretation of the Covenant, which recognises separate rights to individuals belonging to minorities, and *travaux préparatoires*. See also, Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, at 34, according to which decolonisation has contributed to an understanding of self-determination as a right attributed to peoples other than national populations (“populations of territories that had not yet attained independence”). Interestingly, this argument was espoused already by Abi-Saab 1987, at 407: “la réclamation du droit à l’autodétermination n’est plus nécessairement une réaction, mais peut être également une demande initiale pour la reconnaissance de l’identité collective du groupe, et pour sa protection et sa préservation dans le cadre plus large de l’État composé... Cette idée gagne du terrain dans le domaine des droits de l’homme, par exemple pour ce qui est des « peuples autochtones » et autres groupes vulnérables. Mais cela s’accompagne, dans ces cas, de la recherche d’autres issues que l’indépendance”.

³⁷² Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 352-353. In the eyes of Cassese, the added value of this approach would be the recognition of group rights. Plus, it would give minorities enough leeway to choose the way in which self-determination should be realised (“autonomy, regional self-government, participation in the national decision-making”, at 352).

³⁷³ See Anaya, *Indigenous Peoples in International Law* 2004, at 98 ff.

³⁷⁴ *Ibid.*, at 104-105.

this, it is possible to conclude that self-determination cannot be a right whose exercise is limited to the peoples that can identify with a State.³⁷⁵

In contrast, States are only one part of the story both since the State-form is not necessarily the ultimate result of self-determination and because the principle of self-determination responds to the need to account for diversified societies. In this sense, the “challenge of diversity”³⁷⁶ from within the State can be accommodated through internal self-determination. At the same time, diversity in the international society can be accounted for by recognising that peoples, together with States, should be involved in the definition of the principle of self-determination.³⁷⁷ In the words of Knop, “the practice of self-determination thus becomes a struggle for inclusion, not only a people’s struggle to become part of the world of sovereign states, but their struggle to incorporate their own story into international law”.³⁷⁸ In this sense, self-determination is not simply “a norm to be applied, but an opportunity to expose the exclusions and the inequalities of international law”.³⁷⁹

In this light, this section proposes a reconceptualization of the right to self-determination that is in line with indigenous peoples’ needs. The starting point is again common Article 1 of the UN Covenants. By virtue of this provision, not only can peoples “freely determine their political status”, but they also have some form of so-called economic self-determination. Article 1(2) reads:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Although the right freely to dispose of resources seems to be limited by international economic cooperation, it is reiterated in Article 47 ICCPR and Article 25 ICESCR, which both insist on the central importance to preserve “the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources”.³⁸⁰ As a consequence, control over natural resources is a central aspect of self-determination, which must not be separated from the political component under Article 1(1).³⁸¹

³⁷⁵ Ibid., at 105. For a more recent reformulations of this argument, see Anaya, *International Human Rights and Indigenous Peoples* 2009, at 60: statehood is not the essence of self-determination, which instead is an attribute of peoples with freedom and equality at its core.

³⁷⁶ Knop 2002, at 2.

³⁷⁷ See *ibid.*, at 3 and 8.

³⁷⁸ *Ibid.*, at 13.

³⁷⁹ *Ibid.*, at 14.

³⁸⁰ Concerning the ambiguity of the double formulation of economic self-determination, see Gilbert, ‘The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Rights?’ 2013, at 321, 323-324. On the drafting history of Art. 1(2), see Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 49: the proposal of this article came from Chile and was backed by Soviet and developing countries.

³⁸¹ Gilbert, ‘The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Rights?’ 2013, at 321.

Control over natural resources is the precondition for the exercise of meaningful internal self-determination.³⁸² As for the content of economic self-determination, the traditional interpretation is that there is a right for peoples to decide how their governments should use the resources, and a corresponding duty for the State to use the resources in a way that is not detrimental to its peoples.³⁸³ However, this interpretation falls into the trap of equating peoples with governments, and ultimately States. Indeed, self-determination is a right that goes beyond States. Therefore, the exercise of economic self-determination on the part of peoples may also take other forms than the mere delegation of powers to national governments. In fact, the acknowledgment that economic self-determination may be exercised directly by peoples is one of the more pressing challenges to the permanent sovereignty of States.³⁸⁴

Within the framework of the present research, the conflict between States' powers and economic self-determination as attributable to peoples presents some specific nuances. Indigenous peoples' powers over natural resources could conflict with States' permanent sovereignty not only because these insist on the same resources, but also in the sense that indigenous powers might impair the general duty of the State to exercise its sovereignty over resources in a way that is beneficial to the whole population. In this sense, one aspect of this dilemma is the potential conflict between an identified group, that of indigenous peoples, and the public interest.³⁸⁵ In the case of the exploitation of natural resources, the conflict between the general interest and indigenous peoples' rights might be less salient, since in the practice the concession over the exploitation of natural resources to foreign companies rarely, if ever, benefits the whole population of a State.³⁸⁶ Different considerations apply when conservation measures are concerned, since the protection of the environment is more generally recognised as having diffused benefits for the society at large.

The conceptual difficulties linked to the possibility that the right to self-determination of a given group may trump the public interest can be also traced back

See also, Gudmundur Alfredsson, 'Different Forms of and Claims to the Right of Self-Determination' in Donald Clark and Robert Williamson (eds), *Self-Determination: International Perspectives* (Macmillan Press 1996), at 74-75; Pertile, 'Economic Self-Determination in the 21st Century: Tracing the Origin and the Evolution of a Chamaleonic Concept' 2016, at 390; M.K. Nawaz, 'The Meaning and Range of the Principle of Self-Determination' (1965) 14 *Duke Law Journal* 82, at 94.

³⁸² Daes report (2004), para. 17.

³⁸³ Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 55-57.

³⁸⁴ See Tauli-Corpuz and Cariño 2004, at 40. These authors argue that one of the main difficulties is the challenge that indigenous peoples' rights pose to the fiction according to which self-determination, apart from cases of decolonisation, can only be exercised within the State and by the State.

³⁸⁵ See Brownlie, 'The Rights of Peoples in Modern International Law' 1988, at 7, where the author accounts for the possibility of a conflict between collective interests. When such a case occurs, it is important that the differential treatment of some groups is not disproportionate, and thus in violation of the principles of equality and non-discrimination (at 9-10).

³⁸⁶ On this point, see Schrijver 1997, at 9. The author recalls that the way in which profits should be distributed nationally is a matter of domestic jurisdiction.

to the debate on the recognition of collective rights.³⁸⁷ In this respect, one of the most contentious elements is the fact that group rights may prevail over individual rights.³⁸⁸ In contrast with this argument, it is easy to identify reasons why the recognition of group rights is fundamental under certain circumstances. Indeed, there might be cases where some collective needs cannot be satisfied through the protection of individual rights, such as when indigenous peoples' interests are involved. In this case, the recognition of collective rights is instrumental for the enjoyment of individual rights.³⁸⁹ It seems, therefore, that the main difficulty with recognising self-determination as belonging to indigenous peoples lies in the issues related to the recognition of collective rights over resources since this recognition reverberates on the capacity of the State to regulate the management of national natural resources. This is due to the fact that ultimately "self-determination is about the relation between state and community".³⁹⁰

4.2. The right to self-determination of indigenous peoples

In the previous subsection, self-determination has been framed as a right applicable to

³⁸⁷ On the theoretical foundations of recognising group rights, see Peter Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 Human Rights Quarterly 80, at 84-85: based on Raz' definition of what is a right, collective rights are founded on the idea that the collection of the individual interests of group's members is sufficient to justify the imposition of the duties correlated to a right on another subject. Along these lines, the rights of minority groups sharing a common identity are morally comparable to those of groups that only share a contingent interest. One of the differences between the two groups could be that the interests vested in a minority group might not easily exist if vested on a single minority member. At 86 ff., Jones presents another conception of group rights, the so-called "corporate conception", where the moral justification for collective rights does not lie on the individual members' interests, but on the group as such, so that "the holder of the right is the group conceived as a single, integral entity". According to this conception, the identity of a group becomes crucial and precedes the existence of corporate rights. In the view of Jones, corporate rights may not be limited by individual human rights simply because they belong to two separate conceptions of rights (at 93). I personally do not agree with the conclusion that corporate right might represent a greater danger for the individual members of a group. In my view, members of a group would always retain their individual rights. The divide between corporate rights and individual rights is artificial, because the issue of identity-sharing is not simply based on nationhood and pre-defined ethnical characteristics. Identity is a complex notion that may encompass a variety of significances even in a corporate conception of group rights. See also, Brownlie, 'The Rights of Peoples in Modern International Law' 1988, at 15-16, where the author claims that group rights should be treated as a unitary issue without differentiating between peoples, indigenous peoples and minorities.

³⁸⁸ Duruigbo 2006, at 57-58. See also, Philip Alston, *People's Rights* (Oxford University Press 2001), at 269; Ana Filipa Vrdoljak, 'Self-Determination and Cultural Rights' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff 2008), at 41-42; Wiessner, 'The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012' 2013, at 1358-1359. This preoccupation is also reflected in the declarations of vote on the occasion of the adoption of the UNDRIP. See UN Doc. A/61/PV.107 and A/61/PV.108.

³⁸⁹ See Duruigbo 2006, at 59-60. See also, HRC, General Comment No. 12: Article 1 (Right to self-determination) (13 March 1984), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), para. 1: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".

³⁹⁰ Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' 2001, at 92.

all peoples, whose precise content depends on the subjects involved and the claims to be considered. Self-determination has primarily meant independent statehood for colonial peoples. Internal self-determination has been generally accorded to the populations of sovereign States. The principle, however, is evolving so that new subjects can claim self-determination under new conditions.³⁹¹ Although identifying a limited number of peoples entitled to external self-determination, Cassese has already in 1995 acknowledged that a customary rule on the internal dimension of self-determination is developing for some groups, including indigenous peoples.³⁹² Indeed, the principle of self-determination has fundamentally changed since its inclusion in the UN Charter; there is no reason why it cannot continue to evolve “in response to the changing needs of the time”.³⁹³

Far from a limited account of self-determination based on the divide between internal and external dimensions of the principle, indigenous peoples have a clear vision of what self-determination implies for them. Self-determination is first seen as a remedial provision to mitigate the on-going effects of the loss of sovereignty suffered by indigenous peoples during the first wave of colonisation and the establishment of sovereign States.³⁹⁴ Second, self-determination should be attributable to indigenous peoples by virtue of the need to preserve indigenous cultural distinctiveness.³⁹⁵ Third, self-determination is considered as both a collective right and the necessary precondition for the realisation of the other indigenous rights.³⁹⁶ In this respect, internal self-determination in the form of self-government only represents one of the steps to be taken for indigenous peoples to attain full self-determination.³⁹⁷ Fourth, indigenous claims to self-determination are fundamentally based on the awareness that common Article 1 of the UN Covenants

³⁹¹ On the argument that self-determination is evolving, see Alfredsson, ‘Different Forms of and Claims to the Right of Self-Determination’ 1996, at 79. See also Pertile, ‘Self-Determination Reduced to Silence: Some Critical Remarks on the ICJ’s Advisory Opinion on Kosovo’ 2011.

³⁹² Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 103. See also Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* 1990, at 95 ff. The author recognises that internal self-determination in the form of autonomy could be attributable to indigenous peoples, although it is not supported by State practice.

³⁹³ Barelli, ‘Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions’ 2011, at 435.

³⁹⁴ See Tauli-Corpuz and Cariño 2004, at 17. These authors suggest that self-determination is needed to “rectify” a “historical wrong”, namely colonisation and assimilation. See also Pertile, ‘Self-Determination Reduced to Silence: Some Critical Remarks on the ICJ’s Advisory Opinion on Kosovo’ 2011, at 121-122, where he refers to self-determination as an emergency clause.

³⁹⁵ Tauli-Corpuz and Cariño 2004, at 9.

³⁹⁶ *Ibid.*, at 28-29. See also, Tobin 2014, at xix, where the author argues that self-determination is both a precondition for and the result of the respect of indigenous customary law. At 33 and 38, Tobin lists a number of prerogatives that derive from the way in which indigenous peoples see their rights to self-determination: self-government within their territory, including establishing their own institutions; negotiation processes with the State to redefine their status; the “establishment of mechanisms for joint control” with the State; a clear division of competences with the State; the “establishment of conflict resolution mechanisms”; the possibility to enter into relations with other indigenous peoples living in other States.

³⁹⁷ Tauli-Corpuz and Cariño 2004, at 38.

equally applies to all peoples. Accordingly, indigenous peoples “are not asking for special rights”.³⁹⁸

In this sense, the argument that the international norm on self-determination is evolving cannot go so far as to imply that there should be a special notion of self-determination specifically tailored on indigenous peoples.³⁹⁹ On the contrary, the norm on self-determination as applied to indigenous peoples represents a new piece to be added to the general puzzle of self-determination in international law.

The argument that indigenous peoples are beneficiaries of self-determination under general international law brings back the problematic issue of the definition of peoples under common Article 1 of the UN Covenants. There are several reasons why indigenous groups should be identified as peoples.⁴⁰⁰ The first reason has to do with the deprivation of indigenous sovereignty during the colonial past. As put by Sanders, identifying indigenous communities simply as national minorities would wipe out their colonial history.⁴⁰¹ Second, and perhaps most importantly, a minority approach to the indigenous question would exclude the territorial aspect of indigenous identities, which is fundamental for their cultural integrity.⁴⁰² Along the same lines, minorities are not entitled to collective rights in the practice of human rights bodies. Collective land tenure, however, lies at the basis of indigenous identity. Third, the identification of indigenous

³⁹⁸ Ibid., at 32. “Claims to the contrary are discriminatory, racist and perpetuate further inequalities among peoples” (at 33).

³⁹⁹ This is what some States, such as the UK and implicitly India, claim. See UN Doc. A/61/PV.107, at 21 and A/61/PV.108, at 2. Several other States, however, highlight that indigenous self-determination must be exercised in accordance with international law, thus implicitly recognising that the same rules apply to indigenous self-determination. See UN Doc. A/61/PV.107, at 22 (Norway), 23 (Jordan and Liechtenstein), and A/61/PV.108, at 8 (Guatemala): “The Declaration does not create new rights, but reaffirms the right of indigenous peoples to self-determination so that they can freely determine their own economic, political, social and cultural development”.

⁴⁰⁰ See Erica-Irene A. Daes, ‘The Right of Indigenous Peoples to “Self-Determination” in the Contemporary World Order’ in Donald Clark and Robert Williamson (eds), *Self-Determination: International Perspectives* (Macmillan Press 1996), at 53: this is what Daes defines as “belated State-building”. In other words, since indigenous peoples could not take part in the process of State-building, due to their marginalisation and assimilation, they should now be able to negotiate their status within the States, as a form of “belated State-building”. At 51, the author also expresses the view that self-determination should apply in equal terms also to indigenous peoples since they are fully peoples in light of their cultural distinctiveness. On the interpretation of common Art. 1 (ICCPR and ICESCR), see Anaya, *Indigenous Peoples in International Law* 2004, at 103: the term “peoples” should be “interpreted according to their plain meaning”. See also, Anaya, *International Human Rights and Indigenous Peoples* 2009, at 62-63. This author makes the general point that, although in the UNDRIP human rights are specifically construed as attributes of indigenous peoples, they derive from more general rights already protected in human rights treaties. This means that the UNDRIP “seeks to accomplish what should have been accomplished without it: the application of universal human rights principles in a way that appreciates not just the humanity of indigenous individuals but that also values the bonds of community they form”. This argument is in line with the point that self-determination is a universal human right applicable to indigenous peoples.

⁴⁰¹ Douglas Sanders, ‘Self-Determination and Indigenous Peoples’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993), at 75.

⁴⁰² Ibid.

groups as peoples must be read in light of the definition issue.⁴⁰³ Self-identification has been recognised as the general standard under international law to tell apart indigenous groups from other communities. Indeed, self-identification has both an internal and an external dimension. While this standard implies that the decision on the membership of indigenous communities is to be taken by the community itself,⁴⁰⁴ similarly the identification of a group as indigenous must be done by the community itself. In this sense, indigenous peoples are those who define themselves as such.⁴⁰⁵ Fourth, the argument that self-determination should not apply to indigenous peoples because it is a rule that did not exist when indigenous peoples were deprived of their sovereignty is untenable.⁴⁰⁶ In fact, this norm did apply to colonial situations that had been created well before self-determination as a legal norm came into existence.⁴⁰⁷

While self-determination can, at least formally, be applicable to indigenous peoples,⁴⁰⁸ it is important to look at the international practice to see to what extent this norm, and in particular Article 1 of the UN Covenant, has found application with regards to indigenous claims.

The practice in human rights law about the direct application of the right to self-determination to indigenous peoples has been mixed. With regard to the decisions of human rights treaty bodies, the right of self-determination has been either deemed not subject to review or not upheld in the final decision.⁴⁰⁹ Most recently, however, self-

⁴⁰³ See Introduction, section 3.1.

⁴⁰⁴ In partial contrast with this argument, see *Lovelace case*.

⁴⁰⁵ This notwithstanding, Wiessner and Lenzerini 2010, at 7, maintain that clearer definitional criteria should be established to ensure more effectiveness in the implementation of indigenous peoples' rights.

⁴⁰⁶ This argument is voiced by Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' 2006-2007, at 174.

⁴⁰⁷ See Anaya, *Indigenous Peoples in International Law* 2004, at 83: self-determination has already been applied in spite of the "law contemporaneous" to colonial situations. In the same vein, Pertile, 'Self-Determination Reduced to Silence: Some Critical Remarks on the ICJ's Advisory Opinion on Kosovo' 2011, at 110, highlights that self-determination is to be considered an "emergency principle", whose relevance emerges any time either the legal system is not sufficiently regulating a given phenomenon or the factual situation is so exceptional that existing rules would produce an unjust outcome. In the case of indigenous peoples, the exceptional situation would be represented by the unprecedented marginalisation of these communities and their level of oppression. This argument would also be in line with Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' 1994, at 262.

⁴⁰⁸ In this sense, see also Dam-de Jong 2015, at 62, who argues that the notion of peoples is "a dynamic concept that can be applied to different groups, depending on the context and the particular right that is invoked".

⁴⁰⁹ Examples of the first trend are the decisions of the Human Rights Committee. The monitoring body of the ICCPR has reiterated that it only has mandate to review individual complaints under the Optional Protocol. Since self-determination is a collective right, its application cannot be reviewed by the Human Rights Committee. See *Kitok v. Sweden*, para. 6.3; *Lubicon case*, para. 13.3; *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, para. 10.3; *Apirana Mahuika case*, para. 7.6. See also, General Comment 23, para 3.1: "The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights

determination has been significantly used as a parameter to assess States' compliance with indigenous peoples' rights in the conclusions adopted on States by the Human Rights Committee and the CESCR.⁴¹⁰ Therefore, these reports are in line with the conclusion

conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol." As for the second trend, see *Maya v. Belize*, paras. 55 and 154, where the Commission has not followed suit from the applicants' invocation of a right to self-determination.

⁴¹⁰ See HRC, Concluding observations on Canada, UN Doc. CCPR/C/79/Add105 (7 April 1999), para. 8: "The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that "*the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence* (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant" (emphasis added); Concluding observations on Norway, UN Doc. CCPR/C/79/Add112 (1 November 1999), para. 17; Concluding observations on Mexico, UN Doc. CCPR/C/79/Add109 (27 July 1999), para. 19: "Appropriate measures should also be taken to increase their participation in the country's institutions and the exercise of the right to self-determination"; Concluding observations on Australia, UN Doc. A/55/40 Vol. I (24 July 2000), paras. 498-528; Concluding observations on Sweden, UN Doc. CCPR/CO/74/SWE (24 April 2002), para. 15: "The Committee is concerned at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatization of land (arts. 1, 25 and 27 of the Covenant)"; Concluding observations on Finland, UN Doc. CCPR/CO/82/FIN (2 December 2004), para. 17; Concluding observations on Canada, UN Doc. CCPR/C/CA/CO/5 (20 April 2006), para. 8: "The Committee, while noting with interest Canada's undertakings towards the establishment of alternative policies to extinguishment of inherent aboriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of aboriginal rights (arts. 1 and 27)"; Concluding observations on Norway, UN Doc. CCPR/C/NOR/CO/5 (25 April 2006), para. 5; Concluding observations on United States, UN Doc. CCPWC/USA/Q/3/CRP.4 (10-28 July 2006), para. 37; Concluding observation on Chile: Addendum 2009, UN Doc. CCPR/C/CHL/CO/5/Add.1 (22 January 2009), para. 19. See Scheinin 2004, at 11, as for the relevance of Art. 1(2) in the case of Australia. See also CESCR, Concluding observations on the Russian Federation, UN Doc. E/C.12/1/Add.94, paras. 11 and 39. On the practice of the HRC and CESCR on this point, see Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 98-100. Concerning State practice on the protection of self-determination for indigenous peoples, see Art. 2 Mexican Constitution, as amended in 2007, available at https://www.constituteproject.org/constitution/Mexico_2007.pdf (last accessed October 2016). This right comprises the preferential access to natural resources, although under certain conditions, as well as the right to the preservation of the living environment. See also, Art. 2 Bolivian Constitution, available at https://www.constituteproject.org/constitution/Bolivia_2009.pdf: "free determination, consisting of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities" (last accessed October 2016); Section 13 Indigenous Peoples Rights Act in the Philippines, available at <http://www.wipo.int/edocs/lexdocs/laws/en/ph/ph083en.pdf> (last accessed October 2016): "The State recognizes the inherent right of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development". On this point, see Doyle 2015, at 119, note 145. Furthermore, on State practice, it is useful to look also at the declarations of vote in connection with the adoption of the UNDRIP (A/61/PV.107). Sweden (at 24) has declared it recognizes self-determination in national law through national recognition of Sami as people. Sweden also explicitly recognizes that "[t]he political discussion on self-determination cannot be separated from the question of land rights". However, Swedish legislation conceive indigenous land rights as simply rights to use in

that self-determination under general international law applies to indigenous peoples. African States have also declined indigenous self-determination in more concrete terms, as comprising

the full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture.⁴¹¹

Furthermore, Article 1 of the UN Covenants has served as an interpretative criterion for the application of other rights, such as minority cultural rights under Article 27 of the ICCPR.⁴¹² In looser terms, a reference to the substance of self-determination has been derived from the application of a right to development to the Endorois people of Kenya, under the African Charter. In this sense, the right to choose among forms of development is seen as upholding the very substance of the right to self-determination.⁴¹³ Indeed, the Inter-American Court has been more explicit in using the right to self-determination as qualifying the obligations of Suriname to recognise indigenous land rights.⁴¹⁴ In light of the above, it can be concluded first that States are increasingly discussing indigenous issues under the rubric of Article 1 of the UN Covenants.⁴¹⁵ Second, self-determination in the context of indigenous rights is not only relevant with respect to its prescriptive content, but also and foremost for its interpretative nature as a general principle. Section 5 further discusses the extent to which this interpretative role is relevant to this research.

relation to properties held by third parties. Mexico (at 23) has recalled Art. 2 of its Constitution. Norway (at 22) has made reference to the Sami Parliament.

⁴¹¹ Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, para. 27.

⁴¹² See *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, para. 10.3: "the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27". See also, *Apirana Mahuika* case, para. 3.

⁴¹³ *Endorois* case, para. 298. See Dersso 2006, at 362-364. According to Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 108, Ogoni constitute a people for the purposes of international law due to their control over land and resources.

⁴¹⁴ *Saramaka* case, para. 93: "Suriname's domestic legislation does not recognize a right to communal property of members of its tribal communities, and it has not ratified ILO Convention 169. Nevertheless, Suriname has ratified both the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social, and Cultural Rights. The CESCR has interpreted common Article 1 of said instruments as being applicable to indigenous peoples. Accordingly, *by virtue of the right of indigenous peoples to self-determination recognized under said Article 1*, they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence". Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants. This Court considers that the same rationale applies to tribal peoples due to the similar social, cultural, and economic characteristics they share with indigenous peoples (*supra* paras. 80-86)" (emphasis added). See also, *Kaliña and Lokono* case, para. 122. The Inter-American Commission in the *Maya v. Belize* report interprets indigenous rights in light of the "principle of self-determination" (para. 154).

⁴¹⁵ Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* 2007, at 173.

Concerning the instruments dedicated to indigenous rights, while the ILO Convention 169 has excluded “any implications” connected to the term “peoples”,⁴¹⁶ the UN Declaration on indigenous rights has explicitly incorporated the right to self-determination in Article 3. This provision almost literally mirrors common Article 1 of the UN Covenants,⁴¹⁷ the only difference being the subjects entitled to self-determination: “[i]ndigenous 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”. The very inclusion of this provision in the UN Declaration is a historical achievement. Indeed, the inclusion of self-determination has been subject to heated debates in the negotiations leading up to the final text of the Declaration. The right was first introduced in the text of the Declaration by indigenous peoples representatives elaborating a draft within the WGIP.⁴¹⁸ After the final text had been adopted, the recognition of a right to self-determination was one of the main reasons why Australia, Canada, New Zealand, and the US initially rejected the Declaration, and several other States abstained in the vote within the UNGA.⁴¹⁹

A significant novelty in the UN Declaration is that, as emerges from the negotiations,⁴²⁰ the right to self-determination is qualified by Article 4 on the right

⁴¹⁶ Art. 1(3) ILO Convention 169: “The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”. See Scheinin 2004, at 8. The author argues that this saving clause is meant to exclude that tribal groups that are included in the scope of the Convention but do not qualify as peoples may benefit from the rights belonging exclusively to peoples. However logical, this reasoning can be disproved in light of the preparatory works of the Convention, as well as the fact that the ILO Convention does not contain a right to self-determination.

⁴¹⁷ UNDRIP preambular paragraph 16 makes reference to the UN Covenants. See Tauli-Corpuz and Cariño 2004, at 29-30. These authors make the argument that, since the formulation of Art. 3 is almost the same as that of the Covenants, it can be inferred that “indigenous peoples are included in the category of “all peoples””.

⁴¹⁸ See Barelli, ‘Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions’ 2011, at 416: the author shows the centrality in the negotiations of self-determination for indigenous peoples. See also Daes, ‘An Overview of the History of Indigenous Peoples: Self-determination and the United Nations’ 2008.

⁴¹⁹ UN Doc. A/61/PV.107. On the history of the negotiations about the right to self-determination in the UNDRIP, see Alfredsson, ‘The Right of Self-Determination and Indigenous Peoples’ 1993, Ch. 3. See also, Errico, ‘The UN Declaration on the Rights of Indigenous Peoples Is Adopted: An Overview’ 2007; Stefan Oeter, ‘The Protection of Indigenous Peoples in International Law Revisited - From Non-Discrimination to Self-Determination’ in Holger P. Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff 2012), at 485-490. On the contrary votes and abstentions to the final text of the UNDRIP, see Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’ 2006-2007, at 175; Wiessner, ‘The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012’ 2013, at 1361; Anaya, *International Human Rights and Indigenous Peoples* 2009, at 70, concerning the observations of the US while rejecting the Declaration. Concerning how these positions have been reversed, see Coulter 2010, at 2, Anaya, *International Human Rights and Indigenous Peoples* 2009, at 57, and section 3.6 in this chapter.

⁴²⁰ It emerges from the negotiation history of the UNDRIP that the right to autonomy was moved after the right to self-determination as a compromise for some States to accept the recognition of self-determination.

to autonomy. Therefore, it would seem that indigenous peoples are entitled only to internal self-determination in the form of a right to self-government. In addition, this interpretation would be warranted by a joint reading of Article 3 on self-determination with Article 46, which specifically safeguards the territorial integrity of States.⁴²¹

Notwithstanding the need for an overall reading of the UN Declaration, it is equally relevant that the right to self-determination for indigenous peoples has been explicitly recognised in the final text of the Declaration. Plus, the Declaration Preamble significantly acknowledges that “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law”.⁴²² Given these elements, self-determination in the Declaration cannot be limited to political self-government; on the contrary, it must be read in light of general international law. This means that, although political independence should be generally excluded,⁴²³ given the limited recognition it has under general international law, other prerogatives must be derived from the right to self-determination of indigenous peoples. Surely enough, self-government is one of these prerogatives; nevertheless, it is not the only one.

In fact, as far as the right to self-determination of indigenous peoples is concerned, there is a need to go beyond the classical debates on who are the peoples, or the distinction between internal and external self-determination. These debates are inadequate to understand the implications of indigenous peoples’ right to self-determination for a number of reasons. First, they are biased towards a State-centric conception of self-determination, that is a conception where the State is the only possible end-form deriving from the exercise of self-determination.⁴²⁴ Second, the divide between internal and external self-determination is not relevant to indigenous peoples since external self-determination assumes a meaning different from independence in the case of indigenous peoples.⁴²⁵ This is due to the fact that indigenous peoples are not generally claiming independence.⁴²⁶ External aspects of self-determination would rather regard the possibility for indigenous

⁴²¹ Art. 46(1) reads: “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”. Tauli-Corpuz and Cariño 2004, at 35, argue that the joint reading of Art. 3 with Art. 46 creates an ambiguity as for the exact scope of the indigenous peoples’ right to self-determination.

⁴²² Preambular para. 17 UNDRIP.

⁴²³ See Barelli, ‘Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions’ 2011, at 427. See also, Coulter 2010, at 2.

⁴²⁴ See Anaya, *Indigenous Peoples in International Law* 2004, at 104. See also, Kingsbury, ‘Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law’ 2001, at 94. For a general discussion on the potential for disrupting the State-centric order of international law, see Metcalf 2003-2004.

⁴²⁵ See Marc Weller, ‘Settling Self-determination Conflicts: Recent Developments’ (2009) 20 *European Journal of International Law* 111, at 164. This author argues that the divide between internal and external aspects of self-determination has faded in practice, even beyond the realm of indigenous peoples’ rights.

⁴²⁶ See section 4.1 in this chapter.

peoples that are citizens to a given State to engage into a meaningful relationship with keen communities residing in other States.⁴²⁷ Third, and most importantly, the classical debate on internal self-determination has focused on the political component of self-government, thus downplaying the territorial aspect of control over lands and resources, which instead is fundamental to indigenous peoples' integrity as a people.⁴²⁸

The main point, however, is that the classical debates on self-determination do not shed light on the content of the right to self-determination for indigenous peoples.⁴²⁹ In fact, investigating the content of this right is instrumental for understanding what are the implications of indigenous peoples' self-determination on the permanent sovereignty of States.⁴³⁰ In order to unravel the meaning of self-determination for indigenous peoples, an inductive approach is needed. This means that the right to self-determination must be substantiated by looking at the collective rights of indigenous peoples protected under human rights law.⁴³¹ In the words of Hannum, “[t]his linkage between human rights and self-determination is mandated by the latter’s inclusion in the two international Covenants on human rights”.⁴³² Furthermore, as highlighted by Brownlie,

there is a sort of synthesis between the question of group rights as a human rights matter and the principle of self-determination. The recognition of group rights, more especially when this is related to territorial rights and regional autonomy, represents the practical and internal working out of the concept of self-determination.⁴³³

⁴²⁷ See Tauli-Corpuz and Cariño 2004, at 31. See also, Alfredsson, ‘Different Forms of and Claims to the Right of Self-Determination’ 1996, at 70. The latter author reads the bilateral treaties concluded between indigenous peoples and States during colonial times as an instance of external self-determination.

⁴²⁸ Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* 2006, at 205.

⁴²⁹ Tauli-Corpuz and Cariño 2004, at 32. See also, Alfredsson, ‘The Right of Self-Determination and Indigenous Peoples’ 1993, at 53. The latter author claims that the label of internal self-determination is generally unsatisfactory and liable to produce illusions. For the purpose of giving meaning to self-determination, it would be better to stay within the framework of existing rights, namely the right to autonomy, democracy, and participation.

⁴³⁰ Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* 2006, at 225.

⁴³¹ Graham and Friederichs 2012, at 4. These authors highlight the importance of adopting a practical approach to self-determination. See also, Pablo Campaña, ‘Las relaciones de bilateralidad entre estados y pueblos indígenas’ (2012-2013) 28 *American University International Law Review* 1017, at 1029-1030: the rules contained in the UNDRIP give effect to self-determination for indigenous peoples. See further, Hannum, ‘Self-Determination in the Post-Colonial Era’ 1996, at 37. This author proposes a functional notion of self-determination: “This functional sovereignty will assign to sub-state groups the powers necessary in their particular situation to control political and economic matters of direct relevance to them, bearing in mind the legitimate concerns of other segments of the population and the state itself”. On the concrete application of an inductive approach, see Coulter 2010, at 15-16. This author draws the content of the right to self-determination in the UNDRIP from the other rights recognised in the Declaration.

⁴³² Hannum, ‘Self-Determination in the Post-Colonial Era’ 1996, at 34-35.

⁴³³ Brownlie, ‘The Rights of Peoples in Modern International Law’ 1988, at 6. For a contrary view, see Alfredsson, ‘Different Forms of and Claims to the Right of Self-Determination’ 1996, at 63-64, 66, and 70. This author argues that the body of human rights for indigenous peoples is to be seen as an alternative to the solutions provided by self-determination. In this sense, the violation of political human rights, such as political representation, triggers the applicability of self-determination.

Indeed, a global reading of the right to land and natural resources, cultural rights, the right to autonomy, and participatory rights⁴³⁴ integrates the elements of both political and economic self-determination as protected under Article 1 of the UN Covenants. The recognition of these rights prior to the inclusion of a right to self-determination in the UN Declaration⁴³⁵ reinforces the argument that the right to self-determination of indigenous peoples exists and has a concrete content.

The inductive approach also goes in the direction of contextualising the meaning of self-determination for indigenous peoples. Like in the case of the other collective rights of indigenous peoples, a teleological interpretation of self-determination highlights the multifaceted content of this right with respect to indigenous peoples. First, self-determination is instrumental for the preservation of indigenous peoples cultural integrity.⁴³⁶ Second, in line with Article 1(2) of the UN Covenants, self-determination has a strong economic component for indigenous peoples.⁴³⁷ In other words, the control over lands and resources is fundamental to preserve indigenous culture. Thus, economic self-determination takes precedence over the political component.⁴³⁸ In this context, participatory rights can be seen as reinforcing the economic/territorial component of indigenous peoples' self-determination, in that consultation is mandated every time any developments takes place on indigenous peoples' lands. At the same time, the recognition of participatory rights, in the form of participation in the political life of the State, feeds into the political component of indigenous peoples' self-determination under Article 1(1) of the UN Covenant. In support of these arguments, as reminded, the Human Rights Committee has increasingly raised the issue of the implementation of Article 1(2) when it comes to indigenous peoples.⁴³⁹

In light of the above, self-determination can be understood as a “framework

⁴³⁴ On how participatory rights qualify the right to self-determination under the UNDRIP, see Barelli, ‘Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions’ 2011, at 427.

⁴³⁵ See Anaya, *International Human Rights and Indigenous Peoples* 2009, at 62-63. See also, section 3 in this chapter.

⁴³⁶ See Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’ 2011, at 128-129. See also, Wiessner, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples’ 2008, at 1171, where he argues that the main component of indigenous sovereignty is cultural integrity, not political autonomy.

⁴³⁷ See Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* 2007, at 239. See also, Tauli-Corpuz and Cariño 2004, at 44: “For indigenous peoples, it is impossible to talk of self-determination without control over territories and resources and cultural identity”. In this sense, land is part of indigenous peoples' cultural identities and, in the authors' view at 45, this is also a distinguishing feature vis-à-vis minorities or peasants. In more general terms, see Dam-de Jong 2015, at 50: “as legal subjects of the principle of permanent sovereignty, peoples can also assert rights over the State's natural resources”.

⁴³⁸ On the relationship between the economic and political component of self-determination, see Pertile, ‘Economic Self-Determination in the 21st Century: Tracing the Origin and the Evolution of a Chamaleonic Concept’ 2016, at 337-339.

⁴³⁹ *Supra* note 413. See Göcke 2013, at 128.

right”.⁴⁴⁰ In this sense, self-determination is both a precondition for the enactment of other rights of indigenous peoples and an empty shell to be filled with the content of other substantive rights of indigenous peoples. This argument derives from a model on self-determination under general international law whereby the content of this right is derived with reference to the content of other well-established rights.⁴⁴¹ This model does not imply that self-determination is not significant per se; it only conveys the idea that other rights can be used to give concrete effect to self-determination.⁴⁴² At the same time, these rights do not exhaust the significance of self-determination, which is more than a collection of rights.⁴⁴³ However, collective rights are an important starting point both to give a concrete meaning to self-determination and to demonstrate its significance for a given category of peoples.

Although this theorisation of indigenous self-determination is important to understand how the debate on its concrete content is evolving, this section is again unable to draw conclusion on the status of such right under current international law. Contrary to the rights of indigenous peoples, the practice of human rights treaty bodies is still in its infancy concerning the direct attribution of self-determination to indigenous peoples. Moreover, State practice and *opinio juris* has received little attention in this section so that it is not possible to draw conclusion on its customary status.

The prescriptive nature of self-determination as a right of indigenous peoples is not particularly relevant to the research questions asked in this dissertation. Even if it could be demonstrated that indigenous peoples were entitled to exercise self-determination, this right would be relevant to solving conflicts only if the norm had reached the status of *jus cogens*.⁴⁴⁴ This status, however, is only recognised when self-determination applies to decolonising peoples.⁴⁴⁵ Moreover, the recognition that indigenous self-determination would legally prevail over other obligations contracted by States—unrealistic as it may

⁴⁴⁰ See Desmet 2011, at 204 ff. See also, Anaya, *Indigenous Peoples in International Law* 2004, who talks about the “norms elaborating the elements of self-determination” (Ch. 4). Similarly, Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 53, argues that for internal self-determination under Art. 1(1) of the UN Covenants to be properly realised, the respect of other rights should be ensured. On the same vein, see Scheinin 2004, at 9. See also, Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* 2007, at 152 ff., where the author talks of self-determination as an “umbrella right”.

⁴⁴¹ See Hannum, ‘Self-Determination in the Post-Colonial Era’ 1996, at 32, where the author argues that the right to self-determination has been subsumed under the right to political participation.

⁴⁴² See *ibid.*, at 38: “self-determination has taken on a wider content as it has become infused with related human rights norms recognised in the second half of the twentieth century”.

⁴⁴³ See *ibid.*, at 34: at the time of writing, Hannum argues that other human rights are not sufficient to realise the economic and political demands that are implied in the right to self-determination. This is due to the fact that self-determination for sub-national communities in the 1990s was mainly identified with internal self-determination or, in other words, political participation and limited self-government.

⁴⁴⁴ For the criteria of *lex specialis* and *lex posterior* that in any event do not apply to the conflicts analysed in this dissertation, see Introduction, section 5.

⁴⁴⁵ See Åhrén, *Indigenous Peoples’ Status in the International Legal System* 2016, at 60; Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 1995, at 169-170

be—although settling the issue of the legal prevalence of one regime over the other, would probably in practical terms exacerbate conflicts since it would exclude any form of peaceful coexistence between States and indigenous peoples. Furthermore, the purpose of this dissertation is to find ways to reconcile the obligations of States under international biodiversity law with those obligations stemming from international human rights treaties protecting indigenous rights. The absolute prevalence of one regime over the other is therefore not the best possible result.

The next section argues that self-determination still has a role to play when it comes to the interplay of indigenous rights with other bodies of international law, such as biodiversity law under the CBD and the Nagoya Protocol. While the prescriptive content of self-determination is not relevant to this end, its existence as a general principle of international law can provide useful criteria to reconcile indigenous peoples' extensive rights with the permanent sovereignty of States.

5. Self-determination as a general principle of international law: an interpretative approach

This chapter has shown that both the permanent sovereignty of States and the rights of indigenous peoples are not absolute but indeed subject to limits. The rights of indigenous peoples significantly restrict the State's powers over natural resources. In particular, the participatory rights of indigenous peoples are a means of realisation of indigenous substantive rights vis-à-vis the State's extensive powers over natural resources. Veto powers, however, are exceptional, which means that neither indigenous rights nor the State's permanent sovereignty automatically prevails on one another. This also means that when conflicts arise, these need to be solved on a case-by-case basis.

Nevertheless, the lack of a predetermined hierarchy does not result in the absence of any legal criteria to solve those conflicts. This final section argues that the principle of self-determination is underlying indigenous peoples' rights. In turn, this principle can be used to interpret the provisions of the CBD and the Nagoya Protocol potentially or actually conflicting with indigenous rights in a way that is in line with the substance of indigenous rights. In other words, the principle of self-determination offers criteria for the interaction of these two bodies of law and the reconciliation of conflicts.

It emerges from Article 38(1)(c) of the ICJ Statute that general principles are an autonomous source of international law.⁴⁴⁶ Notwithstanding this common ground, it

⁴⁴⁶ Bin Cheng, *General Principles of Law as Applied by Courts and Tribunals* (Cambridge University Press 2006), at 23: this author correctly makes clear that there is not a hierarchy between general principles and other sources of international law. Furthermore, principles are not a subsidiary source. See also, Pauwelyn 2003, at 125. See also Separate Opinion of Judge Cançado Trindade in the *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, at 132: "those principles constitute a (formal) "source" of international law, on their own, not necessarily to be subsumed under custom or treaties".

is still very much discussed in the literature what are their constitutive elements—or in other words how they are created—and what their nature as sources imply in concrete terms.

Concerning the first question, the formulation used in Article 38(1)(c) of the ICJ Statute has generated a huge debate on whether or not such principles may only come into existence if they are present in municipal systems and extracted therefrom, or rather if they may be produced independently from national systems following the needs and specific characteristics of the international legal systems. Scholars have legitimately embraced both views, showing in turn a more voluntarist approach to international law—according to which international rules only derive from the will of their main subjects, i.e., States—or a more legalistic view, in accordance with which principles are the product of the legal system itself.⁴⁴⁷

Notwithstanding this philosophical underpinning, it is correct to argue that there exist different kinds of principles that are applicable for the purposes of international law.⁴⁴⁸ Among these principles, those generated at the international level are particularly relevant to this dissertation. An example of these is provided in the realm of international environmental law;⁴⁴⁹ another relevant example is the principle of self-determination that, as shown in section 4, has been created at the international level.

Although the principle of self-determination is well established in general international law, it has a multifarious content and has mainly been applied to decolonising peoples, as seen in previous sections. Thus, the remainder of this chapter addresses the problem of the applicability of self-determination as a principle to the realm of the rights of indigenous peoples. To this end, it is necessary to dwell upon the issue of how general principles of international law are created.

There is a tendency of international judges using general principles not to discuss their creation but to invoke them without explaining how they have reached their status.⁴⁵⁰

Indeed, even the nature of general principles as sources having the same status of treaties and custom has been contested by the literature. See *infra* notes 452 and 453 (Bassiouni, Cassese, and Malanczuk).

⁴⁴⁷ Separate Opinion of Judge Caçado Trindade in the *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, at 138: “Alfred Verdross pondered that, in approaching the “sources” of international law, there are ultimately two basic opposing conceptions: one, which starts from the “*idée du droit*”, and the other, which privileges consent or the will”. See also, Pauwelyn 2003, at 125-127 and 130.

⁴⁴⁸ Rüdiger Wolfrum, ‘General International Law Principles, Rules and Standards’ Max Planck Encyclopedia of Public International Law, paras. 28 ff. See also, Separate Opinion of Judge Caçado Trindade in the *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, at 134: “As for the ICJ, it has likewise applied general principles of law in the same understanding, i.e., as comprising principles recognized both in *foro domestico* (and transposed into international level) and in international law itself”; at 137-145, Judge Caçado also discusses the evolution of the scholarly debate over whether or not general principles are only those stemming from municipal legal systems or can also be legitimately created at the international level. See furthermore, Voigt 2008.

⁴⁴⁹ See e.g., Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012).

⁴⁵⁰ Separate Opinion of Judge Caçado Trindade in the *Case concerning Pulp Mills on the River Uruguay*

It seems that this lack of systematisation cannot be entirely explained by the complexity of this undertaking⁴⁵¹—that is comparable to the theoretical questions concerning the formation of custom. Instead, the lack of conclusive responses may be attributed to the focus on the functions that principles perform in a legal system and their interplay with rules rather than their precise legal nature.⁴⁵²

Some authors have conflated the debate over the creation of general principles with that on the formation of customary law, the only difference between the two being that State practice is not needed in the former case.⁴⁵³ Indeed, it seems more correct to refer, as some authors do, to a completely different process of formation of general principles that reflect their specific nature and functions in any legal systems. Principles are to be intended as both the underlying rationale and purposes of prescriptive rules. In this sense, the content of principles can be extracted from existing rules in an inductive way.⁴⁵⁴ However, any principle must satisfy the requirement of generality.

(*Argentina v. Uruguay*), at 138. Judge Cançado also aptly describes how general principles have been used by the Permanent Court of International Justice and the ICJ (at 133-135). For a comprehensive treatise on general principles of international law, see Cheng 2006.

⁴⁵¹ See Pauwelyn 2003, at 124, who highlights the complexity of the legal debate concerning general principles.

⁴⁵² See *Iron Rhine Arbitration, Belgium v Netherlands* (24 May 2005), Award, ICGJ 373 (PCA 2005), para. 58: “The emerging principles, *whatever their current status*, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations”. See also, Malgosia Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des cours* 1, at 7: principles underlie rules and answer the question why; Christina Voigt, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO* (Martinus Nijhoff 2009), at 168: principles can pursue two normative functions, namely to provide policy objectives and to contribute to the resolution of conflicts. On the interplay between principles and rules, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977). For a literature review on the definition, origins, and functions of general principles in international law, including in judicial practice, see M. Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1989-1990) 11 *Michigan Journal of International Law* 768.

⁴⁵³ Voigt, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO* 2009, at 160: “The troublesome customary law element of universal State practice is not required”; at 165: To classify sustainable development as a rule of law would require the definition of a complete and precise content. Classification as a principle, on the other hand, presupposes a certain degree of indeterminacy”. On the same vein, see Separate Opinion of Vice-President Weeramantry in the *Gabčíkovo-Nagymaros* case, at 92: what is needed is the “general support of the international community”, which does not mean that “each and every member of the community of nations has given its express and specific support to the principle”. See also, Conforti 2013, at 48-49; Cheng 2006, at 24; Olufemi Elias and Chin Leng Lim, ‘General Principles of Law, ‘Soft Law’ and the Identification of International Law’ (1997) 27 *Netherlands Yearbook of International Law* 3, especially at 29-31 and 36-37. Bassiouni treats general principles other than those stemming from municipal law as “unperfected sources of international law”. See Bassiouni 1989-1990, at 768.

⁴⁵⁴ See Wolfrum *General International Law (Principles, Rules and Standards)*. The author focuses on principles as sources of international law and distinguishes inter alia between principles stemming from municipal law, principles of international relations, and principles deriving from treaty law. See also Cassese, *International Law* 2005, at 188: general principles of international law, which he distinguishes from principles pursuant to Art. 38(1)(c) of the ICJ Statute, “are sweeping and loose standards of conduct *that can be deduced from treaty and customary rules by extracting and generalizing some of their most significant common parts*. They do not make up a source proper. Most of them primarily serve the purpose of filling gaps or of making a particular construction prevail any time when two or more interpretations

If principles may arise through a different process as that of practice and *opinio juris* that is characteristic of international custom, it remains to be seen what gives them legal validity in the international legal system. The literature has found three main sources for the validation of general principles in international law, namely acceptance of States, their global significance, and both the qualification and the discretion of interpreters to extract them from existing rules. This section argues that the principle of self-determination satisfies the requirements of all three strands.

Concerning the acceptance of States,⁴⁵⁵ this chapter has shown that the limit not to impair indigenous distinctiveness, as elaborated by human rights treaty bodies, has gone unchallenged by States. Furthermore, States have not contested the interpretation according to which indigenous rights can be read in light of self-determination.⁴⁵⁶

Regarding global significance, the argument goes that principles need to be relevant beyond the legal regime from which they have originated.⁴⁵⁷ In other words, the substance of general principles must be found in legal documents that are different from those in which they have been originally formulated.⁴⁵⁸ This is certainly the case for self-determination that, as seen in sections 4.1 and 4.2, has been originally included in the UN Charter and then propagated into different branches of international law, including indigenous rights. Although the status of the right to self-determination of indigenous peoples is still uncertain,⁴⁵⁹ the principle of self-determination is not connected to the attribution of that particular right.

are possible”; Malanczuk 1997, at 48-49: “general principles *are not so much a source of law as a method of using existing sources*—existing rules by analogy, inferring the existence of broad principles from more specific rules by means of inductive reasoning” (in both cases, emphasis added). On the function of principles, see also, Voigt, ‘The Role of General Principles in International Law and their Relationship to Treaty Law’ 2008. At 5, this author refers to general principles as “a crucial element of international law”. She also claims that “it is largely due to general principles that international law can be defined as a system”.

⁴⁵⁵ For an articulation of this argument, see Voigt, ‘The Role of General Principles in International Law and their Relationship to Treaty Law’ 2008; Elias and Lim 1997; Julio A. Barberis, ‘Los principios generales de derecho como fuente del derecho internacional’ (1991) 14 *Revista IIDH - Instituto Interamericano de Derechos Humanos* 11; Treves 2005. On the dangers of founding legal principles on the consent of States, see Bassiouni 1989-1990, at 786.

⁴⁵⁶ See section 4.2 in this chapter.

⁴⁵⁷ Wolfrum *General International Law (Principles, Rules and Standards)*, para. 41. This argument is also supported by Cassese, *International Law* 2005, at 189, note 3, where the author claims that some principles are specific to certain areas of international law. At 190, note 3, this author adds: “Some principles may first belong to a particular branch of international law and then gradually come to impregnate the whole body of this law”.

⁴⁵⁸ See Wolfrum *General International Law (Principles, Rules and Standards)*, para. 33: “It is not of relevance whether the same terms are used in various international norms, but rather whether these norms reflect identical principles”; para. 42: it must be verified whether principles are contained in other legal documents with respect to their original formulation; para. 43: for instance, for the principles contained in Article 2 of the UN Charter, including self-determination, it can be concluded that they have been generalised.

⁴⁵⁹ Section 4.2 in this chapter has showed that Art. 1 ICCPR/ICESCR that some practice has already developed.

The third route is to argue that it is the role of interpreters to extract general principles from existing rules. This argument in turn moves the burden of proof from demonstrating the existence of the principle to proving both that the rules from which it is extracted are valid and that the principle at stake may be soundly extracted from those rules.

In this sense, this section argues that the principle of self-determination is underlying indigenous rights and can be extracted in an inductive way from the rationale of these rights, which are protected under international human rights law.⁴⁶⁰ Human rights treaty bodies have promoted a teleological interpretation of indigenous rights, according to which, although they are not absolute, their inherent purpose is to safeguard the existence of indigenous peoples as distinct groups. The denial of indigenous rights is the ultimate threshold that States cannot cross if they do not want to incur in international responsibility for failing to protect, fulfil, and respect internationally protected indigenous rights.⁴⁶¹

The threshold of indigenous peoples' survival, in turn, is given concrete content through the substance of indigenous rights. Indigenous groups can survive as distinct peoples if their right to dispose of their traditional land and resources can be exercised with the aim to safeguard their cultural distinctiveness. In this respect, since land rights are founded upon indigenous customary practices, the extent to which and the modalities whereby indigenous ownership guarantees indigenous culture must be determined in autonomy by indigenous peoples themselves. Procedural rights and the duty of States to engage in negotiations with indigenous peoples guarantee that even when indigenous rights are to be compressed, this is done in cooperation with indigenous peoples.⁴⁶²

⁴⁶⁰ Cheng 2006, at 23-24: "This part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules" (p. 24). This is the same argument as Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" 1957, at 7, Arangio-Ruiz 1972, at 496: principles "determinable by way of induction", and Pauwelyn 2003, at 126.

⁴⁶¹ See *supra* section 3 in this chapter and Chapter 1, section 2, which explain how procedural guarantees serve to define this threshold. Restrictions posed on indigenous rights have to pass the test of reasonableness that is applicable to all human rights. This test, however, has a higher threshold than for other human rights. Every infringement on indigenous peoples' rights should be measured against the paradigm of indigenous peoples' survival as a distinct group. On reasonableness, see Brownlie, "The Rights of Peoples in Modern International Law" 1988, at 9-10.

⁴⁶² In the words of Gilbert, self-determination is primarily a "relational principle". Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 221. In this sense, the relationship between States and indigenous peoples as concerns the management of natural resources is to be renegotiated. In the words of Anaya, "[n]egotiation makes possible nuanced solutions to potentially complex issues of redistribution of power and resources in diverse circumstances. In most instances, self-determination for indigenous peoples cannot be achieved simply by allowing them to choose from among limited predetermined options". Anaya, *Indigenous Peoples in International Law* 2004, at 187. According to this view, self-determination is first of all a procedural endeavour that does not have a predetermined outcome. See Duruigbo 2006, at 64: "where a person holds a right to something, he or she "is not merely a passive beneficiary of someone else's obligation, but an active participant in a relationship that he or she in large measure controls" (quote from Jack Donnelly).

Overall, all of these elements are pieces composing the puzzle of a modern notion of self-determination as applied to sub-national groups. In other words, self-determination is the justification behind rules on the rights of indigenous peoples.⁴⁶³ As a general principle, it can be used for the purpose of the present thesis in two phases, namely to clarify the content of the rights of indigenous peoples and to adapt their content in the context of the CBD regimes without compromising their substance. These phases are illustrated in the following.

Self-determination is first of all a principle that helps legislators, judges, and interpreters apply the rights of indigenous peoples in a way that is in line with the ultimate purpose of preserving indigenous peoples' distinctiveness. The interpretative role of self-determination has gained currency in the reports and decisions of human rights treaty bodies. In the *Apirana Mahuika* case, the Human Rights Committee has explicitly stated that "the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27".⁴⁶⁴ While the Committee used self-determination in an interpretative fashion, it excluded that it could review the application of the right within the complaint mechanism laid down by the Optional Protocol.⁴⁶⁵ As reminded, the Inter-American Court has similarly used common Article 1 of the UN Covenants to extensively interpret Article 21 of the American Convention protecting property rights so as to encompass collective land rights of indigenous peoples.⁴⁶⁶ The fact that the UN Declaration on indigenous rights has explicitly recognised the right to self-determination of indigenous peoples will probably reinforce the functional reading of indigenous rights in light of the general principle.

Once it has been established how the principle of self-determination works within the regime of indigenous rights, a further stage for the purpose of this dissertation is to illustrate how it may solve potential conflicts generated by the interpretation and application of the CBD regime. This is done by way of systemic interpretation under

⁴⁶³ This argument is resonated in more general terms in Emmanuel Voyakis, 'Do General Principles Fill 'Gaps' in International Law?' (2009) 14 *Austrian Review of International and European Law* 239, at 245.

⁴⁶⁴ *Apirana Mahuika* case, para. 9.2.

⁴⁶⁵ *Poma Poma* case, para. 6.3.

⁴⁶⁶ *Saramaka* case, para. 129 and *Kaliña and Lokono* case, para. 122. In *Maya v. Belize*, para. 154, the Inter-American Commission has noted the petitioners' application according to which mining and logging conditions violated inter alia the principle of self-determination but did not examine this contention since it held it was to be subsumed under the violation of Article XXIII of the American Declaration on Human Rights, which had already been ascertained: "the Commission notes the Petitioners' contention that the failure of the State to engage in meaningful consultation with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions, constitute violations of several other rights under international human rights law, including the right to life under Article I of the American Declaration, the right to religious freedom and worship under Article III of the American Declaration, the right to a family and to protection thereof under Article VI of the American Declaration, the right to preservation of health and well-being under Article XI of the American Declaration, and the "right to consultation" implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and the *principle of self-determination*" (emphasis added).

