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Indigenous Peoples, Natural Resources and Permanent Sovereignty

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ABSTRACT

The thesis analyses the rights of indigenous peoples with respect to natural resources under customary international law, focusing on the collective rights of indigenous peoples as such. In doing so, the thesis outlines the evolution of international law on indigenous rights after the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. The dissertation considers the possibility that indigenous rights with respect to natural resources may be conceived in terms of 'permanent sovereignty over natural resources', in the sense that permanent sovereignty vests in indigenous peoples rather than in States, and the possible implications of such postulation.

The thesis is composed of three parts. The first part outlines the notion and current status of permanent sovereignty over natural resources in customary international law and examines the different conceptualizations that indigenous peoples have under international law, namely as individuals, as members of minorities and as peoples. The second part illustrates the rights of indigenous peoples with respect to natural resources before the adoption of the UNDRIP and the situations under international law when a people, rather than a State, may be holder of the right to permanent sovereignty over natural resources. The third part describes the rights of indigenous peoples with respect to natural resources after the adoption of the UNDRIP, outlining the differences with the right to permanent sovereignty over natural resources.

The dissertation demonstrates that permanent sovereignty over natural resources entails the exclusive authority over the exploitation, disposition and utilization of natural resources of a territory and remains an inalienable right of States and of certain peoples with a right to independence in present international law. In contrast, the rights of indigenous peoples with respect to natural resources are part of their right to internal self-determination to be exercised within a State's territory.

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TABLE OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples' Rights
ADRIP	American Declaration on the Rights of Indigenous Peoples
ASEAN	Association of Southeast Asian Nations
AU	African Union
CBD	Convention on Biological Diversity
CCJ	Caribbean Court of Justice
CEACR	Committee of Experts on the Application of Conventions and Recommendations (ILO)
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
EACJ	East African Court of Justice
ECHR	European Convention for the Protection on Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Right
EFCPNM	European Framework Convention for the Protection of National Minorities

HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
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
ICRW	International Convention for the Regulation of Whaling
IWC	International Whaling Commission
ICJ	International Court of Justice
ILA	International Law Association
ILO	International Labour Organization
ITLOS	International Tribunal for the Low of the Sea
NIEO	New International Economic Order
OAS	Organization of American States
OAU	Organisation of African Unity
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PFII	Permanent Forum on Indigenous Issues
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea

UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

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INTRODUCTION

1. Context

Natural resources have fundamental cultural, spiritual, economic and social significance for indigenous peoples. During the recent years, the exploitation of natural resources in lands traditionally occupied by indigenous peoples without considering their wishes is becoming more and more increasingly. This situation is facilitated also by the growing large-scale acquisition of land rights by foreign investors, known as land grabbing. Such activities are granted by States as part of their permanent sovereignty over natural resources of their territories. However, the exploitation of such natural resources may have important implications on indigenous fundamental rights, including for their cultural and physical survival. In such framework, international law, especially after the adoption in 2007 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), provides different instruments to protect the rights that indigenous peoples have, as part of their right to self-determination, with respect to natural resources.

2. The aims of the thesis

The general aim of the thesis is to examine the conceptualization and content under customary international law of indigenous rights with respect to natural resources, focusing for the most part on the collective rights of indigenous peoples as such. More specifically, the thesis considers, first, whether the rights of indigenous peoples with respect to the natural resources of their lands or other territories are conceived of, under customary international law, in terms of 'permanent sovereignty over natural resources', a sovereignty vesting in this context in a people, namely the indigenous people concerned, rather than in the State, or States, in which this people lives; and, secondly, whether, if the answer is no, conceiving in this way of the rights of indigenous peoples with respect to natural resources would add anything of substance to the current content of those rights.

3. The conclusions of the thesis

Under current customary international law, the rights of indigenous peoples with respect to the natural resources of their lands or other territories are not conceived of in terms of 'permanent sovereignty over natural resources'. This is because 'sovereignty' over natural resources as classically conceived presupposes sovereignty over a territory, which indigenous peoples are not recognized under international law as enjoying and to which they are not recognized under international law as entitled. The rights of indigenous peoples with respect to the natural resources of their lands or other territories are certainly conceived of in terms of the right of indigenous peoples to self-determination; but just as the right of indigenous peoples to self-determination does not confer on them the right to statehood, meaning the right to sovereignty over a territory, so too does it not confer on them permanent sovereignty over the natural resources of the territory, which remains vested solely in the State or States with title under international law to that territory.

The possibility to conceive the right of indigenous peoples in terms of 'permanent sovereignty', would, in theory, confer to those peoples a quasi-ultimate authority over all the natural resources of their supposed territory. In practical terms, the exploitation of natural resources would be conducted for the benefit of indigenous peoples and any, in principle, sovereign decision of the State on the exploitation, utilization or alienation of such resources would need the consent of such peoples. In case such consent would not be provided, or in case the exploitation of such resources would not be for the benefit of such peoples, there would be an obligation for the State to compensate the indigenous peoples concerned. However, this possibility is itself controversial since the right to permanent sovereignty represents itself the inalienable, ultimate and absolute authority of a State over the natural resources of its territory and it would be inconceivable to have another non-State entity holder of permanent sovereignty, but not to

a right to statehood and to a precise territory, with veto powers on the exploitation of the natural resources of the same State territory.

4. The contribution of the thesis to the literature

Previous scholars have analysed the development of indigenous rights with respect to natural resources and in particular the affirmation in this regard of the collective rights of indigenous peoples as such. In this context, some scholars have considered the possibility of conceiving of 'permanent sovereignty over natural resources', a sovereignty classically vesting in States, as a right of peoples and specifically as a right of indigenous peoples. This thesis differs from previous treatments of the rights of indigenous peoples with respect to natural resources in its investigation not only of whether such rights are in fact conceived in international law in terms of the permanent sovereignty of indigenous peoples over natural resources but also of whether it would add anything in substance to conceive of them this way.

5. Terminology and clarifications

The object of the thesis is represented by the rights of indigenous peoples under international law with respect to natural resources.

The thesis relies on primary sources of international law, including universal and regional conventions and customary international law. In identifying customary international law, it relies in particular on seminal resolutions of the United Nations General Assembly, including UNDRIP, as a manifestation of State practice and *opinio juris*. The thesis also examines the judgments of international and regional courts as sources of international law and the views non-judicial treaty-monitoring bodies. The first have a subsidiary role according to art 38(1)(d) of the International Court of Justice Statute, in the sense that they may contribute to the identification of current customary international law and may constitute an authoritative interpretation and application of relevant treaties. Diversely, the latter, which may include individual communications, concluding

observations and general comments, do not have the same legal value but, since the recent developments of indigenous peoples' rights with respect to natural resources, they may contribute to the emergence among States of a consensus as to the content of respective treaty provisions. The dissertation considers also relevant domestic jurisprudence, such as the judgments of constitutional and high courts, and national legislation applying relevant international law. Considering that indigenous peoples are located in a limited number of geographical areas, when assessing States' practice to investigate the content of customary international law, the thesis gives particular weight to States 'specially affected' by claims to indigenous rights with respect to natural resources[1].

The term 'natural resources', which is not defined in international legal instruments, refers in the thesis generally to natural resources on land, both above the surface and in the subsoil, and in the territorial sea and seabed. These include, for example, water sources, animals, trees and rivers, especially those necessary for indigenous cultural and physical survival. The term includes also subsoil resources such as minerals and oil. At the same time, for the scope of this dissertation, the term 'natural resources' does not include biological and genetic resources to the extent that such resources would implicate intellectual property considerations.

In some parts of the thesis, the dissertation refers to rights with respect to lands, territories and natural resource[2]. While the thesis is centred on natural resources, and while rights with respect to lands and

[1] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/*Netherlands), Judgment, ICJ Rep 1969, 3, para 73: 'With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'. Cf also Dissenting Opinion of Judge Lachs at 229: 'The evidence should be sought in the behaviour of a great number of States, possible the majority of States, in any case the great majority of the interested States'; also, *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, Arbitral Awards, NAFTA, Government of Canada Submission pursuant to NAFTA Article 1128 (19 January 2009), para 9.

[2] See Chapters 3 and 5.

natural resources are in principle different, the reference to lands and territories is instrumental and necessary for the purpose of the dissertation. The rights of indigenous peoples with respect to natural resources evolved out of the recognition of indigenous rights with respect to lands and territories. Furthermore, ownership rights over certain lands are attractive to indigenous peoples since they may prevent third parties from entering their territories and exploiting their natural resources. Moreover, most of the natural resources over which indigenous peoples have rights are part of indigenous traditional lands, and international law recognizes the need to demarcate, grant title to, and protect these lands to ensure the rights to the respective natural resources.

Considering whether a particular group constitutes an indigenous people is relevant, but this is not a focus of the thesis. There is not a generally accepted definition of indigenous peoples in present international law. Certain instruments, like the ILO Convention No 169 (1989) and the American Declaration on the Rights of Indigenous Peoples (ADRIP), mention self-identification as the main criterion. In contrast, the thesis relies on the approach of the UNDRIP, which does not provide any definition of the term 'indigenous peoples' and leaves such determination to external criteria.

5. Structure of the thesis

The body of the thesis is organized into three parts, embracing five chapters.

Part I of the thesis is composed of two chapters and explores the principle of permanent sovereignty over natural resources and the conceptualization of indigenous in international law.

Chapter 1 focuses on the principle of permanent sovereignty over natural resources. The Chapter explores in particular the evolution of permanent sovereignty over natural resources, its current content under customary international law and the holders of such right. Since permanent sovereignty over natural resources represents the application of territorial

sovereignty over the natural resources of a territory, the Chapter first examines the notion of States' territorial sovereignty. Then it refers to the affirmation of permanent sovereignty over natural resources through Resolutions of the United Nations General Assembly and, particular, to UNGA Resolution 1803 (XVII), and its development in further seminal UNGA Resolutions, international treaties and international case law.

Chapter 2 outlines the conceptualization of indigenous in international law. After an historical introduction, the Chapter distinguishes first the different capacities in which indigenous may claim rights as individuals under international law and, precisely, as individuals generally and as members of a minority group. Then, the Chapter explores the notion of 'peoples', and particularly of indigenous peoples, in international law, underlining the different rights to which different categories of peoples may be holders. In doing so, the Chapter refers to the postulation of indigenous as peoples holders of a right to internal self-determination in UNDRIP. Finally, the Chapter considers the conceptualization of indigenous as individual members of a community.

Part II of the thesis is composed of two chapters and investigates the rights of indigenous, both as individuals and as peoples, with respect to natural resources before the adoption of the UNDRIP.

Chapter 3 examines the individual and collective rights that indigenous have with respect to natural resources before the UNDRIP. In doing so, the Chapter first analyses the rights of indigenous individuals with respect to natural resources under the relevant instruments of international human rights law, considering their application by respective human right bodies and by regional human rights systems and respective judiciary bodies. The Chapter focuses also on relevant provisions considering indigenous special nutritional and cultural needs in international conventions concerning the conservation and exploitation of certain living natural resources. The Chapter then explores the relevant provisions of ILO Convention No 169 (1989). The last section of the Chapter considers the

rights with respect to natural resources that indigenous have as 'peoples' under common Article 1 of ICCPR and ICESCR and relevant provisions of the African Charter on Human and Peoples' Rights.

Chapter 4 deals with the possibility of conceiving of permanent sovereignty over natural resources as a right of peoples and with the categories of peoples that could be the holders of such a right. The Chapter first analyses the content of the right of all peoples to dispose freely of their natural resources stated in common Article 1(2) of the ICCPR and ICESCR and in Article 21 of the African Charter and on its differences with permanent sovereignty. Then the Chapter explores the circumstances where a people may be holder of permanent sovereignty over natural resources under present international law, namely in case of colonial peoples and peoples subject to alien domination, subjugation or exploitation. The last section underlines the role of indigenous as peoples in such framework.

Part III of the thesis is composed of Chapter 5 and deals with the analysis of indigenous peoples' rights with respect to natural resources in UNDRIP and on its influence on international human rights law on indigenous rights. The Chapter opens with an analysis of the relevant provisions of the UNDRIP on indigenous rights with respect to natural resources and then outlines the relevant provisions of successive instruments, including the ADRIP and the proposed Nordic Saami Convention. The Chapter mentions the influence of UNDRIP in regional and domestic jurisprudence and legislation and in the activity of relevant human rights bodies. The last section of the Chapter investigates on the content under customary international law of indigenous rights with respect to natural resources as part of their right to self-determination and on the possibility, if any, to conceive indigenous as holders of permanent sovereignty over natural resources.

The conclusion of the thesis outlines the main findings of the elaborate.

PART I: STATES, SOVEREIGNTY AND PEOPLES' RIGHTS

CHAPTER 1: THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

1.1 Introduction

This first Chapter outlines the historical development and analyses the current content under customary international law of the principle of permanent sovereignty over natural resources. Since the concept of permanent sovereignty over natural resources represents the application of a State's territorial sovereignty to the natural resources of its territory, section 1.2 of the Chapter briefly reviews what international law says as to territorial sovereignty. Diversely, section 1.3 examines the historical development and present content under customary international law of the principle of permanent sovereignty over natural resources.

1.2 Sovereignty over territory in international law

The principle of permanent sovereignty over natural resources entered the international legal lexicon over sixty years ago[1] and constitutes the application of the notion of a State's territorial sovereignty over the natural resources of its territory[2].

[1] JN Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50(4) American Journal of International Law 854-867.

[2] The word 'sovereignty' associated to a territory became current only after the Peace of Westphalia in 1648, when the modern State affirmed as the cornerstone of international relations; the Peace recognized the principles of territorial integrity and of non-interference by other powers within the territorial affairs of a State. Also, HJ Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Knopf 1985) 294; G Simpson, 'International Law in Diplomatic History' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 30; A Cassese, *International Law* (OUP 2005) 23-24; M Frost, *Ethics in International Relations: A Constitutive Theory* (CUP 1996) 105; AB Murphy, 'The Sovereign State System as Political-territorial Ideal: Historical and Contemporary Considerations' in TJ Biersteker and C Weber (eds), *State Sovereignty as Social Construct* (CUP 1996) 92.

1.2.1 Origins of territorial sovereignty

The sovereignty of States over their territories was at the cornerstone of the system of international relations during classical international law[3]. The right of States to exercise full and exclusive authority over their territory is affirmed since early statements of international courts and tribunals. Already in 1928 in *Island of Palmas* case, the Swiss arbitrator Max Huber defined territorial sovereignty in its relevant aspects as the exclusive right of a State to exercise its sovereign powers over a portion of territory[4]. The Permanent Court of International Justice (PCIJ) took the analogous view in *Austro-German Customs Union*, when the Court specified that sovereignty represents the exclusive power of sovereign States within their territories[5], and in *Lotus*, when the PCIJ found that a State can do in its territory all that is not prohibited by international customs or conventions[6]. As part of their

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[3] M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001) 85-98. Also, *Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Eritrea/Yemen* (9 October 1998), para 130: 'the principle of "territorial sovereignty" as it developed among the European powers … became a basic feature of 19th Century western international law'.

[4] *Island of Palmas* (*Neth v US*), Perm Ct of Arbitration, 2 UN Rep Int'l Arb Awards (1928) 829, 838: 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusivity of any other States, the functions of a State'; *The North Atlantic Coast Fisheries Case (Great Britain, United States),* Arbitral Award of 7 September 1910, RIAA, Vol XI, 167: 'one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminous with the Sovereignty'. Also, Koskenniemi ibid 207; J Crawford, *The Creation of States in International Law* (OUP 1979) 62.

[5] *Customs Regime between Germany and Austria* (Advisory Opinion) PCIJ Rep Series A/B No 41, annex 1 (20 July 1931): 'Sovereignty is the continued existence of a State ('Austria') within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial, or other field, these different aspects of independence being in practice one and indivisible'. Cf Montevideo Convention on the Rights and Duties of States, 49 Stat. 3097,165 LNTS 19 (26 December 1933), art 11: 'the territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily'; also, ibid (Crawford) 63.

[6] *Case of the SS Lotus* (*Fr v Turk*) PCIJ Rep Series A No 10 (7 September 1927), 45, 181; Dissenting Opinion of Judge Altamira, 181; Dissenting Opinion of Judge Nyholm, 212; also, *Free Zones of Upper Savoy and District of Gex (Fr v Switz)*, 1930 PCIJ (Ser A) No 24 (Order of 6 December 1930) 12; *Case of the Free Zones of Upper Savoy and District of Gex* (*Fr v Switz*) (Judgment) PCIJ Rep Series A/B No 46 (7 June 1932) 222, 223. Koskenniemi (n 3) 220, 226-233; H Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?' (2007) 29(1) Michigan Journal of International Law 71-94, 73-77; U Özsu; De-territorializing and Re-territorializing Lotus: Sovereignty and Systematicity as Dialectical

sovereignty, in their territories States may contract out some territorial sovereign rights through international legal obligations[7].

1.2.2 Territorial sovereignty in current international law

This notion of territorial sovereignty has been confirmed in modern international law, where the State manifests its sovereignty both internally, through the authority of its government over a territory and its citizens, and externally, as the supremacy of the State as a legal person in the international order[8]. The International Court of Justice (ICJ) in *Corfu Channel* reiterated that the respect of territorial sovereignty between independent States is a fundamental component of international relations[9]. Precisely, under current international law, territorial sovereignty includes the whole body of rights and attributes that a State possesses exclusively in its territory with respect to other countries and subject to applicable customary or conventional rules of international law[10]. As stated more

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Nation-Building in Early Republican Turkey' (2009) 22(1) Leiden Journal of International Law 29-49, 33-37.

[7] *Case of the SS Wimbledon (UK v Japan)* PCIJ Rep Series A No 1 (17 August 1923), 35; *Exchange of Greek and Turkish Populations, Greece v Turkey*, Advisory Opinion, PCIJ Series B no 10, ICGJ 277 (PCIJ 1925) (21 February 1925) 21; *Jurisdiction of European Commission of Danube Between Galatz and Braila*, Advisory Opinion, 1927 PCIJ (Ser B) No 14 (8 December 1927) at 36: 'restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty'. Also, CC Hyde, 'The Interpretation of Treaties by the Permanent Court of Justice' (1930) 24 The American Journal of International Law 1-19, 15-17; J Hilla, 'The Literary Effect of Sovereignty in International Law' (2008-2009) 14 Widener L Rev 77, 124-125.

[8] Without a territory, a legal person cannot be a State under present international law. M Shaw, *International Law* (8th edn, CUP 2017) 409-462; RY Jennings and AD Watts (eds), *Oppenheim's International Law* (9th edn, OUP 1992) 563.

[9] *Corfu Channel, United Kingdom v Albania*, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949) (9 April 1949); International Court of Justice [ICJ] 35; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment [1986] ICJ Rep 14, paras 202, 212.

[10] Ibid (*Corfu Channel*) 43 (*Sep Op Álvarez*): 'by sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States'. Also, *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, (Grand Chamber, 21 December 2016) (Case C-104/16 P), para 95: the term 'territory' includes 'the geographical space over which that State exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as a territory likely to be under the sole jurisdiction or the sole international responsibility of that State'. See Chapter 4.

recently by the ICJ in *Sovereignty over Padra Branca*, the territory represents an indispensable component of States' sovereignty[11].

A State's 'territory', within the meaning of current international law, encompasses the land, including subsoil, delimited by its borders as well as its internal waters and, in the case of a coastal State, its territorial sea, comprising the seabed and the suprajacent waters, and the airspace above its territory[12]. A State's sovereignty over its territory extends to the natural

[11] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, Malaysia v Singapore*, Judgment, Merits, ICJ GL No 130, ICGJ 9 (ICJ 2008) (23 May 2008), International Court of Justice [ICJ], 40, para 79: 'sovereignty comprises both elements, personal and territorial'.

[12] Energy Charter Treaty (ECT) 2080 UNTS 100 (17 December 1994) (enterd into force 16 April 1998), art 10(a)-(b); International Civil Aviation Organization (ICAO), Convention on Civil Aviation 15 UNTS 295 (7 December 1944) (entered into force 4 April 1947) (the 'Chicago Convention'), arts 1, 2; United Nations Convention on the Law of the Sea 1833 UNTS 3 (Montego Bay, 10 December 1982) (entered into force 16 November 1994), art 2; cf Convention on the Territorial Sea and Contiguous Zone (29 April 1958) (Entered into force on 10 September 1964) 516 UNTS 205, arts 1-2; also, ICJ, *Nicaragua v United States of America* (n 9), paras 212, 213, stating that territorial sovereignty under international treaty law corresponds to customary international law; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* Judgment, ICJ Rep 1982 (24 February 1982) 61, para 174: 'the rights of the coastal State in the area concerned are not functional but territorial, and entail sovereignty over the sea-bed and the suprajacent waters, and air column'; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, ICJ Rep 2001 101, para 204: 'A coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself, including its sea-bed and subsoil'; *Maritime Delimitation in the Black Sea, Romania v Ukraine*, Judgment, ICJ: [2009] ICJ Rep 61, para 64; *Bengal Maritime Boundary Arbitration between Bangladesh and India, Bangladesh v India,* Final Award, ICGJ 479 (PCA 2014), (7 July 2014), Permanent Court of Arbitration [PCA] para 191; *Arbitration between the Republic of Croatia and the Republic of Slovenia, Croatia v Slovenia,* Final Award, PCA Case No 2012-04 (29 June 2017), Permanent Court of Arbitration [PCA], para 867; ITLOS, *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports (14 March 2012) 4, at 56, para 169. The territory of a State which is an administering power, does not include the territory of non-self-governing territories since it enjoys 'a status separate and distinct from the territory of the State administering it': UNGA Res 2625 (XXV) 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of United Nations' (24 October 1970); see Chapter 4. Also, Hyde, (n 1) 867; I Brownlie, *Principles of Public International Law* (OUP 2012) 105-106; Cassese, (n 2) 81-82, 94; J Gilbert, *Natural Resources and Human Rights, an Appraisal* (OUP 2018) 12; G Elian, *The Principle of Sovereignty Over Natural Resources* (Sijthooff & Noordhoff International Publishers 1979); Karol Gess, 'Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis' (1964) 13 International & Comparative Law Quarterly 398-449; Jona Razzaque, 'Resource Sovereignty in the Global Environmental Order' in Elena Blanco and Jona Razzaque (eds), *Natural Resources and the Green Economy: Redefining the Challenge for People, States and Corporations* (Brill 2012) 81-110; A Cassese, *International Law in a Divided World* (Clarendon Press 1986) 376-390; P Weil, 'Délimitation maritime et délimitation terrestre', in Y Dinstein and M Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, (Martinus Nijhoff Publishers 1989) 1021-1026.

resources within that territory, including in its subsoil and in the territorial sea and seabed[13].

A coastal State's territory does not include the State's exclusive economic zone (EEZ), an area that may extend up to 200 miles adjacent to the territorial sea from the baselines, and the continental shelf. However, current international law grants to coastal States specific exclusive rights over the EEZ and the continental shelf deriving from their sovereignty over the land[14]. As stated by UNCLOS Article 56, and declared by the ITLOS, the coastal State may enjoy in the EEZ what are referred to as 'sovereign rights' over specific matters related to natural resources[15]. According to UNCLOS

[13] ibid (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya*), para 104: 'The fact that a given area is territorial sea or internal waters does not mean that the coastal State does not enjoy "sovereign rights for the purpose of exploring it and exploiting its natural resources"; it enjoys those rights and more, by virtue of its full sovereignty over that area'.

[14] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/*Netherlands), Judgment, ICJ Rep 1969, 51, para 96: 'The land is the legal source of the power which a State may exercise over territorial extensions to seaward'; *Aegean Sea Continental Shelf, Greece v Turkey*, Jurisdiction, Judgment, [1978] ICJ Rep 3, ICGJ 128 (ICJ 1978), 19th December 1978, para 86; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya*) (n 12), para 73; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Rep 1984 (12 October 1984) 327, para 103; *Maritime Delimitation in the Black Sea* (n 12), para 77: 'The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts'; *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, ICJ Rep (3 June 1985) 13, para 49: 'The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast'; also, *Sep Op Judge Rudas Ruda, Bedjaoui and Jimenez de Arechaga*, para 21; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, Nicaragua v Honduras*, Judgment, ICJ GL No 120, ICGJ 23 (ICJ 2007) (8 October 2007), paras 113, 126. This international customary principle is commonly known as 'the land dominates the sea'. In international treaty law, the distinction between sovereignty over the territorial sea and sovereign rights over the seabed and the EEZ is mentioned, for example, in the Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing UNTS Registration Number 54133, (22 November 2009) (entered into force 5 June 2016) (the 'PSM Agreement'), art 4(1)(a). The principle is codified also in the EU–UK Trade and Cooperation Agreement, OJ L 444, 31.12.2020, 14–1462 (31 December 2020), Preamble, arts FISH.1-2, OTH.9 and Annex Fish 4.

[15] UNCLOS (n 12), art 56(a). The cases when a State has jurisdiction in this area include exploring, exploiting, conserving, and managing living and non-living natural resources; *M/V 'Virginia G' (Panama/Guinea-Bissau)*, Case No 19, ITLOS Judgment (14 April 2014), para 211: 'The Tribunal observes that article 56 of the Convention refers to sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources. The term "sovereign rights" in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures'. In international treaty law, for example: Agreement for the establishment of the Indian Ocean Tuna Commission 1927 UNTS 329 (25 November 1993)

Article 56(2), and as confirmed by the PCA in the *Enrica Lexie* arbitral award, the sovereign rights of the coastal State over the natural resources in the EEZ are not absolute, as in the case of sovereignty proper, but coexist with the high seas freedoms enjoyed by other States in the same zone[16]. Similarly, according to UNCLOS Article 77, a coastal State enjoys specific 'sovereign rights' over the continental shelf in relation to the exploitation of certain natural resources of the seabed[17].

1.2.3 Territorial sovereignty as opposed to property rights

The legal concept of territorial sovereignty must be distinguished from the legal notion of property or, synonymously, ownership. A State's sovereignty over its territory is a question of international law, while an entity or individual's property rights are a question of domestic law[18]. Sovereignty

(entered into force 27 March 1996), art 26: 'This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction'; also, International Law Commission, 'Articles Concerning the Law of the Sea with Commentaries' in Yearbook of the International Law Commission, Vol II (1956), 297: 'the term "sovereign rights" was taken from the language of Article 2 of the 1958 Convention on the Continental Shelf', which the ILC interpreted to mean that 'the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf'; MS McDougal and WT Burke, *The Public Order of the Oceans* (Yale University Press 1962) 89-173; WT Burke, *The New International Law of Fisheries* (Clarendon Press 1994) 40, mentioning how the sovereign rights over fisheries in the EEZ are part of customary international law.

[16] According to UNCLOS Article 56(2) the coastal State is required to have 'due regard' to the rights and duties of other States in the exclusive economic zone. Correspondingly, under Article 58(3), other States shall have 'due regard' to the rights and duties of the coastal State in its exclusive economic zone. *The Enrica Lexie Incident (Italy v India)*, PCA Case No 2015-28, Award of 21 May 2020, para 975: 'The sovereign rights of the coastal State over the natural resources in the exclusive economic zone coexist with the high seas freedoms enjoyed by other States in that zone'. On the notion of 'due regard', *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case No 2011-03, Award of 18 March 2015, para 519.

[17] UNCLOS (n 12), art 77 and (*Aegean Sea Continental Shelf*), para 86; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 12), paras 41, 73; ITLOS, *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (n 12), para 361.Cf Convention on the Continental Shelf (Geneva, 29 April 1958) 499 UNTS 311, UKTS 39 (Cmnd 2422, 1964) 15 UST 471, art 2(2).

[18] Gilbert (n 12) 36-39; Morris R Cohen, 'Property and Sovereignty', 13 Cornell L. Rev. 8 (1927) 8-30 at 8-9; Sovereignty must be distinguished also from public property. *Arbitration between the Republic of Croatia and the Republic of Slovenia, Croatia v Slovenia* (n 12), para 577: 'ownership and management of property must be distinguished from

over territory encompasses the right under international law to determine property rights within that territory, which in turn entails the right, subject to the conditions of international law, to expropriate property rights, as part of States 'eminent domain' over their territory[19]. Thus, the eminent domain represents a manifestation of States' territorial sovereignty, in the sense that States, in case of public interest, may take private property, including lands and resources[20].

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sovereignty. A State may own and manage property such as a forest on foreign soil'. Bernard Siegan, *Property Rights: From Magna Carta to the 14th Amendment* (Transaction Publishers 2001); James W Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (OUP 2008); Katrina M Wyman, 'Second Generation Property Rights Issues' (2019) 59(1) Natural Resources Journal 215-240; Bolwig S and others, 'Securing Property Rights to Land', (2009) 7 Danish Institute for International Studies (DIIS) Report 25-35; A Ripstein, 'Property and Sovereignty: How to Tell the Difference' (2017) 18 Theoretical Inquiries L. 243-268; Francis B Sayre, 'Change of Sovereignty and Private Ownership of Land' (1918) 12(3) The American Journal of International Law 475-497.

[19] Gilbert (n 12) 37; WD McNulty, 'Eminent Domain in Continental Europe' (192) 21(7) Yale Law Journal 555-570; Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1985); Ellen Frankel Paul, *Property Rights and Eminent Domain* (Transaction Publishers 2008). At the same time, changes of territorial sovereignty do not automatically involve a change in property rights: *Settlers of German Origin in Poland*, Advisory Opinion, 1923 PCIJ (Ser B) No 6, 36, para 89; Among domestic jurisprudence, for example: United States Supreme Court, *Banco Nacional de Cuba v Sabatino* 376 US 398 (23 March 1964): 'A State has jurisdiction to prescribe the rules governing the title to property within its territorial sovereignty'; also, *Clarke v Clarke*, 178 US 186 (21 May 1900); *De Vaughn v Hutchinson*, 165 US 566 (1 March 1897).

[20] Benjamin Ederington, 'Property as a Natural Institution: The Separation of Property from Sovereignty in International Law' (1997) 13(2) American University International Law Review 263-331, 263; J Westlake, *Chapters on the Principles of International Law* (CUP 1894) 129-36. In such framework, international human rights law recognizes in different instruments the right to property. For example, the Universal Declaration on Human Rights (UDHR) at Article 17 states that 'everyone has the right to own property', including in association with others, that cannot be deprived arbitrarily. The right has not been included in the 1966 UN Covenants but is part of the International Convention on the protection of all forms of racial discrimination (CERD), of the Convention on the elimination of all forms of discrimination against women (CEDAW), and in regional instruments including the American Convention on Human Rights (ACHR), the European Convention for the Protection on Human Rights and Fundamental Freedoms (ECHR) and the African Charter on Human and Peoples' Rights. Despite such principles do not include an explicit recognition of the right to property of natural resources, the connection between property and natural resources has been established by different human rights regional instruments, including the Inter-American, the European and the African systems. For example, the ECHR case *Dogan and Others v Turkey*, Application Nos 8803-8811/02, 8813/02, and 8815-8819/02 (2004), paras 138-139; *Ucci v Italy*, Application No 213/04 (2006); *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan; Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya,* ACHPR Communication No 276/2003 [2009] AHRLR 75 (27 May 2009); *Mayana (Sumo) Community of Awas Tingni v Nicaragua,* Judgement of 31 August 2001, Inter-American Court on Human Rights, (Ser C) No 79, 2001 (the *'Awas Tingni'* case). See Chapters 3 and 5.

1.3 Permanent sovereignty over natural resources

Permanent sovereignty over natural resources resulted from the application of territorial sovereignty to natural resources and, precisely, finds its roots in the need of newly independent States to ensure the control over natural resources in their territories, as a tool to guarantee both their political independence and economic growth[21]. The principle of permanent sovereignty over natural resources evolved through different UNGA Resolutions and is today part of customary international law as a right of States.

1.3.1 Elaboration via the UN General Assembly

In the light of the tension between former colonial powers and newly independent States for the control of natural resources, the postulation by the UNGA of a States' right 'to freely determine' the use of natural resources was initially limited to developing countries.

Precisely, UNGA Resolution 523 (VI) in its preambular paragraphs recognized the right of underdeveloped countries 'to determine freely the use of their natural resources'[22]. In its operative part, the Resolution proclaimed the need to protect the 'sovereign rights' of underdeveloped countries, including the right to determine their plans for economic

[21] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007) 198-ff; Michael J Kelly, 'Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver" – Revolutionary International Legal Theory or Return to Rule by the Great Powers?' (2005) 10 UCLA J Intl L & Foreign Aff 361, 391-392; Natsu Saito, 'Decolonization, development and Denial' (2010) 6 FLA A&M U L Rev 1, 6-12; James Thuo Gathii, 'Imperialism, Colonialism, and International Law' (2007) 54 Buff L Rev 1013, 1043.

[22] UNGA Res 523 (VI) (12 January 1952), Integrated economic development and commercial agreements, Sixth Session. Also, N Schrijver*, Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge Studies in International and Comparative Law CUP 1997) 39-41; V Victoria R Nalule, *Mining and the Law in Africa: Exploring the Social and Environmental Impacts* (Springer 2020) 28-29; Resolution 523 (VI); S Hobe, 'Evolution of the Principle on Permanent Sovereignty over Natural Resources' in M Bungenberg and S Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 1-12; also, M S Rajan, *Sovereignty over Natural Resources* (Radiant Publishers 1978); N V Zambrano, *Il principio di sovranità permanente sulle risorse naturali tra vecchie e nuove violazioni* (Giuffrè 2009).

development[23]. Those statements have been confirmed and further developed in the successive UNGA Resolution 626 (VII)[24]. The latter, in its preambular paragraphs affirmed the right of peoples freely to use and exploit their natural wealth and resources. Such right is recognized as inherent in peoples' sovereignty and is reiterated in both the two paragraphs of the operative part, as a right of States 'freely to use and exploit their natural wealth and resources'[25].

1.3.2 The UN Declaration on Permanent Sovereignty over Natural Resources

1.3.2.1 The drafting of the Declaration

During its tenth session, the Commission on Human Rights under the mandate of the UNGA identified in permanent sovereignty over natural resources a fundamental component of self-determination, which is a collective human right appertaining to all nations and peoples, not limited to peoples of non-self-governing and trust territories but applicable as a fundamental right of peoples everywhere[26]. However, on the recognition of permanent sovereignty over natural resources to non-independent groups, the Commission concluded that the right to permanent sovereignty over natural resources may apply only when a certain form of political

[23] ibid 1(b): 'Commercial agreements shall not contain economic or political conditions violating the sovereign rights of the underdeveloped countries, including the right to determine their own plans for economic development'.
[24] UNGA Res 626 (VII) (21 December 1952). The Resolution was approved with thirty-six votes in favour and the opposition of New Zealand, South Africa, the United Kingdom and the United States. On such occasion the Philippines successfully proposed that the issue of sovereignty over natural resources should enter also in the debate on the drafting of the human rights Covenants, bringing sovereignty over natural resources from a mere State to even a people-oriented dimension: UN Doc A/C2/SR237 (11 December 1952) 281, para 22.
[25] ibid (Res 626 (VII)), paras 1, 2.
[26] Rep of the Tenth Sess. UN Doc E/2573 (1954) 124-128, 322-335. Also, UNGA Res 637 (VII) A, B and C 'The right of peoples and nations to self-determination' (16 December 1952); JV Bernstorff and P Dann (eds), *The Battle for International Law: South-North Perspective on the Decolonization Era* (OUP 2019) 417; Endalew Lijalem Enyew, 'Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Development' (2017) 8 Artic Review of Law and Politics 222-245, 223-225; Gess (n 12) 398-449. See Chapters 2 and 4.

independence is already acquired[27]. The United Nations Economic and Social Council (ECOSOC) transmitted the proposal of the Commission on Human Rights to the UNGA in 1958[28].

The UNGA stated the relationship between self-determination and the control over natural resources in the 1960 UNGA Resolutions 1514 (XV) and 1515 (XV). The first Resolution, known as the 'Declaration on the Granting of Independence to Colonial Countries and Peoples', indicates in its Preamble that 'peoples' may dispose of their natural wealth and resources for their own ends[29]. The fact that the Resolution refers to colonial peoples, that have also a right to independence[30], suggests that it guarantees the right of newly independent States to take full control over their natural resources[31]. In contrast, UNGA Resolution 1515 (XV) mentions the duty to respect the sovereign right of every State to dispose of its wealth and its natural resources in conformity with international law[32].

Such recognition of a right to control over natural resources for both newly independent and already independent States influenced the work of the Commission[33]. The Committee approved a proposal by Chile, elaborating permanent sovereignty as a right of States, to be exercised for the benefit of the people of the State concerned[34]. The Commission's report was the subject of the ECOSOC debate in August 1961. Many divergences remained on the compatibility of permanent sovereignty over natural

[27] ibid para 131.
[28] ECOSOC Res 586 D (XX) (3 December 1958). Through UNGA Resolution 1314 (XIII), a Commission on permanent sovereignty was established with the task to make recommendations to reinforce the principle of permanent sovereignty as a component of self-determination: UNGA Res 1314 (XIII) (12 December 1958).
[29] UNGA Res 1514 (XV) 'Declaration on the Granting of Independence of Colonial Countries and Peoples' (14 December 1960), Preamble.
[30] ibid para 5.
[31] Gilbert (n 12) 14.
[32] UNGA Res 1515 (XV) (15 December 1960), para 5.
[33] Gilbert (n 12) 64-65.
[34] UN Doc A/AC.97/L3 (10 May 1961); UN Doc A/AC97(L3/Rev2 (18 May 1961). Previously, the Second Committee rejected a proposal by the Soviet Union, postulating permanent sovereign as right of peoples and nations to freely to own, utilize and dispose of their natural wealth and resources in the interests of their national development, UN Doc A/AC97/L2 (5 May 1961).

resources with general international law[35]. However, the final draft resolution was finally approved on 3 December 1962 by six votes to five and twenty-two abstentions[36].

1.3.2.2 The content of the Declaration

On 14 December 1962, the Rapporteur of the Second Committee introduced to the UNGA the report of the Committee[37]. The draft resolution was adopted as General Assembly Resolution 1803 (XVII) on 'Permanent Sovereignty over Natural Resources' with eighty-seven votes to two (France and South Africa), and eleven abstentions[38].

In its preambular paragraphs, the Resolution 1803 (XVII) recalls the right of every State to dispose of its wealth and resources as stated in previous UNGA Resolution 1515 (XV) and describes it as an 'inalienable' right of States to be exercised with the respect of their national interests and economic independence. The UNGA Resolution 1803 (XVII) proclaims in its first paragraph the right to permanent sovereignty over natural wealth and resources, declaring both 'peoples' and 'nations' as holders of such

[35] The same concept of permanent sovereignty over natural resources was not clearly defined in international law and was also not mentioned in the UN Charter.
[36] UN Doc A/C2/SR.858 (3 December 1962) 391, para 58; UN Doc A/C2/SR.842 (16 November 1962) 274, para 35. While the Chilean delegation supported the maintenance of the draft resolution, the United Kingdom and the Soviet Union submitted a number of amendments. Despite the declaration of Chile that the Resolution did not bring modifications to existing principles of international law, the United States opposed the proposal since it could have put in question some fundamental international legal concepts such as sovereignty, nationhood and individual rights: UN Doc A/C2/SR850 (23 November 1962) 326, para 10. The United States did not want '[s]overeignty to be impaired by voting for a resolution which, unless clarified, might put in question the fundamental concept of its nationhood and the rights of its nationals'. The draft resolution included a preambular paragraph proposed by the United Kingdom affirming that the operative part would not prejudice the rights and obligations of successor States in respect of property acquired before the accession to complete sovereignty of former colonies. Also, UN Doc A/C2/L686/Rev2, sub I (28 November 1962).
[37] ibid (UN Doc A/C/SR.858).
[38] Lilian A Miranda, 'The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights and Peoples-Based Development' (2012) 45 Vanderbilt Journal of Transnational Law 794; Robert Dufresne, 'The Opacity of Oil: Oil Corporations, Internal Violence, and International Law' (2004) 36 NYU J Intl L & Pol 331, 335; E Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' (2006) 38 Geo Wash Intl L Rev 33, 34, 37.

right. The same provision states that permanent sovereignty must be exercised in the interest of national development and of the well-being of the people of the State concerned. Such second part of the provision makes clear how, despite the adoption of the terms 'peoples' and 'nations', States are the holders of the right to permanent sovereignty over natural resources[39]. The same postulation of permanent sovereignty as a right of States has been confirmed by subsequent inclusion of the principle in further UNGA Resolutions[40].

The second paragraph of UNGA Resolution 1803 (XVII) reflects the concept of States authority over a territory and affirms that the exploration, development and disposition of natural resources must respect the rules that peoples and nations freely consider necessary or desirable with regard to the authorization, restriction or prohibition of these activities. Successive developments through UNGA Resolutions make clear how permanent sovereignty is an inalienable right of States and extends to natural resources both on land and coastal waters, including resources found in the seabed, subsoil and suprajacent waters part of States' jurisdiction[41].

[39] L Cotula, 'Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice' in M Bungenberg and others (eds), *European Yearbook of International Economic Law 2018* vol 9 (Springer 2018) 8. Also, F Visser, 'The Principle of Permanent Sovereignty Over Natural Resources and the Nationalization of Foreign Interests' (1988) 21(1) The Comparative and International Law Journal of Southern Africa 76-91.

[40] Eg UNGA Res 2158 (XXI) (25 November 1966), paras 1-2 and UNGA Res 41/128 'Declaration on the Right to Development' (4 December 1986), Preamble, para 1. See section 1.3.5 and Chapter 4.

[41] UNGA Res 3016 (XXVII) (18 December 1972), para 1; UNGA Res 3171 (XXVIII) (17 December 1973), paras 1 -2; also, Schrijver (n 22) 96. The issue of water resources was then the subject of ECOSOC Resolution 1737 of 1973 where it was reaffirmed the right to permanent sovereignty of States over 'all their natural resources, on land within their international boundaries, as well as those of the seabed and the subsoil thereof within their national jurisdiction and in the suprajacent waters': ECOSOC, E/RES/1737(LIV) (4 May 1973), para 1.

1.3.2.3 The Declaration on the Establishment of a New International Economic Order (NIEO)

Afterwards, the principle of permanent sovereignty was incorporated by UNGA Resolution 3201 (S-VI) in the 'Declaration on the Establishment of a New International Economic Order' (NIEO), of 1 May 1974[42]. The NIEO Declaration on the one hand reiterates the 'full' permanent sovereignty of each State over its natural resources and all economic activities as an 'inalienable right' to be exercised freely and fully. To safeguard this right, each State is entitled to exercise effective control over such resources and their exploitation[43].

On the other hand, the NIEO Declaration, without mentioning 'permanent sovereignty', affirms the right of developing countries and peoples of territories under colonial and racial domination and foreign occupation, to liberation and to gain effective control over their natural resources and economic activities, including the full compensation for the exploitation and depletion of and damages to their natural resources[44]. While the provision refers to the right of 'peoples' holders of a right to independence under present international law, the presence of terms like 'liberation' before 'control over natural resources' suggests the need for the prior and logical requirement of some political independence of a newly independent State to exercise such right fully[45].

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[42] UNGA Res 3201 (S-VI) 'Declaration on the Establishment of a New International Economic Order' (NIEO), (1 May 1994). G Sacerdoti, 'New International Economic Order (NIEO)', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* Vol VII (OUP 2013) 659–668; H S Zakariya, 'Sovereignty over Natural Resources and the Search for a New International Economic Order', in K Hossain (ed), *Legal Aspects of a New International Economic Order* (Frances Pinter 1980) 208–19.

[43] ibid art 4(e).

[44] ibid art 4(f), (h).

[45] Art 4(f) of the NIEO Declaration recognizes the right of 'all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid, to restitution and full compensation for exploitation, and depletion of, and damages to, the natural resources' of such States, territories and peoples. See Chapter 4.

1.3.2.4 The Charter of Economic Rights and Duties of States (CERDS)

Permanent sovereignty over natural resources, through UNGA Resolution 3281 (XXIX), has been incorporated in the 1974 'Charter of Economic Rights and Duties of States' (CERDS)[46]. Article 2 of the Charter confirms the postulation that each State 'has and shall freely exercise full permanent sovereignty over natural resources in its territory'. Furthermore, the same provision of the CERDS adds some practical manifestations of permanent sovereignty over natural resources, such as the possession, use and disposal over wealth and natural resources[47]. Those rights precisely include the regulation and exercise of authority over foreign investments within national jurisdiction and the regulation and supervision of activities of transnational corporations[48]. The CERDS then recognizes the right of States to fully mobilize and use their resources and the right of restitution of natural resources of States, territories and peoples in case of coercive policies of such resources by other States[49].

1.3.3 Elaboration in general multilateral treaties

Permanent sovereignty over natural resources, as developed through UNGA Resolutions has been embodied in numerous international multilateral treaties[50]. Since many of such treaties involve international environmental

[46] UNGA Res 3281 (XXIX) 'Charter of Economic Rights and Duties of States' (12 December 1974). Also, Isabel Feichtner, 'International (Investment) Law and Distribution Conflicts over Natural Resources' in Rainer Hofmann, Stephan Schill and Christian Tams (eds), *International Investment Law and Sustainable Development* (Edward Elgar 2015); Ricardo Pereira, 'The Exploration and Exploitation of Energy Resources in International Law' in Karen E Makuch and Ricardo Pereira (eds), *Environmental and Energy Law* (Blackwell 2012) 201-202.

[47] ibid art 2(1). Article 3 of the Resolution 3281 (XXIX) states that the exploitation of shared natural resources must be implemented on the basis of cooperation and no-harm principles.

[48] ibid art 2(2).

[49] ibid art 7.

[50] Outside international treaty law, permanent sovereignty over natural resources has been included also in numerous non-binding instruments. For example, permanent sovereignty over natural resources is embodied in the Stockholm Declaration on the Human Environment at Principle 21, which recognizes the States' right to exploit their own natural resources, with the parallel duty to prevent damage to other States or in areas beyond their jurisdiction. Permanent sovereignty over natural resources is also recognized in other

law, permanent sovereignty over natural resources is often balanced with the parallel duty of States to exploit their natural resources respecting international environmental obligations.

A first assertion of States' sovereignty over natural resources was provided in the 1958 Convention on the Continental Shelf which refers to States' exclusive rights over natural resources in the continental shelf[51]. The UNCLOS provides a further application of the principle of permanent sovereignty over natural resources[52]. Indeed, Article 193 of the Convention recognizes the sovereign right of States to exploit their natural resources[53]. Permanent sovereignty over natural resources has been included in the 1992 United Nations Convention on Biological Diversity (CBD) which, both in its Preamble and operative part, affirms that States have sovereignty over their biological resources as a right to exploit them pursuant to their own environmental policies and in accordance with the principles of international law[54]. Even the 1992 United Nations Framework Convention

relevant non-binding international instruments, including in Principle 2 of the 1992 Rio Declaration on Environment and Development, in the 2030 Agenda on Sustainable development. Report of the United Nations Conference on the Human Environment UN Doc A/CONF48/14/Rev1 (5-6 June 1972), Principle 21; Report of the United Nations Conference on Environment and Development, UN Doc A/conf151/26/Rev1 (vol 1) (12 August 1992) Annex 1, Principle 2; UNGA Res 70/1 (25 October 2015), 'Transforming Our World: The 2030 Agenda for Sustainable Development', para 18; also, ILA, Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, in Report of the 62nd Conference of the ILA held at Seoul, ILA: London, 1987, 2.

[51] Convention on the Continental Shelf (n 17), art 2(2).

[52] Y Tanaka, *The International Law of the Sea* (2nd edn, CUP 2015); Dorothée Cambou and Stefaan Smis, 'Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Artic' (2013) 22(1) Michigan State International Law Review 348-376, 350-354.

[53] The same provision also contains an environmental duty for States to protect and preserve the marine environment. See section 1.2.2.

[54] United Nations Convention on Biological Diversity, Rio de Janeiro (5 June 1992) 1760 UNTS 79, Preamble, art 3. In parallel to such right, States have the duty to respect other States' sovereignty, ensuring that activities within their jurisdiction or control do not cause damage in other States' jurisdictions. Cotula (n 39); also, M Oksanen and T Vuorisalo, 'Conservation Sovereignty and Biodiversity' in E Casetta, J Marques da Silva and D Vecchi (eds), *From Assessing to Conserving Biodiversity. History, Philosophy and Theory of the Life Sciences*, vol 24 (Springer 2019); Werner Scholtz, 'Greening Permanent Sovereignty through the Common Concern in the Climate Change Regime: Awake Custodial Sovereignty!' in Oliver C Ruppel (ed), *Climate Change: International Law and Global Governance: Volume II: Policy, Diplomacy and Governance in a Changing Environment* (1st edn, Nomos Verlagsgesellschaft MbH, Baden-Baden 2013) 201-214.

on Climate Change (UNFCCC) includes permanent sovereignty over natural resources in its Preamble, declaring that States have the sovereign right to exploit their own resources[55].

The principle of permanent sovereignty over natural resources has been embodied also in the Energy Charter Treaty (ECT), which recognizes States' sovereignty over their energy resources and sovereign rights to regulate the exploration, development, exploitation and management of their energy resources in accordance with the principles of international law[56]. Permanent sovereignty over natural resources is also reflected in multilateral treaties concerning the management of natural resources, such as for example the Agreement Establishing the International Bauxite Association[57] and the Agreement Establishing the Association of Iron Ore Exporting Countries[58]. At the regional level, permanent sovereignty over natural resources is explicitly mentioned in the Treaty establishing

[55] United Nations Framework Convention on Climate Change (UNFCCC) 1771 UNTS 107, (opened for signature 9 May 1992) (entered into force 21 March 1994), Preamble. Such sovereignty is limited by the principles of international law and by the duty not to cause damage to other States' environment or areas beyond the limits of national jurisdiction. The States' sovereignty over natural resources is confirmed also in various international environmental treaties: Convention on Long-range Transboundary Air Pollution 1302 UNTS 217 (13 November 1979) (entered into force 16 March 1983) (the 'LRTAP Convention'), Preamble; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants 2230 UNTS 79 (24 June 1998) (entered into force 23 October 2003), Preamble; Vienna Convention for the Protection of the Ozone Layer 1513 UNTS 293 (22 March 1985) (entered into force 22 September 1988), Preamble; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1954 UNTS 3 (14 October 1994) (entered into force 26 December 1996), Preamble; Stockholm Convention on Persistent Organic Pollutants 2256 UNTS 119 (22 May 2001) (entered into force 17 May 2001) (the 'POP Convention'), Preamble.

[56] Energy Charter Treaty (n 12) arts 1(10)(a)-(b), 18. Permanent sovereignty over natural resources is mentioned also in the Preamble of the Charter. The Charter refers to the 'Area' including the States' territory under their sovereignty and the areas over which the States exercise sovereign rights according to the international law of the sea. See section 1.2.2.

[57] Agreement Establishing the International Bauxite Association, opened for signature 8 March 1974, 1021 UNTS 176 (entered into force 29 July 1975), Preamble.

[58] Agreement Establishing the Association of Iron Ore Exporting Countries, opened for signature 3 April 1975, 987 UNTS 356 (entered into force 12 October 1975), Preamble. The sovereign right of States to exploit their natural resources is recognized also in the 1994 International Timber Agreement: International Tropical Timber Agreement (ITTA), 1955 UNTS 143; 33 ILM 1014 Geneva (26 January 1994) (entered into force 1 January 1997).

CARICOM[59], while the 1978 Treaty for Amazonian Co-operation refers to the exclusive use and utilization of natural resources as an inherent right of the sovereignty of each 'State'[60]. Even the 2003 Revised African Convention on the Conservation of Nature and Natural Resources (the 'Maputo Convention') reaffirms the sovereign right of States to exploit their natural resources[61]. With reference to living resources, the 2017 Inter-American Convention on the Protection of Sea Turtles affirms the sovereignty of States over living marine resources in accordance with international law as reflected in the UNCLOS[62].

1.3.4 Elaboration in international case law

In the case concerning *Armed Activities on the Territory of the Congo*, the ICJ stated that a State's permanent sovereignty over its natural resources, as elaborated from UNGA Resolution 1803 (XVII), the CERD and the NIEO Declaration, represents a 'principle of customary international law'[63].

