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RIGHTS OF INDIGENOUS PEOPLES

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Interim Report

Table of Contents

1. Introduction, Methodology of Work, Background and Legal Status of UNDRIP	1
2. Understanding the Term “Indigenous Peoples”	6
3. Self-Determination	9
4. Autonomy or Self-Government	12
5. Cultural Rights and Identity	16
6. Land Rights	20
7. Education and Media	25
8. Social and Economic Improvement Rights	28
9. Treaty Rights	30
10. Development and International Cooperation	36
11. Reparations, Redress and Remedies	39
12. Rights of Indigenous Peoples under Customary International Law	43

1. Introduction, Methodology of Work, Background and Legal Status of UNDRIP*

Traditional international law, Eurocentric in origin, has worked to largely ratify the attempts at the cultural, if not physical, eclipse of indigenous peoples. The historical fact of colonization and the effects of modern paradigms of progress have tended to marginalize and dispossess peoples and cultures at variance with both forces of overwhelming power and impact. Still, many indigenous peoples have survived and have recently fought their way back to the table of actors in international law.¹ Their most visible success was the passage, in 2007, of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*,² a comprehensive declaration by

* This Section is based on a Report written by SIEGFRIED WIESSNER. It includes a Report drafted by DALEE SAMBO DOROUGH (Ph.D., Assistant Professor, University of Alaska Anchorage) on the history of UNDRIP.

¹ For an overview of the struggle and legal analysis of its outcomes, see the path-breaking book by the initiator and first chairperson of this Committee, S. J. ANAYA, *Indigenous Peoples in International Law*, 2nd ed., Oxford, 2004.

² G.A. Res. 61/295 of 13 September 2007.

the United Nations General Assembly, specifying their rights and status on the international plane. While it is not in itself, technically, and under the positive law of the United Nations Charter, legally binding, it demonstrates a remarkable consensus among States as the most important actors on the global playing field that indigenous persons and peoples are back not only as fully entitled holders of individual human rights, but as collective actors with distinct rights and status under international law. Those rights have been recognized in various systems of domestic law and in disparate areas of international law, via treaties and other instruments, and have been put together in UNDRIP. They are the result of a struggle over many years, helped by articulating the indigenous voice over many boundaries, acting in a unified way to combat prior attempts at termination of their traditional ways of life and faith. Indigenous peoples have re-emerged empowered, with a strong voice looking forward to self-actualization as a group, steeped in their culture, but open to self-determined change, on their lands with which they share a strong, often spiritual bond. The success has not been on a straight upward trajectory; there have been ups and downs along the journey. That is why UNDRIP has been a milestone of re-empowerment,³ from the down of the *Cayuga Indians* Award of 1926 which denied indigenous peoples the status of a “legal unit of international law”⁴ to their membership, on a level of equality with states, on the UN Permanent Forum on Indigenous Issues⁵ and beyond.

The only way to appropriately locate the state of law along the lines of the categories of UNDRIP intended to provide a comprehensive answer to the essential claims of indigenous peoples is to take a problem-oriented approach to the task of writing an expert commentary on this document. As the founding statement on this Committee indicates, international law has been changed significantly in response to the claims of indigenous peoples over the last few decades: “[n]umerous processes of the international system have responded to the common set of ongoing problems that are central to the demands of indigenous groups, so that discernible patterns of responses and normative understandings have emerged at the international level in respect of Indigenous peoples.”

A societal problem, whether global or domestic, is constituted by conflicting claims of individuals or groups. In our context, it behooves us to survey the claims put forth by indigenous peoples, and to analyze the responses given by the organized international community of States, to each of these claims, to ascertain the progress indigenous peoples have made in terms of the recognized sources of international law including treaties, customary international law as well as a discussion of the legal effect of the declaration itself. It is also essential to appraise this actual state of the law and, if unsatisfactory in light of a goal of maximum access by all to realization of their aspirations, to create and recommend alternatives that might better approximate the desired world public order of human dignity that gives indigenous peoples full opportunities of self-realization. The proper approach to handling this assignment thus appears to be to listen to the assertions of indigenous peoples, organize them into categories of desired outcomes, and analyze the responses given by the legal system. The proper starting point ought to be the authentic claims and aspirations of indigenous peoples.⁶ This heuristic approach would lead to a framework of laws more narrowly tailored to the inner worlds of indigenous peoples and their specific vulnerabilities in historical context. It is also in line with the Committee’s choice of a “thematic” approach that reflects, as “themes”, the various claims put forward by indigenous peoples, and the responses thereto by those who make international law, *i.e.* the authoritative and controlling decision makers of the world community.

Virtually all indigenous peoples share a common set of problems resulting from the tortured relationship between the conqueror and the conquered. First, the oppressors took away the land that indigenous peoples, in line with their cosmovision, had freely shared. Second, the subjugator’s way of life was imposed. Third, political autonomy was drastically curtailed. Fourth, indigenous peoples have often been relegated to a status of extreme poverty, disease, and despair. Five basic claims of indigenous peoples arose from this condition: (1) traditional lands should be respected or restored, as a means to their physical, cultural, and spiritual survival; (2) indigenous peoples should have the right to practice their traditions and celebrate their culture and spirituality with all its implications; (3) they should have access to welfare, health, educational and social services; (4) conquering nations should respect and honour their treaty promises; and (5) indigenous nations should have the right to self-determination.⁷ In line with these general claims, the Committee established a number of subcommittees to deal with the following problems or themes: self-determination; autonomy; cultural rights and identity; land rights; education and media; social and economic rights; treaty rights; development and international cooperation;

³ See S. J. ANAYA & S. WIESSNER, “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment”, *JURIST Forum*, 3 October 2007, available at <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>> (last visited on 7 April 2010).

⁴ *Cayuga Indians (Great Britain) v. United States*, 6 R.I.A.A. 173, 176 (1926).

⁵ See UN Economic and Social Council Res. 2000/22 of 28 July 2000.

⁶ See R. B. PORTER, “Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples”, 5 *Yale Human Rights & Development Law Journal*, 2002, 123, p. 133 ff.

⁷ See S. WIESSNER, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis”, 12 *Harvard Human Rights Journal*, 1999, 57, p. 98 f.

reparations, redress and remedies. After providing a brief historical background of UNDRIP and an attempt to achieve a common understanding of the concept of “indigenous peoples”, the subsequent sections of this Report will be devoted to these themes.

The adoption of UNDRIP by the UN General Assembly in 2007 represented a major accomplishment. It epitomized the change of attitude of the international legal community *vis-à-vis* indigenous peoples, eventually recognizing their dignity as *different* social and cultural groups. In fact, though international organs began to address the suffering of indigenous peoples and responsive initiatives began surfacing in the 1920s and 1930s, non-indigenous attitudes of cultural and social superiority lasted for a long time. This fact is evidenced by the early inter-governmental institutional attention by the International Labour Organisation (ILO)⁸ and the Inter-American Indian Institute of the Organization of American States (OAS)⁹ primarily to indigenous peoples’ widespread poverty and other adverse socio-economic indicators affecting them. Despite what may have been good intentions, both of these entities have been characterized as undertaking strongly integrationist and assimilationist policies towards indigenous peoples,¹⁰ with the supposed aim being to safeguard indigenous individuals and their physical and economic existence while combating their indigenous identity and acculturating them into mainstream society. However, prompted by a number of factors, dynamics began to slowly transform such policies away from assimilation and integration of indigenous “objects” toward indigenous peoples becoming “subjects” in the dialogue concerning their status and conditions, and eventually bringing into focus the concept of fundamental human rights. This era was followed by the constantly growing movement of indigenous peoples as direct actors in the human rights discourse of the United Nations¹¹ and other international fora. Such a movement found fertile ground in the context of the significant advances in international human rights law taking place in the last decades, evidencing a shift away from positivist, state-dominated dialogue toward a more inclusive framework that is much more responsive to the ideals enshrined in the Charter of the United Nations. For indigenous peoples, this shift has created a space for them to move an agenda of promoting and encouraging respect for their human rights within this formal international organization, including the collective rights to their culture, their land, and self-government as an essential part of their individual self-realization. This groundswell of positive progress has had a contagious effect upon other international and regional, inter-governmental institutions, including the ILO, the World Bank, the Commission for Sustainable Development, OAS and numerous other organizations. These more recent initiatives have also expanded the indigenous human rights dialogue and discourse in the Americas, Europe, the Arctic, Asia, the Pacific Basin and Africa. This is evidenced by the fact that the numbers of indigenous representatives participating at the United Nations has been steadily growing since the 1970s.¹² In addition to Tribes, First Nations and numerous indigenous organizations and peoples of Latin America, today we are seeing the regular participation of representatives of the Maori of New Zealand, the Aboriginal and Torres Strait Islanders of Australia, representatives from the Chittagong Hill Tracts, the Cordillero Peoples Alliance of the Philippines, the Ainu of Japan, the Masai of Kenya, the various Small Nations of the Russian North, and many others. Though not all indigenous peoples are represented in these dialogues, the fact that every continent and region has at least some representation is quite significant.

Even prior to and throughout the establishment of the U.N. Working Group on Indigenous Populations (WGIP) in 1982,¹³ a number of transnational indigenous initiatives were simultaneously emerging. In particular, the World Council of Indigenous Peoples (WCIP), a worldwide indigenous peoples organization, and the International Indian Treaty Council (IITC) were established. While the WCIP subsequently collapsed in the midst of internal division, the IITC continues to play an active role in international developments. Also, the Inuit of the circumpolar region organized the Inuit Circumpolar Conference in 1977, a pan-Arctic Inuit organization established to respond to a number of threats to their traditional territory. These international indigenous organizations were subsequently granted NGO status at the United Nations Economic and Social Council. The WGIP consisted of five independent human experts appointed from its parent body, the Sub-Commission on the

⁸ See S. VENNE, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights*, Penticton, 1998, p. 32 ff. The assimilationist approach of ILO was eventually expressed in its *Indigenous and Tribal Populations Convention*, No. C 107 (Convention No. 107), adopted in 1957.

⁹ See S. J. ANAYA, *Indigenous Peoples in International Law*, 1st ed., Oxford, 1996, p. 45 ff.; R. L. BARSH, “Indigenous Peoples: An Emerging Object of International Law”, 80 *American Journal of International Law*, 1986, p. 369.

¹⁰ See ANAYA, *Indigenous Peoples in International Law*, 2nd ed., *cit.*, p. 58.

¹¹ In 1971, as the plight of indigenous peoples had become ever more visible, the United Nations Economic and Social Council appointed a Special Rapporteur, Mr. José Martínez Cobo of Ecuador, to study patterns of discrimination against them around the globe. His reports documented a wide range of human rights issues; cf. his *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, UN Sales No. E.86.XIV.3 (1986).

¹² The 1977 conference held at the Palais des Nations in Geneva, Switzerland, around 150 indigenous peoples represented. The last session of the WGIP had just over 1,200 indigenous participants registered.

¹³ ECOSOC Res. 1982/34 of 7 May 1982. The WGIP had a twofold mandate: (1) to review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples; and (2) to develop international standards concerning the rights of indigenous peoples.

Prevention of Discrimination and Protection of Minorities; their first session took place in 1982 and they met annually until July 2007 (with the only exception of 1986, when the planned meeting was cancelled due to lack of funds). The earliest discussions within the WGIP concentrated on the review of developments and the hearing of interventions by indigenous peoples about the living conditions of indigenous communities, well aware, however, that it was not a body with the capacity to hear human rights “complaints”. This notwithstanding, there was general agreement amongst the WGIP members that their reviews were useful in terms of gaining an understanding of the content and form of indigenous peoples’ human rights standards.

In 1985, the WGIP agreed to begin the preparation of “a Draft Declaration on Indigenous Rights” for possible adoption by the United Nations General Assembly.¹⁴ The first draft principles tabled at the WGIP – with the active participation of indigenous representatives – contained only six principles, which were considered by its Chairperson to be “non-contentious” and therefore palatable to State participants. Needless to say, indigenous peoples criticized the cautious approach of the WGIP members,¹⁵ reiterating that the foundational principle of the right of indigenous peoples to self-determination was to be dealt with squarely by the WGIP in order to provide a suitable context for the consideration of all other indigenous peoples’ rights.

The period from 1988 to 1993 was the time frame wherein the text of the draft Declaration really began to take shape. This was approximately the same period in which ILO decided to revise Convention No. 107 and adopt the new *Indigenous and Tribal Peoples Convention* No. 169 in 1989 (ILO Convention No. 169). In 1993, the WGIP completed its work and transmitted the text for approval to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994.¹⁶ The Sub-Commission adopted the draft Declaration by passage of Sub-Commission Resolution 1994/45. The text was divided into a Preamble and eight parts covering general principles; life, integrity and security; cultural rights; education, information, and labour rights; development, decision making, and economic and social rights; lands, territories and resources; self-determination and indigenous institutions; and implementation. The draft Declaration was largely heralded by indigenous peoples as a statement of the minimum standards necessary to safeguard the rights and status of indigenous peoples, nations and communities.

The document was then delivered to the Commission on Human Rights, who adopted Resolution 1995/32, in which it decided to “establish an open-ended inter-sessional working group [...] with the sole purpose of elaborating a Draft Declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, entitled draft “United Nations declaration on the rights of Indigenous peoples” for consideration and adoption by the General Assembly within the first International Decade of the World’s Indigenous Peoples”.¹⁷ This new Working Group (WGDRIP) met annually from 1995 until the creation of the Human Rights Council in 2006, with the exception of 2001, when the September 11 terrorist attacks delayed the session until February 2002. Procedural and substantive issues plagued the WGDRIP for years, with the former drawing much debate throughout the course of its sessions, prompting walkouts by indigenous peoples, as well as closed-door meetings of government representatives intent on re-drafting the text.

However, at the tenth and eleventh session of the WGDRIP all the debate developed during previous years was translated into a proposal – elaborated by the Chairman – that took into account the different concerns of governmental delegations and representatives of indigenous peoples involved in the discussion.¹⁸ Consequently, on 29 June 2006 the newly established Human Rights Council approved the draft Declaration by adopting resolution 1/2 by a vote of 30 in favour to 2 against, with 12 abstentions. On 28 November 2006, the Third Committee of the General Assembly, by a vote of 82 in favour to 67 against, with 25 abstentions, decided to defer consideration pending further consultations, with a view to taking action on the Declaration before the end of the sixty-first session of the General Assembly, *i.e.* early September 2007. The last changes were made over

¹⁴ UN Doc. E/CN.4/Sub.2/1985/2, Annex II.

¹⁵ UN Doc. E/CN.4/Sub.2/1985/22, Annex IV.

¹⁶ UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

¹⁷ UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, para. 105. The first Decade (*International Decade of the World’s Indigenous People* (1995-2004), G.A. Res. 48/163 of 21 December 1993) began in 1995 and ended in 2004; the second Decade (*Second International Decade of the World’s Indigenous People* (2005-2014), G.A. Res. 59/174 of 22 December 2004) started in 2005.

¹⁸ See Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session, Addendum, UN Doc. E/CN.4/2005/89/Add.2 of 1 April 2005 and Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session, Summary, UN Doc. E/CN.4/2006/79 of 22 March 2006.

the course of 2007 to accommodate primarily some of the demands of the African States which had resulted in the deferral.¹⁹

The final version of the UNDRIP was adopted on 13 September 2007 by a landslide affirmative vote of 143 states in the General Assembly. Four countries – the United States, Canada, Australia and New Zealand – voted against it, while eleven – Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine – abstained. Subsequently, Australia dramatically revised its position on the UNDRIP, endorsing the Declaration in April 2009.²⁰ Similarly, on 19 April 2010 the government of New Zealand announced its support for the Declaration,²¹ while on the following day the Permanent Representative of the United States to the United Nations announced at the *Permanent Forum on Indigenous Issues* the intention of her government to review its position concerning the UNDRIP.²² Canada previously declared, on 3 March 2010, that it “will take steps to endorse this aspirational document in a manner fully consistent with Canada’s Constitution and laws”.²³ Finally, among the abstaining countries, Colombia and Samoa have formally expressed their support for the Declaration.²⁴

As to the legal status of UNDRIP, under Article 12 of the UN Charter, it is, at first blush, as almost any other resolution by the General Assembly, a non-binding “recommendation”.²⁵ There have been attempts to ascribe a higher degree of authority to General Assembly resolutions designated as “declarations”. This is particularly true for the 1948 Universal Declaration of Human Rights.²⁶ In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified that “in United Nations practice, a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected”.²⁷ UNDRIP is such a declaration deserving of utmost respect. This is confirmed by the words used in the first preambular paragraph of the Declaration, according to which, in adopting it, the General Assembly was “[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the *fulfilment of the obligations assumed by States in accordance with the Charter*”;²⁸ this text clearly implies that respect of the UNDRIP represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter.

Furthermore, new standards of evaluation of state conduct, applied by intergovernmental bodies, have emerged that cannot be counted with ease among the traditional “sources” of international law enumerated in Article 38(1) of the ICJ Statute. The vanguard in this development is the process of “universal periodic review” instituted by the Human Rights Council. As standard of evaluation in this review, the Council announced, besides treaties the various countries are parties to, the Universal Declaration of Human Rights.²⁹ Similarly, in August, 2008, Professor S. James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples, announced that he will measure state conduct *vis-à-vis* indigenous peoples, by the yardstick of UNDRIP.³⁰ As a matter of policy direction, the standards of UNDRIP have also been urged to be

¹⁹ On the position of African States see W. VAN GENUGTEN, “Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems”, 104 *American Journal of International Law*, 2010, 29, p. 34 ff.

²⁰ See “Statement on the United Nations Declaration on the Rights of Indigenous Peoples”, 3 April 2009, available at <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm> (last visited on 14 September 2009).

²¹ See E. M. LEDERER, “New Zealand backs indigenous rights, US to review”, available at <<http://www.miamiherald.com/2010/04/19/1587394/new-zealand-backs-indigenous-rights.html>> (last visited on 22 April 2010).

²² See “Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the UN Permanent Forum on Indigenous Issues”, available at <<http://usun.state.gov/briefing/statements/2010/140600.htm>> (last visited on 22 April 2010).

²³ Canada, Speech from the Throne, 3 March 2010, available at <<http://www.sft-ddt.gc.ca/eng/media.asp?id=1388>> (last visited on 24 June 2010).

²⁴ See <<http://www.un.org/esa/socdev/unpfii/en/declaration>> (last visited on 2 July 2010).

²⁵ UN Charter, Articles 10 and 11. The one formal exception, referring to budget allocations to member states (Article 17(2) UN Charter) does not apply here.

²⁶ See M. S. MCDUGAL ET AL., *Human Rights and World Public Order*, New Haven, 1980, p. 273 f. and 325 ff.; Sir H. WALDOCK, “Human Rights in Contemporary International Law and the Significance of the European Convention”, 11 *International and Comparative Law Quarterly*, 1963, Supp., p. 15; L. B. SOHN, “The Human Rights Law of the Charter”, 12 *Texas International Law Journal*, 1977, 129, p. 133.

²⁷ Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. 1), para. 105, 18th session, 19 March – 14 April 1962.

²⁸ Emphasis added.

²⁹ Human Rights Council, Annex to Resolution 5/1, *United Nations Human Rights Council: Institution Building*, 18 June 2007, available at <ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc> (last visited on 6 May 2010), para. 1.

³⁰ According to UN Special Rapporteur S. James Anaya, UNDRIP represents “an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of

“mainstreamed” into the UN’s, the ILO’s, and UNESCO’s policies and programs.³¹ Also, the concept of “soft law” has been offered to characterize the legal significance of UNDRIP.³²

As far as unquestionably binding obligations toward indigenous peoples go, the clearest ones are listed in treaties such as ILO Conventions No. 107³³ and 169.³⁴ They include major protections regarding the rights to their traditional lands. Certain human rights prescriptions are also on point: regarding cultural rights, Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) is on point, albeit indirectly enforced through individual rights of the members of the group but often informed by the provision in Article 1 on the collective right of all peoples to self-determination, as well as Article 21, the right to property under the *American Convention on Human Rights* (ACHR),³⁵ the basis for a broad-based reinterpretation of this entitlement as a group, or communal, right geared toward preservation of indigenous cultures for whom the use of their traditional lands is indispensable.

Important norms expressed in UNDRIP can also be found in the other traditional source of international law: customary international law. A declaration may be or become binding to the extent its various provisions, key parts or principles embedded in it, are backed up by conforming state practice and *opinio juris*.

UNDRIP organizes all the claims of indigenous peoples to the extent and in the structure the international community of states has chosen to approve them. Some of these claims acknowledged as “rights” may already form part of customary international law, others may become the *fons et origo* of later-emerging customary international law.³⁶ As Richard Lillich classically stated, 25 years ago:

Whether a transmutation from mere resolution into binding international law has occurred is determined, broadly, by the degree of acceptance by the international legal community of the norms contained in the resolution. The process is one of juridical osmosis, there being no identifiable instant at which a resolution suddenly bursts forth as a binding legal norm. As the process is necessarily a gradual one, disagreement will often occur over whether, at any given time, the magic point has been attained.³⁷

The committee is tasked, *inter alia*, with assessing whether certain prescriptions in UNDRIP have already reached the status of customary international law. The traditional starting-point for such evaluation is the clarification of the meaning of customary international law as listed in the 1969 ICJ decision in the *North Sea Continental Shelf Case*.³⁸ A useful amplification is offered by the ILA Report on the Formation of Customary International Law³⁹ as well as other scholarly approaches. The issue of customary international law rights of indigenous peoples will be addressed in detail in the final section of this report.

2. Understanding the Term “Indigenous Peoples”**

There is no definition of “indigenous peoples” in UNDRIP. Indigenous peoples argued strongly against inclusion of a definition, for principled as well as strategic reasons. For example, they stressed the need to define themselves,⁴⁰ they did not want to restrict the application of the Declaration too narrowly, plus they were aware

international human rights law [...] The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples”. Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, UN Doc. A/HRC/9/9 of 11 August 2008, paras. 85 and 88.

³¹ See, e.g., Message from Mr. Koichiro Matsuura, Director-General of UNESCO, on the occasion of the International Day of the World’s Indigenous People, 9 August 2008, available at <http://portal.unesco.org/culture/en/ev.php-URL_ID=37756&URL_DO=DO_TOPIC&URL_SECTION=201.html> (last visited on 6 May 2010).

³² See 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”, 58 *International and Comparative Law Quarterly*, 2009, p. 957 ff.

³³ *Convention (No. 107) Concerning Indigenous and Tribal Peoples in Independent Countries*, entered into force on 2 June 1959, 328 UNTS 247.

³⁴ *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 27 June 1989, reprinted in 28 *ILM* (1989) 1382.

³⁵ 1144 UNTS 123.

³⁶ See ANAYA & WIESSNER, “The UN Declaration on the Rights of Indigenous Peoples”, *cit.*

³⁷ R. B. LILLICH, *The Human Rights of Aliens in Contemporary International Law*, Manchester, 1984, p. 44.

³⁸ See *North Sea Continental Shelf Cases*, judgment of 20 February 1969, 1969 *ICJ Reports* 3, p. 42-43, paras. 73-74.

³⁹ See Statement of Principles Applicable to the Formation of General Customary International Law, ILA Final Report 2000, available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/30>> (last visited on 6 May 2010).

** This Section is based on a Report written by CATHERINE J. IORNS MAGALLANES.

⁴⁰ Erica-Irene Daes has noted that “historically, indigenous peoples have suffered from definitions imposed by others.” Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples, UN Doc. E/CN.4/Sub.2/AC.4/1995/3, p. 4.

that obtaining agreement among the wide variety of States and indigenous peoples could further prolong the process of adoption of UNDRIP.⁴¹ However, despite the persisting lack of agreement on this subject, it may be appropriate to address the problem of the “definition” for at least two reasons, *i.e.*: a) in order to assess the scope of application of UNDRIP, with respect to which a precise legal conceptualization of the categories of people to whom it is addressed could be helpful to increase its effectiveness; b) in order to prevent that certain States – as has happened in the recent past especially in Africa and Asia – while supporting UNDRIP in principle, claim that it is not applicable in their territory in light of the assumed absence of indigenous communities within their borders (the lack of any conceptualization of indigenous peoples would in fact facilitate this position, which could be hardly criticized lacking precise objective criteria to be used for ascertaining whether a given community is indigenous or not). The second reason is of particular significance, as a conceptualization of the meaning of the term “indigenous peoples” would have the primary purpose of preventing States from being *de facto* free to determine who are or are not indigenous peoples.