Article 31(3)(c) of the VCLT and customary international law.⁴⁶⁷ As highlighted, in the formulation of the Vienna Convention, a treaty shall be interpreted by taking into account “[a]ny relevant rules of international law applicable in the relations between the parties”. This is the so-called principle of harmonisation that is based on the presumption that the Parties to a treaty are aware of the obligations stemming from other treaties or general international law.⁴⁶⁸ Furthermore, even if international law changes after the conclusion of a treaty, the harmonization clause gives the Parties enough flexibility to take those development into account.⁴⁶⁹

This is the case when it comes to the relationship between indigenous rights as protected by global and regional human rights treaties and international biodiversity law under the CBD and the Nagoya Protocol. When the CBD was ratified in 1992, the protection of indigenous rights was still in its infancy. In this sense, it cannot be said that CBD Parties had a clear vision at that time of their parallel obligations concerning indigenous rights. However, since the 1990s, the interpretation that human rights treaties protect the rights of indigenous peoples has consolidated as shown in section 3 in this chapter. For these reasons, when interpreting the CBD and the Nagoya Protocol, the obligations of Parties towards indigenous peoples stemming from human rights law cannot be ignored and must be duly taken into account by virtue of Article 31(3)(c) of the Vienna Convention.

This is the first part of the interpretative approach applicable to Chapters 3 and 4. The rights of indigenous peoples are incorporated in the interpretation of the CBD and the Nagoya Protocol on the basis of their binding nature as obligations that Parties of the biodiversity regime have contracted by in parallel ratifying human rights treaties.

According to the second part of the interpretative approach, the principle of self-determination is used to ensure the balance between the obligations contained in the CBD and the Nagoya Protocol and the rights of indigenous peoples in a way that the integrity of the latter is preserved. Principles of international law not only have gap-filling functions but also serve to clarify existing rules in a way to avoid conflicts.⁴⁷⁰

In this sense, the principle of self-determination can play a fundamental role when incorporating indigenous rights within the CBD and the Nagoya Protocol. These

⁴⁶⁷ ILC fragmentation report, at 212, para. 422: “Its wording [of Art. 31(3)(c) VCLT], however, is not restricted to “general international law” but extends to “[a]ny relevant rules of international law applicable in the relations between the parties”.

⁴⁶⁸ See Introduction, section 6.

⁴⁶⁹ This is explained very clearly by Koskeniemi in the ILC fragmentation report, at 206-218. The report also explains that it would be absurd to limit the applicability of this clause only to the law that was in force at the time of the conclusion of a treaty and that this option has been rejected by States in the ILC. See also at 141, para. 277: importance of harmonizing interpretation; at 211, para. 419: “This is all that article 31 (3) (c) requires; the integration into the process of legal reasoning – including reasoning by courts and tribunals – of a sense of coherence and meaningfulness”. On the presumption against conflict, see also Pauwelyn 2003, at 240-244.

⁴⁷⁰ See *supra* note 453.

instruments are aimed to ensure the conservation of biodiversity, its sustainable use, and the fair and equitable sharing of benefits. Their objectives therefore do not coincide with those of human rights treaties. Indeed, biodiversity treaties apply to situations where human rights treaties protecting indigenous rights are also applicable. In this sense, in order not to incur in possible conflicts between these two bodies of law, it is important to find ways in which the application of the CBD and the Nagoya Protocol is in line with indigenous rights. This dissertation aims to demonstrate that this harmonizing interpretation is possible.

In this light, interpretation is articulated in three main steps. First, the ensuing chapters assess in which cases the provisions/obligations of the CBD/Nagoya Protocol overlap with provisions/obligations stemming from human rights and may cause conflicts.⁴⁷¹ Second, every time a conflict could arise, the same chapters propose a harmonising interpretation of the provisions of the CBD and the Nagoya Protocol in light of indigenous rights. Third, the principle of self-determination underlying indigenous peoples' rights serves to adjust the content of those rights to the context of the CBD regime, where necessary. In other words, self-determination must be used to facilitate the interpretation of indigenous rights in a way that is in accordance with its rationale but may be adapted to the circumstances of a treaty regime that has different goals. This step, indeed, is optional, meaning that the principle is only invoked when the balance between biodiversity-related obligations and indigenous rights is particularly problematic.

In this sense, the principle of self-determination both reinforces the teleological approach of indigenous rights and provides ways to integrate indigenous rights into the CBD and the Nagoya Protocol in a flexible way. The objective of ensuring cultural integrity and the possibility to exist as distinct peoples may help the interpreter find the right solution in concrete cases. In this light, while indigenous rights need to be balanced with the parallel objectives of the CBD, they cannot be compressed to the point that they impair the existence of indigenous peoples as distinct groups. Therefore, the main function of the principle of self-determination is to solve interpretative doubts that may arise in the context of the CBD and the Nagoya Protocol with respect to indigenous peoples in light of the rationale underlying indigenous rights under human rights law.⁴⁷² The Preamble of the Nagoya Protocol makes reference to the UN Declaration of indigenous rights.⁴⁷³ In this sense, the whole body of indigenous rights, including self-determination, can penetrate the international biodiversity regime by way of contextual interpretation. However, only time will tell whether the Declaration will be used in this fashion.

⁴⁷¹ This is explained in the Introduction of this dissertation, section 5.

⁴⁷² This is in line with Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' 1957, at 7, where the author argues that principles of law provide an explanation for any given rule.

⁴⁷³ Preambular para. 26 Nagoya Protocol.

Chapter 2

As is shown in the remainder of this thesis, the principle of self-determination may convey interpretations whereby provisions of the CBD and the Nagoya Protocol potentially threatening indigenous rights are applied in a way that is consistent—if not supportive of—the general body of indigenous peoples’ rights. In this light, the principle is used in Chapters 3 and 4 to suggest ways how to incorporate indigenous rights in these treaties where interpretation is not clear or absurd because it would lead to the conclusion that in order to implement their obligations under biodiversity treaties, States need to disregard indigenous rights. Chapters 3 and 4 also explore the limits of harmonising interpretation in the context of the CBD and the Nagoya Protocol.⁴⁷⁴

⁴⁷⁴ The ILC fragmentation report suggests that such limits lie in the object and purpose of a given treaty. See at 143, para. 281.

CHAPTER 3

The Access and Benefit-Sharing Regime and Indigenous Peoples: Applying the Interpretative Approach

1. ABS and indigenous rights: conflict and reconciliation

This chapter applies the interpretative approach of the interaction between the CBD regime and indigenous rights, as developed in Chapter 2, to the case of the utilisation of genetic resources and traditional knowledge and the sharing of the benefits deriving therefrom.

Benefit-sharing is one of the objectives of the CBD, whose inclusion originally derives from the need to balance the appetites for access to genetic resources of less-endowed developed countries with the interests of developing countries to grant access to their resources for research and development purposes while also benefiting from this undertaking.¹ According to the CBD, however, benefit-sharing goes beyond the inter-State dimension to embrace the notion of intra-State benefit-sharing—i.e., the fair and equitable sharing of benefits with indigenous and local communities.² Furthermore, the Nagoya Protocol has set up a comprehensive regime that noticeably intersects with indigenous rights.

Access to genetic resources and traditional knowledge is a considerable phenomenon that *inter alia* affects indigenous peoples. Modern biotechnologies have significantly increased the economic potential of genetic resources, which upon research and development activities—otherwise defined as bioprospecting³—can become valuable marketable products in the pharmaceutical and food sectors and be monetised through patents and other intellectual property rights.⁴ While genetic resources are valuable for their transformative potentials and marketability, the traditional knowledge and practices

¹ Art. 1 CBD. See Morgera and Tsioumani, ‘The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods’ 2010, at 152-153; Glowka and *al.* 1994, at 1.

² See Art. 8(j) CBD and *infra* section 2.3 in this chapter. See Morgera and Tsioumani, ‘The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods’ 2010, at 159 ff.

³ See Michael I. Jeffery, ‘Bioprospecting: Access to Genetic Resources and Benefit-Sharing under the Convention on Biodiversity and the Bonn Guidelines’ (2002) 6 Singapore Journal of International Law 747, at 755, who defines bioprospecting *inter alia* as research activities into biodiversity for scientific and commercial purposes.

⁴ See Grethel Aguilar, ‘Access to Genetic Resources and Protection of Traditional Knowledge in the Territories of Indigenous Peoples’ (2001) 4 Environmental Science & Policy 241, at 242; Jeffery 2002, at 747-748; Achim Seiler and Graham Dutfield, *Regulating Access and Benefit Sharing: Basic Issues, Legal Instruments, Policy Proposals* (BfN 2001), at 11; Victoria Tauli-Corpuz, *Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples* (Third World Network 2003), at 32: “Biodiversity has become such an important concern within the past 20 years not only because it is fast disappearing but also because of the growing recognition of its increased economic value and potential for the biotechnology industry. Bioprospecting has become the new extractive activity just like prospecting for minerals in the early days of colonization”.

of indigenous peoples may increase the chances of success of bioprospecting activities in the productive and research sector.⁵ As highlighted by Jeffery, bioprospecting can be very costly before it becomes profitable.⁶ Access to traditional knowledge may reduce these costs by decreasing the time—and success—related aspects of bioprospecting.

For these reasons, genetic resources and traditional knowledge have become extremely desirable commodities for States, research entities, and private businesses.⁷ In this context, the link between bioprospecting and the conservation of biodiversity is represented by the potentially negative effects that scoping and research activities may produce on the preservation of biodiversity. While this aspect is not reflected in the CBD, the Convention and subsequent practice have highlighted the interrelationship between ABS and conservation.⁸ Furthermore, the objective of the Nagoya Protocol is to ensure benefit-sharing, “thereby contributing to the conservation of biological diversity and the sustainable use of its components”.⁹ This objective has been *inter alia* articulated through the obligation for Parties to “encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biodiversity and the sustainable use of its components”.¹⁰

The core of the legal problems stemming from ABS, however, is not *per se* linked to conservation¹¹ but concerns issues such as the ownership of genetic resources and traditional knowledge, the characteristics of prior informed consent and the question of which subjects are entitled to exercise it, the conditions of mutually agreed terms (MATs) to be negotiated between users and providers and their regime,¹² the nature of benefit-sharing and its concrete realisation, as well as the transposition of international rules in

⁵ On the pharmaceutical sector, see Gurdial Singh Nijar, ‘Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects’ (2010) 21 *European Journal of International Law* 457, at 458. On the relevance of traditional knowledge for actors in the research sectors, see Elisa Morgera and Miranda Geelhoed, *Consultancy on the Notion of ‘Utilisation’ in the Nagoya Protocol and the EU ABS Regulation for the Upstream Actors* (University of Edinburgh 2016), at 18.

⁶ Jeffery 2002, at 756-757.

⁷ Secretariat of the Convention on Biological Diversity, *Factsheets in the ABS Series, Traditional Knowledge* (2011), at 3-4.

⁸ See Aphrodite Smagadi, ‘Analysis of the Objective of the Convention on Biological Diversity: Their Interrelation and Implementation Guidance for Access and Benefit Sharing’ (2006) 31 *Columbia Journal of Environmental Law* 243, at 283.

⁹ Art. 1 Nagoya Protocol.

¹⁰ Art. 9 Nagoya Protocol. Other provisions in the Protocol also spell out how the link between benefit-sharing and conservation is to be pursued. See Nagoya Protocol: preambular para. 6 on the link between the economic value of biodiversity, benefit-sharing, and conservation; preambular paras. 2, 7, 14, 20, and 22; Art. 8; Art. 10; Art. 22(5)(h); para. 1(f) and paras. 2(f) and (k) of the Annex include among monetary and non-monetary benefits “[s]pecial fees to be paid to trust funds supporting conservation”, the “[t]ransfer to the provider of the genetic resources of knowledge and technology...that are relevant to the conservation and sustainable utilization of biological diversity”, and “[a]ccess to scientific information relevant to conservation and sustainable use of biological diversity”.

¹¹ The link between ABS and conservation will be explored again in this chapter, in section 2.4.2.

¹² See *infra* section 2 in this chapter.

national systems.¹³ This is particularly true when interrogating the CBD regime in light of indigenous rights.

According to international human rights law, indigenous peoples have rights over their lands and natural resources. These rights, however, are not explicitly embraced in the CBD so that access to genetic resources is framed mainly as an inter-State concern.¹⁴ As the next sections illustrate, the lack of sufficient consideration of indigenous rights has been partially remedied with the adoption of the Nagoya Protocol. In particular, the remainder of this chapter examines to what extent the CBD practice as well as the Nagoya Protocol manage to address and solve the problems deriving from the misappropriation of indigenous knowledge and genetic resources that may arise in the context of the CBD. In this sense, although the CBD encourages the protection of traditional knowledge, this protection is conditioned upon national legislation.¹⁵ Furthermore, since the CBD is premised upon the recognition of the permanent sovereignty of States over natural resources, its ABS rules do not sufficiently take into account the broad prerogatives in terms of resource control deriving from indigenous land rights. In this sense, this chapter also explores to what extent these indigenous rights are acknowledged in the CBD regime.¹⁶

Concerning the CBD obligations on benefit-sharing, Article 8(j) suffers from three main limitations. First, as happens with the protection of traditional knowledge, the obligation to encourage the sharing of benefits with indigenous and local communities is equally subject to national legislation. Second, the sharing with indigenous peoples is only foreseen following utilisation of traditional knowledge, thus leaving aside the case in which users access genetic resources held by indigenous peoples. Third, the obligation merely to “encourage” benefit-sharing with indigenous peoples has downplayed the prescriptive nature of this provision, leading to problems with its interpretation and limited or non-existent implementation.¹⁷

¹³ See Tauli-Corpuz 2003, at 37: “It is difficult to design ABS policies and laws for the following reasons: It is hard to identify who “owns” biodiversity and traditional knowledge. Genetic resources and knowledge on the use of these cut across boundaries whether they are countries, provinces, or municipalities”. See *infra* sections 2.2, 2.3, and 2.4 in this chapter.

¹⁴ See *ibid.*, at 37: “Conflicts between national interest and indigenous peoples’ assertion of their right to have control over their resources are always in the picture. Even the implementation of free and prior informed consent has been met with many difficulties because there are different standards and criteria used by governments and indigenous peoples and local communities”; “[t]he potential of benefit-sharing schemes to create conflicts and divisions between communities and within communities is high especially if benefits are just couched in terms of money”.

¹⁵ Art. 8(j) CBD. On the other critical points about Article 8(j), see *infra* and Chapter 1, section 3.

¹⁶ See UNDESA, Potential Threats to Indigenous Peoples’ Rights by the Convention on Biological Diversity’s Proposed International Regime on Access and Benefit Sharing, UN doc. PFII/2007/WS.4/9 (17-19 January 2007), at 8.

¹⁷ The lack of implementation of the ABS regime is a generalised problem that goes beyond the aspects concerning indigenous peoples. On this point, see Jeffery 2002, at 778; Tomme Young, ‘Legal Issues Regarding the International Regime: Objectives, Options, and Outlook’ in Santiago Carrizosa and others (eds), *Accessing Biodiversity and Sharing the Benefits: Lessons from Implementation of the Convention on*

This chapter analyses developments in the benefit-sharing obligations of CBD Parties following the creation of the Working Group on Article 8(j) and, most importantly, the entry into force of the Nagoya Protocol. This chapter also compares the CBD regime to the multilateral system of benefit-sharing established by the ITPGRFA, adopted in 2001 under the auspices of FAO. The ITPGRFA complements the CBD when it comes to a specific set of genetic resources. Furthermore, the FAO treaty applies to its Parties alternatively to the Nagoya Protocol with regard to genetic resources for food and agriculture since the latter treaty explicitly recognises that international instruments with a focus on specific genetic resources are to be considered *lex specialis*.¹⁸ Therefore, the legal regime of the ITPGRFA is relevant to respond to the research question of how to deal with potential conflicts between biodiversity conservation and indigenous rights in the context of ABS. The ITPGRFA also creates a system whereby benefits are to be shared with local farmers. In this respect, an assessment of the functioning of the FAO multilateral system of benefit-sharing can help to evaluate the obligation to establish a comparable global multilateral benefit-sharing mechanism contained in the Nagoya Protocol.¹⁹

In light of the different legal problems concerning ABS in the context of indigenous rights, this chapter analyses access and benefit-sharing separately. Although benefit-sharing is the legal consequence of access under the CBD, access and benefit-sharing remain two distinct moments. For instance, the respect of consent requirements when accessing traditional knowledge does not ensure that the benefits deriving from this utilisation are equally shared with indigenous and local communities.²⁰ Furthermore, treating access and benefit-sharing separately may produce some advantages in terms of the present analysis since it helps to shed light on those situations where traditional knowledge is accessed from one community but it is shared among several communities that may be located in different States.²¹

Biological Diversity (IUCN 2004), at 275; Reji K. Jospeh, 'International Regime on Access and Benefit-Sharing: Where Are We Now?' (2010) 12 *Asian Biotechnology and Development Review* 77, at 78. On related limitations of Art. 8(j) CBD, see Chapter 1, section 3.

¹⁸ Art. 4(4) Nagoya Protocol: "Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument". On this point, see Morgera, Tsioumani and Buck 2014, at 89-90.

¹⁹ Art. 10 Nagoya Protocol.

²⁰ See Nijar 2010, at 466.

²¹ *Ibid.*, at 470. According to this author, while the prior informed consent must be obtained only from the community that actually provides access, benefit-sharing must be widespread. See also, Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2 (15 July 2009), para. 91: "It was suggested that it may be helpful to address access and benefit-sharing separately"; para. 92: "When traditional knowledge is found in more than one community and prior informed consent and mutually agreed terms are negotiated with only one or few of these communities, it was suggested that trust funds could be established for the sharing of benefits

2. The incorporation of indigenous rights into the international regime on ABS

2.1. Access to traditional knowledge

Before going into the details of how traditional knowledge is treated under the CBD and the Nagoya Protocol, it is worth defining the object of investigation in more general terms. Understanding what traditional knowledge is in the context of indigenous culture facilitates comprehension about its special status within the CBD regime. Furthermore, this comprehension is instrumental for spotting the limitations of the current legal framework.

Traditional knowledge does not simply coincide with the system of knowledge produced by indigenous individuals and groups.²² In the words of von Lewinski,

[k]nowledge is not ‘traditional’ because of its object, nor its subject matter or content, nor its age or antiquity, nor its aesthetic quality. What makes it traditional is the way it has been preserved and transmitted between generations within a community.²³

In this sense, traditional knowledge is both connected to and nurtured by particular social structures. The interlinkages between traditional knowledge and indigenous societies make it so that, while the former contributes to the preservation of social order, societal changes are reflected upon traditional knowledge. In other words, traditional knowledge evolves with indigenous societies, while contributing to their functioning and the perpetuation of knowledge from one generation to the other.²⁴

Although not merely constituting a collection of information, the content of traditional knowledge can be easily disconnected from its social structure and communicated to third subjects that are not members of traditional communities. Thus, the relative easiness with which traditional knowledge can be appropriated by non-indigenous subjects may endanger indigenous culture and distinctiveness to the extent that third parties negatively affect traditional practices. The protection of traditional knowledge is, therefore, a complex undertaking that cannot be limited to the preservation of its content.

The fact that traditional knowledge does not coincide with the object of knowledge—

with the other communities who did not take part in prior informed consent and mutually agreed terms.” See *infra* sections 2.2, 2.3, and 2.4 in this chapter.

²² According to von Lewinski this is the definition of indigenous knowledge that should be distinguished from traditional knowledge. Silke von Lewinski (ed) *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd edn, Wolters Kluwer 2008), at 69.

²³ *Ibid.*, at 59-60.

²⁴ See also, UN Doc. UNEP/CBD/WG-ABS/8/2, para. 33, which provides a working definition of traditional knowledge. Common features of traditional knowledge are: “A link to a particular culture or people”; “[a] long period of development, often through an oral tradition, by unspecified creators”; “[a] dynamic and evolving nature”; “[e]xistence in codified or uncoded (oral) forms”; “[p]assed on from generation to generation”; “[l]ocal in nature and often imbedded in local languages”; “[u]nique manner of creation”; “[i]t maybe difficult to identify original creators”.

i.e, the content that is passed on from one generation to the other—is one of the reasons why indigenous peoples do not generally see indigenous-owned intellectual property rights as an adequate solution to protect their traditional knowledge.²⁵ In contrast, indigenous peoples have experienced misappropriation of their traditional knowledge through patenting by third actors.²⁶

In this context, indigenous peoples oppose to a notion of traditional knowledge that can be easily appropriated by external users a conception whereby the public content

²⁵ Other reasons that concur to the rejection of the international system of protection of intellectual property rights are: 1) the individual entitlement given by patents, which does not correspond to the collective nature of traditional knowledge and does not take into account the fact that inventors are difficult to identify; 2) the time-limits of patents, which do not reflect the permanent nature of indigenous entitlement; 3) the difficulty of patenting the content of traditional knowledge since it is considered as prior art and therefore does not fulfil the requirement of novelty; 4) the patentability of life forms, which produces counter-incentives to conservation; 5) the strict monetary nature of the rewards deriving from the concession of patents. On point 3), see Shakeel Bhatti and others, *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts* (IUCN 2009), at 19: “Following access, many users seek to convert the non-exclusive genetic resource (legally held and potentially usable by a great many [sic] providers) into an exclusive resource, which no other person, country, or entity may use”; “Arguably, this kind of IPR defeats the purpose of ABS (which was intended to provide an incentive for conservation and sustainability), since the financial or potential value of species will be devalued following the issuance of the patent, thereby diminishing the conservation incentive. It seems clear that this type of IPR would also defeat the purpose of patents, which has been described as encouraging and protecting innovation”. On point 4), see Tauli-Corpus 2003, at 6: “We, indigenous peoples, have our own sources of natural law and we consider the values propagated by the individual property-based IPRs regime as values that we do not agree with. Our indigenous cosmologies and worldviews regard knowledge as gifts or heritage from nature, from the creators and great spirits, and from the ancestors. Knowledge is created collectively, accretionally, and inter-generationally and not just by individuals. Indigenous innovation is not just motivated by the desire for profit or for commercialization. Indigenous innovation is the result of the deep interrelationship between us and our territories and resources, between us and our ancestors and our gods and goddesses, and among ourselves.” See also, at 7 and 16-18. See further, J. L. Zweig, ‘A Globally Sustainable Right to Land: Utilising Real Property to Protect the Traditional Knowledge of Indigenous Peoples and Local Communities’ (2009-2010) 38 *Georgia Journal of International and Comparative Law* 770; Seiler and Dutfeld 2001; Davis 1999; Rama Rao, ‘The Relationship between Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions’ in Ulia Popova-Gosart (ed), *Traditional Knowledge and Indigenous Peoples* (LIENIP and WIPO 2009), at 42: “it can be seen that indigenous and local communities, as the custodians of their TK and TCEs, are not entirely unfamiliar with the IP system and do derive some benefit from it. Yet, the conventional IP system does not respond fully to all their needs and aspirations”; Mattias Åhrén, ‘Legal Aspects related to Traditional Knowledge’ in Ulia Popova-Gosart (ed), *Traditional Knowledge and Indigenous Peoples* (LIENIP and WIPO 2009), at 53-54: “the main stumbling block for indigenous peoples to use the IP system is, as already mentioned above, that the system primarily protects the rights of individual creators rather than the communal creativeness of a community”; Aguilar 2001, at 250: “At the moment, the IPR systems are not appropriate for protection of traditional knowledge because they cannot fully respond to the characteristics of certain forms of traditional knowledge like collective ownership, oral transmission, public domain (some cases), communal origination, collective management and ownership of information and knowledge”.

²⁶ This phenomenon is also known as biopiracy. See Federico Lenzerini, ‘Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Nijhoff 2008), at 141-142: “in most circumstances, due to the objective difficulty of recognizing and even knowing the existence of such knowledge, biopirates have successfully exploited traditional knowledge as their own creation, thereby obtaining immense economic income without recognizing any role for the traditional holders of the knowledge concerned”.

of this knowledge does not imply unrestricted use.²⁷ Therefore, in the view of indigenous peoples, even when traditional knowledge is publicly available, access to its content should be conditioned to their prior informed consent.²⁸ This requirement is based on the idea that there is a difference between knowledge being in the public domain and its public availability.²⁹ In this sense, access to traditional knowledge does not equate to deprivation or alienation, since the immaterial value of traditional knowledge and its collective nature are simply non-disposable for indigenous peoples.³⁰

Although being very advanced in the protection of indigenous cultural rights,³¹ international human rights law hardly reflects this conception of indigenous traditional knowledge.³² Even the UN Declaration on indigenous rights ambiguously frame the protection of traditional knowledge in terms of “the right” of indigenous peoples “to maintain, control, protect and develop their intellectual property”.³³ The CESCR has approached problems related to the protection of “scientific, literary and artistic productions of indigenous peoples” under the rubric of Article 15 of the ICESCR. The Committee has never mentioned traditional knowledge but has recognised that States need to prevent unauthorised access to the intellectual production of indigenous peoples beyond protecting authorship. Furthermore, the CESCR has subjected any such use to the free, prior and informed consent of indigenous peoples.³⁴

²⁷ See Tauli-Corpuz 2003, at 12: “Traditional knowledge is not in the public domain. While much of it is known because we openly share this knowledge, it is still held by individuals, clans, tribes, nations and different independent communities... Thus, the assumption that our heritage is in the public domain and therefore cannot be protected by IPRs and can be appropriated and used by anybody is fallacious to us”.

²⁸ This position was expressed by some indigenous groups within the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources. See the UN Doc. UNEP/CBD/WG-ABS/8/2, para. 52: “Some suggested that traditional knowledge found in the public domain remains the property of indigenous and local communities and therefore should require prior informed consent before being used. The distinction between public availability and the public domain was stressed”.

²⁹ See Pag-yendu M. Yentcharé, ‘Le Protocole de Nagoya n’institutionnalise-t-il pas l’absence de protection juridique des savoirs traditionnels? Une explication par l’allégories de l’éclipse solaire’ (2016) 101 *Liason Énergie-Francophonie* 46, at 48.

³⁰ See Tauli-Corpuz 2003, at 7: “Traditional knowledge cannot be alienated”; “Consent to use, display, depict or exercise, is therefore temporary, and given only on the basis of trust that recipients respect and up-hold the conditions and customary laws that are attached to particular aspects of the heritage”. “Traditional knowledge is to be kept in perpetuity to be safeguarded, developed and passed from one generation to the next. The transfer of this knowledge is a collective responsibility and in most cases it is transmitted orally. In some cases these are codified in texts”.

³¹ On the link between the protection of traditional knowledge and cultural rights, see Lenzerini, ‘Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge’ 2008. On indigenous cultural rights, see also Chapter 2, section 3.3.

³² Elisa Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 *European Journal of International Law* 353, at 376-377.

³³ Art. 31(1) UNDRIP. Another relevant provision is Art. 24, which protects traditional medicines. Preambular para. 11 also recognizes “that the respect that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”.

³⁴ CESCR, General Comment 17, para. 32. See also CESCR, General Comment 21, para. 37, which recognises the right of indigenous peoples to traditional knowledge and the State’s corresponding duty to

The CBD is paradoxically more specific in the protection of traditional knowledge than human rights instruments. This is not only due to the fact that human rights treaties are not specifically targeted at indigenous peoples and have been adopted before the international framework of indigenous rights emerged. These considerations, in fact, do not explain why traditional knowledge is not sufficiently protected under the UN Declaration on indigenous rights. Furthermore, the same considerations of temporal obsolescence could apply to the CBD.

A more plausible explanation is that the CBD includes within its scope a number of situations where traditional knowledge, intended as a system of information that encompasses a specific world-vision, can be appropriated by non-indigenous subjects. In recognising the value of traditional knowledge for the protection of biodiversity, the CBD has included it in its scope of application and given it a special status within the international regime on conservation and ABS.

Article 8(j) of the CBD mandates the respect and preservation of indigenous knowledge “embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”.³⁵ While the Convention does not give a definition of traditional knowledge, the regime of in-situ conservation provides some elements to identify to what extent traditional knowledge falls within the scope of the CBD.

First, the fact of “embodying traditional lifestyles” confirms the vision of traditional knowledge as profoundly enmeshed with indigenous social practices. Some authors have criticised this formulation since it could be interpreted as only protecting indigenous traditional knowledge to the extent that it is based on a cultural stalemate of indigenous groups.³⁶ While this interpretation is possible based only on the letter of the CBD, the method outlined in Chapter 2 helps to find an interpretative solution that is more harmonised with current international law.

In this sense, Article 8(j) must be interpreted in a way that is compatible with the modern corpus of indigenous rights under international human rights law. Traditional knowledge is connected to the right to land, cultural rights, and participatory rights. All of these rights have a teleological dimension that is expressed through the principle of self-determination. Not only this principle preserves indigenous peoples’ distinctiveness, but makes it so that this distinctiveness must be determined in an autonomous way by indigenous peoples. In this sense, self-determination goes against cultural stagnation

“respect the principle of free, prior and informed consent” in relation to this right; CESCR, Concluding observations on Jamaica, UN Doc. E/C.12/JAM/CO/3-4 (10 June 2013), para. 32.

³⁵ Art. 8(j) CBD, emphasis added. On the notion of traditional knowledge within the CBD and a critique of its limitation, see Gurdial Singh Nijar, ‘Traditional Knowledge Systems, International Law and National Challenges: Marginalization or Emancipation?’ (2013) 24 *European Journal of International Law* 1205.

³⁶ See Glowka and *al.* 1994, at 48; Maggio, ‘Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity’ 1997-1998, at 210; Morel 2010, at 176. These critiques have been highlighted in Chapter 1, section 3.

and promotes instead a dynamic evolution of indigenous traditional practices pursuant to each group's priorities and objectives.³⁷ This teleological/systemic argument leads to the conclusion that the meaning of Article 8(j) is only in line with indigenous rights as protected under human rights treaties if the locution "traditional lifestyles" is interpreted as encompassing the evolving social structure of indigenous culture.

The second element qualifying traditional knowledge under Article 8(j) is that the traditional lifestyles that States have an obligation to protect and maintain should be instrumental for conservation and sustainable use. This locution has suffered from similar critiques as those outlined above. However, the reference to conservation objectives must not be seen as diminishing the scope of the protection of traditional knowledge in other subfields of international law. As illustrated, international human rights law does not strongly protect traditional knowledge as such. In this sense, the introduction of an obligation to protect indigenous knowledge in the CBD represents an improvement of the current international legal framework.³⁸ Furthermore, conservation and sustainable development are two of the three objectives of the CBD. Consequently, CBD Parties cannot protect traditional practices going against those objectives without letting their international responsibility be engaged for the violation of the CBD itself. In this sense, the overall scope and objectives of the CBD prevents a consideration of indigenous rights that overtly challenges the Convention's goals. This argument implies that even if traditional knowledge were protected under human rights law in a way that is detrimental to the objectives of the CBD, this connotation could not change the scope of the CBD via interpretative methods. In other words, systemic interpretation cannot go so far as to derogate from the object and purpose of the treaties that are interpreted in light of other legal standards unless hierarchy or a relation of specialty cannot be established.³⁹ Although systemic interpretation is not subordinated to other interpretative criteria, it does not supersede them either and must be anchored to the text of any treaties.

Furthermore, COP decisions have increasingly embraced a notion of traditional knowledge that goes beyond knowledge "embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity".⁴⁰ The explanation for this evolution is probably linked to the fact that while traditional practices that go against the objectives of the CBD are understandably excluded from protection, it is less clear how to assess positive impacts of traditional knowledge on the CBD. Moreover, positive impacts may be the product of long-term practices, so that protecting traditional knowledge

³⁷ See Chapter 2, sections 4.2 and 5.

³⁸ See Morgera, 'Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law' 2013.

³⁹ Art. 31(1) VCLT. On this point, see ILC fragmentation report, at 159, 205, 207, and 213. See also, Introduction, sections 5-6.

⁴⁰ See Morgera and Tsioumani, 'The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods' 2010, at 160.

today can presumably contribute to the achievement of CBD objectives in the future. In addition, the evolution of the understanding of traditional knowledge within the CBD seems to be linked to the parallel consolidation of indigenous rights in international human rights law.

Even in early decisions the COP has required Parties to report on the incorporation of unqualified traditional knowledge “into development and resource-management decision-making processes”.⁴¹ In a number of decisions, the COP has recognised the dependency of traditional knowledge upon the preservation of indigenous cultural identity, land and resource ownership systems, and related rights.⁴² In some decisions, this conception has evolved into the acceptance of the necessity to respect indigenous “needs and views” when protecting traditional knowledge.⁴³ Additionally, the COP has observed the mutual relationship between traditional knowledge and conservation. This means not only that the former should be instrumental for the latter, but also that the protection of the natural base should favour the maintenance of traditional knowledge.⁴⁴ Therefore, traditional knowledge and conservation are bound in a reciprocal relationship where conservation and traditional knowledge should be mutually beneficial.

⁴¹ COP dec. IV/9 (1998), para. 10(c). This element is reiterated in COP dec. VII/16, UN Doc. UNEP/CBD/COP/DEC/VII/16 (13 April 2004), para. 4(b)(ii), where Parties are requested to submit information on how they protect traditional knowledge. See also, Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or Which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, COP dec. VII/16, Part F, (hereinafter Akwé:Kon guidelines), which mandates that traditional knowledge must be taken into account when performing impact assessment, especially with regard to its ownership (paras. 27(b), 29, 38, 41, 43: “traditional lifestyles”, and 44(h): “traditional systems of production”, for instance of medicines); COP dec. IX/13, UN Doc. UNEP/CBD/COP/DEC/IX/13 (9 October 2008): Part C reaffirms “the central role of traditional knowledge in the cultures of indigenous and local communities and rights of indigenous and local communities”, thus decoupling traditional knowledge from conservation.

⁴² COP dec. V/16, UN Doc. UNEP/CBD/COP/5/23 (2000), para. 16: recognition that the preservation of traditional knowledge depends upon the preservation of cultural identity and “the material base that sustains” indigenous peoples. COP dec. VI/10, UNEP/CBD/COP/6/20 (2002), preamble: the COP refers to the need to protect traditional knowledge in accordance with the rights of indigenous peoples. COP dec. VII/16, para. 16: link between land and traditional knowledge.

⁴³ COP dec. VII/16, para. 21 of Elements of a Plan of Action. See also, the Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity (hereinafter Tkarihwaí:ri Code of Ethical Conduct), COP Dec. X/42, UN Doc. UNEP/CBD/COP/DEC/X/42 (29 October 2010), which recognises that access to land and natural resources and the possibility to practice their traditions on those land are central elements in the preservation of traditional knowledge (preamble; para. 17 annex code). The Code also recognises the multifaceted nature of traditional knowledge that is linked to particular “spatial, cultural spiritual and temporal qualities” (preamble). Furthermore, the Code specifically highlights that traditional knowledge “should be respected” because of its cultural value and its role in promoting pluralism (para. 12 annex code).

⁴⁴ COP dec. VII/28, PoWPA, Programme Element 1, para. 1.1.7: it is conservation (through the establishment of protected areas) that should benefit traditional knowledge. Akwé:Kon guidelines, para. 28, highlight the link between customary use of biodiversity and the preservation of traditional knowledge. However, the guidelines provide a definition of traditional knowledge that coincides with Article 8(j) (para. 6(h)). See also, COP dec. XII/12, Part B, Annex, Plan of Action on Customary Sustainable Use of Biological Diversity, paras. 6(g) and 9.

All these elements underlie the recognition that traditional knowledge is broader than the notion provided in Article 8(j) CBD. Similar results could be achieved if the locution lifestyles that are relevant to the objectives of the CBD were interpreted in a systemic way to take into account indigenous rights as protected in human rights law. In light of the principle of self-determination, traditional knowledge must be protected in a way that preserves indigenous peoples' distinctiveness by CBD State Parties. In this sense, the contribution to conservation and sustainable use can be seen as the positive formulation of the fact that traditional knowledge cannot be protected within the CBD if it endangers the objectives of this convention.

The same considerations hold true for the interpretation of Article 10(c) of the CBD, which creates an obligation to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”.⁴⁵ According to some authors, this provision helps to define traditional knowledge within the scope of the CBD, since the creation of traditional knowledge is closely related to the customary use of natural resources.⁴⁶

While the locutions used in Articles 8(j) and 10(c) do not necessarily endanger the protection of traditional knowledge since they are only intended to define the scope of the CBD, residual concerns relate to the importance that traditional knowledge may play outside conservation. Beyond prescribing the protection of traditional knowledge, according to Article 8(j) CBD Parties shall promote the application of traditional knowledge and encourage the sharing of the benefits deriving from such a utilisation. In both cases, therefore, traditional knowledge could be used for purposes that go beyond conservation, namely when CBD Parties access genetic resources pursuant to Article 15 of the Convention. According to this provision, access is bound by “environmentally sound uses”. At the same time, access is de facto often performed by State and non-State users with the aim of commercialising the results of research and development activities conducted on the genetic resources of third countries.

In this sense, Article 8(j) suffers from many deficiencies. First, it fails to explicitly link the application of traditional knowledge to the ABS provisions of Article 15. This omission makes the connection between access to genetic resources and access to traditional knowledge obscure and subject to different regulatory regimes and guarantees.

Second, Article 8(j) requires with an equally obscure formulation that traditional knowledge is applied with the approval and involvement of indigenous and local communities. The main ambiguity in this sense lies in the failure to specify whether

⁴⁵ See COP dec. X/43, UN Doc. UNEP/CBD/COP/DEC/X/43 (29 October 2010), para. 8, which included analysis on Art. 10(c) CBD in the Programme of Work on Art. 8(j) CBD.

⁴⁶ The 1994 CBD guide highlights the link between Article 8(j) and Article 10(c) since customary use is at the origin of traditional knowledge and practices. See Glowka and *al.* 1994, at 60.

there is a difference between the two requirements and, if so, under which circumstances approval or involvement should be met.

A related interpretative puzzle is the question of whether or not traditional knowledge that is applied within the scope of Article 8(j) but is not relevant for conservation shall be accessed with the approval and involvement of indigenous peoples and shall be subject to benefit-sharing. This issue can be resolved by observing that the locution that qualifies traditional knowledge in relation to conservation, is only referred to the first part of Article 8(j) prescribing active protection in such a case. Therefore, the approval and involvement of indigenous and local communities are required as necessary conditions independently both from the purpose of utilisation and from the nature of traditional knowledge concerned.

Third, Article 8(j) does not consider the requirements of approval and involvement with respect to the circumstance that indigenous peoples own the genetic resources accessed by third-party users. While this is probably due to the late emergence of indigenous land and resource rights, this omission creates a normative gap that can hardly be filled via interpretative techniques.

Finally, Article 8(j) only establishes the rather weak obligation to encourage the sharing of the benefits arising from the utilisation of traditional knowledge. The weakness of this obligation is mainly linked to its indeterminacy, especially if compared with the parallel obligation under Article 15(7) of the CBD for States to put in place a national legal framework with the aim to share the benefits deriving from the utilisation of genetic resources with States providing those resources. In contrast, benefit-sharing with indigenous peoples does not require the translation of the obligation of ends posited by Article 8(j) of the CBD into national laws. This indeterminacy about the means required to fulfil the obligation “to encourage” have created uncertainties about implementation, thus the weakness of this obligation.⁴⁷ This formulation,⁴⁸ together with the objective difficulties with conceiving a well-functioning mechanism of benefit-sharing, has led to the failure of CBD Parties to implement this provision.

The rest of this subsection addresses more in detail the first two issues highlighted above with a view to understanding to what extent COP decisions and the Nagoya Protocol have contributed to clarify the unresolved interpretative problems and deficiencies

⁴⁷ As argued in Chapter 1, section 3, the indeterminacy of its content does not diminish the binding nature of the obligation to encourage benefit-sharing under Art. 8(j) CBD. Moreover, the same obligation “to encourage” contained in the Nagoya Protocol with reference to Art. 9 and Art. 20 has been interpreted as implying a “best-endeavor obligation for all Parties to support”, which means that although States are not obliged to enact a national legislative framework, they are required to provide the right incentives. Furthermore, they may incur in international responsibility if they put in place disincentives or obstacles to the activities that must be encouraged. See Morgera, Tsioumani and Buck 2014, at 160 and 238 (quotation above).

⁴⁸ Combined with the highly qualified language of the entire provision: “as far as possible”, “as appropriate”, and “subject to national legislation”. See Chapter 1, section 3.

of the CBD. The failure to incorporate consent requirements into the protection of indigenous-owned genetic resources is explored in section 2.2, while the interpretative gaps concerning benefit-sharing are addressed in section 2.3.

2.1.1. *The link between Article 8(j) CBD and ABS*

As said, Article 8(j) of the CBD frames the protection of traditional knowledge within the context of in-situ conservation. Thus, the link with the ABS regime is not explicit in the Convention. However, a contextual appraisal of the CBD would suggest a joint reading of Article 8(j) with Article 15 in light of the treaty's objectives and scope of application.

Ensuring the “fair and equitable sharing of the benefits arising out of the utilization of genetic resources” is one of the three objectives of the CBD.⁴⁹ Article 15(7) articulates this objective with an obligation to put in place legislative measures that endeavour to obtain benefit-sharing in relation inter alia to “the results of research and development”. Research and development over genetic resources, however, are a matter not only of inter-State interaction. Several other actors may contribute to this undertaking, including indigenous peoples whose traditional knowledge is utilised to uncover the properties and potential use of genetic resources.⁵⁰ The relevance of indigenous peoples is reflected in Article 8(j) and this element corroborates the argument that the CBD regime on ABS must be read in light of the indigenous-related provisions of the Convention. Furthermore, Articles 8(j) and 15 CBD are two of the few provisions within the Convention's text articulating the objective of benefit-sharing.⁵¹

In line with this reasoning, the Working Group on Article 8(j) and the CBD COP have similarly embraced an interpretation according to which the provisions protecting traditional knowledge within the CBD are closely linked to the issue of ABS.⁵² This is particularly evident in the decision of the COP VII/19 conferring the mandate to the Working Group on Article 8(j) together with the Working Group on access and benefit-sharing to elaborate the text of an international regime on ABS.⁵³ The work of these bodies has resulted in the adoption of the Nagoya Protocol. Before looking into the text of this

⁴⁹ Art. 3 CBD.

⁵⁰ See Morgera, Tsioumani and Buck 2014, at 38-39. These authors argue that the link between Art. 8(j) and Art. 15 CBD is *praeter legem*.

⁵¹ A reference to inter-State benefit-sharing is also contained in Art. 16(4), 19, and 20(2).

⁵² Morgera, Tsioumani and Buck 2014, at 38. See Report of the Fifth Meeting of the Ad Hoc Open-Ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/9/7 (13 November 2007), paras. 81 ff. See also, Report of the Sixth Meeting of the Ad Hoc Open-Ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/10/2 (21 November 2009), Annex II, para. 3(i).

⁵³ COP dec. VII/19, UN Doc. UNEP/CBD/COP/DEC/VII/19 (13 April 2004). See at 4: the Preamble recognises that, in negotiating a regime on ABS, Art. 8(j) is to be taken into account. The same decision makes also reference to the work carried out by the Working Group on Article 8(j). Finally, the two Working Groups were to negotiate the agreement on ABS with the participation inter alia of indigenous and local communities.

agreement, it is interesting to note that, in defining the scope of the future international agreement, the COP has identified two main clusters, namely access to genetic resources and related benefit-sharing, as well as “[t]raditional knowledge, innovations and practices in accordance with Article 8(j)”.⁵⁴

The Nagoya Protocol remedies to the disconnection between the protection of traditional knowledge and the rules on access to genetic resources.⁵⁵ According to Article 5, benefits deriving from the utilization of genetic resources are not only a matter of inter-State concern. Article 5(1) creates a strong connection between access to genetic resources as disciplined by Article 15 of the CBD and the complementary regime of the Protocol on benefit-sharing. In this sense, this provision indirectly confirms the link between ABS within the Convention and the protection of traditional knowledge. In this respect, Article 5(5) of the Protocol creates the obligation for State Parties to adopt “legislative, administrative and policy measures” that aim to realise the fair and equitable sharing of the benefits deriving from the utilisation of “traditional knowledge associated with genetic resources”. Letting aside for a while issues concerning the meaning of this locution⁵⁶ and the fact that this obligation is heavily qualified,⁵⁷ the link between traditional knowledge and ABS is explicitly recognised and can be considered a step forward.

The link between traditional knowledge and ABS is not only acknowledged as far as benefit-sharing is concerned.⁵⁸ Article 7 of the Protocol also establishes that State Parties must adopt

measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

Notwithstanding the qualified nature of this provision,⁵⁹ the Protocol creates an obligation to regulate procedural guarantees when accessing traditional knowledge. Two elements are necessary, namely prior and informed consent or approval and involvement, which is examined in the next section, and MATs, which are contractual agreements that are concluded between providers and users for the first time extended to the relationship

⁵⁴ COP dec. VII/19, at 6.

⁵⁵ The CBD Secretariat has described the mandate of the Working Group on ABS as aiming to implement both Art. 15 and Art. 8(j) of the CBD. See the introduction to the text of the Protocol edited by the Secretariat, available at <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last accessed October 2016).

⁵⁶ See section 2.1.3 in this chapter.

⁵⁷ See section 2.3 in this chapter.

⁵⁸ Morgera, Tsioumani and Buck 2014, at 39. According to these authors, the link is represented by the obligation to ensure benefit-sharing.

⁵⁹ See “as appropriate” and “with the aim of”. See *infra*.

between the State utilising traditional knowledge and indigenous and local communities. The link between traditional knowledge and ABS is therefore reinforced by procedural guarantees. Both consent and MATs, in addition, have more than a procedural nature but for the purposes of this analysis constitute a further recognition that traditional knowledge has officially entered the realm of ABS.⁶⁰

Finally, the definition of utilization of genetic resources in Article 2 of the Protocol includes research and development activities that, as argued above, may imply the use of traditional knowledge. In this sense, a clearer definition of research and development within the CBD regime would be desirable and could help to dissipate any further doubt.

2.1.2. Consent, approval and involvement

Article 8(j) foresees the qualified obligation for States to promote the application of traditional knowledge “with the approval and involvement” of indigenous and local communities. While approval and involvement seem to be necessary conditions to guarantee the utilisation of traditional knowledge,⁶¹ how these conditions are realised and whether they are interchangeable is less clear.

In order to understand what approval and involvement imply within the CBD, it is useful to define what application of traditional knowledge means. The CBD gives some examples in Articles 17(2) and 18(4), which respectively promote the exchange of information between Parties, including traditional knowledge, and the cooperation regarding the use of traditional technologies. The comprehensive nature of traditional knowledge, the use of the adjective “wider” in Article 8(j), and a comprehensive reading of the CBD in light of the whole of its provisions support the view that every kind of application, be it or not aimed to conservation, must be subject to the approval and involvement of indigenous and local communities.

It remains to be seen what approval and involvement imply and whether they are alternative conditions. In line with the ordinary meaning of the word, approval evokes the notion of consent. On the other hand, involvement is the weakest form of participation in a decision since it requires neither necessarily consultation on a specific matter, nor that indigenous representatives must be involved in decision-making processes concerning the utilisation of their traditional knowledge. The concurrent use of two seemingly contradictory requirements in the text of Article 8(j) leads to difficulties with implementation of this provision since two opposite interpretations are possible. It can be argued that the two requirements should be used in different circumstances. This interpretation would be in line with the fact that Article 8(j) is subordinated to national legislation, and thus different degrees of participation could be required by

⁶⁰ On MATs as a tool for reconciling indigenous rights with ABS provisions within the Protocol, see section 2.4 in this chapter.

⁶¹ See section 2.1 in this chapter.

national systems. At the same time, Anaya argues that approval and involvement are not alternative requirements and must be read in light of the right to free, prior and informed consent as recognised in international human rights law.⁶² According to this interpretation, therefore, approval and involvement are a form of free, prior informed consent that is subject to the same requirements.⁶³

The question, therefore, becomes whether the margin of appreciation of States that seems to be granted under Article 8(j) of the CBD in the implementation of participatory standards is legitimate under current international law. The answer to this question requires both an analysis of how the CBD COP has interpreted this provision and the interpretative support of any relevant rules of international law pursuant to Article 31(3) (c) of the VCLT.

CBD COP decisions, however, are not decisive for understanding the conditions under which either approval or involvement are required because they have failed to define what approval and involvement imply. In contrast, the term participation has also been used without clarifying its peculiarities with respect to the expressions used in the Convention.⁶⁴ Furthermore, latest COP decisions have introduced an additional level of complexity since they speak of “prior informed consent or approval and involvement”.⁶⁵

⁶² Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/67/301 (13 August 2012), para. 92. A similar argument is made by Savaresi, ‘The International Human Rights Law Implications of the Nagoya Protocol’ 2013, at 70, concerning the requirement of prior informed consent or approval and involvement in the Nagoya Protocol.

⁶³ See Chapter 2, section 3.5. These requirements are to engage in good faith consultation with the lawful representatives of indigenous peoples every time a decision affects indigenous groups directly with the aim to reach an agreement with them. In addition, this consultation must be done at the very early stages of decision-making. Furthermore, consent is to be obtained under certain circumstances.

⁶⁴ See e.g. COP dec. XI(14), UN Doc. UNEP/CBD/COP/DEC/XI/14 (5 December 2012) , Part F, para. 10(a): the participation of indigenous peoples is demanded when customary practices are included into national biodiversity strategies.

⁶⁵ COP dec. XII/12, para. 5: “Recognizing that indigenous and local communities are the holders of their traditional knowledge, innovations and practices, access to their traditional knowledge, innovations and practices should be subject to their prior informed consent or approval and involvement”; importance of “full and effective participation” of indigenous peoples in the development of policies about sustainable use. See also, Tkarihwaí:ri Code of Ethical Conduct, para. 11 of the annex: “Any activities/interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups, should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities. Such consent or approval should not be coerced, forced or manipulated”; para. 30: “This principle recognizes the crucial importance of indigenous and local communities fully and effectively participating in activities/interactions related to biological diversity and conservation that may impact on them, and of respecting their decision-making processes and time frames for such decision-making. Ethical conduct should acknowledge that there are some legitimate circumstances for indigenous and local communities to restrict access to their traditional knowledge”. An isolated interpretation is that provided in the Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising out of Their Utilization, COP dec. VI/24 (2002), Annex, (hereinafter Bonn guidelines) (para. 31) that seem to distinguish between the prior informed consent, which is to be obtained from indigenous and local communities, and approval and involvement from holders of traditional knowledge. The problems with this formulation are multiple, ranging from the fact that it is not clear who holders of traditional

In the CBD practice, therefore, the alternative is not between approval and involvement but between the legal requirement of prior and informed consent and the seemingly contradictory combination of approval and involvement. In addition to this lack of clarification provided by COP decisions, it is not clear which alternative refers to which situation.

Some decisions eliminate the ambiguity between two or more alternatives and foresee consent as the only viable option. These examples, however, are limited and coexist with other decisions where ambiguity persists. The Addis Ababa guidelines on sustainable use require that the approval of the holders of traditional knowledge utilised in the adaptive management of biodiversity must be obtained.⁶⁶ In the context of impact assessment for projects that are planned on indigenous territories, the Akwé:Kon guidelines require that prior informed consent is obtained when traditional knowledge is used.⁶⁷

The very notion of prior informed consent is not clear in the context of the CBD. This is partially due to the uncertainties also existing in the realm of international human rights law about whether consent should only be sought or must be obtained.⁶⁸ COP decisions do not explicitly deal with those issues. However, the Report adopted in 2009 by the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources, convened in the context of the CBD, has reconstructed the notion of prior informed consent in light of the international body of indigenous rights.⁶⁹ The report is only one of the possible legal interpretations, although authoritative. The document, however, is interesting because it relies on both international practice, intended as the position crystallised in international instruments, and national practice to conclude that there is “a progressive trend towards international law mandating a requirement for the prior informed consent of indigenous peoples and local communities for traditional knowledge associated with genetic resources”.⁷⁰ Interestingly, the report also refers to the concurrent practice of “commercial users to seek prior informed consent from indigenous

knowledge other than indigenous and local communities are, to the fact that the ambiguity of approval and involvement is not resolved. This formulation is also used in Art. 6 and 7 of the Nagoya Protocol. See *infra* in this section.

⁶⁶ Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (hereinafter Addis Ababa guidelines or principles), COP. Dec. XII/12, Operational guidelines to practical principle 4, at 12.

⁶⁷ Akwé:Kon guidelines, para. 60.

⁶⁸ See Chapter 2, section 3.5. This section argues that, although free, prior and informed consent cannot be considered as a veto power, it must be obtained under particular circumstances, i.e., in case of large scale projects that have an impact on the enjoyment of indigenous core rights.

⁶⁹ See Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, Question 6. In para. 67, the report identifies the international human rights instruments that are relevant for identifying the notion of free, prior and informed consent under current international law: Universal Declaration of Human Rights, ICCPR and ICESCR, ILO Convention 169, ITPGRFA, Bonn guidelines, UNDRIP, and CERD.

⁷⁰ UNEP/CBD/WG-ABS/8/2, para. 68.

peoples and local communities as a matter of best practice”.⁷¹ Furthermore, the report argues for an evolutionary interpretation of the CBD in accordance with new standards of international law.⁷² The Groups of experts, therefore, proposes systemic arguments that are similar to those put forward in Chapter 2 of this dissertation.⁷³

Some COP decisions timidly point to the fact that the conditions under which the utilisation of traditional knowledge should be performed under the CBD depend on the indigenous rights at stake. The Akwé:Kon guidelines, for instance, refers to the respect for the rights of indigenous and local communities to their traditional knowledge.⁷⁴ Therefore, some CBD practice has relied on the incorporation of indigenous rights into the Convention. When it comes to access to traditional knowledge, this means that there is a spectrum of participatory rights ranging from consultation to consent, where free, prior and informed consent is to be obtained when States’ or third actors’ activities may compromise the cultural distinctiveness of indigenous peoples.⁷⁵

Indigenous rights, however, are not the only elements to be taken into account under the CBD. The Bonn guidelines, although referring to the framework of indigenous rights, subordinate rights to “national access policies and domestic laws”.⁷⁶ In light of the current framework of indigenous rights, the subordination of international standards to national law seems unjustified. In contrast, the manoeuvring regulatory space of States can be exercised by tailoring participatory processes to the impacts that the utilisation of traditional knowledge is expected to produce. This means at a minimum that indigenous peoples must always be informed when and for which purposes their traditional knowledge is used.

The requirement of information is mandatory even when it is particularly difficult to implement for States, for instance when the content of traditional knowledge is already in the public domain or when it is stored in archives. In such cases, for States not

⁷¹ UNEP/CBD/WG-ABS/8/2. Other references to the role of private businesses in COP decisions can be found: COP dec. IX/26, UN Doc. UNEP/CBD/COP/DEC/IX/26 (9 October 2008), Preamble; Akwé:Kon guidelines, at 3; Addis Ababa guidelines, at 3 and Practice principles 1 and 3; Tkarihwaïè:ri Code of Ethical Conduct, para. 3; COP dec. XI/7, UN Doc. UNEP/CBD/COP/DEC/XI/7 (5 December 2012), paras. 4(e), (c), and (f); COP dec. X/21, UN Doc. UNEP/CBD/COP/DEC/X/21 (29 October 2010), para. 2(a), (b), (g), and (k).

⁷² UNEP/CBD/WG-ABS/8/2, para. 69: “The Convention on Biological Diversity entered into force in 1993. The understanding of the Convention can evolve over time. The interpretation of the Convention by the Conference of the Parties through its decisions must be guided by the developments in international law and processes particularly with regard to prior informed consent. Within the discussions on Article 8(j) in the Working Group on the subject, and the current negotiations of the International Regime, the need for the knowledge holder’s prior informed consent has been recognized in relation to traditional knowledge associated with genetic resources.”

⁷³ The Group, however, does not explicitly discuss the nature of the relevant rules invoked.

⁷⁴ Akwé:Kon guidelines, para. 60. These rights may be established via indigenous customary laws or through intellectual property rights.

⁷⁵ See Chapter 2, section 3.5.