In World Trade Organization (WTO) law, one WTO Panel has recognized permanent sovereignty over natural resources as an element of

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[59] Treaty establishing the CARICOM: Treaty Establishing the Caribbean Community (CARICOM) (4 July 1973) (entered into force 1 August 1973, revised in 2001), Preamble.
[60] Treaty for Amazonian co-operation, 1202 UNTS 51 (3 July 1978) (entered into force 2 August 1980), art 4.
[61] OAU, Revised African Convention on the Conservation of Nature and Natural Resources (the 'Maputo Convention') (7 March 2017) (entered into force 10 July 2016), Preamble. Cf OAU, African Convention on the Conservation of Nature and Natural Resources (the 'Algiers Convention') (15 September 1968) Article XVI(1)(b). In regional treaty law, also the Southern African Development Community (SADC) Protocol on Forestry (3 October 2002) (entered into force 16 April 2010), art 4(2), which mentions 'the sovereign right' of States to use their forest resources.
[62] Inter-American Convention for the Protection and Conservation of Sea Turtles. Eighth Conference of the Parties (1 December 1996) (entered into force 2 May 2001), art III. In the same provision the Convention mentions also the 'sovereign rights', which as stated above differ from permanent sovereignty, of States over living marine resources in accordance with international law and the UNCLOS.
[63] *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), (19 December 2005), para 244; Schrijver (n 22) 377. Cf GATT Article XX(g) which allows Parties to adopt or enforce measures related to the conservation of exhaustible natural resources: GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 ILM 1153 (1994), art XX(g).

State's sovereignty[64]. In a related dispute, a WTO Panel identified natural resources as 'a natural corollary' of statehood, viewing permanent sovereignty over natural resources as a right of WTO Members and thus of States[65]. Permanent sovereignty over natural resources has been invoked also in various arbitral procedures such as *Libyan American Oil Co (LIAMCO) v Libya*[66] and *Texaco Overseas Petroleum Co (Texaco) v Libya*[67] which recognized the principle of permanent sovereignty over natural resources, as stated in UNGA Resolution 1803 (XVII), as a dominant trend of international opinion concerning the sovereign rights of States over natural resources. In regional jurisprudence, the African Commission on Human and Peoples' Rights declared that 'States and not peoples' have the sovereignty over natural resources[68]. The principle of permanent sovereignty over

[64] Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (adopted 5 July 2011), paras 7.380 and 7.387. On the application of permanent sovereignty over natural resources in WTO law, I Espa, *Export restrictions on critical minerals and metals: testing the adequacy of WTO disciplines* (CUP 2015), 232-243; J Y Qin, 'Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection' (2012) 46 Journal of World Trade 1147, 1180; Manjiao Chi, 'Resource Sovereignty in the WTO Dispute Settlement: Implications in China - Raw Materials and China - Rare Earths', (2015) 12(1) Manchester Journal of International Economic Law 2-15; I Espa, 'Chinese Natural Resources Disputes: A Never-Ending Story?', (2019) 9 European Yearbook of International Economic Law 39-60, 56-58.

[65] Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R (adopted 26 March 2014), para 7.270: 'a State's sovereignty is also expressed in its decision to ratify an international treaty and accept the benefits and obligations that such ratification entails. In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood'.

[66] *Libyan Am. Oil Co. (LIAMCO) v Gov't of Libya Arab Republic* [1981] 20 ILM 1, 53, 29-30, para 206: 'In this connection, the Arbitral Tribunal has reached the conclusion that the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources'. Also, 24 March 1982 arbitration in *Ad-Hoc-Award, Kuwait v The American Independent Oil Company (AMINOIL),* 21 ILM 976 (1982) *('Kuwait v Aminoil')*, para 143.

[67] *Texaco v Libyan Arab Republic* [1978] 17 ILM, 3-37, para 59; A Lowenfeld, 'Investment Agreements and International Law' in (2003) 42 Columbia Journal of Transnational Law 123-124; SP Ng'ambi, 'Permanent Sovereignty over Natural Resources and the Sanctity of Contracts' (2015) 12(2) Loyola University Chicago International Law Review 153-172, 158.

[68] *FLEC v Angola* (Communication No 328/06) [2013] ACHPR 10 (5 November 2013), paras 128-132, in interpreting Article 21 of the African Charter on Human and Peoples' Rights.

natural resources, as developed in international law, has been declared also by domestic courts[69] and implemented in domestic legislation[70].

1.3.5 The current content under customary international law of the principle of permanent sovereignty over natural resources

As stated by the ICJ in *Armed Activities on the Territory of Congo*, permanent sovereignty is today part of customary international law. The fact that permanent sovereignty over natural resources, as formulated in UNGA Resolution 1803 (XVII) has been developed and embodied in numerous UNGA Resolutions, including the CERDS and the NIEO Declaration, in numerous international treaties, in statements of international courts and arbitral tribunals and in domestic jurisprudence and legislation reinforces its binding value and demonstrate its acceptance in States' practice[71].

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[69] In 2010 the Supreme Court of India, stated that India has the permanent sovereignty over its natural resources, as affirmed by UNGA Resolution No 1803 (XVII): *Reliance Natural Resources LTD. v Reliance Industries LTD* [2010] INSC 374 (7 May 2010), paras 87-88, 90-91, 99; also, *United States Court of Appeal, United States v Mitchell*, 553 F.2d 996 (13 June 1977): 'For example the United Nations resolution on 'Permanent Sovereignty over Natural Resources' (…) recognizes the control of sovereigns over the natural resources within their territories'; *International Association of Machinists v Organization of Petroleum*, 477 F. Supp. 553 (C.D. Cal. 18 September 1979): 'the Court can and should examine the standards recognized under international law (…) sovereign State has the sole power to control its natural resources. See e.g. Resolution 1803 G.A., para 1'. Cf Constitutional Court of South Africa, *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), para 71: 'the State is the custodian of all our mineral and petroleum resources on behalf of the people of South Africa'.

[70] Eg UNGA Resolution 1803 (XVII), and permanent sovereignty over natural resources, is explicitly embodied in the 2017 Tanzania Natural Wealth and Resources (Permanent Sovereignty) Act (2017), which in its Preamble and Part II affirms that according to international law the State of Tanzania has the permanent sovereignty over its natural resources. Also, South Africa Mineral and Petroleum Resources Development Act (2002) (Gazette No 23922, Notice No 1273 dated 10 October 2002. Commencement date: 1 May 2004 [Proc. No R25, Gazette No 26264]) (as amended), Section 2 (a): 'recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic'.

[71] I Brownlie, 'Legal Status of Natural Resources in International Law' (some aspects) (1980) 162 Academie de Droit International de Le Haye (Recueil des Cours) 245-318, 260; Y T Chekera and V O Nmehielle, 'The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: the case of Zimbabwean Diamonds' in (2013) 6 African Journal of Legal Studies 69–101, 81.

According to its current customary content, permanent sovereignty over natural resources is the inalienable right of States to exercise their exclusive authority over the natural resources embodied in their territory[72]. Hence, States were initially conceived of as the sole bearers, and remain the main, if not exclusive, bearers of this sovereignty[73]. Notably, the Preamble to UNGA Resolution 1803 (XVII) itself refers to the inalienable sovereignty of 'States' over their natural resources and does not contemplate the possibility that permanent sovereignty legally vests in both States and peoples[74].

This is confirmed by the successive UNGA Resolutions that posit States as the holders of the right to permanent sovereignty over natural resources. That permanent sovereignty inheres in States was unambiguously affirmed in the CERDS, which proclaims that 'every State has and shall freely exercise full permanent sovereignty over all its natural resources'[75], and in the NIEO Declaration, which speaks of 'the permanent

[72] Stephen M Schwebel, 'The Story of the U.N. Declaration on Permanent Sovereignty over Natural Resources' (1936) 49 ABAJ 463, 464; also, James Crawford, 'Some Conclusions' in (J Crawford ed), *The Rights of Peoples* (Clarendon 1992) 159, 171; Schrijver (n 22) 311. Other authors claim that permanent sovereignty is a right of both peoples and States: eg Margo E Salomon and Ajuin Sengupta, *The Right to Development: Obligations of States and the Right of Minorities and Indigenous Peoples* (Minority Rights Group International 2003); Lorne S Clark, 'International Law and Natural Resources' (1977) 4 Syracuse J Int L and Com 377, 380. Cf Elisa Freiburg, 'Land Grabbing as a Threat to the Right to Self-Determination: How Permanent Sovereignty over Natural Resources Limits States' Involvement in Large-Scale Transfers of Land' (2014) 18 Max Planck Yearbook of United Nations Law Online 507, 516-517 affirming that permanent sovereignty constitutes a peoples' and not a States' right.

[73] See Chapter 4.

[74] J Crawford, 'The Rights of Peoples: "peoples" or "governments"?' (1985) 9 Bulletin of the Australian Society of Legal Philosophy 136-147. The same notion of permanent sovereignty as a States' right is adopted also by the successive UNGA Resolution 2158 (XXI), affirming the right of 'countries' to exercise permanent sovereignty over natural resources. Even Resolution 2692 (XXV) refers to the role of permanent sovereignty for the growth of developing 'countries'. UNGA Res 2158 (XXI) (n 39), para 1 and UNGA Res 2692 (XXV) (11 December 1970), paras 2-3. States were conceived as holders of permanent sovereignty over natural resources also in UNGA Res 626 (VII) (n 23), paras 1, 2 and UNGA Res 1515 (XV) (n 32), para 5.

[75] UNGA Res 3281 (n 46), arts 2(1), 3; finally, both UNGA Resolutions 3016 (XXVII) and 3171 (XXVIII) refer to the permanent sovereignty of 'States'. UNGA Res 3016 (XXVII) (18 December 1972), para 1 and UNGA Res 3171 (XXVIII) (n 41), para 1. P De Waart, 'Permanent Sovereignty over Natural Resources as a Corner-stone for International Economic Rights and Duties' (1977) 24(1-2) Netherlands International Law Review 304-322.

sovereignty of every State over its natural resources'[76]. The 'inalienable right of States' to exercise their permanent sovereignty over their natural resources has been affirmed also by the successive UNGA Resolution 36/103 containing the 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States'[77]. In these international legal instruments there is no mention of a right of peoples to permanent sovereignty over natural resources. The only exceptions are represented by the NIEO Declaration, which refers to the rights of peoples of territories under colonial and racial domination and foreign occupation with respect to natural resources, albeit not mentioning explicitly permanent sovereignty over natural resources,[78] and by UNGA Resolution 41/128, incorporating the 'Declaration on the Right to development', which mentions the inalienable right of peoples to full sovereignty over all their natural wealth and resources, subject to the relevant provisions of the ICCPR and

[76] NIEO Declaration (n 42), art 4(e).

[77] UNGA Res 36/103 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' (9 December 1981), Preamble and art 1(b); UNGA Res 2542 (XXIV) 'Declaration on Social Progress and Development' (11 December 1969), art 3(d). States' permanent sovereignty over natural resources was also mentioned in the Preamble and in the second paragraph UNGA Res 35/7 (30 October 1980) and in the Preamble of UNGA Res 37/7 (28 October 1982), which contains the 'World Charter for Nature'. Among relevant non-binding sources, the first United Nations Conference on Trade and Development (UNCTAD) in its final document at Principle 3 recognized permanent sovereignty over natural resources as a right of States to freely dispose of their natural resources; Proceedings of the United Nations Conference on Trade and Development Geneva, 23 March—16 June 1964 Volume I Final Act and Report, principle three; the 1972 Stockholm Declaration (n 50) at Principle 21 and the 1992 Rio Declaration (n 50) at Principle 2 refer to the sovereign right of States to exploit their natural resources; at the regional level, the 2020 Carta Ambiental Andina mentions the sovereignty of Member States of the Andean Community over natural resources: El Consejo Andino de Ministros de Relaciones Exteriores, Carta Ambiental Andina, XXV Reunión Ordinaria (1 December 2020), III(5); even the OAS in a recent resolution reiterated permanent sovereignty as a right of States: OAS General Assembly Resolution 349 (VIII-0/78) (1 July 1978), Preamble, para 1(D bis); the same postulation is confirmed by the African Commission: Resolution on a Human Rights-Based Approach to Natural Resources Governance, ACHPR/Res.224(LI) 2012, Preamble, para i). Also, ILA, Seoul Declaration (n 50), para 5.2; P Peters, N Schrijver and P De Waart, 'Responsibility of States in Respect of the Exercise of Permanent Sovereignty Over Natural Resources: An Analysis of Some Principles of the Seoul Declaration (1986) by the International Law Association' (1989) 36(3) Netherlands International Law Review 285-313. Robert L Rothstein, *Global Bargaining; UNCTAD and the Quest for a New International Economic Order* (Princeton University Press 1979).

[78] NIEO Declaration (n 42), art 4(h). The same postulation is suggested considering UNGA Resolution 1514 (XV) (n 29), para 5. See Chapters 2 and 4.

ICESCR[79]. However, at the time of the approval of the Resolution 41/128 in 1986, the term 'peoples' under international law indicated only States and certain categories of peoples, such as colonial peoples, which enjoy a right to independence and hence to sovereignty over a territory[80]. States are confirmed as the holders of permanent sovereignty also in international treaty law[81] in international case law[82] and in domestic jurisprudence[83] and legislation[84].

Permanent sovereignty includes the right of States to freely determine, in the sense to adopt decisions, on the exploitation, utilization and conservation of natural resources in their territory[85]. The corollary

[79] UNGA Res 41/128 (n 40), Preamble, art 1.
[80] See also the second preambular recital of the Resolution which refers to 'the well-being of the entire population'. See Chapters 2, 4.
[81] Eg UNCLOS (n 12), art 193, which refers to the sovereign rights of 'States' to exploit their natural resources. The 1992 Convention on Biological Diversity (n 54) postulates the sovereign rights of 'States' over their biological resources both in its Preamble and Articles 13 and 15. The ECT Article 18 (n 12) recognizes both the sovereignty and sovereign rights of 'States' over natural resources. States are mentioned as the holders of sovereign rights to exploit their natural resources also in the Preamble of the UNFCCC (n 55), in the preambles of various international environmental treaties, including LRTAP Convention (n 55); Protocol to the 1979 LRTAP Convention on Persistent Organic Pollutants (n 55); Vienna Convention for the Protection of the Ozone Layer (n 55); United Nations Convention to Combat Desertification (n 55); POP Convention (n 55); the 1978 Treaty for Amazonian Co-operation (n 60) that refers the exclusive use and utilization of natural resources as an inherent right of the sovereignty of each 'State'; the same principle is confirmed also in the preambles of the Agreement Establishing the International Bauxite Association (n 57) and of Agreement Establishing the Association of Iron Ore Exporting Countries (n 58), in the International Tropical Timber Agreement (n 58) and, finally, in the Preamble of the 2017 Maputo Convention (n 61) and in the 2002 SADC Protocol on Forestry (n 61). Finally, the sovereignty and sovereign rights of States over living marine resources in accordance with international law are stated in the Treaty establishing the CARICOM (n 59) and in the Inter-American Convention on the Protection of Sea Turtles (n 62).
[82] ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (n 63); Panel Report, *China-Measures Related to the exportation of various raw materials* (n 64); Panel Report, *China-Measures Related to the exportation of rare earths, tungsten, and molybdenum* (n 65); *M Libyan Am Oil Co (LIAMCO) v Gov't of Libya* (n 66)*; Kuwait v Aminoil* (n 66); *FLEC v Angola* (n 68). See Chapter 4.
[83] *Reliance Natural Resources LTD. v Reliance Industries* (n 69); *United States v Mitchell* (n 69); *International Association of Machinists v Organization of Petroleum* (n 69); *Agri South Africa v Minister for Minerals and Energy* (n 69).
[84] Tanzania Permanent Sovereignty Act (n 70); South Africa Mineral and Petroleum Resources Development Act (n 70).
[85] Schrijver (n 22) 36; A Ziegler and L-P Gratton, 'Investment Insurance' in PT Muchlinski, F Ortino, and CH Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2006) 526; SR Chowdhury, 'Permanent Sovereignty over Natural Resources – Substratum of the Seoul Declaration' in P De Wart and others (eds), *International Law and Development* (1988) 59, 61-62.

rights necessary for the use and exploitation of natural resources encompass rights of ownership, freedom to decide the method of their exploitation and the objective to use them so that the people of the State may benefit concretely[86]. For example, the principle includes the right to grant concessions for the realization of projects, infrastructures and activities regarding natural resources. Furthermore, States may conclude regional and multilateral trade agreements for the exploitation of their natural resources[87].

According to the customary content of the permanent sovereignty over natural resources, resources part of States' permanent sovereignty are essentially those included in States' territory that fall within States' jurisdiction, including land, subsoil and seabed resources. At the same time, there is no evidence that permanent sovereignty over natural resources extends beyond States' territory, such as to the EEZ and the continental shelf where States enjoy more limited sovereign rights.

1.4 Conclusion

Permanent sovereignty over natural resources represents the application of the concept of the territorial sovereignty of a State to the natural resources within its territory. Indeed, territorial sovereignty entails the inalienable right of States to exercise their absolute authority over their territory. Historically, permanent sovereignty evolved from a guarantee for newly

[86] Report of the UN Secretary General, 'The exercise of Permanent Sovereignty over Natural Resources and the Use of Foreign Capital and Technology for their Exploitation' UN Doc A/8058 (14 September 1970), requested by UNGA Res 2386 (XXIII) (19 November 1968), para 1. Also, UNGA Res 2692 (XXV) (n 74), paras 3-4. The same social dimension of permanent sovereignty was recognized by the 1969 Declaration on Social Progress and Development that recognized permanent sovereignty over natural resources as one of '[t]he primary conditions of social progress and development': UNGA Res 2542 (XXIV) (n 77), art 3. During the same years, permanent sovereignty was then incorporated into the 1970 International Development Strategy for the Second United Nations Development Decade: UNGA Res 2626 (XXV) (24 October 1970); Schrijver (n 22) 90. However, it was not mentioned in the 1970 Declaration on Principles of International Law concerning the Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations: UNGA Res 2625 (XXV) (n 12).

[87] O Bordukh, *Choice of Law in State Contracts in Economic Development Sector – Is There Party Autonomy?* (Bond University 2008) 171.

independent States of control over their natural resources to an international legal principle applicable to all States. Over the decades, permanent sovereignty was applied even beyond the colonial context, guaranteeing the right of States in general over their natural resources. Today permanent sovereignty is part of customary international law and entails the right of States to decide independently how to exploit, control, use, conserve and manage the natural resources within their territory[88].

[88] J Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia of Forgotten Right?' (2013) 31/32 Netherlands Quarterly of Human Rights 314-341, 320-321.

CHAPTER 2: THE CONCEPTUALIZATION OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW

2.1 Introduction

The purpose of this second Chapter is to explore the conceptual foundations on which indigenous rights under international law are based and specifically the different circumstances in which indigenous individuals and peoples are subjects of international law with, variously, individual and group rights. Section 2.2 introduces the historical conceptualization of indigenous peoples in early and classical international law. Turning to present international law, section 2.3 outlines the position of indigenous individuals for the purposes of international human rights law, distinguishing between indigenous individuals as individuals generally and indigenous individuals as members of a minority group. As for the conceptualization of indigenous peoples as 'peoples' in international law, section 2.4 highlights the different uses of the term 'people' in international law to refer, on the one hand, to the entire population of a State and, on the other, to those specific non-independent populations, in particular those of non-self-governing territories, which enjoy as a 'people' a right to self-determination. Section 2.5 then examines indigenous peoples as a particular category of non-independent 'peoples'. Finally, section 2.6 introduces the conceptualization of indigenous peoples as 'communities' for the purposes of certain international legal instruments.

2.2 Early legal theories on indigenous peoples

2.2.1 The doctrine of discovery

During the age of discovery, some international legal theories based on natural law recognized indigenous peoples as distinct legal subjects that held autonomous rights[1]. European powers could occupy their lands only

[1] Natural law represents a corpus of legal principles that pre-existed States and sovereigns; Mathias Åhrén, *Indigenous Peoples' Status in the International Legal System* (OUP 2016)

when these peoples did not guarantee certain rights to explorers, such as the right of passage[2]. This conditional right of occupation evolved via the doctrine of discovery into a right to pre-emption over a land, where the first discoverer country obtained exclusive property rights that had to be respected by all other European States[3]. At the same time, indigenous peoples maintained some sovereign rights, including the right to possession, occupation and use of their lands[4].

The extinguishment of Indian title over so-called 'native lands' required consensual cession from the Indian tribes through treaties between European countries and native communities[5]. In Canada, for example, in 1763 the British Crown recognized indigenous territorial rights as pre-existing and stated that only the Crown could conclude agreements with native populations[6]. Diversely, in New Zealand in 1840 the British Crown signed the Treaty of Waitangi with the Maori people, recognizing their rights and regulating the relationships with them[7]. In the United States the federal

12. In 1492, spheres of influence between European powers were established by the Spanish-Portuguese Treaty of Peace of Alcáçovas-Toledo of 1479. This agreement was then renewed with the famous bull Inter Caetera of 5 May 1493 and amended with the Treaty of Tordesillas of 1494. Also, M Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 University of Toronto Law Journal 1-36, 12.

[2] ibid (Åhrén) 8-9; A Anghie, *Imperialism, Sovereignty, and the Making of International law* (CUP 2007) 13-14, 52-60; J Crawford, *The Creation of States in International Law* (OUP 1979) 263-264; A Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 2, 5; M Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (CUP 2005) 95; J Gilbert, *Indigenous Peoples' Land Rights Under International Law: from Victims to Actors* (Brill:Nijhoff 2006) 9-11.

[3] RJ Miller, L Lesage and SL Escarcena, 'The International Law of Discovery, Indigenous Peoples, and Chile' (2010) 89 Neb L Rev 2010 819-884, 823.

[4] *Johnson v M'Intosh*, 21 US (8 Wheat) 573-574 (1823): '[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it'.

[5] MC Blumm, 'Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country' (2004) 28 Vermont Law Review 713, 717, 762-763; RN Clinton, 'Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law (1993) 46 Ark L Rev 77, 93. For example, no Indian treaties were concluded by the British Crown with the Australian aboriginals since the British claims over Australia were based on the *terra nullius* doctrine.

[6] Annika Tahvanainen, 'The Treaty-Making Capacity of Indigenous Peoples' (2005) 12(4) International Journal on Minority and Group Rights 397-419, 402.

[7] Also, Benedict Kingsbury, 'The Treaty of Waitangi: Some International Law Aspects' in IH Kawharu (ed), *Waitangi and Pakeha Perspectives of the Treaty of Waitangi* (OUP 1989); Sarah M Stevenson, 'Indigenous Land Rights and the Declaration on the Rights of

government concluded more than 800 treaties with indigenous tribes which, according to the United States Supreme Court, had the same value of treaties concluded with foreign States[8]. For example, one of the most important of those treaties is the 1785 Treaty of Hopewell[9] concluded with the Cherokee nation and interpreted as a legal agreement between two sovereign entities by the Supreme Court[10].

Indigenous Peoples: Implications for Maori Land Claims in New Zealand' (2008) 31(1) Fordham International Law Journal 298-343; Matthew SR Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press 2008); Kenneth J Keith, 'The Treaty of Waitangi in the Courts' (1990) 14 NZULR 37, Victoria University of Wellington Legal Research Paper Series, Keith Paper No 9/2017; Mark Bennet and Nicol Roughan, 'Rebus Sic Stantibus and the Treaty of Waitangi' (2006) 37 Victoria U Wellington L Rev 505; FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press 2006).

[8] *United States v Forty-Three Gallons of Whiskey*, 93 US 188, 197 (1883). Also, FS Cohen, *Handbook on Federal Indian Law* (R Strickland and others eds), (LexisNexis 1982) 58; Tahvanainen (n 6) 399; PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (OUP 2004) 98-108; D Wilkins, 'Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal' (1998) 23 Okia City U L Rev 277, 283 299-304; E-I A Daes, 'Indigenous Peoples and Their Relationship to Land', Final Working Paper prepared by the Special Rapporteur, UN Doc E/CN4/Sub2/2001/21 (11 June 2001), paras 21-32; MA Martinez, 'Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples', Final report by the Special Rapporteur E/CN4/Sub2/1999/20 (22 June 1999) 29, para 187. Native tribes concluded such treaties in exchange of federal protection or prisoners, mutual assistance or land reservations where they exercised self-government and enjoyed some sovereign rights, such as the rights to reserved water, and rights to timbers or minerals.

[9] Treaty of Hopewell, November 28, 1785, U.S.-Cherokee, 7 Stat i8, which conferred to the Congress the right to regulate trade with Cherokees and to control the affairs of the Cherokee Nation. P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*. Harvard Law Review, 107(2), 1993, 381-440. For example, Article 4 of the Treaty of Hopewell refers to boundary allotted to the Cherokees for their 'hunting ground'.

[10] *Worcester v Georgia*, 31 U.S. (6 Pet.) 515 (1832), at 552-53. *Winters v United States*, 207 US 564, 553-54, 576-77 (1908); *United States v Winans*, I98 US 371, 38I-82 (1905). In *Cherokee Nation*, Justice Johnson argued that according to Article 4 of the Treaty, the Cherokee granted all their sovereign powers over lands to the federal government in exchange for the use of such public lands for hunting: *Cherokee Nation*, 30 US (5 Pet) (1831) 23-25 (Johnson J, concurring in the judgment); Pursuant to Article 9 of the Treaty of Hopewell, the United States Congress has the exclusive right to regulate trade with the Indians and to manage all their affairs in a manner that Indians think proper. Justice Johnson stated: 'Almost every attribute of sovereignty is renounced by them in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon, from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper; amounting in terms to a relinquishment of all power, legislative, executive and judicial, to the United States, is yielded in the ninth Article'.

2.2.2 The irrelevance of indigenous peoples as such in classic international law

By the nineteenth century, States had become the sole international legal persons and other entities, such as indigenous communities, had no relevance as such in international law[11]. As seen in the 1870 arbitral award between Portugal and the United Kingdom on sovereignty over the Island of Bulama, the lack of statehood of 'uncivilized' tribes deprived them of any rights over their traditional territories, which could be occupied by colonial powers according to the *terra nullius* doctrine[12].

In the League of Nations Covenant, there was no mention of indigenous peoples[13]. The irrelevance of groups other than European

[11] Such peoples were treated only as aggregated populations of States, irrespective of their ethnic, cultural, religious or linguistic background. Also, Åhrén (n 1) 12; J Anaya, *Indigenous Peoples in International Law* (OUP 2004) 19-22; G Simpson, 'International Law in Diplomatic History' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 30-31. Also, in general, A Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge Studies in International and Comparative Law (CUP 2016).

[12] *Arbitral award between Portugal and the United Kingdom, regarding the dispute about the sovereignty over the Island of Bulama, and over a part of the mainland opposite to it*, Award of 21 April 1870, RIAA Vol XXVIII, 131-140 at 137: 'Countries inhabited by savage tribes may, under well-established rules of public law, be so occupied and possessed by the representatives of a Christian power as to dispossess the native sovereignty and transfer it to the Christian power'. Also, Gilbert (n 2) 6-9, 26-27; Fitzmaurice (n 2) 9-11; H Hannum, *Autonomy, Sovereignty and Self-Determination* (1990 University of Pennsylvania Press) 93; McHugh (n 8) 98-108; Åhrén (n 1) 16-19; LB Tarazona, 'The Civilized and Uncivilized' in B Fassenbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 2, 7, 9-10; Anghie (n 2) 34, 58; P Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' (2008) 30(1) Michigan Journal of International Law 184; ibid (Anaya) 22; Crawford (n 2) 10-14 and 260-261; Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press 2003) 198. The doctrine was influenced by the agrarian theory of Locke. Precisely, the fact that indigenous peoples were not able to cultivate or add value to such lands, prevented them from establishing private property rights over such territories and natural resources that were then considered belonging to no-one.

[13] League of Nations, Covenant of the League of Nations (28 April 1919). At the same time Article 1(2) of the League of Nations Covenant allowed some non-fully sovereign entities, such as dominions and colonies, to join the League in a similar position to States. In contrast, indigenous were still perceived by European powers as uncivilized tribes and groups to be assimilated into dominant societies. For example, Mezes in 1931 described such populations as unfree peoples that needed a 'guardian', like peoples under dictature regimes: S Mezes, 'The Government of Unfree Peoples' (1931) 16(2) Southwest Review 258-264, 260. Also, Åhrén (n 1) 20; J Crawford, 'The Rights of Self-Determination in International Law: Its Development and Future' in P Alston (ed), *Peoples' Rights* (OUP 2001); Hannum (n 12) 52-54; N Lerner, *Group Rights and Discrimination in International*

minorities was evident even in the League of Nations mandate territories, which were perceived as a mere aggregate of populations, without considering their distinct cultural groups[14]. Article 23(b) of the Covenant stated only a generic duty to secure a just treatment for native inhabitants of such territories on a non-discriminatory basis[15]. As found by the arbitral tribunal in the *Cayuga Indians* dispute, indigenous peoples as such were irrelevant in the international law of the time[16]. The non-relevance of indigenous peoples is confirmed by the *Palmas Island* arbitration between

Law (Nijhoff 2003) 10-13: B Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in P Alston (ed), *Peoples' Rights* (OUP 2001) 78; A Becker Lorca, 'Petitioning the International: A 'Pre-history' of Self-determination' (2014) 25(2) European Journal of International Law 497-523.

[14] Ibid (Covenant of the League of Nations), art 22: 'To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant'. Moreover, according to Article 22(6), in remote areas such as South-West Africa and South Pacific Island where the population was sparse, small and remote from civilization, the Covenants requested the mandatory powers only to take into consideration the 'interest' of the indigenous population. Also, International Court of Justice, *South West Africa (Ethiopia v South Africa; Liberia v South Africa*), Second Phase, Judgment [1966] ICJ Rep 6, 35, para 53: 'The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations"; and the recognition of "a sacred trust of civilisation" laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the wellbeing and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights'. Also, Åhrén (n 1) 21. D Myers, 'The Mandate System of the League of Nations' (1921) 96 The Annals of the American Academy of Political and Social Science 74-77; E Haas, 'The Reconciliation of Conflicting Colonial Policy Aims: Acceptance of the League of Nations Mandate System' (1951) 6(4) International Organization 521-536, 522.

[15] The absence of any form of self-determination for indigenous peoples is confirmed by the Commentary to the Covenant presented to the British Parliament in 1919 by the Foreign Office and published in 1920 by the American Journal of International Law: 'Commentary on the League of Nations Covenant' (1920) 14(3) The American Journal of International Law 407-418.

[16] *Cayuga Indians (Great Britain v United States)* (Awards) (1926) 6 RIAA 173, at 179: 'In the first place, the Cayuga Nation has no international status'. Also, Ricardo Pereira, 'The Right to Reproductive Self-Determination of Indigenous Peoples under Human Rights Law' in Sabine Berking and Magdalena Zolkos (eds), *Between Life and Death: Governing Populations in the Era of Human Rights* (Peter Lang 2009) 303, 304; Ricardo Pereira, '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, 452.

the United States and the Netherlands[17]. According to the arbitral award, treaties between States and 'natives' were 'mere facts' irrelevant under international law since they were not concluded with members of the community of Nations[18]. The irrelevance of indigenous peoples was even more manifest in the PCIJ judgement concerning the legal status of Eastern Greenland, where the 'Eskimo' tribes were considered not legally able to occupy such territory[19].

In contrast, in the minority protection clauses of the various peace treaties after the first world war, specific European minorities emerged as communities distinct from the whole populations of States[20]. In 1920, the Commission of Jurists in *Aaland Island* found that, although national groups had no right to secession from an existing State, an extensive 'grant of liberty' in the form of autonomy could be granted to them to preserve their cultural characteristics[21]. A few years later, the PCIJ in its Advisory Opinion

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[17] P Jessup, 'The Palmas Island Arbitration' (1928) 22(4) The American Journal of International Law 735-752, 735-737. Pursuant to the Dutch Government, the island was 'tributary' of native princes' vassals of Netherland since the time of the Dutch East India Company. The Netherlands claimed that Dutch authority was exercised on the island since the conclusion of an agreement with local indigenous populations. Differently, the United States, which received the Philippines from Spain through the 1898 Treaty of Paris, asserted that Spain had legal title on the island based on discovery.

[18] *Island of Palmas (Neth v US), Perm Ct of Arbitration, 2 UN Rep Int'l Arb Awards 829, (1928)*, 858-859: 'The contract between a State and native princes or chiefs of peoples not recognized as members of the community of nations (…) are not, in their international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. (…). If they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account. In substance, it is not an agreement between equals; it is rather a form of internal organization of a colonial territory on the basis of autonomy for the natives'.

[19] *Legal Status of Eastern Greenland (Den v Nor*) [1933] PCIJ Rep Ser A/B, No 53. One of the arguments of Denmark to claim its jurisdiction over the territory was its relationship with the Inuit population living in Eastern Greenland. However, the PCIJ stated that Denmark possessed valid title to the sovereignty over all Greenland arising from its settlement and extensive administrative acts in Greenland. Also, Åhrén (n 1) 23.

[20] For example, the 1923 Treaty of Lausanne, which is still into force, includes various minority protection clauses for the members of the Greek minority living in Turkey and the members of the Turkish minority living in Greece. The aim of the League was to create a coherent legal framework on the protection of minorities. Also, P Leuprecht, 'Minority Rights Revisited' in P Alston (ed), *Peoples' Rights* (OUP 2001) 114, 116. A Cassese, *Human Rights in a Changing World* (Polity Press 1990) 18ff, citing the *Bernheim* case, where a German citizen made a complaint to the Council on the basis of the German-Polish Peace Treaty of 1922 on the protection of minorities in Upper Slesia; Philip M Brown, 'From Sèvres to Lausanne' (1923) 18 Am J Intl L 113.

[21] Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland

on *Minority Schools in Albania* stated the possibility to adopt differentiated treatments for members of minorities in order to guarantee their distinct identity compared to the whole population of a State and to satisfy their particular needs[22]. However, indigenous peoples were not included in any such regime.

2.3 Indigenous individuals under international human rights law

The UN Charter Article 1(3) recognizes a system of individual human rights based on acceptance of State practice as one of the purposes of the

Islands Questions, League of Nations, OJ 5, Special Supp No 3 (1920) 6: 'Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace'. Also, J Barros, *The Aland Islands Question: its Settlement by the League of Nations* (Yale University Press 1968); Crawford (n 2) 110-112; L Hannikainen and F Horn (eds), *Autonomy, and Demilitarization: The Aland Islands in a Changing Europe* (Kluwer Law International 1996); CJ Fromerz, 'Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 156(5) University of Pennsylvania Law Review 1341-1382, 1356. The crisis was resolved in a bilateral agreement between Finland and Sweden, known as the Aaland Island Agreement, where a significant grant of autonomy was guaranteed to the inhabitants of the Aaland islands: Minutes of the Thirteenth Session of the Council of the League of Nations, in 2 League of Nations, OJ 1921, 701-702 (Aaland Island Agreement) (providing the text of the Agreement); A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 27-33; Hannum (n 12) 1990 370-375. Also, Rigo Sureda A, The Evolution of the Right of Self-determination: A Study of the United Nations Practice (Leiden 1973); M Craven, R Parfitt, 'Statehood, Self-Determination and Recognition' in M Evans (ed), *International Law*, 5th Edition (OUP 2018) 177-226; G Pentassuglia, 'Self-Determination, Human Rights, and the Nation-State: Revisiting Group Claims through a Complex Nexus in International Law' (2017) 19(4-5) International Community Law Review 443-484.

[22] *Minority School in Albania*, Advisory Opinion, PCIJ, Ser A/B, No 64 (6 April 1935) 48-51: 'The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties. The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics'; CC Hyde, 'The World Court Interprets Another International Agreement' (1935) 29(3) The American Journal of International Law 479-482; Åhrén (n 1) 21-22; in general, C Brölmann, 'The PCIJ and International Rights of Groups and Individuals' in M Fitzmaurice and CJ Tams (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013) 123-143.

Charter[23]. The codification of such body of human rights had a first fundamental moment in the adoption in 1948 of the Universal Declaration of Human Rights (UDHR) which comprises a list of individual fundamental rights[24]. The second pillar of international human rights law is represented by the International Covenant on Civil and Political Rights (ICCPR) and by the International Covenant on Economic, Social and Cultural Rights (ICESCR)[25]. The two Covenants were adopted in 1966 by the UNGA in the form of international treaties and are based on a system of individual human rights, binding on all States Parties. International human rights law encompasses other international human rights instruments, including the

[23] UN Charter, arts 1(2), 2(4), 2(7) 13(1) and 55; also, A Cassese, *International Law* (OUP 2005) 331-336. The Charter does not provide a set of rights and simply lays down a general program of action. While Article 2(7) reaffirms the principle of domestic jurisdiction of States, Article 13 merely refers to UNGA assistance in the realization of human rights. Finally, Article 55 confirms that the UN promotes the universal respect of human rights without adding much on the content of such rights. It is evident how minority rights are not part of such system. On the one hand, minority protection has been abused to justify aggressions to protect minorities in neighbouring States; on the other hand, the protection of minority or group rights constituted a potential threat to the territorial integrity of States. Protecting minorities through individuals' rights represented the solution for such criticalities. Åhrén (n 1) 26-28 citing Kunz's observation that 'At the end of the First World War international protection of minorities was the great fashion (…) today the well-dressed international lawyer wears human rights': J Kunz, 'The Present Status of the International Law for the Protection of Minorities' (1954) 48(2) American Journal of International Law 282; also, Hannum (n 12) 57; Crawford (n 13) 14, 15; P Leuprecht, 'Der Europarat und das Recht der Nationalen Minderheiten' (1961) 4 Europa Ethnica 8e année 146.

[24] UNGA Res 217 (III) 'Universal Declaration of Human Rights' (10 December 1948). The Declaration represents an 'authoritative guide' for the interpretation of the UN Charter and the first pillar of a three-panel 'international bill of rights': H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 Georgia Journal of International and Comparative Law 287-397, 289; also, Hersch Lauterpacht: 'An International Bill of Rights of Man' (1945) 39(4) The American Journal of International Law 847-850.

[25] International Covenant on Civil and Political Rights (1966) (ICCPR), UNGA Res 2200A (XXI) 999 UNTS 171, reprinted in ILM 368 (1967) (16 December 1966) (entered into force in 1976) and International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), UNGA Res 2200A (XXI) 999 UNTS 171, reprinted in 6 ILM 368 (1967) (16 December 1966) (entered into force in 1976). The UNGA approved also an Optional Protocol to the latter Covenant on the processing of communications from individuals and a second Protocol on the abolition of the death penalty was adopted in 1990; also, L Henkin, 'The United Nations and Human Rights' (1965) 19(3) International Organization 504-517, 509; JP Humphery, 'The Implementation of International Human Rights Law' (1979) 24 New York Law School Review 31-61; A Brundner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework (1985) 35(3) The University of Toronto Law Journal, 219-254; P Hassan, 'International Covenants on Human Rights: An Approach to Interpretation' (1969) 19(1) Buffalo Law Review 35-50; JV Skelton JR, 'The United States Approach to Ratification of the International Covenants on Human Rights' (1979) 1(2) Houston Journal of International Law 103-125.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), based on the principles of equality and non-discrimination[26]. At the regional level, the Council of Europe adopted the European Framework Convention for the Protection of National Minorities (EFCPNM)[27]. Finally, a further relevant, albeit non-binding, instrument is represented by the 1992 'Declaration on the Rights of Persons belonging to Ethnic or National, Linguistic and Religious Minorities', adopted by the UNGA with Resolution 47/135[28].

2.3.1 Indigenous individuals

According to the rights to equality and non-discrimination recognized by international human rights law, indigenous individuals, like other human-beings, enjoy the rights that may be claimed by everyone[29]. Those rights are first set out in Articles 1 and 2 of the UDHR. While Article 1 recognizes

[26] International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (1965), reprinted in 5 ILM 352 (1966) (entered into force 4 January 1969).
[27] The European Framework Convention for the Protection of National Minorities (1 February 1995) ETS 157 (entered into force 2 January 1998); Marc Weller (ed), *The Rights of Minorities—A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005).
[28] UNGA Res 47/135 'United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (18 December 1992), arts 1(2), 2(1) and 3(1); P Thornberry, 'The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observation, and an Update' in A Phillips and A Rosas (eds), *Universal Minority Rights* (John Benjamins Publishing Company 1995) 13; P Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991); Y Jabareen, 'Toward Participatory Equality: Protecting Minority Rights under International Law' (2008) 41(3) Israel Law Review 635-676.
[29] For example, Article 17 of the UDHR guarantees the right to individual property 'as well as in association with others' which cannot be arbitrarily limited. This statement reaffirms the right to property as an individual human right and that it may be exercised with other individuals. According to the independent expert on the right to property, such Declaration's standards became rules of customary international law: 'The Right of Everyone to Own Property Alone as well as in Association with Others' (Luis Valencia Rodriguez Independent Expert) UN Doc E/CN4/1993/15 (1992) 37. In contrast, Article 22 of the UDHR recognizes to every individual the economic, social and cultural rights 'indispensable for his dignity' and his personality; in general, Hannum (n 13) 347; JM Diller, *Securing Dignity and Freedom through Human Rights Article 22 of the Universal Declaration of Human Rights Series: The Universal Declaration of Human Rights* (Nijhoff 2011); Stefan Oeter, 'The Protection of Indigenous Peoples in International Law Revisited– From Non-Discrimination to Self-Determination' in Holger Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity (2 vols) Liber Amicorum Rüdiger Wolfrum,* (Nijhoff 2012) 477-502; R Wolfrum, 'The Protection of Indigenous Peoples in International Law' (1999) 59 ZaöRV 369. See Chapter 1.

that all human beings are equal in dignity and rights, Article 2 states that the rights enshrined in the Declaration must be applied to everyone 'without distinction of any kind'. Article 2 also specifies that no distinction shall be made on the basis of the status of territory to which the persons belong, including in cases of trust and non-self-governing territories and any other limitations of sovereignty.

Such principles have been endorsed by the successive 1966 Covenants. Precisely, Article 2(1) of the ICCPR requires States Parties to respect and ensure to all individuals within their territory the rights of the Covenant without distinction of any kind[30]. Similarly, ICESCR Article 2(2) declares that States Parties must guarantee that the rights enunciated in the Covenant are exercised without discriminations of any kind[31]. The Human Rights Committee (HRC) observed that the obligation under ICCPR Article 2(1) is both positive and negative in nature[32]. Different treatment of individuals is accepted by the Committee unless the criteria for such differentiation are reasonable and objective and the aim is to achieve a legitimate purpose under the Covenant[33].

The HRC applied the rights to equality and non-discrimination under the ICCPR and ICESCR to indigenous individuals on various occasions. In General Comment No 27, the HRC endorsed the adoption of positive discriminations to guarantee specifically to indigenous individuals the right to equality[34]. The need to avoid the discriminations experienced by

[30] Such distinctions include 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; also, ICCPR, art 3 on the equality between men and women.
[31] The provision then includes discriminations 'to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
[32] HRC, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant UN Doc CCPR/C/21/Rev1/Add13 (26 May 2004), para 6; also, *Jacobs v Belgium*, Comm No 943/2000, views adopted on 7 July 2004; Åhrén (n 1) 152. Furthermore, ICCPR Article 26 recognizes the principles of equality before the law and equal protection without any discrimination.
[33] HRC, General Comment No 18: Non-Discrimination UN Doc HRI/gen1/Rev (10 November 1989) 1, 13; also, *Susser v Czech Republic*, Comm No 1488/2006, views adopted 25 March 2008; *X v Colombia*, Comm No 1361/2005, views adopted on 30 March 2007.
[34] HRC, General Comment No 27: Freedom of Movement (Article 12) UN Doc CCPR/C/21/Rev1/Add9 (2 November 1999), para 16: 'The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and

indigenous individuals has been stated by the HRC in various concluding observations on States[35]. The same approach has been adopted by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No 20 where the Committee mentioned formal and substantive discriminations of groups of individuals, including indigenous[36].

The right to equality has been recognized in the successive ICERD Article 1(1), which elaborates a definition of racial discrimination, as any 'distinction, exclusion, restriction or preference' based on race, colour, descent or national or and ethnic origin that may limit the enjoyment and exercise of human rights. Article 1(4) of the Convention permits the adoption of special legal measures to secure adequate advancement of certain racial or ethnic groups or individuals to allow their equal enjoyment in the exercise of human rights and fundamental freedoms[37].

In the light of such principles, the CERD in General Recommendation No 23, calls upon States Parties to recognize and respect indigenous distinct cultures and way of life and to ensure that indigenous individuals are free from any discrimination, including in particular those based on indigenous origin and identity, and that they have equal rights to participate in public life[38]. In its concluding observations, the Committee found that indigenous

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the requirements of proportionality. (…) The conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities'; also, General Comment No 23: Article 12 (Freedom of Movement) UN Doc CCPR/C/21/Rev.1/Add.9 (15 August 1997), para 7.

[35] HRC, Concluding Observations: Panama, UN Doc CCPR/C/PAN/CO/3 (17 April 2008), para 21; also, Concluding Observations: Paraguay UN Doc CCPR/C/PRY/CO/3 (4 January 2008), para 9; Canada UN Doc CCPR/C/CAN/CO/5 (20 April 2006), paras 6, 22, where the HRC expressed concerns that Canadian special legislation over indigenous peoples exempted such communities from the State's general human rights law.

[36] CESCR, General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights, art 2, para 2 UN Doc E/C.12/CG/20 (2 July 2009), para 18.

[37] Article 5 of the Convention contains a list of individual rights to which all persons are entitled without distinction or discrimination. A relevant example of special regimes according to Article 1(4) to guarantee such rights is represented by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); see section 2.5 and Chapter 5.

[38] CERD, General Recommendation No 23: Indigenous Peoples, UN Doc CERD/C/51/misc13/Rev4 (18 August 1997), para 4(d) affirms that States shall ensure that 'no decisions directly relating to their rights and interests are taken without their informed consent'; Anaya (n 12) 130-131.

individuals are discriminated against, and deprived of, their human rights in different areas of the world and urged States to guarantee their cultural integrity[39].

2.3.2 Indigenous individuals as members of minority groups

International law recognizes some rights specifically to individuals belonging to certain communities, such as minorities. Despite the lack of a precise definition under international law, minorities may be regarded as groups of individuals that share some ethnic, religious, or linguistic characteristics different from those of rest of the population of a State[40]. The recognition of minority rights is relevant for indigenous peoples for two main reasons. First, the two groups share numerous characteristics and indigenous individuals may be part of minorities. Furthermore, the recognition of the individual rights of members of minorities brought to a collective dimension to individual rights that paved the way the development of indigenous group rights[41].

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[39] ibid 4; CERD, Concluding Observations: Uruguay, CERD/C/304Add 78 (12 April 2001), para 13 and Concluding Observations: Fiji, CERD/C/62/CO/3 (2 June 2003), para 15. Also, General Comment No 20 (n 36), paras 8-9, 12, 36, 39.

[40] The Permanent Court of Justice in the *Greco-Bulgarian Communities Advisory Opinion* (1930, referring however to the interpretation of the term in Article 6(2) of the 1919 Treaty of Neuilly-sur-Seine, defines a minority community as 'a group of persons living in a given country or locality having a race, religion, language and traditions of their own, and united by this identity (…) in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing their instruction and upbringing of their children in accordance with the spirit and tradition of their race and mutually assisting one other': *Greco-Bulgarian Communities Advisory Opinion*, PCIJ Rep Series B, No 17 (31 July 1930) 33-34. In 1992, the UN Special Rapporteur for Minorities defined minorities as: 'A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being national of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language'; UN Commission on Human Rights, Special Rapporteur Francesco Capotorti of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', UN Doc E/CN4/Sub2/384/Rev1 (1979) 568; B Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart 2016) 38-39. See Chapter 1.

[41] Åhrén (n 1) 87-90; Crawford (n 13) 23-24, 65; AF Vrdoljak, 'Self-Determination and Cultural Rights' in F Francioni and M Scheinin (eds), *Cultural Human Rights* (Nijhoff 2008) 64-69; R Lapidoth 'Autonomy: Potential and Limitations' (1994) 1(4) *International Journal on Group Rights*, 269–290, at 273ff. It relevant to underline that in present international law minorities are not, in principle, conceived as 'peoples' with collective rights, such as

Article 27 of the ICCPR states that 'persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture'[42]. In its individual communications, the HRC found that, in case an indigenous group is a minority, the group falls within the terms of Article 27. Initially, in *Lovelace*, the HRC observed that indigenous individuals who are part of a reserve, kept ties with their communities and wish to maintain such ties, must be considered belonging to a minority under the terms of Article 27[43]. In *Kitok*[44]*,* in *Lubicon Lake*

for example the peoples of non-self-governing territories. Eg Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM (1992) 1488, *Opinion No 2*, para 4(i): 'the Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups under international law'. See Chapters 4 and 5.

[42] Åhrén (n 1) 152. During the drafting of such provision, Australia denied that it could be applied to indigenous communities since they were 'too primitive' to be considered minorities: Australian Delegate to the Third Committee of the General Assembly: UN Doc A/C3/SR 1104 (14 November 1961), para 26. The recognition of cultural diversity is provided also by other international legal instruments such as the 1978 UNESCO Declaration on Race and Racial Prejudice, the 1966 UNESCO Declaration of the Principles of International Cooperation, the 1960 UNESCO Convention against Discrimination in Education (14 December 1960) (entered into force 22 May 1962), and the UN Declaration against Intolerance and Discrimination based on Religion or Belief; in general, H Ketley, 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples' (2001) 8(4) International Journal on Minority and Group Rights 331-368.

[43] *Lovelace v Canada*, HRC Communication No 24/1977 (30 July 1981), para 14: 'Persons who are born and brought up on a reserve who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant'.

[44] *Ivan Kitok v Sweden,* communication No 197/1985 (27 July 1988), paras 9.1-9.8.

Band[45] and, more recently, in *Tiina Sanila-Aikio*[46] the HRC reiterated that ICCPR Article 27 applies to indigenous individuals who are part of a minority group, despite indigenous individuals are not mentioned in the provision.

These principles were confirmed by the HRC in the 1994 General Comment No 23. The Committee observed that ICCPR Article 27 entails a right belonging to individuals, as opposed to self-determination under Article 1 that belongs to peoples[47]. The Committee then affirmed that cultures manifest in many forms and that the rights protected by the provision to enjoy a particular culture may consist in a way of life which is closely associated with a territory and its resources like for indigenous persons[48]. Indeed, the right may include traditional activities such as fishing or hunting and the right to live in reserves[49]. The HRC then stated that the enjoyment of such rights, especially in case of indigenous, may require the adoption of positive measures by States that would ensure the effective

[45] *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (16 March 1990) HRC, No 167/1984, Comm No 167/1984, CCPR/D/38/D/167/1984, para 32.2. Also, *EP v Colombia*, HRC Communication No 318/1988 (25 July 1990), para 8.2; *RL and others v Canada*, HRC Communication No 358/1989 (5 November 1991), para 6.2. The same application of ICCPR Article 27 has been confirmed by various international sources: CESCR, General Comment No 17: The 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, Para. 1 (c) of the Covenant) UN Doc E/C.12/GC/17 (12 January 2006); CESCR, General Comment No 21: The Right of Everyone to take Part in Cultural Life (Article15(1)(a) UN Doc E/C.12/GC/21 (21 December 2009); ILO Convention No 169, Articles 2.2(b) and 5(a); CERD, General Recommendation No 23 (n 38); UN Committee on the Rights of the Child, General Comment No 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child] UN Doc CRC/C/GC/11 (12 February 2009), para 16; *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, Costs, Judgement, Inter-Am Ct HR (Ser C) No 172 (28 November 2007), paras 94-95; African Commission on Human and Peoples' Rights decision in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya,* ACHPR Communication No 276/2003 [2009] AHRLR 75 (the '*Endorois'* case); Åhrén (n 1) 33. See Chapters 3 and 5.