The ordinary meaning of the adjective “indigenous” has a wide scope, referring merely to originating in or being native to a particular place. However, international human rights law has concerned itself with a narrower, legal definition, referring to a “subset of humanity” which has suffered subjugation by colonization or other similar oppression.⁴² In the international legal context, the initial concern was solely with indigenous victims of settlement by European States and thus referred to colonization as an essential element.⁴³ This easily distinguished indigenous peoples from national minorities for the purposes of human rights protection.⁴⁴ An illustration is the use of the two separate terms “indigenous” and “tribal” when referring to the scope of application of ILO conventions No. 107 and No. 169 – the “tribal” peoples of Africa and Asia were initially not thought of as “indigenous peoples” for the purposes of human rights protection, as they were not the descendants of the pre-European inhabitants prior to colonization. For their protection under the said conventions they were explicitly referred to separately. However, indigenous and tribal peoples share very similar characteristics in their needs for protection and the types of difficulties they face. Differences do not appear to depend on the source of their oppression or historical injustices – *i.e.*, whether as a result of European settlement or other imperial conquest.⁴⁵ During the drafting of UNDRIP in the WGIP it became accepted to refer to all such peoples as “indigenous” for the purposes the Declaration.⁴⁶

While an official definition of who counts as “indigenous peoples” has been rejected, a number of key criteria have been advanced within several different international fora, most recently in the Permanent Forum on Indigenous Issues. The commonly cited “modern understanding” is said to be based on the following characteristics:⁴⁷

- *self-identification*: self-identification as both indigenous and as a people;
- *historical continuity*: common ancestry and historical continuity with pre-colonial and/or pre-settler societies;

⁴¹ For extensive discussion of the debate over the term and the various political and other factors at play, see H. MINDE, “The Destination and the Journey: Indigenous Peoples and the United Nations from the 1960s through 1985”, in *Indigenous Peoples: Self-determination, Knowledge, Indigeneity* (Eburon Academic Publishers, Delft, 2008), p. 49 ff.

⁴² See ANAYA, *Indigenous Peoples in International Law*, 2nd ed, *cit.*, p.5.

⁴³ See, *e.g.*, the working definition used in the UN Study on the discrimination against indigenous populations (UN Doc E/CN.4/Sub.2/1986/7), often referred to as the “Cobo Report”, prepared by the Special Rapporteur and author, Jose R. Martinez Cobo, para. 379. The definition is focused on non-dominant, culturally distinct peoples and communities which have historical continuity with “pre-invasion and pre-colonial” societies in the same territories.

⁴⁴ See, *e.g.*, W. KYMLICKA, *Multicultural Odysseys*, Oxford, 2007, p. 266 f.

⁴⁵ This may also be relevant for considering the Sami peoples as indigenous. See, *e.g.*, MINDE, *cit.*, p. 63.

⁴⁶ This approach is not universally supported. For example, the UN Special Rapporteur on the rights of indigenous peoples, Miguel Alfonso Martinez, argued in 1999 that the “indigenous peoples” category should be limited to those from “New World” states, as their situation is different from that of tribal and other similarly oppressed minorities in Africa and Asia. See Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations: Final Report by Special Rapporteur (UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51st session, 22 June 1999, E/CN.4/Sub.2/1999/20), para. 68 ff. and para. 175. See also KYMLICKA, *cit.*, p. 288 ff., who argues that the current inclusion of all such peoples as “indigenous” is too wide because the criteria offered also technically covers “homeland minorities”, even if they are not commonly thought of as indigenous; Kymlicka thus suggests that the legal categories for international human rights protection of minorities and indigenous peoples need to be better refined and targeted.

⁴⁷ UN Permanent Forum on Indigenous Issues, Fact Sheet, 21 October 2007. This also reflects the criteria advanced in the literature by S. WIESSNER, “Rights and Status of Indigenous Peoples”, *cit.*, p. 115, and M. SCHEININ, “The Rights of an Individual and a People: Towards a Nordic Sámi Convention”, in M. ÅHRÉN, M. SCHEININ and J. B. HENRIKSEN (eds.), *The Nordic Sami People: International Human Rights, Self-Determination and other Central Provisions*, *Journal of Indigenous Peoples Rights* No. 3/2007, 40, p. 43 ff. Similar criteria, albeit without specific reference to a special relationship with ancestral lands, were advanced by Erica Daes in her Concept Paper of 1996, Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of “indigenous people,” UN ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess., at 5, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, para. 69, at 22 (1996), and the definition of ILO Convention No. 169, Article 1.

- *special relationship with ancestral lands*: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will often form the basis of the cultural distinctiveness of indigenous peoples;
- *distinctiveness*: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;
- *non-dominance*: forming non-dominant groups within the current society;
- *perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities.

The African Working Group on Indigenous Populations/Communities has studied the application of the term in the African context. It agrees that criteria should be used instead of a formal definition,⁴⁸ that the proper understanding of the term must reach beyond the effects of European colonization,⁴⁹ and that a key criterion is self-identification.⁵⁰ That conceptualization is similar to one advanced with respect to Asian tribal, forest-dwelling or otherwise indigenous peoples.⁵¹ The strength or degree to which these different factors apply may vary in different situations.

The African Commission on Human and Peoples' Rights (ACHPR) has recently taken a very significant stance on the definition of indigenous peoples in a communication concerning the displacement of an indigenous community of Kenya from its traditional lands.⁵² In this case, relying on relevant international instruments and practice,⁵³ the Commission has recognized the community concerned, the Endorois people, as "indigenous" in light of two elements in particular. The first is represented by the existence of an intimate/sacred relationship of the community (particularly of its "culture, religion, and traditional way of life) with its ancestral lands.⁵⁴ The second rests in the self-identification by the community as indigenous, intended as determination by the community "to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity [...] [and to influence] their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems".⁵⁵ The ACHPR has reached this conclusion with the awareness that "indigenous peoples" is a contested term, and that "there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances".⁵⁶ This reality confirms that, although on the one hand it is necessary – for the reasons indicated above – to establish certain criteria that can allow to ascertain whether or not a given community is "indigenous", on the other hand in evaluating such criteria the use of a given degree of flexibility seems to be desirable. This would imply that, depending on the specific circumstances of each instant case, it should not be maintained that, in *all* cases, *all* the criteria listed above – even though representing the usual parameters of indigenesness – must be indispensably met by a community to be considered indigenous. For example, if the essential elements of the special relationship with ancestral lands, historical continuity, distinctiveness and self-identification are clearly present in a given community, such a people should be considered as indigenous – even in the event that it is at present, or has been in the past, the dominant group within the national society (like in

⁴⁸ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", IWGIA (Copenhagen) and African Commission on Human and Peoples' Rights (Banjul), 2005, p. 88.

⁴⁹ *Ibid.*, p. 92; *rectius*: "internal structural relationships of inequality that have persisted after liberation from colonial dominance" (*ibid.*).

⁵⁰ *Ibid.*, p. 101.

⁵¹ See, e.g., Benedict Kingsbury's discussion of the various criteria, including in respect of tribal peoples in Asia, in "Indigenous Peoples' as an International Legal Concept", in R. H. BARNES, A. GRAY & B. KINGSBURY (eds.), *Indigenous Peoples of Asia* (Association for Asian Studies, Inc, 1995), p. 13 ff.; a similar discussion has been developed by the same author in "Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy", 92 *AJIL*, 1998, p. 414 ff. See also Andrew Gray's discussion of its application of the concept to Asia in "The Indigenous Movement in Asia", *ibid.*, p. 35 ff.

⁵² See Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 4 February 2010, available at <[http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDUnidFilename/SMAR-82H3UE-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDUnidFilename/SMAR-82H3UE-full_report.pdf/$File/full_report.pdf)> (last visited on 9 April 2010).

⁵³ See the reasoning developed by the ACHPR at paras. 147-162 of the Communication.

⁵⁴ See, in particular, para. 156 of the Communication. The role of the relationship with the land as an essential element of the "definition" of indigenous peoples is usually emphasized by indigenous persons. For example, on 12 June 2010, at the Maori Wananga taking place in Rotorua (New Zealand), Jonathon S. Ross, President of the Alaska Native Heritage Center, wrote the following text: "What is the definition of indigenous peoples? Something is indigenous when it is naturally growing in an area. For people they are indigenous if they are from an area and they live there in harmony with their surroundings. There is synchronization between the people and their place. They go together in unison. There is alignment; a correct positioning with respect to each other so they perform properly. The frequencies of the earth and the people are in resonance with each other" (document on file with the Rapporteur of the Committee).

⁵⁵ *Ibid.*, para. 157.

⁵⁶ *Ibid.*, para. 147.

the case of indigenous Fijians), thus not meeting the element of non-dominance with respect to one or more phases of its history. Such a relatively flexible approach, leaving a limited degree of inexactness in the conceptualization of indigenous peoples, allows to take into account the differences existing among the countless indigenous peoples living in the different areas of the world, which – as living communities – make their categorization on the basis of static and rigid criteria virtually impossible.

3. Self-Determination***

The right to self-determination has been at the heart of the drafting process of the UNDRIP from its very beginning to the final adoption of the Declaration by the General Assembly in 2007. From the beginning, the position of the representatives of indigenous groups has in fact been that the UNDRIP had to recognize that these peoples have a full legal right to self-determination. On the other hand, States were reluctant to recognize the right in point due to the fear that it could eventually lead to put their territorial integrity under threat. In the end, States accepted that the UNDRIP recognized the right of indigenous peoples to self-determination thanks to the inclusion in the Declaration of Article 46 para. 1, the final text of which affirms that “[n]othing 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”.

The right to self-determination is affirmed by Article 3 UNDRIP, stating that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. This provision is connected with Article 4 – recognizing the right to autonomy or self-government of indigenous peoples in matters relating to their internal and local affairs.⁵⁷ Also relevant to the present Section is the language in preambular paragraph 17, stating that “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law”.

The centrality of Article 46 para. 1 in the discourse of self-determination as recognized in the UNDRIP is demonstrated by the approach taken by States during the voting process of the Declaration. Most of them, in fact, even though giving different shades to their official declarations, strongly affirmed that the right in point is to be exercised within the realm of State sovereignty and territorial integrity. For example, the government of the Philippines declared that “the right to self-determination as expressed in article 3 [...] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign or independent State possessed of a Government representative of the whole of the people belonging to that territory”.⁵⁸ Namibia, on its part, manifested its understanding that “the exercise of the rights set forth in this Declaration [including the right to self-determination] are subject to the limitations determined by the constitutional frameworks and other national laws of States”.⁵⁹ Even more explicitly, Argentina stated that it had voted for the Declaration specifically because Article 46(1) had been amended to “reconcile references to the right to self-determination with principles pertaining to the territorial integrity, national unity and organizational structure of each state”.⁶⁰ Of special interest is the position of Australia, which cast a vote against the Declaration on the basis, *inter alia*, of its

dissatisfaction with the references to self-determination in the Declaration [...] Self-determination applies to situations of decolonization and the break-up of states into smaller states with clearly defined population groups. Australia supported and encouraged the full engagement of indigenous peoples in the democratic decision-making process, but did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic representative Government.⁶¹

However, when in 2009 the Australian government decided to endorse the UNDRIP,⁶² it solemnly declared that

*** This Section is based on a Report written by JON M. VAN DYKE, with the assistance of SINCLAIR SALAS-FERGUSON (Class of 2010, William S. Richardson School of Law, University of Hawaii at Manoa).

⁵⁷ On Article 4 see *infra*, Section 4.

⁵⁸ See UN GAOR, 61st Sess., 108th Plenary Meeting, UN Doc. A/61/PV.108 of 13 September 2007, para. 5.

⁵⁹ *Ibid.*, para. 3.

⁶⁰ See UN GAOR, 61st Sess., 107th Plenary Meeting, UN Doc. A/61/PV.107 of 13 September 2007, para. 19.

⁶¹ See General Assembly Press Release GA/10612 of 13 September 2007, available at <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> (last visited on 9 April 2010).

⁶² See *supra*, note 20.

[t]hrough the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully. Article 46 makes it clear that the Declaration cannot be used to impair Australia's territorial integrity or political unity. We want Indigenous peoples to participate fully in Australia's democracy. Australia's Indigenous peoples must be able to realise their full potential in Australian and international affairs. We support Indigenous peoples' aspirations to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity [...] We also respect the desire, both past and present, of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with land and waters.

At the same time, during the *travaux préparatoires* indigenous peoples themselves showed that they were not really concerned that the right to self-determination would include a right to secession. For example, in a document jointly submitted by a number of indigenous groups in September 2004, they explained that the amendments proposed to the provisions concerning self-determination had, *inter alia*, the purpose to "affirm that, to the extent provided in international law, States will continue to have the freedom to invoke any principle of international law, including the principle of territorial integrity, in relation to the exercise of the right of self-determination".⁶³

The inclusion of Article 46 para. 1 in the text of UNDRIP confirms that the Declaration does not create for indigenous peoples a right unilaterally to establish their own State, *i.e.* a right of secession as a form of exercising the broader right of self-determination. Rather, by virtue of the right of self-determination, the peoples concerned are entitled to exercise an opportune degree of autonomy and self-government within the State in which they live, without providing authorization to carry out acts contrary to the territorial integrity or political unity of States. This said, however, indigenous peoples continue to have the same right that all other peoples have to move toward secession in appropriate cases. As explained by the Supreme Court of Canada, all peoples have the right to "external self-determination [...] where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development".⁶⁴ According to this position, under general international law indigenous peoples who find themselves in such a condition have the right to pursue secession. In this and other self-determination-related-respects, indigenous peoples must be exactly considered as all other peoples (the term "peoples" being intended as referring to all entities it covers according to international law).

An interesting debate has developed concerning the exact meaning of Article 3 UNDRIP. For example, Erica-Irene A. Daes, the former Chair of the WGIP, argues that the provision in point should be "ordinarily interpreted as the right of these people to negotiate freely their political status and representations in the states in which they live",⁶⁵ adding that the State has a duty to "accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically" and that indigenous peoples have the correlative good-faith duty to reach a power-sharing agreement with the existing State.⁶⁶ Indeed, self-determination provides indigenous peoples with the right to control their own destiny and govern themselves – although this does not include secession, except according to the limited extent defined above – and embodies their right to live and develop as culturally distinct groups. Self-determination also implies that the relationship between indigenous peoples and the "State" is to be established through allowing such peoples to exercise their right to autonomy. Furthermore, the fact that indigenous peoples are in principle not entitled to secession as part of their right to self-determination does not imply that they are not allowed to exercise any aspect of "external" self-determination at all; for example, Article 36(1) UNDRIP – in affirming that "Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders" – clearly enshrines one prerogative of "external" self-determination, though one not involving secession.

With respect to the concrete legal entitlements which the right to self-determination translates, Article 3 is to be considered – as previously highlighted – as linked to subsequent Article 4, which provides for the right of indigenous peoples to autonomy or self-government "in exercising their right to self-determination". Also, land rights are considered by most authors as representing the crucial element of indigenous self-determination as

⁶³ See "Indigenous Peoples' Proposed Amendments relating to the Right of Self-Determination", 20 September 2004, submitted by African Indigenous Peoples Caucus, Arctic Indigenous Peoples Caucus, Asian Indigenous Peoples Caucus, Latin American Indigenous Peoples Caucus, Pacific Indigenous Peoples Caucus, American Indian Law Alliance, Assembly of First Nations, Congress of Aboriginal Peoples, Grand Council of the Crees (Eeyou Istchee), Innu Council of Nitassinan, Native Women's Association of Canada, RAIPON (Russian Federation) – a document kindly provided by Dalee Dorrough.

⁶⁴ See *Re: Secession of Quebec*, [1998] 2 S.C.R. 217, Supreme Court of Canada, in 37 *I.L.M.* 1340, 1373, para. 138.

⁶⁵ See E.-I. A. DAES, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations", 21 *Cambridge Rev. of Int'l Affairs*, 2008, 7, p. 23.

⁶⁶ *Ibid.*, p. 24.

well as cultural identity and integrity. In fact, “[t]he true test of self-determination is not whether Indigenous Peoples have their own institutions of self-determination, legislative authorities, laws, police, or judges,” but rather “whether Indigenous Peoples themselves actually feel they have choices about their way of life” and thus “to live well and humanly in their own ways”.⁶⁷ Therefore, indigenous peoples need “the land to subsist and meet their physical needs”, but also for their “cultural integrity and cultural development” and “their continual right to determine their relationship with everything in their world, including landforms, water, animals and plants”.⁶⁸ This conclusion has recently been confirmed by the ACHPR, which – as noted in the previous Section – has emphasized that “the continued existence of indigenous communities as ‘peoples’ is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems [...] through identification with ancestral lands”.⁶⁹

For indigenous peoples, “political” self-determination is not the only type of self-determination they seek, nor is it always the most important element of gaining control of their destinies. What most indigenous peoples pursue is especially “cultural” self-determination, which has been defined as “the right to recapture their identity, to reinvigorate their ways of life, to reconnect with the Earth, to regain their traditional lands, to protect their heritage, to revitalize their languages and manifest their culture – all of these rights are as important to indigenous people as the right to make final decisions in their internal political, judicial, and economic settings”.⁷⁰ Self-determination and the right to self-government for indigenous peoples presuppose that “the survival of their culture, their cosmovision, and their respect for the Earth, including all living and nonliving things” is granted.⁷¹ “[A]bandonment of coercive assimilationist or integrationist policies which inevitably subordinate indigenous to state interests is [therefore] essential, and control by indigenous peoples over their own destiny must be a part of any policy which claims to be consistent with human rights principles”.⁷² These goals are pursued by Article 3 UNDRIP – which emphasizes that through self-determination indigenous peoples “freely pursue their [...] social and cultural development” – as well as in several other provisions included in the Declaration.⁷³ Of course, cultural self-determination must be exercised in accordance with human rights standards as recognized by international law, especially those which – having attained the status of *ius cogens* (e.g. prohibition of torture or similar practices, enslavement, etc.) – are absolutely predominant even over the interests of the community at large.

Many scholars, governments and indigenous peoples assert that Articles 3 and 46 para. 1 UNDRIP, taken together, recognize a right of self-determination for indigenous peoples that differs from the right to self-determination held by non-self-governing peoples living under colonial domination. According to this view, UNDRIP confirms that indigenous peoples have an international legal right to a unique “contemporary” form of self-determination, giving them the right to engage in “belated nation-building”, to negotiate with the others within their State, to exercise control over their lands and resources, and to operate autonomously. This view, however, can be considered as acceptable only if understood according to a “positive” perspective, in the sense that it is to be intended as an *added* prerogative to the ones usually recognized by international law as linked to self-determination. It therefore does not preclude indigenous peoples from being beneficiaries of the general right to self-determination as granted to *all* peoples by general international law and common Article 1 of the U.N. human rights Covenants of 1966, to be operationalized through the provisions of UNDRIP.

UNDRIP provides a platform for indigenous peoples and States worldwide to address the right of indigenous peoples to self-determination. Because indigenous peoples are numerous and diverse, the implementation and application of Article 3 should not be uniform. But the language in Article 3 will be important in facilitating the

⁶⁷ See E.-I. A. DAES, “The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples”, 14 *St. Thomas Law Review*, 2001, 259, p. 263 f.

⁶⁸ *Ibid.*, p. 265. See also J. CASTELLINO, “Territorial Integrity and the ‘Right’ to Self-Determination: An Examination of the Conceptual Tools”, 33 *Brooklyn Journal of International Law*, 2008, 503, p. 561 f.

⁶⁹ See Communication No. 276/2003, *cit.*, para. 157.

⁷⁰ S. WIESSNER, “Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples”, 41 *Vanderbilt Journal of Transnational Law*, 2008, 1141, p. 1176.

⁷¹ *Ibid.*, p. 1175.

⁷² See H. HANNUM, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia, 1990, p. 103.

⁷³ See, *inter alia*: Article 5, which states that indigenous peoples have the right to maintain and strengthen their distinct cultural institutions while retaining their right to participate in the cultural life of the State; Article 8, which provides that indigenous peoples shall not “be subjected to forced assimilation or destruction of their culture”; Article 11, which affirmatively states that “[i]ndigenous peoples have the right to practise and revitalize their cultural traditions and customs”; Article 14, affirming that indigenous peoples have the right to control their language and educational systems; Article 15, which emphasizes that “[i]ndigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information”; Article 16, recognizing that indigenous peoples have the right to their own media in their own languages; and Article 36, which protects indigenous peoples’ rights to maintain cultural relations across international borders.

ability of indigenous peoples, who have been marginalized for so long, to live their lives in conformity with the values that are important to them.

4. Autonomy or Self-Government*

This Section examines the collective rights of autonomy and political participation recognized by UNDRIP. The rights to representative government, to consultation and participation, and to autonomy or self-government are examined in the context of the *telos* of UNDRIP and the international law on indigenous peoples, with special reference to the right of indigenous peoples to self-determination, *i.e.* the right to exercise effective control over those aspects of social, economic and political life that give expression to their distinct identities. Rights of political participation have both an instrumental value in helping to promote the development of good and effective public policy positions and an intrinsic value in promoting individual and group well-being. The instrumental value lies in the inclusion and appropriate consideration in the domestic legal order of the interests and perspectives of indigenous peoples. The intrinsic value of political participation lies in its ability to give expression to the individual and collective aspects of self-determination, as individuals and communities engage with the political system to demand that the laws, regulations and policies that regulate social, economic and political life are consistent with their own identities, interests and expectations. The act of political participation expresses one important element of the identity of indigenous individuals and communities, expressed in terms of public autonomy. The laws, regulations and policies that emerge from political processes in the context of which the right of indigenous peoples to autonomy is exercised establish the framework of law norms that structure their social existence within the State give realization to individual or collective self-determination. The rights of autonomy or self-government, therefore, find expression in the participation and/or consultation in the rule-making of the State. In relation to indigenous peoples, these rights are to be understood in three contexts: their ability to influence the law- and decision-making processes of the State; the chance of being devolved the exercise of State legislative and administrative functions concerning their internal affairs; and the recognition by the State of indigenous political and legal institutions and acceptance of the legitimacy of the regulation of the lives of communities in accordance with indigenous laws, traditions and customs. These are all aspects of the right of indigenous peoples to self-determination, which is especially linked to autonomy or self-government for the latter are functional to give expression and ensure the safeguarding and promotion of the distinctive identities of indigenous peoples, including the element of the relationship to land and natural environment, allowing such peoples to transmit and recreate their cultural identity from generation to generation.

In “operational” terms, the proper realization of the right to autonomy or self-government presupposes the fulfilment of a number of requirements. First, realization of the principle of representativeness is to be granted, in the sense that governmental institutions must include representatives of indigenous peoples, in the framework of constitutional negotiations and in both the legislative body and the executive power. For example, the Committee on the Elimination of Racial Discrimination (CERD) has emphasized the importance of participation by indigenous peoples’ freely chosen representatives in any process of constitutional negotiation, recommending respect for the principle of free, prior and informed consent in those negotiations.⁷⁴ Also, the Human Rights Committee (HRC) has affirmed the need for States parties to the ICCPR to ensure that persons belonging to minorities are represented in relevant decision-making processes, and that failure to fulfil this requirement may translate into a denial of the right to enjoy a distinctive culture, amounting to a breach of Article 27 of the Covenant.⁷⁵ As for State practice, the use of reserving seats to indigenous peoples in national parliaments is not uncommon; Colombia, Fiji, New Zealand and Venezuela represent only some examples of this practice.⁷⁶ The right of participation in the national government also presupposes the right of indigenous peoples to have their interests and perspectives adequately represented in relevant decision-making processes, taking into due account the distinctive aspect of the rights of indigenous peoples, *i.e.* their collective nature. State authorities must engage with the representatives of indigenous peoples in any decision-making process. Those representatives must be chosen by indigenous peoples in accordance with their own procedures, and States cannot impose a

* This Section is based on a Report written by STEVEN WHEATLEY.

⁷⁴ See Letter to Nepal, 13 March 2009, available at <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Nepal130309.pdf>, last visited on 4 December 2009.

⁷⁵ Article 27 ICCPR states that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. See *Ilmari Länsam et al v. Finland (No. 1)*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 of 8 November 1994; *Ilmari Länsam et al v. Finland (No. 2)*, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 of 22 November 1996; *Mahuika et al. v New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 of 15 November 2000.