⁷⁶ Bonn guidelines, para. 31.

to breach human rights provisions on indigenous participatory rights, one possibility is that they put in place a national normative framework requiring that subjects operating under their jurisdiction are obliged to provide information to and engage in consultation with indigenous peoples when traditional knowledge is in the public domain.⁷⁷ Whereas engaging with indigenous peoples is mandatory also because it is functional to benefit-sharing, consent is not necessarily required.⁷⁸

The requirement of information is also a precondition for utilising traditional knowledge, in case the latter is not readily available. In such circumstances, States and private parties must in any case cooperate and consult with indigenous peoples to obtain that knowledge. If application of such knowledge threatens to disrupt indigenous cultural practices, consent must be obtained. Under any circumstances, it is unacceptable that private parties appropriate indigenous knowledge with patents since traditional knowledge is by its nature not transferrable.⁷⁹

Concerning the implementation of consent requirements, the Working Group on Article 8(j) has recently recommended the adoption of some guidelines to steer the work of national legislators.⁸⁰ These guidelines have been submitted to COP 13 for adoption by CBD Parties in 2016 and represent voluntary standards. There are, however, at least two interesting elements. First, indigenous representatives have contributed to the drafting process of these guidelines.⁸¹ Within the CBD COP, the participation of indigenous representatives to the COP decision-making is not exceptional when it comes

⁷⁷ The Expert group on Article 10 called for informing discussions on traditional knowledge in the public domain with reference to the debates taking place in the context WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC). See Report of the Expert Group Meeting on Article 10 of the Nagoya Protocol on Access and Benefit-Sharing, UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/4 (3 February 2016), para. 32. The WIPO IGC committee has not agreed upon the notion of traditional knowledge under the public domain as yet. See WIPO IGC, Report of the 29th session, Doc. WIPO/GRTKF/IC/29/8 (30 May 2016). The WIPO IGC, however, has adopted a problematic notion of public domain, i.e., knowledge that is not protected by patents and may be accessed by everyone without authorization and for free. See WIPO IGC, Glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions, Doc. WIPO/GRTKF/IC/30/INF/7 (3 March 2016), at 34.

⁷⁸ On this point, see also, sections 2.2 and 2.3 in this chapter.

⁷⁹ Indeed, it is possible that indigenous groups decide to commodify their knowledge and transfer it to third parties. In such cases, however, this commodification must be decided freely by indigenous peoples. The assessment of to what extent consent can be deemed free is a very complex one, for reasons that are not specifically analysed in this dissertation, including the rightful identification of indigenous representatives, and the extent to which these can lawfully represent their communities.

⁸⁰ Draft Voluntary Guidelines for the Development of Mechanisms, Legislation or Other Appropriate Initiatives to Ensure the [Free,] Prior Informed Consent or [Approval and Involvement] of Indigenous Peoples and Local Communities for Accessing their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits Arising from the Use of Their Knowledge, Innovations and Practices Relevant for the Conservation and Sustainable Use of Biological Diversity, and for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge, UN Doc. UNEP/CBD/WG8J/9/L.5 (7 November 2015) (hereinafter Draft voluntary guidelines 2015), Annex.

⁸¹ See Elisa Morgera, 'Towards International Guidelines on Prior Informed Consent and Fair and Equitable Benefit-Sharing from the Use of Traditional Knowledge' [2015] <http://www.benelexblog.law.ed.ac.uk/2015/12/09/towards> (last accessed October 2016).

to matters that touch upon interests or rights of indigenous peoples. This decision-making process confirms the fact that the dialogue between States and indigenous peoples is a methodology that goes beyond the drafting of the UN Declaration on indigenous rights.

The second element of interest is constituted by the fact that the locution “approval and involvement” is one of the points that will be subject to further negotiation during COP 13.⁸² This means that the definition of participatory requirements within the CBD is still contentious in the practice of its State Parties and that the locution approval and involvement is a particularly unclear compromise solution. As argued above, however, this compromise solution does not stand in a legal void and must be interpreted in light of relevant human rights.

Furthermore, the draft COP decision contains the first bracketed reference to the human rights standard of free, prior informed consent in CBD history.⁸³ Therefore, it is also possible that CBD Parties would solve interpretative uncertainties about approval and involvement by anchoring this paradigm to an express reference to a human rights standard. Whether or not the formulation free, prior and informed consent will be retained eventually, CBD Parties should have a greater incentive to agree to a clear formulation of participatory rights that is adapted to CBD circumstances rather than simply incorporating human rights standards. In other words, CBD Parties have the chance to clarify how the standard of prior and informed consent applies in concrete in the context of the CBD. In this sense, they might do so also by specifying which shade of participation is needed in which circumstances.⁸⁴

The Nagoya Protocol, although introducing an obligation to take legislative measures to ensure the participation of indigenous and local communities when traditional knowledge is accessed, still articulates participation in terms of “prior and informed consent or approval and involvement”.⁸⁵ However, two novelties are worth highlighting.

First, the Protocol explicitly recognises the rights of indigenous peoples over traditional knowledge and it does so in a legal pluralistic fashion. Preambular paragraph 24 of the Protocol recognises that “it is the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities”. Furthermore, Article 12(1) prescribes that the obligations of the Protocol related to traditional knowledge must be implemented taking

⁸² Ibid.

⁸³ The draft decision refers to [free,] prior and informed consent. In contrast, the Nagoya Protocol requires prior and informed consent under Art. 6 and 7.

⁸⁴ In such a hypothesis, CBD Parties could also decide to explicitly derogate from human rights standards requiring consent, thus proposing an interpretation of the CBD as *lex specialis* with respect to human rights. On the nature and function of *lex specialis* norms, see the Introduction of this dissertation, section 5.

⁸⁵ Art. 7 Nagoya Protocol.

into consideration *inter alia* indigenous customary laws.⁸⁶ In this light, the locution “in accordance with domestic law” included in Article 7 of the Protocol can be interpreted as requiring from State Parties a certain degree of flexibility in adapting participatory standards to national contexts and is very different from the qualification “subject to national law” included in Article 8(j) CBD.⁸⁷ National circumstances might also include diversified customary laws of indigenous peoples. On the other hand, this interpretation does not solve the issue of the different scope of application of the Nagoya Protocol with respect to the CBD, which is addressed in the next section.

Second, the Nagoya Protocol adds to the requirement of “prior informed consent or approval and involvement” the establishment of MATs. The importance of this contractual instrument cannot be downplayed since it points to the fact that users (States and private parties) must negotiate with indigenous peoples at the same level. Another important novelty that is institutionalised in the Protocol is the establishment of community protocols on the part of indigenous peoples.⁸⁸ The nature and value of these instruments are further discussed in section 2.4.

2.1.3. *The notion of traditional knowledge associated with genetic resources*

A further conundrum when it comes to traditional knowledge within the CBD legal regime is the different formulation used in the Nagoya Protocol to define the scope of the latter instrument.⁸⁹ Although the Protocol introduces the formula “traditional knowledge associated with genetic resources”, it fails to define it.⁹⁰ The use of this new formula, therefore, triggers the question of whether the scope of application of the CBD coincides with that of the Nagoya Protocol when it comes to traditional knowledge. In other words, it is doubtful whether the Nagoya Protocol and its novelties can really help

⁸⁶ On the negotiations of this provision, see Kabir Bavikatte and Daniel F. Robinson, ‘Towards a People’s History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing’ (2011) 7/1 LEAD Journal 37, at 46.

⁸⁷ See Gurdial Singh Nijar, ‘The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries’ [2011] https://www.southcentre.int/wp-content/uploads/2013/08/Ev_130201_GNjar1.pdf (last accessed October 2016), at 36: “The Protocol advances the CBD provisions on TK. However, these provisions are made subject to national law. It should be clarified that this is to allow countries to reflect the diversity of the ways in which TK is held and treated in different countries. A preamble to the Protocol recognizes ‘the unique circumstances where traditional knowledge associated with genetic resources is held in countries’. The qualifier should not be construed to thwart the rights of indigenous and local communities. Further, it should be clarified through COP/MOP decisions and national law, that nothing in the Protocol allows for access to publicly available TK or TK that is diffused and has no identifiable holders (and that is consequently held by the State) without PIC and MAT”.

⁸⁸ See Art. 12 Nagoya Protocol.

⁸⁹ Art. 3 Nagoya Protocol.

⁹⁰ See Morgera, Tsioumani and Buck 2014, at 63: “This gap is particularly noteworthy as no other international treaty has referred to this concept or more generally to ‘traditional knowledge associated with genetic resources’”.

to solve the interpretative difficulties linked to Article 8(j) of the CBD. Although the Protocol has *inter alia* been established to respond to these interpretative gaps, there are at least two difficulties preventing the perfect interoperability between the two instruments.

The first one is of a general character and concerns the difference in the contracting Parties of the two instruments. This problem, however, only requires an element of caution on the part of the interpreter who, whenever applying the Nagoya Protocol to a factual situation, must verify whether the States involved are Parties of the Protocol or not.⁹¹ If not, the only applicable instrument will be the CBD with the interpretative difficulties described above.

Indeed, the Nagoya Protocol may find application in bilateral relations between States that are party to it and States that are not. A relevant example is when a provider State establishes a legislative framework in pursuance of Articles 5, 6 and 7 of the Nagoya Protocol to regulate the sharing of the benefits with indigenous peoples and the exercise of prior and informed consent for the utilisation of genetic resources and traditional knowledge associated to them. In this case, even if the user State has not ratified the Nagoya Protocol, its provisions would apply to it via the laws of those State Parties that have implemented the Protocol nationally.⁹²

Furthermore, the Protocol may also play a fundamental role in interpreting the CBD provisions applicable in bilateral or multilateral cases in light of the relevant context or subsequent practice of the Parties concerned. Under Article 31(2)(b) of the VCLT, the Protocol could represent an “instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”. In this case, thus, it is up to the State Party to demonstrate that non-party States have accepted the Nagoya Protocol as an instrument related to the CBD. In light of Article 31(3)(a) of the VCLT, the Nagoya Protocol may also offer grounds for systemic interpretation.⁹³

The second difficulty is related to the unclear meaning of “traditional knowledge associated with genetic resources”. Some authors have argued that the notion of traditional knowledge contained in the Nagoya Protocol is much more circumscribed than that of

⁹¹ On this point, see the Introduction to this dissertation, sections 5-6, which argue that when States that are only party to the CBD interact with States that are also party to the Nagoya Protocol, the Protocol might be able to influence reciprocal obligations by means of a contextual interpretation of the obligations stemming from the CBD in light of the Protocol at least for those obligations that apply to the States that have ratified the Protocol. Since the latter are anyway obliged to implement the Protocol's obligations, this implementation might indirectly affect those States that, although not being party to the Protocol, interact with Parties.

⁹² Although a similar example can be imagined for the case when user States are party to the Protocol, it seems that the legislative framework enacted in this context may only have some influence to the extent it imposes some obligations on States' agents or private third parties that are subject to the jurisdiction of the State having ratified the Protocol.

⁹³ As recalled, Art. 31(3)(a) VCLT reads: “There shall be taken into account, together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.

the CBD since it is qualified.⁹⁴ Consequently, the scope of the two instruments would not perfectly coincide, thus leaving some interpretative gaps unresolved under the new regime. The remainder of this section argues that the expression “associated with genetic resources” may also be interpreted in broader terms in the absence of a contrary indication by the COP/MOP.

Some elements useful to the interpretation of the locution “associated with genetic resources” emerge from COP decisions. In the decision conferring the mandate to prepare an international Protocol on ABS cited above,⁹⁵ traditional knowledge is almost consistently referred to in relation with genetic resources. Indeed, the decision also acknowledges the risks of misappropriation of both genetic resources and traditional knowledge without further qualification. This element stands out also because it is contained in the terms of reference for the Working Group on ABS.⁹⁶ COP decision VIII/5 treats the issue of the adoption of an international regime on ABS in the context of a draft “plan of action for the retention of traditional knowledge...relevant for the conservation and sustainable use of biological diversity”.⁹⁷ This framing of the issue highlights an important overarching connection between unqualified traditional knowledge and ABS. At the same time, the decision suggests that the association with genetic resources could be a specific feature of the ABS regime, but it is not the only legal aspect which is relevant in the context of the CBD.⁹⁸ In other words, the protection of traditional knowledge per se seems an essential element of the CBD legal framework.

These considerations are confirmed when looking at the scope and objective of the Protocol in connection with the framework provided by the CBD. The text of the Protocol only refers to traditional knowledge associated with genetic resources.⁹⁹ The objective to ensure benefit-sharing must be read, as also specified by Article 1 of the Protocol, in connection with the conservation of biodiversity and the sustainable use of its components. As shown in section 2.1,¹⁰⁰ the CBD clearly links conservation to the traditional knowledge of indigenous and local communities.¹⁰¹ Both in the text of

⁹⁴ Morgera, Tsioumani and Buck 2014, at 40. In addition, if mutual supportiveness were to be intended as a general principle of international law as foreshadowed in Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?’ 2010, all CBD Parties could be expected to ratify the Nagoya Protocol since the latter brings more clarity to the relationship between indigenous rights and ABS. Furthermore, mutual supportiveness could inform future CBD practice in the form of CBD COP and COP/MOP decisions to guide implementation of the two treaties.

⁹⁵ COP dec. VII/19.

⁹⁶ COP dec. VII/19, Annex, at 10.

⁹⁷ COP dec. VIII/5, UN Doc. UNEP/CBD/COP/DEC/VIII/5 (15 June 2006), Part II C, at 4.

⁹⁸ See also COP dec. VIII/5, at 16, where the development of sui generis systems of protection relates to unqualified traditional knowledge.

⁹⁹ See in particular Art. 1 and 3 Nagoya Protocol concerning the objective and scope of the treaty.

¹⁰⁰ See also Chapter 4, section 1.

¹⁰¹ See in particular Art. 8(j) and 10(c) CBD.

the CBD and in the practice of the CBD COP, this knowledge is not qualified only in connection with genetic resources. In contrast, traditional knowledge is specifically considered for its contribution to conservation and the harmonious achievement of the three objectives of the CBD. In this sense, since ABS in the Nagoya Protocol should also contribute to realise the other objectives of the CBD, the scope of traditional knowledge in the Protocol must be intended to be as broad as that of the CBD. This broader understanding would imply that even when traditional knowledge is not utilised in connection with the utilisation of genetic resources, this situation would fall under the scope of the Protocol, thus ensuring that the requirement of benefit-sharing applies to the broader hypothesis of access.¹⁰²

In light of the above, the qualification of traditional knowledge in terms of its association with genetic resources in the Protocol may be due to the almost exclusive occurrence of this particular form of traditional knowledge in the ABS regime. In this context, traditional knowledge is valued in relation to the properties of genetic resources it may unveil. This is true both when this knowledge is used to promote the conservation of biodiversity, since it contains useful information on the management of nature, and when it facilitates the commercial development of genetic resources.¹⁰³

Overall, it seems that there are several aspects of traditional knowledge that are relevant in the context of the CBD. Although these aspects constitute a characterisation of traditional knowledge in the different legal areas of the CBD (i.e., conservation and ABS), unqualified traditional knowledge remains a general concern of the CBD regime. In other words, the notion of traditional knowledge associated with genetic resources must be interpreted broadly, including a broad spectrum of traditional knowledge, such as for instance healing practices that may be accessed for their potential to unveil the properties of certain medicinal plants.

¹⁰² On the differences between access and utilization, see next section.

¹⁰³ See Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, para. 13: “Although the traditional knowledge used for the final product may not match the body of traditional knowledge, traditional knowledge adds value to genetic resources by providing a massive increase of efficiency in identifying genetic resources with potential properties. Traditional knowledge can therefore be considered as an indicator of the potential properties of a genetic resource”; para. 15: “there is not always a relationship between the owners of genetic resources accessed and the holders of traditional knowledge”; para. 18: “Article 8(j) as a stand alone provision protects all traditional knowledge of indigenous and local communities...including traditional knowledge associated with genetic resources. Furthermore, associated traditional knowledge does not necessarily have to be associated with genetic resources, as it can also include the use of traditional knowledge associated with biological resources”. Although the report is only an expert document that has not been adopted by the CBD COP, it gives useful indications on the possible interpretations of the notion of traditional knowledge associated with genetic resources. Furthermore, the decision to form this group was agreed by the COP in decision IX/12 with the mandate expressly to “assist” the Working Group on ABS elaborating the Protocol. See COP dec. IX/12, UN Doc. UNEP/CBD/COP/DEC/IX/12 (9 October 2008), Annex II, Section C, para. 1. For information on the list of experts and the methods of their selection, see <https://www.cbd.int/doc/notifications/2009/ntf-2009-041-abs-tk-en.pdf> (last accessed 22 January 2016).

In any event, the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol (COP/MOP) should provide further guidance to clarify the scope of the Nagoya Protocol with respect to traditional knowledge. Indeed, the presence of multiple characterisations of traditional knowledge does not facilitate interpretation and, in practice, gives potentially room to differential treatment within the different regimes, whereas a greater level of consistency would certainly benefit implementation.

2.1.4. The definition of utilisation of traditional knowledge

Another term that the Nagoya Protocol fails to define is “utilisation of traditional knowledge”.¹⁰⁴ The lack of this definition is particularly problematic since utilisation is the precondition for triggering the obligation of benefit-sharing under the Protocol.¹⁰⁵ Furthermore, this gap stands out due to the evident imbalance in Article 2 of the Protocol, which by contrast defines the term “utilization of genetic resources”.

The lack of a general definition can be explained in terms of the particular nature of traditional knowledge. As already illustrated, traditional knowledge is the evolving expression of indigenous cultural practices and social organisation. In light of this, providing a common definition of which utilisation is relevant for the purposes of the Protocol would probably have excluded a significant range of cases. In this sense, the Protocol delegates the definition of utilisation to indigenous and local communities. Pursuant to Article 12(3), these groups must be supported by Parties to establish community protocols, minimum requirements, and model contractual clauses to secure the sharing of the benefits arising from the utilisation of traditional knowledge.

Most recently, the Working Group on Article 8(j) has elaborated a definition of utilisation that brings together concepts such as use and application but, at the same time, is very restrictive since it requires the creation or commercialisation of a traditional product.¹⁰⁶ Moreover, it is very unclear what a traditional product is. Therefore, current attempts to elaborate general definitions are largely unsuccessful in bringing about more legal certainty. This restrictive interpretation does not seem reasonable also in light of a contextual interpretation of the notion of utilisation based on the definition provided for the utilisation of genetic resources, which is centred upon research and development.¹⁰⁷ Whereas the latter can be intended as a synonymous for commercialisation, research also

¹⁰⁴ Morgera, Tsioumani and Buck 2014, at 63. For a study on the notion of utilization of both traditional knowledge and genetic resources, see the consultancy work carried out by Morgera and Geelhoed 2016.

¹⁰⁵ See Art. 3, Art. 5(5), and 12(2) Nagoya Protocol.

¹⁰⁶ See A Glossary of Relevant Key Terms and Concepts to Be Used within the Context of Article 8(j) and Related Provisions, UN Doc. UNEP/CBD/WG8J/9/2/Add.1 (24 September 2015), Annex, at 4.

¹⁰⁷ Art. 2(c) Nagoya Protocol: “‘Utilization of genetic resources’ means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology”.

includes non-commercial activities that are alternative to development.¹⁰⁸

Another question is whether the notion of utilisation can be meaningfully distinguished from access under the Nagoya Protocol. The seed of differentiation is already in the CBD, which creates an obligation of inter-State benefit-sharing only with regard to utilisation.¹⁰⁹ Indeed, this obligation is under the rubric of Article 15 CBD regulating access. Furthermore, access and utilisation are used in pair in other provisions of the CBD, so that the two terms cannot easily be distinguished apart from for the consequences they entail.

This approach is maintained in the Nagoya Protocol, where the obligation to enact national norms to regulate prior informed consent or approval and involvement is a precondition for access, while utilisation entails benefit-sharing. A further element for interpretation can be found in Article 6(1) of the Nagoya Protocol that, as explained in section 2.2, constitutes a relevant framework for the interpretation of Article 6(2) concerning the consent requirement following the utilisation of genetic resources held by indigenous peoples. The former provision links access and utilisation in a relationship that is at least temporal, meaning that access must precede utilisation. At the same time, it also reinforces the conviction that access without utilisation is not really meaningful in practical terms in the context of ABS. By way of analogy, and again due to the lack of definition of utilisation of traditional knowledge, it can be concluded that access to and utilisation of traditional knowledge are bound to one another when it comes to the international regime on ABS. The only relevant exception to that seems to be conceivable in terms of traditional knowledge that is shared among more than one communities, possibly in different State Parties. This situation may render a distinction between access and utilisation relevant in terms of the subjects entitled to receive a share of benefits and is explored in section 2.3.¹¹⁰ This section equally addresses the links between uncertainties deriving from the lack of a definition and other interpretative gaps concerning benefit-sharing with respect to traditional knowledge.

2.2. Access to genetic resources owned by indigenous peoples

The CBD does not contemplate the case in which genetic resources are owned by indigenous peoples. On the contrary, the only criterion for the attribution of prerogatives over genetic resources is the State's sovereignty over natural resources. Pursuant to this principle, enshrined in Article 15 CBD, the decision to provide access to genetic resources belongs exclusively to national governments. In accordance with that, State Parties may

¹⁰⁸ See Morgera and Geelhoed 2016, at 6-8 on the alternative nature of these activities, meaning that research for non-commercial purposes fall within the scope of the Protocol, irrespective of any commercial development of research activities.

¹⁰⁹ Art. 15(7) CBD.

¹¹⁰ In this discussion, Art. 5 is complemented by Art. 11, as shown in section 2.3 in this chapter.

subordinate access to their prior informed consent or decide otherwise, for instance by waiving their consent or establishing additional conditions.¹¹¹

The Nagoya Protocol profoundly innovates in the matter of access to genetic resources since it mandates Parties to adopt national measures aiming to guarantee the prior informed consent or approval and involvement of those indigenous peoples having established rights over genetic resources.¹¹² This provision is ground-breaking at least for it recognises the link between access to genetic resources and indigenous peoples in a binding provision.¹¹³

However, this obligation is conditioned upon three main qualifications that may limit its applicability in the future. Similarly to Article 8(j) of the CBD, national measures must be adopted “as appropriate” and “in accordance with national legislation”. Unlike Article 8(j), the expression “in accordance” is less restrictive than “subject to” since it does not evoke the possibility that international obligations may succumb against contrary national provisions.¹¹⁴ Also in light of these terminological differences, it seems that the qualifications on Article 6(2) of the Nagoya Protocol only give Parties discretion on the nature and content of the measures to be adopted nationally. Parties are in any event under the obligation to adopt such measures.¹¹⁵ The leeway of Parties on the measures to be adopted nationally is also confirmed by the expression “with the aim of ensuring” prior and informed consent.¹¹⁶ The borders within which States’ discretion can be lawfully exercised, however, are those traced by international human rights law, according to

¹¹¹ See Article 15(2) and (5) CBD.

¹¹² Article 6(2) Nagoya Protocol. As usually in the context of the CBD/Nagoya Protocol, the provision is applicable to genetic resources on which local communities have established rights. For the ambiguities on prior informed consent or approval and involvement see section 2.1.2. According to Art. 6(3)(f), criteria for obtaining consent or approval and involvement must be set up nationally. The boundaries of the different participatory requirements are, as already argued, determined by the relevant international standards on indigenous participation.

¹¹³ Morgera, Tsioumani and Buck 2014, at 124.

¹¹⁴ See Bavikatte and Robinson 2011, at 45. These authors explain that the elimination of the clause “subject to national legislation” endured heated negotiations. They also stress that the new formulation “in accordance with national law” has an important role to play, since it reaffirms the role of the State and its responsibility to protect without limiting the protection of indigenous rights to national standards. This evolution may also have repercussions on the interpretation of Article 8(j) CBD. In their words, “This [the clause “in accordance with national legislation”] would retain the facilitative role of the State in situations where Parties argued that communities within their jurisdiction needed State protection against exploitation. At the same time, it would affirm that the GTLE [Group of Legal Experts on Traditional Knowledge associated with Genetic Resources] interpretation of Article 8(j) that the rights of communities under the CBD are not dependent on the discretion of States”.

¹¹⁵ Morgera, Tsioumani and Buck 2014, at 125-126.

¹¹⁶ It is also up to national discretion to determine, in case there are established rights of indigenous peoples, whether only indigenous consent must be obtained or also the consent of the State where genetic resources are located. As already argued, pursuant to Art. 15 CBD and Art. 6(1) Nagoya Protocol, States can also waive their consent when access occurs. While when indigenous genetic resources are concerned, their consent/approval is always required and it is up to national legislation to determine whether the State’s consent is needed as well. In any event, users need to interact with national authorities to understand what are the legal requirements related to the genetic resources concerned.

which consultation is always needed when indigenous rights are affected and consent must be obtained when indigenous cultural integrity is threatened.¹¹⁷

The only circumstance that might exclude the obligation to adopt national measures on indigenous prior informed consent is the lack of “established rights” on genetic resources. Through this expression, Parties have avoided both to recognise indigenous rights directly in the Protocol and to directly connect ownership over genetic resources with indigenous land and resource rights.¹¹⁸ This gap, however, does not justify inaction when it comes to adopting a national legal framework on access to genetic resources and affected indigenous peoples. Article 6(2) only conditions the policy objective of ensuring prior informed consent to the existence of established rights. Therefore, although policy objectives may be different in case there are no established rights, a legal framework must in any event be adopted. Furthermore, the issue of whether rights over genetic resources are established must be read in terms of the relevant international human rights framework that, as shown in Chapter 2 of this dissertation, recognise rights to land and natural resources to indigenous peoples, based on possession, traditional use, and/or customary law.¹¹⁹

The main issue, thus, is to establish whether rights over natural resources automatically give rights over genetic resources. Some authors have claimed that ownership of genetic resources differs from property rights due to the different object of protection. In this sense, property over genetic resources would be more similar to intellectual rather than real property.¹²⁰ However, indigenous land and resources rights, although implying ownership, go beyond the distinction between real and intellectual property to embrace a system of collective entitlements to land having both material and spiritual implications. In this sense, excluding that ownership over genetic resources may derive from land and resource rights based on Western property categories would unduly restrict the notion of property, as already ascertained by human rights treaty bodies.¹²¹

¹¹⁷ See Chapter 2, sections 3.5 and 5.

¹¹⁸ Morgera, Tsioumani and Buck 2014, at 125.

¹¹⁹ See Brendan Tobin, ‘Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples’ Resource and Knowledge Rights’ (2013) 9/2 Law, Environment and Development Journal 142, at 148: “Drawing attention to human rights law, constitutional recognition of indigenous rights and to the customary laws and protocols of Indigenous peoples and local communities, may help prevent narrow interpretations of ambiguous terms”.

¹²⁰ See Morten Walløe Tvedt and Tomme Young, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD* (IUCN 2007), at 7: “The difference between genetic resources, as res, and other categories of natural resources makes it difficult to think about ownership of genetic resources in the same terms as ownership of natural resources”. See also, Nijar, ‘Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects’ 2010, at 465. According to the latter author, ownership of genetic resources is separated from ownership of biological resources and is often regulated through intellectual property rights. The property of genetic resources is also usually non-exclusive.

¹²¹ See e.g. *Awas Tingni* case, para. 149. See also, Statement by the Special Rapporteur on indigenous rights James Anaya, Indigenous peoples’ rights to genetic resources and traditional knowledge (4 February 2013), section 3: “this property right embraces all forms of natural resources customarily used

An additional argument supports the equivalence of natural resources and genetic resources in terms of the source of their entitlement. Article 15 of the CBD confers rights over genetic resources to States based on their sovereignty over natural resources. The analysis conducted in Chapter 2 has shown that indigenous rights to land and natural resources imply very extensive powers that limit the sovereignty of States over natural resources. In particular, indigenous rights over natural resources include all resources located in their traditional territories, except for subsoil resources.¹²² In this sense, entitlements of indigenous peoples over genetic resources may derive from indigenous substantive rights over natural resources, unless human rights treaty bodies reach different conclusions on this point.¹²³ Alternatively, States may either develop an international custom explicitly derogating from the general norm on the comprehensive scope of natural resources or adopt an international treaty constituting *lex specialis* on this point.

It might be argued that the CBD and the Nagoya Protocol already constitute *lex specialis* with respect to indigenous rights over land and resources since they reiterate the sovereignty of States over genetic resources while not explicitly attributing genetic resources to indigenous peoples. However, this argument downplays the fact that the Nagoya Protocol explicitly admits that indigenous peoples can both hold genetic resources and have established rights over genetic resources. While the former option is explored in section 2.3, the interpretation of the locution established rights must be addressed here.

Some authors have highlighted that this expression has been voluntarily left open in the negotiations of the Nagoya Protocol and thus neither recognises nor rejects indigenous rights over genetic resources.¹²⁴ However, if this locution were interpreted restrictively so as to limit ownership of genetic resources to the case that it has been attributed nationally, Article 6 would seriously undermine the implementation of indigenous rights to land and natural resources. Bioprospecting is a widespread phenomenon and research and development activities are usually carried out following physical access to natural

by indigenous peoples. Thus, indigenous peoples' property rights should also be understood to extend over the genetic resources they have traditionally used according to well defined patterns. In this regard the legal sources just mentioned do not distinguish between genetic resources and other natural resources. Furthermore, the UN Declaration on the Rights of Indigenous Peoples provides in article 31 that "[i]ndigenous peoples have the right to maintain, control...and develop their cultural heritage...including genetic resources". For a more detailed analysis, Chapter 2, section 3.1. In this sense, the notion of traditional territories elaborated by the Working Group on Article 8(j) is not in line with international human rights since it links land rights only to current use and occupation. See A Glossary of Relevant Key Terms and Concepts to Be Used within the Context of Article 8(j) and Related Provisions, UN Doc. UNEP/CBD/WG8J/9/2/Add.1, Annex, at 4.

¹²² See Chapter 2, section 3.2.

¹²³ This research did not encounter any case explicitly addressing the issue of genetic resources.

¹²⁴ See Bavikatte and Robinson 2011, at 43 and 46-47. This article shows that, whereas most States have opposed the explicit recognition of indigenous rights over genetic resources, the final formulation of Art. 6(2) is a compromise solution between the position of States and that of indigenous and local community. These authors label this technique as "strategic ambiguity", since it allows for different interpretations.

resources.¹²⁵ In this sense, considering the restrictions over natural resources not relevant for the purpose of applying human rights guarantees would leave indigenous peoples unprotected in a significant number of cases, thus contradicting the purpose of human rights treaties protecting indigenous rights.

Moreover, access to genetic resources is usually obtained through access to traditional lands and natural resources in order to extract the relevant genetic information.¹²⁶ Pursuant to international human rights law, when States restrict indigenous rights to land and natural resources, they must seek free, prior and informed consent independently from whether or not they have adopted any national frameworks on that. The customs of indigenous peoples and traditional use are the criteria identified under human rights law to establish land and resource rights.¹²⁷ Since genetic resources are in most cases traditionally used by indigenous peoples, these can therefore claim land and resource rights over those resources.¹²⁸ In light of this, it does not seem that the locution established rights can be interpreted restrictively to mean that indigenous peoples hold rights over genetic resources only when national laws so establish.¹²⁹ In this sense, establishing property rights over natural resources is a crucial step for the regulation of access to genetic resources in accordance with international human rights.¹³⁰

Furthermore, as argued in Chapter 2, indigenous rights must be read in light of the principle of self-determination.¹³¹ In order to preserve indigenous groups as distinct, even though restrictions to indigenous rights over the genetic resources they have traditionally used are in principle possible, these must go through a participatory process that include effective consultation, impact assessment, and benefit-sharing.¹³² Therefore, a broad

¹²⁵ See section 1 in this chapter.

¹²⁶ See Jeffery 2002, at 783: “The question of ownership of genes is something that for the most part remains undetermined, however issues relating to accessing genetic resources from a specimen located in situ is by and large determined from the ownership and physical control over the specimen containing the genetic resource”.

¹²⁷ See Chapter 2, section 3.1.

¹²⁸ Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 219. On the criterion of traditional use, see also Chapter 2, section 3.1.

¹²⁹ The same conclusion is embraced by Morgera, Tsioumani and Buck 2014, at 108-109 and 125.

¹³⁰ In light of this reasoning, arguing that derivatives are included in the scope of application of the Nagoya Protocol would be more in line with international human rights law because it would allow to take into account indigenous land and resource rights in a broader range of situations. For a discussion on the issue of derivatives within the Protocol, see Bram De Jonge, ‘Towards a Fair and Equitable ABS Regime: Is Nagoya Leading Us in the Right Direction?’ (2013) 9 *Law, Environment and Development Journal* 243; Joseph 2010, at 81 and 91; Evanson C. Kamau and Gerd Winter, ‘An Introduction to the International ABS Regime and a Comment on Its Transposition by the EU’ (2013) 9 *Law, Environment and Development Journal* 108, at 113-114. According to the latter authors, the inclusion of derivatives into the scope of the Protocol derives from the fact that research and development activities, which may generate derivatives, are part of the utilization of genetic resources pursuant to Art. 2 of the Nagoya Protocol.

¹³¹ See Chapter 2, section 5.

¹³² See Chapter 2, section 3.5.

interpretation of the locution established rights is more in line with international human rights law, since it prescribes that States must enact legislation aiming to ensure that prior informed consent (or approval and involvement) is obtained when indigenous genetic resources are concerned.

There are cases when the ownership of natural resources might not solve the issue of which access requirements apply under the CBD regime. For instance, the identity between natural and genetic resources may be challenged when the same sequences of genes are present in different members of the same species, in resources to be found on different territories or even countries, or in gene banks that predate the entry into force of the CBD and/or the Nagoya Protocol.¹³³ In those cases, there might be a difference between ownership of genetic resources and ownership of natural resources and many scenarios are, therefore, possible. If genetic resources are found outside indigenous territories, the way of life of the indigenous groups concerned is not disturbed and their lands and resources are not affected. Therefore, given the non-remedial nature of the Nagoya regime so far,¹³⁴ indigenous peoples must not be involved in access and subsequent development of the genetic resources at stake, although the same can be found in the resources situated on their lands. Different problems may arise in case the genetic resources found outside indigenous territories are developed through indigenous traditional knowledge, in which case the safeguards described in the previous section apply.

Furthermore, there might be cases where the same genetic resources accessed with the prior informed consent of some indigenous peoples are present either on the territories of different indigenous communities within the same State or on the territories of transboundary communities that share the same attachment to the land and resources involved.¹³⁵

Concerning the first case, although neither the CBD nor the Nagoya Protocol explicitly contemplate this occurrence,¹³⁶ the formulation of Article 6(2) is broad enough to include every community that has established rights on the genetic resources to be accessed.¹³⁷ At the same time, the CBD legal framework attaches great importance to the role of national regulations to operationalise access requirements. This is true also in the framework of the Nagoya Protocol, pursuant to which national authorities play the

¹³³ See Bhatti and others 2009, at 18, refer to the “paradox of ‘ownership’ of genetic resources”. It should be clarified that there is no a priori contradiction between the rights of indigenous peoples and the storage of genetic materials in gene banks. On this point, see an interesting paper on how this issue is framed in New Zealand: Angela Beaton and others, ‘Engaging Maori in Biobanking and Genetic Research: Legal, Ethical, and Policy Challenges’ (2015) 6 *The International Indigenous Policy Journal* 1.

¹³⁴ See *infra*, section 2.3 in this chapter.

¹³⁵ See Morgera, Tsioumani and Buck 2014, at 129. See also *infra* section 2.4 in this chapter.

¹³⁶ Art. 10 Nagoya Protocol deals with transboundary situation but delegates States to establish a multilateral system of benefit-sharing. On this, see section 2.3.1 in this chapter.

¹³⁷ See also Art. 1 Nagoya Protocol.

fundamental role both to adopt a legal framework on access and to guide users throughout national requirements on access and benefit-sharing.¹³⁸ In this sense, national authorities may be required to inform users—when they are aware of—about potentially competing rights over the same genetic resources by other communities.

Concerning the case where genetic resources are found in more than one State, Article 11 of the Nagoya Protocol obliges Parties to “endeavour to cooperate, as appropriate, with the involvement of indigenous and local communities concerned, where applicable, with a view to implementing this Protocol”. While the result of cooperation is not determined and the undertaking of cooperation is in itself heavily qualified, the only way to make the provisions on access effective in case of transboundary genetic resources is by means of cooperation. The framework provided by in the Nagoya Protocol is in any event very different from the CBD, which instead limits its jurisdictional scope to the national boundaries of State Parties or to activities carried out under the jurisdiction of one Party.¹³⁹ Therefore, the regime established under the Nagoya Protocol is more protective of indigenous rights also because it enlarges its scope of application to include all rights that are established over the genetic resources concerned with access, notwithstanding national boundaries.

From the perspective of users, however, those subjects who access genetic resources—be they States, private companies, or research institutions—must take into account the established rights on those resources.¹⁴⁰ As already argued, these rights are established in pursuance of international human rights standards, according to which ownership over genetic resources depends on ownership over natural resources. In this sense, users of genetic resources must ascertain all rights that are established on the resources they want to access. If the communities involved are based in different countries, in principle, users must verify corresponding national standards on access.¹⁴¹ The implementation of this obligation would indeed be facilitated if provider States established both cooperation agreements among them and clear national rules to guide users through the procedure of consent-seeking when more than one communities are involved in a transnational context. By virtue of Article 15 of the Nagoya Protocol, user States must enact national legislation on consent requirements that is in line with the requirements adopted nationally by provider countries.¹⁴² Therefore, a certain degree of cooperation is already enshrined in the Protocol.

¹³⁸ See Art. 6(3) and Art. 13 Nagoya Protocol.

¹³⁹ See Art. 4 CBD.

¹⁴⁰ Only States have an obligation to adopt national provisions to ensure consent, while private actors only need to conform to national standards. States might be liable for failing to prevent violations of indigenous rights by private actors, according to their responsibility to protect as delineated in the Ruggie’s report. See Chapter 2, note 261.

¹⁴¹ This argument is discussed again in section 2.3 in this chapter.

¹⁴² On Art. 15, see also *infra* section 2.4.1 in this chapter.

Concerning the case when genetic resources are stored in gene banks, the CBD and the Protocol's requirements only apply to access that has been carried out in accordance with their legal regimes¹⁴³ and do not contain remedial provisions in case access has occurred outside their international frameworks. Moreover, this problem is intertwined with the lack of certainty about the applicability of the CBD regime to situations that have occurred before the entry into force of the CBD and the Nagoya Protocol. In the absence of specific COP decisions, it is doubtful that the safeguards of the Nagoya Protocol apply to the situation where genetic resources have been extracted from natural resources owned by indigenous peoples without their consent and included in gene banks before the entry into force of the Protocol.¹⁴⁴ However, this situation might in principle be challenged before human rights treaty bodies due to the violation of land, resource, and cultural rights, if it can be demonstrated that the genetic resources at stake were extracted from natural resources located on indigenous territories or from lands that indigenous peoples have unduly be dispossessed of. It is therefore important that indigenous peoples are aware of this possibility outside the CBD legal framework. This situation is also an example of a case when it is not possible to reconcile human rights standards with the CBD legal regimes, due to limitations in the current legal framework. Most recently, the Expert group meeting on Article 10 of the Nagoya Protocol¹⁴⁵ has highlighted that States might adopt legislative and other incentives to discourage access to ex situ collections not revealing their sources. If this were the case, the implementation of indigenous rights would be facilitated. Another possible way to integrate indigenous rights into access of genetic resources through gene banks would be for the latter to disclose the providers and require the proof of prior informed consent and MAT from users before granting access.¹⁴⁶

The last point that deserves clarification is whether access pursuant to Article 6 of

¹⁴³ Art. 15(3) CBD, which is also referred to in Art. 3 of the Nagoya Protocol establishing the scope of application of the new regime on ABS.

¹⁴⁴ On the issue of the doubts concerning the temporal scope of the Nagoya Protocol, see Morgera, Tsioumani and Buck 2014, at 73-76; Julinda Beqiraj, 'L'equa condivisione dei benefici derivanti dall'utilizzo delle risorse genetiche secondo il Protocollo di Nagoya: fra obblighi degli Stati e diritti delle comunità indigene' (2011) 5 *Diritti Umani e Diritto Internazionale* 188, at 190. See *infra*, section 2.4.2.

¹⁴⁵ Art. 10 Nagoya Protocol deals with the establishment of a multilateral global system of benefit-sharing and is analysed *infra* in section 2.3.1.

¹⁴⁶ Report of the Expert Group Meeting on Article 10 of the Nagoya Protocol on Access and Benefit-Sharing, UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/4, para. 23: "They noted that many collections had developed codes of conduct and best practices related to ABS. It was also pointed out that measures to implement the Protocol had been and could be developed in such a way as to discourage the use of genetic resources for which information on PIC and mutually agreed terms (MAT) was unavailable. It was highlighted that, in many situations where ex situ collections were unable to identify the source of their material, users were unwilling to use this material because it did not provide legal certainty and collections were unwilling to share it. One expert stated that some ex situ collections, in the spirit of the Nagoya Protocol, redirected users to the provider country to negotiate PIC and MAT, and some experts noted that that might provide a useful example". At para. 24, experts also highlighted "the paucity of information with respect to the ABS practices of ex situ collections".

the Nagoya Protocol coincides with utilisation.¹⁴⁷ This doubt is legitimate since neither the CBD nor the Nagoya Protocol include a definition of access.¹⁴⁸ Furthermore, neither of them has explicitly clarified the relationship between access and utilisation. This issue is important to understand which safeguards apply to which factual situation.

Article 6(1) of the Nagoya Protocol implies that access logically precedes utilisation when it states that “*access to genetic resources for their utilization shall be subject to the prior informed consent...*”.¹⁴⁹ Apart from the temporal sequence of access and utilisation, a closer analysis of the Protocol reveals that different legal consequences are attached to access and utilisation. As shown, prior informed consent or approval and involvement of indigenous peoples are required whenever their genetic resources are accessed. When access does not materially occur, there might be situations in which genetic resources are utilised for research and development purposes. A clear example is when genetic resources are included in gene banks or when they are accessed from communities based in one State but transboundary communities are excluded from consent procedures. In such cases, even when land and resource rights are not materially affected, there are obligations under the Protocol to grant benefit-sharing due to utilisation.¹⁵⁰ The separation of the two moments may appear artificial since it is the result of a compromise between the need to guarantee legal certainty, which would have followed from the clarification that access and utilisation coincide, and the will to separate access and utilisation in order to disconnect the obligation to grant benefit-sharing from the ambiguous formulation of established rights.¹⁵¹ However, as the next section shows, this separation between access and utilisation may enhance the possibility that, when access provisions are violated, indigenous rights are partially protected through benefit-sharing.

2.3. Benefit-sharing

The CBD is innovative in that it regulates the inter-State component of benefit-sharing¹⁵²

¹⁴⁷ Concerning interpretative difficulties related to the expression “consent, approval and involvement”, see *supra* section 2.1.2.

¹⁴⁸ Art. 2(c) of the Nagoya Protocol contains however a definition of utilization of genetic resources, which includes research and development activities.

¹⁴⁹ Emphasis added. The same is true for Art. 15 CBD, which requires consent for access and benefit-sharing following utilisation.

¹⁵⁰ See Morgera, Tsioumani and Buck 2014, at 121. On the conditions of benefit-sharing, see *ibid.*, at 102 and *infra* section 2.3.

¹⁵¹ See *ibid.*, at 119. Note that while Art. 5(5) does not submit benefit-sharing to the ambiguous condition that traditional knowledge is held by indigenous peoples under national law, Art. 5(2) speaks of “genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources”. Concerning how this ambiguity can be solved by incorporating indigenous rights, see *supra* in this section and in section 2.1.

¹⁵² Art. 15 CBD. See Bram De Jonge, ‘What is Fair and Equitable Benefit-Sharing?’ (2011) 24 *Journal of Agricultural and Environmental Ethics* 127, at 129, for the rationale behind inter-State benefit-sharing in the CBD. This author argues that the imbalance in the allocation of genetic resources between

but it also recognises an intra-State dimension following the application of traditional knowledge.¹⁵³ The limitations of Article 8(j) of the CBD are at this stage very well known. First, the heavily qualified language has cast a negative light on the prescriptive nature of this provision and contributed to a generalised lack of implementation. Second, the lack of an obligation to adopt national measures has aggravated the marginalisation of this provision by CBD Parties. Third, benefit-sharing is only referred to the utilisation of traditional knowledge, which creates a normative gap for the situations in which access to indigenous natural resources occurs in the framework of the CBD.

Notwithstanding these limitations, the intra-State dimension of benefit-sharing is recognised in a number of COP decisions, which clarify the functions of benefit-sharing and underlie its importance in the framework of the CBD.¹⁵⁴ First, as emerges from the text of the Convention, benefit-sharing is premised upon the utilisation of traditional knowledge. In other words, the sharing of the benefits with indigenous and local communities is conceived as a reward that is triggered every time traditional knowledge is utilised within the scope of application of the CBD. Indeed, the practice of the CBD COP decisions points to an application of benefit-sharing that goes beyond in situ conservation to embrace every situation in which traditional knowledge is utilised.¹⁵⁵ This practice confirms again the interpretation according to which, even outside the scope of application of the Nagoya Protocol, Article 8(j) of the CBD is closely related to the access provisions of the Convention.

Second, the utilisation of traditional knowledge is instrumental both for the conservation and sustainable use of biodiversity.¹⁵⁶ In this sense, the sharing of the benefits is conceived as a reward for the contribution that indigenous and local communities indirectly pay to the attainment of CBD objectives.¹⁵⁷ Benefit-sharing helps to preserve

developing and developed countries, the need for the latter to compensate this imbalance, and the preoccupation of the former for access conditions that do not threaten their sovereign rights over natural resources constitute the main reasons why the inter-State benefit-sharing mechanism has been originally conceived. See also, Jeffery 2002, at 749.

¹⁵³ Art. 8(j) CBD. See Morgera and Tsioumani, ‘The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods’ 2010, who have coined the categories of “inter-State” and “State-to-community” benefit-sharing.

¹⁵⁴ For an analysis of the functions of benefit-sharing within the CBD, see *ibid.* See also De Jonge, ‘What is Fair and Equitable Benefit-Sharing?’ 2011, who identifies six notions of benefit-sharing linked to six different philosophical conceptions of justice. A similar argument is made by Elisa Morgera, ‘Justice, Equity and Benefit-sharing under the Nagoya Protocol to the Convention on Biological Diversity’ (2015) 24 *Italian Yearbook of International Law* 113.

¹⁵⁵ See Programme of Work on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity, COP dec. V/16 (2000) (hereinafter Programme of work on Article 8(j)), task 7; COP dec. XI/14, Part E, para. 12; COP dec. XII/12, Part D, para. 2(ii): launch of the project to elaborate guidelines on benefit-sharing deriving from the use of traditional knowledge.

¹⁵⁶ This interpretation emerges when reading Art. 8(j) CBD in connection with Art. 10(c) CBD.

¹⁵⁷ Bonn guidelines, para. 48: “those who have contributed to resource management”. In the context of forestry management, see COP dec. VI/22 (2002), para. 13. The same point is made by Smagadi 2006, at 280: “Indigenous communities in particular need to be compensated for their efforts to conserve

the knowledge and practices of indigenous peoples that facilitate conservation.¹⁵⁸ In this connection, benefit-sharing also represents an incentive for indigenous peoples both to maintain their sustainable traditional practices and to sustain their traditional ways of living in the future.¹⁵⁹ Notwithstanding this, benefit-sharing is not necessarily linked to traditional practices that directly favour conservation.¹⁶⁰

Third, the functions of benefit-sharing go beyond utilisation of traditional knowledge, to embrace decisions which deal with the establishment of protected areas.¹⁶¹ In this context, benefit-sharing is conceived mainly as compensation to remedy the negative impacts that the creation of protected areas may produce on indigenous peoples.¹⁶² The Addis Ababa guidelines also frame benefit-sharing in the field of conservation as a reward when indigenous peoples are involved in the sustainable management of natural resources.¹⁶³

While the intra-State component of benefit-sharing is still underdeveloped in the decisions of the COP concerning access to genetic resources when these belong to indigenous peoples, the Nagoya Protocol has completely revolutionized this framework. Article 5(2) of the Protocol has created an obligation for Parties to adopt a national framework that aims to ensure the fair and equitable sharing of the benefits deriving from “the utilization of genetic resources that are held by indigenous and local communities”. This provision is a noteworthy innovation in the CBD regime as it explicitly associates benefit-sharing with access to indigenous genetic resources and foresees an obligation for States to set up a national regulatory framework.¹⁶⁴ The same obligation is established

and sustainably manage genetic resources, and for sharing with the rest of humanity valuable medicinal knowledge developed by them over time”.

¹⁵⁸ Morgera and Tsioumani, ‘The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods’ 2010, at 156.

¹⁵⁹ See Report of Working Group on Article 8(j), UN Doc. UNEP/CBD/COP/10/2, Annex I, section 6/3, para. 12. The report establishes “Elements of a code of ethical conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities”, which contains voluntary standards that have not been decided in the context of the CBD COP. These standards confirm the function of benefit-sharing both as a reward for indigenous peoples that preserve biodiversity and traditional knowledge and as a contribution for sustaining indigenous livelihoods. See also, COP dec. V/6 (2000), Annex B, Operational Guidance 2, para. 9; Addis Ababa guidelines, Operational Guidelines to Principle 4; COP dec. VII/11, UN Doc. UNEP/CBD/COP/DEC/VII/11 (13 April 2004), Annex I, Annotations to Rationale to Principle 4, at 12. See also, Jeffery 2002, at 752: benefit-sharing as an incentive for communities to conserve biodiversity.

¹⁶⁰ See section 2.1.3 in this chapter.

¹⁶¹ Consider that the granting of benefit-sharing does not substitute other requirements, such as consent. On this, see section 2.1.2 in this chapter.

¹⁶² See COP dec. VI/22, Annex, Programme element 2, Goal 2, activities (b) and (i); PoWPA, para. 2.1.1; Akwé:Kon guidelines, paras. 46, 56; Addis Ababa guidelines, Operational guidance to principle 12.

¹⁶³ Addis Ababa guidelines, Operational guidance to principle 12. See also COP dec. X/31, UN Doc. UNEP/CBD/COP/DEC/X/31 (29 October 2010), paras. 30(b) and 31(a)-(b); COP dec. V/6, UN Doc. UNEP/CBD/COP/5/23 (2000), Annex, Part C, para. 9.

¹⁶⁴ A similar requirement was previously included in the Programme of work on Article 8(j), Element 4

in Article 5(5) of the Protocol in relation to the utilization of traditional knowledge associated with genetic resources.

Compared to Article 8(j) of the CBD, the binding nature of these obligations to adopt national measures is not questionable.¹⁶⁵ Thus, beyond expanding the scope of application of benefit-sharing provisions, the Nagoya Protocol also creates legal certainty concerning the nature of the actions to be taken by State Parties.

Most importantly, Article 5(2) of the Protocol even goes beyond the human rights framework concerning benefit-sharing.¹⁶⁶ As seen in the *Saramaka* case before the Inter-American Court,¹⁶⁷ the sharing of the benefits deriving from activities carried out on indigenous territories is one of the means to ensure that the restrictions on indigenous land rights are legitimate. Therefore, in international human rights law benefit-sharing is premised upon the compression of land rights. In contrast, benefit-sharing in the Nagoya Protocol does not require any restrictions to indigenous established rights but is triggered when genetic resources are utilised, even in the absence of constraints.¹⁶⁸ At the same time, it can be argued that when indigenous peoples share their genetic resources with non-indigenous actors, they automatically give up their exclusive use of resources. In this sense, the rationale behind benefit-sharing would still be linked to an original compression of rights.¹⁶⁹

Another innovative factor relates to the fact that the obligation contained in Article 5(2) and (5) is part of the same provision regulating benefit-sharing obligations in relation to provider States.¹⁷⁰ Therefore, the Protocol explicitly clarifies that indigenous rights are relevant when it comes to the regime of access and they are not limited to conservation policies, as the CBD could unduly suggest. Furthermore, the sharing of benefits with indigenous peoples must be fair and equitable like the case when benefits are shared with States.¹⁷¹ In addition, similarly to the regime of inter-State benefit-sharing, the

(Tasks 7 and 8). However, this only regarded benefits arising from the utilisation of traditional knowledge. Moreover, it is the very first time that this obligation is spelled out in a binding treaty. See Morgera, Tsioumani and Buck 2014, at 103: “The groundbreaking nature of Article 5(2) should be highlighted from the outset: for the first time in international environmental law, a treaty creates an obligation for States to establish measures to reward indigenous and local communities responsible for the stewardship of genetic resources and their resulting contribution to scientific progress for the benefit of the global community”.

¹⁶⁵ This is also true when it comes to the formulation of inter-State benefit-sharing. See *ibid.*, at 100, note 7, 101, and 103.

¹⁶⁶ See Elisa Morgera, ‘Le Protocole de Nagoya et les droits environnementaux’ (2016) 1 *Liason Énergie-Francophonie* 42, at 43, where the author concludes that this type of benefit-sharing is a form of contribution to capacity-building.

¹⁶⁷ See Chapter 1, section 2.2.1.

¹⁶⁸ This argument is made by Morgera, Tsioumani and Buck 2014, at 105.

¹⁶⁹ For a similar point, see Terry Williams and Preston Hardison, ‘Culture, Law, Risk and Governance: Contexts of Traditional Knowledge in Climate Change Adaptation’ (2013) 120 *Climatic Change* 531.

¹⁷⁰ See Beqiraj 2011, at 190.

¹⁷¹ Art. 8(j) CBD only refers to the “equitable” sharing of benefits, while the Bonn guidelines already

distribution of benefits in case indigenous peoples are involved must be agreed upon with them in MATs. The convergence between inter- and intra-State benefit-sharing, therefore, supports the conclusion that these are qualitatively similar and based on similar premises, that is extensive powers on the management of natural resources—be they related to national sovereignty or self-determination.

In spite of the relevant building blocks established in Article 5 of the Protocol, there are several problematic aspects. One of the most difficult interpretative problems is that Article 5(2) is heavily qualified since it subordinates the sharing of the benefits to the existence of “established rights” of indigenous peoples over genetic resources.¹⁷² Benefit-sharing is to be guaranteed to indigenous peoples only when these hold genetic resources pursuant to their established rights.

The ambiguity of this formulation lies not only in the qualifier “established”, which introduces a confusing category of rights. Indeed, what established rights are, compared to unqualified rights, is hardly clear. The main problem is that established rights are judged against national parameters,¹⁷³ thus de facto subordinating the conditions for obtaining a fair and equitable share of the benefits to national law. Therefore, there is a risk that if this provision is interpreted restrictively, it would end up producing a stalemate in implementation comparable to that of Article 8(j) of the CBD.¹⁷⁴

This restrictive interpretation, however, is not a valid option because it would run counter the main aim of the Protocol, which is to establish a clear legal framework to ensure “the fair and equitable sharing of the benefits arising from the utilization of genetic resources...taking into account all rights over those resources”.¹⁷⁵ On the contrary, the following interpretation allows for a reading of the Protocol that is more in line with the relevant international human rights framework, while leaving some manoeuvring space to State Parties.¹⁷⁶

utilised the formulation “fair and equitable” in relation to benefits for “all those who have been identified as having contributed to the resource management, scientific and/or commercial process”, including indigenous and local communities (para. 48). On the interpretation of the formula “fair and equitable”, see Morgera, ‘Towards International Guidelines on Prior Informed Consent and Fair and Equitable Benefit-Sharing from the Use of Traditional Knowledge’ 2015, at 15.

¹⁷² The formulations “as appropriate” and “with the aim of ensuring” seem to weaken the obligation to provide benefit-sharing. However, they can be interpreted, in line with the Protocol’s aim and object, simply as conferring State Parties discretion as to the choice of appropriate national measures. Concerning “as appropriate”, Morgera, Tsioumani and Buck 2014, at 110, consider that this qualifier equally “leaves discretion as to the type of implementing measures that Parties have to adopt, but not as to whether to adopt measures at all or not”. Similar problems are discussed in section 2.2 in this chapter.

¹⁷³ Excerpts of Art. 5(2) Nagoya Protocol help to understand the point: “benefits arising from the utilization of genetic resources that are held by indigenous and local communities, *in accordance with domestic legislation regarding the established rights* of these indigenous and local communities over these genetic resources” (emphasis added).