[46] *Tiina Sanila-Aikio v Finland,* Comm No 2668/2015 (1 February 2019), para 8.8; *Klemetti Käkkäläjärvi et al. v Finland*, CCPR/C/124/D/2950/2017 (1 February 2019), para 8.7; *Klemetti Käkkäläjärvi et al. v Finland*, CCPR/C/124/D/2950/2017 (18 December 2019), para 9.8.

[47] HRC, General Comment No 23: The Rights of Minorities (Art 27) UN Doc CCPR/C/21/Rev1/Add5 (8 April 1994), paras 3.1-3.3

[48] Ibid para 7; *Kitok v Sweden* (n 44) 6.2. On the nature of Article 27, F Capotorti, 'Are Minorities Entitled to Collective International Rights?' (1990) 20 Israel Yearbook on Human Rights 351, 353-354; S Pritchard and C Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3(4) Australian Indigenous Law Reporter 473-509.

[49] HRC, General Comment No 23 (n 47), para 7.

participation of members of such communities in the decision-making processes affecting them[50]. In line with General Comment No 23, the HRC confirmed the applicability of Article ICCPR 27 to indigenous members of a minority group. The HRC stated that measures whose impact amounts to a denial of their culture are incompatible with Article 27 in numerous individual communications including in *Ilmari Länsman*[51] and in *Jouni Länsman*[52]*,* where the HRC found that reindeer herding is an essential component of Saami culture*,* in *Apirana Mahuika*[53]*,* where the Committee stated that the use and control of fisheries is an essential element of Maori culture, and in *Poma Poma*[54], where the HRC recognized that raising llamas

[50] ibid para 3.2. Also, Committee's Views on case 511/1992, *I. Länsman et al. v Finland*, (CCPR/C/52/D/511/1992) (26 October 1994), paras 9.6 and 9.8; Concluding Observations: Finland, UN Doc CCPR/C/79/Add.91 (8 April 1998), para 19; New Zealand, UN Doc CCPR/C/75/NZL (7 August 2002), para 4; Guatemala, UN Doc CCPR/CO/72/GTM (27 August 2001), para 29; the Philippines, UN Doc CCPR/CO/79/PHIL (1 December 2003); Åhrén (n 1) 92.

[51] ibid (*I. Länsman et al v Finland*), paras 9.4-9.5, 9.8.

[52] *Jouni E Länsman et al v Finland* HRC No 671/1995, CCPR/C/58/D/617/1995 (22 November 1996), para 10.2: 'It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture; that some of the authors practice other economic activities in order to gain supplementary income does not change this conclusion. The Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community'; and para 10.3: 'Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27'.

[53] *Apirana Mahuika et al v New Zealand,* Comm. No 547/1993 (27 October 2000) UN Doc CCPR/C/70/D/54/1993*,* paras 9.3, 9.9. In this case, at paras 9.2 and 9.4, the HRC underlined that Article 1 may be relevant in interpreting Article 27. Moreover, at para 9.4, the HRC found that article 27 does not only protect traditional means of livelihood but allows also for adaptation of those means to the modern way of life and ensuing technology. In international treaty law, for example, the Schedule of the 1946 International Convention for the Regulation of Whaling, art 25 (b) recognizes the peculiarities of indigenous or aboriginal subsistence whaling: International Convention for the Regulation of Whaling (ICRW), 62 Stat 1716, 161 UNTS 72 (2 December 1946) (entered into force 10 November 1948), art 25 (b). Similarly, the 1931 International Convention for Regulation of Whaling, at Article 3 stated that the Convention does not apply to aborigines dwelling that pursue certain traditional fishing techniques: Convention for the Regulation of Whaling, opened for signature 24 September 1931, 155 LNTS 349 (entered into force 16 January 1935), art 3. The same principles are applied in further international treaties concerning the exploitation of certain migratory living natural resources. See Chapter 3.

[54] *Angela Poma Poma v Peru,* Comm No 1475/2006 (27 March 2009) UN Doc CCPR/C/95/D/1457/2006, paras 7.3-7.4. According to the Committee, the admissibility of such measures depends on whether the members of the community had the opportunity to participate in the decision-making process and whether they will continue to benefit from their traditional economy. Such participation must be effective and not limited to

as a form of subsistence constitutes an essential part of indigenous culture protected under Article 27.

Such principles were also affirmed in the 1992 Declaration on the rights of persons belonging to national, or ethnic, religious and linguistic minorities which affirms that States shall protect the existence and identity of ethnic, cultural, religious and linguistic minorities in their territories, adopting the appropriate measures[55]. The Declaration states that members of minorities may exercise their rights individually or with other members of their group without any discrimination[56]. According to the Commentary to the Declaration, individuals, part of indigenous peoples, are fully entitled to claim the rights contained in international legal instruments on minorities[57].

At the regional level, the European Framework Convention for the Protection of National Minorities (EFCPNM) provides a further contribution

consultations but including the free, prior and informed consent of the community's members. Moreover, such measures must respect the principle of proportionality and must not endanger the survival of the community and of its members. Åhrén (n 1) 92 notes that the fact that States have accepted the HRC understanding of the collective dimension of Article 27 has been interpreted as if the provision is today part of customary international law: S Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 15. See Chapters 3 and 5.

[55] UNGA Res 47/135 (n 28), art 1. The Convention explicitly refers to 'persons belonging to minorities': arts 1, 2, 3.2, 4, 5, 6 and 8; also, Åhrén (n 1) 89, citing Lerner (n 13) 23-24. On the notion of group identity, G Pentassuglia, 'Group Identities and Human Rights: How Do We Square the Circle in International Law?' in A M Bíró (ed), *Populism, memory, and minority rights: central and eastern European issues in global perspective* (Martinus Nijhoff Publishers 2018) 283-312.

[56] ibid art 3.

[57] Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities by Asbjørn Eide Chairperson of the Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/AC.5/2001/2, para 17. It is important to underline that the term 'peoples' in the Commentary simply refers to indigenous individual members of a minority group. Indeed, at para 15 the Commentary states that: 'The rights of persons belonging to minorities differ from the rights of peoples to self-determination. The rights of persons belonging to minorities are individual rights, even if they in most cases can only be enjoyed in community with others. The rights of peoples, on the other hand, are collective rights. While the right of peoples to self-determination is well established under international law, in particular by common Article 1 to the two International Covenants on Human Rights, it does not apply to persons belonging to minorities. This does not exclude that persons belonging to an ethnic or national group may in some contexts legitimately make claims based on minority rights and, in another context, when acting as a group, can make claims based on the right of a people to self-determination'.

on the recognition of rights of indigenous members of minority groups. Article 3(2) of the EFCPNM affirms that the rights enshrined in its provisions may be exercised by individuals belonging to minorities, individually or in community with other members of the group[58]. Article 5 declares the right of minority members to maintain and develop their cultural rights and to be protected by any form of assimilation[59]. Moreover, Article 15 of the EFCPNM affirms that States shall guarantee the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs[60]. The Advisory Committee of the Framework Convention stated that persons constituting an indigenous people are not excluded by the provisions of the EFCPNM[61]. Upon other occasions, the Advisory Committee has underlined the need to protect different aspects of

[58] UN Declaration on the Rights of Persons Belonging to Minorities (n 28), art 3(2); Explanatory Report annexed to the Framework Convention, European Treaty Series - No 157, Strasbourg, 1 February 1995 13, 31, 37. Nevertheless, the OSCE Charter for European Security, the Parliamentary Assembly and the UN Working Group on Minorities (UNWGM) suggested the need to implement minority rights recognizing a separate personality to the group. The importance to recognize a collective dimension of such rights has been stressed also by the Council of Europe Parliamentary Assembly, recognizing the autonomous function of the groups for the implementation of minority rights: Recommendation 1201 of the Council of Europe's Parliamentary Assembly (1993), art 11. The same approach has been stated by the UN Working Group on Minorities (UNWGM): UN Doc E/CN4/Sub2/AC5/2005/2 14, 20. However, neither of the two bodies accepted a notion of group rights.

[59] J Ringelheim, 'Minority Rights in a Time of Multiculturalism—The Evolving Scope of the Framework Convention on the Protection of National Minorities' (2010) 10(1) Human Rights Law Review 99–128; F Steketee, 'The Framework Convention: A Piece of Art or a Tool for Action?' (2001) 8 International Journal of Minority and Group Rights 1-15. Also, P Roter, 'Commentary of Article 5 of the Framework Convention for the Protection of National Minorities' in R Hofmann, TH Malloy and D Rein (eds), *The Framework Convention for the Protection of National Minorities: A Commentary* (Brill:Nijhoff 2018).

[60] TH Malloy, 'Commentary of Article 15 of the Framework Convention for the Protection of National Minorities' in R Hofmann, TH Malloy and D Rein (eds), *The Framework Convention for the Protection of National Minorities: A Commentary* (Brill 2018) 379.

[61] Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Sweden, ACFC/INF/op/i(2003)006 (2003), para 18: 'The Advisory Committee strongly welcomes the fact that both the Swedish Government and the Saami Parliament have taken the view that the recognition of a group of persons as constituting an indigenous people does not exclude persons belonging to that group from benefiting from the protection afforded by the Framework Convention and that Saami are therefore covered by this treaty'; also para 30; Second Opinion on Sweden ACFC/op/ii(2007)006 (2007), para 68; Opinion on Finland, ACFC/INF/OP/I(2001)002 (2000), para 22; Second Opinion on Finland, ACFC/OP/II(2006)003 (2006), para 49; Opinion on Russia, ACFC/INF/OP/I(2003)005 (2002), para 49; Second Opinion on the Russian Federation, ACF/op/ii(2006)004 (2006), paras 96-106. Also, Saul (n 40) 202-203; M Barelli, 'The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime' (2010) 32 Human Rights Quarterly 951, 967.

indigenous cultures such as their special relationship with lands, language, religion and traditional practices[62]. The Advisory Committee found that the risk of exclusion from the participation in socio and economic life is more evident for indigenous members than for other minorities[63]. For such reasons, the Committee in different decisions underlined the need to adopt positive special measure for the protection of indigenous individuals[64].

2.4 Indigenous peoples as a category of 'peoples'

The notion of 'peoples' in present international law has different meanings. Indeed, the term 'people' indicates both the whole population of States and distinct groups within the States' population recognized as a 'people' by international law. In the latter case, the term encompasses colonial peoples and peoples subject to 'alien domination, subjugation or exploitation', on the one hand, and other non-independent peoples, on the other. Today, the latter category includes indigenous peoples, as a specific type of non-independent 'people'. A minority as such, however, is different from a 'people'.

The different connotations that the term 'people' may have in international law are relevant due to the different rights that such peoples may enjoy under present international law. As declared by the CERD in its General Recommendation No 21, while 'all peoples' may enjoy a right to self-determination as stated by common Article 1(1) of the 1966 international Covenants, only in certain cases self-determination includes a

[62] Council of Europe Advisory Committee on the Framework Convention on the Protection of National Minorities, Thematic Commentary No 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention, ACFC/44DOC(2012)001 rev (24 May 2012) 22-23. The Advisory Committee, however, does not mention natural resources.

[63] Council of Europe Advisory Committee on the Framework Convention on the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/31doc(2008)001 (27 February 2008), paras 18-19.

[64] ibid para 14; Advisory Committee on the Framework Convention on the Protection of National Minorities, Third Opinion on the Russian Federation, Adopted on 24 November 2011, GVT/com/iii(2012)004 (25 July 2012), paras 21-23.

right to independence[65]. In such context, international law only recently abandoned integrationist theories and recognized indigenous as a specific category of 'peoples'.

2.4.1 Peoples as the population of the whole of a State

The term 'peoples' is adopted in different provisions of the UN Charter. The Preamble of the Charter begins with the term 'We the Peoples of the United Nations'. Similarly, Article 1(2) of the UN Charter indicates among the purposes of the UN the development of friendly relations among nations based on the principles of self-determination of 'peoples', which is reiterated at Article 55[66].

As used in the Charter, however, the term 'peoples' refers to States[67]. The Preamble itself concludes with the postulation that 'our respective

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[65] CERD, General Recommendation No 21: Right to Self–Determination, UN Doc CERD/48/ Misc.7/Rev.3 (8 March 1996), para 4: 'In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. (…) The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation'. See Chapter 4.

[66] The Charter uses the term 'nations' since four original signatories of the Charter were still not fully independent States. Such countries were Byelorussia, India, Philippines and Ukraine. A similar connotation of peoples as the whole population of States is the one of the ASEAN Charter whose Preamble states at its Preamble 'We, the Peoples of the Member States of the Association of Southeast Asian Nations (ASEAN) represented by the Heads of State or Government of (…)': Association of Southeast Asian Nations (ASEAN), Charter of the Association of Southeast Asian Nations (20 November 2007) (entered into force 15 December 2008), Preamble. On self-determination, in general, C Tomuschat (ed), *Modem Law of Self-determination* (Dordrecht 1993); H Hannum, 'Rethinking Self-determination' (1993) 34 VJIL 1; M Koskenniemi, 'National Self-determination Today: Problems of Theory and Practice' (1994) ICLQ 43, 241; J Salo, 'Self-determination: An Overview of History and Present State with Emphasis on the CSCE Process' (1991) 2 Finnish YbIL 268; R McCorguodale, 'Self-determination: A Human Rights Approach' (1994) 43 ICLQ 857; J Fouques Duparc, *La Protection des Minorites de Race, de Langue el de Religion* (Gale, Making of Modern Law, 1922); P Thornberry, 'Is There a Phoenix in the Ashes? - International Law and Minority Rights' (1980) 15(3) Texas International Law Journal 421-440; R Russell, *History of the United Nations: Commentary and Documents* (3rd and revised edn, Brookings Institution 1959) 30 (Article 1).

[67] R Russell and J Muther, *A History of the United Nations Charter* (Brookings Institution 1958) 45, 62; Cassese (n 20) 39-43; Crawford (n 2) 112-114; P Alston, 'People's Rights: Their Rise and Fall in P Alston (ed), *Peoples' Rights* (OUP 2001) 260-261. Also, A Rigo

governments', confirming that 'peoples' refers to governments which represent States and their whole populations. Moreover, the purposes of the Charter include the maintenance of peace through the respect of sovereign equality among States[68]. Such interpretation of the term 'peoples' in the UN Charter as synonym of States is confirmed by the *travaux préparatoires*, where many States were sceptical about the introduction of self-determination 'of peoples' in the Charter[69]. Hence, the 'peoples' represent the whole population of States and do not refer to groups or minorities. Populations are merely one of the components of States but do not constitute juridical entities *per se* entitled to rights under international law[70].

2.4.2 Peoples as distinct subjects from the population of a State as a whole

In some precise circumstances, international law recognizes that the term 'peoples' may refer to groups distinct from the whole population of a State. Indeed, as found by the Supreme Court of Canada in *re secession of Québec*, the notion of 'people' may even include only a portion of the whole population of a State[71]. Such peoples enjoy the right of 'all peoples' to self-

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Sureda, *The Evolution of the Right of Self-determination: A Study of the United Nations Practice* (Leiden 1973).

[68] H Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47(3) The International and Comparative Law Quarterly 537-572, 539-540. Among scholars, Kelsen notes that Article 1(2) refers to relations between nations and hence between States, the only subjects that may be entitled to rights under international law: H Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (FA Praeger 1950) 53. Moreover, the 1948 UDHR does not mention self-determination among individual human rights, suggesting that at the time it was conceived as a State-to-State principle: ibid (Alston) 261.

[69] ibid (Alston) 260-261; Åhrén (n 1) 28-29; Cassese (n 20) 38-39. While many States from Asia and Africa supported the inclusion of such principle in the UN Charter, European Countries were more sceptical: UN GAOR, 6th Session, Third Committee, 366th meeting 29 and 397th meeting 5-6; UN Doc E/cn4/Sub2/L.625 77, 80.

[70] Crawford (n 13) 52-54. The only exception is provided by Article 73 the UN Charter which mentions the term 'peoples' to refer to the inhabitants of territories who have not yet attained a full form of self-government.

[71] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 SCR 217, para 124: 'It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and

determination stated in common Article 1(1) of the 1966 international Covenants and, by virtue of that right, they determine freely their economic, social and cultural development.

However, the content of the right to self-determination varies considering different categories of such 'peoples'. On the one hand, colonial peoples, including the inhabitants of non-self-governing territories and UN trust territories and of all other territories that have not yet attained independence, and other recognized 'peoples subject to alien domination, subjugation and exploitation', enjoy a right to independence as a function of their right to self-determination. On the other hand, under international law other non-independent peoples, such as indigenous peoples, enjoy a right to internal, but not to external, self-determination. The human rights bodies and then the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[72] and the American Declaration on the Rights of Indigenous Peoples (ADRIP)[73] have confirmed that in present international law indigenous peoples are considered 'peoples' in this latter sense[74].

2.4.2.1 Non-independent peoples with a right to independence

2.4.2.1.1 Colonial peoples

According to international law, colonial peoples have a right to self-determination, in the form of a right to independence. The notion of 'colonial

"state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a State's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose'. Also, paras 125 and 139 where the Court states that it is not necessary to investigate on the consequences of a unilateral secession on indigenous peoples living in Quebec, stating merely that indigenous interests would be, in principle, taken into account through negotiations; also, HRC, *Marie-Hélèn Gillot et al v France,* (Comm No 932/2000), paras 13.16ff.

[72] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), General Assembly, A/RES/61/295 (13 September 2007).

[73] American Declaration on the Rights of Indigenous Peoples: AG/RES.2888 (XLVI-O/16): (Adopted at the thirds plenary session, held on 15 June 2016).

[74] See section 2.5 and Chapter 5.

peoples' is referred in the UN Charter in two different situations, namely non-self-governing territories under Article 73, that mentions expressly the notion of 'peoples'[75], and trust territories under Article 76 which refers to a right to independence for the 'inhabitants' of the latter territories[76].

In 1960, the UNGA approved, with Resolution 1514 (XV), the 'Declaration on the Granting of Independence to Colonial Territories' which relates to colonial peoples in the sense of the whole population of colonial territories, including the inhabitants of trust and non-self-governing territories and all other territories that have not yet attained independence[77]. The UNGA Declaration states that 'all peoples' have the

[75] The provision does not refer to independence but mention the notion of 'self-government': 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government (…)'. Also, C Eagleton, 'Self-Determination in the United Nations' (1953) 47(1) American Journal of International Law 88-93; B Shiva Rao, 'The United Nations and Non-self-governing Territories' (1950) 6(3) India Quarterly 227-234.

[76] The system has as a main objective to promote, *inter alia*, the progressive development of the inhabitants of such territories towards self-government or independence. W Bain, 'The Political Theory of Trusteeship and the Twilight of International Equality' (2003) 17(1) International Relations 59–77; E Haas, 'The Attempt to Terminate Colonialism: Acceptance of the United Nations Trusteeship System' (1953) 7(1) International Organization 1-21; J Kunz, 'Chapter XI of the United Nations Charter in Action' (1954) 48(1) American Journal of International Law 103-110; RE Gordon, 'Some Legal Problems with Trusteeship' (1995) 28(2) Cornell International Law Journal 301-347; F B Sayre, 'Legal Problems Arising from the United Nations Trusteeship System' (1948) 42(2) American Journal of International Law 263-298. Among scholars, Schrijver affirms that Articles 73 and 76 represent the legal roots of the successive affirmation of permanent sovereignty over natural resources: N Schrijver, 'Self-determination of Peoples and Sovereignty over natural Wealth and Resources' in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013) 95-102, at 96.

[76] See Chapter 4.

[77] UNGA Res 1514 (XV) 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960), para 1; the Resolution 1514 (XV) was adopted by 89 votes with 9 abstentions and no State contested the existence of the right of peoples to self-determination. Also, M Bedjaoui, *Terra nullius, 'droits' historiques et autodétérmination* (Sijthoff 1975); M Bedjaoui, 'Non-alignement et droit international' (1976) 151 Recueil des Cours 406; B Boutros-Ghali, *The Arab League 1945-1970* (Revue Egyptienne de Droit International, vol 25, 1969) 67; CJR Dugard, 'Organisation of African Unity and Colonisation' (1967) 16 International and Comparative Law Quarterly 157-190; E McWhinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law* (Martinus Nijhoff 2007), particularly chs 1-4; E McWhinney, *United Nations Law Making: Cultural and Ideological Relativism and International Law Making for an Era of Transition* (Paris, UNESCO; New York, Holmes and Meier, 1984) particularly ch 9 [French version: Les Nations Unies et la formation du Droit, Paris, UNESCO, Pedone 1986]; E McWhinney, *The World Court and the Contemporary International Law-Making Process* (Sithoff & Noordhoff 1979), particularly chs 2 and 4; M Mushkat, 'Process of Decolonisation: International Legal Aspects' (1972-1973) 2 University of Baltimore Law Review 16-34. On

right to self-determination, which includes the right to freely determine their political status and to freely pursue their economic, social and cultural development[78]. According to the Declaration, States must transfer all powers to peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire to guarantee their complete independence[79].

The principles stated in UNGA Resolution 1514 (XV) have been confirmed by the 1970 'Declaration on Friendly Relations among States', adopted by the UNGA Resolution 2625 (XXV)[80]. The Resolution declares that alien subjugation, domination and exploitation constitute a denial of fundamental rights, adding that such situations also represent a violation of self-determination[81]. Echoing the content of common Article 1(2) of ICCPR

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the international jurisprudence applicable to the principle, ICJ, *South West Africa (Ethiopia v South Africa; Liberia v South Africa*) (n 14); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion [1971] ICJ Rep 16; *Western Sahara,* Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975) (16 October 1975); *Frontier Dispute (Burkina Faso v Mali*), Judgment, [1986] ICJ Rep 554; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment [1986] ICJ Rep 14. See Chapters 1 and 4.

[78] ibid (UNGA Res 1514 (XV)), para 2; Macklem (n 12) 99-101; R Burke, *Decolonization and the Evolution of International Human Rights* (University of Pennsylvania Press 2010) 37; R Emerson, *Colonialism, Political Development and the UN* (1965) 19 International Organization 484-503, 486; AWB Simpson, *Human Rights and the End of Empire* (OUP 2001) 300-322. During the same year, the UNGA approved Resolution 1541 (XV) which provided a definition of non-self-governing territories as colonial territories whose peoples had not yet obtained a full measure of self-government that should be reached respecting the free wishes of the peoples in a free and fair referendum: UNGA Res 1541 (XV) (15 December 1960), Principle I. See Chapter 4.

[79] ibid para 5; at the same time, para 6, with reference to States, declares that: 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'*;* ibid (UNGA Res 1541 (XV)), Principle VI, which includes the emergence as a sovereign independent State as a mean to ensure to non-self-governing territories the right to self-government; UNGA Res 2105 (XX) 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (20 December 1965), Preamble. Also, Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019).

[80] UNGA Res 2625 (XXV) 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of United Nations' (24 October 1970). The duty of States to respect the right to self-determination and independence of peoples and nations was confirmed also by UNGA Resolution 2131 (XX) (21 December 1965), at para 11.

[81] ibid. Moreover, the Declaration guarantees the territorial integrity of sovereign States which comply with the principle of equal rights and self-determination and possess a government representing the whole people, without any distinction. Macklem suggests that

and ICESCR, the 1970 Declaration affirms that all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development. Moreover, the Declaration states that the territory of colonies and non-self-governing territories have a 'status separate' and distinct from the territory of the administering State and such status shall exist until the peoples of such territories exercised their right to self-determination, including through the establishment of an independent State[82]. At the regional level, the right to independence of colonial peoples is affirmed by the African Charter on Human and Peoples' Rights. Indeed, Article 20(2) declares that 'colonized or oppressed peoples shall have the right to free themselves from the bonds of domination'.

In its jurisprudence, the ICJ confirmed that under customary international law, the peoples of non-self-governing territories have a right to self-determination, including a right to independence. Precisely, in its *Advisory Opinion on the presence of South Africa in Namibia*, the ICJ found that, while in the UN Charter external self-determination was recognized only for territories under the trusteeship system, the evolution of international law codified in the 1960 Declaration on Friendly Relations among States extended the right to self-determination, in the form of a

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a systematic interpretation of the Declaration would recognize the principle of self-determination, in the sense of a right to statehood, outside colonial context in cases of alien subjugation, domination and exploitation or where a State does not comply with the principle of equal rights and self-determination and does not possess a government representing the whole people without distinction of race, creed or colour: Macklem (n 12) 103. Crawford observes that the holders of self-determination would still be the newly independent States: Crawford (n 13) 16-17.

[82] According to the 1970 UNGA Res 2625 (XXV) (n 80), 'the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people'. The Declaration then states that 'nothing in the foregoing paragraphs shall be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. Further UNGA Resolutions refer also to the need to respect the 'territorial integrity' of the non-independent territory: UNGA Res 3480 (XXX) 'Question of French Somaliland' (11 December 1975), para 5; UNGA Res 3485 (XXX) 'Question of Timor' (12 December 1975), para 5.

right to independence, to all peoples of dependent and non-self-governing territories[83]. The Court, in commenting on Article 80(1) of the UN Charter that refers to the 'rights of peoples' of non-self-governing territories, stated that the provision encompasses the inhabitants of the mandate territories, including in particular their indigenous populations[84]. In the successive *Advisory Opinion on the status of Western Sahara*, the ICJ found that according to UNGA Resolution 1514 (XV)[85], self-determination includes the right of those peoples to determine their political status, to be exercised through the free and genuine expression of their will[86]. As declared explicitly by the ICJ in *Burkina Faso v Mali*, the newly independent State will acquire the territorial sovereignty over the territorial base left by the colonial power[87]. In *East Timor Case* the Court observed that the right to self-determination of peoples of non-self-governing territories evolved from the

[83] *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 77), paras 52-53. Arangio-Ruiz affirms that it was inaccurate to speak of 'rights' and 'obligations' of peoples, since they may be conferred and imposed exclusively on States: G 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 1972-III, 419 at 561-571; Richard A Falk 'The South West Africa Cases: An Appraisal' (1967) 21(1) International Organization 1-23; A Pollock, 'The South West Africa Cases and the Jurisprudence of International Law' (1969) 23(4) International Organization 767-787; N Dugard, 'Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future' (1972) 11 Colum J of Transnatl L 14.

[84] ibid 33, para 59: 'A striking feature of this provision is the stipulation in favour of the preservation of the rights of "any peoples", thus clearly including the inhabitants of the mandated territories and, in particular, their indigenous populations'. However, indigenous are contemplated only as part of the whole population of such territories and not as distinct 'peoples'. Also, for example, 1966 UNGA Resolution 2356 (XXII) on the status of French Somaliland, stated the inalienable right of the peoples of French Somalia to self-determination and independence, referring to the indigenous inhabitants as the whole population of the territory: UNGA Res 2356 (XXII) 'Question of French Somaliland' (19 December 1967), paras 1-2; UNGA Res 3480 (XXX) (n 82), para 1. Also, UNGA Res 3485 (XXX) (n 82), para 1. See Chapter 4.

[85] Western Sahara, Advisory Opinion (n 77), para 162.

[86] ibid. The right of peoples of Western Sahara to self-determination was recognized in the Preamble of the 1974 UNGA Resolution 3292 (XXIX) which requested the ICJ to give the advisory opinion on the status of Western Sahara: UNGA Res 3292 (XXIX) 'Question of Spanish Sahara' (13 December 1974), Preamble. Also, Crawford (n 2) 597-598; T Franck, 'The Stealing of the Sahara' (1976) 70 AJIL 694. See Chapter 4.

[87] *Frontier Dispute* (*Burkina Faso v Mali*) (n 77), para 30: 'By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power'.

UN Charter and the UN practice, acquiring an *erga omnes* character[88]. The ICJ, in its *Advisory Opinion on Kosovo's declaration of independence* of 2010, reaffirmed that current international law on self-determination entails a right of independence for the peoples of non-self-governing territories[89]. In the *Advisory Opinion on the separation of the Chagos Archipelago from Mauritius*, the ICJ found that under customary international law peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to 'their' territory as a whole, whose integrity must be respected by the administering power[90].

2.4.2.1.2 Peoples subject to alien domination, subjugation and exploitation

The UNGA Declaration 2625 (XX) recognizes that even alien domination, subjugation and exploitation constitute violations of peoples' right to self-determination[91]. With reference to such peoples, the UNGA expressly recognized the right of the Palestinian people to self-determination and to independence and sovereignty[92]. The ICJ applied the right to self-

[88] *East Timor (Portugal v Australia)* (Judgement) [1995] ICJ Rep 90, 102, para 29 and 105, para 37. *Erga omnes* obligations are interpreted by the ICJ as those obligations that, given the importance of the rights involved, must be respected by all States: *Barcelona Traction, Light and Power Company, Limited* (Judgement) [1970] ICJ Rep 32, para 33; Judge Dugard (*Separate Opinion*), *Armed Activities on the Territory of the Congo* (New Application:2000) (*Democratic Republic of the Congo v Rwanda*) (Jurisdiction and Admissibility) [2006] ICJ Rep 87, para 4; S Kadelbach, 'Jus Cogens, Obligations Erga omnes and other Rules: The Identification of Fundamental Norms' in C Tomuschat and J Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes* (Brill 2006) 35-39.

[89] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep, para 160. At para 180 the ICJ reiterated the *erga omnes* character of self-determination.

[90] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ GL No 169, ICGJ 534 (ICJ 2019) (25 February 2019), para 160. Also, UNGA Res 73/295 (24 May 2019), para 2.

[91] UNGA Res 2625 (XXV) (n 80); also, UNGA Res 2621 (XXV) 'Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (12 October 1970), Preamble; UNGA Res 3103 (XXVIII) 'Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes' (12 December 1973), para 1.

[92] Eg UNGA Res 2787 (XXVI) (6 December 1971); UNGA Res 2955 (XXVII) (12 December 1972); UNGA Res 3070 (XXVIII) (30 November 1973); UNGA Res 3246 (XXIX) (29 November 1974); UNGA Res 3382 (XXX) (10 November 1975); UNGA Res 3376 (XXX) (10 November 1975); UNGA Res 31/34 (30 November 1976); UNGA Res 37/43 (3 December 1982). See Chapter 4.

determination to peoples subject to alien domination, subjugation and exploitation, such as the Palestinian people, in its *Advisory Opinion on the consequences of the construction of a wall in the occupied Palestinian territory*[93]. The Court found that the Palestinian are a 'people' entitled to the right to self-determination and reaffirmed its *erga omnes* character[94]. In the *Advisory Opinion on Kosovo*, the ICJ confirmed that in present international law not only the peoples of non-self-governing territories, but even the peoples subject to alien subjugation, domination and exploitation enjoy, as part of their right to self-determination, a right to independence[95].

2.5 Indigenous as other non-independent peoples

While common Article 1(1) of ICCPR and ICESCR recognizes the right to self-determination to 'all peoples', no mention is provided for indigenous peoples[96]. Indeed, as illustrated above, at the time of the drafting of the Covenants the term 'peoples' indicated only States and certain categories of non-independent peoples. It is through the application of such provisions that indigenous were first considered as a particular category of non-independent 'peoples', characterized by a special relationship with lands and natural resources and with a right to internal self-determination in

[93] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 13; R O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary' (2004) 37 Revue Belge de Droit International 92–154, at 111-112. See Chapter 4.

[94] ibid 199, para 155. Cf *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'* ICC-01/18-143 (05 February 2021) ICC-01/18-143-Anx1, *Judge Péter Kovács' Partly Dissenting Opinion*, paras 277-279.

[95] *Advisory Opinion on Kosovo* (n 89), para 160; also, *Legal Consequences of the Separation of the Chagos Archipelago* (n 90), paras 152ff.

[96] The HRC in its General Comment No 12 stated: '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. It is for that reason that States set forth the right of self–determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants': HRC, General Comment No 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples UN Doc A/39/40 (13 March 1984), paras 1, 142-143.

international law, by both the HRC[97] and the CESCR[98] and then in the jurisprudence of the African Commission on Human and Peoples' Rights[99]. The same postulation that indigenous are 'peoples' holders of the right to self-determination was embodied for the first time in an international legal instrument in the UNDRIP in 2007 and subsequently in the ADRIP in 2016[100] and in the proposed Nordic Saami Convention[101]. However, those instruments refer to a people's right to internal self-determination, not including a right to independence like for colonial and non-independent peoples and peoples subject to domination, subjugation and exploitation. Indeed, both the UNDRIP and the ADRIP include provisions that affirm how indigenous self-determination does not threat the international law principle

[97] HRC, Concluding Observations: Canada, UN Doc CCPR/C79/Add.105 (7 April 1999), para 8; Mexico, UN Doc CCPR/C/79/Add.109 (27 July 1999), para 19; Norway, UN Doc CCPR/C/79/Add.112 (1 November 1999), para 10; Sweden, UN Doc CCPR/CO/74/SWE (24 April 2002), para 15.

[98] CESCR, Concluding Observations; Australia, E/C.12/AUSTRAL/1 (23 May 2000), para 3. Also, Concluding Observations: Sudan, E/C.12/Q/SUD/1 (13 December 1999), para 10.

[99] African Court of Human and Peoples' Rights, *ACHPR v Kenya*, Application No 006/2012 (2017) (the '*Ogiek'* case), para 107. Also, *Katangese Peoples Congress v Zaire*, Comm No 75/92 (1995), paras 3, 6; *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm No 155/96 Case No ACHPR/COMM/A044/1, (the '*Ogoni'* case), para 69; *Kevin Mgwanga Gunme and others v Cameroon*, ACHPR Communication No 266/2003 (27 May 2009), para 169; *Endorois* (n 45), para 151; Working Paper by Mrs. Erica-Irene A. Daes, on the concept of 'indigenous people' E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996), para 69. See section 2.5.4.

[100] In the light of such developments, after the adoption of the UNDRIP other international legal instruments conceived indigenous as 'peoples'. For example, the Paris Agreement in its Preamble refers to indigenous as 'peoples': Paris Agreement to the United Nations Framework Convention on Climate Change (December 12, 2015) TIAS No 16-1104, Preamble; the Preamble of the 2017 Treaty on the Prohibition of Nuclear Weapons considers the impact of nuclear weapon activities on indigenous 'peoples': Treaty on the Prohibition of Nuclear Weapons (TPNW) 57 ILM 347 (7 July 2017) (entered into force 22 January 2021), Preamble; indigenous are mentioned as 'peoples' also in the 2018 Escazù Agreement: Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (4 March 2018) (entered into force 22 April 2021) (the 'Escazù Agreement'), arts 5(4), 7(15) and by the 2030 Agenda for Sustainable Development: UNGA Resolution 70/1 (25 October 2015). A further reference is provided by the UN Declaration on the Rights of Peasants and other People working in Rural Areas: United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: Resolution adopted by the Human Rights Council on 28 September 2018, A/HRC/RES/39/12, Preamble, arts 1(3), 2(3), 28(1); finally, the proposed Saami Nordic Convention at Article 3 states that indigenous are 'peoples' with a right to self-determination. See Chapter 5.

[101] The proposed Nordic Saami Convention, at Article 3, declares that under international law the Saami are a 'people' with a right to self-determination. See Chapter 5.

of States' territorial integrity, as declared by numerous international law sources[102].

2.5.1 ILO Convention No 169

The ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989 and entered into force in 1991[103]. The Convention is based on the promotion and respect of indigenous peoples and tribal peoples as distinct societies through both individual and collective rights, in contrast with the assimilationist orientation of previous ILO Convention No 107 (1957) concerning the Protection and Integration of Indigenous and other, Tribal and Semi-Tribal Populations in Independent Countries[104].

According to Article 1(1)(b), the ILO Convention No 169 (1989) applies to peoples in independent countries regarded as indigenous because of their descent from the populations which inhabited the country, or one of its regions, at the time of colonisation or establishment of current States' boundaries and who retain some or all their own social, economic, cultural and political institutions[105]. According to Article 1(2), self-identification as

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[102] Eg UNGA Res 1541 (XV) (n 78); UNGA Res 2625 (XXV) (n 80); UNGA Res 50/6 (9 November 1995), para 1; African Charter on Human and Peoples' Rights, art 29(5); *Final Act of the Conference on Security and Co-operation in Europe*, 14 ILM 1292 (1975) (*Helsinki Final Act*), part VIII.

[103] ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169, 1650 UNTS 383 (27 June 1989) (entered into force 5 September 5 1991).

[104] ILO Convention concerning the Protection and Integration of Indigenous and other, Tribal and Semi-Tribal Populations in Independent Countries (ILO No 107), 1957 328 UNTS 247 (26 June 1957) (entered into force 2 June 1959), accompanied by ILO, Recommendation concerning the Protection and Integration of Indigenous, Tribal and Semi-Tribal Populations in Independent Countries (ILO No 104) (1957) International Labour Conference (26 June 1957). The common belief was that bringing such populations into national mainstream through assimilation and integration was their only chance to survive: International Labour Office (Project to Promote ILO Policy on Indigenous and Tribal Peoples), *ILO Convention on Indigenous and Tribal Peoples 1989 (No 169*): *A Manual*, (Geneva 2000) 4. For these reasons, the Convention was therefore progressively criticized as indigenous peoples gained importance in international law: A Fodella, 'International Law and the Diversity of Indigenous Peoples' (2006) 30 Vermont Law Review 565–594, 585.

[105] K Myntti, 'National Minorities, Indigenous Peoples and Various Models of Political Participation' in F Horn (ed), *Minorities and the Right to Political Participation* (Rovaniemi 1996) 24; Åhrén (n 1) 95.

indigenous, or tribal, represents the main criterion for determining the groups to which the Convention applies[106].

However, the third paragraph of Article 1 states that the term 'peoples' in the Convention does not have any implication regarding the rights which may attach to such term under international law[107]. Indeed, the term 'peoples' in the Convention is a mere reference to the notion of 'groups' since, at the time of its drafting, States and international law still did not recognize indigenous as 'peoples'[108]. The scope of the adoption of the term 'people' was to recognize indigenous communities as distinct societies with their own identity and to protect them from the dominant society within their States[109]. This conceptualization is confirmed by the fact that the provisions of the ILO Convention No 169 do not include the right to self-determination[110]. Indeed, the ILO Manual to the Convention declares that the interpretation of the concept of self-determination was out of the Convention No 169 mandate[111].

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[106] Kingsbury observes that such principles may reflect customary international law: B Kingsbury, 'Indigenous Peoples' in *Max Planck Encyclopedia of Public International Law* (online entry, 2006) as cited by Saul (n 40) 29. For example, the HRC in *Lovelace v Canada* stated the predominance of the principle to self-identification over the features required by States. The refusal to recognize such right to self-identification was interpreted by the HRC as a violation of Article 27 of the Covenant: *Lovelace v Canada* (n 43), paras 14-15 and 17.

[107] L Swepston, 'Indigenous Peoples in International Law' in J Castellino and N Walsh (eds), *International Law and Indigenous Peoples*, vol 20 (Nijhoff 2005) 57.

[108] Åhrén (n 1) 96. In international treaty law, indigenous were mentioned as 'peoples' without any implication for international law also in the Multilateral Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean. Indeed, like Article 1(3) of the ILO Convention No 169, Article 1(1) of the Agreement states that: 'The use of the term "Peoples" in this Agreement shall not be interpreted as having any implications whatsoever in regard to rights which may be inferred from this term under International Law': Agreement Establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, 1728 UNTS 380 (24 July 1992) (entered into force 4 August 1993), art 1(1).The same implication of the term 'peoples' is the one, for example, of the Schedule of the International Convention for the Regulation of Whaling (n 53), art 25 (b). See Chapter 3.

[109] M Tomei and L Swepston, *Indigenous and Tribal Peoples: a Guide to ILO Convention No 169* (ILO, 1996) 7.

[110] Only the guarantee that the right to self-determination was not extended to indigenous peoples allowed the approval of the Convention. Also, Åhrén (n 1) 96.

[111] International Labour Office, *A Manual* (n 103) 9.

2.5.2 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

2.5.2.1 The drafting and adoption of the Declaration

In 1982, the UN established a Working Group on Indigenous Populations (WGIP), as a subsidiary Organ of the Sub-Commission on the Protection of Human Rights[112]. The WGIP elaborated a draft instrument on indigenous rights to fill the gap in international human right law on indigenous peoples[113]. The final text of the Draft UN Declaration on the Rights of Indigenous Peoples was submitted to the Sub-Commission, finally adopted in 1994 and sent to the Commission on Human Rights which established an *ad hoc* inter-sessional Working Group on the Draft Declaration (WGDD) to propose a final text to the General Assembly[114]. The Commission on Human Rights recommended the UN General Assembly for the adoption of the draft declaration and the Assembly sent it to the Third Committee to be considered[115].

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[112] ECOSOC Res 1982/35 (7 May 1982). J Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14(2-3) International Journal on Minority and Group Rights 207-230, 212- 213. The request was included in a joint statement by different indigenous organizations: *Urgent Need to Improve the U.N. Standard-Setting Process Importance of Criteria of Consistence with International Law and Its Progressive Development*, UN Doc E/CN4/2005/WG15/CRP3 (24 November 2005); S Pritchard, 'The United Nations and the Making of a Declaration on Indigenous Rights' (1997) 4 Aboriginal Law Bulletin 89. Few years later, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities with Report entitled 'Study on the Problem of Discrimination against Indigenous Population' (the 'Cobo Report') underlined the need to abandon integrationist approaches and to promote ethno-development and self-determination of indigenous peoples in the form of self-governance: E/CN4/Sub2/1983/21 10-44. The UN Sub-Commission was convened by the ECOSOC in 1971: Resolution 1589 (L) (21 May 1971), para 16.

[113] UN Commission on Human Rights, Report of the Working Group on Indigenous Populations on its Fourth Session Annex II, The First Principles Drafted for the Future Declaration, UN Doc E/CN4/Sub2/1985/22 (27 August 1985).

[114] ECOSOC Res 1995/32 (3 March 1995).

[115] UN Doc A/HRC/1/L3, approved by 30 votes to 2, and 12 abstentions. The Resolution was supported by Armenia, Benin, Congo, Costa Rica, Cuba, Cyprus, Denmark, Estonia, Finland, France, Greece, Guatemala, Haiti, Lesotho, Cameroon, Croatia, Ecuador, Ethiopia, Former Yugoslav Republic of Macedonia, Honduras, Hungary, Italy, Latvia, Libyan Arab Republic, Liechtenstein, Luxembourg, Malta, Saint Kitts and Nevis, South Africa, Sweden and Switzerland.

However, the procedure was delayed by the opposition of 53 African States that were critical of some aspects of the draft text[116]. The African Commission on Human and Peoples' Rights, in an Advisory Opinion, requested the Working Group of Experts on Indigenous Populations to consider the concerns of the African States[117]. The Advisory Opinion invoked the international law of substantive equality to avoid that the recognition of indigenous as peoples had as a consequence a special treatment over other individuals[118]. On self-determination, the Advisory Opinion stated that the right of indigenous peoples to self-determination refers mainly to 'the management of their internal and local affairs and to their participation as citizens in national affairs on an equal footing with their fellow citizens' without violating the principle of territorial integrity. The Commission observed that indigenous self-determination should not be confused with the right to self-determination declared in UNGA Resolution 1514 (XV), which is limited to colonial and equivalent peoples[119]. Finally, on 14 September 2007 the UNDRIP was adopted by vote with 143 States in favour, 4 against and 11 abstentions[120].

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[116] Under the proposal of Namibia, the Third Committee delayed the approval of the declaration for a year: Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994: Amendments to the Draft Resolution A/C3/61/L18/Rev1/Namibia on behalf of the Group of African States, UN GAOR, 3rd Comm, 51st session, Agenda Item 68, UN Doc A/C3/61/L57/Rev1 (21 November 2006) ('African Group Amendments').

[117] African Commission on Human and Peoples' Rights, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (adopted by the 41st ordinary session 16-30 May 2007); Assembly of the African Union, Decision on the United Nations Declaration on the Rights of Indigenous Peoples, 8th ordinary session, AU Doc Assembly/AU/Dec141(VIII), Add6 (29-30 January 2007). The crucial topics identified by the Assembly did not only include self-determination and territorial integrity but also ownership and land resources.

[118] ibid (*Advisory Opinion*), para 13.

[119] ibid para 26. Those claims resulted in an addition to the Preamble of the UN Declaration on the need to take into consideration how the situation of indigenous peoples may vary from region to region and from State to State. Also, M Davis, 'Indigenous Struggles in Standard Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2013) 9(2) Melbourne Journal of International Law 439-471, 456.

[120] The United States, Canada, Australia and New Zealand voted against the Declaration; the abstaining States were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine. S Errico, 'The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview' (2007) 7 Human Rights Law Review 741-755.

2.5.2.2 A special regime of group rights

The UNDRIP affirms a basic legal framework on the protection of the rights of indigenous individuals and peoples, in the latter case in the form of group rights[121]. In contrast to ILO Convention No 169, the UNDRIP does not provide a definition of indigenous peoples and leaves such determination to external criteria[122]. With this in mind, UNDRIP Article 33 affirms the right of indigenous peoples to determine their own identity or membership in accordance with their customs and traditions, and even to determine the structures and to select the membership of their institutions in accordance with their own procedures. As stated by Article 1, indigenous, as a collective or as individuals, have the right to enjoy all human rights and fundamental freedoms recognized by the UN Charter, the UDHR and international human rights law.

UNDRIP Article 3, which echoes common Article 1(1) of the ICCPR and ICESCR, declares that indigenous peoples have a right to self-determination, according to which they freely determine their political status and freely pursue their own economic, social and cultural development[123]. This conception of self-determination does not include a

[121] ibid (Errico) 745.

[122] Cf ILO Convention No 169 (n 103), art 1(2); see section 2.5.1. The drafters refused to include a list of non-exhaustive factors to define indigenous groups: Commission on Human Rights, Report of the Working Group Established in Accordance with Commission Resolution 1995/32 (3 March 1995) in its Eleventh Session, E/CN4/2006/79 (22 March 2006), Annex I: Revised Chairman's Summary and Proposals 28-29; B Saul (n 40) 26-27. In 2016 a Scottish Court stated that the beneficiaries of the UNDRIP are only indigenous peoples in the sense of groups of individuals who suffered oppression and domination, and no other categories of 'peoples' like the entire population of Scotland: *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland & Anor*, Scottish Court of Session (5 May 2016), paras 52-55.

[123] It is worth mentioning the position of the New Zealand representative: 'A distinction could be made between the right of self-determination as it currently exists in international law, a right which developed essentially in the post-second world war era and which carried a right of secession, and proposed modern interpretation of self-determination within the boundaries of the Nation State, covering a wide range of situations but relating essentially to the right of a people to participate in the political, economic and cultural affairs of the States (while remaining) within the State in which they lived'. This passage is quoted also by W Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as Self-determination in the UN Declaration on The Rights of Indigenous Peoples' (2011) 20(3) Griffith Law Review 526-556, 543. Among scholars, Errico provides as useful example of indigenous self-government in the Nuuk Conclusion and Recommendations on Indigenous Autonomy and

right to independence but is conceived as a freedom of indigenous peoples to pursue their economic, social and cultural development. Indigenous peoples' right to self-determination represents a foundational principle since most of the rights declared in the UNDRIP, even if the respective provisions do not mention self-determination, are characterized as aspects of indigenous economic, social and cultural development. In this sense, UNDRIP Article 4 specifies that indigenous self-determination entails a right to autonomy or self-government, in the context of existing States, in the matters part of indigenous internal and local affairs and to means to finance their autonomous functions[124]. UNDRIP Article 46(1) incorporates a 'saving clause', echoing the UN Declaration on Friendly Relations, which specifies that nothing in the text of the Declaration may be interpreted as authorizing or encouraging any action which would threat the principle of States' territorial integrity[125].

Indigenous right to self-determination in the UNDRIP must be distinguished from the various instruments adopted by States at the national level to recognize forms of autonomy or specific rights to their

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Self-Government adopted by the UN meeting of experts in 1991 where autonomy is based on 'treaties, constitutional recognition or statutory provisions': Errico (n 120) 750, citing 'Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government', Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples (24-28 September 1991) E/CN4/1992/42 and E/CN4/1992/42/Add1; also, C Doyle and J Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"' in European Academy Bozen/Bolzano (ed), *European Yearbook of Minority Issues* (Martinus Nijhoff 2011) 219-262, at 245-256.

[124] The legal regime created by the Declaration constitutes a form of special legal protection, according to Article 1(4) of the ICERD. The same approach was recognized by the Inter-American Commission on Human Rights (IACHR) in the case of *Garìfuna Community of Triunfo de la Cruz and its Members v Honduras*. In the admissibility decision, the Commission recognized the need for special protection of indigenous peoples in order to allow the exercise of their equal rights with the rest of the population: *Garìfuna Community of Triunfo de la Cruz and its Members v Honduras* Case 906.03, Report No 29/06 (2006), para 44; IACHR, *Mary and Carrie Dann v United States*, Case 11.140, Report No 75/02, Inter-Am CHR Doc 5 rev 1 at 860 (2002), para 126. See Chapters 3 and 5.

[125] UNDRIP (n 72), art 46(1): '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'. Also, UNGA Res 2625 (XXV) (n 80), Principle 5, paragraph 7. See Chapters 4 and 5.

indigenous citizens. For example, some countries granted forms of self-government or autonomy to territories inhabited by indigenous peoples. In Canada the Nunavut Act and Nunavut Land Claims Agreement Act created the Nunavat self-governing region and granted participatory rights to indigenous in major decision involving the utilization of lands resources[126]. Similarly, the Act on Greenland self-government accorded an extensive degree of political and administrative autonomy to the Greenland authorities[127]. Other States recognize particular rights to the members of their indigenous communities. For example, in Norway the Finnmark Act created the 'Finnmark Estate' as an autonomous authority with particular competences on lands and natural resources in the Finnmark area[128]. In Australia the Aboriginal and Torres Islander Act ensures the participation of specific aboriginal persons and Torres Strait islanders on policies that may affect them and provides for the grant of title for Aboriginal land[129].

[126] Nunavut Act (S.C. 1993, c. 28), art 3; Nunavut Land Claims Agreement Act (SC 1993, c. 29). With the land claims Act the Inuit received title to 355,842 square kilometres of land, including royalties on oil and mineral resources. Also, Charles J Marecic, 'Nunavut Territory: Aboriginal Governing in the Canadian Regime of Governance' (1999) 24(2) American Indian Law Review 275–295.

[127] Act on Greenland Self-Government (Act No 473 of 12 June 2009). The Act never mentions indigenous peoples and refers to a form of devolution of authority from the central State to the Greenland government. For example, Article 1 states: 'The Greenland Self-Government authorities shall exercise legislative and executive power in the fields of responsibility taken over'. Bent Ole Gram Mortensen, Ulrike Barten, 'The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain an Indigenous People?' (2017) 8(1) The Yearbook of Polar Law 108-121.

[128] Act of 17 June 2005 No 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act), Section 1: 'The purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life'. It is significant that the Act applies to the 'residents' of the Finnmark county and not to indigenous as peoples. The Act at Section 3 incorporates ILO Convention No 169 into domestic legislation. Section 6 creates the Finnmark Estate (the '*Finnmárkkuopmodat*') as an independent legal entity which 'shall administer the land and natural resources'. Also, Øyvind Ravna, 'Norway and its Obligations under ILO 169 - Some Considerations after the Recent Stjernøy Supreme Court Case' (2012) 7(2) Arctic Review on Law and Politics 201-204.

[129] Aboriginal and Torres Strait Islander (ATSI) Act 2005; particularly, art 3(a): 'The objects of this Act are (…) to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them'. The Act established the Torres Strait Authority and an indigenous land corporation with competence on indigenous land rights. Further examples of peculiar legal regimes on indigenous peoples before the UNDRIP include the New Zealand 'Treaty of Waitangi Act 1975', which established the Waitangi Tribunal to investigate on breaches of the Treaty of

Diversely, Sweden[130], Norway[131] and Finland[132] have created Saami parliaments as representative institutions with certain prerogatives on issues related to Saami rights. While the UNDRIP states the right of indigenous peoples to self-determination under international law, those various national instruments recognize different rights that indigenous may enjoy under their respective domestic laws[133].