⁷⁶ See, on this issue, A. REYNOLDS, *Electoral systems and the protection and participation of minorities*, London, Minority Rights Group, 2006, *passim*.

particular form of organization that is “alien to their practices, customs and traditions” where this would impact on the electoral participation of indigenous candidates.⁷⁷

Also, specific norms must be introduced within the national legal system that take into account the interests, expectations and identities of indigenous peoples. This translates into an obligation for the State to consult with indigenous peoples in relation to policy proposals that will impact on their rights and ways of lives. S. James Anaya has stressed that a generally accepted principle exists in international law that indigenous peoples should be consulted “as to any decision affecting them”; this norm of customary international law is reflected, *inter alia*, in Articles 6 and 7 of ILO Convention No. 169 and is generally accepted by both United Nations treaty supervisory bodies and States.⁷⁸

Not least, the idea of self-government and autonomy of indigenous peoples is also to be understood in terms of allowing the communities concerned to organize their social, economic and political life through their own laws, customs and practices; this is exactly connected with the previously noted existence of a State obligation to recognize the existence of indigenous political and legal institutions and the validity of indigenous laws, traditions and customs.

The elements of autonomy or self-government just referred to find corroboration in the relevant provisions of the UNDRIP. The right in point is specifically contemplated by Article 4, in which it is directly related to the exercise by indigenous peoples of “their right to self-determination”; therefore, the object and purpose of autonomy or self-government is to enable indigenous peoples to “freely determine their political status and freely pursue their economic, social and cultural development”, as provided for by Article 3 UNDRIP. As for the formulation of Article 4, the ordinary meaning of the terms used, *i.e.* “autonomy” and “self-government”, indicates that they are to be understood as coterminous for the purposes of the provision in point; in fact, as indicated by the *Oxford English Dictionary*, “autonomy” is exactly to be intended as meaning “[t]he right of self-government”.

Although Article 4 does not *ipso jure* contain a right to territorial self-government, the latter is to be considered as implicitly encompassed by the provision in point; in fact, in light of the extent to which the social, economic and political life of indigenous peoples is connected to land, it appears unreasonable that the effective guarantee of the right to autonomy or self-government may be achieved without some recognition of control by indigenous peoples of the lands and territories that they have traditionally owned, occupied or otherwise used or acquired. Indeed, control over traditional lands is the key feature of indigenous peoples’ autonomy, conceived as an element of self-determination. In this respect, James Anaya and Siegfried Wiessner affirm that the idea of self-determination means “at least the recognition of indigenous peoples’ control over their people within their lands”; this conclusion is supported by widespread State practice.⁷⁹ To an equivalent extent, Marc Weller refers to the idea of autonomy as “self-governance of a demographically distinct territorial unit within the state”.⁸⁰

As for the scope of autonomy or self-government, it is guaranteed by Article 4 in “internal and local affairs” (not excluding other areas of the life of the society). The idea of “internal affairs” may be taken to refer to the organization of social, economic and political life by indigenous peoples, as well as to the exercise of government function by state institutions under the control of indigenous peoples.

Finally, the provision in point affirms that indigenous peoples have the right to the “ways and means for financing their autonomous functions”; this indicates that the effective guarantee of the right to autonomy or self-government requires adequate funding. There are in principle various means through which this requirement can be implemented, including the possibility of local forms of taxation or the direct grants of funds by the national government; in many cases, given that persons belonging to indigenous peoples are often marginalized in economic terms, the provision of funds by the government may be required.

⁷⁷ See Inter-American Court of Human Rights (IACHR), *Yatama v. Nicaragua*, Series C No. 127, judgement of 23 June 2005, para. 218. See, on this case, M. S. CAMPBELL, “The Right of Indigenous Peoples to Political Participation and the Case of *Yatama v. Nicaragua*”, 24 *Arizona Journal of International and Comparative Law*, 2007, p. 499 ff.

⁷⁸ See S. J. ANAYA, “Indigenous peoples’ participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights indigenous peoples have in lands and resources”, 22 *Arizona Journal of International and Comparative Law*, 2005, 7, p. 7. As for UN treaty supervisory bodies see, *e.g.*, CERD, General Recommendation XXIII on the rights of indigenous peoples, adopted on 18 August 1997, para. 4(d), in which the Committee called upon States Parties to “ensure that indigenous peoples can participate effectively in public life and that decisions affecting their rights are made with their informed consent”.

⁷⁹ ANAYA & WIESSNER, “The UN Declaration on the Rights of Indigenous Peoples”, *cit.*

⁸⁰ M. WELLER, “Towards a general comment on self-determination and autonomy”, UN Doc. E/CN.4/Sub.2/AC.5/2005/WP.5 of 25 May 2005, p. 5.

Article 5 UNDRIP includes two aspects that relate to rights of political participation: the right of indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, and the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. As for the first of these rights, it is to be noted that the article in point does not expressly contemplate any right to *create* institutions; this prerogative, however, can be considered as subsumed within the right of indigenous peoples to “determine their political status” that is part of their right to self-determination. Since the concept of “institution” is not defined by the provision in point, it can be given an open-ended meaning to include the regulation of the social, economic and political life through the laws, traditions and customs adopted or recognized by the political and legal institutions of indigenous peoples. States have a general duty of non-interfering in the workings of these institutions, on the condition that they respect basic human rights standards.

As for the second aspect dealt with by Article 5 – *i.e.* the right of indigenous peoples to participate in the political, economic, social and cultural life of the State – it is in line with the general rule of international human rights law according to which all citizens enjoy rights of political participation on the basis of equality. The right in point includes both a negative aspect, *i.e.* non-interference in its enjoyment, and a positive aspect, requiring the State to introduce the necessary measures to guarantee the effective enjoyment of the rights of political participation. The expression “if they so choose”, included in the text of the norm, is to be understood as affirming the prohibition on the State to compel the participation of indigenous peoples in the political and other spheres of the life of the State, confirming the absolute prohibition of forced assimilation under international law.

Another provision of the UNDRIP pertinent to the present Section is Article 18, establishing that indigenous peoples “have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”. The provision in point does not command States to ensure the participation of indigenous peoples in decision-making according to any specific procedure. Therefore, the modalities of participation may vary according to a number of factors, *i.e.* the constitutional structure of the state or the demographic characteristics of the indigenous peoples concerned. What is essential, in any event, is that the participation of indigenous peoples in matters which would affect their rights is *effectively* ensured. For participation to be *effective* two elements must be met. The first is of procedural character, consisting in allowing indigenous peoples to be actually able to participate in decision-making processes; this may require, *e.g.*, that relevant information is made available to indigenous peoples in their own languages, as well as that mechanisms and institutions are available for participation and indigenous peoples are made aware of their existence. The second element is of substantive nature: the idea of effective political participation is demonstrated through the capacity to influence the outcomes of decision-making processes. It is finally important to stress that Article 18 recognizes a collective right of participation *only*; individuals belonging to indigenous peoples enjoy more limited rights of political participation (guaranteed by international human rights law and the law on minorities), but the right to participate in decision-making processes that affect the rights of indigenous peoples is accorded to the group as a collectivity.

Article 18 is strictly intertwined with Article 19, which requires States to “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”. The purpose of this provision is to ensure that States exercise government functions in a way that avoids unjustified interferences in the ways of life of indigenous peoples. Like Article 18, Article 19 establishes a collective right: the giving or withholding of consent is determined by the indigenous people (as a collectivity), according to the rules and procedures determined by the group itself. The key element of the provision in point rests in the obligation for States to obtain from the indigenous group concerned a consent that is *free* (*i.e.*, given without any form of coercion or undue influence), *prior* (*i.e.*, given *before* the adoption or implementation of the relevant measure) and *informed*. The latter requirement is of particular significance in order to ensure that, before giving their consent, the community concerned is *effectively aware* of the possible effects that the measure to be taken is suitable of producing with respect to its interests. The proper realization of this requirement may imply the need that indigenous peoples have all information – made available to the peoples concerned in a easily comprehensible form and language – that are necessary to arrive at a position on a policy proposal. Finally, it is disputable whether the requirement for States to *obtain* their free, prior and informed consent before adopting a measures that may affect them implies that indigenous peoples have a real *right of veto* in relation to the adoption of the measures concerned or, rather, simply presupposes that States have only a duty to consult in good faith with indigenous peoples with the objective of reaching a consensus. In this respect, while the ideas of democracy and political equality of citizens would suggest that no individual or group within the society should be provided with a veto over legislation with majority support, this conclusion is inconsistent with the recognition of collective rights of indigenous peoples. In addition, the existence of the right of veto in

favour of indigenous peoples seems to be confirmed by the object and purpose of UNDRIP, as shown by other provisions included in its text,⁸¹ as well as by pertinent international practice.⁸²

In establishing that “States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used”, Article 27 is another provision of the UNDRIP that is pertinent to the right of autonomy or self-government. It is to be noted that the use of the adjective “due”, associated with “recognition”, implies that States are not obliged to give recognition to the laws of indigenous peoples *tout court*, but “only” to give them the proper or rightful recognition. In any event, as expressly stated by the last sentence of the provision in point, “[i]ndigenous peoples shall have the right to participate” in the process aimed at recognizing and adjudicate their rights over their lands, territories and resources.⁸³

Article 34 UNDRIP establishes that indigenous peoples “have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”. Although not expressly stated, it is implicit in this provision that States have an obligation to recognize the laws, traditions and customs of indigenous peoples, providing they are consistent with “international human rights standards”. The latter expression is not defined by Article 34; however, in order to understand its meaning it is possible to rely on Article 1 UNDRIP, which, in defining the human rights to which indigenous peoples are entitled, expressly refers to the Charter of the United Nations, the *Universal Declaration of Human Rights* and international human rights law, hence including all human rights standards enshrined by the main pertinent international treaties as well as customary international law. A more restrictive interpretation, preferable in order to assure a wider range of cultural diversity and a parallelism with human rights obligations States are bound to observe in the absence of treaty commitments, would conceive of the pertinent “international human rights standards” as only those standards forming part of customary international law or inderogable human rights treaty law.

Finally, Articles 35 and 36 are also relevant to the present Section. As for the former, in establishing that “[i]ndigenous peoples have the right to determine the responsibilities of individuals to their communities”, it echoes Article 9 para. 1 of ILO Convention No. 169.⁸⁴ Article 36, on its part, affirms the right of indigenous peoples, particularly “those divided by international borders, [...] to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders”, as well as the duty of States, “in consultation and cooperation with indigenous peoples, [to] take effective measures to facilitate the exercise and ensure the implementation of this right”. This provision confirms a position widely adopted by other relevant international instruments,⁸⁵ aimed at avoiding the deleterious consequences that the establishment of State boundaries has on the life of indigenous people belonging to the same cultural community that are divided by international borders. States should therefore facilitate the contacts between these people, *e.g.* through recognizing the right to maintain and develop cross-border contacts with other indigenous peoples in their domestic law as well as through taking any other appropriate measure to facilitate such contacts, including inter-State agreements at the bilateral and/or multilateral level (as it has happened with the *Nordic Sami Convention* between Finland, Norway and Sweden).

In general terms, those writers that have examined the status of the right of indigenous peoples to autonomy or self-government under customary international law have concluded that its status of principle of general

⁸¹ See *e.g.*, Article 10, providing that “[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned”; Article 29 para. 2, according to which “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 32 para. 2, which states that “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”.

⁸² See, *e.g.*, Article 16 of the proposed *Nordic Saami Convention*, according to which “states shall not adopt or permit measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society, unless consented to by the Saami parliament concerned”; ACHPR, Communication 276/2003, *cit.*, paras. 281 and 291.

⁸³ On Article 27 UNDRIP – discussed under the perspective of land rights – see also *infra*, Section 6.

⁸⁴ Article 9 para. 1 of ILO Convention No. 169 states that “[t]o the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected”.

⁸⁵ See, *e.g.*, Article 32 of ILO Convention No. 169, which establishes that States “shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields”. See also Article 43 of the *Nordic Saami Convention*, concerning reindeer husbandry across national borders.

international law is widely confirmed by state practice⁸⁶ and by the evidence of the requisite *opinio juris*.⁸⁷ States are therefore obliged to recognize the right of indigenous peoples to autonomy or self-government – which finds expression in their own political and legal institutions, structured and managed in accordance with their own laws, traditions and customs – in the context of national law. This recognition can take place either in the form of ad hoc provisions included in the national Constitution or ordinary law (as made by a number of States, including Bangladesh, Bolivia, Colombia, Ecuador, Finland, Denmark, Kenya, Mexico, Namibia, Norway, Philippines, Sweden, and Venezuela) or through a formal treaty, agreement or constructive arrangement between the State and indigenous people concerned affirming the right to autonomy or self-government of the latter.⁸⁸

5. Cultural Rights and Identity**

Throughout history, patterns of cultural violence against indigenous peoples have included seizure of their traditional lands, expropriation and commercial exploitation of their cultural objects without their consent, misinterpretation of indigenous histories, mythologies and cultures, suppression of their languages and religions and even their forcible removal from their families and denial of their identity.⁸⁹ Recent years have witnessed the development of new practices of violating indigenous cultures; in particular, with the emergence of ‘modernisation’, States and international corporations have started expanding their activities into regions previously considered remote and inaccessible, including many indigenous territories. While on the one hand indigenous activism brought publicity about the occurring violations, on the other hand it renewed the interest for acquiring indigenous arts, cultures and sciences, eventually resulting in the commercialization of indigenous cultures. A new wave of tourism has also disrupted indigenous historical and archaeological sites. Moreover, biotechnology and demand for new medicines have intensified the interest in traditional botanology and medicine, resulting into misappropriation of indigenous traditional knowledge and biopiracy.⁹⁰ The recognition of the rights of indigenous peoples to determine their own identity and maintain and develop their cultures is deeply rooted in indigenous self-determination. In recent times these principles have been the main quest of the indigenous transnational movement, at a time when cultural rights and the protection of group identity have become very topical in international human rights law debates.⁹¹ It is therefore of no surprise that the protection of identity and culture are so prominent in the whole text of the UNDRIP, which is considered an important tool for reversing the past and, in some cases, ongoing repression of indigenous identities and cultures.

Article 7 UNDRIP, after stating that “[i]ndigenous individuals have the rights to life, physical and mental integrity, liberty and security of person”, affirms at paragraph 2 the collective right of indigenous peoples “to live in freedom, peace and security as distinct peoples”, as well as that they “shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group”. The rules set up by the two paragraphs of Article 7 correspond to well-established standards of customary international law – as well as, in the case of the right to life, part of the prerogatives arising from the right to physical and mental integrity (*i.e.* freedom from torture and similar treatment) and freedom from genocide, *ius*

⁸⁶ See the practice described *infra*, Section 12. Anaya and Wiessner conclude that State practice reflects the “very widespread agreement” that indigenous peoples “hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice” (see ANAYA & WIESSNER, “The UN Declaration on the Rights of Indigenous Peoples”, *cit.*).

⁸⁷ See S. WIESSNER, “Rights and Status of Indigenous Peoples”, *cit.*, p. 127; F. LENZERINI, “Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples”, 42 *Texas International Law Journal*, 2006, 155, p. 186 f.; S. WIESSNER, “Indigenous Sovereignty: A Reassessment in Light of the UN Declaration On The Rights Of Indigenous Peoples”, *cit.*, p. 1156 ff.; M. WELLER, “Settling Self-Determination Conflicts: Recent Developments”, 20 *European Journal of International Law*, 2009, 111, p. 116. A recent monograph on the protection of groups in international law also concluded that “there is sufficient proof of State practice and *opinio juris* among States to suggest the existence of a right to autonomy for indigenous peoples in international law”; see N. WENZEL, *Das Spannungsverhältnis zwischen Gruppenschutz und Individualschutz im Völkerrecht*, 2008, p. 508.

⁸⁸ See, *e.g.*, the agreements on autonomy in relation to the Yatama people of the Atlantic Coast in Nicaragua (see Article 1(1), *Basic Preliminary Accords Between the Government of Nicaragua and the Organization Yatama*, 2 February 1988, available at <<http://cwis.org/fwdp/Americas/yatama.txt>>, last visited on 4 September 2009).

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⁸⁹ See R. J. COOMBE, “The properties of culture and the politics of possessing identity: Native claims in the cultural appropriation controversy”, 6 *Canadian Journal of Law and Jurisprudence*, 1993, 249, p. 272.

⁹⁰ See E.-I. A. DAES, “Study on the protection of the cultural and intellectual property of indigenous peoples”, UN Doc. E/CN.4/Sub.2/1993/28 of 28 July 1993, para. 18 ff.; F. LENZERINI, “Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge”, in F. FRANCONI and M. SCHEININ (eds.), *Cultural Human Rights*, Leiden, 2008, p. 119 ff.

⁹¹ See A. XANTHAKI, “Multiculturalism and International Law: Discussing Universal Standards”, 32 *Human Rights Quarterly*, 2010, p. 21 ff.

cogens – granted to, respectively, *all* individuals (paragraph 1) and peoples (paragraph 2). The meaning of the term “genocide” is to be drawn from the 1948 UN *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention),⁹² which is universally recognized as setting up the standards defining the characters of the crime in point under general international law. As is well known, the scope of genocide in the 1948 Convention is limited to physical and biological scope only, not including ethnocide or cultural genocide; consistently, Article 7 UNDRIP avoids referring to other acts which indigenous peoples have often been victims of, such as “ecocide”, *i.e.* “adverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations”.⁹³ It is to be noted that, although the forcible removal of children from a group to another group is already included in the Genocide Convention, it is also explicitly included in Article 7, as it reflects well-documented experiences of many indigenous children who were taken away from their families forcibly and without the consent of their parents and were adopted by non-indigenous families; an infamous example of this practice is offered by the case of the Australia’s *Stolen Generation*,⁹⁴ for which the Australian government has publicly apologized in 2008.⁹⁵

A separate provision of UNDRIP – *i.e.* Article 8(1) – affirms the right of indigenous peoples and individuals “not to be subjected to forced assimilation or destruction of their culture”. The following paragraph requires States to “provide effective mechanisms for prevention of, and redress for” certain acts of cultural genocide or ethnocide, providing a list that, however, is only illustrative of the acts that constitute forced assimilation and destruction of indigenous cultures.⁹⁶ The expressions “cultural genocide” and “ethnocide” are not mentioned in the final text of the article in point, which instead refers to “forced assimilation and destruction of their culture”. The latter expression, however, includes all elements of ethnocide, as defined by the 1982 UNESCO *Declaration of San José*, *i.e.* “the denial to an ethnic group of its right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually”.⁹⁷ The expression in point also covers the scope that the Secretariat of the Genocide Convention gave to cultural genocide.⁹⁸

The prohibition of indigenous peoples’ forced assimilation and destruction of their culture falls within the scope of a number of provisions included in international human rights treaties. First, it lies at the core of Article 27 ICCPR. In fact, in order for the members of minorities to be able to enjoy their culture as prescribed in Article 27, the specific characteristics of the group should not be destroyed; similarly, any action that deprives indigenous peoples of their cultural values or ethnic identity constitutes a breach of Article 27 ICCPR. Also, Article 1.1 of the 1966 *International Convention against All Forms of Racial Discrimination*⁹⁹ proclaims that any distinction, exclusion or restriction based on race that has the purpose or effect of nullifying the enjoyment of human rights in the cultural life is prohibited. Furthermore, Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) expressly protects the right to culture.¹⁰⁰

Two subsequent articles of the UNDRIP deal with the issue of indigenous membership, *i.e.* Articles 9 and 33, which are closely related to each other. They recognize the following rights: the right of indigenous individuals

⁹² 78 UNTS 277. See, in particular, the list of the acts of genocide provided for by Article 2.

⁹³ See “Revised and updated report on the question of the prevention and punishment of the crime of genocide”, prepared by Mr. B. Whitaker, UN Doc. E/CN.4/Sub.2/1985/6 of 2 July 1985, p. 17, para. 33.

⁹⁴ See *Bringing Them Home*, Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Australia, April 1997, available at <http://www.hreoc.gov.au/social_justice/bth_report/report/content_page_full.html> (last visited on 18 April 2010).

⁹⁵ See the formal apology issued by the Prime Minister of Australia on 12 February 2008, available at <http://www.janesoecania.com/australia_aborigines_children/index1.htm> (last visited on 18 April 2010).

⁹⁶ On this provision see *infra*, Section 11.

⁹⁷ See *Declaration of San José*, adopted by the UNESCO Experts on Ethno-development and Ethnocide in Latin America, UNESCO Doc. FS 82/WF.32 (1982).

⁹⁸ See the Secretariat’s draft in UN Doc. A/362, in GAOR, 2d session, 6th Committee, Summary Records, 16 September-26 November 1947, Annex 3: “[d]estroying the specific characteristics of the group by (a) forced transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of a group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or the prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersal of documents and objects of historical artistic or religious value and of objects used in religious worship”.

⁹⁹ 660 UNTS 195.

¹⁰⁰ Although this article does not specifically address sub-national cultures, the Committee on Economic, Social and Cultural Rights (CESCR) has recently affirmed that the “strong 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”; see General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21 of 21 December 2009, para. 36. The CESCR has also expressly quoted Article 8 and other provisions of the UNDRIP (see *ibid.*, particularly para. 3, footnote 9).

to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned, with no discrimination of any kind arising from the exercise of such a right; the collective right of indigenous peoples to their existence as a group, arising from the right to determine their own identity or membership in accordance with their customs and traditions; the right of indigenous individuals to obtain citizenship in the State where they live; and, finally, the collective right of indigenous peoples to determine the structures and select the membership according to their own procedures.

The right of the individual to belong to an indigenous group has been one of the least controversial rights recognised in UNDRIP, and is firmly established in international law. For example, the HRC has ruled that the individual can be considered a member of an indigenous group irrespective of whether the State has set other criteria for such recognition.¹⁰¹

The right of indigenous peoples to determine membership in their community is more controversial. It has indeed attracted quite a lot of criticism, as there are concerns that membership rules may not comply with the international human rights standards. However, this right is consistent with the underlying overall aim of UNDRIP to give indigenous peoples control over the matters that affect them as much as to confirm the respect that the international community has for indigenous identities and systems. In any case, even though Article 33 does not include any specific requirement that the right of indigenous peoples to determine their own membership must be “in accordance with international human rights standards” (contrarily to Article 34, concerning the right of indigenous peoples to promote, develop and maintain their institutional structures and their distinctive customs), this condition is to be considered as an implicit requirement of all UNDRIP provisions. In fact, Article 46(2) states that “[i]n the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected”. Therefore, an indigenous group cannot impose upon an individual the obligation to be indigenous. Also, the duties that an indigenous community would require of its members must comply with international human rights standards.¹⁰² However, apart from the non-derogable rights, when different human rights are a stake simultaneously, *e.g.* rights of the community *vs.* rights of community members, they must be properly balanced in order to ascertain how and to what extent both rights can be accommodated, or, when this is not possible, which rights prevail over the other in the case at hand. The need for this balance is confirmed by the wording of Article 46(2) itself, according to which:

The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and *strictly necessary* solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the *just and most compelling requirements* of a democratic society.¹⁰³

In *Lovelace*, the HRC confirmed that any restrictions of rights must have both a reasonable and objective justification and be consistent with other human rights.¹⁰⁴ As argued by Anaya, any assessment about a cultural practice must allow a certain deference for the group’s “own interpretive and decision-making processes in the application of universal human rights norms, just as states are accorded such deference”.¹⁰⁵

A key provision in terms of cultural rights and identity is Article 10 UNDRIP, affirming the right of indigenous peoples not to be “forcibly removed from their lands or territories”. This addresses the practice, quite common in the past, of removing indigenous peoples from their territories mainly for economic and development reasons, with tremendous consequences for their physical and cultural survival.¹⁰⁶ Article 10 goes further than the equivalent provision included in ILO Convention No. 169, *i.e.* Article 16, which establishes a general prohibition on all removals that are not carried out in accordance with the Convention; the decision whether the removal is necessary, however, seems to be left to the State, although it can be effectuated only “as an exceptional measure” and, when the free and informed consent of the community concerned cannot be obtained, only by “following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide for the effective representation of the people concerned”. Article 10 UNDRIP, on the other hand, makes the requirements to obtain “the free, prior and informed consent of the indigenous peoples concerned” and to reach an “agreement on just and fair compensation” mandatory for the State in order to justify

¹⁰¹ See *Lovelace v. Canada*, Communication No. R.6/24 (1981), para. 14.