¹⁷⁴ As recalled, Art. 8(j) CBD used a similar formulation: “subject to national law”.

¹⁷⁵ Art. 1 Nagoya Protocol.

¹⁷⁶ On the systemic interpretation of the locution “established rights”, see also section 2.2 in this chapter.

The obligation to adopt national measures contained in Article 5(2) implies that States must previously identify those indigenous peoples that would potentially be entitled to benefit-sharing in case of utilisation of their genetic resources.¹⁷⁷ This identification must be conducted in good faith, which means *inter alia* that States should proceed in consultation with the communities concerned, while taking into account that the definition of indigenous groups is a matter of self-identification pursuant to international human rights law.¹⁷⁸ Moreover, when adopting a national framework on benefit-sharing, States should again consult with indigenous peoples since this national framework is liable to directly affect indigenous communities. Once again, this duty of consultation derives from the international human rights framework explored in Chapter 2.¹⁷⁹

Along similar lines, there could be an interpretation of the formula “established rights” that is protective of indigenous rights, namely when these are identified at the national level in consultation with indigenous peoples. In this sense, when recognising indigenous rights, States can simply rely on indigenous customary law, thus *de facto* delegating the definition of these rights and their boundaries to indigenous legal traditions.¹⁸⁰ Although this delegation is a possibility, it is not necessarily the most protective option. A further guarantee could be assured, for instance, if national legal systems explicitly recognise the legal value of customary law. This result could be obtained by including a general clause explicitly enshrining indigenous customary law into the Constitution.

Another possibility could be that States engage into a thorough process of consultation with indigenous peoples in order to single out the content of indigenous customary rights. The positivisation of indigenous customary law has a number of problematic aspects since it is a very costly process¹⁸¹ and risks crystallising something that by its very nature is very fluid. Furthermore, it gives precedence to the positive paradigm as the only means to incorporate customary law into national legal systems. However, positivisation also implies greater legal certainty and reduce the risk that indigenous rights remain dead letter. In this sense, a good way to proceed to reflect the changing nature of customary law could be to foresee flexibility clauses in order to ensure that positive law evolves with customary law. Furthermore, positivisation must not go so far as to reverse the teleological interpretation according to which the body of indigenous rights serves the purpose of protecting indigenous groups as distinct peoples.¹⁸²

The question remains of what happens if rights are unduly compressed when States incorporate indigenous rights into national legislation. In such an occurrence, the

¹⁷⁷ Morgera, Tsioumani and Buck 2014, at 103.

¹⁷⁸ See Introduction, section 3.1.

¹⁷⁹ See also, Morgera, Tsioumani and Buck 2014, at 106.

¹⁸⁰ See *ibid.*, at 109.

¹⁸¹ Positivisation could be costly in terms of time, trust-building, and resources needed.

¹⁸² See Chapter 2.

international human rights framework represents a limit that cannot be overcome unless conditions to lawfully compress indigenous rights are present.¹⁸³ Still, there is room for abuses since the consonance of national and international legal frameworks will be at first verified by States. Furthermore, remedies can only be activated on a case-by-case basis and bear costs that cannot be sustained by every indigenous community.¹⁸⁴

Even if all guarantees illustrated above were respected, another problem could be that the identification of land and resource rights may not be sufficient to ascertain the rights over genetic resources when these are held in gene banks.¹⁸⁵ In these cases, genetic resources could have been acquired before the entry into force of the Protocol. Plus, it could be extremely problematic to reconnect the extracted genetic resources to its rightful owner. For these reasons, national legal systems on benefit-sharing should also deal with these aspects that are not regulated in the Nagoya Protocol.¹⁸⁶

Article 5(5), which regulates benefit-sharing following the utilisation of traditional knowledge associated with genetic resources does not subordinate indigenous rights over this knowledge to national circumstances. This confirms the argument put forward at the beginning of this chapter¹⁸⁷ that traditional knowledge enjoys a special status within the Protocol, which is even more advanced than the current international human rights framework.¹⁸⁸

Interpretative problems as to the scope of application of Article 5(5) may indeed arise concerning traditional knowledge held by more than one community. This could be the case either when indigenous communities holding the same traditional knowledge reside in the same national territory or when these communities are scattered across the borders. Previous sections have argued that pursuant to international human rights law the provider's national authority has a duty to inform users on multiple ownership, if it possesses such information. Furthermore, users may have a duty to acquire information on all possible holders of traditional knowledge, depending on whether they are States, in which case they are bound by human rights law, or private users if national frameworks are in place in this respect.¹⁸⁹ Given the interpretative uncertainties about the equivalence between access and utilisation, it could also be that consent is required only from the community making its natural resources available for research on genetic properties.¹⁹⁰ At

¹⁸³ See Chapter 2, section 3. See also Preamble para. 27 Nagoya Protocol.

¹⁸⁴ Think of the costs to initiate national and subsequently international proceedings.

¹⁸⁵ See Morgera, Tsioumani and Buck 2014, at 107. See also, Jeffery 2002, at 758-760.

¹⁸⁶ See section 2.2 in this chapter, note 145, for a reference on the ongoing work of the Expert Group Meeting on Article 10.

¹⁸⁷ See section 2.1.

¹⁸⁸ See also, Morgera, Tsioumani and Buck 2014, at 111.

¹⁸⁹ As already underlined in Chapter 2 and in early sections of this chapter, States may incur in international responsibility for violating human rights if they fail to prevent the behaviour of private actors within their jurisdictions disrespecting human rights.

¹⁹⁰ See section 2.2 in this chapter.

the same time, other communities holding the same resources—whether transboundary or not—could be entitled to benefit-sharing in accordance with the objective of the Protocol. These issues fall into the scope of application of Article 10 of the Nagoya Protocol, which obliges Parties to “consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits”. The challenges of setting up such system are considered in the next subsection.

These cases also fall within the scope of Article 11(1) of the Nagoya Protocol, which prescribes cooperation among multiple Parties¹⁹¹ in which the same “genetic resources are found in situ” with the involvement of indigenous peoples when these resources are held by the latter.¹⁹² The involvement of indigenous peoples must be intended in a systemic light as implying effective participation in the form of free, prior and informed consent. This case is similar to what happens in purely internal situations where genetic resources are held by indigenous peoples. In this occurrence, States are obliged to enact provisions to ensure benefit-sharing with indigenous communities. In a similar way, when States engage in international cooperation for genetic resources that are found in more than one State, their obligation to grant a fair and equitable share of benefits to indigenous peoples is not superseded. Hence, in pursuance of human rights obligations, when States start bilateral or multilateral negotiations directly affecting the indigenous peoples located in their territories, they must also engage in effective consultation with them. The results of this consultation are not predetermined but the involvement of indigenous peoples must be effective with a view to influencing the negotiations with other States. Furthermore, these negotiations must aim to realise the objectives of the Protocol and thus cannot but realise the benefit-sharing obligations that States have vis-à-vis their indigenous groups.¹⁹³

Before proceeding with the analysis of the problems related to the establishment of a multilateral system of benefit-sharing, it is worth focusing on additional issues related to bilateral benefit-sharing. Other interpretative puzzles concern the pre-conditions of benefit-sharing, the regulation of its functioning through MATs, the nature of the benefits to be guaranteed, and the objectives and functions of benefit-sharing.

Concerning the conditions triggering the sharing of the benefits with indigenous and local communities, both Article 5(2) and Article 5(5) indicate the utilisation of

¹⁹¹ As argued by Morgera et al., Article 11 only contains a best-endeavour obligation to engage with other States. Efforts to engage in such cooperation must be in good faith. See Morgera, Tsioumani and Buck 2014, at 173. The same authors, at 175, have also made the point that it is unclear how to establish when States share the same genetic resources.

¹⁹² The locution “where applicable” must be referred here to the fact that the Nagoya Protocol distinguishes between situations where genetic resources are held by indigenous peoples and cases where indigenous peoples are not concerned by the use of these resources. Only in the former case, the involvement of indigenous peoples is required.

¹⁹³ See Morgera, Tsioumani and Buck 2014, at 175: “Challenges may arise, in this respect, when indigenous and local communities have rights over genetic resources in one/some, but not, all relevant States. Still, all concerned States will be expected to exert best endeavor efforts to effectively involve these communities in transboundary cooperation”.

respectively genetic resources and traditional knowledge as the starting requirement. As already mentioned, however, utilisation is not defined in the Protocol and doubts may arise as to whether this notion includes commercialisation. The question emerges especially if considering that Article 5(1) distinguishes between utilisation and “subsequent applications and commercialization” and the same formula is not used in Article 5(2) and (5).¹⁹⁴ Indeed, an interpretation excluding benefit-sharing in case of commercialisation would be illogical because it would leave out large parts of the practices that the Nagoya Protocol intends to regulate.¹⁹⁵

An additional question would be, instead, whether utilisation also includes non-commercial research into the scope of application of benefit-sharing. As highlighted by the Working Group on Article 8(j), the distinction between commercial and non-commercial uses of traditional knowledge “is not necessarily relevant” for indigenous and local communities since it anyway implies access.¹⁹⁶ The same reasoning can be extended to the utilisation of genetic resources. In this sense, the fact that the Protocol does not explicitly distinguish between commercial and non-commercial uses when it comes to intra-State benefit-sharing might be connected to the recognition that this distinction is misleading if the objective is to protect the rights of those communities over their knowledge and natural resources. On the contrary, several provisions of the Nagoya Protocol reinforce the argument that utilisation includes non-commercial research activities, including Article 8(a) creating an obligation for Parties to “promote research” also encompassing non-commercial purposes.¹⁹⁷

Regarding the concrete functioning of benefit-sharing, Article 5 indicates MATs as instruments to establish the conditions of the sharing. As anticipated, MATs are contracts of a private nature that are stipulated between users and providers.¹⁹⁸ Article 6(3)(g) of the

¹⁹⁴ Kamau and Winter 2013, at 113-114.

¹⁹⁵ Morgera, Tsioumani and Buck 2014, at 110. The authors claim that a restrictive interpretation would go against the purpose of the Nagoya Protocol.

¹⁹⁶ See Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, paras. 16 and 17. On the distinction between utilization and access, see *supra* section 2.2, at 29. Some developments for a broad interpretation of utilisation are also visible in the Draft voluntary guidelines 2015, UN doc. UNEP/CBD/WG8J/9/L.5, para. 23(e). These are voluntary guidelines that are intended to help States implement Article 8(j) CBD. In this respect, Morgera highlights that utilisation of traditional knowledge for non-commercial purposes may have a number of repercussions on indigenous peoples, including the misappropriation of their knowledge, the failure to reflect indigenous peoples’ values and worldviews in the final research results, the failure to involve indigenous peoples in actual research, and the threats to the preservation of traditional knowledge. See Elisa Morgera, ‘Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law’ (2015) 4 *Laws* 803at 822-825.

¹⁹⁷ On this point, see Morgera and Geelhoed 2016, at 7-8, who furthermore make reference to Art. 17 Nagoya Protocol, which includes in the monitoring of utilization “any stage of research”, and Art. 5(4) Nagoya Protocol and the Protocol’s Annex, which “identify non-monetary benefits” that are likely to “be generated through non commercial research only”. The authors also support their views with reference to the Protocol’s *travaux préparatoires*.

¹⁹⁸ On the private nature of these contracts, see Morgera, Tsioumani and Buck 2014, at 113, note 117.

Protocol obliges Parties to adopt national measures regulating the establishment of MATs in the context of access to genetic resources. Concerning the utilisation of traditional knowledge associated with genetic resources, Article 12(3)(b) creates a parallel obligation for Parties “to endeavour to support” the adoption by indigenous and local communities of “minimum requirements” for MATs. The Protocol therefore ensures more autonomy in the regulation of MATs when traditional knowledge is concerned. At the same time, since the conditions for establishing MATs directly affect indigenous peoples also when genetic resources are concerned, the creation of a national framework must be done by States, in pursuance of their human rights obligations, in consultation with indigenous peoples for the parts that are related to their rights.

In relation to MATs on traditional knowledge, Parties must also translate their obligation to ensure that access is done upon MATs into a national provision. Furthermore, in order to foster the protection of indigenous rights, Parties could also nationally establish an obligation for users to refer to the minimum conditions elaborated at the community level. Indeed, the establishment of minimum requirements is an additional guarantee for the enforcement of benefit-sharing under fair and equitable conditions, which is not present in the international human rights framework.

A limitation of the Protocol is that it has not set out minimum conditions for benefit-sharing, thus leaving a broad manoeuvring space to States and private parties when it comes to the realisation of fairness and equity.¹⁹⁹ Articles 19 and 20 delegate to State Parties individually to develop model contractual clauses and voluntary standards. Since these clauses are difficult to be relied upon before foreign tribunals and courts, the same articles also obliges the COP/MOP to “take stock” of national experiences.²⁰⁰ Most importantly, Article 18 creates an obligation for States to encourage MAT-parties to include provisions on the resolution of disputes in the MATs. Still, indications on other aspects of the content of MATs are lacking.

The lack of common standards is also due to the need to come up with internationally agreed standards, which are enforceable beyond national borders. Indeed, until this gap is filled, the international human rights framework and prior CBD practice represent a useful indicator for determining the minimum content of MATs. In this sense, it is useful to distinguish, as Morgera does, between fairness, intended in procedural terms, and equity, which underlies the substantive objective of ensuring justice through benefit-sharing.²⁰¹ In applying this notion to indigenous peoples, therefore, fairness

¹⁹⁹ See Morgera, ‘Towards International Guidelines on Prior Informed Consent and Fair and Equitable Benefit-Sharing from the Use of Traditional Knowledge’ 2015, at 19. See also, Morgera, Tsioumani and Buck 2014, at 114.

²⁰⁰ See Morgera, Tsioumani and Buck 2014, at 114: “it may be difficult for provider countries to rely on their domestic ABS frameworks in a foreign court”.

²⁰¹ See Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ 2016, at 381: “fairness supports stability within the legal system (predictable and clear procedures), whereas equity as substantive justice tends towards change (recognition or enhanced realization of rights,

would be related to ensuring that the participation of indigenous groups is appropriate in determining the benefits. In other words, involving the legitimate representatives of indigenous communities, in good faith and in culturally appropriate manners would realise fairness, together with considerations regarding the timeliness of negotiations and the provision of useful information. Equity would instead relate to the perception that the negotiated agreement is just and reflects the communities' needs and rights.

MATs represent a direct application of the spectrum of participation described in Chapter 2. Since MATs are contracts, they require the consent of both parties. In this sense, they can be intended as a special means to realize free, prior and informed consent in the context of benefit-sharing. In addition, MATs are suitable formats when users are both States and private parties. In the latter case, MATs can translate voluntary, non-binding international standards on respect for human rights into binding, bilateral obligations.²⁰²

Indeed, MATs can also be seen as a comprehensive process whereby the initial consent to utilisation is negotiated and the terms and conditions of benefit-sharing are further defined.²⁰³ From this perspective, procedural and substantive aspects are conflated since, as argued in Chapter 2, participatory rights do bear relevant substantive consequences in that they are instrumental for the realisation of substantive rights. Although equitable dealings about benefit-sharing are not easily typified, an abstract way to grapple with equity could be to reconnect it to the respect of substantive rights.²⁰⁴

The Bonn guidelines have laid out additional voluntary standards of a procedural nature, such as the need to conclude MATs in a written form.²⁰⁵ Given the oral nature of most of indigenous legal frameworks, it certainly is a huge undertaking to translate oral traditions concerning the life of the community into written standards aimed to regulate the relationship of the community with third actors. In this sense, capacity-building activities as well as actions aimed to support such undertakings are necessary, also in line with Article 12(3)(b), concerning traditional knowledge, and, more generally, Article 22 on capacity-building.²⁰⁶ Support, however, cannot be limited to the development of minimum requirements of MATs for the utilisation of traditional knowledge, but must

(re-)allocation of power over resources)".

²⁰² On international standards about business responsibility, see Morgera, *Corporate Accountability in International Environmental Law* 2009.

²⁰³ Morgera also highlights that in some cases an agreement on benefit-sharing can be a way to waive consent. See Morgera, 'Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law' 2015, at 824.

²⁰⁴ In this sense, see Bonn guidelines, para. 44(g): MATs should specify "[w]hether the knowledge, innovations and practices of indigenous and local communities have been respected, preserved and maintained, and whether the customary use of biological resources in accordance with traditional practices has been protected and encouraged".

²⁰⁵ Bonn guidelines, para. 42(g).

²⁰⁶ Capacity-building is explored in section 2.4 in this chapter.

extend to the concrete negotiations of MATs, also in relation to genetic resources given the interrelated nature of the two.

While the content of MATs is not typified, the Protocol gives an indication on the nature of the benefits that can be agreed upon by including in its Annex a non-exhaustive list of both monetary and non-monetary benefits.²⁰⁷ Article 5(4) also clarifies that benefits can be of both monetary and non-monetary nature. Therefore, the Protocol offers guidance on one of the most important aspects of establishing MATs, which is the concrete identification of the benefits that can be shared.²⁰⁸

As observed by Morgera, Tsioumani and Buck, the inclusion of non-monetary benefits serves the purpose of making benefits more readily available, independently from the realisation of monetary gains that can be delayed due to the intrinsically long process of product development and commercialisation.²⁰⁹ Furthermore, non-monetary benefits can also be more appropriate to suit the needs and traditions of certain indigenous and local communities. Users should be aware of the cultural component when negotiating over the types of benefits to be shared with communities. In light of international human rights, benefits that disrupt indigenous identities may not be in line with indigenous rights and the principle of self-determination, if the indigenous peoples concerned are not fully aware of the consequences that certain types of benefits may produce on their traditional lifestyles. Indeed, some of the benefits listed in the Protocol's Annex can potentially contribute to the strengthening of indigenous identity and self-consciousness, although most of them are difficult to measure, for instance social recognition.²¹⁰ In this sense, it is not clear whether these benefits need to be negotiated or are assumed to automatically arise from cooperation and the conclusion of MATs when accessing genetic resources and traditional knowledge.

Finally, the Protocol gives a hint of the objectives of benefit-sharing. Article 9 obliges Parties to “encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components”. This provision certainly applies to the case where the genetic resources utilised belong to indigenous peoples. However, it is not clear whether this obligation can also be referred to the benefits arising from the utilisation of traditional

²⁰⁷ The list is borrowed from the Bonn guidelines, para. 46 and Appendix II.

²⁰⁸ See Morgera, Tsioumani and Buck 2014, at 115. See also, at 116: “while the Annex identifies types of benefits to be shared, it is silent on possible links between specific benefit types and specific ABS transactions”.

²⁰⁹ *Ibid.*, at 115.

²¹⁰ Annex, para. 2(d) (“Collaboration, cooperation and contribution in education and training”), (h) (“Institutional capacity-building”), (i) (“Human and material resources to strengthen the capacities for the administration and enforcement of access regulations”), (k) (“Access to scientific information relevant to conservation and sustainable use of biological diversity...”), (l) (“Contributions to the local economy”), (m) (“Contributions to the local economy”), (o) (“Food and livelihood security benefits”), and (p) (“Social recognition”).

knowledge associated with genetic resources. A reason for not including benefit-sharing deriving from traditional knowledge could be linked to the fact that indigenous peoples should freely determine the destination of their benefits.²¹¹ Indeed, in light of human rights standards, this must be the case also when benefits derive from the utilisation of genetic resources, by virtue of indigenous rights to land and natural resources, their right to autonomy, and the principle of self-determination. Therefore, States can create a legislative framework to encourage the channelling of benefits belonging to indigenous peoples towards conservation and sustainable use. However, they cannot go so far as to create an obligation for indigenous peoples to do so.

Furthermore, other critiques concern the weak formulation of this obligation, which does not create an obligation to adopt any national regulatory framework to ensure that benefit-sharing contributes to conservation and sustainable use.²¹² In light of the analysis above, however, this flexibility may be ensured to guarantee enough differentiation to distinguish between the hypotheses when genetic resources belong to the State or to indigenous peoples.

Notwithstanding the uncertainties related to Article 9, other implicit functions of benefit-sharing within the Nagoya Protocol can be derived from other provisions. Although the Protocol does not fully adhere to the language of international human rights, it refers to the respect for rights in several provisions.²¹³ Article 4(1), which regulates the relationship of the Protocol with other international instruments, establishes that the Protocol cannot interfere with “the rights and obligations of any Party deriving from any existing international agreement”. Indigenous rights fall in the category of obligations that State Parties are bound by through the ratification of international human rights treaties. Article 4(3) also establishes that, while the Protocol “shall be implemented in a mutually supportive manner with other [relevant] international instruments”, these cannot “run counter to the objectives” of the CBD and of the Protocol. This means that, although indigenous peoples are not obliged to direct their benefits towards conservation, they cannot pursue objectives or enact projects that pose a threat to biodiversity if States want to fulfil their obligations under the CBD regime. In light of this, benefit-sharing can be implemented nationally as an indirect incentive for pursuing conservation.

For the same reasons mentioned above, benefit-sharing can also be seen as means to protect indigenous rights. In this sense, Article 5(2) explicitly links benefit-sharing

²¹¹ See Morgera, Tsioumani and Buck 2014, at 162.

²¹² See Kamau and Winter 2013, at 115: “The basic paradigm that maintaining the potential of discovering valuable genetic resources and traditional knowledge stimulates conservation and sustainable use is now explicitly complemented by the obligation to encourage the flow of benefits towards conservation and sustainable use (Article 9). The language is however rather weak”. See Bavikatte and Robinson 2011, at 41: “From a purely rights perspective Article 8(j) is weak”. See also, Morgera, Tsioumani and Buck 2014, at 160. At 161, these authors highlight that Art. 8(j) CBD should be read in connection with the objectives of the Protocol enshrined in Art. 1 CBD, which include conservation and sustainable use.

²¹³ See Preambular paras. 24, 26 and 27, Art. 1, and Art. 4 Nagoya Protocol.

to the existence of rights. Finally, the inclusion of non-monetary benefits potentially strengthening the identity of indigenous groups also supports the conclusion that benefit-sharing in the Protocol is instrumental for the protection of indigenous rights.

2.3.1. *Multilateral benefit-sharing: a comparison with ITPGRFA*

Article 10 of the Nagoya Protocol foresees the possibility that Parties establish a global multilateral mechanism of benefit-sharing to deal with transboundary situations or situations when it is not possible to grant or obtain prior informed consent.²¹⁴ The provision is a compromise offering potential solutions to the unresolved problems of the Protocol, namely its temporal and geographical scope.²¹⁵

Two main critical aspects have been identified in the literature. First, Article 10 only establishes the obligation to “consider the need” for a multilateral system of benefit-sharing, thus not creating any obligation to actually establish such a mechanism.²¹⁶ Second, the scope of application of this mechanism is rather unclear and almost unconditionally delegated to further negotiations by the Parties of the Protocol. Cogent questions are, for instance, whether this mechanism should apply to every transboundary situation, and whether it can be extended to situations normally covered by the bilateral system of benefit-sharing.²¹⁷

In this respect, the abovementioned Report of the Expert Group on Article 10 has

²¹⁴ Art. 10 Nagoya Protocol reads as follows: “Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.” On the history of this provision, see Morgera, Tsioumani and Buck 2014, at 163-164. The authors highlight that the provision is a compromise solution put forward at the very last minute by Japan. The possibility to establish a multilateral mechanism has constituted a powerful leverage mechanism to convince developing countries to agree upon the Protocol (at 164, note 110).

²¹⁵ See *infra* section 2.4 in this chapter.

²¹⁶ See Alessandro Fodella, ‘Recent Development on Access and Benefit Sharing Relating to Genetic Resources (ABS) in International Law’ in Carlo Casonato and others (eds), *Il biodiritto e i suoi confini: definizioni, dialoghi, interazioni* (Università degli Studi di Trento 2014), at 114. See also, Morgera, Tsioumani and Buck 2014, at 164, who label Art. 10 Nagoya Protocol as an obligation of “a purely procedural nature”. As Morgera, Tsioumani and Buck argue, this mechanism is “to be considered as part of the exercise of national sovereignty” and is not intended as a mechanism to compensate for the compression of indigenous rights. On the contrary, in some cases it may also produce a deterioration of rights protection if compared with the bilateral system established in Art. 6 Nagoya Protocol, since neither of the communities sharing transboundary resources or knowledge would be able to express their prior informed consent. Plus, benefits must be directed to conservation and sustainable use “globally”. Thus, communities providing the resources and/or knowledge would not receive any benefits to sustain their livelihoods. But if it is applied to situations occurred before the entry into force of the CBD, the multilateral mechanism could represent a means to obtain partial redress, although from the formulation of Art. 10 Nagoya Protocol it does not seem that benefits would accrue to the community.

²¹⁷ For a discussion on more undetermined elements, including those mentioned above, see Morgera, Tsioumani and Buck 2014, at 166.

concluded, on the basis of the views submitted by States, that the scope of Article 10 should not extend to cover transboundary situations since these are effectively addressed in the context of Article 11.²¹⁸ A notable exception to this view has been expressed by South Africa, which calls for a multilateral mechanism of benefit-sharing for cases where medicinal plants are found across borders and traditionally used by many communities in different countries.²¹⁹ Furthermore, experts have highlighted that the need to establish such multilateral mechanism is currently very much contested and that bilateral benefit-sharing should continue to be the gist of the efforts to implement the Nagoya Protocol.²²⁰ Notwithstanding this, States have identified some cases where a multilateral system might be needed, including the case where traditional knowledge associated with genetic resources is shared among different communities in different countries.²²¹

If examined in light of indigenous rights, Article 10 raises additional questions that may challenge the validity of the entire system. A multilateral system of benefit-sharing can theoretically help to address situations where genetic resources or associated traditional knowledge are shared among different indigenous peoples located in more than one country. However, given the indeterminateness of Article 10 of the Nagoya Protocol and in light of the only example of multilateral system established by the ITPGRFA,²²² legitimate doubts arise as to whether prior informed consent would be bypassed by the multilateral system.

Article 10 distinguishes between transboundary situations from situations where prior informed consent cannot be obtained so that it is not possible to assume that the multilateral system potentially established under the Nagoya Protocol would automatically waive the requirement of prior informed consent when multiple communities in multiple countries are concerned. However, if the multilateral system were a means to bypass the prior informed consent of the community where access takes place in practice, benefit-sharing alone would not be an adequate mechanism to protect indigenous rights to land and natural resources and cultural rights in light of self-determination. On the contrary, in some cases it might also produce a deterioration of the protection of rights if compared with the bilateral system established in Article 6, since none of the communities sharing

²¹⁸ Report of the Expert Group Meeting on Article 10 of the Nagoya Protocol on Access and Benefit-Sharing, UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/4, para. 33. For the positions of States, see Synthesis of views pursuant to decision NP-1/10, UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/3 (14 December 2015). It is relevant to note that not only Parties to the Nagoya Protocol were invited to submit views on the development of a multilateral global system on benefit-sharing, but also “other Governments, international organizations, indigenous and local communities and relevant stakeholders” (para. 4). Seven non-Parties submitted views, including the United States that is party neither to the CBD nor to the Nagoya Protocol. No submission by indigenous groups was made.

²¹⁹ UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/3, para. 16.

²²⁰ UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/4, para. 39; UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/3, para. 26.

²²¹ UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/3, paras. 19-20.

²²² See *infra* in this section.

transboundary resources or knowledge would be able either to express their prior informed consent or to negotiate which benefits accrue to them and how.

There are two main reasons to believe that the establishment of a multilateral system of benefit-sharing would threaten indigenous rights. One is related to the above-mentioned history and rationale of this provision. As Morgera, Tsioumani and Buck argue, this mechanism is “to be considered as part of the exercise of national sovereignty” and is not intended as a mechanism to compensate for the compression of indigenous rights.²²³ The second reason is linked to a comparative analysis of the structure, purposes, and functioning of the multilateral system of benefit-sharing within the ITPGRFA, which is also referred to in the Preamble of the Nagoya Protocol.²²⁴ Although the ITPGRFA has failed so far to produce the expected results,²²⁵ a comparison is still useful to highlight elements that must be taken into account when shaping the multilateral system under the Nagoya Protocol.

Articles 10-13 of the ITPGRFA establish the “Multilateral System of Access and Benefit-sharing”. Although based on States’ sovereignty over plant genetic resources like the CBD,²²⁶ the FAO multilateral system aims to facilitate access to those resources, eliminates the need for bilateral negotiations and prior informed consent, and creates a global mechanism to share both monetary and non-monetary benefits primarily with farmers.²²⁷ The ITPGRFA’s negotiating history reveals that the reasons for choosing this legal solution are similar to those underlying Article 10 in the Nagoya Protocol. The FAO multilateral system has taken stock of the difficulties experienced within the CBD framework to identify the origins of genetic resources and created a mechanism that automatically accounts for benefits.²²⁸

²²³ See Morgera, Tsioumani and Buck 2014, at 163.

²²⁴ Preambular para. 19 Nagoya Protocol.

²²⁵ See De Jonge 2013, at 250. See also, Expert Group Meeting on Article 10 of the Nagoya Protocol on Access and Benefit-Sharing, Study on experiences gained with the development and implementation of the Nagoya Protocol and other multilateral mechanisms and the potential relevance of ongoing work undertaken by other processes, including case studies, UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/2 (22 December 2015), at 10-11. This study identifies the following weaknesses: few benefits have so far materialised; there is an increasing use of non-listed crops; the benefit-sharing mechanism is project-based so that farmer communities have to compete to receive funds on the basis of project proposals. The latter element does not take into account communities’ capacities. Moreover, the sharing of benefits with communities, which have provided the crops, is only potential. Another element is that contributions to the multilateral systems are per se non-predictable because they depend on commercialisation.

²²⁶ Art. 10(1) ITGPRFA.

²²⁷ See Art. 13(2) ITGPRFA; facilitated access is also considered a benefit per se pursuant to Art. 13(1) ITGPRFA; Art. 13(2)(d)(ii) ITGPRFA establishes that material benefits shall be paid to the multilateral system.

²²⁸ See Chambers 2003, at 321: “difficulty in determining the country of origin”. On the discussion of similar problems within the CBD regime, see De Jonge, ‘Towards a Fair and Equitable ABS Regime: Is Nagoya Leading Us in the Right Direction?’ 2013, at 250, and José T. Esquinas Alcázar, ‘Genetic Resources for Food and Agriculture: International Treaty on Plant and Genetic Resources for Food and Agriculture and Other International Agreements Negotiated through FAO Commission on Genetic Resources for Food and Agriculture’ in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the*

Compared to a prospective similar mechanism pursuant to the Nagoya Protocol, the FAO multilateral system is a very specific instrument due to the scope of application of the ITPGRFA and the limited number of genetic resources that are covered by this mechanism.

Concerning the first point, the ITPGRFA is considered as *lex specialis* with respect to the ABS regime laid out in the CBD and the Nagoya Protocol since it only relates to “plant genetic resources for food and agriculture”.²²⁹ Regarding the resources covered by the multilateral system of benefit-sharing, while the Nagoya Protocol is all encompassing, the ITPGRFA only relates to the resources listed in Annex I of the FAO treaty.²³⁰ The inclusion of listed plant genetic resources under the ITPGRFA has required the identification of relevant genetic material through the cooperation of non-State actors and gene banks.²³¹ A similar undertaking under the Nagoya Protocol can certainly be problematic, especially due to the fact that research on genetic resources and their application is constantly evolving and that problems may arise concerning those resources that are unduly covered by intellectual property rights. Some authors have rightly observed that the inclusion of genetic resources in a prospective multilateral system within the Nagoya Protocol would require the consent of indigenous rightholders.²³²

Most importantly, however, the multilateral system under the ITPGRFA does not

Downtrodden (Martinus Nijhoff 2003), at 244. Claudio Chiarolla, Sélim Louafi and Marie Schloen, ‘An Analysis of the Relationship between the Nagoya Protocol and Instruments related to Genetic Resources for Food and Agriculture and Farmers’ Rights’ in Elisa Morgera, Elsa Tsioumani and Matthias Buck (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Martinus Nijhoff 2013), at 84-85, have highlighted that a multilateral approach to benefit-sharing in the food sector also serves the very peculiar objective to facilitate the exchange of food genetic resources in order to secure food availability.

²²⁹ Art. 3 ITPGRFA and Art. 4(4) Nagoya Protocol. See De Jonge, ‘Towards a Fair and Equitable ABS Regime: Is Nagoya Leading Us in the Right Direction?’ 2013, at 244; Anja von Hahn, ‘Implementation and Further Development of the Biodiversity Convention. Access to Genetic Resources, Benefit Sharing and Traditional Knowledge of Indigenous and Local Communities’ (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 295, at 308. See also Chiarolla, Louafi and Schloen 2013, at 103: “Protocol Article 4.4 establishes a presumption of compatibility between the FAO Treaty, the CBD and the Nagoya Protocol”. When situations occur where providers and are not both party to the ITPGRFA, the situation is far more complex and the applicability of the Nagoya Protocol or the ITPGRFA must be evaluated on a case-by-case basis by virtue of the States involved and the genetic resources concerned. Mexico has proposed to extend the multilateral system foreseen in Art. 10 of the Nagoya Protocol to such cases. See UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/3, para. 20. On this point, see also *ibid.*, at 109-110.

²³⁰ See Art. 11(1) and 11(2) ITPGRFA.

²³¹ See Study on experiences gained with the development and implementation of the Nagoya Protocol and other multilateral mechanisms and the potential relevance of ongoing work undertaken by other processes, including case studies, UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/2. In this study, the author highlights that the FAO Treaty relied on data about food genetic material included in already existing gene banks that not claimed intellectual property rights over genetic material.

²³² See Chiarolla, Louafi and Schloen 2013, at 114. These authors argue that this is the case only when national ABS legislations so provide. This thesis has maintained, in contrast, that prior informed consent is to be sought in pursuance of international human rights norms. Another interesting point raised by Chiarolla et al. is that the consent requirement is applicable also in the context of the ITPGRFA for the purpose of including genetic resources that belong to indigenous farmers.

include benefits deriving from the use of traditional knowledge. Although the protection of traditional knowledge is acknowledged in Article 9(2)(a) of the ITPGRFA concerning Farmers' rights, benefits deriving from its use are not considered in the FAO treaty. This gap may appear inconsistent with a treaty that both incorporates the legal category of Farmers' rights for the first time in a binding convention and is clear in identifying farmers as the privileged beneficiaries of benefits.²³³ In contrast with this lack of regulation, the multilateral system pursuant to Article 10 of the Nagoya Protocol would be again broader since it would also encompass traditional knowledge. Difficulties, however, may arise as for the best way to conceive it. For instance, if it required the identification of traditional knowledge and practices included in the mechanism, it would certainly entail the willingness of indigenous groups to map their knowledge. Although some communities are already engaging in the establishment of community protocols, which *inter alia* may identify their traditions and cultural features, some groups are still sceptic about the advantages of making their knowledge publicly available, due to risks related to bio-piracy.²³⁴

It seems in any event that, although Article 10 of the Nagoya Protocol does not require it, any negotiations on the establishment of a multilateral mechanism should be done in consultation with indigenous representatives in order to ensure the consistency of this mechanism with international human rights law.

Three additional elements in the ITPGRFA still represent a good model for the development of a multilateral mechanism of benefit-sharing within the Nagoya Protocol. First, the FAO treaty foresees the possibility that private actors participate in the multilateral system of benefit-sharing.²³⁵ A multilateral system with the Nagoya Protocol would

²³³ See Art. 9 and Art. 13(3) ITPGRFA, although the formulation of the latter is rather weak. *Ibid.*, at 100, indirectly suggest that the multilateral benefit-sharing system of the ITPGRFA have positive repercussions on the protection of a number of farmers' rights, including the preservation of traditional knowledge since it is intimately linked to the use of food genetic resources. This is plausible in consideration of the fact that the Nagoya Protocol stresses the link between traditional knowledge and genetic resources. The authors also highlight, at 110-111, that "the practical mechanisms through which indigenous and local communities and farmers may attain the protection of their traditional knowledge relevant to PGRFA as well as their rights to equitably participate in sharing benefits and in decision-making are not spelt out by the International Treaty". A further important point is that the requirement of consent incorporated in the Nagoya Protocol may influence the way in which genetic resources are included in the ITPGRFA's multilateral system, as well as an understanding of genetic resources that also encompasses related traditional knowledge (at 113-114 and 121).

²³⁴ Tauli-Corpuz 2003, at 18-20.

²³⁵ See Art. 11(2) ITPGRFA, according to which all holders of Annex I resources are invited to include their plant genetic resources into the Multilateral system; Art. 11(3) ITPGRFA, according to which Parties "agree to take appropriate legal measures to encourage natural and legal persons" to include their Annex I resources into the Multilateral system; finally, Art. 13(5) ITPGRFA foresees a voluntary contribution of industries, although private parties are only encouraged to "include listed crops into the Multilateral System". On this point, Study on experiences gained with the development and implementation of the Nagoya Protocol and other multilateral mechanisms and the potential relevance of ongoing work undertaken by other processes, including case studies, UN Doc. UNEP/CBD/ABS/A10/EM/2016/1/2, at 10.

certainly need to address this aspect. Second, the ITPGRFA has elaborated articulated rules on access to ex situ resources.²³⁶ Negotiations on similar points are expected to take place also in the context of the Nagoya Protocol.

Third, as already highlighted, benefits deriving from the utilisation of listed plant genetic resources must “primarily flow to farmers” especially in developing countries.²³⁷ In contrast, Article 10 of the Nagoya Protocol establish that benefits “shall be used to support the conservation of biological diversity and the sustainable use of its components globally”.²³⁸ This provision hardly fulfils any functions of intra-State benefit-sharing since communities providing genetic resources and/or traditional knowledge would receive neither any reward for their contribution to conservation nor any compensation for the limits posed on their rights. Furthermore, they would be deprived of their decision-making power over the destination of benefits. Again, States should consult with indigenous representatives to implement this provision in a way that is in line with indigenous rights.

Indeed, if the global sharing of benefits is applied to situations occurred before the entry into force of the CBD, it would be a means to obtain partial redress.²³⁹ Although it does not seem from the formulation of the provision that benefits would directly accrue to communities, the conservation of biodiversity could indirectly benefit their ways of living.

In a different fashion, the ITPGRFA adopts other ways to bind benefits to conservation objectives. According to Article 12(3)(a) of the FAO treaty, the purposes of access are limited to “research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses”. In addition, users cannot claim intellectual property rights, although access can end up in commercialisation.²⁴⁰ The approach contained in the ITPGRFA is thus evidently different from that of the CBD, which does not limit the purposes of access provided that they do not run counter the objectives of the Convention. It is questionable whether an approach similar to that of the ITPGRFA would be needed in the context of the CBD. This change would require an amendment not only of the Nagoya Protocol, but also of Article 15 of the CBD, which does not seem a practicable option. Furthermore, access within the CBD regime is already bound to conservation and sustainable use by the interlinkages existing between the CBD objectives. Article 1 of the Nagoya Protocol confirms the binding relationship between ABS, conservation, and sustainable use. In this sense, States must enforce an interpretation of the CBD regime that is truly in line with its objectives, while at the same time not limiting any activities

²³⁶ See Art. 12(4) on standard Material Transfer Agreement and Art. 15 ITPGRFA.

²³⁷ Art. 13(3) ITPGRFA.

²³⁸ See Morgera, Tsioumani and Buck 2014, at 170.

²³⁹ This, however, seems to be excluded at this stage. See UNEP/CBD/ABS/A10/EM/2016/1/3 and UNEP/CBD/ABS/A10/EM/2016/1/4 *supra*.

²⁴⁰ Art. 12(3)(d) ITPGRFA.

that, although not directed to conservation, may potentially have positive effects on it. The additional caveat is that any such access must be based on an agreement with the rightful holders of resources and traditional knowledge.

2.4. Tools for reconciliation and main limitations

The Nagoya Protocol has acknowledged that it cannot prejudice the existence of indigenous rights,²⁴¹ thus recognising that these rights exist independently from the international regime on biodiversity. As mentioned, the Protocol has also noted the importance of the UN Declaration on indigenous rights.²⁴² Moreover, the Protocol generally allows for a mutually supportive reading of its obligations with related instruments, including human rights treaties.²⁴³

The new regime on ABS has gone far beyond recognising the independent existence of indigenous rights. Indeed, it has both put in place and elaborated on a number of tools that help to incorporate the rights of indigenous peoples into the Protocol. The first part of this section analyses these tools, while the second part illustrates the main limitations of the Nagoya Protocol, with a particular attention to normative gaps and unclear aspects.

2.4.1. Tools for reconciliation

These tools are of a different nature and go from Parties' obligations concerning the prior and informed consent of indigenous and local communities to the creation of community

²⁴¹ Preambular para. 27 Nagoya Protocol: "Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities".

²⁴² Preambular para. 26 Nagoya Protocol.

²⁴³ See Art. 4 Nagoya Protocol. Note that mutual supportiveness is also established in the ITPGRFA, preambular para. 9. For a full analysis of Art. 4, see Morgera, Tsioumani and Buck 2014, at 79-97. What seems particularly problematic with this provision is the lack of any specific rules on the relationship between the Protocol and international regimes on intellectual property rights. See Morgera, 'Towards International Guidelines on Prior Informed Consent and Fair and Equitable Benefit-Sharing from the Use of Traditional Knowledge' 2015, at 12-13, who sees this gap as a missed opportunity "to provide an authoritative mandate for its Parties to adopt national measures that may depart from the relevant law of the World Trade Organization (WTO) and afford protection in the context of a possible WTO law dispute". See also, Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' 2010, at 201, who highlights that States may in principle "rule out biotechnological patents" pursuant to the TRIPS agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights). Quite on the contrary, developed countries have concluded so-called TRIPS-plus agreements whereby they make patentability of life forms, organisms and genetic resources mandatorily possible. Pavoni concurs with other authors that "[t]he Nagoya Protocol addressed this misalignment in a very cautious and ambiguous way, *i.e.*, by making sure that no provision *in itself* could be interpreted as *mandating* deviations from the rights purportedly secured by TRIPS" (at 202). The author furthermore highlights that a significant source of potential conflicts is related to the issue of disclosing the origins of genetic resources and traditional knowledge, which would run contrary to the TRIPS but be allowable, and even desirable, under the Nagoya Protocol (at 203-204). Finally, Pavoni argues that Art. 4(2) Nagoya Protocol could be read as obliging its Parties not to negotiate a TRIPS-related agreement affecting genetic resources and traditional knowledge that would run counter the Protocol's objectives, including its amendments (at 207).

protocols by indigenous peoples themselves, from the establishment of an institutional framework in provider countries to the enactment of specific rules in user countries, and from the enhancement of indigenous rights through benefit-sharing to the recognition of indigenous customary law.²⁴⁴ The following analyses each tool of reconciliation with an attention to both the role played in the incorporation of indigenous rights into the Protocol and possible shortcomings.

The requirement that Parties need to establish national measures aiming to ensure the prior informed consent of indigenous and local communities is one of the most relevant novelties of the Protocol.²⁴⁵ Articles 6 and 7 mirror the spectrum of participatory rights established under international human rights law. Notwithstanding ambiguities concerning the conflation between prior informed consent and approval and involvement, the Nagoya Protocol allows for an evolution of its regime that is even more advanced than human rights standards in that prior informed consent might be required even when the survival of indigenous peoples is not at stake. This evolution will largely depend on national legislation but it may also happen—and it is desirable—that the COP/MOP establishes common benchmarks. In any event, national and international standards cannot establish participatory safeguards that are less protective than those stemming from international human rights law.

Furthermore, when Parties establish national legal frameworks on prior informed consent, it is important that they adopt clear rules to both steer and monitor the behaviour of private parties.²⁴⁶ The regulation of private activities can go so far as to extend the same obligations on obtaining consent from indigenous peoples to businesses and research institutions.

The qualified nature of the requirements concerning genetic resources has already been discussed.²⁴⁷ The adoption of national measures concerning prior informed consent when accessing genetic resources is conditioned upon the existence of established rights. The existence of rights over genetic resources must be assessed against the international human rights framework recognising indigenous rights over natural resources. In this sense, the apparently more favourable treatment reserved to traditional knowledge under Article 7 of the Nagoya Protocol is extended to the utilisation of genetic resources by means of systemic interpretation. This analysis is confirmed by the fact that the Protocol acknowledges the inextricable link existing between genetic resources and traditional

²⁴⁴ Most of these elements are discussed by Nijar, 'Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects' 2010, at 471-472.

²⁴⁵ For a discussion of the difference between prior informed consent and approval and involvement, see *supra* section 2.1.2. For the qualifications of the obligation to adopt national measures, including the meaning of established rights, see sections 2.1.2 and 2.3.

²⁴⁶ See Morgera, Tsioumani and Buck 2014, at 132.

²⁴⁷ See *supra* section 2.2.

knowledge.²⁴⁸

Notwithstanding the recognition of interlinkages, the Nagoya Protocol rightly distinguishes between utilisation of genetic resources from utilisation of associated traditional knowledge. As recognised already in the Bonn guidelines, consent concerning the utilisation of one of the two elements does not automatically extend to the other. The separation between consent requirements implies that the interdependence of genetic resources and traditional knowledge can be used to raise safeguards directed to indigenous peoples but not to diminish their rights.²⁴⁹

Another important tool that allows for the incorporation of indigenous rights into the Nagoya Protocol is benefit-sharing. This instrument profoundly innovates in the protection of indigenous rights. Under international human rights law, benefit-sharing is one of the safeguards that States need to ensure when compressing land and resource rights of indigenous peoples. Under the CBD framework, instead, benefit-sharing is historically connected to the utilisation of traditional knowledge.²⁵⁰ Therefore, the international regime on biodiversity conservation adds up a layer of protection of indigenous rights since it introduces benefit-sharing in case traditional knowledge is utilised, even when indigenous rights are not compressed.²⁵¹ On the contrary, benefit-sharing under the Protocol appears less established when it comes to the utilisation of genetic resources, due to the qualification regarding the establishment of indigenous rights over genetic resources in accordance with domestic law.²⁵² Previous sections have indeed proposed a systemic reading of this provision in light of indigenous rights, suggesting that the two standards of benefit-sharing are eventually comparable.

One of the functions of benefit-sharing under the Nagoya Protocol is to reinforce some rights that are protected in a less comprehensive way under international human rights law, such as the right to traditional knowledge.²⁵³ In contrast, the function of benefit-sharing as compensation has not been retained in the Nagoya Protocol, which does not address the establishment of protected areas. Since clearer obligations under

²⁴⁸ Preambular para. 22 Nagoya Protocol.

²⁴⁹ Bonn guidelines, para. 37. See also, Jeffery 2002, at 801.

²⁵⁰ See Art. 8(j) CBD and Art. 5 Nagoya Protocol.

²⁵¹ See Elisa Morgera, 'Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2014).

²⁵² See Art. 5(2) Nagoya Protocol. See also, *supra* section 2.3.

²⁵³ See *supra* section 2.3. See also, Peter-Tobias Stoll, 'Access to GRs and Benefit Sharing - Underlying Concepts and the Idea of Justice' in Evanson C. Kamau and Gerd Winter (eds), *Genetic Resources, Traditional Knowledge and the Law* (Earthscan 2009), at 8: "Farmers' rights and the rights of local and indigenous communities regarding their traditional knowledge represent somewhat a new type of entitlement in intellectual achievements. Unlike classic IPRs, they do not aim at providing incentives for generating innovations, but rather reward achievement of the past. Furthermore, they are both in their nascent state of development and in need of clarification in view of the proper assignment of the power of disposal and the beneficiaries, as well as in view of appropriate enforcement mechanisms".

Article 5 concerning the establishment of national measures on benefit-sharing do not apply to this subsector of the CBD regime, benefit-sharing following the creation of protected areas is still characterized by the uncertainties highlighted in Chapter 4.²⁵⁴

MATs are instrumental for benefit-sharing under the Nagoya Protocol since according to Article 5(2) and (5) the fair and equitable sharing of benefits deriving from the utilisation of genetic resources and traditional knowledge must be based upon the conclusion of MATs. In this sense, MATs realise the condition of fairness since they constitute the procedural framework under which indigenous and local communities can participate in the decisions about benefit-sharing concerning their resources and traditional knowledge. Moreover, MATs also represent the institutional framework under which private parties are indirectly obliged to negotiate conditions with indigenous and local communities. Similarly, equity can be realised through MATs depending on the conditions negotiated between the parties.

As already highlighted, for all of these functions to be fulfilled by the establishment of MATs, clear national rules should exist regulating their conclusion and their minimum contents. Furthermore, a decision of the COP/MOP would be desirable to ensure that indigenous rights are rightly fulfilled in the establishment of MATs.²⁵⁵

When concluding MATs with States or private parties, indigenous peoples are formally in a position of parity, thus realising their right to grant or deny their consent to projects initiated by States or businesses. As highlighted in section 2.3, this feature of MATs makes the establishment of these instruments as conceptually similar to the right to free, prior and informed consent since the conclusion of MATs presupposes the granting of consent on the possibility and the modalities of benefit-sharing. Notwithstanding these similarities, prior informed consent preceding utilisation remains distinct from benefit-sharing following utilisation since the latter can be implemented even when the former is not obtained. Moreover, the implementation of benefit-sharing requirements under Article 5 is not a sufficient condition to meet the obligations of prior informed consent contained in Articles 6 and 7.²⁵⁶

The role of indigenous peoples in negotiating conditions for benefit-sharing must be additionally emphasised. Not only are indigenous peoples protagonists when it comes to determine the nature and extent of benefits deriving from the utilisation of their resources and traditional knowledge, but they are also fundamental actors when it comes

²⁵⁴ See sections 2.1.1 and 3 of Chapter 4.

²⁵⁵ On these points, see *supra* section 2.3.

²⁵⁶ It is important to highlight that one of the main challenges in the future concerning prior informed consent, MATs, and benefit-sharing is to ensure that these requirements are effectively implemented. This is why some authors have proposed a system of certification allowing to verify the compliance with such requirements, in pursuance of Art. 17 Nagoya Protocol. On the advantages and shortcomings of certificates, see Brendan Tobin, Geoff Burton and Jose Carlos Fernandez-Ugalde, *Certificates of Clarity or Confusion: The Search for a Practical, Feasible and Cost Effective System for Certifying Compliance with PIC and MAT* (UNU-IAS Report 2008). On certificates, see also *infra* in this section.

to the realisation of the objectives of the Nagoya Protocol and the related implementation of its provisions.

Although formal parity is realised in the legal framework of the Nagoya Protocol concerning benefit-sharing, there might be evident imbalances in the capacity of indigenous groups when it comes to understanding dealings, negotiating equitable conditions, and being aware of their rights, given also the enormous complexity of ABS agreements.

Article 22(1) of the Nagoya Protocol only establishes an obligation for States to cooperate among them in the field of capacity-building with the aim of facilitating the implementation of the Protocol. In this undertaking, Parties must involve indigenous peoples in inter-State cooperation. This provision does not prescribe any specific obligation to effectively implement capacity-building measures in favour of indigenous peoples, although this interpretation might result from a reading of this provision in light with the objectives of the Protocol, i.e., to realise benefit-sharing. Furthermore, capacity-building obligations of developed States must be fulfilled to address the capacity needs and priorities of developing countries. Article 22(3) prescribes that the latter must determine such needs with a view to supporting the capacity needs of indigenous and local communities.²⁵⁷ It seems, therefore, that indigenous peoples can be concretely involved in bilateral or multilateral cooperation through the mediation of the States that they are citizens of. Importantly, Article 22(3) also refers to the fact that the capacity needs of indigenous peoples must be determined by themselves in autonomy. Although it is not explicitly stated, in order to support indigenous capacity needs, developing countries must consult with indigenous peoples. This interpretation is also in line with human rights standards that require consultation when indigenous peoples are directly affected by some measures. It is also plausible that indigenous representatives will contribute to determine such needs via consultation in the framework of COP/MOP meetings.²⁵⁸

Capacity-building in establishing MATs is explicitly addressed in Article 22(4). This provision, however, only suggests possible areas of interest, do not produce obligations for State Parties, and do not specifically concern indigenous peoples. Article 22(5)(j) includes among the measures to enhance capacity²⁵⁹ special measures dedicated to indigenous and local communities. Again, this provision does not create obligations²⁶⁰ and, in addition,

²⁵⁷ Art. 22(3) reads: “As a basis for appropriate measures in relation to the implementation of this Protocol, developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition should identify their national capacity needs and priorities through national capacity self-assessments. In doing so, such Parties should support the capacity needs and priorities of indigenous and local communities and relevant stakeholders, as identified by them, emphasizing the capacity needs and priorities of women”.

²⁵⁸ In support of this point, see Art. 25(3) Nagoya Protocol.

²⁵⁹ The list is not exhaustive.

²⁶⁰ The only obligation concerning Art. 22(4) and (5) is that regarding the communication of any capacity-building measures to the Access and Benefit-sharing Clearing-House, included in Art. 22(6)

does not specify the areas where capacity-building measures would be more needed, such as for the negotiation of MATs.²⁶¹ When reading these inconsistencies in light of abovementioned Article 22(3), it seems plausible to conclude that the Protocol has delegated the identification of needs directly to indigenous peoples and that the subjects responsible to fulfil those needs remain their States of origin. Developed countries, instead, bear obligations only with regards to cooperation on capacity-building. This is a rather weak construction, not only if considering special capacity needs of indigenous peoples, but also when it comes to addressing capacity issues of developing countries more generally.

Capacity-building obligations—although not labelled in this way—are established more effectively elsewhere in the Protocol. In the Annex, institutional capacity-building is included in non-monetary benefits. Article 21(c) includes among possible awareness-raising activities that Parties are obliged to adopt the establishment of a help-desk for indigenous peoples. Furthermore, in relation to traditional knowledge, Article 12(3) of the Protocol obliges Parties to “endeavour to support, as appropriate, the development by indigenous and local communities” of community protocols, minimum requirements for MATs, and “model contractual clauses for benefit-sharing”.

Community protocols are another tool for incorporating indigenous rights into the Nagoya Protocol. These are instruments, elaborated by communities themselves, which constitute a way for indigenous peoples to formalise their positions on a number of issues, including their attitudes towards external interferences.²⁶² Therefore, in the context of the Nagoya Protocol, indigenous communities could identify the ways in which consent must be sought or MATs can be stipulated, for instance by indicating the authorities that have the capacity to negotiate on behalf of the community or explaining the underlying values of their traditional knowledge and practices.

Article 12(1) creates the obligation for Parties to take into account *inter alia* the

Nagoya Protocol. The ABS Clearing-House has been established by Art. 14 of the Nagoya Protocol pursuant to Art. 18 of the CBD. Parties are obliged to transmit relevant information to the Clearing-House, including non-mandatory information on “[r]elevant competent authorities of indigenous and local communities, and information as so decide”.

²⁶¹ The Bonn guidelines were more specific. See para. 16(a)(vii): “Support measures, as appropriate, to enhance indigenous and local communities’ capacity to represent their interests fully at negotiations”.

²⁶² See *Community Protocols for Environmental Sustainability: A Guide for Policymakers* (UNEP and EDO NSW 2013), at viii: “Community protocols are instruments embodying protocols, procedures, rules and practices, existing in both written and unwritten form, developed and used by ILCs in numerous contexts, such as interactions with their ecosystems, interactions within and between ILCs themselves, and in their interactions with external actors”. See also, Jonas, Bavikatte and Shrumm 2010, at 62: “a biocultural community protocol is a community-led instrument that promotes participatory advocacy for the recognition of and support for ways of life that are based on the customary sustainable use of biodiversity”; “a community protocol is an opportunity to reflect on their ways of life, values, customary laws and priorities and to engage with a variety of supporting legal frameworks and rights”; at 63: “[t]hey also provide a vehicle for articulating their procedural and substantive rights to, among other things, be involved in decision-making”; “[t]hey also help communities to...promote a more participatory and endogenous approach to the future governance”.

community protocols of indigenous and local communities when implementing the provisions of the Protocol concerning traditional knowledge. The reference to national law²⁶³ cannot be interpreted as the possibility for Parties to derogate from the obligation to consider community protocols. In contrast, given the non-established nature of this instrument both for national legal frameworks and for the legal traditions of indigenous peoples, the reference to national law is a way to operationalise the modalities in which community protocols must be taken into account.