Among the rights related with self-determination, UNDRIP Articles 5 and 20(1) provide that indigenous peoples have the right to maintain and 'strengthen' their political, legal, economic, cultural and social systems and institutions. At the same time, they have the right to participate in the political, social and cultural life of the State[134]. This autonomy is extended

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Waitangi by New Zealand; in the Philippines the indigenous peoples Rights Act recognizes to indigenous peoples a form of self-government, including certain rights on the exploitation of natural resources in indigenous 'ancestral domains': Republic Act No 8371 'Indigenous Peoples Rights Act' (29 October 1997), particularly Sections 14 and 57. It is worth to underline that the Act does not provide a right to self-determination under international law. Also, South Africa 'Traditional Leadership and Governance Framework Act' (2003); India 'The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act' (2006) and New Zealand 'Maori Representation Act' (1867).

[130] Saami Assembly Act (Sametingslag 1992:1433, 17 December 1992). In particular Chapter 1, Section 1 which states that the Saami Parliament is 'a special authority (…) with the primary task of monitoring questions related to Sami culture in Sweden'. According to Chapter 2, Section 1(4), the assignments of the Saami Parliament include 'participating in community development and ensuring that Sami needs are considered, including the interests of reindeer breeding in the use of land and water'. On the role of Saami Parliaments in the proposed Saami Convention see Chapter 5.

[131] Saami Act (Act No 56 of 12 June 1987). The Saami Parliament is elected by Saami people to represent them on issues that may concern their interests. Indeed, according to Chapter 2, Section 2: 'The business of the Sameting is any matter that in the view of the parliament particularly affects the Sami people. The Sameting may on its own initiative raise and pronounce an opinion on any matter coming within the scope of its business'.

[132] Act on the Sami Parliament (No 974 of 17 July 1995), Chapter 2, Section 5 (1)-(2): 'The task of the Sámi Parliament is to look after the Sámi language and culture, as well as to take care of matters relating to their status as an indigenous people. (2) In matters pertaining to its tasks, the Sámi Parliament may make initiatives and proposals to the authorities, as well as issue statements'. The Finnish legislation provides a stronger authority on the Parliament compared to the Swedish and Norwegian models. Indeed, according to Chapter 2, Section 9, the State 'shall negotiate with the Sami Parliament regarding all far-reaching and important measures, that directly or indirectly may affect the Saami's status as an indigenous people'. Those matters include 'the management, use, leasing and assignment of state lands, conservation areas and wilderness areas'.

[133] Even after the UNDRIP, the recognition of certain forms of self-determination by domestic law is based on territorial autonomy. See Chapter 5.

[134] The UNDRIP codified a principle that was previously enunciated by the CERD. According to the Committee, States must ensure indigenous peoples' effective participation in public life. Moreover, decisions involving their rights and interests cannot be taken without their informed consent: CERD, General Recommendation No 23 (n 38), para 4(d). The effective

by Article 18 to the right to conserve indigenous decision-making institutions and by Article 34 to the right to promote and maintain institutional structures, juridical systems and customs in accordance with international human rights standards. The right to participation is accompanied by the duty of States on consultation of indigenous peoples, which is mentioned as a general principle in the Preamble of the Declaration and then cited in many of its provisions[135]. Participation is then coupled with the duty of States to obtain the free and informed consent of indigenous peoples. Precisely, Article 19 requires the consultation of indigenous peoples 'in order to' obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them[136].

participation of indigenous peoples in decisions affecting them was stated as an instrument to protect their cultural rights also by the HRC: General Comment No 23 (n 47), para 158. Those provisions state a basic recognition of indigenous traditional institutions. The notions of legal and political own institutions are not defined but it is evident how they are components of the right to autonomy and self-government. At the domestic level, the right of indigenous peoples to participation, according to their customary uses, is declared for example by Article 65 of the Paraguayan Constitution. See Chapter 5.

[135] The right to participation has a secondary role compared to the primary right to self-determination. Indeed, this is confirmed by the expression 'if they so choose' of UNDRIP Article 5.

[136] Pursuant to the Human Rights Council, 'the Declaration on the Rights of Indigenous Peoples requires that the free, prior and informed consent of indigenous peoples be obtained in matters of fundamental importance to their rights, survival, dignity and well-being. In assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned, the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, *inter alia*, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned'. Human Rights Council, Expert Mechanism, Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus, on extractive industries A/HRC/21/55 (16 August 2012), para 22. See Chapter 5.

2.5.3 The American Declaration on the Rights of Indigenous Peoples (ADRIP)

2.5.3.1 The drafting and adoption of the American Declaration

With its establishment in 1948, the OAS increased attention to the situation of indigenous peoples in American countries[137]. The 1948 Inter-American Charter of Social Guarantees at Article 39 affirms that in those States interested by problems with native communities, measures should be adopted to protect such groups[138]. During the 1980s the OAS recognized the lack of an *ad hoc* legal framework to address 'the special and unique problems faced by the aboriginal populations'[139]. Finally, in 1989 the OAS General Assembly provided the Inter-American Commission with the mandate of preparing a regional 'juridical instrument' on the protection of indigenous human rights[140]. However, the American Declaration was finally adopted by consensus only on 15 June 2016 by the General Assembly of the OAS[141].

[137] In 1938, the precursor of the OAS, the Conference of American States (or Conference of the Pan-American Union), at its Eighth International Conference, underlined the need to protect native communities 'in order to compensate for the inadequacy of their physical and intellectual development'.

[138] Inter-American Charter of Social Guarantees, adopted by the Ninth International Conference of American States, Final Act, Resolution XXXIX 29 (1948), Article 39. The Charter, in the same provision, requires the creation of specific institutions to protect their rights to land, to legalize their possession and to prevent the invasion by outsiders.

[139] Preparatory Documents for the Draft of American Declaration of the Indigenous Peoples, Justification and Recommendation to the General Assembly of the OAS on the Preparation of an Inter-American Instrument on this Matter (1989).

[140] OAS General Assembly Resolution No 1022/89 (18 November 1989), para 13. Only a year later, the Commission created the Office of the Special Rapporteur on the Rights of Indigenous Peoples. It is interesting to note how the initiative of the OAS has a parallel trajectory with the drafting of the UNDRIP, showing the connection between international and regional instruments: Barelli (n 61) 963.

[141] During the Eleventh Meeting Negotiations, the Working Group to prepare the OAS Declaration underlined that, while there was a wide consensus on the right to autonomy and self-government, the States Parties were still far from reaching an agreement on self-determination and property rights to land: Åhrén (n 1) 109 at n 111, citing the Report of the Chair, 14 June 2008, document OEA/SerK/XVI, GT/DADIN/doc 321/08, Section II Guidelines. According to the Working Group, in the event of further lack of an agreement the Parties will use the UNDRIP as a baseline for further negotiations. On the draft Declaration, S Wiessner, 'The Proposed American Declaration on the Rights of Indigenous Peoples, International Journal of Cultural Property' (1997) 6(2) 356-375.

2.5.3.2 The content of the American Declaration

As stated by Article XLI, the American Declaration constitutes a *minimum standard* on indigenous rights[142]. In the Preamble, the Declaration recalls explicitly the progress achieved by ILO Convention No 169 (1989), the UNDRIP and the constitutional, legislative and jurisprudential progress of American countries. According to Article I(2), the ADRIP, like ILO Convention No 169, is based on self-identification as the main criterion to identifying to whom the Declaration applies[143].

In general, the Declaration contains both individual and collective rights. As stated by ADRIP Article VI, indigenous peoples have collective rights that are indispensable for their existence, well-being and development as peoples. Article III of the ADRIP, reflecting UNDRIP Article 3, proclaims that indigenous have, as 'peoples', the right to self-determination. Accordingly, borrowing language from common Article 1(1) of the 1966 Covenants and Article 3 of the UNDRIP, indigenous peoples are free to determine their political status and to pursue their economic, social and cultural development[144]. The connotation of the right to self-determination is contained in Articles XXI–XXIV of the ADRIP. Reflecting UNDRIP Article 4, indigenous self-determination in the American Declaration provides a right to autonomy and self-government on indigenous local affairs and the means to finance their autonomous functions. Moreover, self-determination includes the right to maintain and develop their own decision-making institutions and to participate in decision-making processes affecting their rights in accordance with their own norms, procedures, and traditions. The provision must be coupled with

[142] The United States has, however, persistently objected to the text of this American Declaration, which is not itself legally binding, does not, therefore, create new law, and is not a statement of Organization of American States (OAS) Member States' obligations under treaty or customary international law. See Chapter 5.
[143] Cf ILO Convention No 169 (n 103), art 1(2). S Errico, 'The American Declaration on The Rights of Indigenous Peoples' (2017) 21(7) ASIL Insight. See section 2.5.1.
[144] The ADRIP, however, does not mention the UNDRIP statement, contained both in its Preamble and Article 2, that indigenous peoples 'are equal to all other peoples'.

ADRIP Article IV that, like UNDRIP Article 46(1), guarantees territorial integrity and the political unity of sovereign States. Two innovative provisions, compared to previous instruments, are represented by ADRIP Article IX, that declares that States shall recognize full legal personality of indigenous peoples, and Article X where the Declaration explicitly rejects the principle of assimilation.

The right to maintain indigenous institutional structures and juridical systems or customs, in accordance with international human rights standards, is provided by ADRIP Article XXII. Accordingly, 'indigenous law and legal systems' shall be recognized and respected by national, regional and international legal systems. While Article XIII and XVI protects respectively the right to cultural identity and integrity and the right to indigenous spirituality, Article XXIX recognizes indigenous peoples' right to development.

2.5.4 Peoples' rights in the African Charter

The term 'peoples' is mentioned in different provision of the African Charter on Human and Peoples' Rights[145] but its significance evolved during the time within the framework of the African human rights system[146]. Already in the Preamble, the Banjul Charter distinguishes among human and people's rights and the same distinction is included in Chapter I of the Charter, entitled 'of Human and Peoples' Rights'. Precisely, Articles 19–24 refer to peoples' rights. Article 20 in protecting the rights of all peoples to equality and existence recognizes the right to self-determination that is 'unquestionable' and 'inalienable'. In the case of colonized and oppressed peoples, the Charter states a right to independence. While Article 21 recognizes the right of peoples freely to dispose of their natural resources,

[145] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (or the 'Banjul Charter') (27 June 1981), CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).
[146] MO Mhango, 'Recognizing a Right to Autonomy for Ethnic Groups under the African Charter on Human and Peoples' Rights: Katangese Peoples Congress v. Zaire' (2007) 14 Human Rights Brief 11-15, 12.

Articles 22 and 24 declare, respectively, the peoples' right to economic, social and cultural development, and the peoples' right to a satisfactory environment[147].

Indigenous are not mentioned in the Charter but in Africa the concept of 'indigeneity' had a peculiar connotation influenced by colonialism and the formation of a system of States around rigid borders drawn by the former colonial powers that erased the prior existing communities and identities[148]. This postulation that 'all Africans are indigenous' is manifest not only in the Preamble of the African Charter but also in the Advisory Opinion of the Africa Commission on the UNDRIP, stating that the term 'indigenous populations' does not mean 'first peoples' in the sense of aboriginality as opposed to non-African community[149].

Initially, under the influence of the Cairo Resolution adopted in 1964 by the Organisation of African Unity (OAU) Assembly of Heads of States, the term 'people' in the African Charter was interpreted as the aggregate population of States including, for example, a people of Libyans or Kenyans but no other indigenous African indigenous peoples such as, for example, the Berbers in Libya or the Ogiek in Kenya[150]. However, the international recognition of indigenous rights as peoples brought the African Court on

[147] Article 23 of the African Charter states the right of peoples to national and international peace and security.
[148] J Murphy, 'Extending Indigenous Rights by Way of the African Charter' (2012) 24 Pace International Law Review 158-189, 166-167; DG Newman, 'The Law and Politics of Indigenous Rights in the Postcolonial African State' (2008) 102 Proceedings of the ASIL Annual Meeting 69-71; FM Ndahinda, *Indigenousness in Africa, A Contested Legal Framework for Empowerment of 'Marginalized' Communities* (Springer 2011), 55-116.
[149] *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (n 117); J Gilbert and V Couillard, 'International Law and Land Rights in Africa: The Shift from States' Territorial Possessions to Indigenous Peoples' Ownership Rights' in R Home (ed), *Essays in African Land Law* (Pretoria University Law Press 2011) 48. See section 2.5.2.1.
[150] Resolution on Border Dispute Among African States, AHG/Res 16(I) (1964); S Tauval, 'International Organizations' (1967) 21 The Organization of African Unity and African Borders 102-127. Åhrén (n 1) 107, n 98. Moreover, the African post-colonial States associated national building with a privileged ethnic group, marginalizing the several other ethnic groups part of the same States: F Viljoen, *International Human Rights Law in Africa* (OUP 2007) 280.

Human and Peoples' Rights to extend the concept of 'peoples' also to ethnic and cultural subgroups within a State.

Precisely, in *Ogiek* the Court stated that for the identification of indigenous populations, the relevant factors to consider are the presence of priority in time respect to the occupation and use of a specific territory, a voluntary perpetuation of cultural distinctiveness, self-identification as well as recognition by other groups, or by States' authorities, that they are distinct collective entities and a current, or past, experience of subjugation, dispossession, exclusion or discrimination[151]. In doing so, the African Court confirmed previous findings of the African Commission[152]. Among such decisions, in *Endorois* the Commission, in reiterating the previous criterion to identify a 'people' under the Charter, underlined the importance of the linkages between 'peoples, their land, and culture and the significance that such a group expresses its desire to be identified as a people, or have the consciousness that they are a people'[153].

2.6 Indigenous 'communities'

Different international legal instruments refer to the term 'indigenous communities', emphasizing in general the traditional way of living in communities of such individuals[154]. First, the 1992 Rio Declaration on

[151] *Ogiek* case (n 99), para 107.
[152] *Katangese Peoples Congress v Zaire*, (n 99), paras 3, 6; *Ogoni* (n 99), paras 63, 67; *Kevin Mgwanga Gunme and others v Cameroon* (n 99), para 169.
[153] *Endorois* (n 45), para 151, not mentioning expressly natural resources.
[154] P-T Stoll and AV Hahn, 'Indigenous Peoples, Knowledge and Resources in International Law' in SV Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (Kluwer Law International 2007) 9. Similar terms include, for example, 'custodian communities' adopted in the African Commission Resolution on the protection of sacred natural sites and territories: African Commission on Human and Peoples' Rights, Resolution on the Protection of Sacred Natural Sites and Territories, ACHPR/Res 372 (LX), 2017. The term 'peasant and other peoples working in rural areas' has been adopted in the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (n 100), art 1: 'For the purposes of the present Declaration, a peasant is any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land'. The Committee on the Elimination of Discrimination against Women (CEDAW) refers to the term 'rural women': CEDAW, General

Environment and Development refers for the first time to the notion of 'indigenous communities' at its preambular paragraph 12[155]. In international treaty law, this terminology is reflected in the Convention on Biological Diversity (CBD)[156] which in its Preamble recognizes the traditional dependence of many indigenous and local communities embodying a traditional lifestyle based on the use of biological resources. The same term is adopted in Article 8(j), stating the obligation of every State to respect, preserve and maintain knowledge, innovations and practices of indigenous communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. In the CBD, indigenous communities are characterized by their close and traditional dependence on biological resources[157]. The notion 'indigenous communities' has also been adopted by the Nagoya Protocol. The Protocol recognizes, in general, indigenous communities as the holders of their traditional knowledge associated with genetic resources and ensures their involvement and participation in the access to such resources[158].

Recommendation No 34: on the Rights of Rural Women UN Doc CEDAW/C/GC/34 (4 March 2016). J Gilbert, *Natural Resources and Human Rights, an Appraisal* (OUP 2018) 182-185.

[155] Rio Declaration on Environment and Development, UN Doc A/conf151/5/Rev1 (14 June 1992). Among relevant non-binding instruments, the term 'indigenous communities' is mentioned for example in the 2005 UNESCO Universal Declaration on Bioethics and Human Rights (adopted by UNESCO's General Conference on 19 October 2005).

[156] United Nations Convention on Biological Diversity, Rio de Janeiro (5 June 1992) 1760 UNTS 79, Preamble, which recognises: 'the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its component'; Stoll and Hahn (n 154) 32. On the rights of indigenous peoples in the context of biodiversity protection, F Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection: Access, Benefit-sharing and Conservation in Indigenous Lands* (Brill:Nijhoff 2009).

[157] Report of the Expert Group Meeting of Local Community Representatives within the context of Article 8(j) and related provisions of the Convention of Biological Diversity (4 September 2011) UNEP/CBD/WG8J/7/8/Add1, Annex I; also, CBD Decision XI/14/G (2012).

[158] 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) UNEP/CBD/COP/DEC/X/1, Preamble and arts 5-7. Also, Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2226 UNTS 208 (29 January 2000) (entered into force 11 September 2003), art 26.

The same terminology is applied in some provisions of the International Treaty on Plant Genetic Resources for Foods and Agriculture[159]. Similarly, the International Tropical Timber Agreement (ITTA) urges States to guarantee the support and development of land reforestation management, considering the interests of indigenous communities[160]. Finally, the Preamble of the Minamata Convention on Mercury considers the particular vulnerabilities of indigenous communities and the effects of the biomagnification of mercury and contamination on them and, particularly, on their traditional foods[161].

2.7 Conclusion

The conceptualization of indigenous peoples in modern international law resulted from the evolution of peoples' rights. Initially, in addition to the rights of States, modern international law embodied a framework only of individual rights. In this context, members of indigenous communities enjoyed the same rights applicable to every other individual. Only in limited situations, such as colonial and non-self-governing territories, international law recognized a collective right of peoples as distinct from States, namely their right to self-determination including a right to independence.

In present international law, indigenous individuals enjoy also rights as members of minorities. In such context, the HRC applied ICCPR Article 27 to indigenous individuals part of a community that may fall within the term of 'minority'. The same postulation was considered by further relevant instruments, including the ICERD. The progressive recognition of a group dimension of minority rights influenced the adoption of ILO Convention No

[159] International Treaty on plant genetic resources for food and agriculture 2400 UNTS 303 (3 November 2001) (entered into force 29 June 2004), arts 5.1(d), 9.1. While art 5.1(d) refers to Contracting Parties to, *inter alia*, support the efforts of indigenous and local communities, art 9.1 recognizes the contribution of local and indigenous communities for the conservation and development of plant genetic resources. Stoll and Hahn (n 154) 42-43.

[160] International Tropical Timber Agreement (ITTA), 1955 UNTS 143; 33 ILM 1014 Geneva (26 January 1994) (entered into force 1 January 1997), Preamble.

[161] Minamata Convention on Mercury (10 October 2013) (entered into force 16 August 2017), Preamble.

169 where indigenous peoples were considered for the first time as groups holders of collective rights. However, only with the activity of the human rights committees and with the adoption of UNDRIP and ADRIP, indigenous were recognized under international law as 'peoples' holders of the right to self-determination, carrying with it the right freely to determine their economic, social and cultural development but not the right to independence like for colonial and equivalent peoples.

The next part of the dissertation explores the rights of indigenous, both as individuals and as peoples, with respect to natural resources before the adoption of the UNDRIP.

PART II: INDIGENOUS RIGHTS WITH RESPECT TO NATURAL RESOURCES BEFORE UNDRIP

CHAPTER 3: INDIVIDUAL AND COLLECTIVE INDIGENOUS RIGHTS AND NATURAL RESOURCES

3.1 Introduction

Chapter 3 opens Part II of the dissertation. While Part I was centred on States' permanent sovereignty over the natural resources of their territory and on the different conceptualizations of indigenous peoples in international law, Part II examines the international legal rights, prior to the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), of indigenous individuals and peoples insofar as these rights are relevant to the exploitation and conservation of natural resources.

Chapter 3 is divided into three substantive sections. Section 3.2 focuses on the rights of indigenous individuals with respect to natural resources under the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and of certain international treaties concerning the conservation and exploitation of living resources. Section 3.3 investigates on the pertinent provisions of ILO Convention No 169 (1989) on indigenous peoples, considering the peculiar connotation of the term 'indigenous and tribal peoples' under the Convention. Finally, section 3.4 deals with the rights of indigenous as 'peoples' with respect to natural resources under common Article 1, the right to self-determination, of the ICCPR and ICESCR and under the relevant provisions of the African Charter on Human and Peoples' Rights.

3.2 The rights of indigenous individuals with respect to natural resources under international human rights law

3.2.1 Universal instruments

The successive paragraphs introduce the main international human rights instruments relevant to the rights of indigenous individuals with respect to natural resources. Those instruments include ICCPR Article 27, ICESCR Article 15(1)(a), ICERD Article 5(d)(v), CRC Convention Article 30 and CEDAW Articles 15 and 16. Moreover, the following paragraphs consider how indigenous cultural and nutritional needs are considered by international conventions regulating the conservation and exploitation of certain living resources.

3.2.1.1 ICCPR Article 27

Article 27 of the ICCPR has been applied by the Human Rights Committee (HRC) to protect the traditional way of life, including economic and social activities, related with natural resources part of the culture of the community to which indigenous individuals belong[1]. The provision states that persons belonging to minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture'.

[1] U Barten, 'Article 27 ICCPR: A First Point of Reference' in U Caruso and R Hofmann (eds), *The United Nations Declaration on Minorities* (Brill:Nijhoff 2015); A Yupsanis, 'Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee' in N Lavranos, R A Kok (eds), 26 *Hague Yearbook of International Law* (Brill:Nijhoff 2013) 359-410; Anikó Szalai, 'Article 27 of the ICCPR in Practice, with Special Regard to the Protection of the Roma Minority' in *Hungarian Yearbook of International Law and European Law 2015* (Eleven International Publishing 2016); E Henderson and N Shackleton, 'Minority Rights Advocacy for Incarcerated Indigenous Australians: The Impact of Article 27 of the ICCPR' (2016) 41(4) Alternative Law Journal 244–248. With reference to indigenous land rights, other provisions have been applied by the Committee. For example, in *Hopu and Bessert v France*, the Committee applied ICCPR Article 17(1) on the right to privacy and ICCPR Article 23(1) on the protection of the family to guarantee the respect of ancestral burial grounds on their traditional lands threatened by the construction of a hotel complex on the site: *Francis Hopu and Tepoaitu Bessert v France*, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 July 1997), para 10. See Chapter 2.

In its General Comment No 23, the HRC stated that cultural rights under Article 27 manifest in many forms, including a particular way of life associated with land and territory and the use of their resources, especially in case of indigenous individual members of communities constituting a minority[2]. The right may include traditional activities like fishing, hunting and the right to live in reserves. The enjoyment of such right requires positive measures to ensure the effective participation of members of minority communities in decision that may affect them[3]. Hence, the HRC applied Article 27 as legal basis to protect the attachment of indigenous to natural resources as an expression of indigenous individuals, part of minorities, right to culture.

In its individual communications, the HRC reiterates that the rights protected by ICCPR Article 27, include the right of indigenous 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[4]. The HRC in *Länsman I* found that while States may legitimately promote their economic development, this may not undermine the rights protected by Article 27[5]. The HRC stated that, since Article 27 requires that a member of a minority shall not be denied of the right to enjoy his culture, measures whose impact amount to a denial of the right are not compatible with Article 27. Diversely, measures that have a certain limited impact on the way of life of persons

[2] HRC, General Comment No 23: The Rights of Minorities (Art 27) UN Doc CCPR/C/21/Rev1/Add5 (8 April 1994), paras 3.2, 7. The HRC found that the enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State Party. Also, *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* HRC, No 167/1984, Communication No 167/1984, CCPR/D/38/D/167/1984 (16 March 1990) and *Ivan Kitok v Sweden,* Communication No 197/1985 (27 July 1988); also, B Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016) 60. See Chapter 2.

[3] ibid.

[4] *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (n 2), para 32.2.

[5] *Jouni E Länsman et al v Finland* HRC No 671/1995 CCPR/C/58/D/617/1995 (22 November 1996), para 9.4. Also, Martin Scheinin, 'Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights' (2004) Aboriginal Policy Research Consortium International (APRCi) 195; M Åhrén, *Indigenous Peoples Status in the International Legal System* (OUP 2016) 94.

belonging to a minority do not necessary constitute a denial of the right under Article 27[6].

The HRC confirmed such findings in various individual communications[7]. In *Poma Poma*, for example, the HRC stated that measures that affect indigenous culturally significant economic activities must respect the principle of proportionality not to endanger the survival of the community and of its members[8]. In its concluding observations, the HRC recommended in different occasions to guarantee the rights protected under ICCPR Article 27, ensuring consultations with, and the free, prior and informed consent of, indigenous communities in case of projects that could substantially compromise their culturally significant economic activities, or their way of life and culture, or that could have an impact on their traditional owned, occupied or otherwise used lands[9].

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[6] ibid para 10.3.

[7] Eg *Jouni E Länsman and others v Finland* (n 5), paras 10.3, 10.7; *Jouni E Länsman, Eino Länsman, and the Muotkatunture Herdsmen's Committee v Finland,* HRC Communication No 1023/2001 (17 March 2005), paras 10.1-10.3; *Aarela and Nakkalajarvi v Finland,* HRC Communication No 779/1997 (24 October 2001), para 7.5; *Rehoboth Baster Community et al v Namibia*, UN Doc Communication No 760/1997 (6 September 2000), para 10.3; *Howard v Canada,* HRC Communication No 879/1998 (26 July 2005), para 12.7; *Paadar and Alatorvinen Families v Finland*, HRC Communication No 2102/2011, CCPR/C/110/D/2102/2011 (26 March 2014), para 7.7.

[8] *Angela Poma v Peru,* Comm No 1475/2006 UN Doc CCPR/C/95/D/1457/2006 (27 March 2009), paras 7.4-7-6.

[9] HRC, Concluding Observations on the seventh periodic report of the Russian Federation CCPR/C/RUS/CO/7 (28 April 2015), para 24; Concluding Observations on the fifth periodic report of Peru UN Doc CCPR/C/PER/CO/5 (29 April 2013), para 24; Concluding Observations on the sixth periodic report of Mexico CCPR/C/MEX/CO/6 (4 December 2019), paras 44, 45; Kenya UN Doc CCPR/C/KEN/CO/3 (31 August 2012), para 24; Ecuador UN Doc CCPR/C/ECU/CO/6 (11 August 2016), paras 35-36; Concluding Observations on the fourth periodic report of the Democratic Republic of the Congo UN Doc CCPR/C/COD/CO/4 (30 November 2017), paras 49-50; Concluding Observations on the sixth periodic report of Chile (2014) UN Doc CCPR/C/CHL/CO/6 (13 August 2014), para 10 (c); Concluding Observations on the fourth periodic report of Guatemala UN Doc CCPR/C/GTM/CO/4 (7 May 2018), para 38; Concluding Observations on the second periodic report of Angola UN Doc CCPR/C/AGO/CO/2* (8 May 2019), para 50; Concluding Observations in the absence of the initial report of Dominica UN Doc CCPR/C/DMA/COAR/1 (24 April 2020), para 48. Cf General Comment No 36, where the HRC found that the deprivation of indigenous lands, territories and resources may constitute a threat of their right to life: HRC, General Comment No 36: Article 6: right to life UN Doc CCPR/C/GC/36 (3 September 2019), para 26.

3.2.1.2 ICESCR Article 15(1)(a)

The Committee on Economic, Social and Cultural Rights (CESCR) contribution on the recognition of indigenous individual rights with respect to natural resources developed from the application of ICESCR Article 15(1)(a), which establishes the right of every person to take part in cultural life[10].

In the 2009 General Comment No 21, the CESCR found that the communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired[11]. The cultural value and rights associated with indigenous ancestral lands and relationship that indigenous have with nature shall be respected and protected to prevent the degradation of their particular way of life, including their means of

[10] Further references to the indigenous rights with respect to natural resources resulted from the application of ICESCR Article 15(1)(b) on the right to enjoy the benefits from scientific progress and its applications and of Article 15(1)(c) on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic product of which he is the author. Those provisions consider natural resources from the side of traditional knowledge on genetic resources; A Yupsanis, 'The Meaning of Culture in Article 15 (1)(a) of the ICESCR - Positive Aspects of CESCR's General Comment No 21 for the Safeguarding of Minority Cultures' (2012) 55 German YB Intl L 345; R O'Keefe, 'Cultural Life, Right to Participate in, International Protection' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* vol 2 (Oxford: OUP 2012) 916–924; E Lein, 'Human Rights Conventions, CESCR – International Covenant On Economic, Social And Cultural Rights' in *A Concise Encyclopedia of the United Nations* (Brill:Nijhoff 2010); A Chapman and B Carbonetti, 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33(3) Human Rights Quarterly 682-732; Amanda Barratt and Ashimizo Afadameh-Adeyemi, 'Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21' (2011) 11(2) African Human Rights Law Journal 560-587; C Holder, 'Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law' (2008) 33(1) Alternatives 7-28.

[11] CESCR, General Comment No 21: Right of Everyone to take Part in Cultural Life (Article15(1)(a) UN Doc E/C.12/GC/21 (21 December 2009), para 36; also, UNGA Res 61/295 'United Nations Declaration on the Rights of Indigenous Peoples' (UNDRIP) (13 September 2007), art 26(1). The CESCR in its 2020 General Comment No 25 found that States must take all measures to respect and protect the rights of indigenous peoples to their land: CESCR, General Comment No 25: (2020) on science and economic, social and cultural rights (article 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/25 (30 April 2020), para 40. See Chapter 5.

subsistence, the loss of their natural resources and of their cultural identity[12].

The Committee took the view that ICESCR Article 15(1)(a) requires States Parties to adopt measures to recognize and protect the rights of indigenous to own, develop, control and use their communal lands, territories and natural resources[13]. In case such lands, territories and resources have been inhabited or used without indigenous free, prior and informed consent, States must take steps to return them to indigenous[14]. Moreover, States shall respect indigenous right to maintain their spiritual relationship with their ancestral lands and resources traditionally owned, occupied or used and which are indispensable to their cultural life[15]. Finally, the Committee found that States must protect indigenous individuals from illegal and unjust exploitation of their lands, territories and resources, both by States' entities and private and transnational enterprises and corporations[16].

In its concluding observations, the CESCR recommended the need to guarantee the rights of indigenous with respect to access to their traditional lands and resources protected under ICESCR Article 15, particularly in case of extractive industries in their territories and of arbitrary restrictions imposed in their means of livelihood, including hunting and fishing[17].

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[12] ibid (General Comment No 21); cf ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169, 1650 UNTS 383 (27 June 1989) (entered into force 5 September 1991), arts 13-16 and UNDRIP, arts 20, 33.
[13] ibid.
[14] ibid. See Chapter 5.
[15] ibid para 49(d).
[16] ibid para 50(c).
[17] CESCR, Concluding Observations on the fourth periodic report of Ecuador UN Doc E/C.12/ECU/CO/4 (14 November 2019), paras 61-62; Concluding Observations on the sixth periodic report of the Russian Federation UN Doc E/C.12/RUS/CO/6 (16 October 2017), para 58; Concluding Observations: Madagascar UN Doc E/C.12/MDG/CO/2 (16 December 2009), para 33; Argentina UN Doc E/C.12/ARG/CO/3 (14 December 2011), para 25; Australia UN Doc E/C.12/AUS/CO/4 (12 June 2009), para 32; Chad UN Doc E/C.12/TDC/CO/3 (16 December 2009), para 35; Sweden UN Doc/E/C.12/SWE/CO/5 (1 December 2008), para 15. See Chapter 5.

3.2.1.3 ICERD Article 5(d)(v)

According to ICERD Article 5(d)(v), every person, without any distinction, has the right to own property individually and in association with others. The provision is part of the general non-discrimination principle stated in Article 2 of the same Convention[18].

The Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation No 23 found that indigenous individuals have the right to own, develop, control and use their communal lands, territories and resources[19]. Such findings are confirmed by the monitoring activity of the CERD, which recommended in various occasions to guarantee indigenous rights with respect to natural resources, and to adopt safeguards to limit the negative environmental impacts of development projects, including indigenous rights to consultations and free, prior and informed consent and the conduct of environmental impact assessments[20].

[18] Patrick Thornberry, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5(2) Human Rights Law Review 239-269; J Gilbert, *CERD's Contribution to the Development of the Rights of Indigenous Peoples under International Law* (Manchester University Press 2017).

[19] CERD, General Recommendation No 23: Indigenous Peoples, UN Doc CERD/C/51/misc13/Rev4 (18 August 1997), annex V, para 5. The CERD called upon to 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. Such compensation should as far as possible take the form of lands and territories'.

[20] CERD, Concluding Observations in the combined twenty-third and twenty-fourth periodic reports of Ecuador UN Doc CERD/C/ECU/CO/23-24 (15 September 2017), paras 16-18; El Salvador UN Doc A/50/18 (22 September 1995), paras 20-21. On the right to consultations, CERD, Concluding Observations: Suriname UN Doc CERD/SUR/CO12 (13 March 2009), para 14; Ecuador UN Doc CERD/C/ECU/CO/20-22 (24 October 2012), para 17; New Zealand UN Doc CERD/C/NZL/CO/18-19 (17 April 2013), para 18; Bolivia UN Doc CERD/C/BOL/CO/17-20 (8 April 2011), para 20; Concluding Observations on the combined nineteenth to twenty-first periodic reports of Chile UN Doc CERD/C/CHL/CO/19-21 (23 September 2013), paras 12-13; Chile UN Doc CERD/C/CHL/CO/15-18 (7 September 2009), paras 21-23; Cameroon UN Doc CERD/C/CMR/CO/15-18 (30 March 2010), para 18; Indonesia UN Doc A/62/18 (17 August 2007), para 359; Concluding Observations on the combined twenty-second and twenty-third periodic reports of Peru UN Doc CERD/C/PER/CO/22-23 (23 May 2018), paras 16-17, 20, 25; Concluding Observations on the combined fourteenth to seventeenth reports of Cambodia UN Doc CERD/C/KHM/CO/14-17 (30 January 2020), para 28.

3.2.1.4 CRC Convention Article 30

Article 30 of the CRC Convention declares that in States where persons of indigenous origin exist, a child who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

The UN Committee on the Right of the Child has elaborated on Article 30 of the CRC regarding the context of indigenous children's rights with respect to natural resources. In its General Comment No 11, the Committee recalled the linkage between CRC Article 30 and ICCPR Article 27 and stated that indigenous children's cultural rights may be associated with the use of their traditional territory and its resources[21]. The Committee highlighted the need to consider the cultural importance of traditional lands and the quality of the environment while ensuring at the same time indigenous children's development[22]. Such findings have been confirmed in different concluding observations of the Committee, which particularly focused on the impact of development projects for the exploitation of natural resources, recommending States to adopt measures to guarantee indigenous rights

[21] UN Committee on the Rights of the Child (CRC), General Comment No 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child] UN Doc CRC/C/GC/11 (12 February 2009), para 16; also, Recommendations of CRC, Day of General Discussion on the Rights of Indigenous Children (3 October 2003), para 4 and HRC, General Comment No 23 (n 2). N Espejo-Yaksic, 'International Laws on the Rights of Indigenous Children' in U Kilkelly and T Liefaard (eds), *International Human Rights of Children: International Human Rights* (Springer 2018); E Te Kohu Douglas, and R Douglas, 'The Rights of the Indigenous Child: Reconciling the United Nations Convention on the Rights of the Child and the (Draft) Declaration on the Rights of Indigenous People with Early Education Policies for Indigenous Children' (1995) 3(2) The International Journal of Children's Rights 197-211; R van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' [2004] 75 Oceania 125-151. See section 3.2.1.1 and Chapter 2.

[22] ibid (General Comment No 11), para 35. The importance of guaranteeing indigenous children economic development was affirmed in different concluding observations of the CRC, such as Concluding Observations: Thailand UN Doc CRC/THA/CO/3-4 (17 February 2012), para 82; Guatemala UN Doc CRC/C/GTM/co/3-2 (25 October 2010), para 40; Honduras UN Doc CRC/C/HND/CO/3 (3 May 2007), paras 83-84; Kenya UN Doc CRC/C/KEN/CO/2 (19 June 2007), paras 69-70; Myanmar UN Doc CRC/C/MMR/CO/3-4 (14 March 2012), para 96; Burundi UN Doc CRC/BDI/CO2 (20 October 2010), para 78; El Salvador UN Doc CRC/C/SLV/CO/3-4 (17 February 2010), para 91.

with respect to natural resources, including the consultations with indigenous communities and the conduct of environmental impact assessments prior to the approval of investment projects that may affect their rights[23].

3.2.1.5 CEDAW Articles 15 and 16

The CEDAW does not make explicitly references to indigenous women's rights with respect to natural resources. The relevant provisions of the Convention are Articles 15 and 16 that recognize, in general, the equal rights of women to administer property and to enjoyment and disposition of property, respectively[24]. In General Recommendation No 30, the CEDAW Committee recommended States to protect the displacement of indigenous women with special dependency on land[25]. In its concluding observations, the CEDAW Committee underlines the peculiar, disadvantaged position of indigenous women and in particular the discrimination regarding ownership and access to land and natural resources[26].

[23] CRC, Concluding Observations: Guatemala UN Doc CRC/C/GTM/CO/5-6 (28 February 2018), para 35(a); Guatemala UN Doc CRC/C/GTM/CO/3-4 (25 October 2010), para 101; Bolivia UN Doc CRC/C/BOL/CO/4 (16 October 2009), para 61; Honduras UN Doc CRC/C/HND/CO/3(3 May 2007), paras 83-84; Honduras UN Doc CRC/C/HND/CO/4-5 (3 July 2015), para 77(c); Panama UN Doc CRC/C/PAN/CO/3-4 (21 December 2011), para 27; Colombia UN Doc CRC/C/COL/CO/3 (8 June 2006), para 73; Ecuador UN Doc CRC/C/ECU/CO/4 (2 March 2010), paras 30-31.

[24] Also, TL Prior and L Heinämäki, 'The Rights and Role of Indigenous Women in Climate Change Regime' (2017) 8 Arctic Review 193-221; Aparna Polavarapu, 'Reconciling Indigenous and Women's Rights to Land in Sub-Saharan Africa' (2013-2014) 42 Ga J Intl & Comp L 93; Ambreena Manji, 'Commodifying Land, Fetishising Law: Women's Struggles to Claim Land Rights in Uganda' (2003) 19 Australian Feminist Law Journal 81-92; V Nagarajan and A Parashar, 'Space and Law, Gender and Land: Using CEDAW to Regulate for Women's Rights to Land in Vanuatu' (2013) 24 Law Critique 87–105; Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-Discrimination and Equality' (2013) 14 Melb J Intl L 54; also, *Bue Manie and Kenneth Kaltabang v Sato Kilman* (5 July 1983) Supreme Court Vanuatu Land Case No L5/1984.

[25] CEDAW, General Recommendation No 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations UN Doc CEDAW/C/GC/30 (18 October 2013), para 57(d). At para 51 the Committee urged States to guarantee the access to lands and natural resources to rural women, not mentioning indigenous women.

[26] CEDAW, Concluding Observations: Indonesia UN Doc CEDAW/C/UDN/CO/6-7 (11 July 2012), para 45.

3.2.1.6 International treaties concerning the conservation and exploitation of certain animal resources

Various international conventions protecting migratory and endangered living resources consider, among their exceptions, the special nutritional and cultural needs of indigenous peoples[27]. Among those instruments, the International Convention for the Regulation of Whaling (ICRW) allows for whaling on otherwise protected animals in case it is conducted by certain indigenous communities, living in Greenland, Russian Federation, United States and by the people of Bequia in St. Vincent and the Grenadines, to satisfy their subsistence[28]. According to para 13(a) of the Schedule to the ICRW, in case the International Whaling Commission (IWC) recognizes the cultural subsistence and nutritional need for whales and whaling to certain aboriginal communities, those are allowed to hunt some whale species exclusively for local consumption and respecting some procedures[29].

In multilateral treaties, the need to consider the 'traditional subsistence' of users of migratory and wild animals is mentioned also by

[27] In classic international law a similar exception was contemplated in the Award of the Bearing Fur Seals Arbitration: *Arbitral Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (United Kingdom v United States)*, Award of 15 August 1893, RIAA, Vol XXVIII, 263 at 271, art 8: 'The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person'.

[28] International Convention for the Regulation of Whaling (ICRW), 62 Stat 1716, 161 UNTS 72 (2 December 1946) (entered into force 10 November 1948); also, Alexander Gillespie, 'Aboriginal Subsistence Whaling: A Critique of the Interrelationship Between International Law and the International Whaling Commission' (2001) 12 Colo J Intl Envtl L & Poly 77, 89; Chris Wold and Michael D Kearney, 'The Legal Effect of Greenland's Unilateral Aboriginal Subsistence Whale Hunt' (2015) 30(3) American University International Law Review 561-609.

[29] For example, it is forbidden to strike, take or kill calves or any whale accompanied by a calf. Those quotas are allocated on the advice of the IWC Scientific Committee every six-years.

the 1979 Bonn Convention on wild animals[30]. At the regional level, the Convention for the conservation and management of highly migratory fish stocks in the Western and Central Pacific states the necessity to avoid adverse impacts on, and ensure access to, fisheries by indigenous peoples living in the region[31]. In a similar vein, the Inter-American Convention on the Protection of Sea Turtles states that each State Party may allow exceptions to the capture and killing of sea turtles and their eggs to satisfy the economic subsistence needs of traditional communities[32].

Indigenous special nutritional needs are considered also in different bilateral treaties concerning migratory birds. For example, the 1972 Bilateral Convention between Japan and the United States, considered the food and clothing needs of indigenous peoples among the exceptions from the prohibition of taking of the migratory birds and their eggs[33]. Similarly, the bilateral Convention between the United States and the Soviet Union, now the Russian Federation, concerning the conservation of migratory birds recognized the nutritional and other essential needs of indigenous

[30] Convention on the Conservation of Migratory Species of Wild Animals, 1651 UNTS 334 (23 June 1979) (entered into force 1 November 1983) (the 'Bonn Convention'), art III(5)(c).
[31] Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean 2275 UNTS 43 (5 September 2000) (entered into force 19 June 2004) (the 'WCPF Convention'), art 30(2)(b); also, Convention on the Conservation and Management of High Seas Fishery resources in the South Pacific Ocean (14 November 2009) (entered into force 24 August 2012), art 19(2)(b).
[32] Inter-American Convention for the Protection and Conservation of Sea Turtles. Eighth Conference of the Parties (1 December 1996) (entered into force 2 May 2001), art IV(3)(a). The same principles have been applied by European Union law regulating trade in seal products which considers seal hunting as part of indigenous cultural identity: Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products; Commission Regulation (EU) No 737/2010 lying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products; Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010. See Chapter 5.
[33] Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and their Environment, 979 UNTS 150 (4 March 1972), art III(1)(e).

inhabitants of the Chukchi and Koryaksk for taking of migratory birds and the collection of their eggs[34].

3.2.2 Regional instruments

The following paragraphs introduce the main regional human rights frameworks relevant to the rights of indigenous individuals with respect to lands and natural resources[35]. Precisely, they illustrate the pertinent provisions in human rights regimes in the American countries, in Europe and Africa, considering both regional human rights treaties and their application by regional human rights bodies. With regard to Asia there is no regional instrument providing such protection[36]. Even in the context of the ASEAN, the ASEAN Human rights Declaration does not contain any reference to indigenous peoples or even to self-determination.

3.2.2.1 The Inter-American system

As mentioned in the previous Chapter, the 1948 Inter-American Charter of Social Guarantees at Article 39 affirms that, in those States interested by the presence of natives, measures should be adopted to protect such communities, including their right to property[37]. The same provision

[34] Convention Concerning the Conservation of Migratory Birds and their Environment (Soviet Union/Russia-The United States) 1134 UNTS 97 (19 November 1976), arts II(1)(c), 2(II).
[35] F Viljoen, 'Reflections on the Legal Protection of Indigenous Peoples' Rights in Africa' in S Dersso (ed), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press 2010); GM Wachira and T Karjala, 'The Struggle for Protection of Indigenous Peoples' Rights in Africa' in C Lennox and D Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2015).
[36] C Renshaw, 'The ASEAN Human Rights Declaration 2012' (2013) 13(3) Human Rights Law Review 557-579, 575. Renshaw observes that the mention in UNDRIP Article 46 that indigenous self-determination does not undermine sovereignty was not considered enough by ASEAN Governments. Among the most relevant domestic cases in the region involving the right of indigenous peoples with respect to natural resources, Sapporo District Court, *Kayano et al. v Hokkaido Expropriation Committee* (27 March 1997).
[37] Inter-American Charter of Social Guarantees, adopted by the Ninth International Conference of American States, Final Act, Resolution XXXIX 29 (1948), Article 39. See Chapter 2.

requires the creation of specific institutions to protect their rights to land, to legalize their possession and to prevent the invasion by outsiders[38].

The delay in the approval of a proposed American Declaration on the Rights of Indigenous Peoples led to the emergence, first, of the 1948 American Declaration on the Rights and Duties of Man and, then, of the American Convention on Human Rights (ACHR), a legal binding treaty, as the main sources of rights for indigenous individuals. Both instruments do not mention indigenous in their provisions. Indigenous rights are also not mentioned in the Additional Protocol to the Convention on Economic, Social and Cultural Rights, adopted 1988[39]. Rather, indigenous individuals are protected under the same provisions of both instruments as other individuals. The 1948 Declaration Article XXIII affirms the right of every person to own private property in order to meet the essential needs of decent living. Diversely, Article 21 of the American Convention states that every person has the right to property, both in the form of use and enjoyment. The same provision at its second paragraph declares that no person may be deprived of his property, except when prescribed by the law and with just compensation, for reasons of public utility and social interest.

The *Awas Tingni* case was the first judgement where the Inter-American Court (IACtHR) applied the provisions of the American Convention on indigenous rights with respect to lands and natural resources[40]. First,

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[38] ibid.

[39] The American Declaration of the Rights and Duties of Man, OEA/Serv.L./V/11.71 (1948). Relevant provisions of the Additional Protocol are, however, those on the right to a healthy environment (art 11), right to food (art 12) and the right to benefit of culture (art 14); also, O Ruiz-Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties: Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2011) 31(2) Netherlands Quarterly of Human Rights 159-186; M Bothe, 'The Right to a Healthy Environment' in F Bestagno (ed), *I diritti economici, sociali e culturali* (Vita e Pensiero 2009) 129-135.

[40] *Mayana (Sumo) Community of Awas Tingni v Nicaragua,* Judgement of 31 August 2001, Inter-American Court on Human Rights, (Ser C) No 79, 2001 (the *'Awas Tingni'* case). Before *Awas Tingni*, the organs of the Inter-American system were sceptical in recognizing indigenous communal property rights. Indeed, in *Miskito* the IACHR found itself not in a position to decide on the claims of an indigenous community over its ancestral lands. However, the Commission precised that in every case this would not imply a limitation of Nicaraguan sovereign rights over its territory: Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin' (1984) OAS Doc,

the Court found that an evolutionary interpretation of international human rights instruments extended the applicability of ACHR Article 21 to the rights of members of the indigenous communities within the framework of communal property[41]. Hence, indigenous ownership of the land under Article 21 must be recognized as the fundamental basis of their cultures, spiritual life, integrity and economic survival. Indeed, it is not merely a matter of possession and production, but indigenous property of the land includes a material and spiritual element that they must fully enjoy[42].

OEA/Ser.L./V/II.62, Doc 26. Also, CJ Iorns, 'Indigenous Peoples and Self-Determination: Challenging States Sovereignty, Case Western Reserve Journal of International Law' (1992) 24(2) 199-348, 265; H Hannum, *Autonomy, Sovereignty, and Self-Determination: the Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990) 96-97; J Anaya and C Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19(1) Arizona Journal of International and Comparative Law 3-4; J Anaya and Robert A Williams, '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 37-38; C Grossman, 'Awas Tingni v. Nicaragua: A Landmark Case for the InterAmerican System' (Spring 2001) Hum Rts Brief 1, 2. In its judgment in *Awas Tingni*, the IACtHR found that 'the Mayagna Community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory. Their rights "exist even without State actions which specify them". Traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single social conformation throughout the centuries. The overall territory of the Community is possessed collectively, and the individuals and families enjoy subsidiary rights of use and occupation'. At the domestic level, indigenous communal property was recognized by Nicaraguan Law 445: Ley núm. 445 de Régimen de propiedad comunal de los pueblos indígenas y comunidades étnicas de las regiones autónomas de la Costa Atlántica de Nicaragua y de los ríos Bocay, Coco, Indio y Mai (13 December 2020).

[41] ibid (*Awas Tingni*), para 148. J Anaya, 'Divergent Discourses About International Law, Indigenous Peoples and Rights over Lands and Natural Resources: Towards a Realist Trend' (2005) 12(2) Colorado Journal on International and Environmental Law and Policy 253-355. At the domestic level, the recognition of indigenous communal ownership of the land is stated, for example, by Article 64(2) of the Paraguayan Constitution.

[42] ibid para 149: '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. For 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'. As reported by the Court at para 146, the preliminary reference to the right to the use and enjoyment of 'private property' in the Convention was replaced by the right to the use and enjoyment of 'his property'. The Court at para 144 stated that 'property' can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value. In its *Concurring Opinion*, Judge Ramirez noted that the drafting of Article 21 of the Convention rejected a single and rigid model of property in order to allow all subjects to be protected by the Convention according to their culture, interests, aspirations, customs, characteristics and beliefs. In doing so, Ramirez referred to

Hence, possession of the lands as a result of customary practices should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property[43].

Those findings have been confirmed and developed in the successive jurisprudence of the Inter-American Court. In *Yakye Axa,* the IACtHR reiterated the need to consider international human rights law and that the right to communal property under ACHR Article 21 does not only include material things but also any tangible or intangible right that is part of a person's patrimony[44]. Accordingly, indigenous collective property rights on lands are broader than the classic notion of property and encompass a collective right to survival as 'an organized people' and the control over a habitat necessary for their development and for the preservation of their cultural heritage[45]. In the successive *Sawhoyamaxa* case the Court reiterated that 'traditional possession' means the special connection that indigenous maintain with lands and equalized such possession with State-granted full property title[46]. The necessity to interpret ACHR Article 21

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international law, including ILO Convention No 169 and the, still, draft UN and American Declarations: *Concurring Opinion of Judge Sergio Garcia Ramirez in the Judgment on the Merits and Reparations in the 'Mayagna (Sumo) Awas Tingni Community Case*, IACHR Series C No 79 [2001] IACHR 9, paras 6-9, 11. The deep spiritual relationship between indigenous peoples and their lands was recognized by the Court also in *Chitay Nech v Guatemala,* Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (Ser C) No 212 (15 May 2010), paras 145, 168-169. See Chapter 5.

[43] ibid (*Awas Tingni*), para 151.

[44] *Yakye Axa Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (se C), No 125 (17 June 2005), paras 51, 124-125, 128, 130, 137. Also, Thomas M Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013) 35 U Pa J Intl L 113, 146-148; C Courtis, Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples, International Journal of Human Rights (2009) 6(10) 68-70. At para 128, n 195, the IACtHR cites *Judicial Condition and Rights of the Undocumented Migrants: Juridical Conditions and Rights of the Undocumented Migrants* Advisory Opinion OC-18/93 of September 17, 2003, Series A No 18, para 120: 'The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law'.

[45] ibid paras 144-146.

[46] *Sawhoyamaxa Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (Ser C) Mo 146 (29 March 2006), paras 128, 131. The case refers to lands

according to evolving rules and principles of international human rights law, reflected in treaties, customs and other sources of international law, was also confirmed by the Inter-American Commission (IACHR) in *Mary and Carrie Dann*[47] and in *Maya Indigenous Communities*[48]. In the latter case the IACHR found that, since the peculiar nature that the right to property has for the enjoyment and perpetuation of indigenous culture, the duty to consult indigenous communities affected by concessions of natural

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acquired by German investors protected under an investment treaty between Paraguay and Germany: J Gilbert, *Natural Resources and Human Rights, an Appraisal* (CUP 2018) 58-59.