¹⁰² See A. EIDE, “Rights of Indigenous peoples. Achievements in international law during the last quarter of a century”, in 4 *Caldu Gala Journal of Indigenous Peoples Rights*, Special Issue on The UN Declaration on Indigenous Peoples, 2007, 82, 74-75.

¹⁰³ Emphasis added.

¹⁰⁴ See *Lovelace v. Canada*, para. 16.

¹⁰⁵ See S. J. ANAYA, “International Human Rights and Indigenous Peoples: The Move Towards the Multicultural State”, 21 *Arizona Journal of International and Comparative Law*, 2004, 13, p. 26.

¹⁰⁶ See “Transnational investments and operations on the lands of indigenous peoples”, Report of the Centre on Transnational Corporation submitted pursuant to Sub-Commission resolution 1990/26, UN Doc. E/CN.4/Sub.2/1994/40 of 15 June 1994.

any measure of relocation. Both Article 10 UNDRIP and Article 16 of ILO Convention No. 169 provide for the option of return, where possible.

In general terms, international law allows for the restriction of the freedom of movement and residence. For instance, Article 12 (3) ICCPR allows restrictions “which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant”; similar restrictions are enumerated in other international instruments. In this respect, States tend to justify relocations of indigenous peoples on the basis of the development of the economic life of the State. However, one has to keep in mind that the limitation clauses of human rights must be interpreted restrictively; therefore, the mere development of the economic life of the State does not constitute an adequate reason to bring such negative changes to a group’s life.¹⁰⁷ This position is confirmed by the case-law of the IACHR, which has repeatedly affirmed the right of indigenous peoples to return to the lands they have been removed from or, when it is not possible, to receive adequate reparation.¹⁰⁸

The core provisions of UNDRIP concerning cultural rights are undoubtedly Articles 11-13. Article 11 focuses on the right to practise and revitalize indigenous peoples’ cultural traditions and customs (including “the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature”) and customs. Article 12 affirms the rights of indigenous peoples “to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies”; “to maintain, protect, and have access in privacy to their religious and cultural sites”; “to the use and control of their ceremonial objects”; as well as “to the repatriation of their human remains”. Finally, Article 13 focuses on the indigenous intangible heritage, stressing that “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons” (paragraph 1) and requiring States to “take effective measures to ensure that this right is protected” and “to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means”. The right to culture and its importance for the identity and the development of individuals and communities is widely recognized by international treaties¹⁰⁹ and jurisprudential or para-jurisprudential practice.¹¹⁰ However, in the event that a conflict arises between the collective right of indigenous peoples to control their cultures and individual rights over the products of such cultures (also in favour of non-indigenous persons, e.g. the right of all individuals to enjoy the benefits of scientific and medical progress), a balance is to be drawn in light of the specific situation of the instant case, giving particular weight to the fact that culture is an essential feature of the identity of indigenous peoples.

¹⁰⁷ See, e.g., Principle 6.2 of the *Guiding Principles on Internal Displacement* (Guiding Principles), UN Doc E/CN.4/1998/53/Add.2 of 11 February 1998, according to which “displacement is arbitrary ‘in cases of large-scale development projects that are not justified by compelling and overriding public interests’”; the same document adds that State authorities must ensure that all other feasible alternatives are explored and displacement shall last no longer than required and that the free and informed consent of those displaced is sought; finally, the Guiding Principles include a particular obligation to protect against the displacement of indigenous peoples and other groups with a special dependency on and attachment to their lands (see principles 6-9).

¹⁰⁸ See, e.g., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Series C No. 125, Judgment of 17 June 2005, para. 148; *Case of the Moiwana Community v. Suriname*, Series C No. 124, Judgment of 15 June 2005; *Case of the Saramaka People v. Suriname*, Series C No. 172, Judgment of 28 November 2007. The latter decision was interpreted by the UN Special Rapporteur on Indigenous Issues as implying that the State has the duty not to adopt a measure forcing indigenous peoples away from their lands without the agreement of the community concerned, as this measure would have substantial impact that may endanger the indigenous nation’s physical and cultural well-being (see Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, Addendum: Summary of cases transmitted to Governments and replies received, UN Doc A/HRC/9/9/Add.1 of 15 August 2008, Annex 1, paras. 39-40).

¹⁰⁹ See *inter alia*, the 2003 UNESCO *Convention on the Safeguarding of Intangible Cultural Heritage* and the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, both available at <http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html> (last visited on 19 April 2010); Article 2 ILO Convention No. 169 (affirming the duty of States to promote “the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions”); Article 15 ICESCR; Article 5(e)(vi) of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

¹¹⁰ See, e.g., HRC, General Comment No. 23, “Article 27: Rights of Minorities”, UN Doc. CCPR/C/21/Rev.1/Add.5 of 8 April 1994, para. 7; CERD, General Recommendation XXIII, para. 4(a); IACHR, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, Ser. C No. 116, judgment of 19 November 2004, recognizing that the deaths of women and elderly who were traditionally the oral transmitters of the Mayan Achí culture interrupted the passage of cultural knowledge to future generations, and the militarization and repression after the massacre resulted in the indigenous peoples’ loss of faith in their traditions.

Another provision relevant to this Section is Article 31 UNDRIP, affirming the right of indigenous peoples “to maintain, control, protect and develop”: their cultural heritage, traditional knowledge and traditional cultural expressions; the manifestations of their sciences, technologies and cultures, “including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts”; as well as, “their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”. States must take effective measures to recognize and protect the exercise of these rights “[i]n conjunction with indigenous peoples”. The most notable feature of this provision is probably the comprehensiveness of the concept of “cultural heritage”, as encompassing “everything that belongs to the distinct identity of a people and which is theirs to share, if they so wish, with other peoples”.¹¹¹ Article 31 UNDRIP moves forward with respect to the traditional approach of international law concerning the right to take part in cultural life (provided for, *inter alia*, by Article 15(1) ICESCR) and the protection of the economic aspects of cultural productions (particularly intellectual property rights); the right of indigenous peoples to maintain, control, protect and develop their cultural heritage is in fact to be conceived under a holistic and spiritual perspective and safeguarded accordingly as an essential element of indigenous peoples’ identity as well as an indispensable prerequisite for the actual realization of their collective and individual rights.

Finally, Article 34 UNDRIP stresses that indigenous peoples have the right to “promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices”, as well as their juridical systems or customs, “in accordance with international human rights standards”. The latter expression overlaps with the general human-rights-based “limitation clause” included in Article 46(2) UNDRIP, already referred to *supra* in this Section. The right affirmed by Article 34 finds confirmation in several provisions included in human rights treaties, *e.g.* Article 27 ICCPR, Article 2(2) of the *International Convention against All Forms of Racial Discrimination*¹¹² and Article 22 ACHPR, according to which all peoples “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”.

6. Land Rights[♦]

Traditional lands, territories and resources are of existential importance to indigenous peoples.¹¹³ As the Inter-American Court of Human Rights has stressed,

the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy [...] to preserve their cultural legacy and transmit it to future generations.¹¹⁴

The UNDRIP provisions on lands, territories and resources were fought for, in effect, over many centuries, and blood and tears were spilled in the process. Along with the right to self-determination, they are the most important and contested provisions in the Declaration, and are the most explicit and comprehensive in international law in comparison with other pertinent instruments. There were no amendments to the lands, territories and resources provisions in the UNDRIP during the final and particularly contested year of negotiations in the General Assembly between October 2006 and September 2007, while there have been, for example, amendments to the self-determination provisions. This reflects the level to which the land rights provisions were accepted by the international community. However, three apparent ambiguities underlie the Declaration’s lands, territories and resources articles.

First, there is no accepted definition of indigenous peoples’ lands, territories and resources in international law. While international and domestic jurisprudence evidences a trend to include indigenous peoples’ relationships

¹¹¹ See “Study on the protection of the cultural and intellectual property of indigenous peoples”, by Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1993/28 of 28 July 1993, para. 24.

¹¹² According to this provision, States parties must take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms”.

[♦] This Section is based on a Report written by CLAIRE WINFIELD NGAMIHI CHARTERS.

¹¹³ As has been noted, it is the relationship that Indigenous peoples have with their lands, territories and resources that defines them; see J. MARTINEZ COBO “Study of the Problem of Discrimination against Indigenous Populations”, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 of 28 June 1983, paras. 379-80. See, also, *inter alia*, KINGSBURY, ““Indigenous Peoples’ in International Law”, *cit.*

¹¹⁴ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Ser. C No. 79, judgment of 31 August 2001, para 149.

with lands, territories and resources as “property” under international and domestic law,¹¹⁵ it has been difficult to use non-indigenous languages and legal texts to fully and accurately describe those relationships. Indigenous peoples have objected to terms such as property, ownership, control and possession – also in associated verbal forms – because they do not always adequately explain what many perceive as, for example, a personal affiliation with an ancestor, relative or deity. The terms “owned, occupied or used” were employed in UNDRIP for the pragmatic reason of the need for some expression. Indigenous peoples have also found problematic concrete terms such as lands, territories and resources, which unemotionally express what many indigenous peoples understand as Mother Earth. Thus, indigenous peoples’ “lands, territories and resources” must be interpreted broadly, consistently with their own understanding of “the whole of the symbolic space in which a particular indigenous culture has developed, including not only the land but also the ‘sacred landscape’ that corresponds to their world view”.¹¹⁶

Second, indigenous peoples’ right to lands, territories and resources that they continue to possess and control is now recognized as a matter of general international law. At the same time, the extent of indigenous peoples’ rights to lands, territories and resources that they traditionally possessed and controlled, but no longer possess and control, is apparently less clear, especially when those lands, territories and resources are now owned, as a matter of State law, by non-indigenous individuals or other indigenous groups. Unlike the strong lands, territories and resource rights of indigenous peoples who were able to retain their lands, indigenous peoples who have lost their lands have weaker claims to their lands under the UNDRIP,¹¹⁷ being further penalized for the injustice they suffered from the original loss of their lands. However, this anomaly has been addressed in the Declaration negotiations through the inclusion of Article 27 to require that States establish processes to adjudicate disputes over indigenous peoples’ lands, territories and resources rights, including those traditionally owned, occupied or used. In addition, the scope of application of the right to redress contemplated by Article 28 UNDRIP for the lands of which indigenous peoples have been deprived also extends to situations occurred in the past.¹¹⁸ An equitable interpretative approach to international human rights, coupled with one that emphasizes the indigenous peoples’ right to self-determination, commands that a robust interpretation be given to all indigenous peoples’ rights to lands, territories and resources, including to the lands, territories and resources indigenous peoples no longer possess.

Third, in some cases the extent of indigenous peoples’ rights to their natural resources remains contested and the UNDRIP provisions do not wholly clarify relevant international law. However, the rights of indigenous peoples over the said resources are strongly reinforced by the fact that the latter usually represent an essential element of these peoples’ cultural identity.

Article 10 UNDRIP prohibits the forcible removal of indigenous peoples from their lands or relocation without their free, prior and informed consent and agreement on just and fair compensation including, where possible, the option of return. The tense of the verbs in this article, as well as its context, suggest that it relates only to proposed removals or relocations post the adoption of the Declaration, not applying retrospectively. However, evolving international law, influential under a pragmatic interpretative approach, suggests that indigenous peoples continue to have rights to their lands, territories and resources from which they been removed in the past providing that lands are not yet in the ownership of third parties who acquired their title through good faith processes. Contentious issues arising during negotiations on Article 10 included the appropriate exceptions, if ever, to the prohibition against removal and relocation without consent. The wording ultimately agreed upon clearly provides a blanket prohibition on removal and the requirement of consent for relocation. This interpretation is reinforced by a comparison to wording from analogous provisions in the ILO Convention 169, which permit relocation without consent as an exceptional measure, and the practice of the CERD.¹¹⁹ The lack of express exceptions in Article 10 may not, however, prevent removals or relocations in cases of necessity or *force majeure*, permissible under international law generally. Indeed, exceptions for rather unlikely events such as “war and catastrophe” were presaged by some States during the *travaux préparatoires*.¹²⁰ Emerging international

¹¹⁵ See, for example, see *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.

¹¹⁶ A. REGINO MONTES and G. TORRES CISNEROS, “The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, State and Societies”, in C. CHARTERS and R. STAVENHAGEN (eds.), *Making the Declaration Work: The Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen, 2009, 138, p. 161.

¹¹⁷ See A. ERUETI, “The Demarcation of Indigenous Peoples’ Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law”, 23(3) *Arizona Journal of International and Comparative Law*, 2006, p. 543 ff.

¹¹⁸ See *infra*, Section 11.

¹¹⁹ See, in particular, General Recommendation XXIII.

¹²⁰ “Report of the Working Group Established in Accordance with Commission on Human Rights resolution 1995/32” UN Doc E/CN.4/1997/102 of 10 December 1996, para. 180.

law from the UN, Inter-American and African human rights systems, as well as, increasingly, domestic law,¹²¹ reflect the normative agreement reached in Article 10 in that they also require legal security of indigenous peoples' lands, territories and resources.

Article 25 UNDRIP affirms the right of indigenous peoples 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 and to uphold their responsibilities to future generations in this regard". This provision clearly applies to lands, territories and resources that indigenous peoples owned, occupied and/or used historically, even if they no longer own, occupy or use them at present, and speaks of the right to maintain and strengthen their spiritual relationship with those lands. The significant difference between the Declaration text as adopted by the General Assembly and the one initially drafted was that the reference to indigenous peoples' "material" relationship to historically owned, occupied and used lands was dropped at the insistence of States. They were concerned to protect, amongst other matters, the rights of non-indigenous citizens where they legally own, occupy or use the lands today. It is difficult to state with certainty the activities indigenous peoples are entitled to undertake, under Article 25, on or associated with the historically owned, occupied or used lands, territories and resources with which they have a spiritual relationship. In some cases, access over the lands, territories and resources will be essential, as well as prohibitions on access to others. Context, taking into account the spiritual relationship in question, will determine much, and indigenous peoples' perceptions should matter most. States may seek to limit the full extent of Article 25 in the interests of non-indigenous individuals' human rights, under Article 46(2) UNDRIP, but only to the extent they meet the criteria set in this Article.

Article 26 is arguably the most important provision of the UNDRIP dealing with lands, territories and resources. The most contentious paragraph, Article 26(1), expresses the general right of indigenous peoples to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired in the past, while Article 26(2) expresses their right to own, use, develop and control the lands, territories and resources they possess currently. The least contentious third paragraph expresses States' obligations to "give legal recognition and protection to these lands, territories and resources", which applies the rights under both paragraphs 26(1) and 26(2). Article 26(3) goes on to make clear that "State recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".

An ordinary interpretation of Article 26(1) suggests that indigenous peoples have expansive rights to the lands, territories and resources they once owned, occupied and/or used but have now lost, especially as there is no express limitation on the right within the paragraph itself. Moreover, read in the light of Article 25, it is clear that the right to those lands, territories and resources now lost must exceed the maintenance and strengthening of indigenous peoples' spiritual relationship with such lands; otherwise Article 26(1) would be redundant. This conclusion is reinforced by the wording of Article 28, which, as previously emphasized, provides for a right to redress in favour of indigenous peoples also for the taking of their lands occurred in the past. A purposive interpretation of Article 26(1) leads to a similar conclusion, as it demands that the right to historically "lost" lands, territories and resources be robust, given the oftentimes glaring unfairness and discrimination that has led to indigenous peoples' loss of their lands, territories and resources. On the other hand, in consideration of the express reference to ownership in relation to lands currently possessed in Article 26(2) together with the inclusion of Article 27 as a trade-off for deleting the reference to ownership in relation to lands not still possessed by indigenous peoples, the interpretation that the right to lands "lost" under Article 26(1) may be less than full ownership could be advanced.

As for Article 26(2), an ordinary and purposive reading of it unambiguously expresses indigenous peoples' right to own, use, develop and control the lands, territories and resources that they possess, including communally-held lands, territories and resources under indigenous customary norms. Article 26(2) is confirmed in, and reflects, a vast range of other international instruments, such as ILO Convention 169, and developed jurisprudence, including that of the Inter-American Commission and IACHR,¹²² the ACHPR,¹²³ the UN Human Rights Council, the HRC,¹²⁴ the CERD,¹²⁵ UN experts,¹²⁶ UN Special Rapporteurs on indigenous peoples'

¹²¹ See, for example, Article 231(5) of the Brazilian Constitution of 1988, and the *Law of Indigenous Rights and Culture* of the Mexican State of Chiapas of 1999.

¹²² See, for example, *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Series C No. 146, judgement of 29 March 2006; *Case of the Indigenous Community Yakye Axa v Paraguay*; *Case of the Saramaka People v. Suriname*.

¹²³ See, for example, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

¹²⁴ See, especially, *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984 of 26 March 1990, Report of the Human Rights Committee, vol II (1990) UN Doc A/45/40; see also, e.g., Human Rights Committee "Concluding Observations on the United States of America", UN Doc. CCPR/C/USA/CO/3 of 15 September 2006.

related issues,¹²⁷ ILO adjudicatory bodies and, in many cases, domestic law. Indeed, today the right in point can be reasonably considered as being part of customary international law, as evidenced by extensive and consistent state practice as well as *opinio juris*, especially in Latin America,¹²⁸ but also in former Anglo-Commonwealth colonies.¹²⁹ This practice also supports the Article 26(3) State obligations to legally demarcate and delimit indigenous peoples' land rights. The most contentious interpretative difficulties associated with the application of Article 26(2) include questions about the extent of control indigenous peoples must have over lands, territories and resources to be considered to possess them. For example, do indigenous peoples have full Article 26(2) rights over lands, territories and resources they utilize only periodically? Do indigenous peoples possess resources they are unable to access but that reside within their lands and territories, and despite State assertions of ownership of minerals, oil and gas? International law is increasingly supporting (either directly or indirectly) positive answers to these questions, such as that expressed by the IACHR in the *Saramaka* decision, where it held that the Saramaka peoples have the right to resources used by them and on which they rely on for their physical and cultural survival.¹³⁰

Article 27 UNDRIP requires States to establish and implement processes recognizing and adjudicating the rights of indigenous peoples to their lands, territories and resources, including those that were traditionally owned or otherwise occupied or used. It includes requirements that the process be fair, independent, impartial, open and transparent as well as inclusive of indigenous peoples and that it gives due recognition to indigenous peoples' laws, traditions, customs and land tenure systems. A purposive interpretation of Article 27 (and Article 28)¹³¹ indicates that such processes should generously address indigenous peoples' rights to lands, territories and resources lost to them in the past. Moreover, Article 27 is considerably more demanding than equivalent provisions in ILO Convention 169, also in its requirements for fairness, independence, impartiality and transparency, illustrating a deliberate attempt on the part of the UNDRIP drafters to create a robust right. There is some evidence of domestic attempts to implement processes to recognize and adjudicate indigenous peoples' rights to their lands, territories and resources,¹³² which suggests the evolution of customary international law in this field.

According to Article 29(1) UNDRIP, indigenous peoples have the right "to the conservation and protection of the environment and the productive capacity of their lands or territories and resources"; in this respect, States are required to "establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination". The ensuing paragraph affirms that States must take "effective measures to ensure 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". Finally, Article 29(3) contemplates the duty of States to "take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly

¹²⁵ See, in particular, General Recommendation XXIII; see also Decision 1(53): Australia, UN Doc. A/53/18 of 11 August 1998; Concluding Observations: Brazil, UN Doc. CERD/C/64/CO/3 of 12 March 2004; Decision 1(66): New Zealand Foreshore and Seabed Act 2004, UN Doc. CERD/C/66/NZL/Dec.1 of 11 March 2005; and Prevention of Racial Discrimination including Early Warning Measures and Urgent Action Procedures: Decision 1(69) Surinam, UN Doc. CERD/C/Dec/Sur/3 of 18 August 2006.

¹²⁶ For example, see Report on the Expert Seminar on Indigenous peoples' permanent sovereignty over natural resources and their relationship to land, UN Doc. E/CN.4/Sub.2/AC.4/2006/3 of 5 May 2006.

¹²⁷ One of many examples includes Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen submitted in accordance with Resolution 2001/57: Mission to Guatemala, UN Doc. E/CN.4/2003/90/Add.2 of 24 February 2003.

¹²⁸ See, e.g., Columbian Special Decree Nr 2164 (7 December 1995) regulating Chapter XIV of the Agrarian Law; Article 57 of the Ecuadorian Constitution of 2007; Article 231 of the Brazilian Constitution of 1988; Article 30 of the Bolivian Constitution of 2009; Article 119 of the Venezuelan Constitution of 1999; Chilean Indigenous Law No 19.253 of 1993; Articles 62-64 of the Constitution of Paraguay of 1992; Costa Rican Ley 6172; Article 89 of the Nicaraguan Constitution of 1987; Article 27 of the Mexican Constitution of 2001. For a general overview as of 1999, see S. WIESSNER, "Rights and Status of Indigenous Peoples", *cit.*, p. 74 ff.. See also S. JAMES ANAYA and ROBERT A. WILLIAMS, JR., "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System", 14 *Harvard Human Rights Journal*, 2001, p. 33 ff.

¹²⁹ Examples include *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (Australia); *Delgamuukw v British Columbia* (1997) 3 *Supreme Court Reports* 1010, (1998) 37 *ILM* 261 (Canada); *Ngati Apa v Attorney General of New Zealand* [2003] 3 NZLR 643 (CA) (New Zealand); *Aurelio Cal et al v Attorney General of Belize* (Claim 171, 2007) (Belize); *Alexor Limited v Richtersveld Community and Ors* (2003) (12) BCLR 1301 (CC) (South Africa). See C. CHARTERS, "Developments in Indigenous Peoples' Rights under International Law and Their Domestic Implications", 21 *New Zealand University Law Review*, 2005, p. 511 ff.; see also S. M. STEVENSON, "Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand", 32 *Fordham International Law Journal*, 2008, p. 298 ff.

¹³⁰ See *Case of the Saramaka People v. Suriname*.

¹³¹ See *infra*, Section 11.

¹³² For example, the Waitangi Tribunal process and Treaty settlements process in Aotearoa/New Zealand, the treaty settlements processes in Canada and the Indian Claims Commission in the USA.

implemented”. There are few overly ambiguous components in Article 29, as is reflected by the relatively few changes made to these paragraphs during negotiations from 1993 until 2007. States attempted to lessen their obligation to provide “assistance” to indigenous peoples for the conservation and protection and productive capacity of their lands, territories and resources by changing the language to “assistance programmes”, although the impact of this change is linguistically and practically minimal. Moreover, it must be borne in mind that States have environmental obligations generally under international law.

Article 30(1) UNDRIP sets out a general prohibition against military activities on indigenous peoples’ lands and territories, with three exceptions: where it is justified by a significant threat to a relevant public interest, or it is agreed to, or requested by, the relevant indigenous peoples. Article 30(2), applicable to all three of the exceptional circumstances in Article 30(1), requires States to undertake effective consultation with indigenous peoples, including through representative institutions, prior to using their lands or territories for military purposes. It functions as an additional condition, which must be met before military activities can be conducted under any of the Article 30(2) exceptions on indigenous peoples’ lands and/or territories. The use of indigenous peoples’ lands and territories for military activities is a contentious issue on the international legal plane, seen in, for example, complaints to UN treaty bodies and to the Inter-American human rights system, which have upheld indigenous peoples rights to their lands and territories.¹³³ States unsuccessfully expressed their desire to be unfettered in their military activities on indigenous peoples lands in both UNDRIP negotiations and in their explanations of vote.