More problematic is the fact that the obligation to consider community protocols is limited to the implementation of obligations concerning traditional knowledge. Since there is no human rights practice on community protocols, it is difficult to argue that these must be taken into account also when it comes to genetic resources held by indigenous peoples. Indeed, there are some elements in support of this interpretation.

Community protocols are adopted on the initiative of indigenous peoples, thus being an expression of their capacity to self-regulate their own matters. Therefore, to the extent that indigenous peoples decide by themselves which matters to include in community protocols, these might contain also relevant provisions on land and resource rights. In this sense, since indigenous rights over genetic resources depend on their land and resource rights, States might have to consider community protocols when interpreting the expression “established rights” under Articles 5(2) and 6(2). The same reasoning is applicable to Article 12(3), which creates an obligation for Parties to “endeavour to support” the adoption of community protocols “in relation to access to traditional knowledge associated with genetic resources” and related benefit-sharing.

Although the adoption of community protocols is left to the initiative of indigenous peoples, these might need to elaborate them in order to reinforce their position vis-à-vis States—both users and providers—and private parties. Community protocols perform a number of functions. They may serve the purpose of raising the self-consciousness of indigenous peoples on certain issues, including the extent and nature of their rights, as well as the possibility that their resources are sought by external actors.²⁶⁴ Community protocols can also represent a way to bring more legal certainty to customary law.²⁶⁵

²⁶³ Such reference is formulated as follows in Art. 12(1) Nagoya Protocol: “In implementing their obligations under this Protocol, Parties shall *in accordance with domestic law* take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources” (emphasis added).

²⁶⁴ See Jonas, Bavikatte and Shrumm 2010, at 66-67: “clarity to the drivers of external interventions such as protected areas, ABS agreements”. “In this regard, community protocols enable communities to bridge the gap between the customary management of their biocultural heritage and the external management of their resources”.

²⁶⁵ See Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, para. 35: “community protocols...may provide a useful approach” to operationalise customary law. See also, Tobin, ‘Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples’ Resource and Knowledge Rights’ 2013, at 158: “Protocols may be seen as a form of partial codification of custom”. Concerning

Furthermore, they may operationalise indigenous rights by establishing both conditions for access to genetic resources and traditional knowledge²⁶⁶ and procedures for the interaction of State, companies, and indigenous peoples. By providing the institutional framework for indigenous peoples to sit at the same table with States and businesses, community protocols can also influence States' policies and business behaviour.²⁶⁷

Given their multiple functions and close enmeshment with rights, community protocols are considered as a way to operationalise indigenous self-determination.²⁶⁸ However, their utility with respect to the incorporation of indigenous rights into the international regime on biodiversity can be verified only to the extent that they are applied by national and international courts in cases concerning the utilisation of genetic resources and associated traditional knowledge, or if they are reflected in MATs.²⁶⁹

Article 12(1) also obliges Parties to consider "indigenous and local communities' customary law" when implementing obligations related to traditional knowledge.²⁷⁰ The explicit recognition of customary law as a relevant legal framework, although subjected to national law, is a sign that the Nagoya Protocol has internalised legal pluralism.²⁷¹ This recognition is fundamental for the protection of indigenous rights and testifies of an increasing importance of indigenous and local communities in the international framework on ABS.

The main tool for implementing indigenous rights within the framework of the Nagoya Protocol, as highlighted in previous sections, is the adoption of "necessary legislative, administrative or policy measures" by Parties. Although these have a leeway in the choice of the measures deemed more appropriate to achieve the Protocol's objectives,

the point that positivism is a double-edged sword, see *supra* section 2.3.

²⁶⁶ See Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, para. 43. See also, *ibid.*, at 158: "Protocols of this nature enable the custodians of biocultural heritage to define conditions for prior informed consent and benefit-sharing, and to place restrictions on access and use of resources and knowledge."

²⁶⁷ See *ibid.*, at 158: "Taking the initiative to develop community protocols provides the custodians of traditional knowledge with an opportunity to influence the development of national, regional and international law and policy in this area". See also, Morgera, Tsioumani and Buck 2014, at 182.

²⁶⁸ See Jonas, Bavikatte and Shrumm 2010, at 62: "Community protocols are one endogenous rights-based approach that communities are using to draw on a variety of biocultural rights to affirm their right to self-determination, including within the context of ABS".

²⁶⁹ See Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights' 2013, at 160: "The proof of their utility will be seen if and when a court case arises involving issues of customary law, rights to access genetic resources and/or traditional knowledge".

²⁷⁰ The same considerations illustrated above for community protocols apply here concerning the possibility to extend this obligation to the implementation of provisions related to genetic resources.

²⁷¹ See Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights' 2013, at 162: "International law has clearly recognised that the realisation of Indigenous peoples' human rights can only be achieved with due respect and recognition for their customary laws. The Nagoya Protocol has turned the duties to respect and recognise customary law into a binding legal obligation."

Parties must adopt an adequate regulatory framework concerning both benefit-sharing and prior and informed consent.²⁷² As already mentioned, the Protocol does not indicate minimum rules on prior informed consent or benefit-sharing. However, Article 6(3) indicate legal certainty, transparency, and non-arbitrariness as general principles when it comes to the establishment of national rules. In this sense, the flexibility granted to States must be balanced with clarity and legal certainty.²⁷³

The Nagoya Protocol contains other obligations to adopt national measures, like those regarding the establishment of national focal points and national authorities. According to Article 13(1), focal points must provide ABS-related information to users, thus functioning as the national institutional interface for third countries and private businesses.²⁷⁴ In particular, focal points respond to the need to facilitate access to technical information, such as “procedures for obtaining prior informed consent and establishing mutually agreed terms”.²⁷⁵ Ambiguities derive from the fact that information on these procedural requirements are referred to indigenous peoples only when it comes to the utilisation of traditional knowledge.²⁷⁶ This gap can be filled by arguing that the obligation to provide information on conditions for accessing genetic resources is left broad enough to include all possible concerned actors.²⁷⁷ Moreover, Parties have an obligation under the Protocol to establish national measures to ensure indigenous consent following the utilisation of genetic resources.²⁷⁸ In this light, the fact that focal points must provide information on relevant indigenous communities when third parties want to access genetic resources cannot be put into question.

Pursuant to Article 13(2), Parties shall also establish national authorities that are responsible for granting access, issuing evidence that access requirements have been met, as well as providing advice.²⁷⁹ Concerning the first aspect, the question arises of in which ways national authorities can establish contacts with indigenous communities in order to obtain their prior informed consent before granting permission for the utilisation of indigenous genetic resources or traditional knowledge. The Protocol is silent on these aspects, which must be detailed in national legislation concerning ABS.

²⁷² See Art. 5(2) and (5), Art. 6(2) and (3), and Art. 7 Nagoya Protocol.

²⁷³ See Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, para. 59: importance of flexibility of national processes.

²⁷⁴ Focal points also represent the institutional link between Parties and the Protocol’s Secretariat.

²⁷⁵ See Art. 13(1)(a) Nagoya Protocol.

²⁷⁶ See Art. 13(1)(b) Nagoya Protocol.

²⁷⁷ Art. 13(1)(a) reads as follows: “The national focal point shall make information available as follows... (a) For applicants seeking access to genetic resources, information on procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing”.

²⁷⁸ See Art. 5(2) Nagoya Protocol.

²⁷⁹ Pursuant to Art. 13(3) Nagoya Protocol, the functions of giving information and granting permissions can be exercised by a single entity.

One way to ensure that indigenous peoples have full control of these processes is to designate one of the national communities, associations with an indigenous membership, or organisations representing indigenous communities as national authority. While this choice is theoretically feasible within the framework of the Protocol, that for instance allows for the establishment of “one or more national authorities”,²⁸⁰ it is not clear to what extent this would be a positive development for indigenous peoples. On the one hand, full control over procedural aspects and direct interactions with users could enhance indigenous control over their lands and resources. On the other hand, leaving indigenous peoples alone in this undertaking would require huge efforts in terms of capacity building, including in terms of the administrative capacity to receive and process access requests. Furthermore, State Parties cannot waive their obligations concerning both the implementation of the Protocol and the enforcement of indigenous rights. Therefore, it seems more suitable that access requests are processed by authorities having a sufficient administrative apparatus. At the same time, processes must be in place to allow for a timely involvement of indigenous peoples when requests concern their genetic resources and/or traditional knowledge.

National authorities can also issue written “evidence that access requirements have been met”.²⁸¹ This means that they can provide national certificates that may prove, at least nationally, that national ABS legislation has been correctly implemented. The Protocol also makes reference to international certificates, the issuance of which would prove that access of genetic resources has happened in compliance with the Protocol.²⁸² Problems arise concerning the uncertain mandatory nature of the obligation to issue these certificates.²⁸³ Moreover, international certificates within the Protocol seem to refer only to access to genetic resources and related consent and benefit-sharing requirements, thus setting aside traditional knowledge.²⁸⁴ Furthermore, the mere communication of a national permit to the Access and Benefit-sharing Clearing-House as the only condition for creating an international certificate gives too much freedom to State Parties since these have *carte blanche* for setting the conditions for the issuance of permits at the national level. Although Article 17(4)(h) identifies what elements any international certificate must contain at a minimum,²⁸⁵ it does not seem that the Clearing House has a mandate

²⁸⁰ Art. 13(2) Nagoya Protocol. Although theoretically feasible, the designation of an indigenous group/association as national authority has not happened so far. Mexico, however, has designated as one of its national authorities its governmental agency on indigenous issues. See <https://absch.cbd.int/search/national-records/CNA> (last accessed October 2016).

²⁸¹ Art. 13(2) Nagoya Protocol.

²⁸² See Art. 6(3)(e) in combination with Art. 17(3) Nagoya Protocol.

²⁸³ See Morgera, Tsioumani and Buck 2014, at 225.

²⁸⁴ Pavoni explains this choice through the Parties’ unwillingness to deal with IPRs implications of issuing certificates on the requirements related to traditional knowledge. See Pavoni, ‘The Nagoya Protocol and WTO Law’ 2013, at 204.

²⁸⁵ For a discussion on the elements that should be contained in an international certificate, Report of the

to review national processes on prior informed consent or the establishment of MATs.²⁸⁶ Therefore, there is a high risk that conditions are met only on paper.

Another important tool to incorporate indigenous rights into the Protocol that is left to national initiative is the adoption of user-side measures. Articles 15 and 16 of the Nagoya Protocol create an obligation for user countries to establish within their jurisdictions measures to ensure that genetic resources and associated traditional knowledge have been accessed under conditions that are in accordance with the legal framework of provider countries. These provisions also oblige States to put in place redress mechanisms in case provider countries' rules on ABS are not respected. User-side measures certainly aim to respond to the limited enforceability of provider countries' national measures on ABS.²⁸⁷ At the same time, Articles 15 and 16 fail to acknowledge the possibility that provider countries do not adopt measures correctly implementing the Protocol and other international obligations, such as the rights of indigenous peoples. In these cases, user-side measures that only consider the legal framework of provider countries may not be sufficient both to achieve the objectives of the Protocol and to ensure an implementation of the Protocol that is in line with international human rights standards.²⁸⁸

Finally, monitoring and compliance activities are essential tools for ensuring the correct implementation of the Protocol's normative standards. Concerning the latter, Article 30 contains a *de contraendo* clause for Parties to "consider and approve cooperative procedures and institutional mechanisms to promote compliance and to address cases of non-compliance" with the Nagoya Protocol. This provision has provided the basis for the COP/MOP to establish in 2014 a compliance procedure.²⁸⁹ This mechanism presents several elements of novelty that specifically concern the role of indigenous peoples within the compliance procedure.²⁹⁰

Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, para. 102: "Essential components of a certificate would include whether or not there is traditional knowledge associated with genetic resources involved, who the traditional knowledge holders are, and whether or not the user has complied with indigenous customary law, community protocols and other consent or decision-making processes".

²⁸⁶ See Josph 2010, at 82-83 for an overview of the discussions behind the adoption of this provision.

²⁸⁷ See De Jonge, 'What is Fair and Equitable Benefit-Sharing?' 2011, at 132.

²⁸⁸ See Fodella, 'Recent Development on Access and Benefit Sharing Relating to Genetic Resources (ABS) in International Law' 2014, at 106; Tvedt and Young 2007, at 129; De Jonge, 'Towards a Fair and Equitable ABS Regime: Is Nagoya Leading Us in the Right Direction?' 2013, at 253: "the user measures the Nagoya Protocol refers to are not further defined"; "[a]s such, the Nagoya Protocol does not shift the responsibility for benefit sharing to the (developed) countries and parties that use genetic resources from abroad, but leaves it to the 'country of origin of such resources'".

²⁸⁹ COP/MOP dec. NP-1/4, Cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance, UN Doc. UNEP/CBD/NP/COP-MOP/DEC/1/4 (20 October 2014).

²⁹⁰ Please note that this discussion is based on the rules of procedure that are contained in the COP/MOP decision to establish the Compliance Committee above. More detailed rules of procedure have been approved by the Committee at its first meeting (UN Doc. UNEP/CBD/ABS/CC/1/5, Item 3, para.

First, it is a non-adversarial mechanism, as it is mostly the case in multilateral environmental treaties. In this sense, it also considers providing assistance to indigenous peoples as a means to improve compliance.²⁹¹ Although discussions are ongoing on this point, this feature opens up to the possibility that capacity building in the future is addressed directly to indigenous peoples.²⁹²

Second, the Compliance Committee is composed of fifteen members nominated by UN regional groups and then elected by the COP/MOP. These groups can also decide to nominate representative of indigenous peoples as Committee members.²⁹³ Furthermore, indigenous groups can themselves nominate two representatives to serve as observers within the Committee.²⁹⁴ Observers can participate in the deliberations without voting in the meeting concerning “interests of indigenous and local communities”, which is certainly unprecedented for a non-compliance mechanism. Although indigenous representatives cannot cast a vote, they may have some impact in influencing the final decision considering that the Committee must preferably deliberate by consensus.²⁹⁵

Third, although indigenous peoples cannot by themselves trigger the examination of the Compliance Committee, they have a number of possibilities to bring their concerns to the Committee.²⁹⁶ One possibility is that the COP/MOP can in principle present submissions on behalf of indigenous peoples. Furthermore, unlikely as it may seem, the Committee may act *motu proprio* once it receives information that Parties have difficulties complying with the Protocol.²⁹⁷ Most importantly, this kind of information

12) and are recommended for adoption at the next COP/MOP meeting. For the text of these draft rules, see UN Doc. UNEP/CBD/ABS/CC/1/2 (23 February 2016).

²⁹¹ COP/MOP dec. NP-1/4, para. Annex A, para. 2, C and E.

²⁹² On this point, the COP/MOP has mandated the Committee to submit recommendations to be followed up during the second COP/MOP. See COP/MOP dec. NP-1/4, para. 2(b) and Annex F, para. 3(b). At its first meeting, the Compliance Committee decided that priority should be given to assisting Parties with difficulties in compliance with the Protocol’s obligations. Given the existence of provisions on compliance, the Committee found it premature to elaborate new supporting mechanisms. See Report of the Compliance Committee under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization on the Work of Its First Meeting, UN Doc. UNEP/CBD/ABS/CC/1/5 (8 April 2016), para. 14 and 17.

²⁹³ See COP/MOP dec. NP-1/4, Annex, para. 2. This has not happened yet. See COP/MOP dec. NP-1/4, para. 4.

²⁹⁴ See COP/MOP dec. NP-1/4, Annex, para. 2: at least one of them must be from a developing country. Indigenous and local communities’ observers are Mr. Preston D. Hardison and Mr. Onel Masardule Arias. See COP/MOP dec. NP-1/4, para. 4.

²⁹⁵ COP/MOP dec. NP-1/4, para. 11. It is still to be seen whether consensus will be the privileged decision-mechanism within the Committee. Consider also that, beyond the role of the observers, the Committee can either avail itself of information provided by indigenous peoples or look for the advice of indigenous experts. COP/MOP dec. NP-1/4, para. Annex E, paras. 1-2.

²⁹⁶ COP/MOP dec. NP-1/4, para. Annex D, para. 1: only Parties with respect to themselves or to other Parties and the COP/MOP can submit issues to the Compliance Committee.

²⁹⁷ COP/MOP dec. NP-1/4, para. Annex D, para. 9(b). The Committee can also act to “examine systemic issues of general non-compliance that come to its attention” (para. 10). Time will tell whether the indigenous-related provisions of the Protocol fall into this category.

may also be “provided by a directly affected indigenous or local community, related to provisions of the Protocol”.²⁹⁸ Once issues are submitted before the Secretariat for information, this body is obliged to expeditiously transmit them to the Committee.²⁹⁹ The latter is not obliged to examine the allegations; however, it may decide to do so. Therefore, there exists more than an indirect possibility for indigenous representative to trigger the compliance mechanism. This possibility is very innovative and *de facto* recognizes a collective standing to indigenous communities, which is more advanced than individual petitions in certain human rights treaty mechanisms, such as the Human Rights Committee, from the viewpoint of the possibility to address collective claims. At the same time, it must be reminded that the Compliance Committee might also adopt very restrictive views on the implementation of the Protocol’s provisions. Therefore, the extent to which this mechanism would allow to vindicate human rights concerns outside the scope of human rights monitoring mechanisms is far from being clear at this stage.

Beyond the compliance mechanism above, the initiative for monitoring the implementation of the Protocol, creating mechanism to resolve disputes, and ensuring compliance is left to individual Parties. For instance, Article 18 obliges Parties to “encourage providers and users” to bilaterally define through MATs the jurisdiction competent to hear disputes, the applicable law, as well as alternative dispute resolution mechanisms. Moreover, Article 17(1)(a) indicates the establishment of national checkpoints as one of the mechanisms to ensure appropriate monitoring of the Protocol’s rules dealing with the utilisation of genetic resources. Beyond being only potential mechanisms, checkpoints have been criticised for several reasons, going from the fact that their work only concern genetic resources to the fact that these bodies are only able to monitor the implementation of national rules.³⁰⁰ Indeed, an international compliance mechanism could better ensure that the rights of indigenous peoples are effectively implemented under the Protocol. As highlighted by Tobin, in the absence of such a mechanism, human rights courts—whether nationally or internationally—will be increasingly called to enforce indigenous rights also in the context of the ABS regime.³⁰¹

²⁹⁸ COP/MOP dec. NP-1/4, para. Annex D, para. 9(b)(iii).

²⁹⁹ See Draft rules of procedure, UN Doc. UNEP/CBD(ABS/CC/1/2 (23 February 2016), Rule 8(1): “The Committee shall be informed immediately by the Secretariat that a submission has been received... or that information has been provided by a directly affected indigenous or local community under paragraph 9(b)”.

³⁰⁰ See Morgera, Tsioumani and Buck 2014, at 220; Joseph 2010, at 90.

³⁰¹ Tobin, ‘Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples’ Resource and Knowledge Rights’ 2013, at 150: “In the absence of strong compliance mechanisms at the international level the burden for enforcing Indigenous peoples’ rights over their resources and knowledge is, therefore, likely to fall on national courts, regional human rights organisations, such as the Inter-American Court of Human Rights, and alternative dispute resolution mechanisms”.

2.4.2. *Gaps and limitations*

Notwithstanding some of the positive developments described above, there are at least three aspects that have not been addressed in the Protocol and bear consequences on the extent to which indigenous rights can be fully incorporated into the international ABS regime. These aspects are: 1) the unresolved issue of the geographical and temporal scope of the Protocol; 2) the unclear impacts of the ABS regime on conservation and traditional knowledge; and 3) the incomplete acknowledgement of indigenous rights.

As pointed out, Article 3 of the Protocol leaves the question of the temporal and geographical application of the ABS regime open. Particularly problematic aspects are whether the obligations contained in the Nagoya Protocol extend back at least to the entry into force of the CBD and whether the Protocol applies to transboundary situations.

Concerning the first point, Kamau and Winter have argued that “the assumption that the NP [Nagoya Protocol] shall be the baseline would be tantamount to concluding that the Protocol waives the obligations of Parties under the CBD”.³⁰² However, this argument holds true only for those obligations that are already clearly established in the CBD. Given that the consideration of indigenous rights in the CBD is very limited and the implementation of Article 8(j) of the CBD has revealed itself very problematic, Kamau and Winter’s argument does not solve the issue of the temporal scope of the Protocol.

Moreover, both the CBD and the Protocol’s guarantees concerning indigenous peoples do not certainly apply to the period preceding the entry into force of the CBD. The failure of the Protocol to address the issue of past injustices, however, leaves out of the picture a lot of misappropriations happened in the past that have substantive negative repercussions on the Convention’s objective to ensure benefit-sharing. In Morgera’s words, the consideration of aspects of “corrective justice” in COP meetings or future negotiations could remedy these historical imbalances and make benefit-sharing within the Protocol truly equitable.³⁰³ The consideration of historical injustices could also concern the issue of access to ex situ genetic resources incorporating traditional knowledge, which in turn had been accessed without prior consent.³⁰⁴

The issue of extraterritorial application of the Protocol is relevant in this analysis

³⁰² Kamau and Winter 2013, at 114.

³⁰³ Morgera, ‘Towards International Guidelines on Prior Informed Consent and Fair and Equitable Benefit-Sharing from the Use of Traditional Knowledge’ 2015, at 11.

³⁰⁴ See Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UN Doc. UNEP/CBD/WG-ABS/8/2, para. 120: “In the discussion on ex-situ sources, some experts noted that traditional knowledge associated with genetic resources in the public domain does not necessarily have the prior informed consent of the relevant indigenous peoples or local communities from which it was sourced. It was proposed by some that use should trigger some benefit-sharing”. As reminded, these issues have been touched upon in the Report of the Expert Group on Article 10. See *supra* section 2.2, note 145.

due to the possibility, described in previous sections, that the same genetic resources or traditional knowledge are shared among indigenous groups in different countries. In such an occurrence, Article 11 only prescribes cooperation, thus leaving the issue of what this cooperation entails open for interpretation.³⁰⁵ Previous sections have argued that national authorities have the duty to inform users about all possible owners of genetic resources and traditional knowledge if they are aware of transboundary situations. Plus, indigenous communities might authorise access in one country, while at the same time negotiating benefit-sharing conditions that apply to communities across the borders. Therefore, there are some possibilities for an extraterritorial application of the Protocol that are not fully addressed in the Protocol itself.

Another problem that is not fully addressed in the Protocol is the concrete relationship between the ABS regime and the general objectives of the CBD. Some authors have pointed to the uncertain impact on conservation of the Protocol.³⁰⁶ Similarly, uncertainties exist as to the concrete impact of ABS agreements on the traditional knowledge of indigenous peoples.³⁰⁷ These questions, however, can hardly be resolved in the abstract and depend both on the way the Protocol is implemented at the national level and on the content of concrete deals. Both aspects go beyond the scope of this research.

Although general limitations and gaps do bear direct consequences on the capacity of the Nagoya Protocol to fulfil the rights of indigenous peoples, the failure fully to recognise those rights constitutes an independent limitation of the Protocol. The analysis conducted in previous sections has revealed that many steps forward have been taken towards the recognition of indigenous rights, including the acknowledgements contained in the Preamble of the Protocol, as well as the provisions on prior informed consent and benefit-sharing.

At the same time, the Protocol contaminates the language of rights with ambiguous alternatives (consent, approval and involvement) and qualifications deriving from national law (established rights). Furthermore, the Protocol fails to explicitly recognise indigenous rights as an integral whole body of rights, ranging from land to cultural rights, underlying the principle of self-determination.³⁰⁸

³⁰⁵ See *supra* sections 2.2 and 2.3.

³⁰⁶ See Fodella, 'Recent Development on Access and Benefit Sharing Relating to Genetic Resources (ABS) in International Law' 2014, at 122-123: "If one looks at the interests that should be ideally taken into account in the management of genetic resources, it seems that those of resources' users have been privileged over those of providers, and that those of humankind and biodiversity conservation have been somehow overlooked". See also, Claudio Chiarolla, Renaud Lapeyre and Romain Pirard, 'Bioprospecting under the Nagoya Protocol: A Conservation Booster?' (2013) 14/13 IDDRI Policy Brief 1, at 2.

³⁰⁷ See Jonas, Bavikatte and Shrumm 2010, at 57: "In sum, the Hoodia benefit sharing agreement simultaneously represents a moral victory for the San community for recognition of their rights relating to traditional knowledge and a process that has arguably further undermined their traditional values and knowledge and resource governance systems".

³⁰⁸ See Tauli-Corpuz 2003, at 14: "Our right to our heritage which includes, among others, traditional knowledge and our genetic materials, cannot be delinked from the bundle of civil, political, economic,

Indeed, the CBD COP has acknowledged in past decisions that traditional knowledge is not an isolated by-product of indigenous culture but is intimately connected to the concrete exercise of cultural practices on indigenous lands.³⁰⁹ Moreover, the Preamble of the Nagoya Protocol has recognised that there exists a profound link between genetic resources and traditional knowledge. However, as highlighted in previous sections, the Protocol creates two slightly different sets of rules for the case when either genetic resources or traditional knowledge belonging to indigenous peoples are utilised. While the choice to create separate access requirements for genetic resources and traditional knowledge may be more protective of indigenous rights, differences when it comes to acceptable entitlements, monitoring requirements, and others are not justifiable.³¹⁰

3. Unveiling the relevance of indigenous rights and the principle of self-determination: applying the interpretative approach

The incorporation of indigenous rights into the CBD's international regime on ABS is not a new idea since it was already included in the Aichi Target 18.³¹¹ The Nagoya Protocol, however, has enormously changed the legal framework, by partially realising this objective.

This chapter has shown that, notwithstanding the progress made by the Nagoya Protocol, it is still necessary to fill some of its normative gaps by looking at the international framework on the rights of indigenous peoples, in order both to avoid potential conflicts between the two regime and to promote a harmonious interpretation. In particular, two significant examples of the need to perform this systemic interpretation are the notion of “established rights” and the issue of when the prior informed consent of indigenous peoples is required. Concerning the former, when Parties adopt national measures to regulate the utilization of genetic resources and related benefit-sharing, they must take into account the relevant international human rights framework. Concerning the latter,

social and cultural rights which we are entitled to enjoy. All these rights flow seamlessly into each other. Thus, the desegregation of our rights as if these can be treated as separate issues and the breaking up of our heritage to be handled by different international intergovernmental bodies is creating multiple problems for us”.

³⁰⁹ See e.g., COP dec. V/16, para. 16: recognition that the preservation of traditional knowledge depends upon the preservation of cultural identity and “the material base that sustains” indigenous peoples.

³¹⁰ At the same time, as already argued in section 2.1, the CBD and the Nagoya Protocol reinforce indigenous rights to traditional knowledge, a category that is not equally delineated under international human rights law.

³¹¹ Aichi Biodiversity Targets, COP dec. X/2, UN Doc. UNEP/CBD/COP/DEC/X/2 (29 October 2010). Target 18: “By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels”.

the decisive test to assess the compatibility with protected human rights of access to genetic resources and traditional knowledge and related benefit-sharing is the extent to which the planned measures affect the cultural distinctiveness of indigenous peoples and their ability to dispose of their resources and to pursue their own development goals in a way that affects these peoples' distinctiveness.

In both cases, indigenous rights are to be read as a coherent body of rights, whose aim is to preserve indigenous peoples' distinctiveness and, thus, underlying the principle of self-determination. The fact that indigenous rights are not absolute³¹² does not diminish the value of reading them in light of self-determination within the CBD regime. Indeed, also States' sovereignty is subject to limits but this does not diminish its normative value.

Self-determination is a principle that, as highlighted in Chapter 2, emerges inductively from a comprehensive reading of indigenous rights, whose essence is to preserve the identity and distinctiveness of indigenous peoples. In the context of the CBD and the Nagoya Protocol, the principle of self-determination has permitted to clarify that the requirements of prior informed consent and MATs are not about private property and normal disposable rights.³¹³ In contrast, both instruments are an expression of indigenous autonomy, their ability to shape their destiny, and their right to negotiate with States and private parties. The Protocol's reference to customary law and community protocols confirm the instrumental nature of prior informed consent and MATs for the realisation of indigenous self-determination.³¹⁴

Several additional examples of how self-determination shapes the interpretation of the Protocol have been given throughout the chapter. Beyond what has been said about prior informed consent and MATs, self-determination has influenced the very notion of traditional knowledge under the CBD regime, which reflects indigenous culture and evolves with it. Furthermore, entitlements over genetic resources have been derived from land and resource rights due to the fact that, pursuant to self-determination, indigenous peoples are free to determine how to utilise their natural resources and related sub-components. In addition, a parallel has been drawn between the regulation of inter-State benefit-sharing, framed within States' permanent sovereignty over natural resources, and intra-State benefit-sharing, which is premised on the liberty of indigenous peoples to dispose of their natural resources.

³¹² See Jonas, Bavikatte and Shrumm 2010, at 52: "While none of these rights are absolutely unqualified and do allow for limited State involvement, they should be seen as substantial gains for Indigenous peoples and local communities. This is especially true if we understand them, as Anaya points out, as a normative direction in which international law is heading". See also, Chapter 2.

³¹³ See Bhatti and others 2009, at 20: "the user must recognize that ABS-requirements of PIC and MAT are not simply a restatement of contract law".

³¹⁴ See Jonas, Bavikatte and Shrumm 2010, at 51: the Nagoya Protocol "establishes the following four pivotal biocultural rights...The right over their genetic resources; The right over their traditional knowledge; The right to self-governance through respect for their customary laws and community protocols [Art. 9]; and The right to benefit from the utilization of their traditional knowledge and genetic resources by third parties".

Most importantly self-determination can level the differential treatment that the Protocol reserves in some cases to genetic resources and traditional knowledge. Since genetic resources and traditional knowledge are in the purview of the same body of international standards protecting the rights of indigenous peoples, safeguards of one regime must penetrate the other.³¹⁵ This is true also in light of the fact that the Nagoya Protocol recognises the intimate link between genetic resources and traditional knowledge.³¹⁶ In this sense, for instance, when it comes to the identification of benefits under the Protocol, the destination of these benefits must be in the hands of indigenous groups both when they derive from the utilisation of traditional knowledge and genetic resources. Article 9 connects the latter type of benefits to conservation objectives to be determined by States.³¹⁷ Indeed, by virtue of indigenous self-determination, when benefits are accrued to indigenous peoples following the utilisation of their genetic resources, indigenous groups must be able to decide over the destination of such benefits, similarly to what happens when traditional knowledge is involved.

In more general terms, both indigenous genetic resources and associated traditional knowledge are to be read as essential components of indigenous distinctiveness and must be dealt with by the Parties of the CBD and the Nagoya Protocol in this light. However, in concrete terms, the requirements concerning the two are formulated in different ways in the Protocol. Moreover, utilisation of genetic resources and traditional knowledge are conceived of as separated moments that deserve distinct safeguards. To respond to these conceptual challenges, the principle of self-determination can, first, justify a notion of genetic resources that is more firmly rooted to indigenous land rights. Second, it can unveil a conception of traditional knowledge that is instrumental for the utilisation of genetic resources, thus improving the decision-making powers of indigenous peoples over the latter. Third, the unity of genetic resources and traditional knowledge can help to unveil the contradictions stemming from monitoring mechanisms that do not promote the disclosure of origin when it comes to traditional knowledge that is used for research and development within the scope of the Protocol.³¹⁸

³¹⁵ See Nijar, 'The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries' 2011, at 25: "This inextricable link of TK to the genetic resource implies that any application for access to the genetic resource would trigger the provisions in the Protocol relating to access to TK as well (UNEP/CBD/WG-ABS/8/2)".

³¹⁶ Preambular para. 22 Nagoya Protocol.

³¹⁷ See *supra* section 2.3.

³¹⁸ See *supra* sections 2.4.1 and 2.4.2.

CHAPTER 4

Conservation, Protected Areas and Indigenous Peoples: Applying the Interpretative Approach

1. Conservation and indigenous rights: conflict and reconciliation

This chapter applies the interpretative approach of the interaction of the CBD regime and indigenous rights, as developed in Chapter 2, to the case of the conservation of biological diversity and the creation of protected areas. The main purpose is to highlight the potential for conflict between obligations stemming from the international regime on biodiversity conservation, as well as indicating ways to reconcile conservation in the CBD and in the WHC with the rights of indigenous peoples.

In-situ conservation is normally achieved through the establishment of protected areas, which is also the approach adopted in the context of the CBD. Before delving into how protected areas are regulated under the CBD, it is worth briefly touching upon this phenomenon and what it may imply for indigenous peoples in order to understand what regulatory needs are at stake.

For the last fifty years, there has been a progressive intensification in the establishment of protected areas. According to UN data, the number of protected areas in 2014 was 209,429.¹ This number has progressively grown since 1962, but it has more than doubled since 2003, which shows the centrality of this instrument in modern conservation strategies.

In the context of this research these numbers are not significant per se and should be complemented by considerations on land tenure and land use. Some authors describe the creation of protected areas as “the single largest land use and status change that has occurred in recent times”, and particularly so for indigenous peoples.² The impact on

¹ Marie Deguignet and others (eds), *2014 United Nations List of Protected Areas* (UNEP-WCMC 2014), at 12-14. This study presents data also on the geographical distribution of these sites, revealing that most of protected areas are nowadays located in Europe, although the percentage of land covered in this continent is lower than in other regions of the world, such as Central America (at 15). See also, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229, at 7.

² Ashish Kothari and others, *Recognising and Supporting Territories and Areas Conserved by Indigenous Peoples and Local Communities: Global Overview and National Case Studies* (Secretariat of the Convention on Biological Diversity 2012), at 32. See also, Doreen Lustig and Benedict Kingsbury, ‘Displacement and Relocation from Protected Areas: International Law Perspectives on Rights, Risks and Resistance’ (2006) 4 *Conservation & Society* 404, at 408: “conservation-induced displacement has been comparable to development-induced displacement in tending disproportionately to target certain minority groups”; Marcus Colchester, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation* (World Rainforest Movement - Forest Peoples Programme 2003), at 22: “According to some indigenous peoples, protected areas and conventional ‘development’ programmes - dams, mines, roads, pipelines, colonisation schemes - are but two sides of the same coin. Both are experienced as top- down impositions on indigenous communities whereby lands are taken away from the control of local communities and

indigenous peoples is especially strong since their lands are rich in biodiversity and are often chosen by States to host natural reserves.³

The establishment of protected areas on indigenous lands may encroach on indigenous rights at different levels.⁴ First, the designation and creation of protected areas may happen with no involvement whatsoever of indigenous peoples, thus violating their land and resource rights and their participatory rights. Further abuses may occur if indigenous peoples are not involved in the management of protected areas created on their territories.⁵ Conservation projects may also lead to the exclusion of indigenous peoples from their lands—through dispossession or relocation⁶—or from resource use. Finally, benefits deriving from the management of protected areas may be not shared equitably with indigenous peoples.⁷ Although these violations are independent from one another and may happen autonomously, a common element is the failure to acknowledge indigenous rights to land and underlying self-determination.

As highlighted in Chapters 1 and 2, the Inter-American Court of Human Rights in the *Kaliña and Lokono* decision has acknowledged the potential restrictions on indigenous

allocated to uses determined by outsiders. Both are violations of the rights of indigenous peoples to their lands and to self-determination”; Desmet 2011, at 66: “It has been estimated that approximately 50 per cent of protected areas have been established on lands traditionally owned by indigenous peoples. In Latin America this would amount to 80 per cent”.

³ See Claudia Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners* (World Bank 2008), at xii, according to which 22% of the Earth terrestrial surface is indigenous land and these territories preserve the 80% of global biological diversity.

⁴ In recognising the possibility that the establishment of protected areas may negatively affect indigenous peoples, the current Special Rapporteur on indigenous rights, Ms. Victoria Tauli Corpuz, has invited submissions from the public inter alia about cases “when the creation and management of conservation areas has resulted in violations of the rights of indigenous peoples as enshrined in relevant international human rights instruments”. Submissions can also focus on examples of conservation projects that have enhanced indigenous rights, as well as “conservation activities and proposals undertaken by indigenous peoples themselves”. To see the full range of topics: <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/ConservationActivities.aspx> (last accessed October 2016). The deadline for submissions was on 2 May 2016. On a related note, the Special Rapporteur has published the above-mentioned Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229. In this report, she confirms that “[t]he respective Special Rapporteurs...have, since the establishment of the mandate in 2001, received numerous allegations of large-scale violations of the rights of indigenous peoples in the context of conservation measures” (p. 18). Reports on national violations are cited on the same page, note 39. For concrete examples of violations of indigenous rights following conservation and the establishment of World Heritage sites, see the same report at 19-22.

⁵ The reasons more frequently invoked to exclude indigenous peoples from the management of protected areas located in their territories are difficulties in engaging with them, the failure of indigenous peoples to protect the environment, and the refusal of management practices that are not based on Western science. See Mac Chapin, ‘A Challenge to Conservationists’ [2004] *World Watch Magazine* 17.

⁶ Note that relocation can also be performed in a way that is consistent with indigenous peoples, but this would require that free, prior and informed consent is obtained and possibly that indigenous peoples are moved in a place that has comparable features in terms of livelihood and possibility to carry out cultural practices. See *infra*.

⁷ On benefit-sharing, see Chapter 3.

rights stemming from the establishment of protected areas.⁸ Most importantly, the Court has elaborated an additional requirement to evaluate the legality of restrictions placed on indigenous rights in case of the establishment of protected areas on their territories, that is the possibility that indigenous peoples continue to be able to “access and use their traditional territories” after the establishment of protected areas.⁹ Furthermore, the Court has explicitly invoked Articles 8(j) and 10(c) of the CBD, as well as the CBD PoWPA,¹⁰ to reinforce its argument that indigenous peoples have extensive participatory rights when it comes to the establishment and management of protected areas.¹¹ Whether or not the CBD regime contains such an extensive understanding of indigenous rights is the object of this chapter.

In the context of the CBD, conservation is one of the three pillars of the treaty.¹² Although the term is not defined,¹³ the meaning of conservation emerges from the obligations incumbent on Parties concerning in-situ¹⁴ and, in a complementary way, ex-situ conservation.¹⁵ When conservation within natural habitats is viable, Article 8(a) and (b) requires Parties to “[e]stablish a system of protected areas or areas where special measures need to be taken to conserve biological diversity”, and to define guidelines to identify those areas.

The issues at stake when interpreting this provision are two, namely the meaning of protected areas within the CBD and the relevance of establishing protected areas for the overall objective of achieving conservation.

Concerning the first point, Article 2 defines protected areas in a functional way since it stresses the aim of conservation.¹⁶ Furthermore, this provision associates conservation

⁸ The case concerned inter alia the establishment of nature reserves without consultation and the prohibition to carry out traditional activities within the territories designated as protected areas. The Court lacked jurisdiction to examine the legality of the establishment of those nature reserves since these had been created before Suriname accepted the Court’s jurisdiction. However, it examined the issue of the legality of restrictions posed on the use of natural resources by indigenous peoples within the reserves. *Kaliña and Lokono* case, paras. 162 and 166.

⁹ *Kaliña and Lokono* case, para. 181.

¹⁰ As reminded, established by COP dec. VII/28, UN Doc. UNEP/CBD/COP/DEC/VII/28 (13 April 2004).

¹¹ *Kaliña and Lokono* case, paras. 177-178.

¹² Art. 1 CBD. The three objectives of the Convention are the conservation of biological diversity, the sustainable use of its components, and the sharing of the benefits deriving from the utilisation of genetic resources.

¹³ See Elisa Morgera, *Wildlife Law and the Empowerment of the Poor* (FAO 2010), at 19; Desmet 2011, at 44.

¹⁴ Art. 2 CBD. In-situ conservation implies that species, ecosystems and habitats are conserved and restored “in their natural surroundings”.

¹⁵ Under Art. 2 CBD, ex-situ conservation is defined as “the conservation of components of biological diversity outside their natural habitats”. According to Art. 9 CBD measures to realise ex-situ conservation should be adopted “predominantly for the purpose of complementing in-situ measures”.

¹⁶ The definition contained in Art. 2 CBD reads: ““Protected area” means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives”. Gillespie has observed that this broad definition constitutes the “lowest common denominator” of all definitions of

to a physical space. In this sense, the first important element to single out protected areas is that these must be “geographically defined”. Second, those defined areas must be subject to rules or management plans that are aimed to conservation.

Protected areas, however, are not isolated biodiversity hotspots in the understanding promoted by the CBD. The fact that Article 8(a) requires the establishment of a “system of protected areas” hints to a conception of conservation whereby protected areas are selected for their potential to contribute to the conservation of certain species or habitats in a broader perspective, which also considers whether the same habitats or species are protected under other established protected areas.¹⁷ In other words, biodiversity is to be preserved not only within ecosystems but also considering the interactions among them. In this sense, Article 8(a) somehow complements the definition of ecosystems as functional units, provided by Article 2.¹⁸ This interpretation is confirmed by the definition of the ecosystem approach given by the CBD COP, according to which the functional units of any ecosystems do not have a specific scale.¹⁹

From another perspective, the ecosystem approach adopted by the CBD is cognizant of the competition for natural resources and the need to ensure that these are used, although sustainably, for goals that are different from conservation. This interpretation is confirmed by Article 10(a) of the CBD, which requires that States jointly consider conservation and sustainable use when adopting national standards.²⁰ Furthermore, the CBD COP recognises that the functions of ecosystems depend on different perceptions of those functions by different groups.²¹

protected areas contained in other international regimes on conservation. Alexander Gillespie, *Protected Areas and International Environmental Law* (Martinus Nijhoff 2007), at 27.

¹⁷ Lyle Glowka, Françoise Burhenne-Guilmin and Hugh Synge, *A Guide to the Convention on Biological Diversity* (IUCN 1994), at 39: “The word “system” in paragraph (a) implies that the protected areas of a Party or region should be chosen in a logical way, and together should form a network, in which the various components conserve different portions of biological diversity”.

¹⁸ Art. 2 CBD: ““Ecosystem” means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit”.

¹⁹ See COP dec. V/6, UN Doc. UNEP/CBD/COP/5/23 (15-26 May 2000), Annex, Part A, para. 1: “The ecosystem approach is a strategy for the integrated management of land, water and living resources that *promotes conservation and sustainable use in an equitable way*” (emphasis added); and para. 3: “This definition [that of habitat provided in Art. 2 CBD] does not specify any particular spatial unit or scale, in contrast to the Convention definition of “habitat”. Thus, the term “ecosystem” does not, necessarily, correspond to the terms “biome” or “ecological zone”, but can refer to any functioning unit at any scale. Indeed, the scale of analysis and action should be determined by the problem being addressed”; Part B, para. 6, Principles 7 and 10. On the ecosystem approach, see also COP dec. II/8, UN Doc. UNEP/CBD/COP/2/19 (1995), para. 1; COP dec. IV/1 (1998), Part B; COP dec. VI/12, UN Doc. UNEP/CBD/COP/6/20 (2002); COP dec. IX/7, UN Doc. UNEP/CBD/COP/DEC/IX/7 (9 October 2008). See also, the Ecosystem Approach Sourcebook, a tool to help practitioners implement the ecosystem approach in practice, elaborated following COP dec. VII/11. The Sourcebook is available at <https://www.cbd.int/ecosystem/sourcebook/default.shtml> (last accessed October 2016).

²⁰ A similar obligation is established under Art. 8(i) CBD.

²¹ See COP dec. V/6, Annex, Part B, para. 6, Principle 1: “The objectives of management of land, water and living resources are a matter of societal choice. Rationale: Different sectors of society view ecosystems in terms of their own economic, cultural and societal needs. Indigenous peoples and other

In this sense, the CBD COP has endorsed the six-category system of categorisation of protected areas by the International Union for the Conservation of Nature (IUCN), which provides for different degrees of conservation and different degrees of restrictions on the use of resources, ranging from the absolute prohibition of human interference to models that allow for different kind of uses.²² This categorisation responds to the question of how protected areas relate to the objective of conservation, identifying what can be done to achieve conservation depending on circumstances. Differences in strategies for conservation are also overshadowed in Article 8(a) of the CBD that, beyond considering the establishment of protected areas, it also allows for “areas where special measures need to be taken to conserve biological diversity”.²³

The variety of conservation models brings up another fundamental question, which is about who decides on what is done to achieve conservation in protected areas within the range of possible choices, and more generally what are the subjects entitled to take decisions on the establishment of protected areas. These questions relate to what IUCN has named as governance issues.²⁴

Governance issues in the context of Article 8(a) are certainly linked to States’ obligation to establish protected areas. In this respect, next sections explore to what

local communities living on the land are important stakeholders and their rights and interests should be recognized. Both cultural and biological diversity are central components of the ecosystem approach, and management should take this into account. Societal choices should be expressed as clearly as possible. Ecosystems should be managed for their intrinsic values and for the tangible or intangible benefits for humans, in a fair and equitable way”. See also, COP dec. VII/11, Annex 1, para. 3(c): “Ecosystem management is a social process. There are many interested communities, which must be involved through the development of efficient and effective structures and processes for decision-making and management”. This decision also adds new elements to the rationale for Principle 1: “The objectives for managing land, water, and living resources is a matter of societal choice, determined through negotiations and trade-offs among stakeholders having different perceptions, interests, and intentions”. These decisions are also analysed in section 2.1.

²² See CBD dec. VII/28, para. 31 and COP dec. IX/18, UN Doc. UNEP/CBD/COP/DEC/IX/18 (9 October 2008), para. 9. For an overview of the IUCN categories, see Nigel Dudley, *Guidelines for Applying Protected Area Management Categories* (IUCN 2008). The management categories elaborated by IUCN are six: (Ia) Strict Nature Reserves; (Ib) Wilderness Areas; (II) National Park; (III) Natural Monument; (IV) Habitat/Species Management; (V) Protected Landscape or Seascape; and (VI) Protected Areas with Sustainable Use of Natural Resources. These have been elaborated in the first place to promote the harmonisation of the criteria to identify and classify protected areas at the national level. According to Gillespie, however, the endorsement of the IUCN system by the CBD COP has not produced the desired harmonisation of national classifications. See Gillespie 2007, at 30. The same author has identified a number of necessary elements for protected areas to achieve their conservation purposes. These elements are: the presence of management plans, the recognition of legal status, identified borders, adequate size, buffer zones, networks and corridors, adequate staff and sufficient resources, and the performance of environmental impact assessment for projects taking place within or near protected areas. See Alexander Gillespie, ‘The Management of Protected Areas of International Significance’ (2006) 10 *New Zealand Journal of Environmental Law* 93.

²³ This issue is further explored in section 2. See also Art. 8(c) and (g) CBD, which give a hint what “special measures” could be, such for instances adopting a regulatory framework to protect certain biological resources or to prohibit the release of genetically-modified organisms.

²⁴ Grazia Borrini-Feyerabend and others, *Governance of Protected Areas: From Understanding to Action* (IUCN 2013), at 10-11.

extent this obligation can be satisfied by delegating decision-making powers to non-State actors, and in particular indigenous peoples.

This option is not excluded by the CBD when reading Article 8(a) in combination with Articles 8(j) and 10(c). The former requires States to protect traditional knowledge relevant for conservation.²⁵ Similarly, the latter obliges States to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”. These obligations open up for the possibility that States promote a decentralised management of natural resources that might involve indigenous and local communities.²⁶ The CBD, however, neither explicitly refers to the possibility of such involvement nor indicates its modalities. Indigenous and Community Conserved Areas (ICCAs) are included in IUCN’s most recent categorisation of governance types and represent a promising model for including indigenous peoples in decisions on protected areas.²⁷ The extent to which this model is reflected in CBD practice is explored in section 2.1.3.

Regarding the question whether the establishment of protected areas has a prominent place with respect to the objective of conservation, there are two possible interpretations, a literal one and a contextual one. Pursuant to Article 8(a), the obligation to establish a system of protected areas is part of a broader set of obligations to achieve in-situ conservation. Furthermore, as the rest of the obligations under Article 8, it is qualified by the locution “as far as possible and as appropriate”. While this locution does not necessarily limit the mandatory nature of the obligation to establish protected areas but only gives a broad manoeuvring space to States on how to realise this undertaking, protected areas are not the only way to achieve conservation under the CBD.

From a contextual perspective, however, the establishment of protected areas has been reaffirmed several times by the CBD COP and has been included in the long-term objectives of the Convention.²⁸ In light of these elements, the creation of protected areas

²⁵ For a thorough analysis of Art. 8(j) CBD, see Chapter 3.

²⁶ Glowka, Burhenne-Guilmin and Synge 1994, at 60-61: “A Contracting Party’s primary goal should be to encourage governmental policies which minimize or eliminate the antagonism and competition between government and local communities over control and management of biological resources”. This policy objective may imply the involvement of indigenous peoples in the management of natural resources. The IUCN commentary also argues that Art. 11 CBD can also be interpreted as giving States the faculty to establish incentive measures to encourage conservation by indigenous peoples.

²⁷ *Ibid.*, at 7.

²⁸ COP dec. VII/28, para. 1, according to which the establishment of protected areas is essential “for achieving...the three objectives of the Convention”; PoWPA, at 6: “The central role of protected areas in implementing the objectives of the Convention has been repeatedly emphasized in decisions of the Conference of Parties”. See further COP dec. X/2 establishing the CBD Strategic Plan 2011-2020 and the Aichi Biodiversity Targets, Target 11. Following the failure to achieve the objective to reduce biodiversity loss by 2010, the Strategic Plan has reiterated the importance of concrete and “immediate action”, such as the creation of protected areas to “safeguard” and “restore” biodiversity (para. 10(c)). Furthermore, the Aichi Target 11 establishes that: “By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative

is the main measure to realise conservation within the CBD.²⁹ It seems, therefore, that one of the essential questions in order to understand to what extent the creation of protected areas is compatible with indigenous rights is how this undertaking is carried out. The management of natural resources for conservation purposes entails a number of choices that are not only related to the protection of nature.³⁰ The idea that conservation is not anymore about the protection of wilderness from human abuse³¹ but it is instead related to the sustainable management of resources through human activity has largely permeated the literature and is broadly reflected in the CBD. An overall reading of the CBD allows for an interpretation whereby sustainable use is complementary to conservation³².

and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes”. See also Gillespie, *Protected Areas and International Environmental Law* 2007, at 105: “the creation and maintenance of protected areas are ‘essential’ in meeting all of the broad objectives of the CBD, the 2010 target (to significantly reduce the rate of biodiversity loss) from the World Summit on Sustainable Development and the attainment of the United Nations Millennium Development Goals. To achieve these goals, protected areas became incorporated within many of the thematic areas of the CBD, as well as becoming an important stand alone item on the CBD agenda, which is supplemented by active working groups”. The obligation to establish protected areas is also contained in other international regimes on the conservation of certain species and habitats, such as the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2 February 1971, in force 21 December 1975) and the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979, in force 1 November 1983). See *ibid.*, at 98 ff. Furthermore, the obligation to conserve natural heritage of outstanding universal value is contained in the WHC. This obligation may be realised through the creation of protected areas. See *infra* for the analysis of this issue.

²⁹ COP dec. VII/28, PoWPA.

³⁰ Morgera, *Wildlife Law and the Empowerment of the Poor* 2010, at vii: “There is a wide variety of interests to be balanced in wildlife management. These interests range from the conservation of biodiversity and specific endangered species and their habitats, to valuable opportunities in eco-tourism or hunting tourism, to the needs and traditions of the local population relating to hunting and collection of animals or their product for cultural/religious practices”.

³¹ On the exclusionary approaches to conservation, see Colchester 2003, at 3; Jules Pretty, ‘People, Livelihoods and Collective Action in Biodiversity Management: Biodiversity, Sustainability and Human Communities’ in Tim O’Riordan and Susanne Stoll-Kleeman (eds), *Biodiversity, Sustainability and Human Communities: Protecting beyond the Protected* (Cambridge University Press 2002), at 63-64; Holly Jonas, Harry Jonas and Suneetha M. Subramanian, *The Right to Responsibility: Resisting and Engaging Development, Conservation, and the Law in Asia* (Natural Justice and United Nations University – Institute of Advanced Studies 2013), at 3; Desmet 2011, at 15 and 45; Gilbert, ‘The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Rights?’ 2013, at 339, note 97. See also Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229, at 14.

³² See Art. 1, Art. 8(c), Art. 10(c) CBD. See also, COP dec. II/8, para. 1: the COP “[r]eaffirms that the conservation and sustainable use of biological diversity and its components should be addressed in a holistic manner”; COP dec. III/9 (1996), preambular para. 6: “Noting that the reduction in the number of species and the fragmentation and degradation of ecosystems and habitats call not only for conservation but also for inter alia sustainable use and restoration of habitats”; PoWPA, at 6: “Protected areas, together with conservation, sustainable use and restoration initiatives in the wider land- and seascape are essential components in national and global biodiversity conservation strategies”; furthermore, “protected areas are important instruments for meeting the Convention’s targets of significantly reducing the rate of biodiversity loss by 2010” (although this objective has not eventually been met); COP dec. IX/13, which decides for the revision of the tasks of the programme of work at session 10, in order to emphasise the linkages between the protection of traditional knowledge, conservation and sustainable use, as well as benefit-sharing; COP dec. X/43, para. 8: the COP “Decides to include a new major component on

Furthermore, the role of communities and the importance of the ecosystem approach are explicitly acknowledged in the Convention and by the CBD COP.³³

Notwithstanding this progress, conservation does not lose its potential for conflict since “it supposes decisions about the use of scarce natural resources”,³⁴ as well as involving a different set of actors, including States, private actors, and indigenous peoples. Indigenous peoples may largely contribute to conservation due to their traditional practices and knowledge. However, they are not intrinsically stewards of the environment.³⁵ As demonstrated in Chapter 2, they enjoy a vast margin of manoeuvre when it comes to the management and destination of their lands and natural resources.

In this context, this chapter illustrates to what extent the human rights approach to conservation is incorporated into the CBD, what are its main features and its limitations. This analysis is compounded by the study of another international regime with conservation goals, namely the WHC, which embraces a conception of conservation whereby local communities are largely excluded from the efforts of protecting nature. However, since its adoption, the WHC has addressed some concerns related to indigenous participation. Therefore, it is worth analysing to what extent recent developments are in line with the current international regime on indigenous rights. In this context, the underlying purpose of the chapter is to understand what are the conditions under which conservation and indigenous rights can be reconciled under current international law.

The legal problems that guide the analysis of this chapter can be summarised as follows. What happens when protected areas are created without the participation or consent of indigenous peoples? When does consent have to be obtained? How should participation be realised? Can indigenous peoples be evicted from their lands, if a protected area is established? When agreement has been reached on the creation of a protected area, what happens if indigenous peoples are not involved in its management? What if the outcome of participatory processes is not implemented? What is the role of the State?³⁶ Only some of these questions find a response in conservation regimes. The remainder of this section summarises to what extent these issues have been solved by the CBD, the WHC, and related practice, and highlights the main limitations still present

Article 10 with a focus on Article 10(c) in the revised programme of work on Article 8(j)”; COP dec. XI/14, which proposes tasks for future consideration in relation to Article 10(c), including customary sustainable use in protected areas (Task 14); COP dec. XII/12, para. 9. See Ulrich Beyerlin and Vanessa Holzer, ‘Conservation of Natural Resources’ Max Planck Encyclopedia of Public International Law, para. 11: conservation and sustainable use are different, although interrelated, concepts within the CBD. The authors highlight that in more general terms conservation presupposes management and therefore use.

³³ See Chapter 1, section 3 and *infra* section 2.2 in this chapter.

³⁴ Desmet 2011, at 46. The author also acknowledges the positive value of conservation (at 19).

³⁵ *Ibid.*, at 46.

³⁶ Another question could be: how should benefits stemming from the establishment of protected areas be shared? The issue of benefit-sharing is explored in Chapter 3, section 2.3 also with respect to possible interactions with the creation of protected areas. On problems concerning the scope of application of the ABS regime, see *infra*.

in these legal frameworks.