[47] *Mary and Carrie Dann v United States*, Case 11.140, Report No 75/02, IACHR, Doc 5 rev 1 at 860 (27 December 2002), paras 129, 130; those rules included the Draft UNDRIP, the OAS Draft American Declaration on the Rights of Indigenous Peoples, the ILO Convention No 169 (1989), and the ICCPR. The Report stated that the provisions of the American Draft Declaration relating to rights to land and natural resources were an interpretative tool that already reflected general international legal principles applicable within and outside of the Inter-American system. Such body of law included the right to legal recognition of varied and specific forms of control, ownership, use and enjoyment of traditional lands, territories and resources. The IACHR concluded that 'where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost'. Also, D Schaaf and J Fishel, 'Mary and Carrie Dann v United States at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment' in (2002) 16(1) Tulane Environmental Law Journal 175-187*;* MT McCauley, 'Empowering Change: Building the Case for International Indigenous Land Rights in the United States' (2009) 41 Ariz St LJ 1167. The United States claims that Western Shoshone lands have been ceded by the indigenous communities in a treaty concluded with the Federal Government: Treaty with the Western Bands of Shoshone Indians, Oct 1, 1963, U.S.-W. Bands of Shoshone Indians, 18 Stat. 689, reprinted in *2 Indian Affairs: Laws and Treaties* (Charles J Kappler ed, 2nd edn 1904) 851-53; BD Tittemore, 'The Dann Litigation and International Human Rights Law: The Proceedings and Decisions of the Inter-American Commission on Human Rights' (2006-2007) 31 Am Indian L Rev 593; KL Foot, 'United States v. Dann: What It Portends for Ownership of Millions of Acres in the Western United States' (1984) 5 Pub Land L Rev 183. See Chapter 5.

[48] *Maya Indigenous Communities of the Toledo District v Belize*, Case 12,053, Inter-American Commission on Human Rights, Report No 40/04 (Merits Decision of 12 October 2004), paras 98-99. According to the Report the relevant instruments included the ICCPR, the ICESCR, the ICERD, the UDHR, the UNDRIP and the jurisprudence of the IACtHR and IACHR. Also, MS Campbell and J Anaya, 'The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights' (2008) 8(2) Human Rights Law Review 377–399; J Anaya, 'Maya Aboriginal Land and Resource Rights and the Conflict over Logging in Southern Belize' (1998) 1 Yale Hum Rts & Dev LJ 17; Levi Gahman, Filiberto Penados and Adaeze Greenidge, 'Indigenous Resurgence, Decolonial Praxis, Alternative Futures: The Maya Leaders Alliance of Southern Belize' (2020) 19(2) Social Movement Studies 241-248; Garth Nettheim, 'The Maya Land Rights Case': Recognition of Native Title in Belize' (Dec 2007-Jan 2008) 7(2) Indigenous Law Bulletin 25-26; IM Cuneo, 'The Rights of Indigenous Peoples and the Inter-American Human Rights System' (2005) 22 Ariz J Intl & Comp L 53.

resources located in indigenous traditional lands is a fundamental component of the State obligation to implement indigenous communal property rights[49].

On the restrictions of such indigenous communal property, in *Awas Tingni*, the Court found that States shall abstain from any act 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 by the indigenous[50]. States should demarcate and title those lands in accordance with indigenous customary values and customs and avoiding unilateral actions[51]. Those findings were developed in *Yakye Axa*, where the Court listed the guidelines for States in the application of restrictions to indigenous communal property[52]. Where such rights would be in contrast with other private or State property claims, the State shall assess, on a case-by-case basis, the restrictions that would affect indigenous rights, considering that property of the lands is an essential element of indigenous culture[53]. In *Sawhoyamaxa*, the Court confirmed the

[49] ibid para 155.
[50] ibid para 173.
[51] *Awas Tinngi* (n 40), paras 173(3)–(4). In *Yanomami* the IACHR underlined for the first time that States have the duty to demarcate traditional lands and to adopt positive measures to protect the indigenous way of life: IACHR, *Yanomami v Brazil*, Case No 7615, Resolution No 12/85 (5 March 1985), Recommendation 3(b). Also, Shawkat Alam and A Al Faruque, 'From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources Management' (2020) 32(1) The Georgetown Environmental Law Review 59-84, at 76; Leonardo J Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua' (2007) 24 Ariz J Int'l & Comp L 609, 610, 614; Carol Y Verbeek, 'Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of the Kichwa People of Sarayaku v. Ecuador' (2012) 37 Am Indian L Rev 263, 263-282; U Kahtri, 'Indigenous Peoples' Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by Sarayaku v. Ecuador and its Potential to Delegitimize the Belo Monte Dam' (2013) 29 Am U Intl L Rev 165-207. See Chapter 5.
[52] Those guidelines include the following principles: a) they must be established by law; b) they must be necessary; c) they must be proportional; and d) they should pursue a legitimate goal in a democratic society.
[53] *Yakye Axa* (n 44), paras 146-147. The Court opined that restriction of other property rights may be necessary for preserving indigenous identities. Moreover, referring to Article 16(4) of ILO Convention No 169 (1989), at paras 150-151 the IACtHR concluded that where States are not able to restore traditional lands to indigenous communities, they must guarantee alternative lands or compensation, or both, seeking consensus with the peoples involved, respecting their own mechanism of consultation, values, customs and customary law.

procedural requirements to be adopted by States in the case of limitations of rights to lands that should respect the legality, necessity, proportionality and fulfilment of a lawful purpose in a democratic society[54].

The IACtHR applied ACHR Article 21 also to indigenous rights with respect to natural resources in indigenous traditional lands. In *Awas Tingni* the Court found that granting of concessions to third parties to utilize the resources located in an area corresponding to the lands belonging to the community represents a violation of Article 21[55]. The relevance of ACHR Article 21 for natural resources was reiterated in successive judgements of the IACtHR. For example, in *Yakye Axa* the Court found that the lack of access to indigenous ancestral lands may deprive the members of the community of the possibility of access to their traditional means of subsistence and to use and enjoyment of the natural resources of such territories[56].

3.2.2.2 The European framework

Indigenous are not mentioned in the European Convention for the Protection on Human Rights and Fundamental Freedoms (ECHR) and related instruments. The most relevant legal basis for the protection of indigenous

[54] *Sawhoyamaxa* (n 46), para 138. At para 140, the IACtHR found that the contracting Party of an investment treaty may be ordered to perform the restitution of lands to indigenous populations.

[55] *Awas Tingni* (n 40), para 153: 'Based on the above, and taking into account the criterion of the Court with respect to applying article 29(b) of the Convention (supra para. 148), the Court believes that, in light of article 21 of the Convention, the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled'.

[56] *Yakye Axa* (n 44), paras 167-168. Accordingly, States have the obligation to ensure to vulnerable persons such as indigenous peoples a decent life. Making reference to the previous findings of the CESCR, the IACtHR found that the difficulty to access to food and clean water resources represents a violation of indigenous human rights: CESCR, General Comment No 12: The Right to Adequate Food (Art. 11 of the Covenant) UN Doc E/C.12/1999/5 (12 May 1999), para 13; CESCR, General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant) UN Doc E/C.12/2002/11 (20 January 2003), para 16. The adoption of the UNDRIP in 2007 influenced the further developments in the jurisprudence of the IACtHR on indigenous rights with respect to natural resources: see Chapter 5.

rights with respect to land and natural resources is provided by Additional Protocol No 1 to the European Convention, whose Article 1 states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'[57]. Exceptions are allowed only in cases of public interest and in accordance with the law and general principles of international law. A further relevant provision is Article 8 of the Convention, which protects the respect for private life, family life and home.

In applying such provisions, the European Commission of Human Rights (ECommHR) recognized, in principle, indigenous rights with respect to natural resources as a form of property rights[58]. In *Alta* case, the Commission found that the claim of a violation of indigenous right to possession under Article 1 of Additional Protocol No 1 was better suited under Article 8 of the Convention, declaring however the appeal inadmissible since the dam involved in the dispute occupied a relatively small area and the interference was in accordance with the law and in the interest of the economic well-being of the State[59]. Moreover, the

[57] P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2008) 305–306; T Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects' (2011) 18 International Journal on Minority and Group Rights 1-37; Åhrén (n 5) 182-183; Saul (n 2) 200-202. See Chapter 5.

[58] Åhrén (n 5) 182. In general, in the European human rights system, possession and property have the same legal content and include both tangible and intangible goods: *Marckx v Belgium*, 31 Eur Ct HR (ser A) (1979) at para 63; Mark W Janis, Richard S Kay and Anthony W Bradley, *European Human Rights Law: Text and Materials* (3rd edn, Clarendon 2008). Also, *Bramelid and Malmstrom v Sweden*, App Nos 8588/79, [Admissibility] (1982) at 76; *Smith Kline and French Laboratories v the Netherlands*, App No 12633/87, DR 66 (1990) at para 70 (recognizing that ownership of patents falls within the scope of the term 'possessions' in art 1); *Stran Greek Refineries and Stratis Andreadis v Greece* (Merits), App No 13427/87, A301 Eur Ct HR (Ser B) (1994) at paras 11, 61-62 (finding that a final and enforceable arbitration award constitutes a possession within the meaning of Article 1); *Tre Traktorer Aktiebolag v Sweden*, App No 10873/84, 159 Eur Ct HR (ser A) (1989), paras 1, 53. On indigenous rights with respect to natural resources in the European System, also, G Gismondi, 'Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol' (2016) 18(1) Yale Hum Rts & Dev LJ 15; Asbjörn Eide, 'Rights of Indigenous Peoples - Achievements in International Law During the last Quarter of a Century' (2006) 37 Netherlands Yearbook of International Law 179; Ghislan Otis and Aurelie Laurent, 'Indigenous Land Claims in Europe: The European Court of Human Rights and the Decolonization of Property' (2013) 4 Arctic Rev L & Pol 156, 173; P Kovacs, 'Indigenous Issues under The European Convention of Human Rights, Reflected in an Inter-American Mirror' (2016) 48 The Geo Wash Intl L Rev 781-806.

[59] Application Nos 9278/81 and 9415/81 (joined), *G and E v Norway* (3 October 1983), on the admissibility of the applications. In domestic jurisprudence, the Supreme Court of

Commission found that traditional use of vast territories for grazing, hunting and fishing does not represent a property right[60] but a mere business interest that could require compensation in the case of reduction[61]. Differently, in *Konkamaa and 38 Other Saami Villages v Sweden,* the Commission stated that, in principle, the hunting and fishing rights of the Saami villages may be regarded as possession under Article 1 of Protocol 1[62]. Moreover, in *Halvar FROM v Sweden* the Commission recognized, in essence, indigenous customs on lands from time immemorial and found that reindeer herding and hunting are fundamental components of the Saami culture and that their special way of life must be respected[63].

3.2.2.3 The African system

The African Charter on Human and Peoples' Rights does not mention expressly indigenous individuals, which have the same rights of every other human beings. The protection of indigenous individual rights with respect to lands and natural resources has been provided by the African human rights system through the application of the rights to property and culture under Articles 8, 14, 16 and 17 of the African Charter.

While Article 8 of the Banjul Charter protects religious practices, Article 14 proclaims that the right to property shall be guaranteed and that it may only be limited for reasons of public need or general interest in accordance with appropriate law. According to Article 16 every individual shall have the right to enjoy the best attainable state of physical health. Diversely, Article 17 states that every individual may freely take part in the

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Norway in 2001 found that the Saami community has the right to collective ownership of lands acquired from utilization since time immemorial: *Erik Andersen and others v the Norwegian State*, Supreme Court of Norway Serial No 5B/2001, Judgment of 5 October 2001 (the '*Svartskogen*' case), Rt. 2001 s. 1229.

[60] ibid paras 10-11.

[61] ibid paras 10-11.

[62] *Konkamaa and 38 Other Saami Villages v Sweden*, App No 27033/95, Eur Comm'n HR Dec & Rep (1996), paras 8-9. Also, *O.B. and Others v Norway*, App No 15997/90 Eur Comm'n HR Dec & Rep (1992).

[63] *Halvar FROM v Sweden*, App No 34776/97, Eur Comm'n HR Dec & Rep (1998), paras 2-3.

cultural life of his community and that the State has the duty to promote and protect the traditional values recognized by communities[64].

In *Ogoni* the African Commission on Human and Peoples' Rights applied Articles 16 and 14 of the Charter on indigenous rights with respect to natural resources[65]. According to the African Commission, States are obliged to guarantee the free use of resources owned or at disposal of the individual alone or in association with others[66]. The Commission found that the compliance with Article 16 includes environmental and social impact studies prior to any major industrial development, ensuring the participation of indigenous members of communities in the development decisions affecting them[67]. Moreover, the Commission found that the forced evictions of Ogoni from their villages constituted a violation of Articles 14, 16 and 18(1) of the Charter[68].

3.3 The rights of indigenous peoples under ILO Convention No 169

ILO Convention 1989 No 169 (1989)[69] replaces ILO Convention 1957 No 107 (1957)[70] and provides different provisions containing States'

[64] Recently, in its 2016 Resolution on Indigenous peoples, the African Commission urged States Parties to prevent forced evictions of indigenous populations and communities from their lands and to secure their rights to own, control and manage their ancestral lands and resources: African Commission, 334 Resolution on Indigenous Populations/Communities in Africa - ACHPR/Res.334(EXT.OS/XIX) (25 February 2016).

[65] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm No 155/96 Case No ACHPR/COMM/A044/1, (the '*Ogoni'* case), para 69. The Commission found violation of arts 2, 4, 14, 18, 18(1), 21 and 24 of the African Charter and violations of indigenous rights to environment, health and livelihood. Also, Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52(3) The International and Comparative Law Quarterly 749–760. See section 3.4.2.

[66] ibid para 45.

[67] ibid para 53.

[68] ibid para 62; CESCR, General Comment No 7: (1997) on the right to adequate housing (article 11(1)): Forced Evictions UN Doc E/1998/22 (20 May 1997), para 10, mentioning how indigenous peoples suffer disproportionately from the practice of forced evictions.

[69] ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169, 1650 UNTS 383 (27 June 1989) (entered into force 5 September 1991). See Chapters 2 and 5.

[70] ILO Convention concerning the Protection and Integration of Indigenous and other, Tribal and Semi-Tribal Populations in Independent Countries (ILO No 107), 1957 328 UNTS 247 (26 June 1957) (entered into force 2 June 1959). Despite the general integrationist approach of the ILO Convention no 107, Part II contains different provisions regarding States' obligations on indigenous rights with respect to lands, but not to natural resources,

obligations on indigenous individual and group rights with respect to lands and natural resources under national law. As stated in Chapter 2, the ILO Convention No 169, according to its Article 1(3), refers to 'indigenous and tribal peoples', with the term 'peoples' used expressly without 'having implications as regards the rights which may attach to the term under international law'[71]; moreover, the ILO Convention No 169 does not include the right to self-determination in its provisions.

Part II of ILO Convention No 169 is entirely devoted to indigenous and tribal peoples group rights with respect to both lands and natural resources. The section commences with Article 13, stating that governments shall respect the importance for indigenous and tribal cultures and spiritual values of their relationship with the lands and territories which they occupy or otherwise use, including their collective aspects. The second paragraph declares that the term 'lands' covers the notion of territories, including the total environment of the areas which indigenous peoples occupy or use[72]. The ILO Meeting of Experts underlined how the notion of 'territories' includes not only lands but also subsoil, air space, plants and animal lives[73]. Moreover, the Conference Committee of the ILO stated that the term 'land' should be understood to also include rivers, lakes and forests[74]. In 2009 the arbitral tribunal in the *Abyei arbitration* observed that

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under national law. The Convention does not, however, create indigenous individual or group rights under international law. For example, Article 11 refers to indigenous individual and collective rights of ownership over their traditional lands, while Article 13 mentions the need to respect procedures for the transmission of such rights of ownership and use of land established by the customs of the concerned population.

[71] See Chapter 2.

[72] There is no similar provision in ILO Convention No 107. Indeed, States strongly opposed the use of the term 'territories' in Article 11 of the first Convention and proposed the adoption of more general terms such as 'lands' or 'areas'. In ILO Convention No 107, the term 'territories' was mentioned only in Article 12, in the form of 'habitual territories'. The adjective 'habitual' indicates that the term refers to areas traditionally occupied by indigenous peoples. The term 'areas' is mentioned in general only in Article 6 on economic development, while all Part II refers to the notion of 'land'. Indeed, this would have created issues with the ratification processes since the term was not sufficiently distinguished from 'national territories' and could therefore threaten territorial integrity: Thornberry (n 57) 351-352.

[73] Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107) (September 1986) Report VI (1), International Labour Office 44.

[74] Provisional Record 25, International Labour Conference, 1989, Seventy-sixth Session para 162. See Chapter 5.

the duty of States to safeguard the rights of peoples to their traditional land use, as affirmed in ILO Convention No 169, represents a general principle of law and practice even for States that did not ratify the Convention[75].

According to Article 14(1) of the ILO Convention No 169, States shall recognize the rights of ownership and possession of indigenous and tribal peoples over the lands that they traditionally occupy. Furthermore, measures shall be taken to safeguard the rights of such peoples to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. To implement such rights, the Convention states that governments shall identify such traditional lands and protect effectively indigenous rights of ownership and possession[76]. The ILO Tripartite Committee stated that the obligation under Article 14(2)-(3) includes also the process of regularization of title to land[77]. Moreover, the ILO Committee of Experts (CEACR) stressed the importance to guarantee indigenous ownership and possession rights under Article 14, including the delimitation, demarcation and registration of traditional lands[78].

[75] *Government of Sudan v Sudan People's Liberation Movement/Army),* Final Award of 22 June 2009 ('*Abyei Arbitration*'), RIAA, vol XXX, 145 at 412, para 763, at n 1266.

[76] The Guide to the Convention clarifies that the phrase 'traditionally occupy' does not imply a continued and present occupation and that 'traditional occupation' includes a relatively recent expulsion from such land, or a recent loss of title: International Labour Office (Project to Promote ILO Policy on Indigenous and Tribal Peoples), *ILO Convention on Indigenous and Tribal Peoples 1989 (No 169*): *A Manual*, (Geneva 2000) 4. The provision represents an innovation with respect to ILO Convention No 107 where Article 11 refers only to the 'right of ownership', while the term 'rights' in Convention No 169 links the concepts of ownership and possession. Also, G Ulfstein, *Indigenous Peoples Right to Land*, 8 Max Plank United Nation (2004) 17-23.

[77] 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), paras 44-46.

[78] Direct Request (CEACR) adopted 2018, published 108th ILC session (2019) Indigenous and Tribal Peoples Convention, 1989 (No 169) Venezuela (Bolivarian Republic of) (Ratification: 2002); Observation (CEACR) adopted 2019, published 109th ILC session (2021) Indigenous and Tribal Peoples Convention, 1989 (No 169) Brazil (Ratification: 2002); Observation (CEACR) adopted 2019, published 109th ILC session (2021) Indigenous and Tribal Peoples Convention, 1989 (No 169) Mexico (Ratification: 1990); Observation (CEACR) adopted 2018, published 108th ILC session (2019) Indigenous and Tribal Peoples Convention, 1989 (No 169) Nicaragua (Ratification: 2010).

Article 16(1) prohibits the removal of indigenous and tribal peoples from the lands they occupy and affirms that those peoples shall have the right to return to their traditional lands. According to Article 16(4), only when this is not possible, States shall provide them with lands of quality and legal status at least equal to those previously occupied. The new lands shall be suitable to provide for their present needs and future development. The process shall be determined by agreement or through appropriate procedures. Peoples may choose compensation in money or in kind and, in such case, they shall be recompensed under appropriate guarantees. In the event that relocation is necessary, this shall be achieved obtaining their free and informed consent[79]. The CEACR Committee noted that such removal and relocation is an exceptional measure[80]. Moreover, Article 17 of the ILO Convention No 169 declares that States shall respect the traditional procedures concerning the transmission of land rights among the members of such peoples. Diversely, Article 18 requires governments to adequately penalise unauthorized intrusions upon, or use of, the lands of indigenous peoples[81].

The Convention No 169 refers also to natural resources. Article 15(1) affirms that States shall specially safeguard the rights of indigenous and tribal peoples with respect to natural resources 'pertaining to their lands',

[79] 'Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'. The provision clearly reflects Article 12 of Convention No 107. However, the abandonment of the integrationist approach is proved by the fact that national security, national economic development and the health of such populations are not mentioned anymore as circumstances that could legitimize the removal of such peoples. To strengthen indigenous rights, on the basis of the new participation approach, Article 16 of the Convention No 169, in addition to the respect of national laws and regulations, introduces the requirement of public inquiries when appropriate in order to guarantee the effective participation of indigenous peoples.

[80] Observation (CEACR) adopted 2018, published 108th ILC session (2019) Indigenous and Tribal Peoples Convention, 1989 (No 169) Chile (Ratification: 2008).

[81] A further relevant provision is Article 19 of the Convention which provides that national agrarian programmes shall secure for such communities a treatment equivalent to the rest of the population with reference to the provision of more lands when there are insufficient to provide the essentials needs and the means required to promote the development of their traditional lands.

including rights to participate in the use, management and conservation of natural resources. According to Article 15(2), in case a State retains ownership of certain resources pertaining to indigenous and tribal peoples' lands, including but not limited to, mineral or subsurface resources, the State shall guarantee the consultation of these peoples before permitting any exploration or exploitation of such resources. Article 15(2) states also that indigenous and tribal peoples shall, wherever possible, participate in the benefits of such activities and shall receive fair compensation for any damages suffered. The ILO CEACR Committee stressed the importance to ensure the consultations in good faith of indigenous and tribal peoples before any mining, oil, or gas exploitation occur in their traditional lands[82]. On other occasions, the Committee observed that Article 15 requires not only consultations but also an evaluation of how development projects would prejudice indigenous and tribal peoples' lands before the project is undertaken[83]. According to the ILO Tripartite Committee, the Convention does not require indigenous peoples to be in possession of ownership title. Indeed, the consultation envisaged in Article 15(2) are required in respect of resources owned by the State pertaining to the lands that indigenous peoples occupy or otherwise use, whether or not they hold an ownership title[84].

[82] Observation (CEACR) adopted 2019, published 109th ILC session (2021) Indigenous and Tribal Peoples Convention, 1989 (No 169) Bolivia (Plurinational State of) (Ratification: 1991); Observation (CEACR) adopted 2015, published 105th ILC session (2016) Indigenous and Tribal Peoples Convention, 1989 (No 169) Argentina (Ratification: 2000). Also, 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) (2009), paras 44, 49; 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 89-90.

[83] Observation (CEACR) adopted 2019, published 109th ILC session (2021), Indigenous and Tribal Peoples Convention, 1989 (No 169) Colombia (Ratification: 1991).

[84] Report of the Committee set up to examine the representation alleging non-observance by Guatemala (n 77), para 48. Also, 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) (2012), paras 29-30; 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

3.4 The rights of indigenous as peoples under international human rights law

In present international law, indigenous are holders of certain rights with respect to natural resources not only as individuals but also as 'peoples'. Before the UNDRIP, there was no international legal instrument recognizing indigenous as 'peoples' and such rights resulted from the application of common Article 1(2) of the ICCPR and ICESCR by the respective human rights committees and by the jurisprudence of the African Commission on Human and Peoples' Rights.

3.4.1 Common Article 1 of the ICCPR and ICESCR

3.4.1.1 ICCPR

Article 1(1) of the ICCPR recognizes the right of all peoples to self-determination, including the right to pursue freely their economic, social and cultural development. Article 1(2) states that 'all peoples' may, for their own ends, freely dispose of their natural wealth and resources, without any prejudice to any obligation arising out of international law. The same paragraph declares that a people in no case may be deprived of its own means of subsistence[85]. These provisions are complemented by ICCPR Article 47 which specifies that nothing in the ICCPR shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources[86].

ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL) (2001), para 45(a).

[85] HRC, General Comment No 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples UN Doc A/39/40 (13 March 1984), para 5; M Scheinin, 'The Rights to Self-determination under the Covenant on Civil and Political Rights' in P Aiko and M Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Finland: Institute for Human Rights, Abo Akademi University 2000). See Chapter 4.

[86] A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 57; Gilbert (n 46) 23. ICCPR Article 47 seems to reinforce the content of Article 1(2). Even if the provision was less debated than the correspondent ICESCR Article 25, the United States made a reservation based on its compatibility with international law: K Ash, 'U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence' (2005) 3(1) Nw J Intl Hum Rts 5, n 58.

As stated in the previous Chapter, initially the term 'peoples' under international law indicated only States, considering their whole populations, and certain categories of non-independent peoples like colonial and equivalent peoples. Therefore, at the time of the drafting of the Covenants, the right of all peoples to self-determination did not apply to indigenous peoples[87]. However, after the adoption of the Covenants that indigenous peoples as such enjoy the right to self-determination under Article 1 ICCPR has been repeatedly acknowledged by the HRC. In its periodic observations regarding the status of indigenous peoples, the HRC stated that the right to self-determination affirmed in Article 1 requires that all peoples must be able to freely dispose of their natural wealth and resources and may not be deprived of their means of subsistence[88]. On other occasions, the HRC found that the lack of consultations with indigenous representatives in case of extractive and development projects and the difficulties to secure rights over lands and resources constitute obstacles to the indigenous right to self-determination[89]. Moreover, the HRC found that the process of consultation

[87] In present international law, the 'peoples' with a right to self-determination include States, in the sense of their whole populations, peoples of colonial and of non-self-governing territories, peoples subject to alien domination, subjugation or exploitation like the Palestinian people that enjoy also a right to independence and indigenous peoples, which enjoy only a right to internal self-determination. Minorities, in principle, are not considered as an autonomous category of 'peoples' in international law. See Chapter 2.

[88] Consideration of reports submitted by States Parties under article 40 of the Covenant (1999) UN Doc CCPR/C/79/Add105, para 8: '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'. Also, HRC, Concluding Observations: Canada UN Doc CCPR/C/CAN/CO/5 (20 April 2006), para 8; Norway UN Doc CCPR/C/NOR/CO/5 (25 April 2006), para 5; Norway UN Doc CCPR/79/Add.112 (1 November 1999), para 17; Finland UN Doc CCPR/CO/82/FIN (2 December 2004), para 17; New Zealand UN Doc CCPR/CO/75/NZL (7 August 2002), para 14, not mentioning explicitly self-determination but recognizing Maori as a 'people'. See Chapter 5.

[89] HRC, Concluding Observations: Australia UN Doc A/55/40 (28 July 2000), paras 498-528; Sweden UN Doc CCPR/C/SWE/CO/7 (28 April 2016), paras 21, 38; Sweden UN Doc CCPR/C/SWE/CO/6 (7 May 2009), paras 20-21. The HRC also stressed the importance of guaranteeing legal aid to indigenous peoples to solve land claims: Concluding Observations: Sweden UN Doc CCPR/CO/74/SWE (24 April 2002), para 15; Mexico UN Doc CCPR/C/79/Add.109 (27 July 1999), para 19; Denmark UN Doc CCPR/79/Add.68 (18 November 1996), para 15; Canada UN Doc CCPR/C/79/Add.105 (7 April 1999), para 8.

of indigenous peoples should be done before granting licences for the exploitation of their lands and natural resources[90].

3.4.1.2 ICESCR

ICESCR Article 1 recognizes the right to all peoples to self-determination in wording identical adopted into that of Article 1 of the ICCPR, while ICESCR Article 25 mirrors ICCPR Article 47[91]. The position of the CESCR on the applicability of self-determination to indigenous peoples is similar to the one of the HRC[92]. Like the HRC, even the CESCR applied the right of all peoples to self-determination even to indigenous peoples. The CESCR has paid particular attention to the consequences of the exploitation of natural resources on indigenous lands for the enjoyment by indigenous peoples of their right to self-determination under ICESCR Article 1. On various occasions, the Committee recommended States to adopt immediate measures to enable indigenous peoples freely to dispose of their lands, territories and natural resources[93].

[90] HRC, Concluding Observations: Panama UN Doc CCPR/C/PAN/CO/3 (17 April 2008), para 21; Mexico (n 89), para 22. See Chapter 5.

[91] During the debate for the adoption of ICESCR Article 25, numerous developing countries' delegations supported the inclusion of such provision after the adoption of ICESCR Article 21. As reported by Gilbert, the Ethiopian delegation stated that the provision was aimed to protect underdeveloped countries' resources against new forms of imperialism. During the Third Committee debate, some States like the United Kingdom opposed the new provision since it potentially contradicted Article 1. The provision was finally adopted with 75 votes in favour, 5 against and 20 abstentions: Gilbert (n 46) 23; Åhrén (n 5) 23, citing Provisional Summary Record (27 October 1966) Document A/C.3/SR.1405, at 3 and 11-12; D Halpering, 'Human Rights and Natural Resources (1968) 9(3) William and Mary Law Review 770-787.

[92] Minority Rights Group International, University of East London, *Report: Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights' Treatment of Land Rights as Human Rights* (2015).

[93] CESCR, Concluding Observations on the fourth periodic report of Russia UN Doc E/C.12/1/Add94 (12 December 2003), paras 11 and 39; Sweden UN Doc E/C.12/SWE/CO/5 (1 December 2008), para 15; Paraguay UN Doc E/C.12/PRY/CO/4 (20 March 2015), para 6.

3.4.2 African Charter on Human and Peoples' Rights

The protection of indigenous groups' rights with respect to lands and natural resources in the African Charter on Human and Peoples' Rights is provided by a combination of different provisions, including collective rights to self-determination, to natural resources and to development under Articles 20, 21, 22 and 24.

Article 20 of the Charter, in protecting the right of 'all peoples' to existence, states that all peoples shall have the right to self-determination that is 'unquestionable' and 'inalienable'. Accordingly, peoples shall freely determine their political status and shall pursue their economic and social development. Article 21 declares that 'all peoples' shall freely dispose of their wealth and natural resources in accordance with international law[94]. Diversely, Article 22 affirms that 'all peoples' shall have the right to their economic, social and cultural development, with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind[95]. Furthermore, Article 24 states that 'all peoples' shall have the right to a general satisfactory environment favourable to their development.

In *Ogoni*, the African Commission found that under Article 21 of the Charter the State is obliged to guarantee the free use of resources belonging to the collective group, as it has the right to use such resources to satisfy its needs, and to protect right-holders against other subjects by legislation and provision of effective remedies[96]. Moreover, the ACHPR stated that the right under Article 24 imposes an obligation to governments to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources[97]. This

[94] The provision then states that the right must be exercised in the interest of the people that in no case can be deprived of it. In the event of spoliation, the dispossessed peoples have the right to recovery of their property and to adequate compensation.
[95] Moreover, States shall have the duty, individually, or collectively, to ensure the exercise the right to development.
[96] *Ogoni* case (n 65), paras 45-46; also, Coomans (n 65). See section 3.2.2.3.
[97] ibid para 52; despite not mentioning expressly indigenous peoples but referring to 'local communities', on the violation of Article 24 of the African Charter: Court of Justice of the

also includes the adoption of environmental and social impact studies prior to major industrial development, providing information to concerned communities. The ACHPR found that governments shall use due diligence in accepting that economic activities of private actors could devastate indigenous peoples' lands and natural resources and that States shall ensure resettlement assistance and clean lands and rivers damaged by oil operations and appropriate environmental and social impact assessments, informing the population about possible environmental and health risks[98].According to the Commission, the Nigerian Government violated Article 21 of the Charter by allowing oil companies to 'devastatingly affect the well-being of the Ogonis'[99].

3.5 Conclusion

International law before the UNDRIP recognized to indigenous individuals and peoples certain rights with respect to natural resources.

Indigenous individual rights resulted from the application of international human rights law from different human rights bodies such as the HRC, the CESCR and the CERD. Those instruments protect the rights of indigenous individuals to ownership, possession and access to lands and natural resources. This legal framework is composed of two dimensions, namely the protection of rights with respect to natural resources as a cultural right considering the special relationship that indigenous have with their traditional lands and resources and the importance for their culture, and as a property right. At the regional level, such features of indigenous rights with respect to lands and natural resources are clearly established by the IACtHR in *Awas Tingni*.

Conversely, the recognition of indigenous peoples group rights before the UNDRIP has been more limited since indigenous were not explicitly

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Economic Community of Western African States, *SERAP v Federal Republic of Nigeria* (ECW/CCF/JUD/18/12), 14 December 2012, paras 111-112.

[98] ibid para 53.

[99] ibid para 58. See Chapter 5.

recognized as ‘peoples’ in any international legal instruments. Those rights resulted mainly from the application of common Article 1(2) of the two 1966 Covenants by the HRC and the CESCR and by the findings of the African Commission. As part of their right to self-determination indigenous peoples have the right to use, access and dispose freely of the natural resources necessary for their cultural and physical survival and to participate in the management of such resources, including through consultations before decisions, activities and development projects that may affect them.

CHAPTER 4: PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES AS A PEOPLE'S RIGHT

4.1 Introduction

Permanent sovereignty over natural resources was conceived of as an expression of a State's sovereignty over its territory. As such, the bearers of permanent sovereignty over natural resources were necessarily States. This Chapter explores the possibility, however, of conceiving of permanent sovereignty over natural resources as a people's right. It then examines the categories of peoples that might bear this right and whether indigenous peoples could be included among them.

Section 4.2 of the Chapter focuses on common Article 1(2) of the two 1966 international Covenants and on Article 21 of the African Charter on Human and Peoples' Rights, drawing attention to the differences between the right of a people freely to dispose of its natural resources as part of its right to self-determination and permanent sovereignty over natural resources as such. Section 4.3 examines instances where permanent sovereignty over natural resources has been conceived of as vesting in a people, in particular a colonial people or other peoples subject to 'alien domination, subjugation or exploitation'. Finally, Section 4.4 underlines, if any, the role of indigenous peoples in such framework.

4.2 Rights over natural resources as part of the right of all peoples to self-determination

4.2.1 Common Article 1 ICCPR and ICESCR

Common Article 1(1) ICCPR and ICESCR, states that 'all peoples' have the right to self-determination. By virtue of such right, they freely determine their political status and freely pursue their economic, social and cultural development. Elaborating on this, common Article 1(2) of the Covenants declares that all peoples may for they own ends freely dispose of their natural wealth and resources. The provision is accompanied, respectively,

by ICCPR Article 47 and ICESCR Article 25, which state that nothing in the Covenants shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. In contrast to the various UNGA Resolutions on permanent sovereignty over natural resources, Article 1 of the human rights Covenants recognizes a right of all 'peoples' and not of 'States'[1]. Therefore, any people which is recognized as a 'people' by international law enjoys the right freely to dispose of its natural wealth and resources for its own ends, as part of its right to self-determination.

As mentioned in the previous Chapter, despite before UNDRIP no international legal instruments recognized indigenous as 'peoples', the human rights bodies applied such provision also to indigenous peoples, considering them a specific category of 'peoples'[2]. At the same time, common Article 1(2) of the Covenants does not refer to all peoples' 'permanent sovereignty' over natural resources[3]. It posits a people's right to dispose of its natural wealth and resources as an aspect of its right to self-determination recognized in common Article 1(1)[4], without using the language of 'permanent sovereignty'. Nor, in the context of either common Article 1 generally or its application to indigenous peoples specifically, has

[1] As mentioned in Chapter 1, the only exceptions among UNGA Resolutions are represented by the NIEO Declaration and by the Declaration on the Right to Development where, however, the term 'peoples' refers to States and to certain categories of non-independent peoples with a right to independence: UNGA Res 3201 (S-VI) 'Declaration on the Establishment of a New International Economic Order' (NIEO), (1 May 1994), art 4(h); UNGA Res 41/128 'Declaration on the Right to Development' (4 December 1986), Preamble, para 1. See Chapters 1 and 2.

[2] Eg HRC, Concluding Observations: Canada Un Doc CCPR/C/CAN/CO/5 (20 April 2006), para 8; Norway UN Doc CCPR/C/NOR/CO/5 (25 April 2006), para 5; Norway UN Doc CCPR/79/Add.112 (1 November 1999), para 17; Finland UN Doc CCPR/CO/82/FIN (2 December 2004), para 17; CESCR, Concluding Observations on the fourth periodic report of Russia UN Doc E/C.12/1/Add94 (12 December 2003), paras 11 and 39; Sweden UN Doc E/C.12/SWE/CO/5 (1 December 2008), para 15; Paraguay UN Doc E/C.12/PRY/CO/4 (20 March 2015), para 6. See Chapter 3.

[3] J Gilbert, *Natural Resources and Human Rights, an Appraisal* (OUP 2018) 21; M Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (Engel 2005). See Chapter 3.

[4] J Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right' (2013) 31(3) Netherlands Quarterly of Human Rights 314-341; Benedict Kingsbury, 'Competing Structures of Indigenous Peoples' Claims' in Philip Alston (ed), *Peoples' Rights* (OUP 2001) 96-97.

either the HRC or CESCR ever spoken of a people's 'permanent sovereignty' over natural resources[5]. The human rights Committees have referred to indigenous peoples' right of use, access and free disposition of natural resources[6] and to their right to participation in decision-making processes affecting their natural resources[7] as expressions of their right to self-determination under common Article 1, but they have never referred to indigenous peoples' 'permanent sovereignty over natural resources'.

It is significant that the inclusion in common Article 1 of reference to permanent sovereignty over natural resources was expressly rejected during the drafting of the provision. Indeed, Chile had proposed that draft Article 1(3) 'shall include permanent sovereignty over their natural wealth and resources' as a component of all peoples' right to self-determination[8] but the proposed text did not in the end find the necessary support of States[9]. While those in favour of the proposal viewed permanent sovereignty over natural resources as a component of a people's right to self-determination and, as such, as simply a right not to be deprived of those resources[10], the UK delegation, among other western States,

[5] Martin Scheinin, 'Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights' in J Castellino and N Walsch (eds), *International Law and Indigenous Peoples* (Martinus Nijhoff 2004) 3-11; also, M Scheinin, 'What Are Indigenous Peoples' in N Ghanea-Hercock and A Xanthaki (eds), *Minorities, Peoples and Self-determination – Essays in Honour of Patrick Thornberry* (Martinus Nijhoff Publishers 2005) 6.

[6] Eg HRC, Concluding Observations: Canada UN Doc CCPR/C/79/Add.105 (7 April 1999), para 8. See Chapter 3.

[7] Eg HRC, Concluding Observations: Australia UN Doc A/55/40 (28 July 2000), paras 498-528.

[8] UN Doc E/CN.4/l. 24 (16 April 1952); J Balror, 'Some International Legal Problems Arising from the Definition and Application of the Concept of Permanent Sovereignty over Wealth and Natural Resources of States' (1987) 20(3) Comparative and International Law Journal of Southern Africa 335-352, 335. The draft provision then stated: 'In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States'.

[9] N Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge Studies in International and Comparative Law CUP 1997) 48-50. The concern of many western States was that the inclusion of the principle of permanent sovereignty over natural resources in the Covenants would have resulted in the recognition of the right to expropriation without 'prompt, adequate and effective compensation'.

[10] UN Doc E/CN.4/SR.260 (6 May 1952) 7-8. The Chilean proposal was provisionally approved by the Commission of Human Rights on 8 May 1952 with the opposition of western States: Commission on Human Rights, Report of the Eight Session (April–June 1952) UN Doc E/2256, 8; also, UN Doc A/C.3/SR.645 (27 October 1955) (Chile).

considered that permanent sovereignty over natural resources was a principle concerning relations between States[11] and not an aspect of the right of all peoples to self-determination[12]. In the light of such critics, Chile itself reinterpreted its proposal as a mere reference to a State's right to be master of its own resources, as a corollary to its independence, rather than a true right of peoples'[13]. Nevertheless, Chile's proposal was eventually, amended to remove any reference to permanent sovereignty as a right of peoples[14]. This text, without any mention of permanent sovereignty, became common Article 1(2) of the 1966 human rights Covenants.

4.2.2 Article 21 of the African Charter on Human and Peoples' Rights

At the regional level, Article 20 of the African Charter on Human and Peoples' Rights stated that all peoples have the inalienable right to self-determination, by virtue of which they pursue their economic and social development. The provision is followed by Article 21 which declares, in its first paragraph, that all peoples shall freely dispose of their wealth and natural resources[15]. Since peoples are the bearers of the right under Article 21, the right shall be exercised in the exclusive interest of such peoples and in no case peoples shall be deprived of it.

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[11] UN Doc E/CN.4/SR.260 (6 May 1952) 9.

[12] UN Doc A/C.3/SR.642 (24 October 1955) 91, paras 18, 21. The association of sovereignty over natural resources with the principle of self-determination of peoples was criticized also by the United States Delegation: UN Doc A/C.3/SR.646 (27 October 1955) 110, para 34. Also, JN Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50(4) American Journal of International Law 856-860.

[13] UN Doc. A/C.3/SR.645, (27 October 1955) 104, para 11.

[14] UN Doc A/C.3/L.489 (17 November 1955): 'The 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'. Also, J Gilbert (n 3) 21; Nowak, (n 3); 'Indigenous Peoples' Permanent Sovereignty over Natural Resources' (2004).

[15] Philip Alston, 'Peoples' Rights: Their Rise and Fall' in P Alston (ed), *Peoples' Rights* (OUP 2001) 286; WA Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 Virginia Journal of International Law 339; Julia Swanson, 'The Emergence of New Rights in the African Charter' (1991) 12 New York Law School Journal of International and Comparative Law 307.

As stated in the previous Chapter, the African Commission applied such provision as conferring collective rights upon peoples as groups of individuals having a common identity, including indigenous[16]. Like for the 1966 international Covenants, Article 21 of the African Charter does not mention a peoples' right to 'permanent sovereignty' and even the African Court and the African Commission on Human and Peoples' Rights never applied a right of peoples to 'permanent sovereignty over natural resources'[17]. The Commission in *FLEC v Angola*, on the contrary, stated that Article 21 of the African Charter provides the right of States Parties, and not to peoples within the States, to supervise the disposal of natural wealth and resources in the general interest of the State and of its communities[18].

[16] *Kevin Mgwanga Gunme and others v Cameroon*, ACHPR Communication No 266/2003 (27 May 2009), para 174; *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,* Comm No 155/96 Case No ACHPR/COMM/A044/1 (the '*Ogoni'* case), paras 45-46; *Katangese Peoples Congress v Zaire*, Comm No 75/92 (1995), paras 3, 6; *Sudan Human Rights Organization and Centre on* Housing *Rights and Evictions (COHRE) v Sudan*; Communication 276/03; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya,* ACHPR Communication No 276/2003 [2009] AHRLR 75 (27 May 2009) (the '*Endorois'* case); also, African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to extractive industries, human rights and the environment (2017) 10, para 1. See Chapter 3.

[17] ibid (*Ogoni* case), paras 45-46 and 56; See Chapters 1, 3 and 5.

[18] *FLEC v Angola* (Communication No 328/06) [2013] ACHPR 10 (5 November 2013), paras 128-132, at para 131: 'the Commission believes that a "peoples" within an existing state can be beneficiaries of the right in Article 21 to the extent that it imposes a duty on the Respondent State to ensure that resources are effectively managed for the sole and equal benefit of the entire peoples of the state. Accordingly, the African Commission is of the view that one aspect of the right in Article 21 of the African Charter is the duty of the State to involve representatives of its peoples in decisions concerning the management of national wealth and natural resources'. Cf OAU, Revised African Convention on the Conservation of Nature and Natural Resources (the 'Maputo Convention') (7 March 2017) (entered into force 10 July 2016), Preamble, which reaffirms the sovereign rights of States to exploit their natural resources. Also, Resolution on a Human Rights-Based Approach to Natural Resources Governance - ACHPR/Res.224(LI) 2012, Preamble, para (i).

4.3 Permanent sovereignty over natural resources and colonial and equivalent peoples

4.3.1 General framework

Permanent sovereignty over natural resources resulted from the application of territorial sovereignty to the natural resources of a State's territory. According to present international law, permanent sovereignty over natural resources is a right of States since they are the only legal subjects capable to exercise their sovereignty over a territory and its resources[19]. However, in some circumstances certain peoples may be vested of a right to permanent sovereignty over natural resources.

Although permanent sovereignty over natural resources is not considered as an aspect of the right of all peoples to self-determination, this does not necessarily mean that it is not an aspect of the right of specific categories of peoples to self-determination. In this regard, it is significant that colonial peoples have always enjoyed, as an element of their right to self-determination, a right to independence and to statehood and, with it, to sovereignty over a territory[20]. Such peoples were previously represented by the peoples of UN trust territories, non-self-governing territories, and certain other non-independent territories[21]. Today, the category refers only to the peoples of those remaining non-self-governing territories. The same right to independence and statehood and, as such, to sovereignty over territory has been recognized as an element of the right to self-determination of the Palestinian people, as a people subject to 'alien

[19] Permanent sovereignty over natural resources is an inalienable right of States and is today part of customary international law. See Chapter 1.

[20] CERD, General Recommendation No 21: Right to Self–Determination, UN Doc CERD/48/Misc.7/Rev.3 (8 March 1996), para 4: 'The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation'. See Chapter 2.

[21] N Schrijver, 'Permanent Sovereignty Over Natural Resources in Territories Under Occupation or Foreign Administration' in *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge Studies in International and Comparative Law, CUP 1997) 143-168.

domination, subjugation and exploitation' expressly recognized by the UN General Assembly.

4.3.2 Specific instances

Many UNGA Resolutions and relevant international instruments refer to colonial peoples' and the Palestinian peoples' rights to permanent sovereignty in relation to the exploitation of their territories' natural resources as an aspect of their right to self-determination. However, only a few of such instruments mention explicitly the term 'permanent sovereignty' over natural resources[22].

4.3.2.1 The people of Namibia

The UN Council for Namibia on 27 September 1974 approved Decree No 1 for the Protection of the Natural Resources of Namibia[23]. As stated in its Preamble, the scope of the Decree was to secure to the people of Namibia adequate protection of the natural wealth and resources which were

[22] It is worth reporting the dissenting opinion of Judge Weeramantry in the ICJ *Advisory Opinion on East Timor*. According to the ICJ, East Timor constituted a non-self-governing territory and was not incorporated into Indonesian territory. Consequently, its people was vested with the right to self-determination, not mentioning however rights over natural resources. Weeramantry stated that East Timor people's right to self-determination would include a right to permanent sovereignty over natural resources to be exercised at the time of its independence, including its 'sovereign right' to determine how its wealth and natural resources would be disposed of. Therefore, any act that could deprive the people of such right would infringe not only its right to self-determination but also its future right to permanent sovereignty over natural resources that would manifest once East Timor would have achieved independence. Hence, the administering power has the duty to preserve the assets and to conserve the right of the non-self-governing people to permanent sovereignty over their natural resources. *East Timor* [1995] ICJ Rep 19 (*Dissenting Opinion Weeramantry*) 180-181, 197-198. A Anghie, 'C.G. Weeramantry at the International Court of Justice' (2001) 14(4) Leiden Journal of International Law 829-850; R Burchill, 'The ICJ Decision in the Case concerning East Timor: the illegal Use of Force validated?' (1997) 2(1) Journal of Armed Conflict Law 1-22; Brandi J Pummell, 'The Timor Gap: Who Decides Who Is in Control' (1998) 26 Denv J Intl L & Poly 655; Gilbert (n 3) 18; T Cravo and M Freire, 'Portugal and East Timor: Managing Distance and Proximity in Post-Colonial Relations' (2014) 1(3) European Review of International Studies 39-59; B Kondoch, 'The United Nations Administration of East Timor' (2001) 6(2) Journal of Conflict & Security Law 245-265; I GM Scobbie, C Drew 'Self-Determination Undetermined: The Case of East Timor' (1996) 9(1) *Leiden Journal of International Law* 185-211.

[23] The UN Council was created by UNGA Res 2248 (S-V) (19 May 1967).

'rightfully theirs', albeit not mentioning a Namibian peoples' right to 'permanent sovereignty' over such resources[24].

This view was confirmed by successive UNGA Resolutions which mentioned the right that the people of Namibia had on certain natural resources as part of its right to self-determination and to statehood. Precisely, UNGA Resolution 33/182-A declared that the natural resources in Namibia were the 'birthright' of the Namibian people and condemned the activities of all foreign corporations that were illegally exploiting such resources[25]. In 1988 with Resolution 43/26, the UNGA affirmed that the natural resources of Namibia are the inviolable heritage of the Namibian people[26]. This is confirmed also by UNGA Resolution 44/84 that refers to 'Namibia and all other territories under colonial domination'; despite not mentioning 'permanent sovereignty', the Resolution states that Namibian and equivalent peoples have the inalienable right to self-determination and independence and to enjoy and dispose of the natural resources of their territories[27].

4.3.2.2 The people of Nauru

In 1966 the Trusteeship Council underlined in a Report the inalienable right and interest of Nauruan people over their resources as a requisite for their

[24] Schrijver (n 9) 148. Also, G McDougall, 'The Council for Namibia's Decree No 1: Enforcement Possibilities' (1983) 30(1/2) Africa Today 7-16. Moreover, pursuant to paragraph 6, the future independent government of Namibia could hold persons or firms contravening provisions of the Decree liable for damages caused to the Namibian people.
[25] UNGA Res 33/40 (13 December 1978), Preamble, paras 1, 3, 4, 8, 16-17, 20, 22; UNGA Res 33/182 A (21 December 1978), Preamble; UNGA Res 33/182 C (21 December 1978), Preamble, para 5; also, UNGA Res S-9/2 'Declaration on Namibia Programme of Action in Support of Self-Determination and National Independence for Namibia' (3 May 1978), para 13.
[26] UNGA Res 43/26 'Question of Namibia: A Situation in Namibia resulting from the illegal occupation of the Territory by South Africa' (17 November 1988), para 52.
[27] UNGA Res 44/84 'Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Namibia and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa: resolution adopted by the General Assembly (11 December 1989), para 1. Also, UNGA Res 3117 (XXVIII) (11 December 1989), Preamble, paras 1-2.

right to self-determination[28]. In the light of such Report and of UNGA Resolution 2111 (XX)[29], the UNGA in its 1966 Resolution 2226 (XXI) stated that the phosphate deposits in Nauru belonged to the Nauruan people[30]. This Resolution, however, like the above-mentioned instruments, contemplated the right of Nauruan people with respect to natural resources, as part of its right to self-determination and independence, never mentioning explicitly the notion of 'permanent sovereignty' over natural resources[31].

4.3.2.3 The people of Western Sahara (Sahrawi people)

In the 1975 Advisory Opinion on Western Sahara, the ICJ found that there were not legal ties between the territory of Western Sahara and the Kingdom of Morocco and Mauritania that could prevent the application of UNGA Resolution 1514 (XV)[32]. Hence, according to the ICJ, the people of Western Sahara is entitled to the right to self-determination, to be understood as 'the need to pay regard to the freely expressed will of peoples', recognizing thus that Saharawi are a people, with a right to independence, under international law[33].

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[28] 'Report of Trusteeship Council, 1 July 1965–26 July 1966', GAOR 21st Sess Suppl No 4 (A/6304) at 43. Cf the Trusteeship Agreement for the Territory of Nauru 10 UNTS 3 (signed and entered into force 1 November 1947), art 5(2)(a), where indigenous were still not considered as 'peoples' but as 'inhabitants'.

[29] UNGA Res 2111 (XX) (21 December 1965), paras 1-2, requiring immediate steps by the administering authority to restore the island of Nauru for habitation by the Nauruan people as a sovereign nation.

[30] UNGA Res 2226 (XXI) (20 December 1966), Preamble, para 3.

[31] In an ICJ dispute, Nauru further claimed that Australia had breached certain obligations with regard to the implementation of the principles of self-determination and of permanent sovereignty over natural wealth and resources. However, the Parties reached a settlement and discontinued the proceedings: *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) Preliminary Objections ICJ Rep 1992, 240, 262-263.

[32] *Western Sahara*, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975) (16 October 1975). In its 1975 Report, the UN Visiting Mission to Spanish Sahara observed that at the time of the decolonization of Western Sahara, the Spanish Government formally recognized the sovereignty of the indigenous inhabitants of the territory over its natural resources: 'Report of the 1975 United Nations Visiting Mission to Spanish Sahara' A/10023/Rev.1, para 279.