Finally, according to Article 32(1) UNDRIP indigenous peoples have the right to determine and develop strategies for the development or use of their lands, territories and other resources. In accordance with Article 32(2), States must consult and cooperate with indigenous peoples 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. Under Article 32(3) States must provide effective mechanisms for just and fair redress for any Article 32(2) activities and appropriate measures must be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact. While a relatively straightforward interpretation of Article 32(1) is possible, the language used, and meaning of, Article 32(2) is controversial, reflected in the failure of the 1995-2006 WGDRIP to achieve consensus and ongoing jurisprudential attention to the meaning of free, prior and informed consent. Article 32 was contentious because it brings to the fore some of the most pressing contemporary concerns for indigenous peoples: competing States’ and indigenous peoples’ claims to natural resources. Many States legally assume national ownership, or at a minimum control, over natural resources, contrary to indigenous peoples’ claims to ownership and control, and seek to exploit indigenous peoples’ resources, sometimes with the help of private corporations. The tensions behind Article 32(2) led to the somewhat confusing incorporation of State consultation obligations, usually somewhat lesser than the need for consent, together with a requirement to obtain indigenous peoples’ free, prior and informed consent. The linguistic opacity over whether indigenous peoples’ consent is always absolutely necessary before proceeding to resource projects, or must only be sought, is largely answered by the negotiating history. The Chair of the WGDRIP, in coming up with compromise language ultimately accepted by the General Assembly, rejected language that States only “seek” indigenous peoples’ consent, instead opting for the “obtain” requirement. However, some States – namely New Zealand, Australia, Canada, Sweden and Columbia – also expressly rejected any interpretation of Article 32(2) that would give indigenous peoples a veto over national resource development in their explanation of vote. Numerous international bodies have been engaged in jurisprudentially influential activity to elaborate on the meaning of free, prior and informed consent, such as the IACHR,¹³⁴ the ACHPR,¹³⁵ the UN Human Rights Council,¹³⁶ the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples and the UN Permanent Forum on Indigenous Issues.¹³⁷ It has become clear that all consultation should be undertaken with the objective of obtaining indigenous peoples’ free, prior and informed consent and that, especially in cases of large-scale development or investment projects that would have a major impact on indigenous peoples’ territories, consent is *necessary*. Moreover, consultation must be undertaken in good faith, with the participation of indigenous representatives, and the State must provide all relevant information well in advance of the decision-making

¹³³ See CERD, Decision 1(68): United States of America, UN Doc. CERD/C/USA/DEC/1 of 10 March 2006; Inter-American Commission of Human Rights, *Mary and Carrie Dann*, Case 11.140 (United States), Report 75/02 of 27 December 2002.

¹³⁴ See *Case of the Saramaka People v. Suriname*.

¹³⁵ See, ultimately, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

¹³⁶ See, for example, UN Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review: New Zealand, UN Doc. A/HRC/WG.6/5/L.7 of 11 May 2009.

¹³⁷ See, e.g., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, UN Doc. A/HRC/12/34 of 15 July 2009; UN Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc. E/C.19/2005/3 of 19 January 2005.

process.¹³⁸

7. Education and Media ♦♦

The rights of indigenous peoples re education and media are contemplated by three independent, yet interrelated articles of UNDRIP: Articles 14, 15 and 16. These articles realize some of the basic purposes and principles of UNDRIP, as articulated in its Preamble. They include, *inter alia*, the need to address “historical injustices” (including “doctrines, policies, and practices” that promote “superiority of peoples or individuals”), to respect and promote cultural “diversity and richness,” to ensure that “indigenous families and communities retained shared responsibility for the upbringing, training, education and well-being of their children,” and to reaffirm “the fundamental importance of the right of self-determination of all peoples”.

Article 14 articulates individual and collective rights to education. This includes the right of indigenous peoples to develop and control educational systems that are consistent with their linguistic and cultural methods of teaching and learning. It also includes the right of indigenous individuals to have access to these or other similarly situated educational systems or programs. In addition to promoting and protecting indigenous ways of learning and teaching, the article in point articulates a more general right of non-discriminatory access to all levels and forms of education within the State, thereby ensuring that indigenous pupils are placed on an equal footing with non-indigenous pupils. Finally, it ensures that any action that a State takes with respect to the education of indigenous individuals is done in partnership with indigenous communities.

The first paragraph of Article 14¹³⁹ is most importantly an expression of self-determination in education. Both UN human rights covenants refer to the right of all peoples to “freely determine their political status” as well as to “freely pursue their economic, social and cultural development”.¹⁴⁰ Education is a key aspect of a people “freely” determining and achieving these ends. Article 14(1) involves two aspects of self-determination: the first is the right of indigenous peoples to be in charge of the creation and control of any new schools serving their communities, as well as the right to take over the management of schools already in existence in their communities; secondly, paragraph (1) recognizes the right of indigenous peoples to provide an education in their indigenous languages and within their indigenous cultures. The language of Article 14(1) includes both the right to develop and maintain non-governmental schools, as well as exercising control and authority over the creation and control of government-funded schools serving indigenous communities.

Article 14(2) is specifically related to the right of non-discrimination in all levels and forms of education offered by the State. In doing so, it does not merely comprise the right of indigenous pupils to attend any and all existing State schools. Rather, indigenous pupils have the right to receive education to the same extent and of the same quality as non-indigenous pupils. This implies that, because different pupils have different backgrounds and needs, schools that offer exactly the same services to all pupils do not necessarily produce the result of placing all individuals on an equal footing once their education is completed. Therefore, State responsibility toward indigenous peoples does not end with merely facilitating the unrestricted admission of indigenous pupils to all existing State schools. Rather, education must “adapt” to the particular needs and best interests of each child.¹⁴¹ In order to truly eradicate discrimination and provide indigenous students with “the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community”,¹⁴² States need to ensure that State-funded education is tailored to “enable and assist” indigenous pupils to enjoy the benefits of education to the same extent as other pupils.¹⁴³ Therefore, the focus under paragraph (2) is on “eliminat[ing] [...] inequalities in educational *outcomes* for [indigenous] children and young people”.¹⁴⁴ The meaning of the term “equal opportunity” is not necessarily limited to a student having an equal chance at competing for a slot in a school or within the educational system as a whole, but rather that the schooling provided to this student equips

¹³⁸ See, e.g., *Case of the Saramaka People v. Suriname*.

♦♦ This Section is based on a Report written by LORIE GRAHAM.

¹³⁹ “Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning”.

¹⁴⁰ See Article 1 common to the ICESCR and the ICCPR.

¹⁴¹ See MARTINEZ COBO, “Study of the problem of discrimination against indigenous populations”, paras. 70-74.

¹⁴² See Article 26 of ILO Convention No. 169.

¹⁴³ Schools are required to adapt themselves to the needs of the pupil, rather than the pupil having to adapt himself to whatever schooling is available. See “Annual Report of the Special Rapporteur on the Right to Education”, UN doc. E/CN.4/2002/60 of 7 January 2002, para. 30; CESCR, “General Comment No. 13, Article 13”, UN doc. E/C.12/1999/10 (1999), para. 47.

¹⁴⁴ World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Programme of Action, Agenda item 9, adopted on September 8, 2001 in Durban South Africa, UN doc. A/CONF.189/5 (2001), para. 123(e) (emphasis added).

her to succeed in society to the fullest extent of her potential.¹⁴⁵ Thus, in order to meet the goals of preparing indigenous pupils for a blended way of life that allows them to function in and (if necessary) outside of their indigenous communities, State curricula will need to incorporate indigenous ways of knowing and learning in addition to general knowledge and skills needed for survival outside of the indigenous community.¹⁴⁶ Accordingly, non-discrimination in the education of indigenous pupils includes at minimum curricula and teaching methods relevant to and consistent with the cultural and linguistic needs and concerns of students and their families.

The third and final paragraph of Article 14 requires States to take affirmative steps to ensure that the full right of education is fulfilled with respect to indigenous peoples and individuals. Thus, paragraph (3) of Article 14 represents the practical application of the first two paragraphs. First, it requires that States take affirmative action to ensure that indigenous pupils have access to linguistically and culturally appropriate education. Second, any action that States take relating to the education of indigenous individuals must be in partnership with the affected communities. This would include such things as consulting with indigenous communities on the development and planning of new educational programs in the wider educational system, as well as the development of educational programs and systems within the communities themselves.

Article 15 overlaps with Article 14 in that it speaks about the elimination of inaccurate, prejudicial, and distorted information in textbooks and other educational materials. In particular, it states that indigenous peoples have the right to have “their cultures, traditions, histories, and aspirations [...] appropriately reflected in education”. Similar to Article 14, States are required under Article 15 to work with indigenous peoples not only to combat prejudice and discrimination in education, but to actively develop educational tools that “promote tolerance, understanding, and good relations among indigenous peoples and all other segments of society”. Article 15 extends this duty of non-discrimination and promotion of cultural pluralism to all public information, not just educational materials.

The right to the dignity and diversity of culture, as articulated in Article 15, encompasses more than the right of peoples to practice and transmit their customs, traditions, and belief systems to future generations. It is an acknowledgement that “all peoples and individuals constitute one human family, rich in diversity” and that this diversity should be protected and promoted in schools and other informational settings.¹⁴⁷ Thus, education and information are seen as two key means of achieving important cultural diversity rights for indigenous peoples. However, Article 15 goes one step further, pairing the language of rights with a movement to identify and advance mutual interests among indigenous peoples and other segments of society. In this respect, education, media and other sources of information are primary means by which non-discrimination, tolerance, understanding and good relations between and among societal groups can be promoted. Chief Justice Yazzie, of the Navajo Supreme Court, perhaps summed it up best when he said “[i]f we do not understand each other, if we do not know the culture or the history of each other, it is difficult to see the value and dignity of each other societies”.¹⁴⁸

Article 16 UNDRIP articulates a right to media within the context of such international human rights rules as freedom of expression, access to information and non-discrimination. Within these well established norms, States have a duty to ensure that indigenous cultural diversity is duly reflected in non-indigenous media. Since media is one primary way in which information concerning indigenous peoples is conveyed to other sectors of society, it serves as an important link to a State’s duty of non-discrimination and the promotion of cultural pluralism – through the preservation and transmission of indigenous language and culture – under Article 15. Moreover, consistent with the self-determination principle, indigenous peoples have the right to establish their own media in their own language and the corollary right of non-discriminatory access to all forms of non-indigenous media. These aspects of Article 16 are consistent with Article 14 in that they ensure access to culturally relevant information and help to promote and protect indigenous languages and cultures. Article 16 is thus a necessary mechanism to guarantee that the human rights of indigenous peoples are respected. Media, as the most ubiquitous means of mass communication, is the conduit through which all peoples exercise the right to freedom of expression and right to information. And, as such, the development of indigenous media is essential to and inseparable from indigenous peoples’ enjoyment of freedom of expression and right to information.

¹⁴⁵ See Committee on the Rights of the Child (CRC), “General Comment No. 1, article 29(1)”, UN doc. CRC/GC/2001/1 (2001), para. 3.

¹⁴⁶ See Articles 28(2) and 29 of ILO Convention No. 169; Art. 13(1) ICESCR.

¹⁴⁷ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31- Sept. 8, 2001, *Durban Declaration and Programme of Action*, UN doc. A/CONF.189/12 of 8 September 2001, para. 6.

¹⁴⁸ See L. DRISCOLL, “Tribal Courts: New Mexico’s Third Judiciary”, 32 *N.M.B. Bulletin*, 18 February 1993, at A5 (quoting Chief Justice Yazzie).

Media has a crucial role in combating discrimination. For decades, radio, television, print media, music and all of the many other forms of media have been dominated by non-indigenous voices to the exclusion of indigenous voices. Furthermore, media has been utilized by both State and private actors to promote assimilation of indigenous peoples with the resulting marginalization of indigenous communities. Such discriminatory practices, whether deliberate or not, have significantly undermined indigenous cultural integrity, language and self-determination. In order to redress these past and in some cases ongoing discriminatory practices, indigenous-run media must be supported and nurtured.

All the three articles in point reflect themes prevalent throughout the UNDRIP, such as the understanding that universal human rights extend to both the individual and the collectivity. Moreover, these three articles suggest an important interpretation of “rights” in which the ideas of equality and access in education and media within a State is consistent with indigenous peoples’ rights to different ways of knowing and learning and speaking. States are duty bound not only to respect these differences, but to actively promote tolerance and understanding of these differences throughout societies generally. At the same time, all the three articles are aimed at correcting injustices against indigenous peoples in terms of their treatment in the educational process, in the media, and in the wider society generally. Throughout history, education of indigenous peoples has been used by many countries as a tool of forced assimilation and cultural destruction; also, stereotypic and even racist portrayals of indigenous peoples have been perpetuated throughout non-indigenous societies in the media and elsewhere, often backed or tacitly approved by governments themselves. Thus, the articles in point take on a special meaning and purpose in terms of redressing wrongs (such as forced assimilation or discrimination in education, media, and public life), as well as repairing, restoring, and strengthening indigenous communities and cultures.

In recent times, even well before the adoption of the UNDRIP, a number of countries have adopted legislation and established programmes that are consistent with the provisions of Articles 14, 15 and 16. Several Latin American States, including Argentina,¹⁴⁹ Brazil,¹⁵⁰ Colombia,¹⁵¹ Ecuador,¹⁵² Guatemala,¹⁵³ Mexico,¹⁵⁴ Panama¹⁵⁵ and Venezuela¹⁵⁶ have recognized either the right to inter-cultural and/or bilingual education or to education in the mother tongue for indigenous peoples in their constitutions. Bolivia, being the first country to incorporate the provisions of the UNDRIP into national law,¹⁵⁷ has followed the same approach, although the right of national indigenous peoples to receive education in their mother tongue was contemplated earlier. Similar rules are contemplated – if not at the constitutional level – by the legislations of, *inter alia*, Australia,¹⁵⁸ Japan,¹⁵⁹ Malaysia,¹⁶⁰ Nepal,¹⁶¹ New Zealand,¹⁶² Taiwan¹⁶³ and the United States.¹⁶⁴ Furthermore, a number of countries,

¹⁴⁹ See Section 75 of the Constitution.

¹⁵⁰ See Article 210 of the Constitution.

¹⁵¹ See Articles 10 and 68 of the Constitution.

¹⁵² See Article 84(11) of the Constitution.

¹⁵³ See Article 76 of the Constitution.

¹⁵⁴ See Article 2.B.II of the Constitution.

¹⁵⁵ See Article 84 of the Constitution; see also “Derechos de los Pueblos Indígenas, Comparación de Constituciones”, available at <<http://pdba.georgetown.edu/Comp/Derechos/indigenas.html#pan>> (last visited on 1 April 2010).

¹⁵⁶ See Article 121 of the Constitution.

¹⁵⁷ This was made with National Law No. 3760 of 7 November 2007; see R. KEARNS, “U.N. declaration becomes law of the land in Bolivia”, *Indian Country Today*, 10 December, *Bolivia Rising*, available at <<http://boliviaring.blogspot.com/2007/12/un-declaration-becomes-law-of-land-in.html>> (last visited on 1 April 2010).

¹⁵⁸ See, e.g., *Aboriginal Education (Supplementary Assistance) Act* 1989 No. 1 of 1990 (Australia), available at <http://www.austlii.edu.au/au/legis/cth/num_act/aeaa1989454/> (last visited on 1 April 2010); *Indigenous Education (Targeted Assistance) Act* of 2000, available at <[http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/8F84319ED5827F2ACA2570E0000146E6/\\$file/IndigenousEducTargetAssti2000_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/8F84319ED5827F2ACA2570E0000146E6/$file/IndigenousEducTargetAssti2000_WD02.pdf)> (last visited on 1 April 2010).

¹⁵⁹ See *Law for the Promotion of the Ainu Culture and for the Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture*, Law No. 52 of 14 May 1997 (amended in 1999), available at <http://www.fpac.or.jp/eng/e_prf/profile06.html both enacted in 1997> (last visited on 1 April 2010).

¹⁶⁰ See K. J. SMITH, “Minority Language Education in Malaysia: Four Ethnic Communities’ Experiences”, in 6 *International Journal of Bilingual Education and Bilingualism*, 2003, p. 52 ff.

¹⁶¹ See Article 17(1) and (3) of the Interim Constitution.

¹⁶² The Maori language is protected under the Treaty of Waitangi as a *taonga*, a valued Maori treasure. It was made an official language in 1987 and legislation has been adopted implementing bilingual education; see F. DE VARENNES, “Indigenous People and Language”, 2 *Murdoch University Electronic Journal of Law*, 1995, No. 1, p. 7.

¹⁶³ Several provisions establishing that indigenous peoples must be granted educational opportunities shaped according to their cultural identity and values are included in the *Education Act for Indigenous Peoples* of 1998 (available at <http://www.apc.gov.tw/main/docDetail/detail_official.jsp?isSearch=&docid=PA000000000792&linkSelf=231&linkRoot=231&linkParent=231&url=>>) and in the *Indigenous Peoples Basic Law* of 2005 (available at <http://www.apc.gov.tw/main/docDetail/detail_official.jsp?isSearch=&docid=PA000000001795&linkSelf=231&linkRoot=231&linkParent=231&url=>>); both these pages have been visited on 1 April 2010).

¹⁶⁴ See *Native American Languages Act* of 1990, PL 101-477; *Esther Martinez Native American Languages Preservation Act* of 2006, H.R. 4766 [109th].

including New Zealand, Tanzania and Uruguay, have developed ad hoc media networks specifically addressed to indigenous peoples.

8. Social and Economic Improvement Rights^{♦♦♦}

For many of the world's indigenous peoples the impact of colonialism and the consequent loss of autonomy and independence has resulted in their economic exploitation and marginalisation. The loss of control over their resources, the exploitation of those natural resources in ecologically unsustainable fashion, the often brutal and forced use of indigenous labour including systematic abuse of child labour, and similar forms of discriminatory and demeaning behaviours by settlers, authorities and companies have led to economic impoverishment and social harm. The situation is captured in many countries by indicators that measure the gap between economic and social outcomes for indigenous peoples as against the majority of the population. Such gaps cannot only be explained in terms of differing aspirations and a lesser emphasis on material outcomes. They are indicators of real poverty and social distress. In particular, significantly lower life expectancy, low educational attainment, high rates of criminalization, and significant problems such as alcohol and substance abuse and domestic violence are indicators of social harm and dysfunction.

The Preamble to the UNDRIP recognises the historic roots of the economic and social problems confronting indigenous societies, expressing the concern that

indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation 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.¹⁶⁵

However, the positive developments whereby indigenous peoples are taking back into their own hands the task of development are also noted, including economic and social development. Therefore, the Preamble welcomes “the fact that indigenous peoples are organising themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur”.¹⁶⁶

UNDRIP's provisions on socio-economic rights are intensely related to articles concerning other topics. In particular, there is a clear inter-relationship between the articles dealt with in the present Section and those concerning development and international cooperation,¹⁶⁷ to the extent that one set of rights strengthens the objectives of another set. Consequently, it would be advisable to read these two sets of articles together.

The main provisions of UNDRIP concerning economic and social rights are contained in Articles 17, 21, 22 and 24, even though the rights in point are also covered in certain respects by a number of other articles of the Declaration. In general terms it is to be noted that the provisions just listed, typically, contain both negative norms, in particular those prohibiting discriminatory practices, and positive or aspirational provisions looking to constructive outcomes. The latter aspect is captured in characterising the relevant articles as “social and economic *improvement* rights”.

Article 17 UNDRIP deals with labour rights. It represents a particularly important provision, given the central place that the exploitation of indigenous labour has played in the experiences of indigenous peoples since the spread of western colonialism into the New World in the 15th and 16th centuries. It is also a very strong article in the sense of its undoubted status as reflecting well established international law, especially for the reason that the principles established therein are mainly directed toward ensuring protection for certain basic rights at work of indigenous *individuals*, who – as *human beings* – are *ipso facto* entitled to all human rights established by international law. In particular, the sentence included in paragraph 1 of Article 17, in affirming that “[i]ndigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law”, is characterized by a sort of tautological formulation; in fact, to the extent that certain labour rights are recognized by relevant law in favour of individuals, they automatically apply to indigenous individuals as well. Apparently less clear is the reference to “peoples” in this provision. In reality, certain international labour standards are directly or indirectly addressed toward protecting communities. For example, Article 20 of ILO *Forced Labour Convention* No. 29 of 1930¹⁶⁸ affirms that “[c]ollective punishment

♦♦♦ This Section is based on a Report written by TOM CALMA, MEGAN DAVIS, DARREN DICK and GREGORY MARKS.

¹⁶⁵ See sixth preambular paragraph.

¹⁶⁶ See ninth preambular paragraph.

¹⁶⁷ See *infra*, Section 10.

¹⁶⁸ Available at <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (last visited on 17 April 2010).

laws under which a *community* may be punished for crimes committed by any of its members shall not contain provisions for forced or compulsory labour *by the community* as one of the methods of punishment”.¹⁶⁹

Similar considerations can be developed with respect to paragraphs 2¹⁷⁰ and 3¹⁷¹ of Article 17, with respect to which little doubt exists that they reflect well-established international law. As regards paragraph 2, it is to be noted that the requirement that these measures are taken “in consultation and cooperation with indigenous peoples” is clearly an application of the rights to self-determination and autonomy.¹⁷²

Article 21(1) UNDRIP affirms the right of indigenous peoples, without discrimination, to the improvement of their economic and social conditions in the areas, *inter alia*, “of education, employment, vocational training and retraining, housing, sanitation, health and social security”. It represents a key provision with respect to the topic of the present Section, in light of the fact that it is exactly the lack of these rights and the disadvantaged status of indigenous peoples in regard to these rights that are at the forefront of concern with the situation of indigenous peoples. For too long, indigenous peoples have been discriminated against in these central issues. The realization of the right in point is essential in order to ensure the well-being and a fully dignified quality of life in favour of indigenous peoples. Paragraph 2 of Article 21 requires States to “take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions”; in this regard, particular attention is to be paid “to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities”. As with the labour rights encompassed in Article 17, the economic and social rights contained in Article 21 are embedded in virtually all relevant international law instruments, including but not limited to the ICESCR.

Article 22 UNDRIP takes the identification of the special needs of certain vulnerable groups within indigenous society – *i.e.* “elders, women, youth, children and persons with disabilities” – a little further, stressing that these needs must be the object of special attention in the implementation of the Declaration. Special concern is expressed by Article 22(2) with respect to the need of taking special measures “in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination”. The purpose of this article is clearly to emphasize a principle that is undoubtedly part of general international law irrespective of its reiteration in the text of the UNDRIP, that is the right of the specially vulnerable sectors of the society to enjoy special measures of protection. Paragraph 2, in particular, even though in technical terms could be considered redundant as its content is already covered by paragraph 1, is particularly significant in putting the spotlight on a historical shame that has upset indigenous peoples along the last five centuries, *i.e.* racism-based violence and discrimination.

Article 24 UNDRIP has a twofold value. First, it is particularly concerned with health as a key determinant of social well-being; this concern is expressed by a number of sentences included both in paragraph 1 (“Indigenous peoples have the right [...] to maintain their health practices”; “Indigenous individuals also have the right to access, without any discrimination, to all social and health services”) and paragraph 2 (“Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health”). In this respect, according to paragraph 2, States “shall take the necessary steps with a view to achieving progressively the full realization of this right”. In addition, the provision in point expresses a fundamental cultural right of indigenous communities, *i.e.* their “right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals”. Therefore, in addressing an essential element of indigenous cultural identity, Article 24 complements with Article 31, concerning the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.¹⁷³

In conclusion, even though economic and social improvement rights are usually not considered to be as important as some other sets of rights, in particular civil and political rights, for indigenous peoples the recognition, promotion and realization of socio-economic rights is central to reverse the past trend characterized by the innumerable and terrible injustices they have suffered as well as the ongoing consequences in economic deprivation and marginalisation and in social problems and disadvantage. In addition, they represent essential requisites for both the improvement of social and economic conditions of indigenous peoples as well as for their rights to self-determination and non-discrimination to be effective.

¹⁶⁹ Emphasis added.

¹⁷⁰ “States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment”.

¹⁷¹ “Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, *inter alia*, employment or salary”.

¹⁷² See *supra*, Sections 2 and 3 respectively.

¹⁷³ See *supra*, Section 5.

9. Treaty Rights⁺

Article 37 UNDRIP states that “Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties”, as well as that nothing in the Declaration “may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements”. The provision has clearly been inspired by the ignoble practice regularly repeated in the past by several States of concluding treaties with indigenous peoples and subsequently disregarding them as soon as their interest in respecting the treaty obligations laid down. The comprehensible frustration of indigenous peoples for such a reality was epitomized by the renowned “Trail of Broken Treaties March”, the major Native American reaction against the US government’s systematic breaking of treaties, held in Washington, DC in 1975.¹⁷⁴

The practice just referred to, however, has been significantly different in the various States that have developed the practice of concluding treaties with indigenous peoples. For this reason, three case-studies will be considered in the present Section – *i.e.* Canada, New Zealand and the United States of America – in order to demonstrate how the said practice has evolved in different national contexts. However, it is important to stress that Article 37 has far more extensive relevance than just among these three States. European powers negotiated many treaties with indigenous peoples in many other regions. Great Britain, for example, negotiated treaties in its colonies in West Africa, in India and in what is now Malaysia, and elsewhere. Spain also negotiated treaties in parts of Latin America.