2. The incorporation of indigenous rights into international conservation regimes

Although the establishment of protected areas has posed a strain on indigenous rights for many years, it has only recently attracted attention.³⁷ This change of discourse in the general understanding of this problem has been possible thanks both to the increasing importance of indigenous voices and to the work of international institutions dealing with conservation, such as IUCN.

Concerning the representation by indigenous peoples of the interplay between their rights and the protection of biodiversity,³⁸ these groups have traditionally recognised their own role in protecting the environment, additionally arguing for the linkage between the protection of their rights and long-term sustainability. The 2002 Indigenous Peoples' Plan of Implementation on Sustainable Development, furthermore, has highlighted the importance of the cooperation between indigenous peoples and the CBD institutional mechanisms.³⁹ These positions have emerged from a number of declarations that indigenous representatives and indigenous-related organisations have made often in the context of side events organised by them on the occasion of international conferences of States, such as the United Nations Conference on Environment and Development and the World Summit on Sustainable Development.⁴⁰ These declarations, therefore, only

³⁷ Grazia Borrini-Feyerabend, Ashish Kothari and Gonzalo Oviedo, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation. Guidance on Policy and Practice for Co-managed Protected Areas and Community Conserved Areas* (IUCN 2004), at 7. Gillespie, *Protected Areas and International Environmental Law* 2007, at 181. Peter Bille Larsen and Gonzalo Oviedo, *Reconciling Indigenous Peoples and Protected Areas: Rights, Governance and Equitable Cost and Benefit Sharing* (IUCN 2006), at 2: "Three of the major milestones of the protected area paradigm change (Philips 2003) involve the recognition of the rights of indigenous peoples, equitable cost and benefit-sharing, and the emphasis on new forms of governance to protected area management". See also, Anne Perrault, Kirk Herbertson and Owen J. Lynch, 'Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC)' (2007) 19 *Georgetown International Environmental Law Review* 475, at 476. Outside the CBD realm, the World Bank's Operational Policy 4.12 on Involuntary Resettlement (December 2001) has acknowledged the impacts that the creation of protected areas may produce on the capacity of indigenous peoples to access natural resources (paras. 3, 7, and 8).

³⁸ See Desmet 2011, at 134-138.

³⁹ Para. 35: "We will continue to participate actively in the full process of the Convention on Biological Diversity, through the International Indigenous Forum on Biodiversity, in order to defend and safeguard the biodiversity of our lands and territories, and we call for the coherence and consistency in the implementation of the different Rio instruments, with other local, national and regional instruments".

⁴⁰ See Indigenous Peoples' Earth Charter, paras. 67 and 83: "67. Recognizing Indigenous Peoples' harmonious relationship with nature"; "83. Indigenous Peoples should form and direct their own environmental network". See also, Charter of the Indigenous and Tribal Peoples of the Tropical Forests, Statement of the International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests (Established Penang, 15 Feb 1992; revised Nairobi, 22 Nov 2002), Art. 13: "There can be no sustainable development of the forests and of our peoples until our fundamental rights as peoples are respected"; Art. 43: "The best guarantee of the conservation of biodiversity is that those who promote it should uphold our rights to the use, administration, management and control of our territories. We assert that guardianship

provide an idea of indigenous positions on certain matters related to their interest and rights. As such, they have tried to influence the positions of States and the development of soft law standards by the latter. In spite of this, indigenous declarations do not possess an autonomous legal value under current international law. Furthermore, it is often unclear which indigenous groups endorsed these declarations. Therefore, these can be deemed only partially representative of indigenous world visions on certain issues.

In other indigenous declarations, indigenous peoples have clarified that they refuse environmental strategies that are imposed from the outside without respecting their self-determination and their rights, and with no consideration for their involvement and consent.⁴¹ In particular, the Indigenous Peoples' Earth Charter has identified the creation of parks as an activity that can create trade-offs with indigenous rights.⁴² Furthermore, the Charter has problematized the uncritical notion according to which biological diversity and cultural diversity always go hand in hand. Indeed, while the former may be instrumental for the latter, indigenous culture should evolve freely in accordance with each community's priorities and development strategies.⁴³ On the

of the different ecosystems should be entrusted to us, indigenous peoples, given that we have inhabited them for thousands of years and our very survival depends on them". See further, Indigenous Peoples' Plan of Implementation on Sustainable Development (Johannesburg 2002), para. 6: "We reaffirm our spiritual and cultural connection to our land and territories"; para. 38: "We demand that all legislation, policies or work programs on forests and protected areas guarantee and rigorously respect our lands and territories, rights, needs and benefits and recognize our full rights to control and manage our forests". See Corobici Declaration, Expert Meeting on Traditional Forest-Related Knowledge, (San José, 2004), para 2: "Indigenous peoples provide concrete solutions to many of the issues facing humanity today and by strengthening indigenous peoples' roles through effective participation in areas such as forest management and sustainable development, indigenous peoples can contribute significantly to a sustainable future for all of humanity"; see also General Principles 1 and 2 on self-determination and free, prior and informed consent.

⁴¹ See inter alia Indigenous Peoples' Earth Charter, para. 40: "There must be some control placed upon environmental groups who are lobbying to protect our territories and the species within those territories. In many instances, environmental groups are more concerned about animals than human beings. We call for Indigenous Peoples to determine guidelines prior to allowing environmental groups into their territories"; para. 61: "Indigenous Peoples must consent for all projects in our territories. Prior to consent being obtained, the people must be fully and entirely involved in any decisions. They must be given all the information about the project and its effects. Failure to do so should be considered a crime against the Indigenous Peoples". See also, Charter of the Indigenous and Tribal Peoples of the Tropical Forests, Art. 21: "Control of our territories and the resources that we depend on: all development in our areas should only go ahead with the free, prior and informed consent of the indigenous people involved or affected. We insist on recognition of our right to veto any developments proposed on our lands without our consent"; Art. 42: "Conservation programmes must respect our rights to the use and ownership of the territories and resources we depend on. No programmes to conserve biodiversity should be promoted on our territories without our free, prior and informed consent as expressed through our indigenous organisations".

⁴² Indigenous Peoples' Earth Charter, para. 41: "Parks must not be created at the expense of Indigenous Peoples. There is no way to separate Indigenous Peoples from their lands"; "The person or persons who violate this should be tried in a world tribunal within the control of Indigenous Peoples set for such a purpose. This could be similar to the trials held after World War II." See also, Corobici Declaration, para. 3: "Protected areas, oil, timber, fishing concessions and forest plantations are created that overlap with our lands, resulting in the eviction of and restrictions for our peoples".

⁴³ Indigenous Peoples' Earth Charter, para. 59: "We value the efforts of protection of the biodiversity

contrary, other indigenous declarations have insisted on the need to assimilate protected areas to indigenous territories, thus calling for the recognition of indigenous forms of conservation in accordance with their right to self-determination.⁴⁴ This argument has been echoed by discussions on ICCAs in the context of IUCN and the CBD, as explained below and in section 2.1.3.

Concerning the work of international institutions dealing with conservation, the recommendations and guidelines adopted by IUCN are particularly significant due to its work on the categorisation of protected areas, its cooperation with the CBD COP,⁴⁵ and its official role in advising the World Heritage Committee for the inscription of natural and mixed sites within the WHC.⁴⁶ Furthermore, IUCN has played an active role in the promotion of indigenous rights in conservation projects.⁴⁷ In this sense, IUCN has partially influenced the evolution of the integration of indigenous rights into conservation treaties, by spreading its policy papers and research, influencing UN bodies and States with strategies and guidelines, and proposing concrete models.⁴⁸

but we reject to be included as part of an inert diversity which pretends to be maintained for scientific and folkloric purposes”. See also, Corobici Declaration, General Principle 6: “Indigenous peoples have the right to a development that is appropriate and suitable for us, on our own terms and conditions, and at our own pace and tempo, managed and guided by our own leaders, institutions and processes. The right to use our forests, water and subsoil which we have protected and sustainably used over the centuries, in ways that we find appropriate, including contemporary innovative systems of forest use and forest management, is part of our right to development”.

⁴⁴ Charter of the Indigenous and Tribal Peoples of the Tropical Forests, Art. 44: “Environmental policies and legislation should recognise indigenous territories and systems of natural resource management as effective ‘protected areas’, and give priority to their legal establishment as indigenous territories”. See also, Indigenous Peoples’ Plan of Implementation on Sustainable Development, para. 37: “We call for constitutional and legislative recognition of our conservation and management of biodiversity, as inherent to the sovereignty of Indigenous Peoples”; para. 40: “With regards to protected areas established on indigenous lands and territories, including wetlands, coasts and seas, States must transfer the territorial control, including the jurisdiction, administration and management over these areas to Indigenous Peoples”.

⁴⁵ Especially by developing position papers for CBD meetings. See <http://www.iucn.org/theme/global-policy/resources/position-papers/convention-biological-diversity-cbd> (last accessed October 2016).

⁴⁶ On the last point, see *infra* section 2.2.2 in this chapter. See also Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter Operational Guidelines), Doc. WHC.15/01 (8 July 2015), paras. 30, 31(e), and 37: “The specific role of IUCN in relation to the *Convention* includes: evaluation of properties nominated for inscription on the World Heritage List, monitoring the state of conservation of World Heritage natural properties, reviewing requests for International Assistance submitted by State Parties, and providing input and support for capacity-building activities”.

⁴⁷ The interest in indigenous issues is reflected already in the IUCN resolutions of the 1970s. See IUCN General Assembly (GA) Res. 12.5 (1975), recommendations 3-5.

⁴⁸ See Desmet 2011, at 122: “The International Union for Conservation of Nature (IUCN) has played a leading role in promoting the integration of the rights and aspirations of indigenous peoples and local communities in conservation policy and practice”. For the history of the institution’s most relevant decisions concerning indigenous rights and conservation and its advocacy activity, see at 138-144. See also, IUCN, Indigenous Peoples Issues in IUCN: An Internal Discussion Note (24 November 2006), available at https://www.iucn.org/sites/dev/files/import/downloads/sp_ip_issues_iucn_wcc_04.pdf (last accessed October 2016). This section analyses only some of the IUCN decisions on protected areas depending on their relevance. For the identification of concrete models to address the issue of interaction

The different nature of these instruments reflects the varied and atypical institutional structure of IUCN. This has a complex institutional framework, since it gathers different kinds of members, such as States and NGOs. Decisions within IUCN are also adopted by different sets of bodies, such as the Council, the governing body, and general Congresses, which are the general assemblies of the union. The latter are convened by IUCN but gather a broad range of actors, going from States to indigenous representatives and businesses. The value of IUCN position papers and other documents, therefore, mainly relates to the capacity to represent the position of IUCN's members and of the union as such. IUCN resolutions, on the other hand, usually are used both to express the official endorsement of certain positions by the union and to adopt non-binding recommendations directed to IUCN members. For the purpose of this thesis, the importance of IUCN variegated set of instruments lies in the influence that these standards have exercised both on the process of formation of international norms and on their interpretation, which is examined more in detail in the next two sections, and on the positions of the national departments that are members of the union.⁴⁹

IUCN's position vis-à-vis indigenous rights has significantly evolved so that it is possible to identify two main phases, one preceding the Durban World Parks Congress in 2003 and the changes following the adoption of the Durban Accord and Action Plan.⁵⁰ Concerning the first phase, the adoption in 1996 of Resolution 1.53 on Indigenous Peoples and Protected Areas has set the agenda of the organisation for the years to come.⁵¹ IUCN was called to endorse a tripartite set of objectives:

- 1) recognition of the rights of indigenous peoples with regard to their lands or territories and resources that fall within protected areas; 2) recognition of the necessity of reaching agreements with indigenous peoples prior to the establishment of protected areas in their lands or territories; 3) recognition of the rights of the indigenous peoples concerned to participate effectively in the management of the protected areas established on their lands or territories, and to be consulted on the adoption of any decision that affects their rights and interests over those lands or territories.⁵²

The path towards the official endorsement by the organisation of these standards has been incremental until the World Parks Congress held in Durban in 2003.⁵³ The

between indigenous rights and the creation of protected areas, see the work of TILCEPA. This acronym stands for the "Theme on Indigenous and Local Communities, Equity and Protected Areas", which has been set up by IUCN in 2000. This body regularly produces policy briefs and guidance.

⁴⁹ See IUCN's website for the list of State departments that are members of the union: <http://www.iucn.org/secretariat/membership/about/union/members/who-are-our-members> (last accessed October 2016). Most of them are governmental departments dealing with environmental issues.

⁵⁰ See Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229, at 15-18.

⁵¹ IUCN GA Res. 1.53 (1996) (hereinafter Res. 1.53).

⁵² Res. 1.53, para. 1.

⁵³ Res. 1.53 was followed up by a set of guidelines and principles adopted in 1999. IUCN and WWF, Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas (May 1999).

Congress, bringing together inter alia representatives of governments, indigenous peoples and business, has produced the Durban Accord, a declaration of intent, and the Durban Action Plan that was meant to implement the related political agreement.⁵⁴ The latter document has clearly endorsed a set of outcomes, including Outcome 5, according to which “[t]he rights of indigenous peoples, including mobile indigenous peoples, and local communities are secured in relation to natural resources and biodiversity conservation”. This outcome is complemented by a series of targets and actions to be implemented at all decision-making levels.⁵⁵

The resulting framework of reference is an inclusive approach to conservation that promotes the respect for indigenous rights (target 8),⁵⁶ the participation of indigenous peoples in the management of protected areas (target 9), and the establishment of participatory mechanisms for the restitution of territories “that were incorporated in protected areas without their free and informed consent” (target 10).⁵⁷ It is significant to note that the Durban Plan of Action has identified the CBD COP as one of the main addressees of the standards elaborated by IUCN. COP VII, which took place only one year after the Durban World Congress then adopted decision VII/28 that explicitly

Although these guidelines acknowledge the need to consider the rights of indigenous peoples in the establishment of protected areas, priority is given to conservation objectives (Introduction). Furthermore, the guidelines are ambiguous in stating that agreements between indigenous peoples and conservation agencies should only be sought (Principle 1). Furthermore, more emphasis is put on the role of indigenous peoples in the management of protected areas, rather than in their establishment. Also, the way in which indigenous rights are framed is not in line with international human rights standards on indigenous peoples, since the right to own and use traditional lands and resources is ambiguously downplayed in favour of a right to participate in the management of those land and resources (Principle 2).

⁵⁴ IUCN, Durban Accord: Our Global Commitment for People and Earth’s Protected Areas; Durban Action Plan (Vth IUCN World Parks Congress, 2003).

⁵⁵ The levels of action required are international, national and local, at the level of the managements authorities of protected areas, and by IUCN. Concerning international action, the Durban Action Plan recommends that the “CBD COP7 should ensure the implementation of the spirit and intent of articles 8(j), 10(c) and related provisions of the CBD”. Given the ambiguities of these articles, however, this recommendation appears at least generic.

⁵⁶ In the follow-up to the Durban Congress, IUCN World Conservation Congress (WCC) Res. 4.048 (2008) has furthermore referred to the application to the UNDRIP to “IUCN’s Programme and operations”. Other elements of interest are that: the implementation of IUCN’s standards should be evaluated with the involvement of indigenous peoples; and national governments should undertake reform to implement the Durban Accord and Action Plan, as well as the UNDRIP. The interconnectedness between the recognition of indigenous rights and the attainment of conservation objectives has been reiterated at the last World Parks Congress of 2014. See IUCN, A Strategy of Innovative Approaches and Recommendations for Respecting Indigenous and Traditional Knowledge and Culture in the Next Decade (22 December 2014) (hereinafter A Strategy of Innovative Approaches), at 2: “The situation can be turned around based on strong evidence demonstrating that where policies recognize, support and protect the rights of Indigenous Peoples and the importance of their traditional knowledge and governance systems, conservation values and peoples well-being are improved and sustained”.

⁵⁷ See Desmet 2011, at 141. These targets have been confirmed by the last World Parks Congress of 2014. See A Strategy of Innovative Approaches. Concerning the substance of these standards, the reference to free, prior and informed consent is only indirect since this is not explicitly requested for the creation of protected areas. Instead, the lack of free, prior and informed consent is considered an entitlement to restitution.

recognises the role of indigenous peoples in the establishment and management of protected areas, as discussed in next section.⁵⁸

Other targets have been agreed in Sidney in 2014, including that “[t]he implementation of the World Heritage Convention is aligned with the principles of UNDRIP and the Outcome Document of the 2014 World Conference on Indigenous Peoples and the Convention’s procedures and Operational Guidelines are amended accordingly”.⁵⁹ Some ambiguities, however, remain concerning the recognition by individual States within IUCN of indigenous peoples as “equal partners” in conservation policies.⁶⁰

Notwithstanding contradictory declarations of individual members, recent policy documents have made explicit the difference between the management categories of protected areas, which focus on the types of conservation measures, and the governance categories of protected areas, which respond to the question of which subjects decide over the establishment of protected areas. Governance categories are four and include governance by governments, shared governance, private governance, and governance by indigenous and local communities.⁶¹ This categorisation has not been developed autonomously in the context of IUCN, which instead has extensively drawn from parallel developments in the CBD regime.⁶²

While these normative developments are analysed in the next section, the following gives a brief overview of IUCN’s governance types both to introduce terms of reference

⁵⁸ See Durban Action Plan, at 264: “Perhaps the most important audience of all for the work done in Durban is the intergovernmental Conference of Parties to the CBD. The sections of this plan that relate to the CBD, and the Message to the Convention on Biological Diversity adopted in Durban, constitute a wealth of expert advice that IUCN hopes will be of great assistance to the CBD COP7 – with its special focus on protected areas – and subsequently”. See also, at 249: under the heading of suggested international action, the “CBD COP7 should ensure the implementation of the spirit and intent of articles 8(j), 10(c) and related provisions of the CBD”. On CBD COP dec. VII/28, see *infra* section 2.1.

⁵⁹ The World Conservation Congress of IUCN had agreed already in 2008 to fully implement the UNDRIP in every activity of the organisation. See WCC Res. 4.052 (2008), which endorses the UNDRIP and recognises that “the ability of indigenous peoples to protect and support biological and cultural diversity is strengthened by a fuller recognition of their fundamental human rights” (Preamble). See also WCC Res. 5.055 (2012), which “[r]equests, as directed in WCC Res. 4.052 and as funding permits, that the Council establish a taskforce to examine the application of the Declaration to every aspect of the IUCN Programme”.

⁶⁰ A Strategy of Innovative Approaches, at 2. This is also evident in the commitments formulated by individual States. Although these represent a tangible result of the Sidney World Parks Congress, they remain vague in terms of the recognition of indigenous rights and of the actions that every State is willing to take to include them in the establishment and management of protected areas. See the commitments at http://worldparkscongress.org/about/promise_of_sydney_commitments.html.

⁶¹ See Borrini-Feyerabend and others 2013. The categorization of governance types has been endorsed by IUCN through a series of resolutions adopted at the World Conservation Congress of Jeju, including Res. 5.040 (2012), Res. 5.042 (2012), and Res. 5.094 (2012).

⁶² As revealed in the report, IUCN’s categorisation is also a survey of existing governance types. See *ibid.*, at 29. Overall, IUCN’s position paper stresses the importance of involving a range of different actors also with a view of achieving more effective conservation (at 18: “Having multiple institutions engaged in protected area governance buffers the system against the failings of any one institution”). According to the report, this is also the tendency in some States (at 17).

that are used in the rest of the chapter and to understand to what extent the same categories are reflected in CBD-related instruments.

IUCN's approach to the issue of governance is based on the understanding that each governance type has a different and well-identifiable decision-maker. In this light, when protected areas are established on the initiative of governmental agencies, either at central or decentralised levels, it is a case of governance by government. The argument goes that the government does not need to own the territories of prospected protected areas, as long as it has the power to decide over the destination on land. Similarly, governmental agencies can delegate management powers to non-governmental actors, as long as the former retain decision-making powers.⁶³

Notwithstanding this clear-cut premise, different factors contribute to blur the lines of this first category. IUCN refers to the case where national laws foresee participatory requirements for the establishment and day-to-day governance of protected areas.⁶⁴ In such cases, depending on how participatory requirements are conceived, decision-making powers may be shared among different actors. Even though the initiative comes from the government, decisions might not be taken solely by it. Furthermore, relevant participatory requirements can be found not only in national legislation but also in international treaties. In the case of indigenous peoples, a participatory process seeking consent must be initiated if indigenous land, resource and cultural rights are at stake.⁶⁵ This means that contrary to IUCN categorisation, land rights do play a role when it comes to decision on governance types.

The co-decision of different actors is reflected in the second governance type, that of shared governance where governmental and non-governmental actors are flexibly involved in decision-making.⁶⁶ This governance type must be tested against three criteria, namely that an effective negotiation process takes place, that "a co-management agreement...establishing roles, responsibilities and expected benefits and contributions from different parties" is concluded, and that "a multi-party governance institution" is in place.⁶⁷ Depending on the concrete institutional arrangements under this governance type, indigenous rights may be satisfied if this shared governance is established with the free, prior and informed consent of indigenous peoples.

The third IUCN type, i.e., governance by private actors encompasses a range of options where landowners—be they individuals or profit and not-for-profit entities—

⁶³ Ibid., at 30-31.

⁶⁴ Ibid., at 31.

⁶⁵ See Chapter 2, section 3.5.

⁶⁶ Beyond the involvement of different national decision-makers, IUCN refers to the case of transboundary protected areas, when more than one States are involved, as a case falling into the category of shared governance. Borrini-Feyerabend and others 2013, at 33.

⁶⁷ Ibid., at 33.

are also those who established a protected area on their territory.⁶⁸ Under this category, the establishment of protected areas is thus voluntary, although arrangements with governmental agencies may follow mainly to seek recognition and support from public authorities.⁶⁹ While lack of recognition is usually reflected in the absence of data on privately-owned protected areas,⁷⁰ a too pronounced involvement of government authorities may in contrast transform this governance type into those described above. This category may also overlap with the following category, ICCAs, when landowners are indigenous peoples.⁷¹

Governance by indigenous peoples, the last IUCN category, is realised when conservation occurs in areas collectively owned and/or voluntarily managed by indigenous peoples.⁷² Although IUCN recognises that this governance type might not have a formally established decision-making system, it identifies three main criteria to dub indigenous territories as ICCAs, i.e., attachment to land, at least a *de facto* capacity to enforce decisions, and some results in terms of conservation.

The last two criteria are especially difficult to meet. First, the capacity to enforce decisions might be compromised by governmental decisions authorising a different set of activities on indigenous territories without effectively consulting with them. Since ICCAs have been formalised as a governance category in order to ensure more recognition for areas managed by indigenous peoples, the failure to enforce decisions *vis-à-vis* the State or private actors authorised by the State cannot be considered a very telling criterion in the identification of those areas. On the contrary, States need to put in place legislative and other kind of provisions to ensure that indigenous governance can be effectively enforced on third actors. Second, it is not clear by what standards the achievement of conservation objectives needs to be evaluated and why the same criterion is not considered when evaluating other governance types.

This last critique finds resonance in the acknowledgment by IUCN that beyond these four governance types, there might exist cases of territories that *de facto* achieve conservation results although their original purpose was not to maintain biological diversity. Ancillary conservation, as the IUCN report defines it, can be recognised as a relevant example of conservation efforts and might represent an example of special area-based conservation measures under Article 8(a) of the CBD.⁷³ In this sense, even

⁶⁸ *Ibid.*, at 36.

⁶⁹ *Ibid.*, at 37-38.

⁷⁰ *Ibid.*, at 39.

⁷¹ The multiple overlapping of IUCN governance types are recognised in the IUCN policy paper, which indeed frames the four governance types as a continuum. See *ibid.*, at 45.

⁷² *Ibid.*, at 40. This category also includes protected areas that are governed by local communities. The report refers to a comprehensive concept of Indigenous Peoples' and Community Conserved Territories and Areas, abbreviated as ICCAs. At 41, the report provides some examples of existing ICCAs. On the definition of ICCAs, see also Kothari and others 2012, at 16-20.

⁷³ Borrini-Feyerabend and others 2013, at 51.

indigenous territories that are not managed primarily to protect nature or that do not fall under the definition of protected areas under the CBD but that de facto contribute to conservation might be relevant for the purposes of meeting the obligation of Article 8(a).

The main problem is that States willing to meet their international obligations through the recognition of ICCAs or ancillary conservation need to engage in a process of formalisation that is not necessarily sought by indigenous peoples. In this sense, the legality of this formalisation need to be carefully evaluated against the standards established under international human rights law, including the existence of a process of effective participation and direct negotiation with indigenous peoples concerning the formal recognition of their conservation efforts.⁷⁴ As highlighted by IUCN, formal or informal recognition of indigenous rights over land is usually a necessary precondition for the State to engage in participatory processes with indigenous peoples.⁷⁵

2.1. Developments in the CBD: indigenous participatory rights

Article 8(a) of the CBD does not offer explicit criteria to address the issue of the potential conflict with the rights of indigenous peoples. While the utilisation and protection of indigenous traditional knowledge is regulated under Article 8(j) and the Nagoya Protocol,⁷⁶ the issue on how to reconcile indigenous land and resource rights with conservation is left unaddressed in the text of the CBD. As highlighted above, a combined reading of Article 8(a) and 10(c) suggests a positive presumption in favour of the integration of conservation objectives and indigenous traditional practices. However, the CBD does not indicate any concrete means to achieve the mutually supportive objective of realising conservation while enhancing traditional practices. Furthermore, the CBD does not adopt the language of the human rights of indigenous peoples currently recognised under international law. This lack of explicit human rights language can be attributed to the fact that the adoption of the CBD precedes the consolidation of indigenous rights. Still, the problem remains as to whether it is possible to interpret the provisions concerning conservation within the CBD in light of indigenous rights.

In more general terms, the CBD does not establish any hierarchy between its provisions and other international regimes. According to Article 22,

[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

⁷⁴ Ibid., at 52: “voluntary conserved territories and areas should not be incorporated into a formal protected area system unless there is clear agreement from the rightholders that this is desired”.

⁷⁵ Ibid., at 55.

⁷⁶ Other CBD provisions are relevant when it comes to the issue of traditional knowledge, practices and innovations. COP decisions on Art. 8(j) are also crucial in partially solving the interpretative difficulties linked to this provision. These issues are examined in Chapter 3.

In light of this, the CBD would prevail on other obligations agreed upon by Parties only in case other international regimes produce negative effects or a threat on biodiversity that are so strong to reach the threshold of seriousness required in Article 22.⁷⁷ The general expectation is, however, that Parties should find ways to implement the CBD in a manner that is in line with other obligations incumbent on them.⁷⁸

As seen in the Introduction of this dissertation, a way in which the coordination of multiple instruments with different subject matters can be achieved is by means of interpretation. Article 31(3)(c) of the VCLT prescribes that interpretation must take account of general international law that might be relevant to the provisions at stake. In the same vein, the ICJ has concluded that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”.⁷⁹ In this sense, the international regime on the rights of indigenous peoples is relevant not only to the extent that the CBD recognises a role for indigenous and local communities in the conservation of biodiversity, but also given that indigenous peoples might be affected by the implementation of CBD provisions on conservation.

This argument is supported by a conspicuous set of CBD COP decisions that have clarified the relationship between conservation and indigenous rights.⁸⁰ Recent CBD practice has specifically provided indications on the role of indigenous peoples in the creation and management of protected areas. In this sense, while Article 23 assigns to the COP a law-making role with respect to the adoption of protocols and amendments to the Convention,⁸¹ some authors have argued that, given the COP’s mandate for the

⁷⁷ On the indeterminateness of this threshold, see Glowka and *al.* 1994, at 109. See also, Chandler 1993, at 148-150. See also Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?’ 2010, at 655. This author has denounced the indeterminateness of this threshold, thus challenging the value of Art. 22 CBD as a rule capable of addressing conflicts across regimes. The same author has also questioned the very need to discuss the interaction with other treaties from the perspective of which treaty should prevail, i.e., hierarchy. Morgera opposes to the argument of indeterminateness a different interpretation of Art. 22. See Elisa Morgera, ‘Far Away, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law’ (2011) 2 *Climate Law* 85. According to this author, not only does Art. 22 authorize CBD Parties to deviate from non-CBD obligations when these pose a threat or have negative impacts on biodiversity, but it also requires that CBD Parties actively seek for cases where negative repercussions could occur and raise an explicit exception.

⁷⁸ See ILC fragmentation report, para. 277. The report highlights that while harmonisation of regimes maybe relatively easy when international rules share the same subject matter or goals, the same operation may reveal itself difficult when international regimes have different rationales. See the Introduction to this thesis, section 2.

⁷⁹ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory opinion (21 June 1971), para. 53.

⁸⁰ Although the first COP meeting took place in 1994, the first decisions relevant for indigenous and local communities were taken at COP 3 in 1996.

⁸¹ See Art. 23(4)(c), (d), and (e) CBD. The entry into force of protocols and amendments is in any case subjected to the ratification of new instruments and changes by Parties.

development and implementation of the CBD regime, even COP decisions have been acquiring an interpretative and “norm-making” role.⁸² In this sense, for instance the COP has created a Working Group on Article 8(j) to suggest ways for States to implement this provision in their national legal system.⁸³ It is interesting to note that non-State actors including indigenous peoples are invited to take part in COP meetings and may influence the discussion therein. In more general terms, the COP functions as the general assembly of State Parties and thus crystallises their practice in relation to the CBD regime.

In light of this important role of the CBD COP, the remainder of this section explores the way in which the relationship between conservation and indigenous peoples has been framed by CBD parties. Particular attention is given to the issue of how participation and ICCAs are reflected in CBD decisions.

2.1.1. *Participatory rights and the ecosystem approach*

As said, the ecosystem approach underlies the CBD obligations on conservation. This approach is relevant from the perspective of acknowledging indigenous rights while implementing CBD provisions on in-situ conservation since it recognises the existence of multiple values attached to biological resources, as well as the possibility of different conservation choices depending on societal needs.⁸⁴ In this sense, conservation needs to be balanced against competing interests. One of the ways to account for multiple interests is to ensure the participation of several actors in conservation, including indigenous peoples.⁸⁵

⁸² See Morgera and Tsioumani, ‘Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity’ 2011, at 4: “The COP is principally mandated to keep under review the implementation of the convention, including by undertaking ‘any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation.’ On this basis, it has evolved into a prolific norm-creating body across all areas covered by the CBD”.

⁸³ On this Working Group, see Chapter 3.

⁸⁴ COP dec. V/6, Annex, Part A, para. 1: “The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Thus, the application of the ecosystem approach will help to reach a balance of the three objectives of the Convention”; para. 2: “It recognizes that humans, with their cultural diversity, are an integral component of many ecosystems”; para. 3: “the scale of analysis and action should be determined by the problem being addressed”; Part B, Principle 1: “The objectives of management of land, water and living resources are a matter of *societal choice*” (emphasis added); Principle 10: “The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity”. See also COP dec. VII/11, Annex 1, para. 2: “It recognizes that humans, with their cultural diversity are an integral component of many ecosystems”; para. 3(a): “Management of living components is considered alongside economic and social considerations at the ecosystem level of organisation, not simply a focus on managing species and habitats”; para. 3(c): “Ecosystem management is a social process. There are many interested communities, which must be involved through the development of efficient and effective structures and processes for decision-making and management”; Annex 1, Annotations to the rationale of Principle 1 “All relevant sectors of society need to have their interests equitably treated”; Annex 1, Annotations to the rationale of Principle 2: “There are usually many communities-of-interest in ecosystem management”; annex 1, Implementation guidelines to Principle 10.

⁸⁵ COP dec. VII/11, para. 10: the COP “[r]ecommends that Parties and other Governments, [sic] facilitate the full and effective participation of indigenous and local communities”; Annex 1, Annotations

This recognition is certainly a first attempt to operationalize the multiple options concerning the creation of protected areas in Article 8(a) in a way that is coherent with indigenous rights.⁸⁶ At the same time, some ambiguities remain. First, participation in decision-making is only foreseen with respect to the management of conservation,⁸⁷ thus excluding governance issues related to the establishment of protected areas from the scope of the ecosystem approach. This limitation is probably due to the fact that early decisions on the ecosystem approach do not specifically deal with protected areas but more extensively with conservation.

At the same time, there seems to be a conflation of governance and management issues. For instance, both COP decisions V/6 and VII/11 insist on a participatory approach to the definition of spatial scale, with the involvement *inter alia* of indigenous peoples.⁸⁸ Similarly, indigenous peoples are to be involved in management choices over the goals of management.⁸⁹ Both boundaries and the identification of conservation objectives clearly require a participatory governance model. Furthermore, a very innovative element is the indication that power inequalities need to be considered when promoting participatory processes in decision-making.⁹⁰ In contrast with this framework, the same COP decisions suggest a division of work where strategic decisions are taken by central government, while communities only decide on the allocation of benefits.⁹¹

The framework delineated above must be completed through the examination of the links between conservation and sustainable use in the CBD. This analysis sheds some light on the additional idiosyncrasies and contradictions of the CBD regime when it comes to the relationship between conservation and indigenous peoples. As already clarified, conservation and sustainable use are interdependent objectives within the CBD.⁹² The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity confirm this bond in that they highlight that sustainable use contributes to conservation and

to the rationale of Principle 1: “All interested parties (particularly including indigenous and local communities) should be involved in the process”.

⁸⁶ COP dec. V/6, Annex, Part B, Rationale for Principle 1: “Indigenous peoples and other local communities living on the land are important stakeholders and their rights and interests should be recognized”.

⁸⁷ COP dec. V/6, Annex, Part B, Principle 2 and Part C, para. 11.

⁸⁸ COP dec. V/6, Annex, Part B, Principle 7.

⁸⁹ COP dec. VII/11, Annex 1, Implementation guideline 1.1 to Principle 1.

⁹⁰ COP dec. VII/11, Annex 1, Implementation guideline 1.5.

⁹¹ COP dec. VII/11, Annex 1, Implementation guideline 2.1 to Principle 2. Additional ambiguities relate to the indication, in Principle 11 and related implementation guidelines, that information provided by indigenous peoples must be facilitated within the framework of Art. 8(j). Chapter 3 explores in depth the problems concerning the interpretation of this article, as well as the potential conflict between the utilisation of traditional knowledge under Art. 8(j) and indigenous rights.

⁹² See note 32 *supra*.

cannot be achieved without it.⁹³ In continuity with the PoWPA and related decisions,⁹⁴ the Addis Ababa principles recognise the importance of the participation of indigenous peoples in the decisions concerning resource use. The conditions, procedural steps, and results of participation are not specified.⁹⁵ In the same vein, the principles make reference to “local rights” although they fail to specify the relevant legal framework.⁹⁶ Also, benefit-sharing is defined only as an instrument for addressing the needs of indigenous peoples following inter alia conservation projects.⁹⁷ Under human rights law, however, benefit-sharing is a general measure and must be ensured every time States restrict indigenous land rights.⁹⁸ In sum, the principles fall short of adopting a fully-fledged human rights language.

2.1.2. *Participatory rights and protected areas*

COP decision VII/28 of 2004 represents a paradigm change in terms of the relationship between conservation and indigenous peoples since it adopts the PoWPA. With this document the COP has agreed on the main framework for the establishment of protected areas for the years to come. While the overall objective of the decision is to contribute to the conservation of ecosystems,⁹⁹ the PoWPA reflects the CBD Parties’ consensus on four interrelated and mutually supportive areas: 1) the establishment and management of

⁹³ Addis Ababa guidelines, at 5.

⁹⁴ See next section.

⁹⁵ Therefore, it is not clear whether or in which cases indigenous peoples should only be consulted or their consent should be required. See *infra* section 3 in this chapter.

⁹⁶ Addis Ababa guidelines, Practical Principle 2 and its Rationale: “Governments recognize and respect the “rights” or “stewardship” authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities, private landowners, conservation organizations and the business sector. Moreover, to reinforce local rights or stewardship of biological diversity and responsibility for its conservation, resource users should participate in making decisions about the resource use and have the authority to carry out any actions arising from those decisions”. On the link between conservation and benefit-sharing, see Chapter 3, section 2.3.

⁹⁷ Addis Ababa guidelines, Practical principle 12: “The needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources”. Operational guidelines: “Promote economic incentives that will guarantee additional benefits to indigenous and local communities and stakeholders who are involved in the management of any biodiversity components”; “[i]nvolve local stakeholders, including indigenous and local communities, in the management of any natural resource”. These formulations never refer to the fact the participation is to be ensured by virtue of indigenous substantive rights.

⁹⁸ See *Saramaka* case. See Chapter 2, section 3.

⁹⁹ See COP dec. VII/28, at 7, suggested activity 1.1.5, and Goal 1.2. This decision also explicitly confirms that the creation of protected areas is “essential for achieving, in implementing the ecosystem approach, the three objectives of the Convention” (para. 1).

protected areas;¹⁰⁰ 2) participation;¹⁰¹ 3) enabling activities; and 4) standards, assessment, and monitoring. Each of the four programme elements contains a number of suggested activities from which Parties may select “according to particular national and local conditions and their level of development”.¹⁰² While the variety of measures confers flexibility to the system, monitoring is ensured through the reporting duties incumbent on Parties and “other Governments”.¹⁰³

Concerning the elements that are relevant to the relationship between protected areas and indigenous peoples, there are three thematic clusters that emerge from the analysis of the PoWPA, namely respect for indigenous rights and participation, impact assessment, and community-conserved areas. The last element is examined in the next section dedicated to COP decisions on ICCAs, while the first two are analysed in the following.

“Full and effective participation” of indigenous and local communities in “the establishment, management and monitoring of protected areas” is one of the cornerstones of the PoWPA. The main novelty in this context is represented by the articulation of participation in relation to the “full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations”.¹⁰⁴ The first innovative aspect is, therefore, that there is a clear reference to the rights of indigenous peoples, as overshadowed in decisions on the ecosystem approach. Indigenous rights must be used as a benchmark to determine the content of participation under national and international law. The second innovation is that, contrary to Article 8(j) where

¹⁰⁰ The PoWPA is divided into four Programme elements. The title of Programme element 1 is: “Direct actions for planning, selecting, establishing, strengthening, and managing, protected area systems and sites”.

¹⁰¹ The full title of the second element is: “Governance, participation, equity and benefit sharing”.

¹⁰² COP dec. VII/28, at 7-8. According to paras. 5-6 of the decision, the programme is to be adjusted by taking into account national legislation and national priorities.

¹⁰³ COP dec. VII/28, para. 30. States should report to the Executive Secretary, which in turn is called to “[c]ompile information received from Parties, other Governments and relevant organizations and bodies on the implementation of the programme of work” (para. 35(a)). The decision has also established an Ad Hoc Open Ended Working Group on Protected Areas to support and review implementation (para. 25). For more information on monitoring and implementation, see <https://www.cbd.int/protected/implementation/highlights/?headerid=4df79863-f2ad-43cf-a560-b6c90475b533> and <https://www.cbd.int/protected/implementation/actionplans/> (last accessed October 2016).

¹⁰⁴ COP dec. VII/28, para. 22: the COP “[r]ecalls the obligations of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and notes that the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations”. See also, Goal 2.2: “To enhance and secure involvement of indigenous and local communities and relevant stakeholders” in management and establishment of protected areas “in full respect of their rights and recognition of their responsibilities” by implementing specific plans and initiatives (suggested activity 2.2.2) and involvement in decision-making (2.2.4); suggested activity 1.4.1: in order to ensure effective planning and management, Parties should “Create a highly participatory process, involving indigenous and local communities and relevant stakeholders”; suggested activity 2.1.5: Parties should “Engage indigenous and local communities and relevant stakeholders in participatory planning and governance, recalling the principle of the ecosystem approach”.

the protection of traditional knowledge is subject to national law, the PoWPA indicates that both national and international law are relevant frameworks for the identification of indigenous rights. It seems, therefore, that these frameworks are supplementary to one another, although it is not entirely clear what would happen if national standards diverged from internationally established rights.

More recent decisions indicate the need to “take note” of the United Nations Declaration on indigenous rights while implementing the PoWPA.¹⁰⁵ In light with Chapter 2, indigenous participatory rights are protected under international human rights treaties, whose provisions are mandatory on those CBD Parties that have ratified them. For these reasons, obligations stemming from human rights treaties cannot be disregarded when implementing the CBD.

The reference to “applicable international obligations” is a clear indication that the international body of indigenous rights applies to the situation where protected areas are established, managed, or monitored. Under international law, participation is a spectrum that can be subsumed under the concept of free, prior and informed consent and goes from consultation in matters concerning the land and resources of indigenous peoples or otherwise affecting their culture to actual consent.¹⁰⁶

In line with human rights law, the PoWPA requires that prior and informed consent is obtained every time the creation or management of protected areas imply the resettlement of indigenous and local communities.¹⁰⁷ Resettlement is certainly one of the hypotheses when the consent of indigenous peoples is required. As explained in Chapter 2, the compression of indigenous rights to the point that their distinguished identity is threatened has also been interpreted as a case that requires consent under international human rights law.¹⁰⁸

Human rights treaty bodies have not applied yet the requirement of consent to the case concerning the establishment of protected areas. In *Kaliña and Lokono*, the Inter-American Court has elaborated a specific test to assess the compression of indigenous rights following the creation of protected areas.¹⁰⁹ In the reasoning of the Court, proportionality is ensured when effective participation, continued access to territories

¹⁰⁵ COP dec. X/31, para. 1(i); COP dec. X/2, Strategic Plan 2011-2020, para. 4.

¹⁰⁶ See Chapter 2, section 3.5.

¹⁰⁷ PoWPA, suggested activity 2.2.5: “Ensure that any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations”. Compare with Art. 10 UNDRIP: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”.

¹⁰⁸ Chapter 2, section 3.5.

¹⁰⁹ As reminded in note 8, the Inter-American Court did not specifically assess the legality of the creation of concerned protected areas due to lack of jurisdiction on facts occurred before Suriname accepted the jurisdiction of the Court. *Kaliña and Lokono* case, para. 162.

and resources, and benefit-sharing are in place.¹¹⁰

It is interesting to note that concerning effective participation, the Inter-American Court directly refers to the PoWPA to support the point that agreements on establishment and management must be sought between indigenous representatives and conservation agencies.¹¹¹ The Court equally refers to Article 8(j) and Article 10(c) of the CBD to reinforce the argument that conservation and indigenous rights can be mutually supportive.¹¹² Furthermore, it *inter alia* relies on the abovementioned Addis Ababa guidelines on sustainable use elaborated by the CBD COP to argue that protected areas are not only biodiversity reserves, but also have a “socio-cultural dimension”.¹¹³ This reliance on the CBD and CBD-related instruments is a unique example in the panorama of human rights treaty bodies and testifies to an increased contamination of the two international bodies. The fact that this contamination has occurred in relation to participatory requirements for the creation and management of protected areas is also very significant and may be linked to the fact that the CBD COP decisions have elaborated on participatory requirements in a way that is more detailed than human rights treaty bodies since they explicitly contemplate the case where consent is required.

The last COP has furthermore acknowledged the potential for conflict of establishing protected areas without the prior informed consent of indigenous and local communities. At the same time, it has highlighted the centrality of conservation for “the protection and maintenance of customary sustainable use of biological diversity and associated traditional knowledge”.¹¹⁴ While it is noteworthy that the COP has articulated the ambivalence inherent in the relationship between conservation and indigenous peoples, the last COP has shown that the recognition of indigenous rights within the CBD cannot be taken for granted for two reasons.

First, decision XII/12 adopts a broad formulation to refer to prior informed consent, which *inter alia* includes the mere approval and involvement of indigenous peoples.¹¹⁵ This confusion contributes to blur the lines between these categories but at the same time reflects the fact that participation is a spectrum going from consultation to consent even under international human rights law.¹¹⁶ Indeed, the fact that the CBD does not use the

¹¹⁰ In *Xákmok Kásek* case, the Court equally found a link between the creation of a nature reserve and the failure for the State to respect indigenous rights to land. However, it did not explicitly articulated criteria to judge the proportionality of restrictions. In the African system (*Endorois* case), the creation of a nature reserve is judged against the paradigm established in the *Saramaka* case, namely legality, proportionality and necessity. On the latter cases, see Chapter 1, section 2.2.1 and section 2.2.2.

¹¹¹ *Kaliña and Lokono* case, para. 181, note 230.

¹¹² *Kaliña and Lokono* case, paras. 177 and 181.

¹¹³ *Kaliña and Lokono* case, para. 173. On the guidelines, see *infra* in this section.

¹¹⁴ COP dec. XII/12, para. 9.

¹¹⁵ For an analysis of this formulation in Art. 8(j), see Chapter 3, section 2.1.2. See also, Morgera, ‘Towards International Guidelines on Prior Informed Consent and Fair and Equitable Benefit-Sharing from the Use of Traditional Knowledge’ 2015.

¹¹⁶ See Chapter 2, section 3.5.

same terms of art as in human rights law, but introduces new categories may signal that CBD Parties would like to keep a way-out from the application of human rights standards within the CBD. In light of systemic interpretation and harmonisation, States cannot implement one treaty's obligations while disregarding connected obligations stemming from other treaties, unless they explicitly derogate from one of the regimes concerned.

Second, it seems that the implementation of indigenous participatory rights is downplayed in favour of the attainment of the objectives of the CBD. While this further ambiguity is dictated by the restricted scope of the Convention and the separateness of the regime on indigenous rights, the COP would better contribute to the definition of this relationship by providing more concrete criteria for the interaction of the two regimes.

Participation is compounded in the PoWPA by complementary activities, such as the assessment of the impacts deriving from the establishment of protected areas. The PoWPA does not specify whether the assessment of costs and benefits should precede the establishment of protected areas;¹¹⁷ this would be the case under human rights standards. Furthermore, an important term of reference for impact assessment within the CBD is the decision VII/16 adopting the Akwé:Kon guidelines. These are voluntary standards on “cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities”.¹¹⁸ The guidelines were agreed upon at the same COP as PoWPA's and can be read in logical continuity with it.

In contrast with the PoWPA, however, the Akwé:Kon guidelines do not adopt a clear human rights language, referring instead to the need to take into account the “concerns and interests” of indigenous and local communities.¹¹⁹ The only references to indigenous rights are related to a specific kind of assessment, highly qualified, or both. For instance, “[n]ational environmental impact assessment legislation and processes should respect existing inherent land and treaty rights as well as legally established rights of indigenous and local communities”.¹²⁰ While the locution “inherent land rights” might refer to indigenous customary land tenure systems, the reference to treaty land rights is ambiguous. Indeed, it is not clear whether this locution limits the consideration

¹¹⁷ PoWPA suggested activity 2.1.1: Parties should “[a]ssess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities, and adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs and equitably share benefits in accordance with the national legislation”.

¹¹⁸ These terms are defined in the guidelines in para. 6. It is interesting to note that cultural assessment may concern elements such as the impact on traditional livelihoods. See COP dec. VII/16, Akwé:Kon guidelines paras. 40, 43(c) and (i), 44(i) 45, and 47.

¹¹⁹ Akwé:Kon guidelines para. 3(b), and para. 21: “In order to protect the interests of affected indigenous and local communities”.

¹²⁰ Akwé:Kon guidelines para. 35.

of indigenous rights to the extent they are protected under international human rights treaties ratified by CBD Parties or, instead, whether treaty rights are only those established in bilateral agreements between the State and indigenous peoples.¹²¹

In any event, and as a general requirement, “[g]overnments, their agencies and development proponents should take into account the rights of indigenous and local communities over lands and waters traditionally occupied or used by them and the associated biological diversity”.¹²² The definition of land rights as merely based on traditional occupation or use, however, leaves out the case where indigenous groups have been illegally deprived of their lands and relocated elsewhere. The failure to acknowledge a broader notion of land rights is also reflected in the delimitation of the scope of application of the guidelines, which uses the same formula.¹²³ Therefore, the notion of land rights incorporated in the guidelines is not entirely in line with international human rights standards.

This drawback in the formulation of the guidelines, however, can be remedied by looking at the notion of land rights as emerging from the decisions of regional human rights treaty bodies, the ILO monitoring system, and the UN Declaration on indigenous rights. In light of this framework, the lack of current possession does not amount to the absence of land ownership, which is a broader concept than physical occupation and reflects the cultural relationship of indigenous peoples with land.¹²⁴

Another element that needs clarification is the extent to which involvement and participation of indigenous and local communities in impact assessment activities are “subject to national legislation”. In light of the Akwé:Kon guidelines, participation in screening and scoping activities might be limited by national legislation.¹²⁵ On the

¹²¹ An example could be the Treaty of Waitangi. This interpretation, however, is problematic due both to the contested legal nature of and the difficulties in implementing most of those treaties, as well as the assimilationist nature of some of them. See e.g., Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006, at 41-54; Olivier Michel, ‘Status of Treaties Entered into with Indigenous Peoples Predating Modern State Practice’ (2009) 34 *South African Yearbook of International Law* 223; Michael R. Hudson, ‘Status of Treaties with Indigenous Peoples in International Law’ [1993] *Canadian Council on International Law Proceedings* 114; John Borrows, ‘Ground-Rules: Indigenous Treaties in Canada and New Zealand’ (2006) 22 *New Zealand Universities Law Review* 188; Andrea Ormiston, ‘(Re)writing History : A Report on the United Nations Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations’ (2005) 12 *Law & Anthropology* 196; Kent McNeil, ‘Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion’ (2002) 33 *Ottawa Law Review* 301; Michael Coyle, ‘Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties’ (2009) 32 *Manitoba Law Journal* 1.

¹²² Akwé:Kon guidelines, para. 57.

¹²³ See Akwé:Kon guidelines, para. 12.

¹²⁴ See Chapter 2, section 3.1.

¹²⁵ Akwé:Kon guidelines, para. 14: “Affected indigenous and local communities should be invited to participate on any body appointed to advise on the screening and scoping phases or should be consulted on an impact assessment process for a development proposal, and should be involved in the establishment of the terms of reference for the conduct of the impact assessments, subject to national legislation”. On the meaning of this locution under Art. 8(j) CBD, see Chapter 1, section 3, and Chapter 3, section 1.

contrary, assessment procedures are to be carried out in accordance with indigenous rights, including participation, “subject to national legislation consistent with international obligations”.¹²⁶ Given the different formulations used, it can be concluded that within the scope of application of the Akwé:Kon guidelines, when impact assessments are performed, national standards contrary to internationally protected rights of indigenous peoples shall be superseded by international obligations. It can be inferred that the similar locution used in the PoWPA shares the same meaning. Therefore, also in the context of the PoWPA, international standards would prevail on contrasting national provisions.

In addition to the framework above, the Akwé:Kon guidelines operationalize the involvement of indigenous peoples in impact assessment in a way that is not explicitly contemplated by human rights bodies and instruments. The novelty is represented by the possibility for indigenous communities and the proponent of any development taking place on their lands to stipulate an agreement to identify the reciprocal rights and duties, as well as any procedural steps to be taken in the assessment procedure, “including the option of a no-action alternative”.¹²⁷ Agreements, even when framed as a mere possibility, are an expression of a recognised subjectivity for indigenous peoples, in that they concern fundamental aspects such as the option not to proceed with the proposed development. Furthermore, such agreements may regulate rights and duties in a position of reciprocity. It may occur, therefore, that when the proponents of developments are public agencies, indigenous peoples have an instrument to negotiate with the State. In this case, the locution “subject to national legislation and regulations” contained in the guidelines confirms the fact that these agreements are not comparable to international treaties but should be framed as internal acts whose conclusion is regulated by national legislation.

Moreover, when development projects are controlled by private actors, CBD Parties must supervise them in accordance with their general duty to protect human rights.¹²⁸ Private parties that are proponents of conservation projects may also enter into agreements with indigenous communities. Therefore, this instrument allows both States and businesses to engage with indigenous peoples.

The possibility to stipulate agreements might in principle also provide a solution to the issue of the relationship between impact assessment and the requirement of prior and informed consent. The Akwé:Kon guidelines condition the results of assessment

¹²⁶ Akwé:Kon guidelines, para. 57.

¹²⁷ Akwé:Kon guidelines, para. 21: “In order to protect the interests of affected indigenous and local communities, an agreement, could be negotiated between the community and the proponent of the development. The terms of such an agreement, subject to national legislation and regulations, could cover the procedural aspects of impact assessments, including the option of a no-action alternative, setting out the rights, duties and responsibilities of all parties, and also address measures to prevent or mitigate any negative impacts of the proposed development”. Similarly, in para. 30 concerning cultural impact assessments, the guidelines foresee the possibility that indigenous peoples conclude protocols with the proponents of development projects to regulate the behaviour of development agents.

¹²⁸ UN Report on business and human rights. See Chapter 2, note 261.

procedures to prior informed consent only when this is required at national level.¹²⁹ In this sense, agreements between indigenous peoples and development proponents may circumvent the lack of consent requirements in national legislation. However, while the failure to seek for free, prior and informed consent is not in line with international standards,¹³⁰ the conclusion of agreements is only optional so that it may not suffice to fill national lacunae.

By reading the PoWPA in conjunction with the Akwé:Kon guidelines, it is clear that impact assessment is a complex undertaking that may contribute to reach the objective of realising participation in the establishment and management of protected areas. If conducted as a process that incorporates indigenous rights into broadly-speaking development decisions on indigenous lands, impact assessment may be instrumental for the empowerment of indigenous peoples and the realisation of their rights. In this sense, impact assessment can be functional to the establishment of procedural and institutional arrangements through which indigenous peoples can negotiate with the concerned authorities.¹³¹

The empowerment of indigenous peoples may also derive from the requirement that CBD Parties invest in capacity-building activities in order to allow for an effective participation of indigenous and local communities in decision-making processes.¹³² The main problem with the standards contained in the Akwé:Kon guidelines is that they are voluntary and scarcely implemented.¹³³ At the same time, impact assessment is also a procedural guarantee that must be performed under human rights law when restrictions are imposed on indigenous peoples. In this sense, although the modalities of impact assessment are left to the initiative of States, their performance is anyway required to ensure the protection of indigenous rights.

While the adoption of the standards of participation and impact assessment is a way to integrate the rights of indigenous peoples into the implementation of the CBD, it is very hard—and it lies outside the scope of this dissertation—to assess the concrete impact of the adoption of the PoWPA and related standards on national legal systems.

¹²⁹ An exception to that is represented by impact assessment procedures of projects that require the utilisation of traditional knowledge. According to para. 60 Akwé:Kon guidelines, this is always subject to prior informed consent. This requirement is also explored in Chapter 3, section 2.1.

¹³⁰ Since a process of consultation must always be initiated when indigenous peoples are directly affected. See Chapter 2, section 3.5.

¹³¹ This conclusion is explicitly recognised in Akwé:Kon guidelines para. 35: “As information gathering processes, environmental impact assessments can contribute to the protection of the rights of indigenous and local communities by recognizing the distinct activities, customs and beliefs of the affected indigenous and local communities”.

¹³² See Akwé:Kon guidelines paras. 18, 55, and 66. See COP dec. IV/9.

¹³³ See Leena Heinämäki, Thora Martina Herrmann and Antje Neumann, ‘The Protection of the Culturally and Spiritually Important Landscapes of Arctic Indigenous Peoples under the Convention on Biological Diversity and First Experiences from the Application of the Akwé:Kon Guidelines in Finland’ (2015) 6 *The Yearbook of Polar Law* 189, at 217.

When looking at the PoWPA Action Plans submitted by CBD Parties to this date, the level of detail on the involvement of indigenous peoples is so poor that it is not possible to tell to what extent PoWPA standards are implemented at the national level. National reports make no explicit reference to the different degrees of participation and to the requirements in place to realise the involvement of indigenous peoples.¹³⁴ Furthermore, some of the submitted national reports are usually not organised so as to reflect the structure of the PoWPA. For these reasons, it is not easy to understand to what extent suggested activities are implemented at national level.¹³⁵

2.1.3. *Participatory rights and ICCAs*

The PoWPA also innovates concerning alternative forms of protected areas, including ICCAs. These are recognised as potentially contributing to the achievement of conservation pursuant to the CBD. Furthermore, it encourages State Parties to promote these forms of conservation also by means of legal recognition and protection at the national level.¹³⁶ Legal recognition in turn should occur in the context of a process where indigenous peoples are duly involved.¹³⁷

¹³⁴ Most countries have used the same template for PoWPA Action Plans, which provides no details concerning the measures implemented for realising the objective to ensure the participation of indigenous peoples.