[33] ibid (*Western Sahara*), paras 57-59. The Security Council requested from the Under-Secretary General for Legal Affairs and UN Legal Counsel an Opinion on the legality of the Moroccan decisions concerning the offer and signature of contracts with foreign companies

In the light of such findings, in a claim concerning the consequences of the trade agreement on agricultural and fisheries products concluded between the European Union and the Kingdom of Morocco, the Court of Justice of the European Union (CJEU) found that, since Morocco is an occupying power, the exploitation of natural resources in the territory of Western Sahara by Morocco cannot be to the detriment of the inhabitants of the territory and cannot infringe their fundamental rights[34]. In a successive dispute concerning the validity of the Fisheries Partnership Agreement concluded between the European Community and the Kingdom of Morocco, the CJEU found that the inclusion of the territory of Western Sahara in the scope of such agreement would be contrary to the principle of self-determination, despite not mentioning the rights of Saharawi people on such coastal water resources[35].

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for the exploitation of Western Sahara natural resources. On 29 January 2002, the Letter was addressed to the President of the Security Council. In applying the principles of international law, the States' practice and the judgments of the ICJ, the Under-Secretary General found that the exploitation of natural resources in non-self-governing territories must be conducted for the benefit of the peoples in the territory and on their behalf, or in consultation with their representatives. Only in such circumstances would the activity be compatible with the principle of permanent sovereignty over natural resources and with the UN Charter. The Letter underlined that where exploration and exploitation activities do not guarantee the interests and wishes of Western Sahara people, they would be contrary to the principles of international law on natural resources: Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council UN Doc S/2002/161, paras 24-25; also, Gilbert (n 3) 18.

[34] *Front Polisario v Council*, European Court of Justice, Judgement of the General Court of 10 December 2015 (Case T-512/12), para 241. In the appeal judgement, the Court ruled that the General Court was not correct in interpreting that the trade agreement applied to the territory of Western Sahara and therefore, the Front Polisario was not directly affected by the Decision: *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, (Grand Chamber, 21 December 2016) (Case C-104/16 P), para 108.

[35] *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment*, Food and Rural Affairs (Grand Chamber, 27 February 2018) (Case C-266/16), para 63. The Opinion of Advocate General Wathelet stated that the current significance of the principle of permanent sovereignty guarantees, at minimum, that the exploitation of natural resources must be carried out for the benefit of the non-self-governing territory: *Western Sahara Campaign Uk* (*Opinion of Advocate General Wathelet*), paras 133, 233, 257-273. J Odermatt, 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)' (2017) 111(3) American Journal of International Law 731; E Milano, 'The New Fisheries Partnership Agreement between the EC and Morocco: Fishing too South?' (2006) 22 Anuario Español de Derecho Internacional 413-457, 435-442; J Soroeta Liceras, 'La posicíon de la Unión Europea en el conflicto del Sahara Occidental, una muestra palpable (más) de la primacía de sus intereses económicos y políticos sobre la promoción de la

4.3.2.4 The people of the Virgin Islands

The UNGA in its Resolution 33/34 reaffirmed the inalienable right of the people of the United States Virgin Islands to self-determination, independence and territorial integrity of their territories. At the same time, it recognized the 'inalienable right' of the people of such territory to the enjoyment of their natural resources, urging the administering power to take effective measures to guarantee the right of such people to own and dispose of those natural resources and to establish and maintain the control of their future development[36].

4.3.2.5 The people of Guam

In UNGA Resolution 33/32, the UN General Assembly declared the 'inalienable right' of the people of the territory of Guam to enjoy of their natural resources by taking effective measures to guarantee their right to own and dispose of such resources and to establish and maintain control of their future development[37].

democracia y de los derechos humanos' (2009) 34 Revista de Derecho Comunitario Europeo 823-864, at 829-837 and 844-847; H Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' in N Botha, M Olivier and D van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (VerLoren van Themaat Centre 2010) 231-247, 242; J Etienne, 'L'accord de pêche CE-Maroc: quels remèdes juridictionnels européens à quelle illicéité internationale' (2010) Revue Belge de Droit International 77-107, 86-88; B Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources', Sydney Law School Legal Studies Research Paper, No 15/81 (September 2015) 29-31; P Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara' (2019) 52(1) Israel Law Review 3-29. On the appeal judgement, also, Jed Odermatt, 'Fishing in Troubled Waters' (2018) 14(4) European Constitutional Law Review 751-766; Carlos Ruiz Miguel, 'L'Union européenne et le Sahara occidental: pas (seulement) une affaire de droits de l'homme' (2018) 16 Cahiers de la recherche sur les droits fondamentaux 123-140.

[36] UNGA Res 33/34 (13 December 1978), paras 1, 6.

[37] UNGA Res 33/32 (13 December 1978), paras 1, 6.

4.3.2.6 The peoples of certain non-self-governing islands

Such principles were confirmed by the UNGA Resolution No 46/68 A concerning the situation of certain non-self-governing islands[38]. In reaffirming the principles of previous UNGA Resolution 1514 (XV) and, as such, the inalienable right of the peoples of such islands to self-determination and independence[39], the Resolution urged the respective administering powers, in cooperation with the local governments, to guarantee the inalienable right of such peoples to own, develop and dispose of the natural resources of their territories, including the marine resources[40]. Moreover, the Resolution recognizes to such peoples the right to maintain the control over the future development of such resources[41].

4.3.2.7 The Palestinian people

Another example of the application of the principle of permanent sovereignty over natural resources to a particular non-independent people pertains to the Palestinian people[42]. It will be recalled that the Palestinian people has been recognized in repeated resolutions of the UNGA and acknowledged by the ICJ to be a people with a right to self-determination,

[38] UNGA Res 46/68 A (11 December 1991). The concerned islands were American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Guam, Montserrat, Tokelau, Turks and Caicos Islands and United States Virgin Islands; also, UNGA Res 33/29 (13 December 1978), paras 1, 6.
[39] ibid paras 2-3.
[40] ibid para 7.
[41] ibid.
[42] In general, L El-Jazairi, 'The Occupied Palestinian Territory' in M Langford and A Russell (eds), *The Human Right to Water: Theory, Practice and Prospects* (CUP 2017) 396-428; M Turner, 'Peacebuilding as Counterinsurgency in the Occupied Palestinian Territory' (2015) 41(1) Review of International Studies 73-98; Q Wright, 'The Value of International Law in Occupied Territory' (1945) 39(4) American Journal of International Law 775-783; M Shaw, 'The League of Nations Mandate System and the Palestine Mandate: What Did and Does It Say about International Law and What Did and Does It Say about Palestine?' (2016) 49(3) Israel Law Review 287-308; M Bassiouni, '"Self-Determination" and the Palestinians' (1971) 65(4) American Journal of International Law 31-40.

the content of which has been repeatedly affirmed by the UNGA to include a right to a State of its own[43].

In Resolution 3005 (XXVII), the UNGA affirmed 'the principle of the sovereignty of the population of occupied territories over their national wealth and resources'[44]. The successive UNGA Resolution 3175 (XXVIII), entitled 'Permanent sovereignty over national resources in the occupied Arab territories'[45], affirmed explicitly 'the right of the Arab States and peoples whose territories are under foreign occupation to permanent sovereignty overall their natural resources'[46]. The same Resolution declared that all measures taken by Israel to exploit such resources were illegal and affirmed the right of these peoples to restitution of, and full compensation for the exploitation and looting of, and damage to, these resources[47].

The permanent sovereignty of what would later be referred to as 'the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem', over its natural resources, has been reaffirmed in a series of successive UNGA resolutions[48]. Among those, UNGA Resolution 74/243 mentioned in particular the inalienable right of Palestinian people to 'land, water and energy resources'[49]. More recently, the 2020 Resolution 43/33 adopted by the HRC on the right of Palestinian people to self-determination reiterated that the principle of permanent sovereignty over natural resources, as an integral component of self-determination, is applicable to

[43] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, para 155. See Chapter 2.
[44] UNGA Res 3005 (XXVII) (15 December 1972), para 4.
[45] UNGA Res 3175 (XXVIII) (17 December 1973). The proposal of the resolution was submitted by Pakistan and was focused on the exploitation of oil resources by Israel in the Sinai region: UN Doc A/C.2/L.1333 (3 December 1973).
[46] ibid para 1.
[47] ibid paras 2-3.
[48] UNGA Res 3336 (XXIX) (17 December 1974); UNGA Res 31/186 (21 December 1976); UNGA Res 32/161 (19 December 1977); UNGA Res 34/136 (14 December 1979); UNGA Res 35/110 (5 December 1980); UNGA Res 36/173 (17 December 1981); UNGA Res 37/135 (17 December 1982); UNGA Res 38/144 (19 December 1983); UNGA Res ES-10/15 (2 August 2004); UNGA Res 61/184 (25 January 2007); UNGA Res 62/181 (19 December 2007); UNGA Res 74/243 (19 December 2019).
[49] ibid (UNGA Res 74/243), para 1.

the Palestinian people[50]. In the same year, an ECOSOC Resolution declared the right of the Palestinian people to permanent sovereignty over its natural resources[51].

4.3.2.8 Non-independent peoples in UNCLOS

A further contribution on the rights of non-independent peoples with respect to natural resources is provided by the Resolution III of Third UN Conference on the Law of the Sea (UNCLOS III), included as Annex I to the UNCLOS in the Final Act of the Third Conference[52]. Subparagraph (1)(a) of the Resolution, which constitutes an integral part of the UNCLOS, applies to the peoples of territories that have not obtained their full independence, or the self-governing status according to the UN system, and to territories under colonial domination. The provision states that the rights and the interests contained in the UNCLOS, including those with respect to the exploitation of natural resources, must be implemented by metropolitan powers for the benefit of the people of the dependent territory[53].

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[50] HRC Res 43/33 'Right of the Palestinian people to self-determination' (22 June 2020), Preamble, paras 1, 6.
[51] ECOSOC Res 2021/4 (14 September 2020), Preamble.
[52] Final Act of the Third U.N. Conference on the Law of the Sea, Dec. 10, 1982, Resolution III, U.N. Doc. A/CONF. 62/121, 21 ILM 1245, 1257. CR Symmons, *The Maritime Zones of Islands in International Law* (Martinus Nijhoff, 1979) 8; S Rosenne, 'The Third United Nations Conference on the Law of the Sea' (1976) 11(1) Israel Law Review 1-51; K Jayraman, *Legal Regime of Islands* (Marwah Publications 1982); Elisabeth Mann Borgese, 'Law of the Sea: the Next Phase' (1982) 4 Third World Quarterly 708; S Jain, 'Journal of the Indian Law Institute' (1983) 25(1) 143-146; DJ Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987); R Wolfrum, 'The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea' (1987) 18 Netherlands Yearbook of International Law 121-144; R Churchill and A Lowe, *The Law of the Sea* (rev edn, Manchester 1988); B Kwiatkowska and AHA Soons, 'Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own' (1990) 21 Netherlands Yearbook of International Law 139-181; James K Kenny, 'Comment, Resolution III of the 1982 Convention on the Law of the Sea and the Timor Gap Treaty' (1993) 2 Pac Rim L & Poly J 131; R O'Keefe, 'Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea' (Apr 1996) 45(2) The International and Comparative Law Quarterly 408-420; Malcolm D Evans, *Maritime Boundary Delimitation: Where Do We Go From Here?* (OUP 2006).
[53] ibid (Final Act) 1257. The Resolution also declared that the interest of such people must be considered even in consultations regarding conflicts over the sovereignty of such territories.

4.3.3 Colonial and equivalent peoples

The above-mentioned specific instances demonstrate how present international law recognizes the right of certain colonial and equivalent peoples to permanent sovereignty over natural resources of their territories.

4.3.3.1 Generally applicable rules

Despite the fact that many such instruments do not mention explicitly 'permanent sovereignty over natural resources', the content of the rights of colonial and equivalent peoples with respect to natural resources is substantially comparable since it includes an 'inalienable right' to own, develop and dispose of the natural resources part of their territories. As stated by UNGA Resolution 2625 (XXV), the non-self-governing territory enjoys 'a status separate and distinct from the territory of the State administering it' that shall exist until the people of such territory have exercised its right to self-determination in accordance with the UN Charter[54]. The ICJ confirmed that, under present international law, non-self-governing territories and peoples subject to alien subjugation, domination and exploitation have a right to self-determination in the form

[54] UNGA Res 2625 (XXV) (24 October 1970). Also, UNGA Res 1514 (XV) (14 December 1960); UNGA Res 2232 (XXI) (20 December 1966); UNGA Res 2023 (XX) (5 November 1965); UNGA Res 2183 (XXI) 'Question of Aden' (12 December 1966); UNGA Res 2357 (XXII) (19 December 1967); UNGA Res 3161 (XXVIII) (14 December 1973); UNGA Res 3291 (XXIX) 'Question of the Comoro Archipelago' (13 December 1974); UNGA Res 34/91 'Question of the islands of Glorieuses, Juan de Nova, Europa and Bassas da India' (12 December 1979). Also, CJEU Case C-104/16 P (n 34), paras 26, 90, 92

of independence[55] and that the right to self-determination of such peoples is defined by reference of the entire non-self-governing territory[56].

In such context, evidences suggest that such right of peoples to permanent sovereignty over natural resources is not limited to those specific circumstances but is applicable to all peoples of non-self-governing territories and other peoples subject to 'alien subjugation, domination and exploitation'[57]. First, the NIEO Declaration, without mentioning 'permanent sovereignty' recognizes the right of the peoples under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources[58]. Diversely, UNGA Resolution 33/40 mentions explicitly the need to ensure that 'the permanent sovereignty of the colonial territories over their natural resources is fully respected and safeguarded'[59]. The same Resolution reaffirms the inalienable right of the peoples of such territories to independence, to the enjoyment of the natural resources of their territories and to dispose of those resources in their best interests[60]. Accordingly, any administering or occupying power which deprives the colonial peoples of the exercise of their legitimate rights over their natural resources, or subordinate such rights to

[55] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep, para 82; also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion [1971] ICJ Rep 31, paras 52-53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 31-33, paras 54-59; *Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia v Malaysia, Judgment*, Application for Permission to Intervene, [2001] ICJ Rep 575, ICGJ 53 (ICJ 2001) (23 October 2001) *Sep Op Judge Frank*, para 10.

[56] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ GL No 169, ICGJ 534 (ICJ 2019) 25 February 2019, para 160; also, CJEU, Case C-266/16 (n 35), para 63.

[57] *Advisory Opinion on Kosovo* (n 55), para 82; also, UNGA Res 2625 (XXV) (n 54), Preamble.

[58] UNGA Res 3201 (S-VI) (n 1), art 4(h). Permanent sovereignty over natural resources is mentioned only with reference to States in paragraph (e) where the NIEO Declaration declares that every 'State' enjoys 'full permanent sovereignty over its natural resources'. See Chapter 1.

[59] UNGA Res 33/40 (n 25), para 20.

[60] ibid para 1. The Preamble states that the natural resources of such territories are 'the heritage' of their peoples.

foreign and financial interest, would violate the obligations assumed under the UN Charter[61].

More recently, the 2016 UNGA Resolution 71/103 declared explicitly the 'permanent sovereignty of the peoples of the non-self-governing territories over their natural resources'[62] and the 2020 UNGA Resolution 75/236 reiterated the same right of permanent sovereignty over natural resources for 'peoples under foreign occupation'[63]. Moreover, many of the UNGA Resolutions, including those on the Palestinian people[64], that mention the right of colonial peoples to permanent sovereignty as part of their right to external self-determination, refer to 'all peoples' or to peoples 'in all territories' under colonial, and equivalent, domination. For example, UNGA Resolution 2288 (XXII) reaffirmed the inalienable right of peoples of colonial territories to self-determination and independence and to the natural resource of their territories, including the right to dispose and use of such resources in their best interests[65]. The Resolution condemned the exploitation of natural resources contrary to such peoples' interests, the obstruction of access of peoples to their natural resources and the grant of concessions contrary to present or future interests of the peoples of such

[61] ibid para 3. At para 4, referring to Southern Africa, the UNGA Declaration states that the depletive exploitation of natural resources represents an obstacle to the political independence and to the enjoyment of the natural resources by the indigenous inhabitants of those territories.
[62] UNGA Res 71/103 'Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories' (23 December 2016), para 8.
[63] UNGA Res 75/236 (30 December 2020), Preamble. With reference to the occupation of Iraq, the right of Iraqis 'to freely control their own natural resources' was affirmed by the Preamble of the Security Council Resolution 1483 (22 May 2003); A Carcano, *The Transformation of Occupied Territory in International Law* (Brill:Nijhoff 2015) 183-186.
[64] Eg UNGA Res 3175 (XXVIII) (n 45), para 4: 'Declares that the above principles apply to all States, territories and peoples under foreign occupation, colonial rule or apartheid'. States under foreign occupation, being States, enjoy permanent sovereignty over natural resources, and also peoples of a State under apartheid like South Africa, since South Africa is a State; UNGA Res 62/181 (n 48), Preamble: 'Reaffirming the principle of the permanent sovereignty of peoples under foreign occupation over their natural resources'.
[65] UNGA Res 2288 (XXII) (7 December 1967), para 2.

territories[66]. Such principles were confirmed in a series of further UNGA Resolutions[67].

4.3.3.2 Accordance with international law

Permanent sovereignty over natural resources as an aspect of the right to self-determination of colonial and equivalent peoples accords with the customary content of a State's right to permanent sovereignty over natural resources. Administering States do not enjoy a right to permanent sovereignty over the natural resources of those territories that have a 'separate status' according to UNGA Resolution 2625 (XXV).

As part of their right to external self-determination, colonial and equivalent peoples not only have a right to independence but also a right to permanent sovereignty over the natural resources of such territory, described as 'inalienable' by UNGA Resolution 33/40. Such right is vested in such peoples even before the independence and includes the right that the exploitation of the natural resources by the administering power must respect the will of such peoples and must be conducted for their benefit. No exploitation without their consent, and against their benefit, shall take place in the territories of colonial and equivalent peoples.

In case the administering power would not respect the rights of the colonial people, the State would have an obligation under international law to make reparation to the people concerned. This right of such peoples to permanent sovereignty over the natural resources of their territory would

[66] ibid paras 3-6.

[67] Eg UNGA Res 33/40 (n 25); UNGA Res 3117 (XXVIII) (n 27); UNGA Res 2873 (XXVI) (20 December 1971); UNGA Res 34/41 (21 November 1979); UNGA Res 31/33 (30 November 1976); UNGA Res 3299 (XXIX) (14 December 1974). The right to permanent sovereignty of non-independent peoples is mentioned also by the 1983 Vienna Convention on succession of States in respect of State Property, that refers to the right to permanent sovereignty over natural resources of every people in case of international agreements involving the succession of States and the creation of newly independent States. The Convention is, however, still not into force: Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 22 ILM 306 (1983) (adopted on 8 April 1983), arts 15(4), 38(2).

then become 'full' when peoples will achieve their independence and statehood as part of their right to external self-determination[68].

4.4 Permanent sovereignty over natural resources and indigenous peoples

There is no evidence in current international law that indigenous peoples are characterized legally as holders of permanent sovereignty over natural resources and such proposed right is mentioned only in secondary sources.

In 2001, the Sub-Commission on the Promotion and Protection of Human Rights requested, by its Resolution 2001/10, Mrs Erica-Irene A Daes to prepare a working paper on 'indigenous peoples' permanent sovereignty over natural resources'. In its 2004 Report to the Commission on Human Rights, the Special Rapporteur Daes found that permanent sovereignty over natural resources must be applied to indigenous peoples[69]. Nevertheless, the same Report declared that the term 'permanent sovereignty' as applied to indigenous peoples has a different meaning from the traditional sovereignty associated with States and would not indicate the supreme authority of an independent State[70]. Indeed, the Report stated that, in the context of indigenous peoples, permanent sovereignty over natural resources must be conceived of as a collective legal right to the control, use and management of natural resources as part of their right to internal self-determination[71]. Despite the Report urged to recognize expressly indigenous peoples right to permanent sovereignty over natural resources

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[68] *Frontier Dispute (Burkina Faso v Mali), Judgment, [1986] ICJ Rep 554; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment [1986] ICJ Rep 14,* para 30: 'By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power'. See Chapter 3.

[69] E-I A Daes, 'Indigenous Peoples' Permanent Sovereignty over Natural Resources', Final Report of the Special Rapporteur, UN Doc E/CN.4/Sub.2/2004/30 (13 July 2004). Also, E-I A Daes, 'Indigenous peoples' permanent sovereignty over natural resources: Final Report of the Special Rapporteur', Addendum, E/CN.4/Sub.2/2004/30/Add.1 (12 July 2004), para 1.

[70] ibid (Final Report), para 18.

[71] ibid para 53.

in the draft UNDRIP and ADRIP, the final text of both instruments did not include permanent sovereignty[72].

A further mention of the indigenous right to permanent sovereignty over natural resources appeared in the 2006 Human Rights Council Report on the expert seminar on indigenous peoples' permanent sovereignty over natural resources and their relationship to land, which found that such right is inherent, inalienable and essential for indigenous peoples. However, even in this document, and despite the adoption of the term 'permanent sovereignty', the right is conceived as part of indigenous self-determination[73]. Indeed, this right would be articulated as a collective right by virtue of which States must respect, protect and promote the governmental and property interests of indigenous peoples over their natural resources[74]. The same postulation is provided by the 2012 Human Rights Council Follow-up Report on indigenous peoples and the right to participate in decision-making with a focus on extractive industries, which refers to a 'clear principle of indigenous peoples' right to permanent sovereignty, albeit identifying it as a component of their right to internal self-determination[75].

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[72] ibid para 71. According to the Report, the draft UNDRIP provisions on lands and natural resources included an implicit recognition of indigenous peoples' permanent sovereignty over natural resources. See Chapter 5.

[73] E/CN.4/Sub.2/AC.4/2006/3 'Report on the expert seminar on indigenous peoples' permanent sovereignty over natural resources and their relationship to land' (5 May 2006), para 30.

[74] ibid para 33.

[75] Human Rights Council, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries* A/HRC/21/55 (16 August 2012), paras 13, 44. Cf Ricardo Pereira, '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, 495, mentioning permanent sovereignty over natural resources as part of indigenous right to internal self-determination; Shawkat Alam and A Al Faruque, 'From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources Management' (2020) 32(1) The Georgetown Environmental Law Review 59-84, at 70-72; Endalew Lijalem Enyew, 'Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Development' (2017) 8 Artic Review of Law and Politics 222-245, at 231, stating that indigenous rights with respect to natural resources, as part of their right to self-determination, directly challenges the proposition that the State has ultimate sovereignty over its territorial resources. Also, Saaba Ahmad Khan, 'Rebalancing State and Indigenous Sovereignties in International Law: an Artic lens on trajectories for

In general, such propositions were not followed by the inclusion of an indigenous peoples' right to permanent sovereignty over natural resources in any international legal instruments and no evidence is provided by international case law[76]. In every case, despite the adoption of the notion 'permanent sovereignty', those proposals refer to a right part of indigenous internal self-determination to be exercised within existing States and, hence, were irreconcilable with the current meaning of permanent sovereignty over natural resources under customary international law[77]. It is evident how a proposed right of indigenous peoples to permanent sovereignty over natural resources would not reflect the current content of the right to permanent sovereignty over natural resources. In present customary international law, permanent sovereignty over natural resources is an inalienable right of States, and of certain colonial and equivalent peoples with a right to independence, over the natural resources of their territories. As stated by the ICJ in *Sovereignty over Pedra Branca/Pulau*, territorial sovereignty cannot exist without the control over a territory[78]. Since indigenous peoples do not have a right to independence and to a territory, they cannot enjoy the right to permanent sovereignty over natural resources, which derives from territorial sovereignty[79].

4.5 Conclusion

Under present international law all peoples may enjoy certain rights with respect to natural resources as part of their right to internal self-

Global Governance' (2019) 32(4) Leiden Journal of International Law 675, at 676-678. On the notion of 'indigenous sovereignty': Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 Texas International Law Journal 155-189; Kent Mcneil, 'Sovereignty and Indigenous Peoples in North America' (2016) 22(2) Articles & Book Chapters 81-104.

[76] See Chapters 2, 3 and 5.

[77] See Chapter 1.

[78] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, Malaysia v Singapore*, Judgment, Merits, ICJ GL No 130, ICGJ 9 (ICJ 2008) (23 May 2008), International Court of Justice [ICJ], 40, para 79: 'With regard to Singapore's assertion about the existence of a "traditional Malay concept of sovereignty" based on control over people rather than on control over territory, the Court observes that sovereignty comprises both elements, personal and territorial'.

[79] See Chapter 1.

determination under common Article 1 of the 1966 international Covenants. This is a right of 'all peoples' to dispose freely of their natural wealth and resources and has been applied by the HRC and the CESCR also to indigenous peoples. However, neither the international Covenants nor the human rights committees have ever mentioned a right of peoples 'to permanent sovereignty over natural resources'.

Nevertheless, certain categories of peoples, including colonial and equivalent peoples, enjoy certain rights with respect to natural resources as part of their right to self-determination in the form of independence. Such rights have the same content in terms of permanent sovereignty over natural resources. Indeed, those peoples enjoy a right to statehood over a territory and its natural resources. In this framework there is no evidence that before UNDRIP indigenous peoples enjoyed a right to permanent sovereignty over natural resources since their right to self-determination must be exercised in the territory of an existing State and they do not have, under present international law, a right to independence and statehood.

The next part examines the post-UNDRIP developments on the rights of indigenous peoples with respect to their natural resources.

PART III: INDIGENOUS RIGHTS WITH RESPECT TO NATURAL RESOURCES AFTER UNDRIP

CHAPTER 5: INDIGENOUS PEOPLES' RIGHTS WITH RESPECT TO NATURAL RESOURCES IN UNDRIP

5.1 Introduction

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in 2007[1], recognizes a comprehensive set of indigenous peoples' rights based on a foundational indigenous collective right to self-determination. The current Chapter explores the rights of indigenous peoples with respect to natural resources recognized in the Declaration and their impact on the customary international law on indigenous rights.

Section 5.2 of the Chapter examines the provisions of UNDRIP on indigenous collective rights with respect to natural resources. Section 5.3 looks at the influence of the UNDRIP on successive regional instruments on indigenous peoples, namely the 2016 American Declaration on the Rights of Indigenous Peoples (ADRIP)[2] and the proposed Nordic Saami Convention[3]. Section 5.4 focuses on the adoption of UNDRIP principles in regional human rights jurisprudence, by domestic jurisprudence and legislation and by human rights bodies. Section 5.5 explores whether, after UNDRIP, indigenous rights with respect to natural resources may be conceived as indigenous 'permanent sovereignty over natural resources' and its possible implications.

5.2 Indigenous peoples and natural resources in UNDRIP

The UNDRIP, which is not itself binding as a matter of international law, but which can be looked to for evidence of the content of customary international law, declares a corpus of rights for both indigenous individuals

[1] UNGA Res 61/295 'United Nations Declaration on the Rights of Indigenous Peoples' (UNDRIP) (13 September 2007).
[2] American Declaration on the Rights of Indigenous Peoples (ADRIP): AG/RES.2888 (XLVI-O/16): (Adopted at the thirds plenary session, held on 15 June 2016). See section 5.3.1.
[3] See section 5.3.2.

and indigenous peoples. A significant focus of the rights of indigenous peoples recognized in the Declaration is the connection of such peoples to 'their lands, territories and resources'. The point is stated in several preambular recitals of the Declaration:

> *Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests
>
> *Recognizing* 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
>
> *Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.

These stated inspirations are reflected in various operative provisions of the UNDRIP[4].

As stated in Chapter 2, in contrast with ILO Convention No 169 (1989) and the ADRIP, the term 'indigenous peoples' is not defined in the UNDRIP, leaving whether a particular group constitutes an indigenous people to be determined by external criteria[5]. Moreover, the Preamble to the Declaration recognizes 'that the situation of indigenous peoples varies from region to region and from country to country' and that 'the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration'[6].

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[4] See section 5.2.2.

[5] See Chapter 2; cf ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169, 1650 UNTS 383 (27 June 27 1989) (entered into force 5 September 5 1991), art 1(2) and ADRIP (n 2), art I(2).

[6] This provision was adopted in response to the Advisory opinion of the African Commission on the UNDRIP: African Commission on Human and Peoples' Rights, Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (adopted by the 41st ordinary session (16-30 May 2007); Assembly of the African Union, Decision on the United Nations Declaration on the Rights of Indigenous Peoples, 8th ordinary session, AU Doc Assembly/AU/Dec141(VIII), Add6 (29-30 January 2007). See Chapter 2.

5.2.1 Self-determination

The conceptual basis of most of the rights recognized in the Declaration is the right of indigenous peoples to self-determination[7]. Article 3 provides: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

In this way, UNDRIP is the first international legal instrument, albeit a non-binding one, expressly to posit self-determination as collective right of indigenous as 'peoples'[8]. The provision is accompanied by Article 4 which provides:

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[7] M Weller, *Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1*) in J Hohmann and M Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 123-124; F MacKay, 'The Evolution and Revolution of Indigenous Rights' in A Von Arnauld, K Von der Decken and M Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (CUP 2020) 233-240; S Wheatley, 'Conceptualizing the Authority of the Sovereign State over Indigenous Peoples' (2014) 27(2) Leiden Journal of International Law 371-396; E Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (CUP 2012); C Brölmann and M Zieck, 'Some Remarks on the Draft Declaration on the Rights of Indigenous Peoples' (1995) 8(1) Leiden Journal of International Law 103-113; A Xanthaki, 'Emerging Law: The United Nations Draft Declaration on Indigenous Peoples' in *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge Studies in International and Comparative Law, CUP 2007) 102-128; C Holder, 'Self-determination as a Basic Human Right: The Draft UN Declaration on the Rights of Indigenous Peoples' in A Eisenberg and J Spinner-Halev (eds), *Minorities within Minorities: Equality, Rights and Diversity* (CUP 2005) 294-316; M 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(4) International and Comparative Law Quarterly 957-983; R Niezen, *Public Justice and the Anthropology of Law* (CUP 2010) 105-136; S Wiessner, 'Indigenous Self-determination, Culture, and Land' in E Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (CUP 2012) 31-63; B Kingsbury, 'Self-Determination and "Indigenous Peoples"' Proceedings of the ASIL Annual Meeting (1992) 86, 383-394; I Bantekas and L Oette, 'Group Rights: Self-determination, Minorities and Indigenous Peoples' in I Bantekas and L Oette (eds), *International Human Rights Law and Practice* (CUP 2013) 409-451; A Tomaselli, 'The Right to Political Participation of Indigenous Peoples: A Holistic Approach' (2017) 24 International Journal on Minority and Group Rights 390-427.

[8] In doing so, the UNDRIP codified the previous findings of the HRC and CESCR that applied common Article 1 of the ICCPR and ICESCR to indigenous peoples: eg HRC, Concluding Observations: Canada UN Doc CCPR/C/79/Add105 (7 April 1999), para 8: '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'; Canada Un Doc CCPR/C/CAN/CO/5 (20 April 2006), para 8; Norway UN Doc CCPR/C/NOR/CO/5 (25 April 2006), para 5; Norway UN Doc CCPR/C/79/Add.112 (n 2), para 17; Finland UN Doc CCPR/CO/82/FIN (2 December 2004), para 17; New Zealand UN Doc CCPR/CO/75/NZL (7 August 2002), para 7; Australia UN Doc A/55/40 (28 July 2000), paras 498-528; Mexico UN Doc CCPR/C/MEX/CO/5 (27

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The fact that the provision does not specify the matters to fall within indigenous self-government allows flexibility in this regard[9]. At the same time, Article 46(1) proclaims that the Declaration shall respect the principle of territorial integrity of States[10]. In other words, the right of indigenous peoples to self-determination does not carry with it the right to independence and to statehood like in the case of colonial and equivalent peoples[11]. Hence, the self-determination of indigenous peoples envisaged in UNDRIP is not 'external' but 'internal', in the sense that it must be enjoyed within the territory of an existing State[12].

July 1999), para 22; CESCR, Concluding Observations on the fourth periodic report of Russia UN Doc E/C.12/1/Add94 (12 December 2003), paras 11 and 39. Also, J Crawford, 'Democracy and the Body of International Law' in GH Gox and BR Roth (eds), *Democratic Governance and International Law* (CUP 2000) 91; T Franck, 'The Emerging Right to Democratic Governance' (1992) 86(1) American Journal of International Law 46-91, 52; H Steiner, 'Political Participation as a Human Right' (1988) 1 Harvard Human Rights Yearbook 77-134, 77; M Scheinin and M Åhrén, 'The UNDRIP's Relationship to Existing International Law' in J Hohmann and M Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (n 7) 66; M Barelli (n 7) 966. Cf ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169 (n 5), art 1(3); Agreement Establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, 1728 UNTS 380 (24 July 1992) (entered into force 4 August 1993), art 1(1). See Chapters 2 and 3.

[9] Helen Quane, 'New-Directions for Self-Determination and Participatory Rights?' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 270-271. UNDRIP Article 37 suggests that such autonomy or self-government may be guaranteed through treaties or agreements between indigenous peoples and States.

[10] UNGA Resolution 2625 (XXV) (24 October 1970), Principle 5, para 7. See Chapter 2.

[11] Cf African Commission on Human and Peoples' Rights, Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (adopted by the 41st ordinary session, 16-30 May 2007), para 26. See Chapter 4.

[12] Moreover, according to UNDRIP Article 46(2) in the exercise of the rights enunciated in the Declaration, international human rights law shall be respected.

5.2.2 Indigenous collective rights with respect to lands, territories and natural resources

The operative part of UNDRIP contains a series of provisions specifically conceived for the protection of collective indigenous rights with respect to natural resources[13].

5.2.2.1 Terminology adopted by the Declaration

The UNDRIP refers to rights with respect to 'lands, territories and natural resources'. The purpose of such comprehensive terminology was to include the totality of indigenous peoples' relationship with lands and with respect to all their resources[14].

The UNDRIP reflects the content of ILO Convention No 169 Article 13(2), which states that the term 'lands', in the relevant Articles 15 and 16 of the Convention, includes the notion of 'territories', which refers to 'the total environment of the areas which the peoples concerned occupy or otherwise use'[15]. For such reasons, the term 'natural resources' must be, in principle, understood to cover all natural resources without any distinction. However, this does not imply that rights of ownership on lands and territories include inherent rights with respect to all the natural resources

[13] S Errico, 'The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview' (2007) 7 Human Rights Law Review, 752-754.

[14] Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, by E-I A Daes, Chairperson of the Working Group on Indigenous Populations, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993). While the term 'land' was adopted by previous ILO Conventions, the use of the term 'territory', supported by indigenous representatives, was opposed by different States considering its possible implications for the notion of 'States' territorial sovereignty': UN Commission on Human Rights (UNCHR), Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc/E/CN.4/1996/84 (4 January 1996), para 83. See Chapter 3.

[15] The ILO Meeting of Experts underlined how the notion of 'territories' in the ILO Convention includes lands and also sub-soil, air space, occupants, plants and animal lives: Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107) (September 1986) Report VI (1), International Labour Office 44. See Chapter 3.

upon, and below, such lands and territories[16]. Indeed, while the terms 'lands', 'territories' and 'resources' are used together to cover all aspects of such peculiar relationship between indigenous and nature, in applying the different rights affirmed in the UNDRIP, lands, territories and resources shall be considered separately[17].

5.2.2.2 Collective rights to cultural and spiritual relationship with respect to natural resources

Article 25 of the Declaration furthers the trend in international law towards taking into account the special spiritual and cultural values that lands and natural resources have for indigenous peoples[18].

The provision states that indigenous peoples have 'the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources'[19]. The norm refers to the 'spiritual relationship' that indigenous peoples have with their lands,

[16] Diversely, Article 15 of ILO Convention No 169 mentions 'natural resources pertaining to' indigenous lands. See Chapter 3 and sections 5.2.2.2 and 5.2.2.3.

[17] For example, according to UNDRIP Article 26(2) indigenous may have ownership rights by reason of traditional ownership or other traditional occupation or use, without having the same rights over the natural resources of those lands and territory. Another example is provided by the right to redress that could imply the restitution of lands but, for example, not of exhaustible natural resources: CERD, General Recommendation No 23: Indigenous Peoples, UN Doc CERD/C/51/misc13/Rev4 (18 August 1997), para 5. A final argument in this sense is provided by the fact that the UNDRIP at Article 10 does not mention 'natural resources' but only 'lands and territory'. On the right to redress in UNDRIP, see section 5.2.2.5. Also, *Mary and Carrie Dann v United States*, Case 11.140, Report No 75/02, IACHR, Doc 5 rev 1 at 860 (27 December 2002), Report No 75/02, paras 129, 130. See Chapter 4.

[18] For example, ILO Convention No 169 art 13 urges States to respect the special importance for the cultures and spiritual values of indigenous peoples of their relationship with the lands or territories. Also, A Xanthaki, 'Indigenous Cultural Rights' in *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge Studies in International and Comparative Law, (CUP 2007) 196-236; Wiessner, (n 7) 31-63.

[19] UNDRIP Article 25 reflects the content of Article 13(1) of ILO Convention No 169 but conceives it as a stand-alone right and not as a mere State obligation like the ILO Convention. See Chapter 3.

territories and resources[20]. Considering 'the importance of the indigenous control over their lands, territories and resources for their culture and traditions' affirmed in the Preamble, such 'spiritual relationship' includes all practices and traditions associated with such lands, territories and resources. The draft text of the Declaration contained a reference also to the 'material relationship' between indigenous and lands, territories and resources but this was removed after the opposition of some States since it could have implied the right of indigenous to acquire physical possession of lands, territories and resources possessed by third parties as a result of such spiritual relationship[21].

The use of past tense in the provision means that peoples have the right to maintain and strengthen such spiritual relationship also with respect to lands, territories and resources no longer in their possession but that they owned, occupied or used in the past, even if those are owned, occupied or used by third parties[22]. To maintain such spiritual relationship, the drafting history of the provision demonstrates that under Article 25 indigenous have the right to access to such territories, lands and resources[23]. The same right to access has been affirmed by regional jurisprudence[24]. The drafting of the provision and the use of the term

[20] The provision chimes with UNDRIP Article 12, which guarantees to indigenous peoples the right to maintain, protect and have access in privacy to their religious and cultural sites.

[21] Australia, Canada, New Zealand, and the United States underlined the 'third party interests' with regard to UNDRIP Article 25. However, indigenous peoples and a number of States were comfortable with the inclusion of 'material' in the text of Article 25: UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2003/92 (6 January 2003), paras 28, 29.

[22] In doing so, UNDRIP Article 25 is consistent with ILO Convention No 169 Article 13, which refers not only to lands currently occupied by indigenous peoples, but also to lands which they otherwise use. See Chapter 3. Differently, UNDRIP Article 26(2) refers only to lands, territories and resources that indigenous currently possess. See section 5.2.2.3.

[23] United Nations Declaration on the Rights of Indigenous Peoples: Annex to Human Rights Council Resolution 2006/2 (Chair's Text), adopted by the Human Rights Council (29 June 2006).

[24] Eg *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya,* ACHPR Communication No 276/2003 [2009] AHRLR 75 (the '*Endorois'* case); *Yakye Axa Indigenous Cmty v Paraguay,* Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (se C), No 125 (17 June 2005). Also, CESCR, General Comment No 21: Right of Everyone to take Part in Cultural Life (Article15(1)(a) UN Doc E/C.12/GC/21 (21 December 2009), para 49(d); among domestic jurisprudence: *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v*

'natural resources' in the Declaration evidence that the right to maintain such spiritual relationship refers to all natural resources, including waters and coastal seas[25].

5.2.2.3 Collective rights with respect to lands and natural resources

UNDRIP Article 26(1) recognizes indigenous peoples' 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'[26]. The text is somewhat misleading in its overly concise use of the phrase 'or otherwise used or acquired'. Reading it in the context of Article 26(2)[27], which elaborates on Article 26(1), what is meant in Article 26(1) is lands, territories and resources which indigenous peoples have traditionally owned, occupied or otherwise used or, in the alternative, which they have otherwise acquired, for example, by way of purchase or lease in perpetuity in accordance with the ordinary law of property applicable in the State in question or by way of legislative statutory grant of a proprietary or other possessory interest under that law[28].

Moving from the general statement in Article 26(1), Article 26(2) specifies that indigenous peoples have the right to own, use, develop and

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*Northern Territory, Ward v Crosswalk Pty Ltd [*2002] HCA 28 ('*WA v Ward*') (8 August 2002).

[25] UNCHR, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, International Workshop on the Draft United Nations Declaration on the Rights of Indigenous Peoples: Patzcuaro, Michoacan, Mexico 26–30 September 2005, UN Doc E/CN. 4/2005/WG.15/CRP.1 (29 November 2005). See Chapter 3 and section 5.2.2.1.

[26] A Xanthaki, 'Indigenous Land Rights' in *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge Studies in International and Comparative Law, CUP 2007) 237-279; T Rowse, 'Land ownership for Aborigines Presents Difficult Problems' in T Rowse (ed), *Obliged to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (CUP 2000) 34-52; C Charters, 'Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27' in J Hohmann, M Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples. A Commentary* (OUP 2018) 395-424.

[27] United Nations Vienna Convention on the Law of Treaties (VCLT) 1155 UNTS 33 (23 May 1969) (entered into force 27 January 1980), art 31(1) and (2), acknowledging that UNDRIP is not a treaty.

[28] That is, the word 'traditionally' qualifies 'owned, occupied or otherwise used' but not 'or otherwise (…) acquired'. On the distinction between territorial sovereignty and property see Chapter 1.

control the lands, territories and resources that they currently possess 'by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired'[29]. The right of indigenous peoples to own lands, territories and resources that they possess by reason of traditional occupation or use posits a right under international law to a specifically propriety form of customary, 'aboriginal' or 'native' title under national law, as distinct from a form of customary, 'aboriginal' or 'native' title under national law conferring only rights of access or usufruct. Such right is not only limited to ownership but includes also the right of indigenous peoples to use and to develop such resources. Diversely, the right of indigenous peoples to own lands and territories that they have otherwise acquired would seem to represent a right under international law to the opportunity to obtain ownership under national law of lands and territories acquired by way of, for example, lease in perpetuity or legislative grant of a non-proprietary possessory interest.

Article 26(3) affirms that States shall give legal recognition and protection to such lands, territories and resources. The provision refers to the protection and recognition of such lands and resources, however acquired, as a matter of substantive law. In case such acquisition is done by way of traditional ownership or other traditional occupation or use, such recognition must be conducted with due respect of the customs, traditions and land tenure systems of the peoples concerned[30].

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[29] On the notion of 'possession', in *Awas Tingni* the IACtHR stated that indigenous had to demonstrate 'traditional, ancestral patterns of use and occupation' of lands, territories and resources to claim a title to them, while they are not required to demonstrate an intensive continuity to such lands and resources since the moment of sovereignty transfer, as it required in the common law doctrine: *Mayana (Sumo) Community of Awas Tingni v Nicaragua,* Judgement of 31 August 2001, Inter-American Court on Human Rights, (Ser C) No 79, 2001 (the *'Awas Tingni'* case), para 151; also, *Maya Indigenous Communities of the Toledo District v Belize*, Case 12,053, Inter-American Commission on Human Rights, Report No 40/04 (Merits Decision of 12 October 2004), paras 127-130. Jéremie Gilbert and Cathal Doyle, 'A New Dawn over the Land: Shedding Light on Indigenous Peoples' Land Rights' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Bloomsbury 2011) 298; J Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title' (2007) 56(3) International and Comparative Law Quarterly 583-611.

[30] ibid (*Awas Tingni*), para 164: 'the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation,

As the text makes clear, UNDRIP Article 26 pertains not only to lands and territories as such but also to 'resources'[31]. However, the provision does not specify whether the term 'resources' within Article 26 refers to surface resources, such as rivers, coastal waters, trees, animals, or includes also subsoil resources, such as oils and minerals[32]. During the Working Group on the Draft Declaration, some States like Australia underlined how ownership of subsoil resources, like minerals and petroleum, was vested in the State[33]. The same position was supported by New Zealand[34], Canada[35] and Venezuela[36].

demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores'. Also, Gilbert and Doyle (n 29) 300-301; T Joona, 'Indigenous Peoples' Right to Natural Resources: Reflections from the Arctic' in H Tegner Anker and B Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia 2018) 229-242; D Dam-de Jong, 'Defining the Right of Peoples and States to Freely Exploit their Natural Resources' in International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations (Cambridge Studies in International and Comparative Law, CUP 2015) 34-57; E Macpherson, 'Regulating Indigenous Water Rights: Nature, Humans and Markets' in *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge Studies in Law and Society, CUP) 32-46.

[31] Those rights are completed by UNDRIP Article 10, which prohibits the forcible removal of indigenous peoples from their lands and territories, stating that no relocation shall take place without their FPIC and agreement on just and fair compensation, including if possible the option of return, and by UNDRIP Article 29 which states that indigenous peoples have the right to conservation and protection of the environment and to 'the productive capacity of their lands, territories and resources'. In the light of such right, no storage or disposal of hazardous materials shall take place in indigenous lands and territories without their free, prior and informed consent. Despite not mentioning the UNDRIP, in 2018 the East African Court of Justice (EACJ) found that, in principle, the eviction of Maasai members from historically occupied lands is not justified by environmental considerations and would not be compensated by an award of damages: EACJ, *Ololosokwan Village Council and 3 others v The Attorney General of the United Republic of Tanzania*, Application No 15 of 2017 (25 September 2018), paras 48-54. At the national level the prohibition of forced removal has been included for example in Article 62(2) of the Paraguayan Constitution.

[32] S Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in S Allen and A Xanthaki (ed), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 329-366, at 338.

[33] 'Report of the Working Group on draft declaration on indigenous peoples': UN Doc E/CN/4/2000/84, (6 December 1999), para 92.

[34] ibid para 93.

[35] 'Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32UN Doc E/CN.4/2001/85 (6 February 2001), para 108.

[36] ibid para 110; also, E-I A Daes, 'Indigenous Peoples' Permanent Sovereignty over Natural Resources', Final Report of the Special Rapporteur, UN Doc E/CN.4/Sub.2/2004/30 (13 July 2004), para 71. The Special Rapporteur recommended the inclusion of subsurface resources in the regime; Errico (n 32) 340.

For such discrepancies, the attempts to include explicitly subsoil resources in Article 26 of the UNDRIP failed. However, as stated above[37], the general reference of Article 26 to 'natural resources' may, in principle, cover both those categories. In accordance with the general rules of treaties interpretation stated in Article 31(1) and (2) of the 1969 Vienna Convention on the law of treaties (VCLT), and acknowledging that UNDRIP is not a treaty, Article 26 in this sense must be interpreted considering also Articles 25 and 32(2) of the UNDRIP. While Article 25 itself refers to 'waters and coastal seas and other resources', Article 32(2) mentions 'mineral, water or other resources', suggesting that the notion of natural resources in the UNDRIP Article 26(2) is not limited to surface resources but embraces also mineral and other resources[38]. However, an obstacle to the inclusion of subsoil resources within the meaning of Article 26(2) is that, for the purpose of the provision, indigenous must have traditionally owned, occupied or otherwise used, or otherwise acquired, such resources. These circumstances tend to exclude subsoil resources such as minerals and oil, considering the difficulties to conceive any traditional connection with such resources, unless they have acquired them otherwise than traditionally, for example through statutory grant.

If the traditional rights that indigenous would have on lands and territories would extend automatically also natural resources of such lands and territories, indigenous peoples would have rights to exploit, use and control not only resources over which they retain ownership but also all resources within their traditional lands and territories, creating an evident conflict with both private third parties and States' permanent sovereignty over the natural resources of such territories. In this sense, it is worth mentioning ILO Convention No 169 Article 15(1) that refers to the right of

[37] See section 5.2.2.1.

[38] Cf Final Report of the Special Rapporteur (n 36), para 42: 'These resources can include air, coastal seas, and sea ice as well as timber, minerals, oil and gas, genetic resources, and all other material resources pertaining to indigenous lands and territories. There appears to be widespread understanding that natural resources located on indigenous lands or territories, resources such as timber, water, flora and fauna, belong to the indigenous peoples that own the land or territory'.

indigenous peoples 'to participate' in the use, management and conservation' of 'natural resources pertaining to their lands', but not owned or possessed by indigenous peoples.

Various regional courts findings reflect the principles affirmed in UNDIRP Article 26(2) on indigenous rights with respect to natural resources above the surface that they currently possess[39]. In contrast, divergencies remain on the rights with respect to subsoil resources. At the regional level, the IACtHR found that, despite subsoil resources are vested in the State, indigenous peoples have rights with respect to natural resources linked with indigenous cultures and found on their lands and territories necessary for their cultural and physical survival. In doing so, the IACtHR stated that such right is not absolute but subject to justified limitations[40]. Similarly, the African Commission on Human and Peoples' Rights found that natural resources in indigenous traditional lands are vested in indigenous peoples[41].

However, divergence persists in the jurisprudence of domestic courts, acknowledging the different concepts of native or customary title recognized under the respective domestic law and the peculiar relationship between the peoples and lands or resources involved. For example, the Supreme Court of Canada in *Delgamuukw* found that 'physical occupation' sufficient to ground indigenous title to land may be established by 'regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources'[42]. The Court stated that such aboriginal title includes also mineral

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[39] Eg *Awas Tingni* (n 29), para 153; *Cal (on behalf of the Maya Village of Santa Cruz) and Others & Coy (on behalf of the Maya Village of Cenejo) and Others v Attorney General of Belize and Minister of Natural Resources and Environment,* Claims No 171 and 172 of 2007, (18 October 2007), paras 127-130; *Yakye Axa* (n 24), paras 124, 137; *Sawhoyamaxa Indigenous Cmty v Paraguay,* Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (Ser C) Mo 146 (29 March 2006), paras 118-121; CERD, Early Warning and Urgent Action Procedure, Decision 1(68) United States of America (Western Shoshone), UN Doc CERD/C/USA/DEC/1 (2006). See Chapter 3.

[40] *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, Costs, Judgement, Inter-Am Ct HR (Ser C) No 172 (28 November 2007), paras 121-128.

[41] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,* Comm No 155/96 Case No ACHPR/COMM/A044/1, (the '*Ogoni'* case), para 54; *Endorois* (n 24), para 186; also, *Doğan and Others v Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras 138-139

[42] *Delgamuukw v British Columbia* (1997), 3 SRC 1010, particularly para 149: '[O]ccupation may be established in a variety of ways, ranging from the construction of

rights[43]. Even the Constitutional Court of South Africa found that communal ownership includes the indigenous right to exploit natural resources, above and beneath the surface[44]. In contrast, both the High Court of Australia[45] and the Federal Court of Australia[46] and also the Supreme Court of Philippines[47] have stated that the native title in question, while including the right to certain natural resources, did not encompass subsoil resources such as petroleum and minerals.

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dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources'; also, *R v Marshall; R. v Bernard*, [2005] SCC 43 (20 July 2005), para 66. The relevance of natural resources exploitation for native title was recognized in a more explicit terms in *Tsilhqot'in v British Columbia* [2014] SCC 44 (26 June 2014), para 50: 'occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty'. The native title in Canada was recognized for the first time in *Calder et al v Attorney-General of British Columbia*, Supreme Court of Canada (1973), 34 DLR (3d) 145.

[43] ibid (*Delgamuukw*), para 122: 'aboriginal title also encompasses mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands'; C Bell, 'Canadian Supreme Court: Delgamuukw v. British Columbia' (1998) 37(2) International Legal Materials 261-333. Also, *United States v Shoshone Tribe of Indians* 304 US 11 (1938), where the United States Supreme Court found that the mineral rights on the Shoshone reservation lands belonged to the tribe and not to the State. Cf the previous case *United States v Cook*, 86 U.S. 19 Wall. 591 591 (1873), where the Court found that the land and timber is owned by the State and Indians had a mere right to occupy such lands.