Lest it be thought that indigenous treaties are tied solely to the era of colonization, it must be stressed that treaty making remains very active in some jurisdictions. Canada has negotiated nineteen new treaties since 1975 while the Maori and the New Zealand government have achieved a number of treaty settlements to remedy breaches of the treaty of Waitangi over the past two decades.

Article 37 also encompasses “agreements and other constructive arrangements”. These words can include recent developments in both nations without a history of treaties (*e.g.* Indigenous Land Use Agreements (ILUAs) under the Native Title Act (NTA) with Australia) as well as those who have a treaty relationship (*e.g.* treaty settlements in New Zealand since 1992), so long as the agreements include the State as a signatory and not solely private individuals or corporations (thus, many ILUAs in Australia may not obtain UNDRIP protection as they are between traditional owners and mining companies or pastoralists). Implementation of recent indigenous rights jurisprudence can itself lead to agreements that obtain the benefit of Article 37 protection.¹⁷⁵

Canada

Treaty-making has provided the primary vehicle for fostering the process of colonisation for what is now called Canada since the 1600s. It has been the cornerstone for forging the largely peaceful Indian-settler relationship for the past four centuries. However, its enduring benefits have been overwhelmingly one-sided. Treaty-making was the approach preferred by both First Nations and European parties to sort out the essential terms of how colonists and their governments would relate to the original owners of the land throughout most of North America.

Recent judicial interpretations, along with the entrenchment of the protection of treaty rights in Canada’s Constitution in 1982,¹⁷⁶ have resurrected the importance of historic Indian treaties as well as the necessity for new treaties to be negotiated with Indian, Inuit and Métis peoples.

Canada has experienced four distinct eras in which treaties were negotiated: (1) from the earliest days of contact to the American Revolution; (2) from 1790 to independence in 1867; (3) from 1867 to 1930; and (4) the modern era from 1975 to present. The primary focal points of treaty relations in the 1600s and 1700s, and of international or inter-governmental relationships generally among Europeans and Indian Nations at this time, were on trade, military alliances, and peaceful interaction, so as to permit colonies to flourish and to generate maximum economic wealth for the mother countries. Early agreements involved some small land conveyances for trading

⁺ This Section is based on three reports written respectively by BRADFORD W. MORSE (Canada), CATHERINE J. IORNS MAGALLANES (New Zealand) and SIEGFRIED WIESSNER (United States of America).

¹⁷⁴ See V. DELORIA, JR., *Behind the Trail of Broken Treaties*, Austin, 1985; see also the “Trail of Broken Treaties 20-Point Position Paper”, issued by the American Indian Movement (AIM) in Minneapolis on 31 October 1972 and available at <<http://www.aimovement.org/archives/index.html>> (last visited on 22 April 2010).

¹⁷⁵ See, *e.g.*, agreements for autonomy for the Yatama people with Nicaragua, *supra*, note 88.

¹⁷⁶ Section 35(1) of the *Constitution Act, 1982* states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.

posts, military forts and modest colonial settlements, while also establishing a pattern of gift giving. A new wave of treaties, concerning land cession, then began after the American revolution with the significant influx of new settlers in the late 1780s in southern Ontario, with the focus upon acquiring clear legal title to land in a form of property conveyance, in return for a lump sum payment consisting of a combination of money and trade goods. The next significant development in the nature of treaties in Canada occurred through the negotiation of the *Robinson-Huron* and *Robinson-Superior Treaties* affecting the upper Great Lakes region in 1850; not only did these two treaties operate on a far larger geographic scale (affecting more than twice the territory than all prior land surrender treaties combined), but they also introduced the concept of creating Indian reserves for individual communities out of small portions of the territory being surrendered under treaty. These reserves were then set aside after the extinguishment of aboriginal title for the exclusive use of individual Indian communities, while the underlying title was claimed by the Crown. The so-called “number treaties” (numbered from 1 to 11 as they were negotiated from 1871 to 1921) followed the pattern set by the two *Robinson Treaties* of 1850. The written form, in English only, of each treaty involved the surrender of vast tracts of traditional territory by Indian leaders on behalf of their citizens to the Federal Crown. In return they were given promises of the setting aside of small parcels of land as exclusive Indian reserves for particular communities, annual payments to each member, guarantees of continued hunting and fishing rights, and occasionally other benefits (such as schools, farming implements, ammunition, medical supplies, etc). The indigenous version of the treaty negotiations, the oral promises made during the discussions, and the content of the final agreement is consistently asserted to differ dramatically from the “official” text. Few of the Indian participants could anticipate the large-scale settlements that were to occur in many of the treaty areas, or how the influx of farmers and foresters would fundamentally alter the landscape in a way that would virtually destroy the traditional economy in the southern portion of the Prairies in only a few years.

The passage of time led to a significant shift in Federal governmental attitudes as Indian people were thought to face either extinction as a race (in part through the massive death toll from imported diseases) or complete absorption into Canadian society as an underclass of farm workers and domestic labourers. Indian reserves became the vehicle to “smooth the dying pillow” or to serve as a laboratory for social re-engineering and assimilation. This perception was far removed from the days of viewing sovereign Indian Nations as military allies and valuable trading partners. Treaties became viewed over time by non-Aboriginal citizens as anachronistic documents that had outlived their purpose and were neither to be renewed nor replicated elsewhere. All of this was to change, however, with the decision of the Supreme Court of Canada in *Calder v Attorney General of British Columbia*.¹⁷⁷ This case was launched by the Nisga’a Nation of North-western British Columbia as the latest salvo in their century long struggle to have their land rights recognized by the Crown, going to court asserting their rights through the common law doctrine of aboriginal title over their traditional territory. Six of the seven judges of the Supreme Court that addressed the case on its merits concluded that the doctrine of aboriginal title was still good law in Canada, declaring that such a title could only have been extinguished in the absence of a treaty by unilateral federal Crown action. The fallout of this landmark decision was immense, as it compelled a complete reversal of previous federal views and the acceptance that aboriginal title likely still existed in large parts of Canada where no historic treaty had previously been negotiated.

Major modern land claim settlements have been negotiated between the Government of Canada, the relevant provincial or territorial government and the aboriginal titleholders over the past 35 years. These settlements constitute modern treaties that confirm exclusive land rights for the Indian, Inuit and Métis participants of the relevant agreements that exist in Quebec, British Columbia, Yukon, Northwest Territories, Nunavut Territory and Labrador, totalling over 600,000 square kilometres. The ongoing effort of negotiating new treaties in Canada is a long way from conclusion for First Nations and Métis peoples, although the process is now completed for the Inuit. Several from British Columbia are in the ratification stage at present. At the same time, Aboriginal communities in many parts of the country are still struggling for recognition that their traditional territory remains in their exclusive hands. In addition, many First Nations and Métis peoples either cannot persuade the Crown to negotiate with them at all or they are rejecting the treaty model advocated by the federal government as resulting in the confirmation that they have been dispossessed of the vast majority of their traditional territory.

Treaty negotiations have been heavily affected by the jurisprudence that has evolved over the last twenty years in several critical respects. The courts have articulated a clear set of principles that must guide all efforts in interpreting the proper meaning to be given to both historic as well as modern treaties. The Supreme Court has also definitively established the existence of a fiduciary relationship between the Crown and Aboriginal peoples that has received constitutional elevation through section 35 of the *Constitution Act, 1982*. All of the Canadian jurisprudence – developed following treaty conflicts which began to become commonplace since the 1950s – is only willing to regard treaties as domestic and not international agreements. This jurisprudence has been summarized in the leading treaty fishing rights case of *Regina v Marshall (No 1)* in 1999,¹⁷⁸ according to which

¹⁷⁷ [1973] SCR 313.

¹⁷⁸ [1999] 3 S.C.R. 456.

the following are the proper legal guidelines to be used in interpreting treaty provisions: (1) Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation; (2) treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories; (3) the goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed; (4) in searching for the common intention of the parties, the integrity and honour of the Crown is presumed; (5) in determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties; (6) the words of the treaty must be given the sense which they would naturally have held for the parties at the time; (7) a technical or contractual interpretation of treaty wording should be avoided; (8) while construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic; (9) treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way, as they are not frozen at the date of signature, and the interpreting court must therefore determine what modern practices are reasonably incidental to the core treaty right in its modern context.¹⁷⁹ It is important to note, however, that these principles may be subject to modification when interpreting a modern treaty as the Aboriginal party has received the full benefit of legal counsel and is negotiating highly detailed documents through a lengthy period of time in a language with which they are comfortable.

In terms of remedies, there are three distinct fora in which to pursue remedies for the breach of treaty provisions within Canada, although the availability of two is a function of the nature of the agreement allegedly breached. Litigation before the general court system is always available for any lawsuits against the Crown. All but the earliest of the modern land claims treaties contain a dispute resolution mechanism emphasizing consultation and discussion to foster efforts to resolve any disputes on interpretation of terms or actions to fulfil obligations; ultimately, a tripartite arbitration system is the preferred choice set out in detail in the agreements. Finally, specific claim commissions have been established; in particular, the Indian Specific Claims Commission (ISCC) was created in 1991 and, with the passage of the *Specific Claims Tribunal Act* in June 2008,¹⁸⁰ a new independent tribunal has been vested with the power to make binding decisions on the validity of, and compensation for, specific claims. Canada still rejects any access for First Nations to the International Court of Justice.

New Zealand

The situation of Aotearoa/New Zealand is unique in the world, as it represents the only case in which the land was occupied by the colonizing power – the British Crown – by virtue of a treaty concluded with the local indigenous peoples, the Maori. It is the *Treaty of Waitangi*, which was signed on 6 February 1840. It consisted of a preamble and three articles. The preamble recited the purposes for making the Treaty, including the protection of "the native population" from the "evil consequences" of the lack of laws governing settlers. The first article stated that the Maori Chiefs cede sovereignty to the Queen of England. The second article guarantees to Maori "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties [...] as long as it is their wish and desire to retain them". This article also included a British right of pre-emption over Maori lands – *i.e.*, if they wanted to sell their lands, Maori could only sell them to the British Crown, not to settlers directly. The third article grants to Maori all the rights and privileges of British subjects.

The next task was to translate this English text into Maori. Unfortunately, the most experienced translators were not available. The British Resident, Busby, accepted help from a missionary and his son who both spoke Maori but were not experienced at translating. The result was a Maori text which was essentially opposite to the English text – it certainly ceded a lot less to the Queen and retained a lot more for Maori. It has been suggested that the difference was not accidental but deliberate "in order to secure Maori agreement".¹⁸¹ The missionaries who did the translation certainly believed that Maori would be better off under British sovereignty and that it was their task "to help influence the Maori people to surrender sovereignty".¹⁸² In the first article, the Maori version of the Treaty stated that the Chiefs ceded to the Queen only government, not sovereignty.¹⁸³ Further it was not stated in the Treaty how the government would relate to Maori authority over themselves. For example, British government would clearly extend over settlers and include authority over settler crimes against Maori, and probably Maori crimes against settlers. But it did not clearly extend British authority to govern relationships

¹⁷⁹ *Ibid.*, para. 78 (sources deleted).

¹⁸⁰ See <http://www.sct-trp.ca/legis/index_e.htm> (last visited on 22 April 2010).

¹⁸¹ See, for example, C. ORANGE, *The Treaty of Waitangi*, Wellington, 1987, p. 41.

¹⁸² *Ibid.*, p. 39.

¹⁸³ Whereas the English version refers to sovereignty, the Maori word chosen is "*kawanatanga*"; this term does not refer to sovereignty, but literally to governorship. It is to be contrasted with reference to kings and their authority ("*kingitanga*") or chieftanship ("*rangatiratanga*"). In missionary-Maori "*rangatiratanga*" was used to refer to the Kingdom of God. In the 1835 Declaration of Independence by the Maori "*rangatiratanga*" was used to refer to sovereignty. It was also used in an 1840 notice by Captain Hobson to refer to the sovereignty of the Queen.

among and between Maori.¹⁸⁴ In the second article, whereas the English version refers to Maori retaining “full exclusive and undisturbed possession” of their lands and resources, the Maori version refers to Maori retaining “*te tino rangatiratanga*” over their lands, villages and treasures. This phrase refers to the highest or absolute chieftainship, and would be the best Maori term to use to refer to sovereignty. Therefore, the exchange in the Maori version was very different from that in the English version: under the Maori Treaty, Maori retained sovereignty and gave away only limited rights of government. Also in Article 2, the English reference to the right of “pre-emption” was not translated into Maori. The Maori text only referred to the purchase and sale of land which Maori was willing to sell; it did not refer to the Crown’s exclusive right to buy from Maori. Indeed, the reference in Article 3 to Maori having the rights of British subjects would suggest that they had the same right as any other landowner to sell to whomever they wished. The more detailed implications of both Articles 2 and 3 would have needed to be explained separately if Maori were to understand British intentions. The Maori at Waitangi were by no means unanimously in favour of the Treaty – indeed, it appeared that some understood what the British were proposing and strongly opposed it. However, many signatures were obtained around the country and Hobson proclaimed sovereignty over New Zealand in May 1840. English and Maori signed copies of the Treaty were sent back into the Colonial Office in England. Ironically, the Maori copy was said to be the Treaty and the English copy purported to be a direct translation of it.

The Privy Council has ruled that the Treaty of Waitangi is a valid treaty of cession of sovereignty.¹⁸⁵ This recognises that Maori were legally considered capable of holding sovereignty and ceding it to another power. However, under the constitutional system of parliamentary sovereignty adopted in Aotearoa/New Zealand, and pursuant to the dualist approach to international law, the Treaty is unable to be enforced directly in New Zealand courts. The only way to enforce any rights accorded under the Treaty are where those rights are enshrined in domestic legislation. Despite the Treaty being unable to be directly enforced without legislative reference, the domestic courts have upheld the Treaty as having an important status as a founding constitutional document. In 1975 the *Treaty of Waitangi Act* was enacted, establishing the Waitangi Tribunal. The Tribunal has exclusive jurisdiction to interpret the Treaty and to determine whether the Crown behaviour complained of is or is not in breach of “the principles of the Treaty”.¹⁸⁶ The Waitangi Tribunal has determined the principles of the Treaty by first looking at the words used in the texts and “the evidence of the surrounding sentiments, including the parties purposes and goals” at the time.¹⁸⁷ It took the approach that: “[a] Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the treaty transcends the sum total of its component written words and puts literal or narrow interpretations out of place”.¹⁸⁸ The Tribunal has accordingly taken a broad approach to both texts, focusing on the spirit of the Treaty to be derived from the texts and their surrounding circumstances.

Despite the historical shortcomings surrounding the understandings and signing of the Treaty, the Tribunal has upheld the cession of sovereignty by Maori giving the (then British) government the right to make laws for the country. Other key principles determined by the Tribunal include: the principle of mutual benefit whereby both parties should gain from the Treaty; the principle of partnership, whereby the partners “act toward each other reasonably and with the utmost good faith”;¹⁸⁹ the principle of consultation, whereby the Crown should consult the other Treaty partner before making important decisions which concern them; a fiduciary duty to act fairly;¹⁹⁰ Maori autonomy or self-management;¹⁹¹ the right of redress for past breaches; the right to development;¹⁹² and biculturalism.¹⁹³ These principles were determined in response to claims as they arose. It is reasonable to expect that new grievances will arise in the future, thus enabling the Tribunal to develop new principles in order to address them. At the same time as determining the principles, the Tribunal has worked at defining the interests to be protected and determining the priority they should be given. The Maori interests to be protected very clearly include the matters explicitly referred to in the two texts: lands, forests and fisheries. Importantly, the Tribunal has determined that not only are the listed matters protected, but protection should extend to include Maori authority to control them.

¹⁸⁴ In April 1840, Hobson circulated an official notice to northern chiefs, which was translated into Maori. It referred to a certain evil settler who had been stirring up trouble against the sovereignty (translated as “*rangatiratanga*”) of the Queen and guaranteed that the assurances given at Waitangi would be honoured: that Hobson would “ever strive to assure unto you the customs and all the possessions belonging to Maori”.

¹⁸⁵ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

¹⁸⁶ Treaty of Waitangi Act 1975, s. 6(1).

¹⁸⁷ *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Department of Justice, Wellington, 1988), p. 388.

¹⁸⁸ *Report of the Waitangi Tribunal on the Motinui-Waitara Claim*, Wai-6 (Department of Justice, Wellington, 1983), p. 47.

¹⁸⁹ Waitangi Tribunal, *The Ngai Tahu Report 1991*, p. 242 f.

¹⁹⁰ Waitangi Tribunal, *Interim Report on the Rangitāiki and Wheao Rivers Claim*, 1993, p. 4.

¹⁹¹ Waitangi Tribunal, *Te Whanau O Waipareira Report*, Wai-414, 1998.

¹⁹² Waitangi Tribunal, *Te Ika Whenua Rivers Report*, Wai-212, 1993, p. 134; *Ngati Awa Raupatu Report*, Wai-46, 1999; *Radio Spectrum Management and Development Final Report*, Wai-776, 1999.

¹⁹³ Waitangi Tribunal, *The Wananga Capital Establishment Report*, 1999, p. xi.

In the event of breaches of the Treaty of Waitangi there are three types of remedies currently available in New Zealand: a Waitangi Tribunal report on the breaches, which may contain non-binding recommendations for redress; a binding Court order (where reference to the Treaty is legislatively incorporated); and a negotiated settlement with the Crown, giving rise to the creation of modern treaties.

United States of America

Contrary to the overriding principle of acquisition of territory by discovery of a *terra nullius* principle generally employed by the Iberian *conquistadores*, the subjugation of the indigenous peoples on the territory of the present United States of America occurred, to some significant degree, on paper.¹⁹⁴ This pattern of acquiring lands and securing peace and friendship as well as regulating trade by way of formal treaty was followed in North America by, among others, the Dutch, the French, the British and the early American colonists, even the Spanish. Trendsetters were the British who established an extended treaty system on the North American Continent. In a Royal Proclamation of 1763, the British Empire prohibited the grant of land claimed by Indians until the Indian title was acquired by sale or a treaty of cession. Interestingly, in the ensuing battles over colonial land between the British, the French, the Spanish and the Dutch, treaties were made with particular Indian nations to make them useful allies in fights among the colonizing peoples over divvying up the pie of North America. After the United States obtained independence, treaties between the new federal government and Indian tribes were largely used to constrict the latter to ever smaller patches of land, in exchange for solemn guarantees that this would be a final determination as to what land the white man would desire and receive. Sadly, the pressure by settlers in their pursuit of the Manifest Destiny of colonizing the American West led to a legacy of breaches, and ever further constrictions of the living quarters and conditions of Native America as well as relocation of many Indian Nations from the East across the Mississippi river.

The early treaties of the United States with the Indian tribes were concluded for national security purposes to protect U.S. independence and to enlist the help of Native Americans in this effort. Again, these treaties were written in full recognition of the sovereignty of tribal governmental structures, using the language of international law. Since the “State of the Union” at this point was still precarious, the tribes were useful allies, won, by and large, through arm’s length negotiations. They were treated as “relative equals”.¹⁹⁵ The first U.S.-Indian agreement, the 1778 Treaty with the Delaware Nation,¹⁹⁶ clarified the boundaries between the Delawares and the United States, and guaranteed the Delaware Nation’s territory in exchange for mutual assistance and “perpetual friendship”. Chief Justice Marshall characterized this treaty as formed, “in its language and in its provisions [...] as near as may be, on the model of treaties between the crowned heads of Europe”.¹⁹⁷

This period of alliance and friendship treaties essentially ended with the War of 1812. The Treaty of Ghent, concluding this conflict, contained a promise by the United States to Great Britain that it would restore to the Indian nations aligned with the former enemy their political status as it existed prior to that war.¹⁹⁸

As the outside threat receded, and eventually disappeared, domestic pressure upon the Indian communities intensified. Settlers pushed westward, encroaching on ever larger areas of Indian land. The instrument of treaties was now used predominantly to regularize and channel the removal of Indians from their traditional vast hunting and fishing grounds to ever smaller, ever more barren areas of land called reservations. Generally speaking, treaties of removal appear to often have been imposed by force or fraud, tainted by corruption or lack of authority by Indian representatives.¹⁹⁹ In 1980, the United States Supreme Court, in *United States v. Sioux Nation of Indians*,²⁰⁰ per Justice Blackmun, declared the taking of the sacred Black Hills in treaty-guaranteed Sioux territory illegal, arguing that “a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation”.²⁰¹ It also considered “President Grant’s duplicity in breaching the Government’s treaty obligation” relative to the 1868 Fort Laramie agreement with the Sioux, and concluded that the United States Government was guilty of “a pattern of duress [...] in starving the Sioux to get them to agree to the sale of the Black Hills”.²⁰²

¹⁹⁴ This overview draws largely on S. WIESSNER, “American Indian Treaties and Modern International Law”, 7 *St. Thomas Law Review*, 1995, p. 567 ff.

¹⁹⁵ See S. L. PEVAR, *The Rights of Indians and Tribes*, 1992, p. 37 (referring to Chief Justice Marshall’s historical analysis in *Worcester v. Georgia*, 31 U.S. 515, 548 (1832)).

¹⁹⁶ Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13.

¹⁹⁷ *Worcester v. Georgia*, 31 U.S. 515, 550 (1832).

¹⁹⁸ Treaty of Ghent, Feb. 17, 1815, 8 Stat. 218, art. IX.

¹⁹⁹ See C. F. WILKINSON & J. M. VOLKMAN, “Judicial Review of Indian Treaty Abrogation: ‘As Long as Water Flows, or Grass Grows Upon the Earth’. How Long a Time Is That?”, 63 *California Law Review*, 1975, 601, p. 610.

²⁰⁰ 448 U.S. 371 (1980).

²⁰¹ *Ibid.*, p. 388.

²⁰² *Ibid.*

In 1871, a rider to the *Indian Appropriations Act*²⁰³ ended the practice of making treaties with Native Americans.²⁰⁴ By then, the United States government and Indian tribes had entered into more than 800 treaties; the Senate, however, had approved only 370 of them.²⁰⁵ At the time of their conclusion, all of the treaties prior to 1871 appeared to have the nature, as well as force and effect of international legal obligations. Eventually, the Judicial Branch of the US Government worked its way up to final recognition of the international law character of these commitments in Justice Marshall's famed trilogy of Indian law cases: *Johnson v. M'Intosh*,²⁰⁶ *Cherokee Nation v. Georgia*,²⁰⁷ and *Worcester v. Georgia*.²⁰⁸ Marshall was particularly clear in *Worcester*:

The constitution, by declaring treaties already made, as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.²⁰⁹

Later case law and administrative judgment confirmed this understanding,²¹⁰ although the development of the plenary power doctrine by the US Supreme Court has largely validated Congressional authority to infringe upon tribal sovereignty and even terminate tribal existence to a largely unlimited degree.

The U.S. courts, however, have developed a jurisprudence tailored to American Indian treaties that departs from the standard application of international legal norms regarding validity, interpretation and termination of treaties. In particular, they have decided to fashion three special canons of construction that reflect the historic circumstances of often unilateral imposition of these obligations: Indian treaties should be construed as the Indians would have understood them;²¹¹ ambiguous expressions must be resolved in favour of the Indians;²¹² and treaties must be liberally construed in favour of the Indians.²¹³ This special treatment under domestic law could be based on Chief Justice Marshall's rejection, in *Cherokee Nation*, of the designation of Indians as "foreign nations", preferring to call them "dependent domestic nations".²¹⁴ The fact that Marshall distinguished between Indian tribes and foreign nations, however, does not make the treaties concluded with the Indians instruments of domestic law. Chief Justice Marshall clarified this in *Worcester*, when he affirmed the equal nature of treaty commitments to Indians and treaties with any other foreign nation.²¹⁵ In addition, it may be argued that, even if the Indian nations lost their character as "sovereign states" between 1776 and 1871, the obligations under their treaties as normative commitments under international law did not disappear with that change of status. As the International Court of Justice stated in its 1975 *Advisory Opinion on the Legal Status of the Western Sahara*,²¹⁶ the agreements between indigenous tribes and colonizing sovereign states maintain international legal effect, as they could be regarded as "derivative roots of title".²¹⁷

In sum, the argument can be maintained that indigenous peoples' treaties with the U.S. – and possibly with other nations – retain their original character as international legal agreements, with the attendant consequences of customary international law governing their validity, interpretation and termination. Such a re-characterization of these treaties, which constitutes, in fact, a return to their roots, may not result in adverse consequences to the indigenous nations involved, as protective rules regarding interpretation against the drafter, in particular the rule

²⁰³ *Indian Appropriations Act* of March 3, 1871, 16 Stat. 566.