¹³⁵ See e.g., the PoWPA action plans of Bolivia, Botswana, Denmark, India, Kenya, New Zealand, and Nicaragua that I have selected as a representative sample of every geographical area of interest for indigenous peoples. New Zealand presented a Statement of Intent for 2012-2017 where it does not even refer to the PoWPA. Denmark assessed the implementation of the suggested activities and goals, but only in a very condensed table at the end of the report. Bolivia, Botswana, India, Kenya, and Nicaragua only assign numerical value from 0 to 4 to measure the advancement in every suggested activities without further description. This is in any event the template used by most of CBD Parties that have reported on PoWPA, where 0 stands for activity “not yet begun, no progress”, 1 for “just started, limited progress”, 2 for “activity fully underway”, 3 for “significant progress, nearly completed”, 4 for “activity completed”. For the full list of action plans, see <https://www.cbd.int/protected/implementation/actionplans/> (last accessed October 2016). COP dec. IX/18 has recommended to Parties to create national focal points to facilitate the implementation of the PoWPA (para. 21). See Larsen and Oviedo 2006, at 8: “While the new protected area paradigm can be considered reconciliatory in spirit and wording, it is also clear that the CBD programme of work on protected areas does not equate an actual consensus on how to effectively reconcile indigenous peoples and protected area relationships. The majority of protected areas have not been established with the rights of indigenous peoples in mind and the use of alternative governance measures, albeit growing hastily, remains limited”. If national implementation is uncertain, it is worth mentioning that COP dec. X/31, para. 32(e) and COP dec. XI/24, para. 1(i), encourage Parties to include indigenous peoples in committees that report to the CBD on the implementation of the PoWPA. Therefore, monitoring at the international level foresees the involvement of indigenous peoples.

¹³⁶ PoWPA, suggested activity 2.1.2: “Recognize and promote a broad set of protected area governance types related to their potential for achieving biodiversity conservation goals in accordance with the Convention, which may include areas conserved by indigenous and local communities and private nature reserves. The promotion of these areas should be by legal and/or policy, financial and community mechanisms”. See also, suggested activity 2.1.3 and suggested activity 2.2.7 The latter promotes exchange of information inter alia on ICCAs.

¹³⁷ PoWPA, suggested activity 2.1.3: “Establish policies and institutional mechanisms with full participation of indigenous and local communities, to facilitate the legal recognition and effective management of indigenous and local community conserved areas in a manner consistent with the goals

Importantly, participation of indigenous peoples is also required to assess the effectiveness of ICCAs in protecting biological diversity.¹³⁸ Pluralism in the assessment of conservation results is also overshadowed by the promotion of “understanding of science-based knowledge by indigenous and local communities” and indigenous capabilities.¹³⁹ Moreover, conservation need to be beneficial to indigenous peoples, thus confirming a notion of nature protection that is socially determined.¹⁴⁰

This means in terms of guidance to national governments that when these decide on their national system of protected areas, their understanding of what constitutes a protected area must reflect pluralism to be in line with both human rights law and international biodiversity law. This broad interpretation of conservation is possible under the CBD not only by virtue of Article 8(a) including special area-based conservation measures, but also in light of COP decisions on ecosystem approach above and ICCAs.

The autonomous determination of conservation objectives and methodologies seems more in line with a governance model of protected areas where indigenous peoples play a fundamental role in decision-making concerning the establishment of protected areas. This point is left open in the PoWPA, which instead does not explicitly distinguish between participatory planning, management, establishment, and governance of protected areas.¹⁴¹

Subsequent decisions reiterate that the creation of protected areas must occur in consultation with indigenous peoples and the latter must also be involved in management decisions, as well as national strategic planning.¹⁴² Participation in decision-making is indeed only one aspect of the integration of indigenous rights into conservation, which is realised through the acknowledgement of broader governance issues.

of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities”.

¹³⁸ PoWPA, suggested activity 1.1.4.

¹³⁹ PoWPA, suggested activities 3.5.2 and 2.2.4.

¹⁴⁰ PoWPA, suggested activity 1.1.7.

¹⁴¹ PoWPA suggested activities 1.4.1, 2.1.5, and 2.2.2.

¹⁴² COP dec. IX/13, Part D, para. 4(i): “Creation of protected areas, nature parks and others, in consultation with indigenous and local communities and also involving them in their management, consistent with national law”; COP dec. IX/18, Part A, para. 6(d): Parties are invited to “[e]stablish effective processes for the full and effective participation of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, in the governance of protected areas, consistent with national law and applicable international obligations”; COP dec. X/31, para. 32(c): “Establish effective processes for the full and effective participation of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, in the governance of protected areas, consistent with national law and applicable international obligations”; COP dec. XI/2, UN Doc. UNEP/CBD/COP/DEC/XI/2 (5 December 2012), para. 4: Parties are invited “to include all stakeholders, including indigenous and local communities, women and youth, in planning and implementing national biodiversity strategies and action plans”; COP dec. XI/16, UN Doc. UNEP/CBD/COP/DEC/XI/16 (5 December 2012), para. 1(g): “Promoting the full and effective participation of indigenous and local communities and the use of relevant traditional knowledge and practices in appropriate ecosystem restoration activities”.

In this sense, COP decisions continue to encourage CBD Parties to acknowledge the contribution of ICCAs to conservation,¹⁴³ including through the recognition of ICCAs by national laws, the diversification of governance models, and financial support to indigenous activities aimed to develop conservation methods and to institutionalise their conserved areas.¹⁴⁴ Furthermore, in Aichi Target 11 the CBD COP takes stock of IUCN's categorisation of governance types, explicitly referring to governance by indigenous peoples and local communities.¹⁴⁵ In relation to IUCN categories, the recognition in CBD decisions that capacity building may be needed partially responds to the critique, formulated in section 2, against the inclusion of the capacity to enforce decisions among IUCN criteria to identify non-formalised ICCAs.

In contrast, an aspect that is not specifically dealt with in CBD COP decisions is the issue of how non-formalised ICCAs can become part of the national system of protected areas, thus contributing to the fulfilment of Parties' obligations to establish protected areas under Article 8(a). It must be reminded that Article 8(a) foresees the possibility of conserved areas that are less formalised than protected areas ("areas where special measures need to be taken"). Still the question of how States can assess to what extent special measures for conservation are put into place remains. As emerges from human rights law, however, States cannot impose a change of destination of indigenous lands without engaging in a process of free, prior and informed consent. Moreover, if formalising protected areas implies that indigenous peoples are to be displaced or deprived of their resources, consent is also needed.

Overall, it seems indeed that the requirements contained in COP decisions go beyond the safeguards identified by the Inter-American Court in the abovementioned *Kaliña and Lokono* decision. Apart from the already discussed proportionality test, the only reference to different types of governance is made by the Inter-American Commission, which in the allegations to the case recommends co-management as one of the possible solutions to remedy the violation of land rights.¹⁴⁶ The Court does not build upon this

¹⁴³ COP dec. IX/18, Part A, para. 6(b) and Part B, para. 6(a); COP dec. X/31, paras. 31(b); invites Parties to "[r]ecognize the role of indigenous and local community conserved areas and conserved areas of other stakeholders in biodiversity conservation, collaborative management and diversification of governance types".

¹⁴⁴ COP dec. X/31, para. 32(a) and (b); COP dec. XI/14, Part A, para. 9; COP dec. XI/24, para. 1(e); COP dec. XII/12, Plan of Action on Customary Sustainable Use of Biological Diversity, Annex, para. 9: "Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas".

¹⁴⁵ See Aichi Target 11 and Strategic Plan For Biodiversity 2011-2020: Further Information Related to the Technical Rationale for the Aichi Biodiversity Targets, Including Potential Indicators and Milestones, UN Doc. UNEP/CBD/COP/10/INF/12/REV1 (14 March 2011), at 15. See also COP dec. XI/24, para. 1(e). See furthermore *Quick guide to Aichi Target 11*, available at <https://www.cbd.int/doc/strategic-plan/targets/T11-quick-guide-en.pdf> (last accessed October 2016).

¹⁴⁶ *Kaliña and Lokono* case, para. 161.

suggestion and limits itself to find the violation of indigenous rights due to the lack of participation into decision-making.

2.2. Developments in the WHC: indigenous participatory rights

The general framework provided by the CBD on biodiversity conservation is accompanied by a number of specialised regimes that protect particular species or habitats, preserve nature from specific threats, or concern identified regions.¹⁴⁷ Some of these treaties, such as the Ramsar convention on wetlands and the Bonn convention on migratory species, contain obligations to create protected areas. These instruments, however, have been excluded from the present analysis due to their limited scope either in terms of membership or the object protected. In contrast with this fragmented framework, the WHC is a universal treaty with a general subject matter, which lays down a legal framework for the protection of cultural and natural heritage¹⁴⁸ and has approximately the same number of Parties as the CBD.¹⁴⁹

Similarly to the CBD, the protection of the world heritage is grounded on the exercise of the State's sovereign powers over the sites that form the object of international protection.¹⁵⁰ Furthermore, the preservation of the world heritage is a common concern

¹⁴⁷ Although some of these general categories may overlap, examples of the first category are the Convention on Wetlands of International Importance especially as Waterfowl Habitat and the Convention on the Conservation of Migratory Species of Wild Animals. The second category is represented by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (most commonly known as CITES) (Washington, 3 March 1973, in force 1 July 1975). Examples of the third group are the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 19 September 1979, in force 1 June 1982) and the African Convention on the Conservation of Nature and Natural Resources. Most of these instruments precede the CBD in time, although the latter is the most general in scope and has been widely ratified. For an overview of these instruments and their reciprocal relationship, see Gillespie, *Protected Areas and International Environmental Law* 2007.

¹⁴⁸ See Art. 1 and Art. 2 WHC. According to the former, "the following shall be considered as "cultural heritage": monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view". Pursuant to Art. 2, "the following shall be considered as "natural heritage": natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty". For a detailed analysis of the WHC, see Francesco Francioni with Federico Lenzerini (eds) *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008). For a summary of the process of listing World Heritage properties, see Patricia Birnie, Alan Boyle and Catherine Redgwell (eds), *International Law and the Environment* (Oxford University Press 2009), at 677-680.

¹⁴⁹ The CBD has 196 Parties, the WHC 191. See <http://whc.unesco.org/en/statesparties/> (last accessed October 2016).

¹⁵⁰ See Art. 6(1) WHC; Operational Guidelines, para. 15: "While fully respecting the sovereignty of

of humankind.¹⁵¹

At the same time, the logic behind the two international global treaties on conservation is different in many respects. First, while the CBD aims inter alia to conserve the genetic variability of species, habitats, and ecosystems, the WHC embraces a conception of conservation that has been defined as “spatial” since protection is in principle reserved to unmovable objects, i.e., cultural and natural monuments and sites.¹⁵² Natural heritage, in particular, includes habitats of threatened species, as well as “natural areas” that are relevant for conservation, including protected areas.¹⁵³ In this sense, the WHC pursues objectives of biodiversity conservation.

The second big difference with respect to the CBD regime is that not all sites potentially relevant for conservation purposes fall in the purview of the WHC. Only those natural sites that are recognised as being of “Outstanding Universal Value” can be included in the World Heritage List and protected under the terms established by the WHC.¹⁵⁴ According to the Operational Guidelines for the implementation of the WHC, the value of World Heritage properties is universally outstanding only if their significance is “exceptional”, “transcend[s] borders” and has repercussions on future generations.¹⁵⁵ Notwithstanding the complex notion of Outstanding Universal Value, some authors have highlighted that the presence of this threshold in the WHC significantly limits the

the States on whose territory the cultural and natural heritage is situated, States Parties to the *Convention* recognize the collective interest of the international community to cooperate in the protection of this heritage”.

¹⁵¹ See Operational Guidelines, para. 4. The term “common concern” is not explicitly used in the text of the WHC. However, the creation of an international institutional mechanism to manage and conserve cultural and natural habitats presupposes the acknowledgment that national territories and resources must be managed in a way that satisfies the general concern of the international community for the protection of the assets of humanity. See Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013), at 52.

¹⁵² Dupuy and Viñuales 2015, at 178. See also Birnie, Boyle and Redgwell, at 678: “The Convention is... useful only in protecting certain habitats (mostly in national parks); a species itself, however extraordinary, cannot be listed”. See *infra* the special regime reserved to cultural landscapes.

¹⁵³ Operational Guidelines, para. 102: nominated properties may coincide with protected areas. On the concept of natural heritage, see Catherine Redgwell, ‘Protecting Natural Heritage and Its Transmission to Future Generations’ in Abdulqawi Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Brill 2007), at 267 ff.

¹⁵⁴ See Art. 1, Art. 2, and Art. 11 WHC. See also, Tullio Scovazzi, ‘Article 8-11: World Heritage Committee and World Heritage List’ in Francesco Francioni with Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008), at 161-166; Francesco Francioni, ‘The Preamble’ in Francesco Francioni with Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008), at 17-21; Catherine Redgwell, ‘Article 2: Definition of Natural Heritage’ in Francesco Francioni with Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008), at 68-75.

¹⁵⁵ Operational Guidelines, paras. 49-53. See also, section II.D of the guidelines, including para. 77(iii), (v) and (x), and para. 95. Section II.E of the guidelines furthermore elaborates on the requirements of integrity and/or authenticity, which also must be present for a property to meet the threshold of outstanding universal value. On previous attempts to define outstanding universal value within the WHC, see World Heritage Committee, Dec. WHC-05/29.COM/9 (15 June 2005), sections 19(g) and 20(c).

number of protected areas that actually qualify to be included in the list.¹⁵⁶

Indeed, World Heritage sites are numerous and widespread across the four continents.¹⁵⁷ More than one-hundred-and-eighty sites have been inscribed in the World Heritage List as natural or mixed properties. This phenomenon is relevant not only in terms of biodiversity conservation, but also due to the impact that the nomination, inscription, and management of these sites may have on the livelihood and rights of indigenous peoples. According to the former Special Rapporteur on indigenous rights, although the exact number of properties established within or next to indigenous territories is unknown,

[i]ndigenous peoples have expressed concerns over their lack of participation in the nomination, declaration and management of World Heritage sites, as well as concerns about the negative impact these sites have had on their substantive rights, especially their rights to lands and resources.¹⁵⁸

The creation of World Heritage sites has, for instance, led to the displacement of indigenous peoples.¹⁵⁹

In this context, it is worth exploring to what extent the WHC and related practice infringe on indigenous rights and if attempts to reconcile the two have been satisfactory. Similarly to the CBD, although the WHC was adopted well before the creation of international norms establishing indigenous rights, it does not stand in a legal vacuum. Therefore, its obligations and subsequent practice must be interpreted in light of relevant international standards.¹⁶⁰

¹⁵⁶ Gillespie, *Protected Areas and International Environmental Law* 2007, at 10-11.

¹⁵⁷ According to UNESCO data, there are 1,031 World Heritage properties to date. For UNESCO statistics and an overview on the geographical distribution, see <http://whc.unesco.org/en/list/> (last accessed October 2016).

¹⁵⁸ See Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/67/301, para. 33. See also, paras. 34 and 35: “34. The exact number of World Heritage sites that are within or near the traditional territories of indigenous peoples, or that otherwise affect them, is not certain and the World Heritage Committee has apparently never undertaken a comprehensive review of this, but the indications are that there are dozens of such sites. 35. In the meantime, there is still no specific policy or procedure which ensures that indigenous peoples can participate in the nomination and management of these sites”. Concerning the Operational Guidelines, although they have been reformed, it cannot be said they have laid out a specific policy on indigenous peoples.

¹⁵⁹ See Permanent Forum on Indigenous Issues, Report on the ninth session (19-30 April 2010), UN Doc. E/2010/43-E/C.19/2010/15, para. 131: “The Permanent Forum reiterates its concern about conservation efforts, including the designation of national parks, biosphere reserves and world heritage sites, which frequently lead to the displacement of indigenous peoples from their traditional lands and territories”. The Operational Guidelines recognise that “[f]or some properties, human use would not be appropriate” (para. 119), thus confirming at least the option that some sites could exclude human presence.

¹⁶⁰ The general need for harmonisation and systemic integration may be reinforced by the fact that the WHC has been adopted under the auspices of UNESCO, which is a UN agency and as such should respect UN standards on indigenous rights, including the UNDRIP. Therefore, although the same reasoning cannot be applied to its member States, UNESCO does have an institutional role to play when it comes to the implementation of the WHC after 2007. See Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/67/301, para. 41. See also, Draft Programme of Action for the

The text of the Convention does not contemplate the role of sub-State groups. Instead, States are primarily responsible for the identification and the correct management of World Heritage sites.¹⁶¹ The final decision on the inscription of national sites on the World Heritage List, however, is taken by the World Heritage Committee, which is an intergovernmental body composed of twenty-one rotating States.¹⁶² The Committee also adopts and revises the Operational Guidelines, which guide States in the process of inscription of their properties.¹⁶³ Therefore, the World Heritage Committee has a steering role in the evolution of the practice of the WHC.¹⁶⁴ The remainder of this section analyses its decisions with a view to understanding to what extent the rights of indigenous peoples are integrated into the WHC. One of the objectives is also to compare WHC standards with those emerged in the practice of the CBD and to see to what extent the latter may supersede the former.

Indigenous rights overlap with the implementation of the WHC in at least three respects, namely the participation of relevant stakeholders in the identification and management of World Heritage sites, the inscription of cultural landscapes on the World Heritage List, and the performance of mining activities in protected properties.

2.2.1. Participatory rights and the creation and management of World Heritage sites

Concerning participation, the incorporation of communities' interests into the WHC has been fairly recent. Following on from the Budapest Declaration,¹⁶⁵ the World

Second International Decade of the World's Indigenous People, UN Doc. A/60/270 (18 August 2005), para. 16.

¹⁶¹ See Art. 4 WHC. The creation of a Tentative List and the nomination of sites are in the exclusive responsibility of States. See Art. 11(1) WHC; Operational Guidelines, para. 62. International cooperation, however, is mandated under Art. 6(1) and (2) WHC. Concerning the obligation of Parties to correctly manage World Heritage sites, see Operational Guidelines paras. 97-102; para. 117: implementation should be done "in close collaboration with property managers, the agency with management authority and other partners, and stakeholders in property management". States should also report on implementation to the World Heritage Committee. See Art. 29 WHC; Operational Guidelines paras. 96, 169-176, and 199-210.

¹⁶² Art. 8-10 WHC and Operational Guidelines, paras. 19 and 21. See also, Art. 11, Art. 13, and Art. 29 WHC. On the powers of the Committee to decide upon the inscription of properties, see Operational Guidelines, para. 153. For a complete list of the Committee's functions, see Operational Guidelines, para. 24.

¹⁶³ Operational Guidelines have been revised many times since the entry into force of the WHC, the last being in 2015. On the history of the amendments to the guidelines, see <http://whc.unesco.org/en/guidelines/%23guidelineshistorical> (last accessed October 2015).

¹⁶⁴ See Edward J. Goodwin, 'The World Heritage Convention, the Environment, and Compliance' (2009) 20 Colorado Journal of International Environmental Law and Policy 157, at 173, who argues that the World Heritage Committee exercises executive powers and supersedes the role of the WHC COP.

¹⁶⁵ World Heritage Committee, Budapest Declaration, Dec. 26 COM 9 (2002), para. 3(f), Doc. WHC-02/CONF.202/25 at 6: the Committee will "seek to ensure the active involvement of our local communities at all levels in the identification, protection and management of our World Heritage properties".

Heritage Committee in 2007 revised its Strategic Orientations to include “communities” among the five strategic objectives of the World Heritage regime.¹⁶⁶ More specifically, in subsequent decisions, the Committee has recommended that States, in implementing the WHC, both involve indigenous peoples in decision-making processes concerning World Heritage sites and respect their rights.¹⁶⁷

The World Heritage Committee has only partially incorporated these recommendations in the Operational Guidelines, which do not explicitly mention indigenous peoples when encouraging Parties

to ensure the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination and protection of the World Heritage properties.¹⁶⁸

At the same time, the Committee promotes a “partnership approach to nomination, management and monitoring” of World Heritage sites and includes indigenous peoples among the relevant partners.¹⁶⁹

This ambiguity is not dissipated with respect to the creation of Tentative Lists of properties on the part of State Parties since the Operational Guidelines fail again to explicitly acknowledge the role of indigenous communities.¹⁷⁰ In this respect, it is useful to compare the ambiguous notion of stakeholder under the WHC with the distinction, proposed by IUCN, between rightholders and stakeholders. While the former indicates the existence of legal—whether statutory or customary—rights over land and natural resources, the second notion is only qualified in terms of mere interests of certain subjects in developments over natural resources.¹⁷¹ In this sense, although indigenous peoples often possess a direct interest in the matters at stake, they are most importantly

¹⁶⁶ See World Heritage Committee, Dec. 31 COM 13A (2007), para. 5, and Dec. 31 COM 13B (2007), para. 3, Doc. WHC-07/31.COM/24 at 192-193. The other objectives are credibility, conservation, capacity-building, and communication. Together they are defined as the five Cs. The original four Cs were identified in 1992. See Doc. WHC-92/CONF.002/12 (1992), Annex II.

¹⁶⁷ See World Heritage Committee, Dec. 35 COM 12E (2011), para. 15: the World Heritage Committee encourages States to “e) Involve indigenous peoples and local communities in decision making, monitoring and evaluation of the state of conservation of the properties and their Outstanding Universal Value and link the direct community benefits to protection outcomes, f) Respect the rights of indigenous peoples when nominating, managing and reporting on World Heritage sites in indigenous peoples’ territories”. See also Dec. 35 COM 10A (2011), para. 13: the Committee “[r]ecognises the valuable role played by local communities, including indigenous peoples, in the management of cultural and natural heritage properties in Africa”.

¹⁶⁸ Operational Guidelines, para. 12.

¹⁶⁹ Operational Guidelines, paras. 39-40.

¹⁷⁰ Operational Guidelines, para. 64: “States Parties are encouraged to prepare their Tentative Lists with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties and partners”.

¹⁷¹ It is interesting to note that, in IUCN’s understanding, even those that are not legally entitled may have a recognised interest in intervening in decisions over the destination of land for public interest.

rightholders under international law.

In contrast with these ambiguities, Operational Guidelines are very clear in encouraging the participation of indigenous peoples “in the nomination process”.¹⁷² It should be noted that this participation is also meant “to enable them to have a shared responsibility with the State Party in the maintenance of the property”.¹⁷³ The guidelines, therefore, go in the direction of expanding the responsibility for the protection of the World Heritage to non-State actors, provided that these are duly involved in the process of nomination of sites.

Furthermore, States are encouraged to prove that nomination has been preceded by the free, prior and informed consent of indigenous peoples.¹⁷⁴ Emphasis is put on procedural aspects, such as the fact that public hearings and consultation are conducted and that information is provided in the appropriate language, although these are only possible ways to realise the Operational Guidelines.¹⁷⁵ In this respect, it is unclear whether the request to *obtain* free, prior and informed consent alludes to the requirement that States should only seek this consent or should actually get the agreement of indigenous peoples before proceeding with the nomination.

If interpreted in light of relevant human rights standards and the principle of self-determination, consent would indeed be needed under certain circumstances, such as if the creation of a World Heritage site would lead to the forcible removal of indigenous peoples or the consequences of the inscription of the property would be so extensive as to compromise the livelihood and cultural identity of those peoples. As a practical example of this circumstance, in a resolution concerning the designation of Lake Bogoria as a World Heritage site, the African Commission has concluded that inscription

without involving the Endorois in the decision-making process and without obtaining their free, prior and informed consent contravenes the African Commission’s Endorois Decision and constitutes a violation of the Endorois’ right to development under Article 22 of the African Charter.¹⁷⁶

In the African system, therefore, consent must be obtained before inscribing

¹⁷² Operational Guidelines, para. 123: “States Parties are encouraged to prepare nominations with the widest possible participation of stakeholders and to demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained”.

¹⁷³ Operational Guidelines, para. 123. See Gillespie, *Protected Areas and International Environmental Law* 2007, at 168-169. According to this author, the rationale behind involving non-State actors in the identification and management of sites is inter alia that when the public is not involved, it may engage in unsustainable patters in protest with the decision of establishing protected areas. Thus, participation becomes a means to extend the responsibility to conserve nature to other actors, including indigenous peoples.

¹⁷⁴ Operational Guidelines, para. 123.

¹⁷⁵ The text says “through, inter alia”, public hearings and consultation.

¹⁷⁶ African Commission, Resolution on the Protection of Indigenous Peoples’ Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site, Res. 197 (5 November 2011), available at <http://www.achpr.org/sessions/50th/resolutions/197/> (last accessed October 2016).

heritage properties in order to fulfil the rights of peoples to development. As a general rule, when indigenous land and resources are involved, States must genuinely seek for the consent of indigenous peoples, thus commencing a process of negotiation that cannot boil down to the mere provision of information on the project in an appropriate form.

Although the Operational Guidelines encourage States to obtain free, prior and informed consent, this requirement is not necessary for an application to be complete.¹⁷⁷ The only indirect reference in the nomination form to the potential involvement of indigenous peoples might be found in the fact that States can also indicate “traditional measures” as a way to fulfil their obligation to protect the nominated site. Nonetheless, it is not clear whether the term used refer to the traditional knowledge and practices of indigenous peoples, although it may be interpreted so as to include indigenous practice. The main problem is that the Operational Guidelines do not say anything on the requirements to obtain such knowledge.¹⁷⁸ This is also the case in the CBD, where COP decisions on conservation encourage the use of traditional knowledge without fully articulating consent requirements. Indeed, as seen in previous sections, COP decisions acknowledge the link between indigenous contribution to conservation and benefit-sharing.¹⁷⁹

The concrete irrelevance of the involvement of indigenous peoples in the process of nomination appears to be confirmed by the fact that the Advisory Bodies to the World Heritage Committee do not have to verify whether requirements of consultation and consent have been respected by the proponent States when evaluating their nominations.¹⁸⁰

Another undertaking that can be incompatible—depending on its implementation—with the requirement of encouraging the participation of indigenous peoples is the definition of the boundaries of nominated sites.¹⁸¹ In particular when it comes to natural heritage sites, the Operational Guidelines establish that “boundaries should reflect the spatial requirements of habitats, species, processes or phenomena”.¹⁸² Although this requirement is understandable in terms of an ecosystem approach to nature conservation, the fact that the requirements to delimit properties are presented as verifiable in terms of scientific data leaves little room for the inclusion of indigenous peoples’ perspectives. On the contrary, the evaluation of the spatial requirements needed to preserve some natural properties might require the knowledge of indigenous peoples. Furthermore, as emerges

¹⁷⁷ See Operational Guidelines, para. 132 and Annex 5.

¹⁷⁸ It seems, therefore, that general human rights should apply here to fill this gap. Human rights norms, however, do not regulate directly the issue of access to traditional knowledge. On this, see Chapter 3.

¹⁷⁹ Concerning the functions of benefit-sharing in the ABS regime, see Chapter 3, section 2.3.

¹⁸⁰ These bodies provide advice to the World Heritage Committee. As said, IUCN gives advice on natural heritage, while ICOMOS (the International Council on Monuments and Sites) evaluates the nominations of cultural sites. See Operational Guidelines, paras. 30-31 and 143-151.

¹⁸¹ Operational Guidelines, para. 132(1).

¹⁸² Operational Guidelines, para. 101.

from CBD decisions on the ecosystem approach, ecological units and conservation needs are to be determined in line with social needs.

In the context of the WHC, the definition of boundaries could be a concrete way to involve indigenous peoples in the nomination process. Again, however, the WHC regime does not give indications on how traditional ecological knowledge is to be obtained and whether their contrary view to the establishment of a World Heritage property within certain boundaries would be taken into account.

Similarly, the Operational Guidelines do not explicitly require that management plans for nominated sites are prepared in consultation with indigenous peoples.¹⁸³ It might happen that, pursuant to the WHC, States consult indigenous peoples on the opportunity to nominate a given site, but do not engage with them for elaborating the obligatory management plan. This differential treatment would not be in line with human rights standards since the management of World Heritage sites can enormously affect indigenous rights.

Furthermore, consultation with indigenous peoples is not a requirement for a correct management of the sites already inscribed on the World Heritage List. The Operational Guidelines only mention the possibility that effective management can be reached through “a thorough shared understanding of the property by all stakeholders”.¹⁸⁴ While “stakeholders” is a generic term for all interested actors, it is unclear what a “shared understanding” would imply for the site managers. The World Heritage Committee in its decision on the Kakadu National Park of 2003 required Australia to report about consultation efforts undertaken with the site’s traditional owners.¹⁸⁵ In a previous decision about the Everglade National Park in the United States, the Committee considered as a “significant progress made in the state of conservation” the fact that the Miccosukee Tribe would be allowed to stay in the territory of the reserve. The Tribe’s presence was deemed to contribute to the restoration of the site’s water cycle and thus of its entire ecosystem.¹⁸⁶ It is difficult, however, to recognise a trend in this sense in the decisions of the Committee affecting properties that are found on indigenous lands. In this respect, CBD requirements are again more advanced in that they explicitly demand participation in management decisions, even co-management, or independent management by

¹⁸³ Operational Guidelines, para. 108.

¹⁸⁴ Operational Guidelines, para. 111. The same paragraph refers to “(d) the development of mechanisms for the involvement and coordination of the various activities between different partners and stakeholders”.

¹⁸⁵ World Heritage Committee, Dec. 27 COM 7B.28 (2003), para. 3(c).

¹⁸⁶ World Heritage Committee, Dec. VII.12 (1999), Doc. WHC-98/CONF.203/18, at 10. The French version is more easily understandable. See Dec. VII.4 (1999), Doc. WHC-98/CONF.203/18 (French version), at 8: “Une législation a été présentée au Congrès américain afin d’assurer la présence permanente de la tribu Miccosukee dans le Parc national des Everglades. Tout accord visant à assurer un site pour maintenir la culture vivante de la tribu pourrait aller à l’encontre de la restauration du flux des eaux dans la partie est de Shark Slough (où habite la tribu Miccosukee), considérée comme mesure essentielle pour la restauration de l’ensemble de l’écosystème des Everglades et pour la survie des espèces menacées comme le moineau noir de mer”.

indigenous peoples.

Moreover, in light of the analysis above, the World Heritage Committee unreasonably distinguishes among situations where consultation of indigenous peoples is not required, i.e., the establishment of Tentative Lists or the management of sites, from others where consultation is indeed requested, i.e., the nomination of sites. This seems unreasonable because under human rights law consultation is required every time indigenous peoples are potentially affected by States' measures. In this respect, the inclusion of a property traditionally owned or used by indigenous peoples in the Tentative List starts a process whereby indigenous lands might end up being listed among World Heritage properties. Tentative Lists, therefore, are the first step of a decision-making process that directly affects indigenous land and resource rights. Since consultation must be started at the very early stages of a decision potentially impacting on indigenous peoples, the inclusion of indigenous lands in Tentative Lists must equally entail a procedure of consultation.¹⁸⁷ Similarly, the management of natural heritage can enormously affect the capacity of indigenous peoples to freely dispose of their lands and resources and, therefore, free, prior and informed consent must be guaranteed under international human rights law.

Given the strong impact of site inscriptions on the life of indigenous peoples, the former Special Rapporteur on indigenous peoples has argued that these peoples should be able to autonomously propose the inscription of their own lands.¹⁸⁸ However, this is not reflected anywhere in the WHC system.

A recent report of the Special Rapporteur on indigenous rights has highlighted that the failure to adequately implement participatory rights within the WHC system may be due to the lack of sufficient financial resources and governmental support to carry out comprehensive consultative processes.¹⁸⁹ International financial assistance, however, is granted to State Parties also on the basis of the WHC.¹⁹⁰ While Article 13 of the Convention identifies the protection of sites as the main target of financial assistance, the Operational Guidelines introduce an element that could improve the protection of participatory rights within the WHC. One of the criteria to evaluate applications for international assistance is the extent to which such assistance can contribute to the fulfilment of the Committee's Strategic Objectives, which as said include consultation.¹⁹¹ Additional funding might improve the concrete implementation of indigenous

¹⁸⁷ See Stefan Disko and Helen Tugendhat, *Report of the International Expert Workshop on the World Heritage Convention and Indigenous Peoples* (IWGIA 2013), at 23. According to this report, the creation of Tentative Lists should be transparent so that indigenous peoples may activate themselves at an early stage.

¹⁸⁸ Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/67/301, para. 40: "In the view of the Special Rapporteur, proposals for the declaration of World Heritage sites that directly affect indigenous peoples should come from those peoples".

¹⁸⁹ Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/67/301, para. 39.

¹⁹⁰ See Art. 13 WHC; Operational Guidelines, paras. 223-257.

¹⁹¹ Operational Guidelines, para. 239(e).

participatory rights by, for instance, allowing for activities that facilitate the engagement of public and private actors with indigenous peoples, including translation and cultural mediation.

Another concern that has emerged is the involvement of indigenous peoples in the decisions of the World Heritage Committee. As said, the Committee has the final say on the inscription of nominated properties upon advice of ICOMOS and IUCN. In this context, a proposal endorsed by Australia, Canada, and New Zealand was made in 2000 by a Forum of indigenous peoples to create a committee that could especially assist the World Heritage Committee in the evaluation of mixed sites or cultural landscapes.¹⁹² The creation of the World Heritage Indigenous Peoples Council of Experts, however, was soon dismissed at the World Heritage Committee in 2001, *inter alia* on the grounds that the term indigenous would need further elaboration, together with a disagreement within the World Heritage Committee on its functions.¹⁹³ Therefore, participation of indigenous peoples at the international level in the context of the WHC reveals itself difficult. A further confirmation of that is given by the fact that participation of sub-national groups, including indigenous peoples, is not required when States submit their periodic reports to the World Heritage Committee.¹⁹⁴

While the issue of property nomination and inscription is generally problematic for the reasons above, the category of “cultural landscape” particularly intersects with indigenous rights. It is defined in the Operational Guidelines as a form of cultural heritage which presents elements in common with natural properties since it represents “the combined works of nature and man”.¹⁹⁵ Although cultural landscape is never explicitly connected to indigenous peoples in the guidelines, this category embraces a notion of

¹⁹² World Heritage Committee, Doc. WHC-2000/CONF.204/21 (2001), Annex V, Submission to the World Heritage Committee from a Forum of Indigenous Peoples Assembled in Cairns, Australia, 24 November 2000. See Lynn Meskell, ‘UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)’ (2013) 20 *International Journal of Cultural Property* 155, at 161-162. On cultural landscapes, see *infra* in this section.

¹⁹³ World Heritage Committee, Doc. WHC-01/CONF.208/24 (2002), para. XV.5. See also, para. XV.4: “It was proposed that indigenous peoples could meet on their own initiative, be included as part of State Party delegations to the Committee and were encouraged to be involved in UNESCO’s work relating to the intangible heritage”. See Gillespie, *Protected Areas and International Environmental Law* 2007, at 177; Meskell 2013, at 162-165.

¹⁹⁴ See Operational Guidelines, paras. 96, 169-176, and 199-210.

¹⁹⁵ Art. 1 WHC; Operational Guidelines para. 47: “Cultural landscapes are cultural properties and represent the “combined works of nature and of man” designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal”. This category was introduced in 1992. See World Heritage Committee, WHC-92/CONF.002/12 (1992), para. XIII.2.3. See also, Dec. CONF 203 VIII.C.1 (1995), at 43, concerning a Chilean property: “The Committee concluded that Rapa Nui National Park contains one of the most remarkable cultural phenomena in the world. An artistic and architectural tradition of great power and imagination was developed by a society that was completely isolated from external cultural influences of any kind for over a millennium. The substantial remains of this culture blend with their natural surroundings to create an unparalleled cultural landscape”.

cultural property that goes well beyond the protection of architectural monuments.¹⁹⁶ The guidelines also recognise that some forms of land use that are instrumental for the conservation of biodiversity fall into this category and deserve protection under the WHC.¹⁹⁷ Moreover, some decisions of the World Heritage Committee concerning the inscription of sites show that cultural specificities are the decisive element in the identification of a site as cultural landscape. In this sense, natural elements are almost non-existent or they are only functional to a particular cultural tradition.¹⁹⁸ A significant example of this practice is the decision to inscribe the Richtersveld Cultural and Botanic Landscape in South Africa on the basis of the cultural value of the indigenous Navi's living traditions, as well as due to the special relationship of the community with the natural environment.¹⁹⁹

Linked to the category of cultural landscape is the problem of the identification of this type of cultural heritage. If indigenous peoples are not involved in the identification of these properties, it might be problematic for States to recognise the cultural specificities relative to those sites. Indeed, the debates among States taking place in the Bureau of the World Heritage Committee²⁰⁰ reflect these concerns. For instance, concerning the

¹⁹⁶ See Meskell 2013, at 161. The Operational Guidelines distinguish among three categories of cultural landscape. See Annex 3, section I, para. 10: 1) "intentionally created by man" mainly for aesthetic reasons; 2) "organically evolved landscape" created for social, religious and other reasons but there are signs of evolution due to the interaction with nature; 3) "associative cultural landscape" with almost no "material cultural evidence".

¹⁹⁷ Operational Guidelines, Annex 3, section I, para. 9.

¹⁹⁸ World Heritage Committee, Doc. WHC-96/CONF.201/21 (1997), para. IX.4: cultural landscape in Africa also includes "traditional architecture and material traces of living non-monumental cultures, including technical heritage and unbuilt sacred places"; Doc. WHC-2000/CONF.204/21 (2001), at 45: Ryukyu islands: decision to inscribe this Japanese site on the basis of the fact that "the Ryukyu sacred sites constitute an exceptional example of an indigenous form of nature and ancestor worship that has survived intact into the modern age alongside other established world religions"; Dec. 32 COM 8B.27 (2008): "The continuing cultural landscape of Chief Roi Mata's domain, Vanuatu, has Outstanding Universal Value as an outstanding example of a landscape representative of Pacific chiefly systems. This is reflected in the interaction of people with their environment over time in respecting the tangible remains associated with Roi Mata and being guided by the spiritual and moral legacy of his social reforms. The landscape reflects continuing Pacific chiefly systems and respect for this authority through tabu prohibitions on use of Roi Mata's residence and burial that have been observed for over 400 years and structured the local landscape and social practices. The landscape memorialises the deeds of Roi Mata who still lives for many people in contemporary Vanuatu as a source of power and inspiration"; Decision 32 COM 8B.50 (2008); Dec. 35 COM 8B.18 (2011): protecting the creation of terraces by Konso peoples in Ethiopia; Dec. 36 COM 8B.16 (2012).

¹⁹⁹ World Heritage Committee, Dec. 31 COM 8B.20 (2007), para. 3: "The extensive communal grazed lands of the Richtersveld Cultural and Botanical Landscape are a testimony to land management processes which have ensured the protection of the succulent Karoo vegetation and thus demonstrates a harmonious interaction between people and nature"; "[t]he rich diverse botanical landscape of the Richtersveld, shaped by the pastoral grazing of the Nama, represents and demonstrates a way of life that persisted for many millennia"; "[t]he Richtersveld is one of the few areas in southern Africa where transhumance pastoralism is still practised; as a cultural landscape it reflects long-standing and persistent traditions of the Nama, the indigenous community".

²⁰⁰ The Bureau is made of seven State Parties elected by the World Heritage Committee and functions as a preparatory body for the discussions to be held in the Committee. The Bureau also undertakes organisational matters. See <http://whc.unesco.org/en/committee/> (last accessed October 2016).

Tongariro National Park in New Zealand, IUCN reported during a Bureau meeting that any intervention on the site would affect its spiritual value for the Maori tribes concerned and, therefore, its classification as cultural landscape.²⁰¹

In a decision concerning the Kakadu National Park in Australia, the delegate of Japan highlighted that it was problematic to assess the cultural impacts of a mining project on the property, due to the complexities of the cultural and spiritual elements at stake.²⁰² Japan also “stressed that such cultural factors as living culture and cultural landscapes have gained more and more weight in the work of the Committee and Bureau through the history of the World Heritage regime”. While Korea and Morocco joined Japan in calling for a “consensual solution” between Australia and the Mirrar Aboriginal peoples involved, the government of Australia highlighted that “living cultural traditions” were not established concepts and could not be applied to an ongoing case. Therefore, the catalyst role for indigenous participation that could be played by the inscription of cultural landscapes encounters the resistance of some States.

The same difficulties may arise when the Advisory Bodies and the World Heritage Committee are called, in their respective roles, to evaluate the Outstanding Universal Value of nominated properties.²⁰³ In this respect, indigenous peoples could contribute to the attainment of the objectives of the WHC by helping States identify cultural landscapes. This collaboration would further the objective to “establish a representative, balanced and credible list”.²⁰⁴

In the practice of the WHC, the classification of sites within this category has improved some aspects of the interplay between the State and indigenous peoples in the management of those sites. For instance, already in 1999, “[t]he Bureau recommended that the Committee request the Australian Government, with the necessary co-operation of the Mirrar and appropriate involvement of other stakeholders, to complete the cultural heritage management plan of Jabiluka”.²⁰⁵ In some cases, the Committee recommended governments to modify the site’s management plans in order to take into account and sustain the living traditions of local peoples.²⁰⁶ In other cases, the Committee requested

²⁰¹ Bureau Dec. CONF 201 V.B.38 (1998). The same document reports that consultations with Maori were ongoing at that time.

²⁰² Bureau Dec. CONF 204 IV.B.47 (1999): the Japanese delegate distinguished between natural and cultural impacts of the mining project and concluded that there are “difficulties to assess such cultural elements as the spiritual linkages between people and nature, the impact upon living cultures as well as the impact upon the cultural landscape. He commented that it seemed that the cultural assessment is, in a sense, much more difficult than scientific assessment”.

²⁰³ See Meskell 2013, at 155-156.

²⁰⁴ See Operational Guidelines, paras. 54-61.

²⁰⁵ Bureau Dec. CONF 204 IV.B.47 (1999), para. 4.

²⁰⁶ World Heritage Committee, Dec. 31 COM 8B.20 (2007), para. 4(c) and (d): the Committee recommended to South Africa to “Develop the proposed Management of Cultural Assets Plan in order to identify effective ways to sustain the grazing traditions of the Conservancy, to give cultural matters an even higher profile in the Management Plan” and to “Allocate a sufficient recurring budget for conservation

that local peoples take an active—or even a leading role—in the management of sites.²⁰⁷

In this sense, the role of the Committee in assessing the inscription and management of sites provides a concrete opportunity for testing the respect of indigenous rights in these undertakings, which is lacking in the CBD system that only foresees monitoring of general national programmes on conservation. Although these decisions represent steps forward towards an approach to conservation that recognises participation and direct involvement as its method of work, the Committee has never explicitly referred either to indigenous peoples or to the rights of the peoples concerned.

A positive reading could be that the cultural landscapes transcend fixed categories of rightholders—such as indigenous peoples—to include every situation in which natural and cultural aspects intermingle. However, this approach is easily subject to abuse since it leaves a broad manoeuvring space either to the State Parties or to the World Heritage Committee to decide which sites classify as cultural landscape and where participation and co-management are needed. The limitations of this approach are confirmed by the fact that the recognition of participatory prerogatives has been uneven in the decisions of the World Heritage Committee. For instance, in recent cases, although the link between local peoples and cultural manifestations was recognised, the governments of Indonesia and China were not required to revise their plans in consultation with the populations concerned.²⁰⁸ It is not clear whether these differences have to do with the different nature of the communities concerned or with the different stances taken by the governments involved on the matter of participatory rights.

2.2.2. *Participatory rights and mining in World Heritage sites*

The participation of indigenous peoples may be required by the Committee in cases development projects are planned to take place on World Heritage sites. The case of mining projects is interesting because the Committee has recognised that mining activities can affect the cultural and natural values inherent in World Heritage properties.²⁰⁹ The granting of licences for uranium mining activities within the Kakadu National Park has prompted the Committee to send an independent mission to Australia that would

and management of the cultural aspects of the landscape”.

²⁰⁷ World Heritage Committee, Dec. 35 COM 8B.18 (2011), para. 4: “(b) Revise the existing Management Plan to include community members”; Dec. 32 COM 8B.50 (2008), para. 5: “(c) enter into agreements with Kaya Elders to establish them as the guardians of the Kayas; d) modify the Management Plan to reflect the needs of the nominated Kayas, in particular integrating the conservation of cultural and natural resources and traditional and non-traditional conservation and management practices”.

²⁰⁸ World Heritage Committee, Dec. 36 COM 8B.26 (2012); Dec. 37 COM 8B.24 (2013). See also, Gillespie, *Protected Areas and International Environmental Law* 2007, at 177.

²⁰⁹ The impact of mining activities on indigenous rights has also been recognised by human rights treaty bodies. See Chapter 1, section 2 and Chapter 2, section 3. See also, Reports by former Special Rapporteur on indigenous rights, James Anaya: UN Doc. A/HRC/24/41; A/HRC/21/47; A/HRC/18/35 (11 July 2011); A/HRC/15/37 (19 July 2010).

evaluate the consequences of the project. The mission concluded for the incompatibility of the mining project with the preservation of the Outstanding Universal Value due to heavy projected impacts on both cultural and natural elements.²¹⁰

In particular concerning cultural impacts, the Committee highlighted that Aboriginal communities would be prevented from maintaining “their traditional relationships to the land” and “emphasized the fundamental importance of ensuring thorough and continuing participation, negotiation and communication with Aboriginal traditional owners”. Therefore, given multiple impacts on aboriginal way of living and, consequently, on the site’s integrity, the Committee recognised the importance to consult with indigenous peoples.

Significantly, the Bureau also acknowledged “that it is the clear responsibility of the Australian Government to regulate the activities of a private company, such as Energy Resources of Australia, Inc, in relation to the proposed mining and milling activities at Jabiluka”.²¹¹ Pursuant to its responsibility to protect human rights, the State must put in place measures that ensure the fulfilment of those human rights also on the part of private actors.²¹² In addition, under the WHC, the State is responsible for creating a regulatory environment that favours the preservation of both cultural and natural values embedded in World Heritage properties.²¹³

In another series of decisions concerning the Richtersveld Cultural and Botanical Landscape, the Committee influenced the decision of South Africa not to proceed with mining activities within the World Heritage site.²¹⁴ Therefore, the inscription of cultural landscapes on the World Heritage List could theoretically be seen as an additional means

²¹⁰ World Heritage Committee, Dec. CONF 203 VII.28 (1998): “the mission had seriously questioned the compatibility of mining, and particularly uranium mining and milling, with such close proximity, and upstream from, a World Heritage property”. See also, Bureau Dec. CONF 201 V.B.36 (1998): “Uranium mining in an area of high natural and cultural values is of sensitivity and potential concern”. The issue at stake was the inscription of the Kakadu National Park on the List of World Heritage in Danger without the consent of Australia. Before deciding on the matter, the Committee asked for a detailed report of Australia on the measures taken to avoid additional damage and mitigate past impacts. It also asked for the voluntary suspension of the mining works.

²¹¹ Bureau Decision CONF 204 IV.B.47 (1999), para. 5.

²¹² UN Report on business and human rights. See Chapter 2, note 261.

²¹³ Businesses, however, may also play a role on their own, as it has happened in the Kakadu National Park, when the company involved “has made a commitment to the Gundjemi Aboriginal Corporation (GAC) that no mining will take place at the Jabiluka without the agreement of the Mirmar people”. See World Heritage Committee, Dec. 28 COM 15B.35 (2004), para. 1. In this case, therefore, the WHC system has prompted a private company to fulfil its international responsibility to respect human rights. This element is more nuanced in the CBD system, which does have important standards on business responsibility but leaves their implementation to States, as partially showed in section 2.1.

²¹⁴ World Heritage Committee, Dec. 33 COM 7B.49 (2009): the Committee “[n]otes with satisfaction that the State Party has confirmed that prospecting/mining activities are not allowed within the property and its buffer zone, in line with the “No-go” commitment of the International Council for Minerals and Metals (ICMM) in World Heritage properties (2003)” and “[e]ncourages the State Party to carry out an assessment of the impact of mining activities in areas close to the buffer zone on the Outstanding Universal Value and integrity of the property and to identify measures to comprehensively address them”.

to prevent mining activities on indigenous territories. However, further practice shows that the listing of properties as World Heritage has not prevented the same State Party, i.e., South Africa, to grant mining licences on other protected sites.²¹⁵ Importantly enough, the recommendation of the Committee to halt mining activities, pending the performance of impact assessments, had initially been followed up by South Africa that eventually authorised the continuation of extractive works.²¹⁶

Although there is no general policy preventing developing activities from taking place in World Heritage sites, the Operational Guidelines establish that when such activities endanger the Outstanding Universal Value of properties, the World Heritage Committee may consider delisting them.²¹⁷ In this sense, to the extent that the value of properties is assessed also against parameters such as traditional land use or the effects on indigenous livelihood, the establishment of World Heritage sites could help to protect indigenous rights. As long as the participation of indigenous peoples in the identification, inscription, and management of sites is not systematically ensured, the positive effect on indigenous rights would only remain potential.

Other elements could also contribute to the strengthening of indigenous rights, such as the performance of comprehensive heritage impact assessments with the involvement of indigenous peoples. The practice within the WHC, however, does not provide sufficient guidance in terms of the conditions under which impact assessment must be performed and its procedural requirements, including the actors to be involved.²¹⁸ In contrast,

²¹⁵ World Heritage Committee, Dec. 34 COM 7B.52 (2010), para. 3: the Committee “[e]xpresses concern at the granting of a mining licence for coal 5 km from the boundary of the property, in a highly sensitive area adjacent to the Limpopo river and in the proposed buffer zone that was submitted at the time of the inscription”; para. 7: the Committee “[u]rges the State Party to halt the mining project until the joint World Heritage Centre/Advisory Bodies mission has assessed the mining impact”.

²¹⁶ See World Heritage Committee, Dec. 35 COM 7B.44 (2011), para. 5 and Dec. 36 COM 7B.48 (2012), para. 3. Mining activities were eventually authorised only to take place in the buffer zone. See Dec. 37 COM 7B.43 (2013), para. 7. It is not clear whether the mining projects discussed in the decisions are the same.

²¹⁷ See Operational Guidelines para. 98: “protection of the property from social, economic and other pressures or changes that might negatively impact the Outstanding Universal Value, including the integrity and/or authenticity of the property”; para. 116: “Where the intrinsic qualities of a property nominated are threatened by human action and yet meet the criteria and the conditions of authenticity or integrity set out in paragraphs 78-95, an action plan outlining the corrective measures required should be submitted with the nomination file. Should the corrective measures submitted by the nominating State Party not be taken within the time proposed by the State Party, the property will be considered by the Committee for delisting in accordance with the procedure adopted by the Committee”; para. 119: “World Heritage properties may support a variety of ongoing and proposed uses that are ecologically and culturally sustainable and which may contribute to the quality of life of communities concerned. The State Party and its partners must ensure that such sustainable use or any other change does not impact adversely on the Outstanding Universal Value of the property. For some properties, human use would not be appropriate. Legislations, policies and strategies affecting World Heritage properties should ensure the protection of the Outstanding Universal Value, support the wider conservation of natural and cultural heritage, and promote and encourage the active participation of the communities and stakeholders concerned with the property as necessary conditions to its sustainable protection, conservation, management and presentation”.

²¹⁸ Operational Guidelines limit themselves to establish that “[i]mpact assessments for proposed

within the CBD regime, through in particular the Akwé:Kon Guidelines operationalise the participation of indigenous peoples in impact assessments procedures in ways that in some cases even go beyond human rights standards.²¹⁹

Another element to reconcile indigenous rights with developments occurring in World Heritage sites would be the introduction of a general requirement to create buffer zones, which is not present in the Operational Guidelines,²²⁰ as well as the definition of general criteria to determine the activities that are allowed to take place in these buffer areas. World Heritage Sites themselves may be either protected areas or buffer zones. The latter are areas surrounding protected ones, where less restrictive or no special protection rules apply, that in any event are functional to implement or reinforce protective rules within protected areas.²²¹

IUCN highlights the role of buffering zones in conservation, especially due to their functions as ecological corridors allowing for the undisturbed migration of species.²²² This is in line with the ecosystem approach under the CBD, according to which, as reminded, ecosystems are functional units whose scale must be determined in line with conservation needs.²²³ Furthermore, although buffer zones are usually not subject to active conservation activities, they do not allow for the performance of development activities that may negatively affect the conservation of protected areas. In line with this notion of buffer zones, when these are not established protected areas, their role can be secured through voluntary stewardship of local communities.²²⁴ In this sense, the governance of buffer zones surrounding World Heritage sites could be left to indigenous peoples when these coincide with indigenous lands. At the same time, when indigenous territories also include core areas of World Heritage sites, the governance of buffer zones might not be sufficient to ensure that indigenous rights are respected.

interventions are essential for all Heritage properties” (para. 110). It is not clear for instance whether impact assessment should be performed only for interventions on sites that are already on the World Heritage List. Moreover, the term “interventions” is not elaborated on any farther. ICOMOS, one of the Advisory Bodies, has elaborated about the differences between environmental impact assessment and Heritage impact assessment. See ICOMOS, *Guidance on Heritage Impact Assessment for Cultural World Heritage Property* (ICOMOS 2011). Much emphasis is put on the need to identify the components of a site that are responsible for its Outstanding Universal Value. Indeed, this analysis may be far from complete when indigenous peoples are not involved in the nomination process. The guidance highlights the importance of involving all relevant actors, including local communities, in the scoping phase of the impact assessment. However, it does not mention specifically indigenous peoples. Furthermore, local communities are not involved in the evaluation of impacts.

²¹⁹ See *supra* section 2.1.2.

²²⁰ The Operational guidelines, in paras. 103-107, only require to establish buffer zones “[w]henever necessary”.

²²¹ Nigel Dudley (ed) *Guidelines for Applying Protected Area Management Categories* (IUCN 2013) (on management categories), at 37, 55, and 81.

²²² *Ibid.*, at 16, 20, and 37.

²²³ COP dec. V/6, para. 3.

²²⁴ Dudley 2013, at 55.

2.3. Common elements: tools for reconciliation and limitations

As emerges from the analysis of the two global regimes on conservation, the consideration of indigenous rights in these legal regimes is incomplete but positive elements have indeed developed.

Concerning the first aspect, the failure to incorporate international human rights standards has to do with the limited scope of conservation treaties. The CBD is primarily a framework convention that has laid out objectives and a common institutional framework. In this sense, it does not provide details on conservation measures, leaving a lot of manoeuvring space to States. The WHC, on the contrary, is a very specific regime where the consent of States to the inscription of sites remains the cornerstone.

Another reason for the lack of indigenous rights in the treaties' texts is that most of conservation instruments have been adopted before a normative body on indigenous rights had emerged under international law and before even that participation gained some importance in international environmental law. This is particularly true for the WHC, which has recognised the importance of public participation only in recent times.

On the contrary, the CBD has been adopted at the UN Conference on Environment and Development in Rio and is thus receptive of the changes in mind-set this conference has provoked inter alia in terms of the role of non-State actors in environmental protection. This is probably why the CBD regulates access to traditional knowledge, although with insufficient means, and recognises the role of indigenous and local communities in the protection of biodiversity. In spite of this, it does not set up any hard-law standards to deal with the issue of the establishment of protected areas under Article 8(a) on indigenous territories. Again, this one-sided acknowledgement of the role of indigenous peoples in conservation is probably attributable to the fact that at the time of the CBD adoption indigenous land tenure was not intended as a collective right to land ownership with extensive prerogatives on land and resource use.