[44] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), paras 60, 62 and 64; However, while indigenous may have certain rights over mineral resources, the sovereignty over such resources remains vested the State: Constitutional Court of South Africa, *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), para 71 and South Africa Mineral and Petroleum Resources Development Act (2002) (Gazette No 23922, Notice No 1273 dated 10 October 2002. Commencement date: 1 May 2004 [Proc. No R25, Gazette No 26264]) (as amended), Section 2 (a). See Chapter 1. Ö Ülgen, 'Developing The Doctrine of Aboriginal Title in South Africa: Source And Content' (2002) 46(2) Journal of African Law 102, 131-154. In *Gold Ltd v United States*, a dispute concerning mining activities on indigenous lands, the award merely refers to 'the interest of indigenous peoples', without specifying whether those include rights with respect to subsoil resources: *Glamis Gold Ltd v United States*, Award, IIC 380 (2009), 14 May 2009, despatched 8th June 2009, Ad Hoc Tribunal (UNCITRAL), para 8.

[45] *WA v Ward* (n 24); also, *Tjungarrayi v Western Australia*; *KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia* [2019] HCA 12. On the notion on native title in Australia, also, *Mabo v Queensland* (No 2) [1992] HCA 23 (3 June 1992) 175 CLR 1. Among first landmark cases on the recognition of indigenous rights to lands in common law jurisprudence: *Amodou Tijani v Southern Nigeria*, United Kingdom Privy Council (1921).

[46] *Attorney General of the Northern Territory v Ward* (2003) FCA 283, paras 5(a), 7.

[47] *Cruz and Europa v Secretary of the Environment and Natural Resources, et al.* GR No 135385, Judgment (6 December 2000), Supreme Court of the Philippines.

5.2.2.4 Recognition and adjudication of rights with respect to lands, territories and natural resources

UNDRIP Article 27 relates specifically to the process for recognizing and adjudicating the rights referred to in Article 26. The provision declares that States must establish and implement, in conjunction with the indigenous peoples concerned, 'a fair, independent, impartial, open and transparent process to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources', including not only those that they currently possess but also to those lands, territories and resources which 'were' traditionally owned or otherwise occupied or used.

Moreover, UNDRIP Article 27 compared to ILO Convention No 169 Article 14(3)[48] requires a 'fair, independent, impartial, open and transparent' process that gives 'due recognition to indigenous peoples' laws, traditions, customs and land tenure systems'[49]. Indigenous have a right to participate in adjudicatory processes, while ILO Convention Article 16(2) only mentions an 'opportunity for effective representation of the peoples concerned' in case of relocation. States shall implement such obligation through domestic mechanisms to establish process for redress and adjudicate both historically and present indigenous rights with respect to natural resources[50].

[48] ILO Convention No 169, Article 14(3): 'adequate measures shall be established within the national legal systems to resolve land claims by the peoples concerned'; cf Articles 16(2) and 16(4) of the ILO Convention 169. See Chapter 3.

[49] At the regional level, in *Mary and Carrie Dann v United State* the IACHR stated in general the need to respect international human rights law in adjudicating indigenous peoples' rights: *Mary and Carrie Dann v United States* (n 17), paras 124-131.

[50] For example, the Australian Native Title Act 1993 and the New Zealand Treaty of Waitangi Act 1975, through the Waitangi Tribunal, include mechanism to adjudicate indigenous claims. In the United States, the same role is played by the Indian Claims Commission established under the Indian Claims Commission Act of 1946.

5.2.2.5 The right to redress

The above-mentioned provisions are completed by UNDRIP Article 28(1), which proclaims that indigenous peoples have:

> the right to redress … for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

The provision, that refers also to natural resources, echoes CERD General Recommendation No 23 which stated the indigenous right to restitution or, alternatively, to a just, fair and prompt compensation, in case they have been deprived of their lands and territory traditionally owned or otherwise inhabited or used without their free, prior and informed consent[51].

Article 28(1) refers only to those lands, territories and resources that indigenous have traditionally owned or otherwise occupied or used. Indeed, lands, territories and resources acquired otherwise than traditionally are excluded from UNDRIP Article 28(1) since in this latter case indigenous peoples, like any other holder of a property right under domestic law applicable in the State in question, will already enjoy a right to redress for unlawful interference with such right. The provision specifies, in line with the customary international law of State responsibility[52], that the redress to which indigenous peoples have a right in relevant cases shall be 'by means

[51] CERD, General Recommendation No 23 (n 17), para 5. In contrast, the UNDRIP Draft Declaration 28 mentioned only the right to restitution. See Chapter 3.

[52] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No 10 (A/56/10), chp.IV.E.1, arts 1, 2, 3, 12, 13. The principle was applied by the ICJ in different occasions, including *Corfu Channel, United Kingdom v Albania*, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949) (9 April 1949); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America*), Merits, Judgment [1986] ICJ Rep 14, paras 283, 292. Also, F Lenzerini, 'Reparations, Redress and Remedies', International Law Association, Committee on the Rights of Indigenous Peoples, Hague Conference Report (2010) 39, 42; F Lenzerini, 'Reparations for Indigenous Peoples in International and Comparative Law: An Introduction' in F Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (OUP 2008), 11-17; F Lenzerini, 'Reparations, Restitution, and Redress: Articles 8(2), 11(2), 20(2), and 28' in J Hohmann, M Weller (ed), *The UN Declaration on the Rights of Indigenous Peoples. A Commentary* (OUP 2018) 573-598.

that can include restitution or, when this is not possible, just, fair and equitable compensation'. Article 28(2) focuses redress by way of compensation. It states that 'unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'. The paragraph declares that compensation in kind should be the first option to be ensured in all possible situations for indigenous peoples and that compensation in money or other forms of compensations would represent only a secondary remedy when redress is not practicable.

On natural resources, UNDRIP Article 28(1) is accompanied Article 32(3), which declares that States shall provide 'effective mechanisms for just and fair redress' for project affecting their lands or territories and other resources, considering in particular utilization or exploitation of mineral, water or other resources. In general, the right to redress is characterized by a consistent international and State practice[53] and is stated also by Article 16 of the ILO Convention No 169[54]. At the regional level, the IACtHR found that reparations shall consist in 'measure necessary to make the effects of the committed violations disappear' in light of the special needs

[53] HRC, Concluding Observations: Brazil UN Doc CCPR/C/BRA/CO/2 (1 December 2005), para 6; Chile UN Doc CCPR/C/ 79/Add.104 (30 March 1999), para 22; Guatemala UN Doc CCPR/CO/72/GTM (27 August 2001), para 29; CESCR, General Comment No 21 (n 24), para 36; CERD, General Recommendation No 23 (n 17), para 5; Report of the United Nations High Commissioner for Human Rights on Indigenous Issues, UN Doc A/HRC/4/77 (6 March 2007), para 8; also, Articles 15(2) and 16 of ILO Convention No 169; CEACR, Direct Request concerning Convention No 169, Indigenous and Tribal Peoples, 1989 Paraguay (ratification: 1993; submitted: 2004); Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No 169) Bolivia (ratification: 1991; published: 2006).

[54] ILO Convention No 169 Article 16(3)-(4): '3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees'. See Chapter 3. The right of indigenous peoples to redress was commonly supported during the drafting of the UNDRIP, including by Australia and Canada: Report of the Working Group on the draft United Nations declaration on the rights of indigenous peoples, paras 185, 279; UN Doc E/CN.4/2004/81, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, para 16.

of the communities concerned and shall include both restitution and monetary compensation also for immaterial damages[55]. The African Commission similarly found that when a State is not able to return traditional lands and communal resources to indigenous peoples, it must surrender alternative lands of equal extension and quality[56].

In referring to the 'free, prior and informed consent' of indigenous peoples to any confiscation, occupation or use of or damage to the lands, territories and resources which they have traditionally owned or otherwise occupied or used, Article 28(1) foreshadows the obligation recognized in Article 32(2).

5.2.2.6 Consultations and free, prior and informed consent

Article 32(2) recognizes the duty of States to 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[57].

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[55] Eg *Awas Tingni* (n 29), paras 163, 167; *Yakye Axa* (n 24), para 149.
[56] *Endorois* (n 24), para 234. Also, *Ogoni* (n 41), para 41.
[57] According to the HRC, the principle affirmed in the UNDRIP includes an inherent and prior right of indigenous peoples that requires third parties to enter into an equal relationship with indigenous peoples based on a principle of informed consent and includes 'processes that allow and support meaningful choices by indigenous peoples about their development path'. Cf CESCR, General Comment No 21 (n 24), para 37: 'States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights'. Also, UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Preliminary Working Paper on the Principle of Free, Prior and Informed Consent of Indigenous Peoples in relation to Development Affecting Their Land and Natural Resources That Would Serve as a Framework for the Drafting of a Legal Commentary by the Working Group on This Concept*, submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation, 22nd sess, Agenda, Item 5, UN Doc E/CN.4/Sub.2/AC.4/2004/4 (8 July 2004), para 13; Draft Programme of Action for the 2d International Decade of the Worlds' indigenous People, Report of the Secretary General, UNGAOR, 60th session, UN Doc A/60/270 (18 August 2005), para 9. C Doyle and J Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"' in European Academy Bozen/Bolzano (ed), *European Yearbook*

The text of Article 32(2) itself is unclear as to whether a State is obliged actually to obtain such consent, rather than merely to consult and cooperate in good faith with a view to obtaining it, prior to the approval of any project affecting the lands or territories and other resources of the indigenous people concerned. Reading UNDRIP Article 32(2) in the context of both Article 8(2)(b)[58] and Article 28(1)[59] suggests, albeit if not conclusively, the former.

Such a reading of Article 32(2) would also be consistent with prior developments in international human rights law[60]. In 1993, CERD General Recommendation No 23 referred to a general duty to obtain the informed

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of Minority Issues (Martinus Nijhoff 2011) 219-262, at 247, underlining the link with the indigenous rights to development and self-determination; Gilbert and Doyle (n 29) 305-315; J Razzaque, 'A Stock-Taking of FPIC Standards in International Environmental Law' in S Turner and others (eds), *Environmental Rights: The Development of Standards* (CUP 2019) 195-221; Margaret Satterthwaite, Deena Hurwitz, 'The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects' (2005) 22 Arizona Journal of International and Comparative Law 1-4. The principle of public participation in decision making processes is affirmed in the environmental field, as stated by the Aarhus Convention and, at the regional level, by the Escazù Agreement: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 U.N.T.S. 447, 38 ILM (opened for signature 25 June 1998) (entered into force 30 October 2001) (the 'Aarhus Convention'); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (4 March 2018) (entered into force 22 April 2021) (the 'Escazù Agreement'), which mentions specifically the rights of indigenous peoples at Articles 5(4) and 7(15); also, A Fodella, 'International Law and the Diversity of Indigenous Peoples' (2006) 30 Vermont Law Review, 582-583; M Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in J Hohmann, M Weller (ed), *The UN Declaration on the Rights of Indigenous Peoples. A Commentary* (OUP 2018).

[58] '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'.

[59] 'Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'.

[60] VCLT (n 27), art 31(3)(c), acknowledging again that UNDRIP is not a treaty. In this way, international human rights law contrasts with Art 15 ILO Convention No 169, which establishes merely a duty on States to consult indigenous peoples in the case of exploration or exploitation of resources in their lands. Similarly, while the consultation of and participation by indigenous peoples were identified by the World Bank in 2005 as emerging principles of international law in the context of the exploration or exploitation of resources on indigenous lands, there was not the same evidence with reference to the specific requirement of the free, prior and informed consent of the indigenous people concerned with any such exploration or exploitation: Legal Note on Indigenous Peoples, 8 April 2005, submitted to the Board of Executive Directors, 10 May 2005, para 28; Errico (n 32) 357-359.

consent of indigenous peoples before any decision relating to their rights and interests[61]; and first in 2003, in its concluding observations on Ecuador, the CERD found that mere consultations before exploiting the resources of such communities do not meet the requirements under General Recommendation No 23, recommending States to obtain the free, prior and informed consent of the indigenous people concerned[62]. The same principle has been recognized by both the HRC[63] and the CESCR[64], while at the regional level the IACtHR has insisted on the need not merely to consult but to seek the consent of indigenous peoples for the grant of concessions on their lands and with respect to their resources[65]. The principle is then part of the ILO Convention No 169, stated in Articles 6[66] and 15(2)[67] as a right to consultations.

On the other hand, during the drafting of the provision, the original text of Article 32, former Article 30 in the draft Declaration, mentioned the right of indigenous peoples that States shall 'obtain' their free, prior and informed consent prior to the approval of any project affecting their lands,

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[61] CERD, General Recommendation No 23 (n 17), para 4(d).
[62] CERD, Concluding Observations: Ecuador UN Doc CERD/C/62/CO/2 (21 March 2003), para 16; Australia UN Doc CERD/C/AUS/CO/14 (14 April 2005), paras 11, 16; Guatemala UN Doc CERD/C/GTM/CO/11 (15 May 2006), para 19; India UN Doc CERD/GTM/CO/19 (5 May 2007), para 19; Suriname: Decision 1(67) Early Warning and Urgent Action Procedure' UN Doc CERD/C/DEC/SUR/4 (1 November 2005), para 4.
[63] HRC, *I. Länsman et al. v Finland* (CCPR/C/52/D/511/1992) (26 October 1994), paras 9.4-9.6; Concluding Observations: Panama, UN Doc CCPR/C/PAN/CO/3 (17 April 2008), para 21.
[64] Eg CESCR, Concluding Observations: Colombia UN Doc E/C.12/Add.1/74 (30 November 2001), paras 12, 33; Ecuador UN Doc/C.12/1/Add.100 (7 June 2004), paras 12, 35; Brazil UN Doc E/C.12/1/Add.87 (26 June 2003), para 58. Also, UN Sub-Commission on the Promotion and Protection of Human Rights, 'Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights', UN Doc E/CN/.4/Sub.2/2003/38/Rev.2, para 10(c).
[65] *Awas Tingni* (n 29), concerning, in general, unilateral concessions by Nicaragua; *Saramaka* (n 40), paras 133ff; *Mary and Carrie Dann v The United States* (n 49), para 140.
[66] 'In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'.
[67] 'In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands'.

territories and other resources[68]. Given the possibility that the free, prior and informed consent could be interpreted as a veto right of indigenous peoples, its inclusion was particularly contested during the drafting of the UNDRIP[69]. For these reasons, UNDRIP Article 32, like Article 19, was changed requiring States not to obtain the free, prior and informed consent of indigenous peoples, but to consult them 'in order to obtain' such consent.

The contrast between the text of UNDRIP Article 32(2), which mirrors that of Article 19[70], and the respective texts of Articles 10, 29(2) and 30(1) of the Declaration is striking. Article 10 states unambiguously that '[n]o relocation' of indigenous peoples from their lands or territories shall take place without the free, prior and informed consent of the indigenous peoples concerned'. Similarly, Article 29(2) affirms that 'no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent' and Article 30(1) similarly declares that military activities 'shall not take place' in those lands and territories unless justified by relevant public interest or otherwise 'freely agreed' by the indigenous peoples concerned.

From the analysis of the free, prior and informed consent requirement in those provisions and from the positions of objecting States, it seems arguable that under UNDRIP Article 32(2), like for Article 10, States have an obligation to consult indigenous peoples 'in order to obtain' their free, prior and informed consent. This interpretation of UNDRIP Article 32(2) can be seen in the ICSID Arbitration *Bear Creek Mining Corporation v Republic*

[68] UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994). A similar expression was used in former Article 20 in the Draft Declaration, today Article 19 of UNDRIP.
[69] Gilbert and Doyle (n 29) 316-317; Errico (n 32) 361-362; Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc/E/CN.4/1996/84 (4 January 1996), para 81; Report of the Working Group on the draft United Nations declaration on the rights of indigenous peoples UN Doc E/CN.4/1997/102 (10 December 1996), para 53.
[70] 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.

of Perú[71]*.* Considering ILO Convention, the expression 'consult in order to obtain' their free, prior and informed consent requires that the States should consult indigenous peoples in an effective way, with the objective to reach an agreement with them in case of legislative measures or of development plans that could significantly affect their cultural and physical survival[72]. The right to consultation in order to obtain the indigenous free, prior and informed consent, has been applied with respect to development projects on natural resources by different regional judiciary bodies[73].

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[71] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2 (30 November 2017), paras 258, 406, mentioning UNDRIP Article 32(2) at n 525: 'All relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities'. On indigenous rights with respect to natural resources and investment law, V Vadi, 'Natural Resources and Indigenous Cultural Heritage in International Investment Law and Arbitration' in Miles K (ed), *Research Handbook on Environment and International Investment Law* (Edward Elgar Publishing 2009) 464-479.

[72] Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 100th Session, 2011, ILC.100/III/1A, 784; Human Rights Council, 'Expert Mechanism, Follow-up report on indigenous peoples and the right to participate in decision- making, with a focus, on extractive industries' A/HRC/21/55 (16 August 2012), para 22: 'The Declaration on the Rights of Indigenous Peoples requires that the free, prior and informed consent of indigenous peoples be obtained in matters of fundamental importance to their rights, survival, dignity and well-being. In assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned, the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned'.

[73] Eg *Saramaka* (n 40), paras 133-137, 155; *Sawhoyamaxa* (n 39), para 223; *Kichwa Indigenous People of Sarayaku v Ecuador*, Merits and Reparations, Judgement, Inter-Am Ct H R (Ser C) No 245 (27 June 2012), paras 163ff; *Garìfuna Community of 'Triunfo de la Cruz' and Its Members v Honduras*, Case 12.548, IACtHR Application IACHR Report No 76/12 (7 November 2012), paras 250ff; *Endorois* (n 24), paras 281ff. Among domestic jurisprudence, the Supreme Court of Canada in *Haida Nation* and *Taku River* declared the duty of States to 'consult and accommodate' aboriginal peoples before exploiting resources in their traditional lands: *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 (18 November 2004), paras 35, 76; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74 (18 November 2004), para 42; also, *Delgamuukw v British Columbia* (n 42), para 168; *Mikisew Cree First Nation v Canada* (Minister of Canadian Heritage) [2005] SCC 69, [2005] 3 SCR 388, para 34; Constitutional Court of Colombia, Judgment C 169/01 of 14 February 2001, para 2.3. In South Africa, the Interim Protection of Informal Land Rights Act No 1057 (26 June 1996) recognized at art 2(2) that 'no person may be deprived of any informal right to land without his or her consent', where 'informal right to land' includes 'any tribal, customary or indigenous law or practice of a tribe' according to art 1(a)(i) of the Act. In a 2018 judgment, the High Court of South Africa found that consent rather than consultation is required for mining projects in indigenous lands: *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018), paras 71-82; see section 5.4.5.2.

5.3 UNDRIP's influence on later international instruments

Many of the rights and principles affirmed in the UNDRIP are also part of the two international legal instruments adopted after the UNDRIP, namely the ADRIP and the proposed Nordic Saami Convention.

5.3.1 Indigenous peoples and natural resources in ADRIP

5.3.1.1 Right to self-determination

The ADRIP finds its roots in the OAS decision to develop an *ad hoc* legal framework for the protection of indigenous human rights[74]. The Declaration, adopted in 2016, in its Preamble mentions the progress achieved at the international level, including the ILO Convention No 169 and the UNDRIP. In contrast with the UNDRIP, the ADRIP is based on self-identification and provides a set of collective rights for indigenous peoples, including the recognition of indigenous full legal personality as 'peoples'. Among such collective rights, ADRIP Article III, like the UNDRIP Article 3, recognizes indigenous people's right to self-determination. By virtue of such right, indigenous peoples freely determine their political status and freely pursue their economic, social, and cultural development. The provision is accompanied by the duty to respect the principle of territorial integrity of States affirmed in Article IV.

5.3.1.2 Collective right to cultural and spiritual relationship with lands and resources

The spiritual relationship between indigenous peoples and their lands and resources stated in the UNDRIP is also part of the ADRIP. The Preamble of the American Declaration recognizes the need to respect and promote indigenous rights deriving from cultures and spiritual traditions, including

[74] OAS General Assembly Resolution No 1022/89 (18 November 1989); S Wiessner, 'The Proposed American Declaration on the Rights of Indigenous Peoples' (1997) 6(2) International Journal of Cultural Property 356-375. See Chapters 2 and 3.

especially their rights with respect to lands, territories and resources. While UNDRIP Article 25 mentions only the indigenous right to maintain the spiritual relationship with their lands, territories and resources, ADRIP Article XXV(1) affirms the indigenous peoples' right to maintain and strengthen 'their distinctive spiritual, cultural and material' relationship with their lands, territories and resources.

5.3.1.3 Collective ownership rights to lands, territories and resources

The Preamble of the ADRIP mentions the historical dispossession of indigenous lands and territories as a limitation of their right to development[75].

ADRIP Article XXV(2) states the generic right to lands, territories and resources that indigenous have traditionally owned, occupied or otherwise used or acquired. Furthermore, ADRIP Article XXV(3) affirms that indigenous have the right to own, use, develop and control the lands and resources that they currently possess by reason of traditional ownership, or other traditional occupation or use, as well as those which they have otherwise acquired[76]. According to ADRIP Article XXV(4), States shall give legal recognition and protection to such lands, territories and resources, with due respect to customs, traditions and land tenure systems of the indigenous peoples concerned[77]. Article XXV(5) specifies that the legal recognition of the various forms of property, possession and ownership of their lands, territories, and resources must be in accordance with States'

[75] Among other relevant provisions, Article XIX(1) states that indigenous have the right to live in harmony with nature and to a healthy, safe and sustainable environment. Similarly, Article XIX (2) states that indigenous have the right to conserve, restore and protect the environment and to manage their lands, territories and resources in a sustainable way. At Article XXIX(1) the ADRIP declares that indigenous have the right to be guaranteed of their own means of subsistence and development and to engage freely in all their economic activities. Moreover, Article XVIII recognizes rights to use and protection of their medicinal plants, animals, mineral and other natural resources for medicinal use in their lands and territories. Finally, Article XXVI mentions the duty of States to respect and protect the lands, territories and environment of indigenous peoples in voluntary isolation or initial contact.
[76] Cf UNDRIP, art 26(2).
[77] Cf UNDRIP, art 26(3).

domestic legal systems and international instruments. The same provision also declares that States shall establish special regimes for the recognition, effective demarcation and titling of indigenous lands and territories, stating that those procedures shall be conducted with due respect to indigenous peoples' customs, traditions and land tenure systems[78].

In ADRIP indigenous peoples' rights with respect to lands and territories are extended also to natural resources[79]. Despite the draft American Declaration initially including a reference to ownership rights to mineral and subsoil resources at draft Article XVIII(5), the proposal was not confirmed in the final text of the ADRIP[80]. However, considering the general rules of treaties interpretation stated in the VCLT, and acknowledging that the ADRIP like the UNDRIP is not a treaty, the fact that the term 'resources' refers to all resources, including those in the subsoil, is confirmed by ADRIP Article XXIX(4) that mentions 'mineral resources'. Hence, it would seem arguable that subsoil resources are included in Article XXV, acknowledging however the difficulties that indigenous peoples may have a traditional possession of such resources.

5.3.1.4 The right to redress and restitution

ADRIP Article XXIX(5) declares the right to restitution[81] or, in case it is not possible, of compensation in case indigenous have been deprived of their 'means of subsistence and development'[82]. While the term does not refer

[78] In addition, ADRIP Article XXII states the right of indigenous peoples to maintain their juridical systems and customs in accordance with international human rights law.
[79] Gilbert and Doyle (n 29) 302-303.
[80] Draft ADRIP Article XVIII (5) stated: 'In the event that ownership of the minerals or resources of the subsoil pertains to the State or that the State has rights over other resources on the lands, the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of such peoples would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis not less favourable that in the standard of international law for any loss which they may sustain as a result of such activities'.
[81] Such right includes compensation for harm caused by plans, programs or projects of States, international financial institutions and private business.
[82] Cf UNDRIP Article 28(1); see section 5.2.2.5.

explicitly to lands, territories and resources, the provision must be interpreted considering the Preamble of the American Declaration which states that 'dispossession of their lands, territories and resources' prevented indigenous from exercising their right to development, making evident how lands, territories and resources are part of their means of subsistence and development. Restitution shall be preferred, while compensations are secondary options[83].

5.3.1.5 Right to consultations and free, prior and informed consent

ADRIP Article XXIX(1) mentions indigenous right to maintain and determine their priorities with respect to their, *inter alia*, political, economic, social and cultural development 'in conformity with their cosmovision'[84].

Article XXIX(3) then states that indigenous have the right to be actively involved in developing and determining development programs that affect them. Moreover, they should participate, to the extent possible, in the administration of such programs through their institutions. The right to consultation is then explicitly recognized in Article XXIX(4)[85]. According to such provision, States shall consult and cooperate in good faith with indigenous peoples, through their representative institutions, 'in order to' obtain their free, prior and informed consent before the approval of projects affecting their lands, territories and natural resources. The provision

[83] According to ADRIP Article XXIX(5) indigenous peoples have the right to effective measures to mitigate adverse ecological, economic, social, cultural or spiritual impacts of the implementation of development projects, including the right to compensation for any harm occurred.
[84] ADRIP Article XXIX(2) states that: 'this right includes the development of policies, plans, programs, and strategies in the exercise of their right to development and to implement them in accordance with their political and social organization, norms and procedures, own cosmovisions, and institutions'.
[85] The principle is mentioned in a further innovative provision. Precisely, Article XVIII (3) of the American Declaration affirms that: 'States shall take measures to prevent and prohibit indigenous peoples and individuals from being subject to research programs, biological or medical experimentation, as well as sterilization without their prior, free, and informed consent. Likewise, indigenous peoples and persons have the right, as appropriate, to access to their data, medical records, and documentation of research conducted by individuals and public and private institutions'.

mentions, particularly, projects concerning the development, utilization and exploitation of mineral, water and other resources.

However, since the wording of the ADRIP Article XXIX reflects UNDRIP Article 32(2), rather than a veto right, under the ADRIP indigenous peoples have a right to prior and effective consultations with the objective to obtain their consent and to participate in the decision-making processes regarding decisions and projects that may affect their rights[86].

5.3.2 Indigenous collective rights with respect to natural resources in the proposed Nordic Saami Convention

5.3.2.1 The roots of the Convention

Whilst at the date of the completion of this thesis the Convention has still not be ratified by its Parties, the proposed Nordic Saami Convention, whose final text has been presented in 2017, constitutes the most recent instrument relating to the protection of indigenous peoples and the first international treaty on indigenous rights after ILO Convention No 169 (1989)[87]. The final text of the Saami Convention is based on the principles of self-determination and non-discrimination.

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[86] The State of Colombia breaks with consensus on Article XXIX(4), of the American Declaration on the Rights of Indigenous Peoples. In its statement at footnotes 2 and 3 of the ADRIP, the government of Colombia declares that Articles XXIII(3) and XXIX(4) are unacceptable since they draft the free, prior and informed consent as a veto-power of indigenous communities. Therefore, Colombia affirms that its domestic law defines such communities' right to prior consultation in accordance with ILO Convention No 169. It is however worth mentioning that a duty to obtain indigenous consent is indeed stated in different terms in ADRIP Article XXX which states that military activities may take place in indigenous lands and territories only when justified by a relevant public interest and 'if freely agreed', or requested, by indigenous communities, suggesting that without the agreement of such peoples such military activities must not take place. See section 5.2.2.6.

[87] The proposed Convention finds its roots in the 1986 decision of Finland, Norway and Sweden, together with the Saami Council, to adopt an international treaty on the right of indigenous Saami. An Expert Group appointed by the three countries in 2002 proposed in 2005 a draft Convention. Finally, the final text was adopted in 2015 and currently under ratification processes by the Parties; also, Mathias Åhrén, *Indigenous Peoples' Status in the International Legal System* (OUP 2016),110-111; Malgosia Fitzmaurice, 'Recent Developments regarding the Saami People of the North', Queen Mary School of Law Legal Studies Research Paper No 28/2009 546-548; T Koivurova, 'The Draft Saami Convention: Nations Working Together', (2008) International Community Law Review 279-x; N Bankes,

5.3.2.2 The rights to self-determination and co-determination

The proposed Convention does not refer to the principle of self-identification but includes some specific requirements to identify its recipients at Article 4[88]. Like the UNDRIP and the ADRIP, the Saami Nordic Convention recognizes indigenous as 'peoples' holders of the right to self-determination. Indeed, Article 3 states that Saami are a 'people' which enjoys the collective right to self-determination according to international law. Echoing ICCPR and ICESCR common Article 1, by virtue of their right to self-determination Saami peoples have the right to determine their own economic, social and cultural development and to dispose, to their own benefit, of their own natural resources[89]. According to Article 39, Saami parliaments have the right to 'co-determine' the management of Saami lands and resources[90].

T Koivurova (eds), *The Proposed Nordic Saami Convention National and International Dimensions of Indigenous Property Rights* (Hart Publishing 2013); Mattias Åhrén, 'The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights' (2014) 32(3) Nordic Journal of Human Rights 283-286; M Åhrén, *The Nordic Sami Convention: International Human Rights, Self-determination and Other Central Provisions* (Resource Centre for the Rights of Indigenous Peoples 2007); LS Vars, 'Sápmi' in DN Berger (ed), *The Indigenous World 2019* (IWGIA 2019), *sub Constitutional recognition and the Sámi Convention* 54-55.

[88] 'The Convention applies to persons residing in Finland, Norway or Sweden that identify themselves as Saami and who: '1. have Saami as their domestic language or have at least one parent or grandparent who has or has had Saami as his or her domestic language, or 2. have a right to pursue Saami reindeer husbandry in Norway or Sweden, or 3. fulfil the requirements to be eligible to vote in elections to the Saami parliament in Finland, Norway or Sweden, or 4. are children of a person referred to in 1, 2 or 3'.

[89] Reflecting UNDRIP Articles 18, 20 and 32(2), in the proposed Saami Convention self-determination is accompanied by Article 14 stating that Saami parliaments are the highest representative bodies of Saami in their countries with the mandate to contribute to the implementation of their right to self-determination. Moreover, Articles 15 and 16 recognize to Saami parliaments the rights to adopt independent decisions pursuant to national and international law, to conclude agreements and to negotiate before decisions on Saami matters are adopted by public local authorities. Such negotiations must take place sufficiently earlier to allows Saami parliaments to effectively influence the decision-making procedures and the final result. In parallel, pursuant Article 16(2) of the proposed Saami Convention, States must not adopt measures that may damage Saami cultures, livelihoods and society without the consent of the Saami parliaments. See Chapter 2.

[90] The same right is affirmed also by Article 40 with reference to environmental management affecting Saami lands, water areas and resources. See Chapter 2.

5.3.2.3 Right to ownership of lands and water resources

Article 34 recognizes that the protected traditional use of lands or water areas is the basis for collective and individual ownership rights for Saami. The provision then states that in case Saami occupy and have traditionally used lands or water areas for reindeer husbandry, hunting, fishing and they are not the owners of such lands and areas, they shall have the right to continue to occupy and use them. In case Saami use those areas in association with other users, the exercise of Saami rights shall be subject to due regard to each other and to the nature of their rights, considering in particular the interests of reindeer-herding Saami[91]. The assessment of traditional use shall be conduct on the basis of traditional Saami use of land and water[92].

According to Article 36 the rights of Saami with respect to natural resources on lands and water shall be afforded particular protection, considering that the access to such resources may be a prerequisite for the preservation of their traditional knowledge and cultural expressions[93]. Finally, according to Article 40 States are obliged to 'actively protect' the environment to guarantee the sustainable development of Saami land and water areas.

5.3.2.4 Rights to customary land tenure system

Article 34 of the Convention declares that protracted traditional use of land and water represents the basis for Saami ownership on such resources. The

[91] According to the same provision, the fact that those rights are based on continued use shall not prevent the adaptation of such forms of use to necessary technical and economic developments.
[92] The last paragraph of the provision states that the article shall not imply any limitation in the right to restitution of property that the Saami might have under national and international law.
[93] Article 38 of the proposed Saami Convention states that the provisions on water areas shall apply also to Saami fishing and other use of fjords and coastal seas. Accordingly, echoing the 1946 IWC, States must pay due regard to the use of such resources and to the importance of such communities when allocating catch quotas for fish and other marine resources. See Chapters 2 and 3.

Convention does not mention the right to restitution, stating however at Article 34(4) that the provision shall not imply any limitation of such right under national and international law. In parallel, Article 35 affirms the duty of States to guarantee effective protection of such Saami rights to lands and water areas, including the identification of land and water areas that Saami traditionally use[94].

5.3.2.5 Right to consultation and free, prior and informed consent

Article 36 states that before public authorities grant permits for prospecting or extracting of minerals or subsurface resources, or make decisions on other natural resources utilization in both lands and water, negotiations shall be conducted with the concerned peoples and the Saami parliaments. Moreover, in case such activities make impossible or substantially more difficult the utilization of Saami areas, and such use is essential for their culture, permit for prospecting or extraction shall not be granted, unless consented by the people and the Saami parliaments[95].

5.3.2.6 Right to compensation

In case of damages to their lands, Saami have, according to Article 37, the right to compensation[96]. The same provision states that in case domestic law obliges persons granted permit to extract resources to pay a fee or share the profits to the landowner, the permit holders shall be obliged also

[94] Nevertheless, the proposed Nordic Convention does not entail the right to maintain indigenous juridical systems and customs as affirmed by UNDRIP Article 34.
[95] The last paragraph of Article 36 states that the provision applies also to other forms of natural resources utilization and intervention in the nature, including forest logging, hydroelectric and wind power plants, construction of roads, recreational housing, military exercise activities and permanent exercise ranges. Åhrén notes that this provision builds on the HRC interpretation of ICCPR Article 27: M Åhrén, 'The Saami Convention' in M Åhrén, N Scheinin and JB Henriksen, *The Nordic Convention: International Human Rights, Self-determination and other Central Provisions* (Galdu Cada, 2007).
[96] The provision states that the article cannot imply any limitation to the rights recognized under international law.

to the Saami that have traditionally used and continue to use the area concerned.

5.4 The UNDRIP influence on regional and national jurisprudence

The principles and rights stated in the UNDRIP have been explicitly applied by regional courts in the Inter-American, Caribbean, European and African systems and by different domestic courts and legislations.

5.4.1 The Inter-American system

5.4.1.1 Indigenous peoples right to self-determination

In *Saramaka,* the first judgment of the IACtHR after the adoption of the UNDRIP, the Court applied Article 21 of the American Convention in the light of ICCPR and ICESCR common Article 1 on the right of indigenous peoples to self-determination, including their right 'to freely dispose of their natural wealth and resources' and to ensure that they are not 'deprived of their own means of subsistence'[97]. Members of indigenous and tribal community freely determine and enjoy their own social, cultural and economic development, including the right to enjoy their particular spiritual relationship with the territory they traditionally use and occupy[98]. Such findings have been confirmed by the IACtHR in *Khalina Lokono,* where the Court mentioned the UNDRIP in addition to ICCPR and ICESCR[99]. In the 2020 *Lhaka Honhat* case, the Court found that indigenous have been recognized as collective subjects of international law and that the UNDRIP

[97] *Saramaka* (n 40), paras 97ff; Lisl Brunner, 'The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights' (November 2008) 7(3) Chinese Journal of International Law 699–711; Marcos A Orellana, 'Saramaka People v Suriname' (2008) 102(4) The American Journal of International Law 841–847. See Chapter 2.
[98] ibid (*Saramaka),* para 122.
[99] *Kalina and Lokono Peoples v Suriname*, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 309 (25 November 2015), para 122; Cf *Saramaka* (n 40), para 131; cf CESCR, Concluding Observations: Russian Federation (thirty-first session) UN Doc E/C.12/1/Add.94 (12 December 2003), para 11.

and the ADRIP recognize indigenous peoples as holders of human rights, including the right to self-determination[100].

5.4.1.2 Rights with respect to natural resources

In *Saramaka* the Inter-American Court found that members of indigenous communities have the right to the communal territory they have traditionally used and occupied, derived from the use and occupation of lands and natural resources necessary for their cultural and physical survival[101]. The right to land itself would be 'meaningless' if is not connected with the natural resources that lie on and within the land[102]. In *Kuna Indigenous Peoples*[103], mentioning UNDRIP Articles 26(2) and 26(3), the Court found that nowadays States have obligations to delimit, demarcate and grant titles to the lands of indigenous peoples[104].

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[100] *Comunidades indígenas miembros de la asociación Lhaka Honhat (Nuestra Tierra) v Argentina*. Fondo, Reparaciones y Costas. Sentencia de 6 de febrero de 2020. Serie C No 400, para 154; EF MacGregor, 'Lhaka Honhat y los derechos sociales de los pueblos indígenas' (June 2020) 39 REEI 1-5. Indigenous right to self-determination was mentioned also in *Chitay Nech v Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (Ser C) No 212 (15 May 2010), para 113.

[101] *Saramaka* (n 40), paras 85-96. At para 121, the Court specifies that the natural resources protected by Article 21 of the American Convention are those resources traditionally used and necessary for the survival, development and continuation of indigenous peoples' way of life.

[102] ibid para 122. Such findings were confirmed in *Xakmok Kase* judgement: *Xakmok Kasek Indigenous Community v Paraguay* (Merits, Reparations and Costs) (2010) IACtHR (Ser C) No 214 (24 August 2010), para 85. In its concurring opinion, Judge Grossi underlined a progressive development of international law towards collective rights, citing draft UNDRIP Article 1. According to Grossi, such provision and other international sources demonstrate a universal trend in international law to a special protection of indigenous collective rights to lands and natural resources. Hence, the concurring opinion suggested to include in the term 'person' of the Convention not only indigenous individuals but also indigenous peoples as holders of own rights: *Concurring Opinion (Grossi)*, paras 18-20, 27. A further application of such principles is provided in *Kichwa Indigenous People of Sarayaku* (n 73), paras 121, 124. In a further case, the Commission found that the peculiar notion of indigenous right to property reflected in the UNDRIP and in the practice of international law instruments protects both indigenous traditional ownership and possession of their traditional territory and is guaranteed by Article 21 of the Convention; *Garìfuna Community of Punta Piedra and Its Members v Honduras (Merits)*, Case 12.761, IACHR Report No 30/13 (21 March 2013), paras 86-110, and particularly at para 101, n 104.

[103] *Kuna Indigenous People of Madungandi and the Embera Indigenous People of Bayano and their Members v Panama* (Preliminary Objections, Merits, Reparations and Costs) (2014), IACtHR (Ser C) No 284 (14 October 2014).

[104] ibid paras 118-119.

UNDRIP Article 26 has been mentioned also in *Kalina and Lokono*, when the IACtHR found that, the right to property of indigenous peoples includes the full guarantees over the territory that indigenous have traditionally owned, occupied and used to protect their particular way of life, culture, subsistence and development as peoples. This right extends to other additional traditional areas to which indigenous have access for their traditional or subsistence activities regarding which they should, at least, be ensured the necessary access and use[105]. Moreover, the IACtHR stated that, considering UNDRIP Articles 18, 25 and 28, indigenous peoples have the right to the protection of natural resources[106]. In 2018, in reiterating that States must protect the right of indigenous peoples to use their natural resources, the IACtHR in *Xucuru* found that the UNDRIP, together with ILO Convention No 169, domestic law and other international instruments and jurisprudence, constitutes a *corpus iuris* to define the obligations of States Parties under Article 21 of the American Convention on the protection of indigenous communal property over their traditional territories[107]. In *Lhaka Honhat,* the Court cited UNDRIP Articles 20(1), 29(1) and 32(2) and ADRIP Article XIX as an evidence of the rights of indigenous peoples to be secure in the enjoyment of their own means of subsistence and development and on the conservation and protection of the environment and the productive capacity of their lands and territories, including the right to determine the development or use of their lands, territories and resources[108].

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[105] *Kalina and Lokono* (n 99), paras 122ff.
[106] ibid paras 180-181.
[107] *Pueblo Indígena Xucuru y sus miembros v Brasil*. Excepciones preliminares, Fondo, Reparaciones y Costas. Sentencia de 5 de febrero de 2018. Serie C No 346, paras 116-117; cf *Yakye Axa* (n 24), paras 127-128.
[108] *Lhaka Honhat* (n 100), para 248; also, CESCR, General Comment No 21 (n 24), para 36; HRC, General Comment No 23: The Rights of Minorities (Art 27) UN Doc CCPR/C/21/Rev1/Add5 (8 April 1994), paras 3, 7; United Nations Special Rapporteur on the Right to Food, 'The Right to Food' Doc A/60/350 (12 September 2005), para 23: 'The realization of indigenous peoples' right to food often depends crucially on their access to and control over the natural resources in the land and territories they occupy or use. Only then can they maintain traditional economic and subsistence activities such as hunting, gathering or fishing that enable them to feed themselves and preserve their culture and distinct identity'; also, Human Rights and Indigenous Issues, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, submitted pursuant to Commission Resolution 2001/57

5.4.1.3 Participation, consultation and free, prior and informed consent

The IACtHR in *Saramaka* found that States must guarantee the effective participation of members of indigenous communities, according with their customs and traditions, on all development, investments, exploration or extraction plans on their territory, respecting their customs and traditions[109]. States shall also ensure that concessions are prevented unless and until independent and technically capable entities under the State supervision perform a prior environmental and social impact assessment and that indigenous receive reasonable benefit from such plans within their territories[110]. In case of large-scale development or investment projects that would have a major impact, the effective participation of indigenous peoples requires the group free, prior and informed consent for the realization of the projects[111]. Considering UNDRIP Article 32, the Court found that States shall guarantee a reasonable benefit from such projects for the involved communities[112].

In *Kichwa,* the IACtHR cited ILO Convention No 169 and UNDRIP Articles 19, 30 (2), 32 (2) and 38, and found that the recognition of indigenous right to consultation is 'a general principle of international law' and constitutes one of the fundamental guarantees to ensure the participation of indigenous peoples in decisions regarding their communal property[113]. Consultations shall take place in accordance with traditions of indigenous peoples and during the first stages of development and investment plans[114]. In *Kalina Lokono* the Court mentioned UNDRIP Articles

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Doc E/CN.4/2002/97 (4 February 2002), para 57: 'land, territory and resources together constitute an essential human rights issue for the survival of indigenous peoples'.

[109] *Saramaka* (n 40), paras 118ff.

[110] ibid, paras 129ff.

[111] ibid paras 135-137.

[112] ibid paras 129-130, 138-140.

[113] *Kichwa Indigenous People of Sarayaku* (n 73), para 164.

[114] ibid para 160; also, *Saramaka* (n 40), para 134. According to the Court, in general the right to consultation is recognized by both domestic and international law. Those sources of law include UNDRIP Articles 36(2) and 38, ILO Convention No 169 and the jurisprudence of many States inside and outside the inter-American system and domestic law cases: *Hoopa Valley Tribe v Christie*, 812 F.2d 1097 (1986); *Oglala Sioux Tribe of Indians v Andrus*, 603 F.2d 707 (1979); *Lower Brule Sioux Tribe v Deer*, 911 F Supp. 395 (DSD

18 and 32 and found that the enjoyment of collective rights to property recognized by Article 21 requires that, in case of utilization and exploitation of natural resources, States must ensure the effective participation of indigenous peoples through culturally adapted decision-making mechanisms[115]. The Court stated that indigenous peoples have the right to take part in any decision-making on matters that affect their interests, exploitation and utilization of natural resources in their territories[116]. In *Lhaka Honhat*, the IACtHR found that, diversely from the building of new projects that require consultations, the maintenance of existing works does not require consultations since it would represent an unreasonable or excessive understanding of States' obligations. The Court stated that, however, the particular significance of a project for States' sovereignty does not allow the violation of indigenous rights[117].

5.4.2 The Caribbean system

Article XI of the 1997 Caribbean Charter of Civil Society for the Caribbean Community declares that States undertake to protect indigenous historical rights and respect their culture and way of life[118]. The Caribbean Court of Justice (CCJ) in a decision relating to Maya Toledo people found that States

1995); *Klamath Tribes v US*, 1996 WL 924509; *Confederated Tribes and Bands of the Yakama Nation v US Department of Agriculture*, 2010 WL 3434091; *Quechan Tribe v Department of Interior*, 755 F Supp 2d 1104; *New Zealand Maori Council v Attorney General* (1987) 1 NZLR 641; *Gill v Rotorua District Council* [1993] 2 NZRMA 604; *Haddon v Auckland Regional Council* [1993] A77/93; *Aqua King Limited v Marlborough District Council* [1995] WI9/95.

[115] *Kalina and Lokono* (n 99), paras 202-203.

[116] ibid paras 196 and 203. At footnote 230, the Court added that participation rights should be interpreted also in accordance with UNDRIP Article 12 and include the right to accede to traditional health systems, to preserve their way of life, customs and language, to accede and to maintain and protect their religious and cultural sites and to contribute to the sustainable care and protection to the environment. In its dissenting opinion, Judge Pérez affirms that the participation rights under UNDRIP Article 23, focused on regulation of political rights, are different from those in art 21 affirmed in *Saramaka* (n 40), that refers to effective participation and consent: *Partially Dissenting Opinion (Judge Pérez)*, at 20(g).

[117] *Lhaka Honhat* (n 100), para 179. Also, *Comunidades indígenas miembros de la asociación Lhaka Honhat (Nuestra Tierra) v Argentina*. Sentencia de 24 de Noviembre de 2020 (Interpretación de la Sentencia de Fondo, Reparaciones y Costas) Serie C No 420, paras 25-29.

[118] Charter of Civil Society for the Caribbean Community (1997), art XI.

have the obligation to protect the customary and constitutional land tenure rights of indigenous peoples[119], based on both national and international law commitments, including UNDRIP Articles 26-28, Article XXIII of the American Declaration on the Rights of Duties and Man and the findings of the IACHR in *Maya Indigenous Communities of the Toledo District*[120]. Hence, the CCJ found that Belize has the positive obligation to recognize such land rights and to delimit, demarcate and title indigenous territories. According to the Court, such recognition shall include a form of communal property rights since the domestic property regime did not protect Maya traditional lands[121].

5.4.3 The European framework

The influence of the UNDRIP on the jurisprudence of the European Court of Human Rights is still limited to some general references and in no case the ECtHR mentioned the relevant UNDRIP provisions on the rights of indigenous with respect to natural resources[122]. In *Handölsdalen Saami Village*, a case involving the claim of Saami villages that their right to use land constituted a possession under Article 1 of Additional Protocol No 1,

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[119] Caribbean Court of Justice Decision of 30 October 2015, *Maya Leaders' Alliance and others v Attorney General of Belize* (2015) CCJ 15 (Appellate Jurisdiction); A Strecker, 'Indigenous Land Rights and Caribbean Reparations Discourse' (2017) 30(3) Leiden Journal of International Law 629-646; A Strecker, 'Revival, Recognition, Restitution: Indigenous Rights in the Eastern Caribbean' (2016) 23 International Journal of Cultural Property 167; S Caserta, 'The Contribution of the Caribbean Court of Justice to the Development of Human and Fundamental Rights' (2017) 18(1) Human Rights Law Review 1-15.

[120] ibid paras 58-60. At para 54 the CCJ states that despite UNDRIP is not binding, 'it is relevant to the interpretation of the Constitution of Belize which in its preamble explicitly recognizes that state policies must protect the culture and identity of its indigenous peoples'. Also, para 78 where the CCJ highlighted that despite the emerging international law on reparations for historical injustices to indigenous peoples, those communities are not sovereign entities within the State of Belize. See section 5.2.2.5.

[121] ibid.

[122] In December 2020, the European Court of Human Rights in *Ukraine v Russia (re Crimea)* stated in general terms that the prohibition of the indigenous Crimean Tatar people from entering Crimea and subsequently from entering the territory of the Russian Federation constituted a violation of their fundamental rights and freedoms, as set out in the UNDRIP: *Ukraine v Russia (re Crimea)* European Court of Human Rights, Application nos. 20958/14 and 38334/18 (16 December 2020), para 139(c). Article 4 of the UNDRIP has been merely mentioned in *Chiragov and Others v Armenia* (Application no 13216/05) (16 June 2015), para 44, n 86.

the ECtHR found, in principle, that in the presence of assets there is a legitimate expectation of having an effective enjoyment of property rights[123]. However, the possibility to include Saami proprietary interests as assets depends on national law[124]. In this occasion, the ECtHR stated that indigenous reindeer herding represents a usufruct of economic value founded with a prescription from time immemorial[125]. However, the UNDRIP was mentioned only in the partial dissenting opinion of Judge Ziemele as a component of the new international framework on indigenous rights[126].

In contrast, the UNDRIP has been referred in more precise terms by the CJEU in a dispute involving the rights of Inuit hunters seeking the annulment of the Regulation (EC) No 1007/2009 on trade in seal products, which mentioned the UNDRIP in its Preamble, claiming a violation of UNDRIP Article 19 since the EU institutions did not obtain the appellants' prior consent before the regulation was adopted[127]. On the one hand, the Grand Chamber found that the UNDRIP does not have the binding force of a treaty and cannot grant the Inuit autonomous and additional rights over and above those stated in EU law[128]. On the other hand, the Grand Chamber

[123] *Handölsdalen Saami Village and Others against v Sweden* (Application No 39013/04) (17 February 2009) European Court of Human Rights (Third Section), para 52. In *Doğan and Others v Turkey*, the ECtHR found that 'property rights' could also include the economic resources and rights over the common land: *Doğan and Others v Turkey* (n 41), paras 138-139. Also, *Chagos Islanders v United Kingdom*, App No 35622/04, 56 Eur Ct HR (2012); *HINGITAQ 53 v Denmark*, App No 18584/04, Eur Ct HR (2006); *Johtti Sapmelaccat RY*, App No 42969/98, Eur Ct HR (2005); *The Muonio Saami Village v Sweden*, App No 28222/95, Eur Ct HR (2000). See Chapter 3.

[124] ibid (*Handölsdalen Saami Village and Others v Sweden*).

[125] ibid paras 8-9, 39.

[126] *Handölsdalen Saami Village and Others against v Sweden* (Application No 39013/04) (17 February 2009) European Court of Human Rights (Third Section) (partly dissenting opinion of Judge Ziemele) 20, paras 2-3. See Chapter 3.

[127] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ 2009 L 286, 36), preambular para 14: 'The fundamental economic and social interests of Inuit communities engaged in the hunting of seals as means to ensure their subsistence should not be adversely affected. The hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognised by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed'. See section 5.4.6.

[128] General Court, *Inuit Tapiriit Kanatami et al. II*. (25 April 2013) (Case T-526/10), para 112. In WTO law, in a case concerning the European Union Seal Regime, which prohibited the importation and sell of seal products with an exception for hunts conducted by Inuit

declared that the EU observed UNDRIP provisions by considering the particular situation of Inuit communities and providing an exemption for products from hunts traditionally conducted by them for the purposes of subsistence[129]. In the appeal judgment, the CJEU confirmed that the mention of the UNDRIP in the Preamble of the regulation does not provide any binding effect to UNDRIP Article 19[130]. According to the Court, the reference to the UNDRIP states the reason for the derogation from the regulation prohibition on placing seal products on the market[131].

5.4.4 The African system

The African Court on Human and Peoples' Rights and the African Commission applied some principles affirmed in UNDRIP on indigenous rights with respect to natural resources.

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and other indigenous communities, the EU claimed that 'the protection of the economic and social interests of Inuit or indigenous communities is recognized at the international level as illustrated, for example, in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)'. In its report, a WTO Panel did not mention the UNDRIP but stated that 'the interests to be balanced against the objective of the measure at issue are grounded in the importance, recognized broadly in national and international instruments, of the need to preserve Inuit culture and tradition and to sustain their livelihood, particularly in relation to the significance of seal hunting in Inuit communities': Panel Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400, WT/DS401) (Adopted 16 June 2014), paras 7.292, 7.295-7.296. Also, Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (adopted 16 June 2014), para 2.101. M Fakhri, 'The WTO, Self-Determination and Multi-jurisdictional Sovereignty' (2015) 108 AJIL Unbound 287-294.

[129] ibid para 115.

[130] Court of Justice, *Inuit Tapiriit Kanatami et al. II* (3 September 2015) (Case C-398/13 P) (Judgment), para 64; cf the *Opinion of the Advocate General Kokott*, stating that despite UNDRIP is not binding, the respect for the United Nations according to art 3(5) TEU and the European Union's sincere cooperation with its own Member States stated in art 4(3) TEU 'requires the EU institutions to consider the substance of the UNDRIP and to take it into account as far as possible in the exercise of their powers': *Inuit Tapiriit Kanatami et al. II* (19 March 2015) (Case C-398/13 P) (*Opinion of Advocate General Kokott*), paras 92-93.