²⁰⁴ Thereafter, the federal government continued to enter into "agreements" with Native American tribes, maintaining, at least formally, a horizontal rather than vertical type of relationship with the Indian nations. Obligations under these agreements, however, had to be made binding domestic law under the regular process of legislation, which needed the affirmative vote of both houses of Congress instead of solely the Senate. The last such agreement was entered into in 1902. See G. T. MORRIS, "In Support of the Right of Self-Determination for Indigenous Peoples under International Law", 29 *German Yearbook of International Law*, 1986, 277, p. 291.

²⁰⁵ See A. HIRSCHFELDER, *The Native American Almanac: A Portrait of Native America Today*, New York, 1993, p. 54.

²⁰⁶ 21 U.S. 543 (1823).

²⁰⁷ 30 U.S. 1 (1831).

²⁰⁸ 31 U.S. 515 (1832).

²⁰⁹ *Worcester v. Georgia*, 31 U.S. 559-60.

²¹⁰ See, e.g., *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1976); see also *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

²¹¹ *Jones v. Meehan*, 175 U.S. 1 (1899).

²¹² *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 752 (1985).

²¹³ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995).

²¹⁴ 30 U.S. 17.

²¹⁵ 31 U.S. 559.

²¹⁶ 1975 I.C.J. 4 (Oct. 16, 1975).

²¹⁷ *Id.*, p. 39.

contra proferentem rule,²¹⁸ are not unknown to international treaty law. Also, new general principles of law regarding contracts of adhesion may have emerged which might be applicable to international agreements of a similarly lopsided character.

10. Development and International Cooperation⁺⁺

Article 39 UNDRIP bestows on indigenous peoples “the right to have access to financial and technical assistance from states and through international cooperation”. In addition, it stipulates that such assistance is considered to be a prerequisite to enable indigenous peoples to fully enjoy their rights contained in the other articles of the Declaration. Corresponding to the right embodied in Article 39 UNDRIP, Article 41 UNDRIP urges international organisations, in particular the UN, to organize “financial cooperation and technical assistance”. Finally, Article 42 UNDRIP extends this duty on States, though by means of a more general obligation of the UN and States to promote and follow-up the implementation of the Declaration.

The wording of Articles 39, 41 and 42 UNDRIP, as finally approved, makes no use of the term “development”. Instead it utilises the expressions “assistance” and “cooperation”, which may be either “financial” or “technical”. In this regard, Article 39 UNDRIP differs from its precursor, Article 38 of the 1993 Draft Declaration, which referred expressly to development:

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, *to pursue freely their political, economic, social, cultural and spiritual development* and for the enjoyment of the rights and freedoms recognized in this Declaration.²¹⁹

However, draft Article 38 was eventually struck off during the long negotiation process in the WGDRIP. Despite this disregard of the term “development” in Articles 39, 41 and 42 UNDRIP, financial and technical assistance or cooperation is mainly granted within the framework of the “international law of development”, or “international development law”. Since the creation of this field of law in the 1960s, there have been – albeit disputed – attempts to clearly link it with another branch of international law – *i.e.* human rights – by taking recourse to the notion of the right to development. This right is not only referred to in Articles 39, 41 and 42 UNDRIP, but is also expressly mentioned in preambular paragraphs 6 and 10 and in Article 23 of the Declaration. Moreover, development plays a significant role in the context of environmental protection,²²⁰ demilitarisation,²²¹ the right to self-determination,²²² child labour,²²³ means of subsistence and development²²⁴ and land rights.²²⁵ Finally, numerous articles of the UNDRIP²²⁶ clarify that the safeguarding of the distinct identity of indigenous peoples does not consist in the conservation of a *status quo*, but is an open-ended process: it is not limited to revitalize, maintain, control, practise and protect past and present forms of their identities, but they also have the right to further develop these identities.

Until a few decades ago, indigenous peoples were only indirectly and marginally touched upon by international documents dealing with the right to development. The indirect references typically available in this respect were of the kind of that included in Resolution 5(XXXV) of the UN Commission on Human Rights, declaring “that the denial of the right to self-determination of peoples, foreign occupation, colonialism, apartheid, racism and racial discrimination constitute an impediment to social and economic progress”.²²⁷ A similar formulation can be found in the 9th preambular paragraph of the *Declaration on the Right to Development*, adopted by the UN

²¹⁸ The rule *contra proferentem*, in particular, has been supported by Lord McNair, with respect to the treaties with Indian tribes: “there is a well-established rule that a treaty made with an Indian tribe must be construed indulgently and in their favour; they are *inops consilii*, and the treaty, being expressed in English, properly attracts the *contra proferentem* [*sic.*] rule”; LORD MCNAIR, *The Law of Treaties*, New York, 1961, p. 53 (1961). For its general presence in international law, see *Oppenheim’s International Law* (Sir R. JENNINGS & SIR A. WATTS eds.), vol. 1, 1992, p. 1279.

⁺⁺ This Section is based on a Report written by RAINER HOFMANN, JURI ALISTAIR GAUTHIER (University of Frankfurt), CAMILO PÉREZ BUSTILLO (Research Professor at the State of Mexico campus of the Instituto Tecnológico y de Estudios Superiores de Monterrey) and WILLEM VAN GENUGTEN.

²¹⁹ See *Draft United Nations Declaration on the Rights of Indigenous Peoples*, as completed by the Working Group on Indigenous Populations in 1993, UN Doc. E/CN.4/Sub.2/1993/29, Annex I, and adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities with Res. 1994/45 of 26 August 1994 (emphasis added).

²²⁰ See preambular paragraph 11, referring to “Sustainable and equitable development”.

²²¹ See preambular paragraph 12, referring to “Economic and social progress and development”.

²²² See preambular paragraph 16 and Article 3 UNDRIP, referring to “Economic, social and cultural development”.

²²³ See Article 17 para. 2 UNDRIP.

²²⁴ See Article 20 UNDRIP.

²²⁵ See Article 32 UNDRIP.

²²⁶ See Articles 11(1), 12(1), 13(1), 18(1), 20(1), 26(2), 31(1), 32(1), 34, 36(1).

²²⁷ See UN Doc. E/CN.4/1347 of 2 March 1979, para. 3.

General Assembly in 1986.²²⁸ More recently, however, this trend has changed, to an extent that Article 39 UNDRIP can be considered as proclaiming what seems now to be a trend in international law, namely the fact that States are more willing to accept a right to development in the case of indigenous peoples than in other cases. Among the reasons for this situation is the high moral pressure on States to support indigenous peoples' rights and to remedy the many severe historical injustices suffered by indigenous peoples, especially the deprivation and destruction of their lands and other natural resources.²²⁹ A significant evidence of this trend can be found in ILO Convention No. 169, which, apart from "[r]ecognising the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions"²³⁰, and asking States to "establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose",²³¹ affirms in Article 7 the right of these peoples to "decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development". This right is supplemented by the right of indigenous peoples to participation in the planning, execution and assessment of national development programmes of relevance for them, and a corresponding duty of States to take into account indigenous peoples' needs and interests in such programmes;²³² a very similar provision is included in Article 23 UNDRIP. On the other hand, it would not be adequate to be (too) enthusiastic about States' acceptance of a right to development for indigenous peoples. It must not be forgotten that State participation to ILO Convention No. 169 – at least outside Latin America – is still low.²³³ Moreover, in the discussions of the WGDRIP some states expressed their support,²³⁴ but others continued to uphold their reluctance to accept a right to development.²³⁵ Finally, the scope of the right to development in Article 39 UNDRIP has been limited to "the rights contained in this Declaration", whereas a text proposed by some States during the discussion of the draft article in the WGDRIP aimed to extend it to "the rights contained in this Declaration *and in other international human rights instruments*".²³⁶ As this initiative was not successful, it can be concluded that the acceptance among States of a right of indigenous peoples to development, though being higher than in general international human rights law, is not shared universally.

The UNDRIP vests the right to development in indigenous peoples as collectives (in Article 39) and focuses on States as duty-bearers. At the same time, it does not ignore the international dimension of the right in point. In fact, while Article 38 affirms that States have the primary obligation to implement the rights of indigenous peoples to development, Article 39 explicitly refers to "financial and technical assistance from States *and through international cooperation*" (emphasis added); in addition, Article 41 extends this obligation to relevant institutions within the UN system and of other international organisations, without clearly stating, however, who shall be assisted by them, whether indigenous peoples themselves or States.

As for the content of the right to development as enshrined in the UNDRIP, it can be conceived according a twofold perspective. First, a substantive right to development based on self-determination and/or active and equal participation is embodied in general in Article 23 and, with regard to land and other natural resources, in Article 32. Second, Article 39 UNDRIP – notwithstanding the formulation "the right to have access to financial and technical assistance" – is to be considered as primarily embodying a "procedural" right to development aiming at implementing the other rights of indigenous peoples enshrined in the Declaration, in particular their right to the protection and promotion of their distinct identity. This understanding of Article 39 is supported by its collocation in the section concerning the implementation of the UNDRIP. As a consequence, the interpretation of Article 39 is relatively clear and simple. It does not draw an obscure picture of a utopian situation, but plainly asks States and the international community to provide indigenous peoples with the necessary financial and technical assistance to enable them to fully enjoy their rights contained in the other articles of the Declaration.

²²⁸ UN GA Res. 41/128 of 4 December 1986.

²²⁹ See ANAYA, *Indigenous Peoples in International Law*, 2nd ed., *cit.*, p. 149 f.

²³⁰ See preambular paragraph 5.

²³¹ See Article 6(1)(c).

²³² See Article 7(1).

²³³ As of 16 April 2010, 20 states had ratified the Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, Venezuela; see <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (last visited on 16 April 2010).

²³⁴ See UN Doc. E/CN.4/1997/102 of 10 December 1996, paras. 202 (Sweden), 208 (Malaysia), 215 (Brazil), 216 (Colombia), 219 (Norway).

²³⁵ See UN Doc. E/CN.4/1996/84 of 4 January 1996, paras. 81 and 97; Doc. E/CN.4/1997/102, paras. 221, 301 and 304 (concerning USA and Venezuela).

²³⁶ See the amended text tabled by Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland in UN Doc. E/CN.4/2004/WG.15/CRP.1 of 6 September 2004, p. 13, and the explanatory comments thereto, UN Doc. E/CN.4/2004/WG.15/CRP.2 of 6 September 2004, p. 9 (emphasis added).

Among the said rights, a particularly significant role is played by land rights, in light of the special link between indigenous peoples and their traditional lands and natural resources, which represents an essential feature of their distinctive identity. As a consequence, the right of indigenous peoples to development, which aims at setting the ground for the full realisation of their rights, is intrinsically connected to the right to self-determination and to land rights on the one hand and to the right to a healthy environment on the other hand. Only when their natural environment is protected, indigenous peoples can fully enjoy their right to practise their own cultural life in Article 11 and their land rights in Articles 25-32.

The role of indigenous peoples in fostering sustainable development is recognized by a number of relevant international instruments. For example, Principle 22 of the 1992 *Rio Declaration on Environment and Development*²³⁷ affirms that

Indigenous people and their communities [...] have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

A similar statement is included in the 1995 *Copenhagen Declaration on Social Development*, in which States commit to create a framework for action to “[r]ecognize and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organization and cultural values”.²³⁸ The Copenhagen Declaration also links development to environmental issues, by stating that the participating governments “are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development” and that “equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development”.²³⁹

Last but not least, Article 24 ACHPR provides for the right of peoples (including indigenous ones) “to a general satisfactory environment favourable to their development”. In this respect, Article 29 UNDRIP grants indigenous peoples “the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources”, urges states to “establish and implement assistance programmes for indigenous peoples for such conservation and protection”, and forbids in principle²⁴⁰ the “storage or disposal of hazardous materials [...] in the lands or territories of indigenous peoples”. In addition, Article 30 UNDRIP prohibits in principle²⁴¹ military activities on indigenous lands.

One key aspect of the right to development of indigenous peoples is the “cultural sustainability” of development projects. In fact, an approach limited to the economic aspects of development is particularly problematic for indigenous peoples because it evokes experiences of the assimilationist and destructive “integration policies” towards indigenous peoples perpetrated up to recent times, in the context of which their traditional activities were regarded as backward or primitive and in need of “adjustment to modernity”. Therefore, it is of utmost importance to apply a concept of development that is not limited to the traditional “Western” focus on economic or industrial development, but that appropriately addresses the value of social and cultural concerns of indigenous peoples. This need is recognized by Article 2(2) of the *Declaration on the Right to Development* – through referring to “the need for full respect for their human rights and fundamental freedoms” – as well as by Article 22 of the *African Charter on Human and Peoples’ Rights*,²⁴² stating that “[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their [...] identity”.²⁴³

The character of the right to development as a “solidarity right” raises the question of *who* is the holder of the corresponding duty to grant development. Owing to the complexity of development processes, usually the State alone cannot establish the ideal environment for the full realisation of human rights. This is a task that requires cooperation from the entire international community, particularly international institutions. The drafters of the UNDRIP seemed to be well aware of this need, as shown by the multiplicity of actors and modalities it involves in the action for the realization of the right to development of indigenous peoples, including States and international cooperation (Article 39), “[t]he organs and specialized agencies of the United Nations system and other intergovernmental organizations [...] through the mobilization, inter alia, of financial cooperation and

²³⁷ Available at <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>> (last visited on 16 April 2010).

²³⁸ See UN Doc. A/CONF.166/9 of 14 March 1995, para. 26(m).

²³⁹ *Ibid.*, para. 6.

²⁴⁰ Unless there is a “free prior and informed consent” of indigenous peoples.

²⁴¹ “[U]nless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.”

²⁴² 21 *ILM* 58 (1982).

²⁴³ Emphasis added.

technical assistance” (Article 41), as well as “the United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level” (Article 42). The emphasis is clearly on financial and technical assistance and on promotion by states – acting unilaterally and multilaterally – as well as the UN and its specialized agencies, but also by “other intergovernmental organizations”. In this respect, at present an “international architecture of indigenous rights”²⁴⁴ is emerging that is characterized by a complex, evolving *interaction* between global, regional and national norms and processes of enforcement. Such an architecture involves, *inter alia* – in addition to the relevant action developed at the national level (particularly in Latin American countries) – the ILO, the United Nations Development Programme (UNDP),²⁴⁵ some UN human rights monitoring bodies (particularly HRC, CERD and CRC), the International Monetary Fund (IMF), the World Bank, and the OAS (including the IACHR).

As for the ILO, its activity aimed at fostering the right to development of indigenous peoples is multi-structured. In particular, ILO supervisory bodies constantly monitor the implementation of ILO Convention No. 169 and provide comments to guide its application in the twenty ratifying countries. They also develop promotional activities, among which the *Programme to promote ILO Convention No. 169 (PRO169)*²⁴⁶ emerges.

Among the UN human rights monitoring bodies, the activity of the CERD is of special significance; in particular, in its 1997 General Recommendation on the Rights of Indigenous Peoples, the Committee observed that “indigenous peoples [have to be provided] with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics”.²⁴⁷ To a similar extent, the CRC has emphasized the obligation of the States parties to the *Convention on the Rights of the Child*²⁴⁸ to ensure realization of the right of indigenous children “to survival and development as well as an adequate standard of living” pursuant to Articles 6 and 27 of the Convention;²⁴⁹ in addition, the Committee has affirmed that, in consideration of the special link existing between indigenous peoples and their ancestral lands, “States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible”.²⁵⁰

11. Reparations, Redress and Remedies[♥]

Reparation for human rights breaches suffered by indigenous peoples attains a particularly high degree of complexity, in light of the holistic vision of life of these peoples, in the context of which spiritual and social values have usually a significance which greatly overcomes any consideration for economic interests. This reality represents the paramount element to be considered when programmes of reparations are planned in favour of indigenous peoples, in the sense that it is essential to go beyond the classical Western-shaped language and conception of reparation, at least under a twofold perspective. First, in the Western world reparation is essentially conceived as compensation to *individuals*, while with respect to indigenous peoples it has a real sense only to the extent that it assumes a *collective* significance. Second, according to the Western vision, monetary compensation is commonly considered the only – or at least the paramount – goal to be achieved in order to ensure effectiveness of reparation itself. In the case of indigenous peoples, material reparation – especially when it takes the form of compensation – is usually inappropriate to ensure effective redress for the pain they have suffered.

In the event of dispossession of indigenous lands, the form of reparation to be pursued is *restitutio in integrum*, except when it is objectively unfeasible, for the reason that “the profound relationship that indigenous peoples [have] with their lands and territories [has] critical social, economic, political, cultural and spiritual dimensions. [This makes] the return of land [...] the only means by which to provide redress and restore a people’s ability to survive as a distinct people”.²⁵¹ In other situations, on the contrary, due to the specific circumstances of the case

²⁴⁴ See W. VAN GENUGTEN and C. PÉREZ BUSTILLO, “The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional and National Dimensions”, 11 *International Journal on Minority and Group Rights*, 2004, p. 379 ff.

²⁴⁵ See *UNDP and Indigenous Peoples: A Policy of Engagement*, 2001, available at <http://www.undp.org/partners/civil_society/indigenous/documents.shtml> (last visited on 17 April 2010).

²⁴⁶ See <<http://www.ilo.org/indigenous/Aboutus/PRO169/lang--en/index.htm>> (last visited on 17 April 2010).

²⁴⁷ See General Recommendation No. 23: Indigenous Peoples: 18/08/97, available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument)> (last visited on 17 April 2010), para. 4(c).

²⁴⁸ UN G.A. Res. 44/25 (1989).

²⁴⁹ See General Comment No. 11 (2009), Indigenous children and their rights under the Convention, UN Doc. CRC/C/GC/11 of 12 February 2009, para. 34.

²⁵⁰ *Ibid.*, para. 35.

[♥] This Section is based on a Report written by FEDERICO LENZERINI.

²⁵¹ See Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, UN Doc. E/CN.4/2002/98 of 6 March 2002, para. 81.

even *restitutio in integrum* may not represent the best practicable means of reparation, or can even be inadequate when the relevant human rights breaches take place in an environmental context characterized by social inequality or other structural situations incompatible with the individual and collective dignity of indigenous peoples. In such situations, in fact, *restitutio in integrum* – i.e. re-establishment of the previous situation and elimination of the effects produced by the violation – would simply recreate the pre-existing unacceptable social structure representing a fertile ground for human rights breaches to flourish. Rectification of the pre-existing situation – aimed at removing the social and cultural roots favouring perpetration of human rights abuses – is therefore essential.²⁵²

In more general terms, for indigenous peoples *non-material reparations* have a special significance, on account of the fact that, in many instances, human rights breaches lead not only their members to feel physical and psychological pain at the individual level, but also to destroy the spiritual identity and even the socio-political construction of the collectivity – producing harmful consequences that usually perpetuate at the intergenerational level – since the inherent order of the universe surrounding them is affected. As a consequence, beyond material restitution, non-material reparations are essential for reintegrating this order to its original status and allow the community to continue its collective existence correctly. These kinds of reparation include, but *may not be limited to*: recognition of wrongs by the State or other perpetrators; guarantee of non-repetition; disclosure of truth; apology; punishment of the perpetrators; various kinds of psychosocial reparations, which allow victims to fully recuperate their place in the society to which they belong.²⁵³

These complex dynamics of reparations for indigenous peoples are incorporated in the text of the UNDRIP to an extent which – in the end – is quite satisfactory, as it was hard to expect that a UN declaration, which by its nature is to be approved by political representatives of States, could do more in this respect.

The first provision of UNDRIP that is relevant to the present Section is Article 8(2), which affirms the right of indigenous peoples to redress for a number of practices threatening their cultural and ethnic identity and integrity as well as their way of life. These practices include: actions having the aim or the effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities, or having the aim or effect of dispossessing them of their lands, territories or resources; any form of forced population transfer having the aim or effect of violating or undermining any of their rights; any form of forced assimilation or integration; as well as any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them. This provision is clearly inspired by the consciousness that preservation of cultural identity and sense of belonging to the community is essential in order to ensure proper safeguarding of the rights of indigenous peoples. As for the meaning of the term “redress”, used in the provision in point, it is broad enough to consider such a provision as an open-ended rule according to which the specific kind of reparation to be granted is to be decided on a case-by-case basis, through choosing the most appropriate reparatory measure to re-establish the pre-existing situation and/or to grant effective redress to the victims, taking into primary account their own perception of the matter.

Article 10 UNDRIP establishes the prohibition to forcibly remove indigenous peoples from their ancestral lands; relocation is only possible with the “free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”. As regards reparatory measures, the meaning of the word “compensation” is not to be interpreted as necessarily limited to pecuniary redress, as confirmed by the use made of this term in the context of the whole UNDRIP. Compensation must be “just” and “fair”, i.e. equitable for both the parties involved in the reparation process (usually the State and the indigenous community concerned). Finally, it is essential to differentiate the right to compensation established by Article 10 with the right to redress due to indigenous peoples 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, established by Article 28; in fact, while the latter is aimed at “reimbursing” the community for the loss of its land, on the basis of its spiritual and economic value, the former is specifically addressed to redress the anguish suffered by the relocated people due to relocation as such.

The following relevant provision – Article 11(2) – establishes that “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or

²⁵² See *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, judgement of 16 November 2009, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf> (last visited on 27 February 2010), especially para. 450 ff. For an assessment of the concept of “transformative reparation” see R. RUBIO-MARÍN, “Gender and Collective Reparations in the Aftermath of Conflict and Political Repression”, in R. RUBIO-MARÍN (ed.), *The Gender of Reparations. Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, Cambridge, 1999, 381, p. 398 f.

²⁵³ See N. GOMEZ, “Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities”, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford, 2008, p. 143 ff.

in violation of their laws, traditions and customs”. The use of the term “effective”, attached to “mechanisms”, presupposes that the form of redress granted must be perceived *by the community concerned* as adequate to feel actually repaired for the wrong suffered according to their own perspective; this is also confirmed by the requirement, included in the provision in point, that the mechanisms concerned are developed “in conjunction with indigenous peoples”. Article 11(2) is complemented by Article 12(2), which requires States to “seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned”.

Article 20(2) entitles indigenous peoples deprived “of their means of subsistence and development” to “just and fair redress”. The use of the broad-scope term “redress” implies that the reparation due pursuant to this provision may take any kind of form that is most suitable to ensure effective reparation in light of the specific features characterizing a given case. In any event, however, redress must be “just and fair”; the contextual use of these two terms suggests that it must be equitable from both the perspective of the State providing reparation and for the victims of the deprivation of the means of subsistence and development for which redress is granted. Also, redress must be effective, meaning that, whatever reparatory measure is adopted, it *must* fulfil the actual result of producing in the victims the *genuine* perception that such measure is adequate to restore their dignity and to effectively compensate the tort suffered. Differently from most of the provisions including in the UNDRIP concerning reparatory aspects, Article 20(2) is to be considered as applicable *ex tunc*; this appears from an objective evaluation of the formulation used by the provision in point and is confirmed by relevant international practice, including Article XXIX(6) of the *Draft American Declaration on the Rights of Indigenous Peoples* (Draft American Declaration),²⁵⁴ which is even clearer than Article 20(2) in affirming that “Indigenous peoples who *have been* deprived of their own means of subsistence and development have the right to restitution and, where this is not possible, to fair and equitable compensation”.²⁵⁵

The most important provision dealing with reparation included in the UNDRIP is undoubtedly Article 28, which affirms the right of indigenous peoples

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.