Concerning positive developments, as shown in the analysis above, the original texts of the CBD and WHC have been enriched by subsequent practice within each regime. The CBD COP has most recently recognised that conservation projects may conflict with indigenous rights.²²⁵ Furthermore, it has elaborated a number of participatory tools that aim to ensure the participation of indigenous and local communities in the creation of protected areas, as well as guidance for impact assessment. With rather different institutional mechanisms, the World Heritage Committee of the WHC has amended several times its Operational Guidelines so as to include consideration of indigenous peoples, mainly in the form of their participation. Indeed, although the practice of conservation regimes now reflects indigenous issues, the incorporation of international

²²⁵ See section 2.1 in this chapter.

human rights standards into these treaties has been realised only to a certain extent.²²⁶

Both the CBD and the WHC have established a framework to promote the involvement of indigenous peoples in conservation projects. However, they have done so in a different way. The CBD anchors the PoWPA to the “full respect” of the rights of indigenous peoples. Previous sections have shown that the complementarity between national and international standards is resolved in favour of the latter. Although the reference to rights is not consistent in all PoWPA-related documents,²²⁷ overall the language of rights testifies to a framing of the issue of participation that is typical of law. While some standards may be broadly formulated, participation is a requirement that is not subject to fluctuating circumstances. According to PoWPA indigenous peoples should be involved in the “establishment, management and monitoring of protected areas”. This standard derives from the reference to “applicable international obligations”.

In contrast to the framework delineated in the CBD, the WHC Operational Guidelines and the decisions of the World Heritage Committee fail to frame participation as an established right. The language of rights is less pervasive with the result that the involvement of indigenous peoples may depend on the different phases of the inscription process, on the circumstances of the site, or on the States involved. This underlying indefiniteness of the WHC regime with respect to indigenous participation resembles more the variability of political decisions rather than the parameters of law.

Furthermore, a problem that is not addressed and cannot be solved with a human rights interpretation of the WHC is the possibility for indigenous peoples to propose the inscription of their lands on the World Heritage List, either directly or through the State. The first option would require an amendment of the Convention which seems unlikely at present, also because it raises the issue of other local communities that might be willing to exercise similar powers within the Convention. Concerning the second option, even the fulfilment of participation in the listing and nomination of sites would not give indigenous peoples an autonomous power to propose the inscription of new sites.²²⁸ This faculty has instead received recognition under the CBD, which as reminded

²²⁶ The International Expert Workshop on the World Heritage Convention and Indigenous Peoples (Copenhagen, 20-21 September 2012) has produced a report where it proposed amendments to the Operational Guidelines to include a reference to the UNDRIP and the introduction of a human rights language. The report is available at http://www.iwgia.org/iwgia_files_publications_files/0610_International_orkshop_-_H_and_IP_-_Report_eb.pdf (last accessed October 2016). See also, Wiessner and Lenzerini 2012, at 17-20. See also, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229, at 25.

²²⁷ I refer here to the Akwé:Kon guidelines and the Addis Ababa principles.

²²⁸ To this end, national standing committees would be needed whereby indigenous groups could discuss with States’ representatives proposals made by the former. Indeed, the possibility for indigenous peoples to propose their sites would be in line with their right both to freely determine their development and to freely dispose of their resources. See Chapter 2, section 3. Art. 31 UNDRIP also recognises the right of indigenous peoples “to maintain, control, protect and develop their cultural heritage”. Furthermore, the creation of those sites would create a corresponding obligation of the States involved to preserve those properties.

has embraced the governance types elaborated by IUCN, including ICCAs.

Regarding the concrete modes in which participation is realised in the CBD and in the WHC, in both legal systems there are numerous uncertainties with respect to the concrete steps to realise participation, the differences between participation and consent, and the results of participatory processes. It may be purported that the differences between human rights standards on participation and those upheld in the regimes on conservation could be interpreted as an emerging State practice that is aimed to modify crystallised rights and principles. However, the participatory standards of conservation regimes are so undefined that it is not possible to identify a consistent practice.

In contrast, the interpretative gaps in conservation treaties must be filled in light of existing human rights norms. Chapter 2 has identified the main components of participation under international human rights law, according to which consultations should be carried out in good faith and with the objective of obtaining consent.

The requirement of good faith is partially reflected in the Akwé:Kon guidelines on impact assessment, which foresees the participation of indigenous peoples in the screening and scoping phases of impact assessment processes.²²⁹ This requirement, however, is subject to national legislation. Furthermore, impact assessment may not be the earliest phase of decision-making processes, in which case indigenous peoples must be informed on planned decisions and involved well before the stage of impact assessment. The guidelines also establish the need to notify interested indigenous peoples of information on the project and the results of impact assessments.²³⁰

The World Heritage Committee of the WHC has not elaborated any concrete general standards to ensure that indigenous peoples participate in the initial phase of the inscription of a site. On the contrary, the Operational Guidelines do not require that participation must be ensured when States create Tentative Lists. In contrast with this framework, providing information on the creation of Tentative Lists would allow indigenous peoples to take action and engage with the State from a very early stage of the inscription process.²³¹

Both the CBD and the WHC give indications on the cultural adequateness of indigenous participation.²³² Again, while the PoWPA remains silent on those issues, the Akwé:Kon guidelines request that communications should be provided “in the language(s) of the communities and region that will be affected”.²³³ Furthermore, they propose a model for a correct articulation of values on the part of the communities in cooperation

²²⁹ Akwé:Kon guidelines, para. 14.

²³⁰ Akwé:Kon guidelines, para. 10.

²³¹ See Disko and Tugendhat 2013, at 23.

²³² The issue of how to access traditional knowledge is analysed in Chapter 3.

²³³ Akwé:Kon guidelines, para. 10.

with the proponents of conservation projects through the conclusion of protocols.²³⁴ To facilitate participation, the Akwé:Kon guidelines foresee the possibility to record the positions of indigenous peoples living in remote areas.²³⁵ Indeed, this seems a double-edged sword since it does not allow for a real and interactive exchange of positions.

Under the WHC, the comprehension and communication of indigenous cultural values is at the basis of the inscription of cultural landscapes. However, neither the Operational Guidelines nor decisions of the World Heritage Committee give indications on the way in which participation should be concretely realised.²³⁶

Concerning the meaning of free, prior and informed consent, the Akwé:Kon guidelines condition it to national legislation,²³⁷ thus excluding the applicability of international standards. Under the PoWPA, it is not clear whether prior informed consent must be only sought or be obtained. However, the PoWPA refers in this case to applicable international standards, thus opening up to the contamination of CBD standards with human rights law in light of the considerations above.

A similar lack of clarity has been found in the WHC Operational Guidelines. On the one hand, the guidelines require Parties, when nominating sites, “to demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained”.²³⁸ On the other hand, this demonstration is not a mandatory part of the applications for nomination and Advisory Bodies have no mandate to verify that consent has been obtained. Furthermore, the decisions of the World Heritage Committee on the inscription of sites have not upheld these concerns and rather refer to the involvement and participation of local communities. In this case, therefore, although there is no interpretative problem, the requirement of free, prior and informed consent is not enforced in the practice.

Another problem identified when participatory rights are concerned is the lack of clarity as to the requirements of participation in the management of protected areas or World Heritage properties. The PoWPA only refers to the need to “[i]mplement specific

²³⁴ Akwé:Kon guidelines, para. 30: “protocols could be established in order to facilitate the proper conduct of the development, and personnel associated with it, on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities”. The establishment of protocols may be likewise relevant for a participatory management of protected areas.

²³⁵ Akwé:Kon guidelines, para. 17: “The proponent and members of the affected indigenous or local community should establish a process by which community views and concerns can be properly recorded, as community members may not be in a position to attend public meetings because of, for example, remoteness of the community, or poor health. While written statements may be preferred, the views of the community members could also be recorded on video or audio tape, or any other appropriate way, subject to the consent of communities”.

²³⁶ See section 2.2.1 in this chapter.

²³⁷ Akwé:Kon guidelines, para. 53. On the possibility to conclude agreements between indigenous peoples and proponents, see section 2.1 in this chapter.

²³⁸ Operational Guidelines, para. 123.

plans and initiatives” to ensure the involvement of indigenous peoples.²³⁹ On the other hand, the CBD COP has gone beyond human rights standards, by acknowledging the contribution to conservation given by ICCAs and encouraging States to give legal recognition to these forms of conservation by indigenous peoples. This indication is a historical step forward not only concerning management issues, but also raising concrete opportunities for indigenous peoples to have their governance recognised, at least for the purpose of biodiversity conservation.

Quite differently, within the WHC, the World Heritage Committee is only starting considering the participation of indigenous peoples in the management of sites as a criterion to postpone or revise the inscription of sites. However, there is not a coherent trend and no details are provided as to the concrete involvement of indigenous peoples.²⁴⁰

Given that participation may be a burdensome process in terms of time and activities to be undertaken, this process may require huge financial demands for the actors involved. In this respect, neither the CBD nor the WHC foresee dedicated funding mechanisms. The PoWPA only refers to the need to “[i]dentify and establish positive incentives that support the integrity and maintenance of protected areas and the involvement of indigenous and local communities and stakeholders in conservation”.²⁴¹ No international mechanism is otherwise established. The WHC, instead, has established a general funding mechanism, i.e., the World Heritage Fund,²⁴² under which Parties may request international assistance to manage and preserve their sites.²⁴³ No specific funding heading, however, is dedicated to promote the Strategic Objective to foster community involvement. In a limited number of decisions, the Bureau has recommended to the States obtaining the funds that these should be used to reach the planned objective in cooperation with local communities.²⁴⁴

In addition, some decisions of the World Heritage Committee have highlighted that development activities, and in particular mining projects, are likely to endanger the Outstanding Universal Value of properties. This gives State Parties a broad manoeuvring

²³⁹ PoWPA, suggested activity 2.2.2.

²⁴⁰ See section 2.2.

²⁴¹ PoWPA, suggested activity 3.1.6.

²⁴² Art. 15-18 WHC.

²⁴³ Art. 19-26 WHC. Operational Guidelines, paras. 233-257. See para. 233: “The Convention provides International Assistance to States Parties for the protection of the world cultural and natural heritage located on their territories and inscribed, or potentially suitable for inscription on the World Heritage List. International Assistance should be seen as supplementary to national efforts for the conservation and management of World Heritage and Tentative List properties when adequate resources cannot be secured at the national level”.

²⁴⁴ For instance, in the Bureau Dec. CONF 205 VII.28 (2002), concerning the request of Indonesia to obtain financial assistance to develop the Strategic plan for the Lorentz National Park, “[t]he Bureau approved an amount of US\$30,000, requesting the State Party to work in collaboration with other potential donors, conservation NGOs and the private sector, and in particular the local communities, for the preparation of the strategic plan and seek their full support for the long-term conservation of the Lorentz National Park”. See also, Bureau Dec. CONF 205 VII.24 (2001).

space to regulate and limit the activities of businesses when World Heritage sites are concerned. Furthermore, cultural impact assessment is a concrete instrument through which States may include the cultural effect of proposed projects on indigenous peoples into the overall evaluation of cultural impacts. However, there is not consolidated practice in this sense and the conditions under which heritage impact assessments are to be conducted appear unclear.

In light of the above, the incorporation of human rights norms on indigenous rights into conservation treaties has only been partial. This lack of integration is furthermore aggravated by a rudimentary system of monitoring of the international treaties analysed. This is particularly true of the CBD, where a compliance mechanism does not exist. The COP has monitored the implementation of the PoWPA. However, this body does not have the power and the resources to investigate the capacity of the legal frameworks established at the national level to fulfil international standards.

Within the WHC, the opposite is true. While the decisions of the World Heritage Committee are in principle pervasive and many propose recommendations for States to preserve the integrity of their sites, the standards implemented are overall less protective of indigenous rights. The last version of the Operational Guidelines establishes a generalised requirement to obtain free, prior and informed consent when establishing World Heritage sites on indigenous territories. It remains to be seen however whether this requirement will be enforced by the Committee and whether it will be done in a consistent way.

To conclude, it is interesting to note that WHC and CBD obligations may overlap when World Heritage sites, in particular natural heritage and cultural landscapes, are also part of States' national systems of protected areas.²⁴⁵ In this sense, CBD requirements might also extend to the creation of mixed sites or cultural landscapes, thus ensuring an interpretation of participatory requirements that is more in line with indigenous rights.²⁴⁶

3. Unveiling the relevance of indigenous rights and the principle of self-determination: applying the interpretative approach

The analysis of the incorporation of indigenous rights into conservation treaties has shown the positive developments, as well as the limitations and interpretative doubts, deriving from the practice of the CBD and the WHC. Some questions remain unaddressed, such as

²⁴⁵ Dudley 2013, at 16: "All new and most existing natural World Heritage sites are protected areas and comply with the IUCN definition of a protected area. So are some cultural sites, especially World Heritage Cultural Landscapes". See also, Redgwell, 'The World Heritage Convention and Other Conventions Relating to the Protection of the Natural Heritage' 2008, at 384.

²⁴⁶ Redgwell, 'The World Heritage Convention and Other Conventions Relating to the Protection of the Natural Heritage' 2008 also suggests that the WHC might be *lex specialis* with respect to other conservation treaties. She also argues that cross-fertilisation is possible by virtue of Art. 31-32 VCLT (at 395-397).

what is the content of free, prior and informed consent within international conservation regimes and to what extent these regimes contemplate the option that indigenous peoples may themselves establish protected areas. As seen, the lack of fully-fledged responses to the issue of indigenous participation and initiative is partly attributable to an insufficient recognition of indigenous rights within conservation regimes.

Another important reason for insufficient responses and legal uncertainty, which is developed in this concluding section, is the lack of reflection upon the articulation of participatory rights in a way that is tailored to the foreseeable impacts on indigenous peoples stemming from the creation and/or management of protected areas. While the occurrence of some impacts have received precise legal responses, some other situations need a more thorough consideration of how indigenous rights can be concretely articulated, while at the same time safeguarding public interest and conservation needs. As illustrated below, the principle of self-determination plays an important role in this exercise.

Chapter 2 has proposed an innovative reading of indigenous rights, according to which the self-determination of indigenous peoples is a general principle of international law and as such has an important interpretative role to fulfil. First, within international human rights law, the rights of indigenous peoples are to be interpreted in light of self-determination.²⁴⁷ The second interpretative function goes beyond the realm of human rights to affect the international regimes on conservation examined in this chapter. Whenever there are interpretative doubts or gaps in the interpretation of provisions regarding indigenous peoples, the principle of self-determination must be used to fill these gaps.

The principle therefore contributes to define the rights of indigenous peoples delineated in conservation regimes, such as participation and consent. Furthermore, the principle sets a threshold according to which, while fulfilling conservation obligations, indigenous rights cannot be compressed so as to impair the cultural distinctiveness of indigenous groups. Since cultural distinctiveness depends on factors such as the relationship with land, the ability to practice traditional activities, the organisation of indigenous society, and others, this threshold needs to be evaluated on a case-by-case basis, depending on the indigenous peoples concerned.

The first situation potentially affecting indigenous peoples is the establishment of protected areas. In contrast with human rights law and with CBD standards, this may happen without engaging in a process of free, prior and informed consent. It may also happen, when indigenous land governance is realised, that the formalisation of ICCAs occurs without seeking the free, prior and informed consent of indigenous peoples. This original violation of indigenous land and participatory rights may in turn result in at least three different additional violations, namely the forced removal of indigenous peoples

²⁴⁷ See Chapter 2, section 5.

from their lands, the imposition of some restrictions on the use of natural resources, and the blanket prohibition to use natural resources.

The eviction of indigenous peoples from their lands has received a mixed response in human rights law. Expropriation or dispossession cannot occur without the consent of indigenous peoples according to Article 10 of the UN Declaration on indigenous rights and Article 16(2) of the ILO Convention 169. Chapter 2 has explained why these instruments have a limited binding capacity, although they can be and have been used to interpret and enlarge the scope of other human rights treaties' provisions in relation to indigenous rights. Human rights treaty bodies, however, have not clearly established so far that consent must be obtained in case of removal of indigenous peoples from their lands, the CERD representing an exception in this context.²⁴⁸ This might be due to the fact that nearly no case of recent forced dispossession has been brought before them.

The requirement of obtaining consent can indeed be derived by implication from the fact that, as explained in Chapter 2, this is recognised in case developments on indigenous lands risk threatening indigenous cultural integrity. This would most probably be the case, if the State failed to negotiate with indigenous peoples any potential relocation.²⁴⁹ Furthermore, human rights treaty bodies have both established that lost possession does not extinguish property rights and grants rights to restitution or compensation with similar land when indigenous peoples have been forcibly dispossessed. In this context, it is also relevant that the PoWPA has embraced the requirement of prior consent as a necessary safeguard to avoid encroachments on indigenous rights when relocation is at stake.²⁵⁰ Therefore, the failure of the WHC framework to foresee a similar safeguard appears as a lacuna that contravenes international law.²⁵¹

Restrictions upon resource use are another possible consequence of the establishment of protected areas. As already highlighted, their legality is tested by human rights treaty bodies against proportionality, which is satisfied inter alia when participatory processes seeking consent are in place. Furthermore, proportionality has also substantive limits since

²⁴⁸ CERD, General Recommendation 23, para. 5. See also, *Sawhoyamaya* case, para. 131 (establishing the right to restitution). In the *Dann* case, para. 130, the Commission finds that indigenous title to land cannot be changed without consent, thus indirectly confirming the provisions on forced removal contained in UNDRIP and ILO Convention 169.

²⁴⁹ Human rights treaty bodies have also established that, when restitution cannot be enforced, indigenous peoples must be given with similar lands enabling their traditional livelihoods. These remedies are also established under Art. 28 UNDRIP. See Chapter 2, section 3.1.

²⁵⁰ See section 2.1.2 in this chapter.

²⁵¹ See section 2.2.1 in this chapter. See also, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, UN Doc. A/HRC/15/37/Add.1, para. 250: "Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the interests involved. A significant, direct impact on indigenous peoples' lives or territories, such as their removal from their traditional lands, establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent"; Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229, at 25, which recommends to UNESCO to "[r]eform the Operational Guidelines".

restrictions are only acceptable if they do not compromise indigenous distinctiveness. Another important criterion is that indigenous peoples are still able to access and utilise their resources.²⁵² In this case, therefore, depending on the impacts at stake the free, prior and informed consent is to be intended as a process more than as a given participatory result since it does not imply that consent must be obtained but only that prospected impacts and remedies are jointly assessed. As also highlighted by the Inter-American Court of Human Rights, conservation measures do not need to be exclusionary and thus can be conceived with the participation of indigenous peoples in a way that is respectful of indigenous rights. To ensure this, however, participatory processes must be in place. This requirement would be for instance satisfied if States had permanent bodies in place where States, indigenous representatives, and possibly conservation agencies, could meet regularly to discuss all kinds of activities planned to take place on indigenous territories.

In some cases, however, restrictions are conceived as blanket prohibitions to use some resources or to use them in a traditional way. This occurrence for the reasons explained above and by virtue of the principle of self-determination requires that consent is obtained. Although human rights treaty bodies have elaborated these criteria in the context of development projects, it is not excluded that a conservation project can be large-scale and equally affect indigenous peoples.²⁵³ In this sense, also a combination of small projects may produce an impact on indigenous rights that is so extensive as to trigger the guarantee of obtaining consent. This is indirectly confirmed by the condition posed in the *Kaliña and Lokono* case for restrictions to be acceptable, i.e., resources must continue to be accessible.

In order to meet these criteria, the choice about the management type of protected areas appears essential. IUCN distinguishes between six management categories that allow for different degrees of human presence and involvement.²⁵⁴ In this sense, engaging in participatory processes with indigenous peoples on this choice will help States and conservation agents find a combination of conservation measures that does not compress indigenous rights.

Another option to meet both conservation needs and indigenous rights is that indigenous peoples themselves create and manage protected areas through ICCAs. In the African regional context, the revised Maputo Convention already includes an obligation for its Parties to “promote the establishment by local communities of areas managed

²⁵² See *Kaliña and Lokono* case; HRC, *Apirana Mahuika* case and *Länsman* cases in Chapters 1 and 2.

²⁵³ Expert Mechanism on the Rights of Indigenous Peoples, Progress report on the study on indigenous peoples and the right to participate in decision-making, UN Doc. A/HRC/EMRIP/2010/2, para. 34: “Particular emphasis is placed on free, prior and informed consent for projects or measures that have a substantial impact on indigenous communities, such as those resulting from large-scale natural resource extraction on their territories or *the creation of natural parks, reserved forests, game reserves* on indigenous peoples’ lands and territories” (emphasis is added).

²⁵⁴ See Dudley 2008 and Gillespie, *Protected Areas and International Environmental Law* 2007, at 33 ff.

by them primarily for the conservation and sustainable use of natural resources”.²⁵⁵ The most problematic aspect concerns the question whether and under which terms States’ recognition of these conservation models is needed. In this sense, Western science cannot be considered the only way to validate the conservation objectives and results of ICCAs.²⁵⁶ Furthermore, certain indigenous groups might be unwilling to have their territories formalised as protected areas.²⁵⁷ In this context, a good starting point would be to map those areas in consultation with indigenous peoples and to include them in the evaluation of national and international conservation goals through a participatory process aiming to obtain consent.²⁵⁸

A second set of violations may also derive even if the first condition, i.e., establishing protected areas with the free, prior and informed consent of indigenous peoples, is met. When protected areas are not created by indigenous peoples, management models may vary to the extent that management decisions are taken without engaging in a process of free, prior and informed consent with indigenous peoples. In this sense, it may happen that indigenous peoples are completely excluded from the management board, that they are only superficially consulted or merely informed when decisions are taken, or even that participation takes place in an effective way but excluding those matters that are of primary concern for indigenous peoples.

In order to judge whether management decisions are in line with participatory standards, it is useful to assess whether protected areas coincide with indigenous territories or are established on lands that are close to indigenous territories or where indigenous peoples occasionally go for their activities. When protected areas are on indigenous territories, it seems that the only way to ensure effective participation is co-management, meaning that indigenous peoples must be on the management board.²⁵⁹ This does not

²⁵⁵ Art. XII(3) African Convention on the Conservation of Nature and Natural Resources. See Desmet 2011, at 157.

²⁵⁶ See Kothari and others 2012, at 17: “ICCAs do not have to be considered as protected areas (i.e., within the official protected area system) for their conservation achievements to be recognized”.

²⁵⁷ See Perrault, Herbertson and Lynch 2007, at 535-542. These authors make the argument that the legal recognition of indigenous-led protected areas might be detrimental. See also, Kothari and others 2012, at 85: “While legal recognition is considered as a generally beneficial foundation for a resilient ICCA, it is also important to note that not all indigenous peoples or local communities will want their ICCAs to be recognized”. Indeed, these authors argue (at 26), the formalisation of ICCAs may contribute to the recognition of land rights. At the same time, the recognition of indigenous land rights is an enabling condition for ICCAs to flourish (at 30).

²⁵⁸ See Kothari and others 2012, at 27: “There is no global estimate of the number and extent of ICCAs. This is largely due to their neglect by formal conservation circles”. These authors also note the absence of written documentation among indigenous groups on conserved areas and the fact that this category is not well defined; at 44: they indicate the existence of a voluntary database, the ICCA Registry. See also, Göcke 2013 at 121-122 for examples also in Canada and New Zealand.

²⁵⁹ For a review of co-management experiences in Australia and Canada, see Donna Craig, ‘Recognising Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences’ (2002) 6 *New Zealand Journal of Environmental Law* 199. In some of them indigenous peoples retain ownership, in others not. The author is very critical of those forms where indigenous peoples retain ownership but then lease back their lands and resources to the State, either perpetually or for a long term (at 254).

mean that they would have veto powers on all decisions; in contrast with that, voting rules may be majoritarian and consent might only be required when restrictive measures impact on the exercise of their rights to the extent that their culture is compromised. However, it is important that specific measures to address cultural differences, and possibly capacity building, are in place according to the circumstances.

When protected areas are not established on indigenous lands, co-management might be an option but it is not necessary. As a bottom line, however, the State and conservation agents must engage in a participatory process with affected indigenous peoples both to determine potential impacts, corrective measures, the rights that are likely to be compressed, the benefits that indigenous peoples can obtain, and, if impacts are particularly extensive, to acquire consent. Once again, good faith, engagement at an early stage, and cultural appropriateness are essential elements of these participatory processes.

The problems described above mainly concern the obligatory interaction between indigenous peoples and national and local levels of government. However, the same restrictions on indigenous rights might derive from multilateral/bilateral treaties establishing natural reserves. The question arises on whether it is sufficient in this case that indigenous peoples are represented by negotiators of the State. The answer once again depends on which rights are at stake. If prospective protected areas are to be created on indigenous territories, States must engage in a consultation process with indigenous representatives before concluding treaties. When indigenous peoples are otherwise affected by those treaties, it is possible that States autonomously pursue international negotiations, with a view to ensuring that they can implement obligations at national level in a way that is compatible with indigenous rights.²⁶⁰

Concerning the first option, it is possible that States establish institutional mechanisms through which indigenous peoples can effectively participate in international negotiations.²⁶¹ The World Heritage Committee has embraced this position while

See also, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, UN Doc. A/71/229, at 22: “indigenous participation in management boards is impeded by a lack of training and orientation for indigenous peoples on their roles and responsibilities and such meetings tend to be conducted using overly technical language”.

²⁶⁰ This would be in line with the principle of mutual supportiveness that, according to Pavoni, must guide the conclusion of new obligations. See Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?’ 2010, at 650 and 666-669.

²⁶¹ See Kamrul Hossain, ‘Hunting by Indigenous Peoples of Charismatic Mega-Fauna: Does Human Rights Approach Challenge the Way Hunting by Indigenous Peoples is Regulated?’ (2008) 10 *International Community Law Review* 295. This author has made an attempt to place the interaction between conservation and indigenous peoples within the debate on self-determination with reference to the International Convention for the Regulation of Whaling (Washington, 2 December 1946, in force 10 November 1948) and Agreement on the Conservation of Polar Bears (Oslo, 15 November 1973, in force 26 May 1976). One of the conclusions he reached is that, pursuant to their self-determination, representatives of indigenous peoples should be included in national delegations representing States before the institutional mechanisms of conservation regimes (at 317). Furthermore, according to Hossain,

rejecting the creation of an advisory body made of indigenous representatives. Indeed, the participation of indigenous peoples in national delegations would not reach the goal of articulating indigenous positions through agents of the State, if the State did not recognise indigenous groups, failed to consult in good faith with indigenous representatives, or failed to report indigenous peoples' opinions.

In contrast with this framework, the CBD allows indigenous representatives to participate in COP meetings as autonomous subjects with respect to their respective national delegations. Being no Parties to the CBD, indigenous peoples are not granted with voting rights within the COP. However, their presence has been decisive in influencing the workings of the COP in indigenous-related matters, such as for instance the creation of the Working Group on Article 8(j),²⁶² which has gradually led to the adoption of the Nagoya Protocol.

Finally, a third area of conflict between conservation and indigenous rights concerns access to traditional knowledge for conservation purposes by national authorities and/or national private actors without the free, prior and informed consent of indigenous peoples. This issue is addressed in Article 8(j) of the CBD and has been thoroughly analysed in Chapter 3 concerning its connections with the ABS regime. Although obligations on ABS aim to regulate inter-State relations, Article 8(j) is a general provision primarily intended to regulate intra-State matters. In this sense, notwithstanding the interpretative uncertainties illustrated in Chapter 3,²⁶³ the expression "approval and involvement" must be interpreted in a systemic way in light of indigenous rights and the principle of self-determination. It must be reminded, however, that the Nagoya provisions requiring States to establish a national framework to ensure consent and benefit-sharing only applies to inter-State relations.²⁶⁴ It might be argued, however, that differential treatment at national level might be sanctioned on the grounds of discrimination. Furthermore, the obligation to put in place a normative framework that realise participatory rights stems

indigenous peoples should be able to withdraw from conservation treaties. This argument, however, sounds illogical to the extent that indigenous peoples are not parties of conservation treaties in the first place. To my knowledge the only other author that has made a similar point on the importance of recognising the self-determination in conservation treaties is Aristizábal Corredor in his Master thesis published online, available at <http://thesis.eur.nl/pub/8632/> (last accessed October 2016). His dissertation, however, is not a legal analysis on this issue.

²⁶² See COP dec. III/14 (1996), para. 8: "Decides that activities as part of the intersessional process referred to in paragraph 7 should include representation by Governments, indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity, and other relevant bodies"; COP dec. IV/9, para. 2: "Decides that the working group shall be composed of Parties and observers, including, in particular, representation from indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity with participation to the widest possible extent in its deliberations in accordance with the rules of procedure"; para. 5. According to the CBD, the COP has a broad mandate to "[c]onsider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation" (Art. 23(4)(i)).

²⁶³ Chapter 3, sections 2.1.2 and 2.4.1.

²⁶⁴ Another limitation of course is the limited number of ratifications of the Nagoya Protocol as yet.

in any event from human rights law and would also derive from mutual supportiveness as explained in the Introduction to this dissertation.²⁶⁵

As emerges from the discussion above, one of the major threats to indigenous governance of protected areas is the lack of recognition of indigenous rights, and in particular land rights.²⁶⁶ Indeed, the novelty provided for in the CBD and partially in the WHC is that, even in the absence of articulated rights,²⁶⁷ participation of indigenous peoples is a requirement. This practice reinforces the existence of indigenous rights because it is implicitly founded on this recognition. Furthermore, the lack of explicit links between rights and protection may open up to the extension of indigenous prerogatives to other subjects and groups, as it is foreshadowed by the reference both to local communities in the CBD and to stakeholders in the WHC.

At the same time, the creation of protected areas can also be seen as a way to remedy past expropriations or dispossessions of indigenous peoples' lands. Co-management and ICCAs may produce control on lands, autonomy arrangements and internal self-determination, as well as the prevention of development activities that are threatening both conservation and indigenous rights.²⁶⁸ In this sense, the international regime on conservation may reinforce the rights of indigenous peoples when conservation is implemented through effective participation and, in some cases, consent.

To conclude, this section has illustrated how the rights of indigenous peoples and the principle of self-determination may allow for a systemic interpretation of the international regimes on conservation. The only caveat is that a correct interpretation does not ensure that the implementation of the concerned conventions will ensure the fulfilment of indigenous rights. For this to occur it is necessary to have monitoring mechanisms in place, stricter requirements, and more financial resources. Furthermore, when interpretation is overstressing existing obligations contained in conservation treaties, the principle of self-determination can perform the function of guiding principle in the modification of existing provisions. In certain cases, only the amendment of existing treaties or changes in the practice of the organisation can guarantee the compatibility of conservation regimes with indigenous rights.

²⁶⁵ See Introduction, section 6.

²⁶⁶ See Ashish Kothari and others, *Recognising and Supporting Territories and Areas Conserved by Indigenous Peoples and Local Communities: Global Overview and National Case Studies* (2012), at 30.

²⁶⁷ The WHC only speaks of stakeholders and equates indigenous peoples to other subjects; the CBD in principle recognises rights but does not articulate them, apart from procedural ones.

²⁶⁸ Craig 2002, at 214, gives the examples of Nisga'a and Nunavut.

CONCLUSION

Avenues for Reconciliation with Indigenous Rights: the CBD and beyond

1. A reasoned summary and main results

Indigenous peoples, often depicted as stewards of the environment, can be affected by environmental conservation in many ways. This dissertation has investigated the relationship between the rights of indigenous peoples and the protection of biodiversity under international law in light of two main research questions. The first question was aimed to detect potential conflicts between the obligations incumbent on CBD Parties and those stemming from human rights treaties and protecting indigenous rights. The second question looked at these conflicts to identify ways to prevent or solve them by ways of systemic interpretation. One of the main objectives, therefore, was to suggest harmonious interpretations of States' obligations stemming both from the CBD regimes and the human rights treaties protecting the rights of indigenous peoples.

The relevance of conflicts between these two bodies of law has been established in Chapter 1, which has first positioned this research in the context of the traditional scholarly debate about human rights and the environment. This strand of research has privileged the analysis of the incorporation of environmental considerations into well-established human rights, also known as human rights approach to environmental protection. Human rights treaty bodies have used environmental degradation as an element to ascertain the violation of indigenous rights, thus mainly concluding that environmental protection and indigenous rights are mutually reinforcing. In the limited cases where the pursuance of environmental objectives by States has negatively affected indigenous rights, the problem of conflict has not explicitly been addressed. In parallel, Chapter 1 has analysed the text of the CBD to see whether the specific problem of the interaction between indigenous rights and biodiversity protection is addressed under this treaty. This analysis has produced two main results. First, there is a lot of potential for conflict between the provisions of the CBD concerning indigenous and local communities (Articles 8(a), 8(j) and 10(c)) and the rights of indigenous peoples as protected in human rights treaties. Second, these conflicts are understudied and therefore need to be identified by looking at two subfields of the CBD, i.e., ABS and conservation. Chapter 1 has also identified the problem of access to land and natural resources as the main underlying issue that lies at the basis of the conflict between indigenous rights and biodiversity protection.

Chapter 2 has elaborated an interpretative approach to promote coherence between States' obligations under the CBD and obligations establishing indigenous rights pursuant

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to human rights law. These conflicts cannot be solved through classic rules of hierarchy, *lex posterior*, or *lex specialis* since the CBD and indigenous rights do not represent *jus cogens*, have different objects, and do not explicitly derogate from one another. This interpretative approach is based on the presumption against conflicts characterising international law. In this sense, it harmonises conflicts by means of the incorporation of indigenous rights into the CBD through contextual and systemic interpretation. Indigenous rights are protected under widely ratified global and regional human rights treaties and, therefore, represent applicable international rules in the relations of CBD Parties. The interpretative approach builds on systemic interpretation with an additional tool. Beyond substantive and procedural indigenous rights, another applicable rule between CBD Parties is the principle of self-determination that, Chapter 2 has argued, must be used when the content of CBD provisions is particularly unclear or interpretation particularly complex.

The principle of self-determination has been extracted inductively from the underlying rationale of existing indigenous rights. These rights emerge mainly from the practice of human rights treaty bodies, which have extensively interpreted existing—primarily individual—rights as encompassing the collective rights of indigenous peoples to land, natural resources, culture, autonomy, and participation. Coherently with human rights cases, the limited instruments dedicated to the protection of indigenous rights (the ILO Convention 169 and the UN Declaration on indigenous rights) have been used mainly as supplementary means to identify the content of indigenous rights. The general binding force of indigenous rights, however, is attributable to the almost exhaustive membership of global and regional human rights treaties.

Although this thesis has argued that extensive interpretation has been accepted by States, the main limitation of this approach is that human rights practice is in any event limited to a defined number of emblematic cases. It seems, therefore, that the study of indigenous rights may in future benefit from a detailed analysis of how indigenous rights are realised in national systems. At the same time, the objective of this dissertation was not to reach definitive conclusions on the content and status of indigenous rights, but rather to find criteria of interactions between those rights and the protection of biodiversity.

Chapter 2 has acknowledged that indigenous rights are not absolute but subject to limits. The same is true for the permanent sovereignty of States over natural resources that lies at the basis of the CBD. In this context, self-determination is in essence a relational principle, which allows for the compression of indigenous rights in the exercise of States' sovereignty up to the so-called denial test. This test has been used by all human rights treaty bodies, including the more restrictive European Court of Human Rights, to assess the legality of the restrictions imposed on indigenous rights. Accordingly, restrictions are admissible as long as they do not amount to a denial of rights and preserve the distinctive identity of indigenous groups as peoples.

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Although limited to indigenous rights, this understanding of self-determination as a relational general principle makes a contribution to the general debate on self-determination in international law. This thesis has purposefully downplayed the issue of the attribution of self-determination as a prescriptive right that belongs to a problematic notion of peoples. On the contrary, it has recovered the significance of self-determination as a general principle of international law. Furthermore, it has privileged an inductive approach that can be used in future research to explore the issues of both which peoples are entitled to self-determination and what is the substantive content of this right.

This thesis has identified three main functions of the principle of self-determination. First, in the field of human rights, self-determination serves to operationalise the limits to possible States' restrictions stemming from the exercise of public powers, public interest, and the sovereignty over natural resources. Under international human rights, the precise contours of indigenous rights often depend on the circumstances, including participatory rights. In this sense, the principle of self-determination permits to adapt the content of indigenous rights to different national circumstances, while preserving the substance of rights.

Second, in the context of the CBD, the principle of self-determination serves to clarify the contours of indigenous rights when CBD provisions are ambiguous and allow for multiple possible States' conducts. Again, although there is room for a diversification of rights within the CBD, interpretations cannot go so far as to deprive indigenous peoples of their distinctiveness. In this sense, the principle poses some limits to the leeway attributed to States under the CBD. Furthermore, the principle allows for extending the teleological criterion, used by human rights treaty bodies to set limits to the restrictions posed by States on indigenous rights, to the rights protected under the CBD regime. This is important for instance to determine the content of "consent or approval and involvement" in the context of specific ABS arrangements.

Third, self-determination also solves possible inconsistencies between the membership of human rights treaties and the Parties of the CBD regime. In this last respect, in the remote hypothesis that CBD Parties are not bound by any human rights treaty, the principle of self-determination can help balance States' powers with indigenous rights protected under the CBD. In this sense, the principle permits to extend interpretations that are more protective of indigenous rights to CBD Parties that have not ratified certain human rights treaties. It also offers arguments why indigenous rights must apply even to the cases that are not regulated by the CBD and the Nagoya Protocol, such as the collections of genetic materials created preceding the entry into force of the CBD.

The interpretative approach illustrated above has been tested against two thematic case studies. Chapter 3 has identified conflicts between the CBD regime on ABS and indigenous rights as protected under human rights law. The study of CBD COP

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decisions, as well the Nagoya Protocol, has revealed that conflicts can be solved through the incorporation of indigenous rights into the CBD regime.

This approach has led to a number of results with respect to the following problematic issues, i.e., titles over genetic resources, the definition of access and utilisation, the notion of traditional knowledge, differences between rules concerning traditional knowledge and genetic resources, and forms of participation. Chapter 3 has highlighted the importance of establishing clear land rights because title to genetic resources can be deduced from land and resource rights. Moreover, it has revealed that, although artificially drawn, the line between access and utilisation can facilitate the protection of indigenous rights in that if the former's requirements are not ensured (consent, approval and involvement), the latter's might be (benefit-sharing). This means that participation and benefit-sharing are cumulative guarantees that do not necessarily need to be satisfied at the same moment. Chapter 3 has also illustrated the main novelties of the Nagoya Protocol, including the fact that this instrument creates clear obligations concerning indigenous peoples even when genetic resources are involved. In this sense, the seemingly more restrictive conditions applicable to genetic resources are to be interpreted in light of indigenous rights. If conditions were to be interpreted restrictively—for instance, entitlements to genetic resources only if established nationally—land rights would be potentially disrupted by the increasing phenomenon of bioprospecting. Furthermore, this interpretation would be contrary to the acknowledgment, in the Nagoya Protocol, of the UN Declaration on indigenous rights and the recognition of the close relationship between traditional knowledge and genetic resources. Indeed, the Protocol delimits its scope with reference to traditional knowledge associated with genetic resources, which reinforces the link between the two elements. Chapter 3 also identifies a number of substantive reconciliation tools, including the conclusion of MATs as a way to realise the free, prior and informed consent of indigenous peoples. The clearer standards of the Nagoya Protocol in this respect might be extended to CBD Parties that have not ratified the Protocol to the extent that Parties of the latter adopt national legislation requiring users to perform the more stringent requirements of the Protocol. Indeed, national implementation seems crucial especially in the context of a very technical regime, such as that on ABS.

Chapter 4 has identified conflicts between the CBD regime on conservation and indigenous rights as protected under human rights law. The main result in this subfield concerns the high level of fragmentation of the CBD regime on protected areas. While the Nagoya Protocol gives legal certainty to the regime on ABS, the regulation of conservation results from a combination of often heterogeneous CBD decisions adopting different kinds of standards. In this sense, for instance, whereas the PoPWA acknowledges the importance of fully respecting indigenous rights, other decisions adopt a limited notion of land rights. There is also an underlying ambiguity between the notions of governance

and management of protected areas, due probably to the relative novelty of debates about the former. At the same time, one of the most important achievements in this field is the recognition of ICCAs as legitimate governance types. This requirement goes beyond the standards elaborated under human rights law in the *Kaliña and Lokono* case. The CBD also distinguishes itself from the WHC in that it has embraced to a further extent the ecosystem approach to conservation, according to which human needs and societal necessities are a crucial part of the evaluation of conservation objectives. At the same time, the disruptive effects of mining projects on both conservation and the rights of communities have been exposed more clearly under the WHC, due to the existence of a dedicated monitoring system. Chapter 4 concludes with the articulation of different participatory requirements depending on the prospective impacts of conservation. One of the main limitations of this analysis is related to the fact that the approach of this thesis is to look at indigenous peoples as black boxes, without investigating either the articulation of authority within communities or issues of representation. In this sense, participation might be more difficult in reality than prospected if conceiving indigenous peoples as a single unitary entity.

Notwithstanding specificities, the CBD regimes on ABS and conservation also share important elements. In both cases, the CBD regime protects indigenous peoples in a way that cannot be anticipated from the mere textual analysis of the framework convention. Even when sticking to textual interpretation, the biodiversity regime provides for some level of protection for indigenous peoples also in the remote circumstance that its State Parties have not ratified human rights treaties. Furthermore, indigenous rights are operationalised within the CBD regime through participation, including consultation, consent, and benefit-sharing.

2. The conceptual limits of *lex specialis*

As stated in the Introduction, one of the objectives of this research was to verify to what extent differences in the CBD regime concerning the protection of indigenous rights may amount to derogations of human rights law. In other words, may different formulations of indigenous rights in the CBD and the Nagoya Protocol prevail over human rights obligations by virtue of *lex specialis*? Does the CBD regime aim to establish a more specialised body of law when it comes to the consideration of indigenous rights? The analysis of the cases on ABS and conservation would rather warrant a different conclusion. While no explicit derogation can be found in the rules examined, these in contrast are either not sufficiently clear when enucleating standards on indigenous peoples or more protective of indigenous rights than human rights treaties.

The first point has been examined in detail in Chapters 3 and 4. For instance, uncertainties surround the notion of approval and involvement both under the CBD

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and the Nagoya Protocol. As explained, human rights law allows for a spectrum of participatory rights (under the category of free, prior and informed consent) that permits different shades of involvement of indigenous peoples in decision-making. In this sense, the adequateness of participatory requirements in the CBD with respect to human rights standards will depend on concrete implementation. The latter in turn must be judged on a case-by-case basis depending on circumstances, concrete impacts, and indigenous rights involved. In this sense, uncertainty in this case can be read as a means to ensure flexibility in the protection of indigenous rights rather than as a way to derogate from them, also in light of the fact that the same uncertainties characterise human rights law.

A difference with the human rights regime can be found in the interplay between participation and benefit-sharing. Under human rights law, these are cumulative guarantees that need to be satisfied concurrently to ensure that restrictions on indigenous rights do not amount to a violation. In contrast, under the CBD regime, participation and benefit-sharing do not necessarily need to intervene at the same moment and seem to respond to different logics. This separation can be explained through the abovementioned distinction between access and utilisation. As said, however, this distinction allows for a reinforced protection of indigenous rights since benefit-sharing may intervene when participatory requirements have not been fully satisfied. Furthermore, while the safeguards of human rights law are premised on the restriction of indigenous rights, the requirements of the CBD regime are to be fulfilled even if no restrictions is foreseen.¹

In three significant cases the CBD regime is even more advanced or more detailed in the protection of indigenous rights than human rights law. First, as highlighted in Chapter 3, the CBD enucleates the protection of traditional knowledge in a way that is more explicit than in human rights law, whose monitoring systems mainly refer to cultural rights in general. Rather, under the CBD, COP decisions have acknowledged the need to preserve traditional knowledge even when it is not immediately related to conservation purposes given the long-term beneficial effects on conservation. Second, as reminded, participatory rights and benefit-sharing are foreseen for every kind of utilization, not only those restricting indigenous rights. This finding confirms the argument that indigenous participatory rights are an autonomous category of rights that is not only instrumental for the protection of substantive rights but stands on its own to fulfil different functions, including providing for a special position of indigenous peoples in the framework of inter-State relations concerning access to genetic resources and traditional knowledge. Third, under the general obligation for State Parties to foresee consent or approval and involvement of indigenous peoples in the case of access to genetic resources and related traditional knowledge,² the Nagoya Protocol gives national legislators the possibility to

¹ Chapter 3 has explained that the fact of sharing indigenous resources/knowledge can per se be considered a restriction.

² Art. 6(2) and 7 Nagoya Protocol. See Chapter 3, sections 2.1.2 and 2.2 for a thorough discussion on

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implement participatory standards in the form of consent even when survival is not at stake. Consent instead has been framed as a residual option under human rights law, which is only limited to large-scale project threatening the survival of indigenous peoples. Depending on the future practice of States within the CBD regime, therefore, there could be a third hypothesis where consent is required under international law, beyond relocation and the preservation of cultural distinctiveness.

In light of the above, it could be argued that the CBD and the Nagoya Protocol constitute *lex specialis* because they apply in substitution of human rights standards in a context that is more specific. However, this category is not very meaningful in the case the CBD regime does not derogate from human rights law since it is not instrumental for solving conflicts. In contrast, the relationship between the two regimes analysed in this dissertation might be described as one of complementarity, whereby the standards of both regimes complements one another to ensure a level of protection of indigenous rights that guarantees their survival.

Indeed, this thesis has highlighted cases where the two regimes are not complementary and recourse to systemic interpretation and mutual supportiveness cannot solve potential or actual conflicts. First, the unclear temporal scope of the CBD and the Nagoya Protocol generates gaps where standards of free, prior and informed consent and benefit-sharing are not applicable to the situations occurred before the entry into force of these biodiversity treaties. Since genetic resources and traditional knowledge have been extensively collected before the 1990s,³ the inapplicability of standards protective of indigenous rights creates a disparity between two similar situations, violating both the object and purpose of treaty provisions that protect indigenous rights and aim to redress historical injustices and the objectives of the CBD, including realising benefit-sharing. In those cases, amendments or developments by the CBD COP and the COP/MOP are warranted to ensure the harmonious application of CBD-related rules with the parallel obligations incumbent on States pursuant to the established rights of indigenous peoples under human rights treaties. Second, under the WHC, the participation of indigenous peoples in the creation of Tentative Lists, as well as their consent when inscription of sites requires relocation must be ensured through the amendment of Operational Guidelines.

With the purpose to explore further elements of complementarity, the next session assesses to what extent the developments occurred in the CBD context have influenced or have the potential to influence the evolution of indigenous rights under human rights law.

this point.

³ Moreover, there are numerous gene banks that do not reveal the origins of their genetic materials.

3. The CBD regime and contamination of indigenous rights

State practice in the CBD can contribute to clarify, reshape, and even to reinforce the content of indigenous rights. Two examples have been already made in the previous section concerning traditional knowledge and the nature and form of participatory rights. Other examples are also relevant and are illustrated in this section.

The Nagoya Protocol embraces a pluralistic notion of indigenous rights. In particular, Article 12 emphasises the role of both community protocols, elaborated by indigenous peoples, and indigenous customary laws in determining States' obligations with regard to traditional knowledge. This explicit reference to other legal standards not only contributes to the reinforcement of legal pluralism within the CBD regime, but also confirms the role of customary laws for the identification of indigenous rights.⁴

Another important consequence of this provision is that indigenous peoples are fundamental actors when it comes to the implementation of the Protocol's obligations concerning traditional knowledge and associated genetic resources. The obligation of States to take into account indigenous legal standards becomes an incentive for indigenous peoples to be as clear as possible when articulating their conditions for access and utilisation of genetic resources and related traditional knowledge. The more indigenous groups engage in the process of articulating these standards, the more they are able to actively promote their rights in the context of the CBD regime. At the same time, it must be reminded that this push towards codification may also produce the effect of rendering customary law rigid and, eventually, challenging its very nature as living law. Furthermore, it might force indigenous peoples to use a language that does not genuinely reflect indigenous legal concepts.

To these elements of caution it must be added that indigenous peoples do not have the legal standing to directly activate the newly established international compliance system under the Protocol. This system is in any event in its infancy and its functioning must be reviewed in the future. It might also be interesting in the future to study the concrete translation of indigenous-related provisions of the Nagoya Protocol into national legal systems.

It is worth emphasising, however, that any developments may be challenged by indigenous groups before the monitoring systems of human rights treaty bodies. Although not being conceived for reviewing the implementation of METs, these bodies may review the legitimacy of national measures taken to implement the CBD/Nagoya Protocol in light of indigenous rights. For instance, even if the temporal scope of the CBD and the Nagoya Protocol is limited, indigenous peoples may bring their cases before human rights treaty bodies if the violations have occurred within the temporal scope of human

⁴ Chapter 2 has illustrated the importance of customary laws in defining indigenous land rights.

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rights treaties. In line with the case law examined in Chapter 2, human rights treaties also apply to the continuing effects of past actions undertaken before the entry into force of human rights regimes. Therefore, human rights treaty bodies might in principle hear cases that are outside the temporal scope of application of the CBD regime. To avoid that situations not being in the purview of the CBD are only regulated by human rights standards, CBD Parties could have an incentive to extend the scope of the CBD to cases that require historical adjustments.

It is also possible that human rights treaty bodies indirectly review the correct implementation of legal standards of the CBD regime, similarly to what happened in the *Kaliña and Lokono* case, where the Inter-American Court of Human Rights has used CBD standards to support the argument that conservation and indigenous rights may be mutually beneficial. In this sense, litigation before human rights treaty bodies may accelerate the effective incorporation of indigenous rights into the CBD regime. The complementarity of remedies is, therefore, an important aspect of the more general debate on the relationship between human rights and the environment that should be explored more in future research, as illustrated in the next section.

Furthermore, CBD institutional mechanisms do bear important consequences on the consolidation of the role of indigenous peoples in international law. Their role within the CBD is testified by the fact that indigenous peoples can participate, either as observers or within national delegations, in COP meetings. As highlighted in Chapter 3, they have actively taken part both in the Working Group on Article 8(j) and in the Working Group that has produced a draft of the Nagoya Protocol. In this sense, it can be concluded that indigenous peoples have acquired an institutional role within the CBD, as well as being able to influence the development of CBD-related legal standards. The role of indigenous peoples in the development of legal standards is also linked to their recognised right to directly negotiate MATs with users to determine the conditions of benefit-sharing. This right, however, does not necessarily reflect the concrete capacity of indigenous peoples to negotiate MATs in a way that may benefit them.⁵

The abovementioned developments concerning institutional capacity, participation in norm creation, and role in implementation, confirm a trend that has been consolidating in the UN context over the last thirty years. As highlighted in this dissertation, indigenous peoples' representatives sit on an equal footing with States at the UNPFII. Although this institutional arrangement does not allow for bilateral negotiations, it is an explicit acknowledgment of the importance to recognise equal status to States and indigenous peoples when discussing indigenous issues at the international level. Furthermore, the negotiations of the UN Declaration on indigenous rights has also conformed to the

⁵ On a related problem, see Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' 2016, at 372, who discusses the capacity of benefit-sharing has to enhance the position of vulnerable actors.

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need to include indigenous peoples' views in the process of standard creation at the international level. As reminded, indigenous peoples associations have elaborated the first draft of the Declaration within the WGIP, as well as participating in the following stages of the consolidation of the text. The negotiations of the newly adopted American Declaration on the Rights of Indigenous Peoples have also followed similar patterns since representatives of indigenous peoples have been involved in the preparation of the document.⁶

The transformation of indigenous peoples "from victims to actors"⁷ also opens research avenues on the extent to which this increasingly recognised personality of indigenous peoples in international law is compounded by corresponding duties. The recognition that indigenous peoples have responsibilities together with rights might represent a factor increasing the acceptability of indigenous powers in the face of States. It might also mirror a conception of State sovereignty that, as illustrated in this dissertation, is subject to limits that are both inherent in the notion of sovereignty and qualified by the evolution of public international law.

4. Lessons for human rights and the environment and global significance of this research

To conclude the analysis conducted in this dissertation, final considerations are warranted concerning the relevance of this research to the more general debate on human rights and the environment. These can be summarised in four main points.

First, this research has shown the importance of investigating potential conflicts between international environmental law and human rights law. As said, it cannot be concluded that one of these two bodies of law represents *lex specialis* and shall supersede the other. If a genus to species relationship exists, this must be verified on a case-by-case basis. This is true for the rights of indigenous peoples with respect to the international regime on biodiversity, but can also be extended to the relationship of other environmental regimes with the rights of indigenous peoples.⁸

Second, the interpretative approach proposed in Chapter 2 to solve potential conflicts between the rights of indigenous peoples and the CBD regime can be used to assess the compatibility of other conservation regimes with indigenous rights. In

⁶ The role of indigenous peoples in international negotiations concerning their rights has been indicated by Åhrén as an emerging "external aspect of the right to self-determination" of indigenous peoples. See Åhrén, *Indigenous Peoples' Status in the International Legal System* 2016, at 131 and 224.

⁷ I borrowed this term from the title of Jérémy Gilbert's monograph. See Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* 2006. The same language is used by Oeter 2012, at 497.

⁸ The same case-by-case approach could be adopted also for the relationship between international environmental law and obligations of States concerning the protection of individual rights.

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this respect, beyond emphasising the possibility for reconciliation, this thesis has put emphasis on a neglected aspect of the debate on human rights and the environment, namely the possibility for conflict.

Third, although the interpretative approach can be generalised, the results of the assessment might be different depending on the regimes analysed. Concerning the CBD regime, this thesis has concluded that both the CBD and the Nagoya Protocol allow for interpretations that are compatible with the respect and promotion of indigenous rights. In the study of other METs, the initial step would be to identify potential conflicts through an in-depth analysis of the environmental treaties concerned as well as the related practice. Indeed, given the centrality of preserving the cultural implications of land and resource rights, the same interpretative approach could be used to assess the compatibility with indigenous rights of other regimes that are not concerned with the protection of the environment but with the use of natural resources—trade, investments, intellectual property. The principle of self-determination would then serve to exclude from legitimate implementation certain kinds of interpretation that are too restrictive of indigenous rights. The same types of arguments may also be used by activists before national courts or human rights treaty bodies to support the view that some interpretations are not legitimate in light of international human rights law on indigenous peoples. In this sense, although the main purpose of this thesis is to advance analysis, the method proposed can be used also to promote indigenous rights beyond the academic context. More clarity on the content and boundaries of indigenous rights may also be relevant when it comes to the emerging discussion on the business responsibility to respect human rights, since it also clarifies the implications for the due diligence required of private actors when affecting indigenous peoples.

Finally, the interplay between the CBD and indigenous rights also teaches some lessons on the alleged separateness of international environmental law and human rights law. Although they continue to be different in terms of Parties, objectives, and monitoring mechanisms, this thesis has demonstrated that these two bodies of law are not separated and complement each other. Furthermore, as highlighted above, their monitoring mechanisms can be complementary and the legal developments occurring in one field are likely to influence legal developments in the other. The main implication of this thesis, however, is that mutual supportiveness and the principle of self-determination must guide the evolution of international biodiversity law. In this sense, some interpretations of States' obligations under the CBD, the Nagoya Protocol, and the WHC are to be preferred, although future practice in the different institutional settings will say whether the incorporation of indigenous rights in the forms described in this thesis is also retained by States and international organisations.

The interpretative approach described in this thesis might indeed be used in the practice of the CBD COP and COP/MOP to foster interpretations of the CBD that

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are coherent with human rights obligations in the field of indigenous rights. In the same vein, the monitoring mechanism of the Nagoya Protocol might in the future propose interpretations that take into account protected indigenous rights. Human rights treaty bodies might discuss in more explicit terms the relationship between the CBD regime and the rights they are mandated to monitor. Most importantly for the impact of this research on indigenous rights, States might embrace the interpretative approach proposed either when implementing the CBD and the Nagoya Protocol nationally or when enacting legislation on indigenous rights⁹. Finally, public officers and national judges could adopt a similar interpretative approach when interpreting and applying national laws that give effect to international obligations.

Indigenous rights and the international regime on conservation are in constant evolution; monitoring their developments certainly offers avenues for future research and provokes stimulating intellectual challenges for scholars and practitioners alike.

⁹ This emerges very clearly from French 2006, at 287.

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