[131] Ibid (*Inuit Tapiriit Kanatami*), para 66.

5.4.4.1 Rights with respect to natural resources under Article 14

In *Ogiek*, the African Court interpreted the provisions of the Banjul Charter on rights with respect to land and natural resources in the light of the UNDRIP[132]. The Court stated that the right to property guaranteed to individuals according to Article 14 may apply also to groups and communities and includes the rights to use, to enjoy the fruit and to dispose of the land[133]. According to the Court, such provision must be interpreted in accordance with UNDRIP Article 26(2) which is not limited to ownership rights but includes also the right to dispose, possession, occupation and utilization of the land[134].

In *Endorois*, on the alleged violation of Article 14, the African Commission cited the Preamble of the UNDRIP[135], finding irrelevant the lack of full title of Endorois over their lands, since they had houses and cultivated the concerned lands from generations[136]. The African Commission found that possession of the lands should suffice to obtain property even in case of a lack of a real title[137]. Accordingly, the African Commission recognized such territories as traditional indigenous lands based on ancestral patterns of land and use customs. The Commission then affirmed that States do not have only the duty to respect such rights but also to protect them[138]. Referring to *Saramaka*, the Commission stated that Kenya has the duty to recognizes a framework of communal property system to the members of

[132] *Ogiek* (n 99).
[133] ibid para 124.
[134] ibid paras 126-127.
[135] *Endorois* (n 24), para 232.
[136] ibid para 189.
[137] ibid para 190, citing *Awas Tingni* (n 29), paras 140(b) and 151.
[138] *Endorois* (n 24), paras 191-197; Maria Sapignoli, 'San and Bakgalagadi peoples' land rights and the case of the Central Kalahari Game Reserve in Botswana', Case Study for the Report of the Committee on the 'Implementation of the Rights of Indigenous Peoples' of the International Law Association (ILA)' (contributing authors: Robert K Hitchcock, Renè Kuppe and Alexandra Tomaselli) (2006).

the Endorois community and to establish domestic special measures to protect such rights[139].

5.4.4.2 Rights with respect to natural resources under Article 21

In *Ogiek*, the Court first stated that the provision under Article 21 of the African Charter applies also to ethnic sub-group and communities forming part of a State population, like indigenous peoples, and that such right does not challenge States territorial integrity[140]. The Court hence found that the violation of indigenous rights to use, enjoy and access to their traditional lands, constituted a breach of Article 21 since the Ogiek people has been deprived to the right to enjoy and freely dispose of the food produced in its ancestral territories[141].

In *Endorois*, the African Commission found that Endorois peoples have the right freely to dispose of their wealth and natural resources in consultation with the respondent State under Article 21 of the Charter[142]. Hence, as stated in *Ogoni*, a people inhabiting a precise region may claim the protection of the natural resources in such territory pursuant to Article 21 of the African Charter[143]. The State has the duty to evaluate whether the restriction to private properties is necessary to protect indigenous rights with respect to the natural resources indispensable for their survival[144].

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[139] ICERD, art 1.4 (stating that '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination') and CERD, General Recommendation No 23 (n 17), para 4 (calling upon States to take certain measures in order to recognise and ensure the rights of indigenous peoples). On *Saramaka* findings, see sections 5.4.1.1-5.4.1.3.

[140] *Ogiek* (n 99), paras 198-199. At para 199, the Court observed: 'It would in fact be difficult to understand that the States which are the authors of the Charter intended, for example, to automatically recognise for the ethnic groups and communities that constitute their population, the right to self-determination and independence guaranteed under Article 20(1) of the Charter, which in this case would amount to a veritable right to secession'. See Chapters 2 and 4.

[141] ibid para 201.

[142] *Endorois* (n 24), para 268. Also, J Cerone 'Endorois Welfare Council v. Kenya (Af. Comm'n H. & Peoples' R.), Introductory Note by John Cerone' (2010) 49(3) International Legal Materials 858-906.

[143] See Chapter 3.

[144] *Endorois* (n 24), paras 266-268.

According to the Commission, the lack of such evaluation and of adequate compensation or restitution of traditional lands threatened Endorois right to freely dispose of their natural resources under Article 21[145].

5.4.4.3 Consultations and free, prior and informed consent

In *Ogiek* the African Court found that Article 22 of the Charter must be read in accordance with UNDRIP Article 23[146]. The Court hence underlined how the eviction of Ogieks from their lands without effective consultations impacted their economic, social and cultural development and violated Article 22 of the Charter[147].

The requirement of consultation has been analysed by the African Commission in *Endorois,* finding that the right to development requires that indigenous peoples must be involved in a process of compensation and sharing of benefits arising from development projects[148]. The Commission stated also the duty to undertake effective consultations with the communities concerned in order to obtain the free, prior and informed consent of such peoples in case of investment projects that may have a major impact on their territories[149].

5.4.5 Influence on domestic jurisprudence

Despite the UNDRIP is not a binding legal instrument, as an evidence of the influence of its principles, on many occasions constitutional and high-level domestic courts applied the rights affirmed in the UNDRIP on disputes concerning indigenous rights with respect to natural resources[150].

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[145] ibid.
[146] *Ogiek* (n 99), para 209.
[147] ibid paras 210-211.
[148] *Endorois* (n 24), paras 277-197.
[149] ibid para 291.
[150] F Lenzerini, 'Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples' (2019) 23(1-2) The International Journal of Human Rights 51-62. Cf ILA Resolution No 5/2012 (2012), para I(3). The draft provisions of the UNDRIP were considered by the High Court of Botswana in *Sesana and others v the Attorney-*

5.4.5.1 Rights with respect to lands and natural resources

The Supreme Court of Belize in *Maya v Belize* found that Article 14 of the 1989 ILO Convention No 169 and Article 26 of the UNDRIP embody general principles of international law relating to indigenous peoples' rights with respect to natural resources[151]. Diversely, the Supreme Court of Chile applied UNDRIP Article 29 in stating that Mapuche indigenous peoples have the right to conservation of their environment[152].

General 2002 (1) BLR 452 (HC). While UNDRIP influenced different courts decisions in Australia, Canada and New Zealand, it is relevant to note that the United States courts refused to recognize any private right of action under the UNDRIP since the Declaration does not create obligations enforceable in United States Court: *Van Hope-el v U.S. Dep't of State,* No 18 C 0441, 2019 WL 295774, at *3 n.2 (E.D. Cal. Jan. 22, 2019); *Marrakush Soc. v New Jersey State Police*, No CIV A 09-2518(JBS), 2009 WL 2366132, at*6, no 17 (D.N.J. 30 July 2009). Similarly, a United States Court in 2020 stated that also the ADRIP does not confer a private right of action in United States courts: *Williams v Trump*, US District Court for the Northern District of Illinois Eastern Division Case No 20 C 2495 (16 October 2020). On the non-binding value of international declarations in United States Courts: *Sosa v Alvarez-Machain*, 542 U.S. 692, 734 (2004); *Calderon v Reno*, 39 F. Supp. 2d 943, 956 (N.D. Ill. 1998). Diversely, the Supreme Court of Canada, as well as other Canadian courts, declared that while the UNDRIP does not create substantive rights unless implemented into national legislation, it applies for the interpretation of domestic law concerning indigenous peoples: *Mitchell v Minister of National Revenue*, 2001 SCC 33 at paras 80-83 [Mitchell]; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 350-354; aff'd 2013 FCA 75; *Simon v Canada (Attorney General)*, 2013 FC 1117, para 121 [Simon]; *Nunatukavut Community Counsel Inc. . Canada (Attorney General)*, 2015 FC 981, para 103; *Taku River Tlingit First Nation v Canada (Attorney General)*, 2016 YKSC 7, para 100; *Elsipogtog First Nation v Canada (Attorney General)*, 2013 FC 1117 at para 117; *Sackaney v The Queen*, 2013 TCC 303 (CanLII), para 35; *Ross River Dena Council v Canada*, 2017 YKSC 59 (CanLII), para 303; *TA v Alberta* (Children's Services), 2020 ABQB 97 (CanLII), para 79.

[151] *Cal (on behalf of the Maya Village of Santa Cruz)* (n 39); MS Campbell and J Anaya, 'The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights' (2008) 8(2) Human Rights Law Review 377–399; S Mohamed, 'The United Nations Declaration on the Rights of Indigenous Peoples and Cal v. Attorney General, Supreme Court of Belize' (2007) 46(6) International Legal Materials 1008-1049, paras 130-132. Cf *The Maya Leaders Alliance and the Toledo Alcades Association on behalf of the Maya Villages of Toledo District and others v The Attorney General of Belize and the Minister of Natural Resources Environment Claim No 366* (2008) Supreme Court of Belize (28 June 2010), para 126(i): 'I reaffirm the judgment of this court, delivered on 18th October 2007, and now declare that Maya customary land tenure exists in all the Maya villages in the Toledo Districts and where it exists, it gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution'; also, HRC, Concluding Observations on the initial report of Belize UN Doc CCPR/C/BLZ/CO/1/Add.1 (11 December 2018), paras 45-46.

[152] Court of Appeals of Temuco Judgment on Appeal for Protection, *Case 1773-2008 Francisca Linconao v Forestal Palermo* (16 September 2009), upheld that same year by the Supreme Court of Chile. In 2010 the Chilean Court of Appeals of Valdivia, in a case concerning the disposal of non-hazardous substances in indigenous traditional areas without consultations, considered UNDRIP Article 25 to underline the connection between

The influence of the UNDRIP was relevant also in European domestic courts, where in 2020 the Swedish Supreme Court cited UNDRIP Article 26 in finding that the Saami community Girjas Sameby has exclusive fishing and hunting rights in its traditional lands based on presence from time immemorial[153]. The Supreme Court of Norway in 2018 found that the UNDRIP, and particularly Articles 3, 26 and 32, despite being non-binding reflects the international law principles in the field of indigenous rights[154]. The UNDRIP was also cited in 2017 by the Constitutional Court of the Republic of Sakha (Yakutia) which states that UNDRIP Article 42 represents a consensus of inalienable rights of indigenous peoples to be entitled of collective rights in order to guarantee their cultural, economic and legal identity[155].

The UNDRIP was mentioned also by the High Court of Australia in the 2020 judgment *Love v Commonwealth of Australia*, when the Court noted how international instruments, such as the UNDRIP, not only recognise the cultural and spiritual dimensions of the connection between indigenous peoples and their traditional lands but also formulate in the form of self-determination the capacity to represent, and obligations to protect, indigenous peoples[156]. In 2018, in a case involving the effects of mining in

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the environment and such communities. The judgment was upheld by the Chilean Supreme Court: Court of Appeals of Valdivia, *Decision No 243/210* (4 August 2010), considering No 4 and Supreme Court of Chile, *Decision No 6062/2011* (4 January 2011). A Tomaselli, R Hofmann, '*Summary and Further Reflections on the case of land and water rights in Chile* for the final Report of the Committee on the Implementation on the Rights of Indigenous Peoples of the International Law Association' (ILA) (2020) (contributing author: Federico Lenzerini).

[153] *Högsta Domstolen* [Swedish Supreme Court] (23 January 2020) Case No T 853-18 (Decision), paras 131-134, stating at para 134 that the application of domestic law must correspond to the requirements of international law; on cases involving the Swedish Supreme Court on Saami rights, also, *Nordmaling* Case, (Nytt Juridiskt Arkiv, NJA) (27 April 2011), s. 109 and *Selbu Case*, Rt 2001 4B/2001 (21 June 2001*),* s. 769.

[154] Supreme Court of Norway Judgment of 9 March 2018, HR-2018-456-P (case no 2017/860), paras 64, 97.

[155] Decision No 4-П of the Constitutional Court of the Republic of Sakha (Yakutia), Russian Federation.

[156] *Love v Commonwealth of Australia and Thoms v Commonwealth of Australia* [2020] HCA 3 (11 February 2020), paras 73 at n 101 and 274 at n 408. Another relevant development in Australian jurisprudence is represented by *Northern Territory v Mr A Griffths,* where the High Court recognized aboriginal rights to reparations due to the extinguishment of native title: *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7.

the EEZ on indigenous peoples' rights in the coastal waters, the High Court of New Zealand stated that the EEZ Act needs to be interpreted, *inter alia*, with the provision of the UNDRIP[157]. Even the Supreme Court of New Zealand in a 2017 judgment mentioned several times the UNDRIP, and specifically Article 40 on the right to restitution, and found that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the indigenous customary owners[158]. The UNDRIP was cited also in a judgment of the Supreme Court of India which declared certain indigenous rights with respect to forest resources[159].

In 2018 the Supreme Court of South Africa, in recognizing the continued existence of customary rights of the Dwesa-Cwebe communities to access to and use of marine resources associated with their cultures, stated that the African Charter on Human and Peoples' Rights must be interpreted in the light of UNDRIP Article 26[160].

5.4.5.2 Participation and consultation

The Supreme Court of Belize, mentioning UNDRIP Article 26, ordered to abstain from acts that may impact indigenous communities without their informed consent, including granting of mining permits and issuing

[157] *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217 (28 August 2018), paras 144, 234-237, stating however that UNDRIP provisions, like the ones of the Waitangi Treaty and of the UNCLOS, must not be considered separately. In the Pacific area, UNDRIP Article 28 was mentioned by the Fiji Islands Liquor Licensing Authority in a case involving the Rotumans indigenous peoples: *In re Irava Bottle Shop* [2013] FJLLAE 1; Contested Case 1.2012 (8 March 2013), para 35.

[158] Supreme Court of New Zealand, *Proprietors of Wakatū v Attorney General* [2017] NZSC 17 (28 February 2017), paras 491, 679.

[159] *Orissa Mining Corporation LTD v Ministry of Environment & Forest & Ors*. [2013] INSC 459 (18 April 2013), paras 37-38; also, Supreme Court of India, *K. Guruprasad Rao vs State of Karnataka & Ors* [2013] 8 SCC 418 (1 July 2013), para 90. A further significant evolution in the area is represented by the 2021 judgment of the Balochistan High Court (Pakistan) which declared that an unsettled area corresponding up to 43 per cent of Pakistan total territory belongs to indigenous tribes: *Constitutional Petition no 1269 of 2018 and 1128 of 2020* High Court of Balochistan (18 March 2021).

[160] *Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S* (1340/16, 287/17) [2018] ZASCA 87; [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) (1 June 2018), paras 58-59, 65-66.

regulations concerning resource use[161]. In a successive judgment, the Supreme Court of Belize stated that Belize is bound to uphold the general principles of international law contained in the UNDRIP, and particularly in Article 32, and to ensure free, prior and informed consultation with indigenous peoples before granting concessions for oil drilling on their lands[162]. In 2012, the Supreme Court of Mexico applied UNDRIP Article 19 in finding that Mexico must consult in good faith and in an informed and culturally appropriate way the Yaqui people before the construction of an aqueduct to determine whether it would provoke irreversible damages for the peoples and, eventually, to stop the project[163].

Another example of such influence of international law instruments is provided by the Supreme Court of Argentina, which recognized the right to consultation of Mapuche people[164], and by the Constitutional Court of Peru which found that current international law includes the principle of consultations before the realization of a large-scale projects that may impact indigenous territories and resources[165]. Similarly, the Constitutional Court of Colombia in 2015 stated that the UNDRIP represents the accepted opinion ('*opinión autorizada*') of the international community on the rights of indigenous peoples, declared the duty to consider UNDRIP provisions when applying international and national law on indigenous peoples and found that the UNDRIP reinforces, particularly, the duty to consult

[161] *Cal (on behalf of the Maya Village of Santa Cruz)* (n 39). On the implementation of the right to free, prior and informed consultation in South America, C Wright, A Tomaselli (eds), *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap* (Routledge Studies in Development and Society 2019).
[162] *Sarstoon Temash Insitute for Indigenous Management and others v Attorney General of Belize and others,* Claim No 394 of 2013 (3 April 2014), paras 30-38.
[163] Supreme Court of Mexico, *Amparo No 631/2012 (Independencia Aquedut)* (8 May 2013).
[164] *Resolución de la Corte Suprema de Justicia de la Nación en causa CSJ 1490/2011 (47-C)/CS1 'Comunidad Mapuche Catalán y Confederación Indígena Neuquina c/ Provincia del Neuquén s/ acción de inconstitucionalidad'* (8 April 2021). The Court based its decision on ILO Convention No 169 since the appellant failed to demonstrate whether the principles of the UNDRIP are part of general international law. However, the Court stated that the right to self-determination affirmed in UNDRIP shall, in every case, respect the sovereignty and territorial integrity of the State concerned.
[165] *Jaime Hans Bustamante Johnson*, Exp No 03343-2007-PA/TC, Lima, paras 32-36.

indigenous peoples[166]. On another occasion the Court stated that the rights of indigenous peoples with respect to lands and natural resources are today part of general international law, including the right to consultations and the duty to obtain their free, prior and informed consent in case of large-scale projects that may affect their lands and resources[167]. The Supreme Court of Panama underlined that the State must comply with the principles of the UNDRIP, including in particular the participation in issues that may have an impact on indigenous peoples' relationship with natural resources[168]. Diversely, the Supreme Court of Chile invoked UNDRIP Article 32(2) to suspend hydroelectric and mining activities that did not respect the indigenous right to consultation[169].

A further landmark decision after the adoption of the UNDRIP is represented by the *Baleni* judgment of the High Court of South Africa. The Court, considering international human rights norms in general, found that indigenous community consent, rather than mere consultation, is required for mining projects on indigenous lands[170].

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[166] Constitutional Court of Colombia, *Sentencias T-661/15* (23 October 2015), para 40, n 67. Also, Constitutional Court of Colombia, *Judgments T-379/14* (13 June 2014), paras 2.3.1.5, n 14 and 2.3.2.1.3, n 27, mentioning, *inter alia*, UNDRIP Articles 3, 4, 5, 26, 27 and particularly the indigenous rights to self-determination; *T-129/11* (3 March 2011), para 7 mentioning UNDRIP Article 32; *T-736* (12 May 2009), para 9, stating that the UNDRIP in an authoritative source of interpretation for domestic law regarding indigenous peoples; *T-704* (13 December 2016), paras 3.21, 3.26; *T-766/15* (16 December 2015), paras 5.1, n 36 and 5.3; *T-514* (30 July 2009), paras 1, 4, n 29. Also, Felipe Gómez Isa, 'Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights' (2014) 36 Human Rights Quarterly 723-756.

[167] ibid (*T-129/11)*, paras 26-35.

[168] Supreme Court of Panama, Sala Tercera, *Sentencia (12 April 2017)*: 'Antes de dirimir el conflicto planteado, es emportante recordar que Panama debe cumplir con los compromisos adquiridos al ser participle de la Declaración de las Naciones Unidas sobre los Derechos de los pueblos indigenas'. Such Court findings were mentioned also by the successive judgement of the 20 October 2020 when the Supreme Court, in finding the ancestral rights of Naba peoples over their historical lands, stated the need to respect the international obligations on indigenous rights, including also Article 21 of the American Declaration, ILO Convention No 107 (1957) and the findings of the Inter-American Court: Supreme Court of Panama, Pleno, Sentencia (28 October 2020).

[169] Apelacion De Sentencia De Amparo – *Expedientes 457-2012* and *4958-2012*.

[170] *Baleni and Others v Minister of Mineral Resources and Others* (n 73), paras 71-82, citing CERD General Recommendation No 23, CESCR General Comment No 21, HRC findings in *Poma v Peru*, *Endorois* and *Ogiek* cases. As stated above, however, the findings of the High Court on a right to consent, in the sense of a veto power, do not reflect the notion of

5.4.6 Influence on domestic legislation

The influence of the UNDRIP is evident also on domestic legislation[171]. At the constitutional level the Constitution of Ecuador, drafted in 2008 after the approval of the UNDRIP, at Article 57 refers to collective rights of indigenous peoples recognized not only in international treaties but also in 'declarations and other international instruments'[172]. According to Article 13(3) of the Constitution the human rights established in those international instruments are directly applicable and enforceable. As a matter of fact, the collective rights of indigenous peoples recognized by the Ecuadorian Constitution reflect those declared in the UNDRIP[173]. Indigenous collective rights are recognized also by the Paraguayan Constitution, amended in 2011 after the approval of the UNDRIP[174]. The Mexican Constitution, amended after the UNDRIP, recognizes the right of indigenous peoples to internal self-determination[175]. Even the 2009 Constitution of Bolivia echoes some principles of the UNDRIP, including the right of indigenous peoples to internal self-determination[176].

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indigenous free, prior and informed consent under present international law which is limited to a right to meaningful consultations in order to obtain their consent. See section 5.2.2.6.

[171] Human Rights Council, Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned – 2007-2017 A/HRC/EMRIP/2017/CRP.2 (2017).

[172] Article 11(3) of the Constitution of Ecuador states that the human rights established in international instruments are directly applicable and enforceable.

[173] Those rights include, for example, the ownership of ancestral lands and territories, the right to participate in the use, usufruct, administration and conservation of natural renewable resources located on their lands and the right to free prior informed consultation on the plans and programs for prospecting, producing and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them, and to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. According to Article 1 of the Constitution, Ecuador is a plurinational State which guarantees political and territorial autonomous districts, as stated in Art 257. Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (2018) 31(4) Leiden J. Int. Law, 773-792.

[174] Eg Article 64 of the Paraguayan Constitution that recognizes the right of indigenous peoples to communal ownership of the land [*'propiedad comunitaria'*] and prohibits their removal or transfer without their express consent.

[175] Article 2 of the Mexican Constitution: 'Indigenous people's right to self-determination shall be subjected to the Constitution in order to guarantee national unity'.

[176] Article 2 of the Bolivian Constitution: 'Given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control of their territories, their free

Among substantive national law, the UNDRIP has been explicitly transposed into domestic Bolivian legislation in 2007 with Law No 3760[177]. In 2018 Costa Rica approved the Law No 40932 which recognized the right of indigenous peoples to free, prior and informed consultation mentioning expressly both the UNDRIP and the ADRIP[178]. In Peru, the 2011 Law No 29785, while not mentioning the UNDRIP, implemented into domestic law the right to free, prior and informed consultations in conformity with ILO Convention No 169[179]. Differently, Colombian Decree No 4633 of 2011, which provides restitution and reparation remedies in case of breach of indigenous land rights, mentions international declarations on indigenous rights[180]. Finally, Canada with Bill-69, committed to implement the UNDRIP and the new legal instrument to transpose the UNDRIP into domestic legislation, Bill C-15 has currently been approved by the House of Commons[181]. In 2019, a Declaration on the Rights of Indigenous Peoples

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determination, consisting of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, is guaranteed within the framework of the unity of the State, in accordance with this Constitution and the law'. Moreover Articles 352 and 353 declare, respectively, the right to prior consultation in case of exploitation of natural resources in indigenous territories and the right to share the benefit arising from such activities. According to Article 1 of the Constitution, Bolivia is a 'social and plurinational' State and indigenous communities have a right to self-government through the 'Indigenous Autonomies' stated in Article 289.

[177] Ley N. 3760 del 07 Noviembre 2007, Gaceta N° 3039 del 08 Noviembre 2007. A Tomaselli, R Hofmann, '*The Indigenous Territory and Natural Park TIPNIS in Bolivia'*, for the Report of the Committee on the Implementation on the Rights of Indigenous Peoples of the International Law Association (ILA) (2016) (contributing author: Ebun Abolarin), 6-7.

[178] Decreto núm. 40932-MP-MJP, de 6 de marzo de 2018, que establece el Mecanismo General de Consulta a Pueblos Indígenas (6 March 2018), preambular paras I, VII and Art 14. Also, art 1(b) which defines 'indigenous territory' as the collective property of indigenous peoples, including lands and natural resources traditionally occupied or used by indigenous peoples.

[179] Ley No 29785 del derecho ala consulta previa a los pueblos indígenas u originarios reconocido en el convenio 169 de la Organización Internacional del Trabajo (OIT) (8 August 2011). Also, the 2021 Decree 007 which created the indigenous reservation Yavarí Tapiche and recognized indigenous rights to self-determination: Decreto Supremo que declara la categorización de la Reserva Indígena Yavarí Tapiche, No 007-2021-MC, art 6. A further relevant development in the area is represented by Nicaraguan Law 445 of 2020: Ley núm. 445 de Régimen de propiedad comunal de los pueblos indígenas y comunidades étnicas de las regiones autónomas de la Costa Atlántica de Nicaragua y de los ríos Bocay, Coco, Indio y Mai (13 December 2020).

[180] Decree No 4633 (9 December 2011), Preamble.

[181] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, Preamble. Draft Bill C-15, *An Act respecting the United Nations*

Act, has been adopted by the British Columbia to ensure that its laws are consistent with the UNDRIP[182].

In Europe, the Finnish 2011 Mining Act provides special procedures for mining activities in Saami traditional lands and reindeer herding area, including the consultation with the Saami parliament to avoid that the exploitation of natural resources may have adverse impacts on Saami culture[183]. In EU law, the EU Regulation on trade in seal products refers to the UNDRIP in declaring the need to protect the fundamental economic, social and cultural interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence[184].

Declaration on the Rights of Indigenous Peoples. The support to UNDRIP implementation is explicitly mentioned by further Canadian legislation, such as for example by the Preamble of the Manitoba's Path to Reconciliation Act (2016) and the British Columbia's Bill 51 (2018).

[182] Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44, art 3: 'In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration', where Declaration means UNDRIP according to Article 1(1) of the Act. In 2021, the UNDRIP has been adopted also by the Canadian city of Inuvik: Inuvik Town Council Motion 039/02/21 (2021): 'That Inuvik Town Council hereby adopt the United Nations Declaration on the Rights of Indigenous Peoples and to repudiate the concepts used to justify European sovereignty over Indigenous people and lands'.

[183] Mining Act (621/2011) (10 June 2011), Section 38.

[184] Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, preambular paragraph 3. More recently, the European Parliament approved a Resolution on land grabbing requesting the EU and its Member States 'to create conditions for the fulfilment of the objectives set out in the UNDRIP and to encourage its international partners to adopt and implement it fully': European Parliament resolution of 3 July 2018 on violation of the rights of indigenous peoples in the world, including land grabbing (2017/2206(INI)) OJ C 118, 8.4.2020, 15–31, para 6. The UNDRIP is then expressly mentioned in the EU-Central America association agreement: Agreement Establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the Other OJ L 346, 15.12.2012, 3–2621 (15 December 2012), arts 13, 45. The same support for the UNDRIP with reference to consultations and to the right of free, prior and informed consent has been declared by further resolutions: European Parliament resolution of 11 September 2018 on transparent and accountable management of natural resources in developing countries: the case of forests (2018/2003(INI)) OJ C 433, 23.12.2019, 50–65, para 40; European Parliament Resolution of 16 March 2017 on an integrated European Union policy for the Arctic (2016/2228(INI)) OJ C 263, 25.7.2018, 136–147, para 36. Finally, the draft Council decision on the signing, of a Sustainable Fisheries Partnership Agreement between the EU and Greenland and Denmark states that the Parties undertakes to implement the Agreement in accordance with the UNDRIP: Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of a Sustainable Fisheries Partnership Agreement between the European Union on the one hand, and the Government

Among other domestic legislations, the principles of the UNDRIP are reflected in the Republic of the Congo 2011 Law No 5, which recognizes indigenous collective rights with respect to natural resources[185]. Finally, in Japan, the Ainu Promotion Act approved in 2019 does not mention the UNDRIP but recognizes for the first time the Ainu as an indigenous 'people'[186]. According to the Act, the Ainu may apply for special rights over lands and rivers to preserve their traditions and culture[187].

5.4.7 International human right bodies

The UNGA and various human rights bodies mentioned in various occasions UNDRIP provisions with reference to indigenous rights with respect to natural resources.

The UNGA in the outcome document of the World Conference of Indigenous Peoples reaffirmed its support for the UNDRIP and explicitly invited States and human rights bodies to continue to promote the respect for the Declaration[188]. In 2021 the Human Rights Council recommended States to develop and implement national legislation to achieve the goals of the UNDRIP, including on collective rights to self-determination and with respect to natural resources[189]. Before, the Human Rights Council stated that the UNDRIP 'influenced positively the drafting of several constitutions

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of Greenland and the Government of Denmark, on the other hand and the Implementation Protocol thereto COM/2021/73 final (16 February 2021), para 6.

[185] Law n°5-2011 of 25 February 2011 on the Promotion and Protection of the Rights of Indigenous Populations, arts 31-35. Cf also the Uganda Wildlife Act (2019), art 32(1), which recognizes historic rights of communities around conservation areas. Not mentioning the UNDRIP but reflecting the content of UNDRIP Article 28(1), in Colombia Article 204 of the Law 1448 of 2011 recognized the right of indigenous peoples victims of human rights violation during the Colombian internal armed conflict to reparation and restitution of land and to prior consultation. See sections 5.2.2.5-5.2.2.6.

[186] Act on Promoting Measures to Realize a Society in Which the Pride of the Ainu People is Respected, Act No 16 of 2019 (the 'Ainu Promotion Act') KANPOU (official gazette) Extra Ed., No 87, 26 April 2019, at 5, arts 1-2. Cf previous Act No 52, 14 May 1997, art 1, where the Ainu were defined as an 'ethnic group'.

[187] ibid arts 16-18.

[188] UNGA Res 69/2 'Outcome Document of the High-level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples' (22 September 2014).

[189] Human Rights Council, Annual report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/46/72 (26 January 2021), para 97.

and statutes at the national and local levels and contributed to the progressive development of international and domestic legal frameworks and policies as it applies to indigenous peoples'[190]. The UNDRIP is reaffirmed also in the Preamble of Declaration on the Rights of Peasants and other People working in Rural Areas approved by the Human Rights Council in 2018[191].

The HRC mentioned UNDRIP in a series of views adopted under article 5(4) of the Optional Protocol, including *Tiina Sanila-Aikio[192] v Finland,* and *Klemetti Käkkäläjärvi et al. v Finland[193]* affirming that indigenous peoples

[190] Human Rights Council, Human Rights and Indigenous Peoples, A/HRC/36/L.27 (26 September 2017), Preamble. Also, Human Rights Council, 'Expert Mechanism, Follow-up report on indigenous peoples and the right to participate in decision- making, with a focus, on extractive industries' (n 72), para 22, underlining how the UNDRIP Peoples requires that the free, prior and informed consent of indigenous peoples in matters of fundamental importance to their rights; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S James Anaya A/HRC/9/9 (11 August 2008), para 85: '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'.

[191] United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: Resolution adopted by the Human Rights Council on 28 September 2018, A/HRC/RES/39/12, Preamble.

[192] *Tiina Sanila-Aikio v Finland*, CCPR/C/124/D/2668/2015 (20 March 2019), para 6.9: 'The Committee further observes that article 27, interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to "freely determine their political status and freely pursue their economic, social and cultural development".'

[193] *Klemetti Käkkäläjärvi et al. v Finland*, CCPR/C/124/D/2950/2017 (18 December 2019), para 9.9: 'The Committee further recalls that the preamble of the UN Declaration establishes that "indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples'. Also, *Klemetti Käkkäläjärvi et al. v Finland*, CCPR/C/124/D/2950/2017 (1 February 2019), para 9.6: 'The Committee recalls that under article 33 of the UN Declaration, "indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions (…) and the right to determine the structures and to select the membership of their institutions in accordance with their own procedures." Article 9 of the UN Declaration provides that "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right." According to Article 8(1) of the Declaration "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture".' Also, HRC, Concluding Observations on the seventh periodic report of Finland* UN Doc CCPR/C/FIN/CO/7 (3 May 2021), paras 42-43, not mentioning the UNDRIP but recognizing the Saami as an indigenous people with the right to self-determination and to free, prior and informed consent.

have the inalienable right to 'freely determine their political status and freely pursue their economic, social and cultural development'.

The CESCR, in General Comment No 20, referred to UNDRIP Article 26 to state that the communal dimension of indigenous peoples' cultural life includes the right to the lands, territories and resources traditionally owned, occupied or otherwise used or acquired[194]. Moreover, relying on UNDRIP Articles 20 and 33, the CESCR stated that those rights should be protected in order to guarantee indigenous peculiar way of life, including their means of subsistence and the loss of natural resources. States shall then recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and return them do indigenous in case they have been inhabited or used without their free, prior and informed consent, that should be respected in all matters covered by their specific rights. The CESCR mentioned the UNDRIP in various concluding observations, urging States to take measures to ensure the free, prior and informed consent of indigenous peoples in relation to decisions that may affect their economic, social and cultural rights related with their traditional lands, territories and resources[195].

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[194] CESCR, General Comment No 21 (n 24), paras 36, 37; CESCR, General Comment No 25: (2020) on science and economic, social and cultural rights (article 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/25 (30 April 2020), para 40, not mentioning UNDRIP but referring to indigenous peoples' self-determination.

[195] Eg CESCR, Concluding Observations: Guatemala UN Doc E/C.12/GTM/CO/3 (9 December 2014), para 97; Concluding Observations on the combined fifth and sixth periodic reports of Mexico* UN Doc E/C.12/MEX/CO/5-6 (17 April 2018), para 13(a); Colombia UN Doc E/C.12/COL/CO/6 (19 October 2017), para 18(a); Paraguay UN Doc E/C.12/PRY/CO/4 (20 March 2015), para 6; Argentina UN Doc E/C.12/ARG/CO/3 (14 December 2011), para 9; Concluding Observations of the Committee on Economic, Social and Cultural Rights on the fourth periodic report of Argentina UN Doc E/C.12/ARG/CO/4 (1 November 2018), para 19; Concluding Observations of the Committee on Economic, Social and Cultural Rights on the fourth periodic report of Cambodia UN Doc E/C.12/KHM/CO/1 (12 June 2009), para 16 and in general, para 15; Concluding Observations of the Committee on Economic, Social and Cultural Rights on the fourth periodic report of Russia UN Doc E/C.12/RUS/CO/6 (16 October 2017), paras 14-15; Concluding observations on the seventh periodic report of Finland UN Doc E/C.12/FIN/CO/7 (30 March 2021), para 51, not mentioning the UNDRIP but urging the State Party to strengthen the legal recognition of the Sami as indigenous peoples and the legal and procedural guarantees for obtaining the free, prior and informed consent of the Sami in line with international standards'; the CESCR cites the Committee on the Elimination of Racial Discrimination in August 2017: Concluding Observations on the twenty third and twenty fourth periodic reports on the

Similar points have been made by the CERD, which in various occasions has recommended the implementation of UNDRIP standards, including the right to consultation in order to obtain indigenous free, prior and informed consent in case of measures likely to affect their rights with respect to natural resources[196]. In 2020, the Committee in *Ågren et al. v Sweden* mentioned UNDRIP Article 26 in reiterating the right of indigenous peoples to free, prior and informed consent in case their rights on their ancestral territories and natural resources may be affected by projects carried out in their traditional lands[197]. Even the CRC Committee in its concluding observations found that in presence of large-scale exploitation projects, or of mega projects, that may deprive indigenous of their ancestral lands and natural resources, States should adopt processes to seek the free, prior and informed consent of indigenous individuals in conformity with the UNDRIP[198].

Finally, in its monitoring activity on the application of ILO Convention No 169 (1989), the CEACR Committee required a State Party to guarantee the rights to consultation established in the Convention and in the UNDRIP

Russian Federation UN Doc CERD/C/RUS/CO/23-24 (20 September 2017), paras 23 and 26; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia UN Doc E/C.12/COL/CO/5 (7 June 2010), para 9; Democratic Republic of the Congo UN Doc E/C.12/COD/CO/4 (16 December 2009), para 14; Concluding Observations on the fourth periodic report of New Zealand UN Doc E/C.12/NZL/CO/4 (1 May 2018), paras 9(c), 17(a); Concluding Observations on the fifth periodic report of Australia UN Doc E/C.12/AUS/CO/5 (11 July 2017), para 16(f).

[196] Eg CERD, Concluding Observations: Colombia UN Doc CERD/C/COL/CO/17-19 (22 January 2020), paras 13(b), 19(a); Australia UN Doc CERD/C/AUS/CO/18-20 (26 December 2017), para 22; Concluding Observations on the combined sixteenth seventeenth periodic reports of Guatemala UN Doc CERD/C/GTM/CO/16-17 (17 May 2019), para 22; Concluding Observations on the combined eighteenth to twenty-first periodic reports of Mexico UN Doc CERD/C/MEX/CO/18-21 (19 September 2019), para 23 (c).

[197] CERD, *Ågren et al. v Sweden*, Opinion approved by the Committee under article 14 of the Convention concerning communication No 54/2013* UN Doc CERD/C/102/D/54/2013 (18 November 2020), paras 6.5-6.7

[198] CRC, Concluding Observations on the combined fifth and sixth periodic reports of Costa Rica UN Doc CRC/C/CRI/CO/5-6 (4 March 2020), para 44(d); Concluding Observations on the combined third to fifth periodic reports of Kenya* UN Doc CRC/C/KEN/CO/3-5 (21 March 2016), para 68(e); Ecuador UN Doc CRC/C/ECU/CO/5-6 (26 October 2017), paras 40(a), 41(a); Philippines UN Doc CRC/C/PHL/CO/3-4 (22 October 2009), para 21. Also, CRC, General Comment No 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child] UN Doc CRC/C/GC/11 (12 February 2009).

in case of mining concessions[199]. According to the CEACR, the UNDRIP and the ILO Convention No 169 are two different legal instruments that complement and reinforce each other[200].

5.5 Indigenous 'permanent sovereignty' over natural resources

Part II of the thesis outlined how indigenous rights with respect to natural resources before UNDRIP did not entitle a right of indigenous peoples to 'permanent sovereignty' over natural resources. The adoption of the UNDRIP does not change these findings.

Indeed, even after the adoption of the UNDRIP the growing body of indigenous rights guaranteed by international law does not rely on, or even allude to, the notion of indigenous 'permanent sovereignty' over natural resources. The UNDRIP does not mention at all the right of permanent sovereignty over natural resources. The same is the case for the ADRIP and the proposed Nordic Saami Convention. Moreover, indigenous permanent sovereignty over natural resources has not been mentioned by any judgments of international, regional or domestic courts, in relevant national legislation and in the activity of human rights bodies.

The UNDRIP, as well as the ADRIP and the proposed Nordic Saami Convention, recognizes a right of indigenous peoples to internal self-determination to be exercised within the context of existing States. UNDRIP leaves no doubt in this sense, stating at Article 46(1) the need to respect the territorial integrity and political unity of sovereign and independent States. As illustrated in previous chapters, in current international law permanent sovereignty over natural resources is an 'inalienable' right of States, component of their territorial sovereignty and, therefore, of certain peoples, such as colonial and equivalent peoples who enjoy a right to

[199] Observation (CEACR) - adopted 2015, published 105th ILC session (2016) Indigenous and Tribal Peoples Convention, 1989 (No 169) - Honduras (Ratification: 1995).
[200] General Observation (CEACR) - adopted 2018, published 108th ILC session (2019).

independence and, hence, to statehood[201]. Indeed, indigenous peoples cannot exercise the territorial sovereignty necessary for being entitled of a right to permanent sovereignty over the resources of a territory. Even after UNDRIP indigenous peoples do not have under present international law a right to statehood or to independence from an existing State.

In such context, the rights stated in the UNDRIP with respect to natural resources are different from the rights part of permanent sovereignty over natural resources. Indeed, Article 26(2) of the UNDRIP refers to a right to 'own, use, develop and control' of natural resources that indigenous peoples 'possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired'. In contrast, the rights part of permanent sovereignty over natural resources refer to an exclusive authority over the exploitation, disposition and utilization of the resources of a territory where a State exercises its territorial sovereignty. Those rights are not part of the UNDRIP and have never been mentioned by international tribunals or relevant regional and domestic jurisprudence.

Against this backdrop, if such right would have been recognized as a right of indigenous peoples, indigenous would have a right to permanent sovereignty with respect to natural resources comparable with that of colonial peoples. Hence, permanent sovereignty would be vested in indigenous peoples that would have the ultimate authority in deciding on the exploitation over natural resources of their territory, including both surface and subsoil resources, independently from the ownership, use or possess of such resources. Moreover, States would be obliged to exploit the resources in indigenous territories in the exclusive interests of such peoples and respecting their consent. In case of a breach of such obligations, States would have a duty to reparation to indigenous peoples, in a similar way that administering powers have for colonial peoples according to international law. However, such proposition is not acceptable under present

[201] See Chapters 1 and 4.

international law since the territory of colonial peoples has a distinct status from the one of the administrative powers that could, evidently, not exist for indigenous peoples since they do not have a right to territorial sovereignty.

5.6 Conclusion

UNDRIP represents a milestone in the evolution of the international recognition of indigenous rights with respect to natural resources. Its influence on the successive development of international law has been significant.

The UNDRIP refers to different aspects related with indigenous collective rights with respect to natural resources, including indigenous spiritual relationship with their lands, territories and natural resources, indigenous ownership, use, development and control rights with respect to lands, territories and natural resources, indigenous traditional land tenure systems, the right to redress and not to be forcibly removed from their lands and the right to consultation in case of measures that could impair their rights with respect to natural resources. Most of such principles are also part of the ADRIP and of the proposed Nordic Saami Convention. Many of the relevant provisions of the UNDRIP have been applied in numerous decisions of the Inter-American System, in the African System, by domestic courts and legislations and by human rights bodies.

The evolution of indigenous rights with respect to natural resources after UNDRIP, however, does not give rise to indigenous peoples' permanent sovereignty over natural resources. There is no evidence of such a principle in UNDRIP and successive international and regional instruments and jurisprudence. While permanent sovereignty over natural resources, as a component of States' territorial sovereignty, to be vested in a people requires a right to statehood, indigenous self-determination, as stated explicitly by the UNDRIP, is limited to a form of internal self-determination to be exercised within a State territory.

CONCLUSION

1. Introduction

The following sections illustrate the main findings of this dissertation. While section 2 focuses on the research results on the conceptualization of indigenous as 'peoples' and on the features of their right to self-determination, section 3 explores the possibility to conceive an indigenous right to 'permanent sovereignty' over natural resources. Section 4 illustrates the main findings on the content of indigenous rights with respect to natural resources as part of their right to self-determination and section 5 examines the main differences between permanent sovereignty over natural resources and those indigenous peoples' rights with respect to natural resources part of their right to internal self-determination.

2. Indigenous peoples as 'peoples' with a right to self-determination

Initially, indigenous peoples were not considered as 'peoples' under international law. It was only through the application of common Article 1 of the two 1966 international Covenants by the human rights committees that indigenous peoples were conceived for the first time as 'peoples' in international law. However, indigenous were mentioned as 'peoples' for the first time in an international legal instrument only by the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Since that time, indigenous peoples have been considered as a particular category of non-independent 'peoples', holders of rights under international law, in successive legal instruments and by regional human rights judicial bodies[1].

As 'peoples', indigenous peoples enjoy, like all other peoples, the right to self-determination, as stated in common Article 1(1) of the ICCPR and of the ICESCR[2]. According to their right to self-determination, they freely pursue their economic, social and cultural development. Outside the colonial

[1] See Chapters 2 and 5.
[2] See Chapter 2.

context, limited to peoples of non-self-governing territories and other peoples 'subject to alien subjugation, domination and exploitation' who enjoy a right to independence, the right to self-determination is internal and does not include a right to independence or to statehood.

The right of indigenous peoples to self-determination has been embodied in UNDRIP Article 3 and by successive international instruments[3]. As set out in UNDRIP Article 46(1), indigenous peoples have a right to internal self-determination that must be exercised with respect to States' territorial integrity. As stated by UNDRIP Article 4, such right includes a form of self-government or autonomy to be exercised in the context of existing States and based on the principles of participation and consultation and includes rights with respect to natural resources[4]. This right to self-determination that indigenous have as 'peoples' under international law, differs not only from the right to self-determination of other non-independent peoples, which includes a right to statehood, but also from the various forms of self-government and specific rights that indigenous enjoy under their respective domestic law, which do not confer rights under international law[5].

3. Indigenous peoples' 'permanent sovereignty over natural resources'

The principle of a State's permanent sovereignty over the natural resources within its territory is part of customary international law[6]. By virtue of such right, States have an exclusive authority on the exploitation, disposition and management of the natural resources of their territory.

This permanent sovereignty over natural resources does not extend to the territory of any non-self-governing territory administered by that

[3] See Chapter 2.
[4] Helen Quane, 'New Directions for Self-Determination and Participatory Rights?' in S Allen and A Xanthaki (ed), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011).
[5] See Chapter 2.
[6] See Chapter 1.

State, which enjoys 'a status separate and distinct from the territory of the State administering it'[7], by virtue of the right to external self-determination enjoyed by the people of a such territory. Rather, permanent sovereignty over the natural resources of a non-self-governing territory vests in the people of that territory[8].

Permanent sovereignty over the natural resources does not, however, vest in all 'peoples' within the meaning of international law, despite the fact that all peoples under present international law enjoy the right to self-determination. Indeed, permanent sovereignty over natural resources vests only in those categories of peoples which, as a function of their right to self-determination, enjoy a right to statehood and, with it, to sovereignty over a territory. Indigenous peoples do not fall within any such category of peoples. Therefore, their right to self-determination does not carry with it a right to statehood. As such, it does not entail a right to sovereignty over a territory and, with it, the permanent sovereignty over the natural resources of that territory[9].

In summary, permanent sovereignty over natural resources as such and statehood are conceptually inseparable.

4. Indigenous peoples' rights with respect to natural resources

Indigenous peoples' rights with respect to natural resources should be considered as part of their right to internal self-determination and are reconcilable with States' permanent sovereignty over natural resources[10].

As stated by common Article 1(2) of the two 1966 international Covenants, according to their right to self-determination indigenous peoples may, for their own ends, freely dispose of their natural wealth and

[7] UNGA Res 2625 (XXV) (24 October 1970). See Chapter 4.
[8] See Chapter 4.
[9] See Chapters 4 and 5.
[10] As found by the United States Supreme Court, in a judgment before the adoption of the UNDRIP, indigenous rights with respect to natural resources, arising in that case from Indian treaties, coexist and are not incompatible with States' sovereignty over natural resources: *Minnesota v Mille Lacs Band of Chippewa Indians*, 526 US 172 (1999).

resources. The right of indigenous peoples to self-determination has been adopted in the UNDRIP which, despite its non-binding nature, influenced the further development of international law on indigenous rights. In the context of their right to self-determination, international conventions, the judgments of international and regional courts and State practice suggest that indigenous peoples, as 'peoples', have different rights with respect to natural resources under customary international law[11].

First, indigenous peoples have rights to ownership, in a broader sense than the classical notion of property under national law, to use, develop and control the natural resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. As confirmed by regional jurisprudence, those rights include surface resources, while uncertainty remains on rights with respect to subsoil resources by reason of traditional occupation or use[12].

Next, indigenous peoples have the right to entitlement, demarcation and protection of the lands where such resources are located. In doing so, States must consider indigenous land tenure systems. With regard to natural resources, indigenous peoples have the right to access to natural resources which have a 'spiritual relationship' with them. Indigenous have

[11] On the influence of UNDRIP on customary international law, S Esterling, 'Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples' in (2021) 28(1) International Journal on Minority and Group Rights 1-26; S G Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' in (2017) 6(2) International Human Rights Law Review 242-261; S Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 Harvard Human Rights Journal 57 at 109; S Wiessner, 'The United Nations Declaration on the Rights of Indigenous Peoples' in A Constantines and N Zaikos (eds), The Diversity of International Law (Brill 2009) at 343–362; E Voyiakis, 'Voting in the General Assembly as evidence of customary international law?' in Allen, Stephen and Xanthaki, Alexandra (eds), *Reflections on the Un Declaration on the Rights of Indigenous Peoples. Studies in international law* (30) (Hart Publishing 2011) 209-224; Felipe Gómez Isa 'The UNDRIP: an increasingly robust legal parameter' (2019) 23(1-2) The International Journal of Human Rights 7-21, observing at 9 that some of the key provisions of the UNDRIP are part, or are in the process of emerging as new rules of customary law.

[12] See Chapters 3 and 5.

also a right to redress, that shall be implemented first through restitution and, only if the latter is not possible, by compensation.

As part of their right to self-determination, indigenous peoples have the right to be consulted on projects and activities that may concern indigenous natural resources and to participate in the benefits arising from the exploitation of such resources. This right to consultation shall be effective and shall seek indigenous free, prior and informed consent, especially in case of major development projects that may affect indigenous cultural and physical survival, including, if necessary, through the adoption of prior environmental impact assessments.

5. Indigenous 'permanent sovereignty over natural resources' versus indigenous peoples' rights with respect to natural resources: terminological formality or genuine legal difference?

The analysis of the previous chapters demonstrates how indigenous rights with respect to natural resources are part of the indigenous right to internal self-determination.

Indigenous peoples do not have, under current international law, a right to 'permanent sovereignty' over natural resources. While the rights with respect to natural resources, as part of indigenous right to self-determination, may be comparable in certain aspects with permanent sovereignty over natural resources, the difference with permanent sovereignty is not only terminological. Indeed, permanent sovereignty over natural resources developed as part of States' territorial sovereignty, as the ultimate authority over the natural resources in their territories. By virtue of such right, States freely adopt decisions on the exploitation, utilization and conservation of natural resources in their territories. This right is 'inalienable' and constitutes a component of States' territorial sovereignty[13].

[13] See Chapter 1.

In contrast, indigenous peoples may 'freely dispose' for their own ends, of their natural wealth and resources. Such disposition must be exercised in the context of States' permanent sovereignty[14]. For example, while indigenous may have a right to consultation on the exploitation of their natural resources as part of their right to participation, they do not have a right to consent, as a veto power, since the ultimate authority to decide on such exploitation remains a right of States. For the same reason, as part of their right to internal self-determination, indigenous peoples would not be entitled to expropriate any natural resources in respect to which they have rights under international law but which are owned by others under national law.

The position of indigenous peoples is different also from those peoples who have a right to permanent sovereignty as part of their right to external self-determination, namely peoples of non-self-governing territories and other peoples subject to alien subjugation, domination and exploitation[15]. The latter, even before the independence, manifest their sovereignty over natural resources in various forms, including the right to provide their consent for the exploitation of natural resources by the administering power. Moreover, such exploitation shall be conducted for the sole benefit of such peoples. The administering States have the obligation to make reparation to the peoples of such territories in the event that such exploitation occurs without their consent or is not conducted for their sole benefit. Those rights, corollary to a right to independence, are not part of indigenous rights with respect to natural resources. Indeed, as stated above, indigenous peoples as part of their right to internal self-determination have a right to participation and effective consultation with the States on decisions affecting the natural resources of their lands but do not have a right to consent. Moreover, the exploitation of such resources shall not be conducted for the exclusive benefit of indigenous peoples, that

[14] See Chapters 2, 3 and 5.
[15] See Chapter 4.

in contrast have a more limited right to participate in the benefits arising from such activities.

6. Conclusion

Under present international law, indigenous peoples enjoy, like all other peoples, a right to self-determination and this has been embodied in the UNDRIP and successive legal instruments. While some peoples, like colonial and equivalent peoples, have a right to independence and statehood, the right of indigenous peoples to self-determination must be exercised respecting States' territorial integrity. Since permanent sovereignty over natural resources is a component of States' territorial sovereignty, only those peoples with a right to independence and statehood are holders of permanent sovereignty. In contrast, indigenous peoples do not enjoy such right. Indeed, indigenous peoples' rights with respect to natural resources are part of their right to self-determination and encompass a number of rights with respect to such resources, including the rights to ownership, to access to and use of such resources, to consultation, to redress and to participation in the benefits arising from their exploitation. Those rights shall be exercised in the context of existing States and are substantially different from the right to permanent sovereignty over natural resources that includes for States the ultimate authority on the exploitation of the natural resources of their territory and, for colonial and equivalent peoples, the right that such resources, before the independence, shall be exploited with their consent and for their own benefit.

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