As emerges by the text of the provision in point, when deprivation of ancestral lands of indigenous peoples occurs, the kind of reparation that is in general to be preferred is restitution of the lands, territories and resources concerned. The reason for this is that in most cases no form of compensation is adequate to recompense effectively the deep spiritual significance that the motherland has for the very cultural identity and – in many cases – even the physical existence of indigenous communities. Therefore, restitution is the form of redress to be granted any time that it is actually practicable. When it is not practicable, then it must be replaced by compensation, which must be “just, fair and equitable”; the combination of all these terms denotes that compensation must take a form that is perceived as just, fair and equitable by the indigenous communities concerned.

Paragraph (2) of Article 28 adds that, “[u]nless 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”. This formulation confirms – as previously stressed with respect to Article 10 – that the meaning of the term “compensation” as used in the UNDRIP is not necessarily limited to monetary redress.

Similarly to what has been said with respect to Article 20(2), the formulation used in Article 28 clearly shows that it can be the object of retrospective application. In most cases, however, this is a false problem, for the reason that, in consideration of the special relationship that indigenous peoples have with their traditional lands, they usually continue to be negatively affected by the loss of those lands even after many generations. Therefore, as the effects of deprivation of ancestral lands of indigenous peoples perpetrated in the past continue to be suffered by the communities concerned *at present*, the act in point is to be considered an *ongoing violation* that *continues to produce its effects today*. Hence, in most cases the reparation proscribed by Article 28 is not to be seen as redress for a violation occurred in the past, but rather for a breach that is continuing to take place at present (without any need to debate on the applicability *ex tunc* of the article in point).

²⁵⁴ The latest version of the Draft American Declaration available at the moment of this writing is included in OAS Doc. OEA/Ser.K/XVI-GT/DADIN/doc.334/08 rev. 5 of 3 December 2009 (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Twelfth Meeting of Negotiations in the Quest for Points of Consensus).

²⁵⁵ Emphasis added.

The provision of Article 28 finds confirmation in a huge State practice. In addition of being proclaimed by Article 16 of ILO Convention No. 169 and Article XXIV of the Draft American Declaration, the right of indigenous peoples to restitution or to other forms of reparation in the event of dispossession of their traditional lands has been affirmed and reiterated in the relevant case law at the international and domestic level. As for the former, the “jurisprudence” of the HRC,²⁵⁶ the IACHR²⁵⁷ and the ACHPR²⁵⁸ emerges. At the domestic level, the right in point has been affirmed, *inter alia*, by the courts of Argentina,²⁵⁹ Australia,²⁶⁰ Belize,²⁶¹ Botswana,²⁶² Brazil,²⁶³ Cambodia,²⁶⁴ Colombia,²⁶⁵ India,²⁶⁶ Japan,²⁶⁷ Malaysia,²⁶⁸ New Zealand,²⁶⁹ South Africa²⁷⁰ and the United States.²⁷¹ Last but not least, specific programmes of reparation have been recently developed by a number of governments that have granted redress to indigenous communities that in the past had been deprived of their traditional lands; this has happened, in particular, Australia,²⁷² Canada²⁷³ and the United States.²⁷⁴

A specific situation is addressed by Article 32(3) UNDRIP, according to which States must provide effective mechanisms for just and fair redress for any project affecting the lands or territories and other resources belonging to indigenous peoples, particularly in connection with the development, utilization or exploitation of mineral, water or other resources; appropriate measures must also be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact arising from such projects. The situation covered by Article 32(3) lays outside the scope of application of Article 28; in fact, while the latter attributes a right to redress in favour of indigenous peoples only whether and to the extent that their lands have been “confiscated, taken, occupied, used

²⁵⁶ For a comprehensive assessment of the relevant practice of the HRC see C. CHARTERS, “Reparations for Indigenous Peoples: Global International Instruments and Institutions”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, 163, p. 177 ff.

²⁵⁷ See G. CITRONI and K. I. QUINTANA OSUNA, “Reparations for Indigenous Peoples in the Case Law of the Interamerican Court of Human Rights”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, p. 317 ff.

²⁵⁸ See Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 2001, 2001 AHRLR 60; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

²⁵⁹ See the cases described by M. ROSTL, “Reparations for Indigenous Peoples in Two Selected Latin American Countries”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, p. 345 ff.

²⁶⁰ See the renowned cases of *Mabo v. Queensland (No 2)* and *Wik v. Queensland*, 187 CLR 1, 1996. For a comprehensive assessment of reparations for indigenous peoples in Australia see B. A. HOCKING and M. STEPHENSON, “Why the Persistent Absence of a Foundational Principle? Indigenous Australians, Proprietary and Family Reparations”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, p. 477 ff.

²⁶¹ See the very recent case of *Aurelio Cal et al. v. The Attorney General of Belize and the Minister of Natural Resources and Environment*, Supreme Court, Judgement of 18 October 2007 (text of the judgement available at <<http://www.elaw.org/node/1620>>, last visited on 25 April 2010); for a comment on this case see S. J. ANAYA, “Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law – The Maya Cases in the Supreme Court of Belize”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, p. 567 ff.

²⁶² See *Sesana and Others v. Attorney General*, High Court of Lobaste, 13 December 2006, 2006 AHRLR 183.

²⁶³ On 19 March 2009 the Supreme Federal Tribunal of Brazil issued a final ruling in which it upheld a previous decision affirming that the territory of the Raposa-Serra do Sol reservation, in the Northern Roraima state, was to be restored to the 194 indigenous communities traditionally living there, and that the rice farmers who had held plantations within that territory were bound to leave the area; see “Brazil: Supreme Court rules Raposa-Serra do Sol indigenous territory”, 21 March 2009, available at <<http://www.wv4report.com/node/7052>> (last visited on 13 September 2009).

²⁶⁴ See the *Ratanakiri Land Dispute*, described and commented by P. S. CHINGMAK, “International Law and Reparations for Indigenous Peoples in Asia”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, 409, p. 449 f.

²⁶⁵ See Constitutional Court, *Sentencia No. T-380/93* of 13 September 1993 and *Sentencia SU-039/97* of 21 February 1997, both available at <http://www.ernestoramiroestacio.nom.co/documentos-de-interes/cat_view/20-jurisprudencia-en-favor-de-los-pueblos-indigenas.html> (last visited on 13 September 2009).

²⁶⁶ See Supreme Court (K. Ramaswamy, S. Saghir Ahmad, G. B. Pattanaik), *Samatha v. State of Andhra Pradesh*, 11 July 1997, available at <<http://www.mmpindia.org/samatha%20vs%20AP.htm>> (last visited on 25 April 2010).

²⁶⁷ See *Kayano and Others v. Hokkaido Expropriation Committee* (Nibutani Dam Decision), 27 March 1997, 38 ILM 397 (1999).

²⁶⁸ See the cases described by CHINGMAK, *cit.*, p. 442 ff.

²⁶⁹ See the very comprehensive assessment provided by C. J. IORNS MAGALLANES, “Reparations for Maori Grievances in Aotearoa New Zealand”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, p. 523 ff.

²⁷⁰ See *Alexkor Ltd and the Government of the Republic of South Africa v. the Richtersveld Community and others*.

²⁷¹ See, ultimately, Supreme Court, *United States v. Lara*, 541 US 193 (2004).

²⁷² See D. SHELTON, “Reparations for Indigenous Peoples: The Present Value of Past Wrongs”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, 47, p. 55.

²⁷³ See “History of Reparations Payments”, at <<http://www.mtholyoke.edu/~kmpporter/historyreparations.htm>> (last visited on 13 September 2009); more in general on Canada see B. MORSE, “Indigenous Peoples of Canada and their Efforts to Achieve True Reparations”, in LENZERINI, *Reparations for Indigenous Peoples, cit.*, p. 271.

²⁷⁴ See SHELTON, “Reparations for Indigenous Peoples”, *cit.*, p. 56; “History of Reparations Payments”, *cit.* See also P. REIS, “Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit”, *The New York Times*, 8 December 2009, available at <<http://www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-1-92369.html>> (last visited on 27 February 2010).

or damaged *without their free, prior and informed consent*” (emphasis added), the former grants a form of redress that is due *independently* of any consent given by the communities concerned, as it arises *ipso facto* when one of the said activities is performed on indigenous lands. The redress contemplated by Article 32(3) is indeed to be intended as a sort of recompense – *rectius*, benefit sharing – for profiting from the opportunities offered by indigenous lands to develop economic projects. The use of the expression “just and fair redress”, in the text of the provision in point, indicates that the kind and amount of redress granted in any concrete situation must be perceived as effective and equitable by the indigenous communities concerned.

The last provision of concern to the present Section is Article 40 UNDRIP, which grants indigenous peoples the right to effective remedies (*i.e.* “to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights”) for all violations of their rights, both of individual and collective character. The particular significance of this provision lays in the fact that the right in point extends to infringements of *collective* rights, which – differently from individual rights – are safeguarded only partially, fragmentarily and in most cases indirectly²⁷⁵ by international instruments on human rights. Article 40 is the only provision in the UNDRIP in which the term “remedies” is used. The fact that a different term is utilized than in all other relevant provisions, *i.e.* “remedy” in place of “redress”, indicates that in the context of Article 40 the term “remedy” is to be interpreted restrictively to mean “access to justice”, without necessarily implying, in principle, that it must be automatically followed by a form of reparation. However, the fact that the term “remedies” is accompanied by the word “effective” presupposes that these remedies must be of such kind to ordinarily allow the victim of a breach (at the individual and/or collective level) to obtain that the truth is disclosed and that the wrongs suffered, if any, are satisfactorily repaired through adequate redress. It is finally to be noted that, as explicitly mentioned by the provision in point, the relevant remedies must be granted through “giv[ing] due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”.

12. Rights of Indigenous Peoples under Customary International Law^{*}

The adoption of the UNDRIP in 2007 by the GA represented a groundbreaking event in the struggle of indigenous peoples to obtain recognition of their collective dignity as well as of their right to be different from the stereotyped cultural models of the dominant society and to transmit this diversity to future generations. Although by its nature UNDRIP, just like any other declaration of principles, cannot be considered as a binding legal instrument, the question arises as to whether and to what extent the text of the Declaration corresponds to established general international law as a whole. In this respect, even though it cannot be maintained that UNDRIP as a whole can be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to which States are *bound* to comply with. In fact, the overwhelming voting majority with which the UNDRIP has been approved, the subsequent endorsement of the Declaration by most of the few governments that had voted against it,²⁷⁶ the unequivocal judicial and para-judicial practice of treaty bodies, as well as the pertinent state practice at both the domestic and international level, unequivocally show that a general *opinio iuris* as well as *consuetudo* exists within the international community according to which certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law.

The relevant areas of indigenous peoples’ rights with respect to which the discourse on customary international law arises are self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies. However, it would be inappropriate to deal with these areas separately, for the reason that – in light of the holistic vision of life of indigenous peoples – the rights just listed are all strictly interrelated with each other as building blocks of the unique Circle of Life representing the heart of indigenous peoples’ identity, to the extent that “the change of one of its elements affects the whole”.²⁷⁷ To provide just an example of this complex reality, the rights to self-determination and autonomy cannot fully flourish without the right to cultural identity being granted. For the same reason, under a legal perspective these rights reinforce each

²⁷⁵ See, *e.g.*, Article 27 ICCPR.

^{*} This Section has been written by the Rapporteur of the Committee, FEDERICO LENZERINI. The information on Latin American countries has been mainly provided by RENÉ KUPPE.

²⁷⁶ See *supra*, Section 1.

²⁷⁷ See *Kari-Oka and the Indigenous Peoples’ Earth Charter*, 30 May 1992, available at <http://www.idrc.ca/en/ev-30141-201-1-DO_TOPIC.html> (last visited on 22 April 2010), para. 56 of the Earth Charter (see also the Declaration, affirming that “We, the Indigenous Peoples, are connected by the circle of life to our land and environments”); Indigenous Peoples Council on Biocolonialism, *The “Heart of the Peoples” Declaration*, 7 August 1997, available at <http://www.ipcb.org/resolutions/htmls/dec_heartopeoples.html> (*ibid.*), Preamble.

other. Consequently, the relevant practice supporting the existence of customary law concerning each of the above rights usually also serves the purpose of backing the assumption that the same status has been attained by any or all of the others.

In this respect, the adoption of the UNDRIP and the huge governmental support that has characterized its approval – in the context of which the recent change of mind (either turned into effective steps or simply remaining, at the moment of this writing, at the level of promises) by Australia, Canada, New Zealand and the United States attains a special significance – stands as something more than the cherry on the big cake of the relevant international practice previously developed. The said practice, however, during the last decades has progressively increased its amount like a flooding river under an unstoppable rain.

First of all, the historical status of indigenous peoples as sovereign nations that “were socially and politically organized in tribes and under chiefs competent to represent them” – thus possessing the usual attributes of sovereignty – has been authoritatively affirmed by the International Court of Justice in the *Western Sahara Advisory Opinion* of 1975.²⁷⁸ Also, specific indigenous peoples’ rights have been widely incorporated in a number of international treaties (in some cases characterized by huge ratification records), ranging from those specifically devoted to indigenous peoples themselves – namely ILO Convention No. 169 – to treaties dealing with human rights,²⁷⁹ cultural heritage²⁸⁰ or environmental protection, the latter ones recognizing in particular (since the 1950s) the right of indigenous communities to act according to their cultural traditions as a matter of exception to the prohibitions established in their texts.²⁸¹ In any event, it is especially through the evolutionary interpretation of human rights treaty provisions, to the extent of expanding their inherent individual character to covering *collective* prerogatives, that international human rights monitoring bodies have universalized indigenous peoples’ rights. In particular, in interpreting Article 27 ICCPR, the HRC has emphasized that

positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their

²⁷⁸ 1975 *I.C.J. Reports* 18, para. 81.

²⁷⁹ See, e.g., Article 30 of the *Convention on the Rights of the Child*, affirming that “[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or 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 practise his or her own religion, or to use his or her own language”.

²⁸⁰ See, in particular, the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, recognizing the need for the adequate protection and promotion of “the knowledge systems of indigenous peoples” (see Preamble, 8th sentence) and the right of individuals and social groups to “including persons belonging to minorities and indigenous peoples”, to “have access to their own cultural expressions” (see Article 7(1)(a)). The 2003 UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage* is also of significance for the present discussion.

²⁸¹ See, e.g. Article VII of the 1957 *Interim Convention on the Conservation of North Pacific Fur Seals*, 314 *UNTS* 105, stating that “[t]he provisions of this Convention shall not apply to Indians, Ainos, Aleuts or Eskimos dwelling on the coast [...] who carry on pelagic sealing in canoes not transported by or used in connection with other vessels, and propelled entirely by oars, paddles or sails, and manned by not more than five persons each, in the way hitherto practiced and without the use of firearms; provided that such hunters are not in the employment of other persons or under contract to deliver the skins to any person”; Article III(1)(d) of the 1973 *Agreement on Conservation of Polar Bears*, available at <<http://sedac.ciesin.org/entri/texts/polar.bears.1973.html>> (last visited on 22 April 2010), which allows hunting such bears when it is carried out “by local peoples using traditional methods in the exercise of their traditional rights”; Article III(5)(c) of the 1979 *Convention on the Conservation of Migratory Species of Wild Animals*, available at <http://www.cms.int/pdf/convtxt/cms_convtxt_english.pdf> (*ibid.*), affirming that the general prohibition to the taking of endangered migratory species may be derogated from, *inter alia*, when it is carried out to “accommodate the needs of traditional subsistence users of such species”; Article 8(j) of the 1992 *Convention on Biological Diversity*, available at <<http://www.cbd.int/convention/convention.shtml>> (*ibid.*), stating that, in the context of *in situ* conservation of biodiversity, parties are to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”. See also the constant practice of exempting aboriginal subsistence whaling from the prohibition on whaling imposed by the International Whaling Commission established by the 1946 *International Convention for the Regulation of Whaling* (see <<http://www.iwcoffice.org/conservation/aboriginal.htm#asw>>, *ibid.*). Finally, see (albeit not a treaty) the European Union Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *Official Journal of the European Union*, L 286 of 31 October 2009, p. 3, affirming that “[t]he fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a 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” (Preamble, para. 14) and that “the placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products” (Article 3, para. 1).

religion, in community *with the other members of the group* [...] culture manifests itself in many forms, including a particular way of life associated with the use of land resources, *especially in the case of indigenous peoples* [...] The protection of these rights is directed *towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned*, thus enriching the fabric of society as a whole.²⁸²

This view has been confirmed by the HRC in a number of communications on individual complaints.²⁸³ In several other cases, concerning Australia, Canada, Democratic Republic of the Congo, Honduras, Norway, Paraguay and the United States of America, the HRC has also stressed the obligation of States parties to the ICCPR to, *inter alia*, “provide an effective restitution of ancestral lands” to indigenous peoples.²⁸⁴

Also the CERD has proclaimed the legal requirement that indigenous peoples are allowed to preserve their culture and historical identity. This entails an obligation for the States parties to the *International Convention against All Forms of Racial Discrimination* (which in most part reproduces customary international law) to “[e]nsure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages”,²⁸⁵ as well as “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”.²⁸⁶

As for the CESCR, it has affirmed that “indigenous peoples have the right to specific measures to improve their access to health services and care” pursuant to Article 12 ICESCR (protecting “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”); the CESCR has added that these health services

should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. [...] The Committee notes that, *in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension*.²⁸⁷

More recently, the CESCR, using the UNDRIP as a parameter for interpreting the right of everyone to take part in cultural life protected by Article 15 ICESCR – as referred to indigenous peoples – has affirmed that the latter right must be realized “in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples”,²⁸⁸ the exercise of the right to take part in cultural life must take “due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples [as] [t]he strong 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”.²⁸⁹ In addition, indigenous peoples have the right “to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights”.²⁹⁰ In addition, indigenous peoples have the right “to their

²⁸² See Human Rights Committee General Comment No. 23, para. 6.2 ff. (emphasis added).

²⁸³ See, e.g., *Ivan Kitok v. Sweden*, Communication No. 197/1985 of 27 July 1988; *Bernard Ominayak and the Lubicon Lake Band v. Canada*; *Ilmari Lämsä et al v. Finland (No. 1)*, Communication No. 511/1992 of 14 October 1993; *Hopu & Bessert v. France*, Communication No 549/1993 of 29 July 1997; *Diergaardt et al. v. Namibia*, Communication No. 760/1997 of 6 September 2000; *Apirana Mahuika et al v. New Zealand*, Communication No. 547/1993 of 27 October 2000.

²⁸⁴ See Report of the United Nations High Commissioner for Human Rights on indigenous issues, UN Doc. A/HRC/4/77 of 6 March 2007, para. 8.

²⁸⁵ See General Recommendation XXIII, para. 4(e).

²⁸⁶ *Ibid.*, para. 5.

²⁸⁷ See General Comment No. 14 (2000), “The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)”, UN Doc. E/C.12/2000/4 of 11 August 2000, para. 27 (emphasis added).

²⁸⁸ See General Comment No. 21, para. 16(e).

²⁸⁹ *Ibid.*, para. 36.

²⁹⁰ *Ibid.*, para. 37. See also para. 50(c), according to which indigenous peoples have the right to respect and protection of their own cultural productions, “including their traditional knowledge, natural medicines, folklore, rituals and other forms of

culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life”;²⁹¹ persons belonging to indigenous peoples have the right to participate “in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk”.²⁹² The CESCR has also stressed that indigenous peoples “have the right to the full enjoyment, *as a collective* or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, *as well as the United Nations Declaration on the Rights of Indigenous Peoples*”.²⁹³

The practice of the CRC is also of special significance for the purposes of the present Section. In particular, in its very recent General Comment concerning the rights of indigenous children under the *Convention on the Rights of the Child*,²⁹⁴ the CRC has backed the CERD in calling upon States parties “*to recognize and respect indigenous distinct cultures, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation*”.²⁹⁵ In order for the principle of the best interest of the child (provided for by Article 3 of the Convention) to be realized for indigenous children it is essential that it is “conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights[, even though] [...] the best interests of the child cannot be neglected or violated in preference for the best interests of the group”.²⁹⁶ In addition, “[i]n the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant importance to their development and enjoyment of culture. States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible”.²⁹⁷ With respect to the education of indigenous children, after emphasizing that it “is an essential means of achieving individual empowerment and self-determination of indigenous peoples”,²⁹⁸ the CRC has stressed that

[i]n order to ensure that the aims of education are in line with the Convention, States parties are responsible for protecting children from all forms of discrimination [...] States parties should [therefore] ensure that the curricula, educational materials and history textbooks provide a fair, accurate and informative portrayal of the societies and cultures of indigenous peoples. Discriminatory practices, such as restrictions on the use of cultural and traditional dress, should be avoided in the school setting.²⁹⁹

Also, “education in the child’s own language is essential”,³⁰⁰ and “[a]ttempts should also be made to ensure that indigenous children living outside their communities have access to education in a manner which respects their culture, languages and traditions”.³⁰¹ The right of indigenous peoples to be consulted and to participate to the adoption of measures concerning their own affairs has been proclaimed by the CRC with respect to a number of situations, including the adoption of special measures through legislation and policies for the protection of indigenous children,³⁰² in the context of education of indigenous children³⁰³ and more in general for the implementation of the Convention.³⁰⁴ Finally, the CRC has urged States parties “to adopt a rights-based approach to indigenous children based on the Convention [on the rights of the child] and other relevant international standards, such as ILO Convention No. 169 and the *United Nations Declaration on the Rights of Indigenous Peoples*”.³⁰⁵

expression. This includes protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations”.

²⁹¹ *Ibid.*, para. 49(d).

²⁹² *Ibid.*, para. 55 (e).

²⁹³ *Ibid.*, para. 7 (emphasis added).

²⁹⁴ See General Comment No. 11. It is to be considered that, having the *Convention on the Rights of the Child* been ratified by all the countries of the world except two (see the status of ratification at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>, last visited on 22 April 2010), both its provisions and the views of the CRC attain a special significance in the context of the operation aimed at ascertaining the existence of customary international law.

²⁹⁵ *Ibid.*, para. 18 (Italics in the original text).

²⁹⁶ *Ibid.*, para. 30.

²⁹⁷ *Ibid.*, para. 35 (footnotes omitted).

²⁹⁸ *Ibid.*, para. 57.

²⁹⁹ *Ibid.*, para. 58 (footnotes omitted).

³⁰⁰ *Ibid.*, para. 62.

³⁰¹ *Ibid.*, para. 61.

³⁰² *Ibid.*, paras. 20 and 31.

³⁰³ *Ibid.*, para. 60.

³⁰⁴ *Ibid.*, paras. 39 and 80.

³⁰⁵ *Ibid.*, para. 82 (emphasis added).

Last but not least, in the context of the implementation of ILO Convention No. 169, in many occasions the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has shown concern with respect to the measures taken by States parties that threaten indigenous land rights, concentrating in particular on the initiatives adopted by such States in view of redressing indigenous peoples evicted from their lands in order to implement dam development projects,³⁰⁶ as well as to grant fair compensation for the damages suffered by indigenous communities as a result of the exploration and exploitation of natural resources in their traditional territories.³⁰⁷

At the regional level, the jurisprudence of the IACHR emerges. First, since the landmark case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court has constantly affirmed that the right to property protected by Article 21 of the ACHR includes “the [collective] rights of members of the indigenous communities within the framework of communal property . . . [which] is not centered on an individual *but rather on the group and its community*”.³⁰⁸ In the same case the Court has also emphasized that

“[i]ndigenous 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”.³⁰⁹

It is to be noted that, in its lawsuit filed before the Court against Nicaragua, the Inter-American Commission on Human Rights, had asserted that, “there is an international customary international law norm which affirms the rights of indigenous peoples to their traditional lands”;³¹⁰ while Nicaragua raised a large amount of defensive arguments in order to deny that any breach of the *Awas Tingni* community had taken place, it did not refute this assertion, therefore acquiescing with the assumption that indigenous land rights are protected by customary international law.

Subsequently, the IACHR has proclaimed a number of other significant principles concerning land rights and cultural rights of indigenous peoples, particularly: the fact of indigenous peoples being precluded to performing their rituals according to their own traditions (namely the exercise of their customary practices aimed at properly honouring the deceased) and of being separated from their traditional lands amounts to “emotional, psychological, spiritual and economic hardship-suffering to such a degree as to result in the state’s violation of Art 5(1)” ACHR (which prescribes the right of every person “to have his physical, mental, and moral integrity respected”);³¹¹ obstruction of the effective possession by an indigenous community of its ancestral lands can translate into a breach of the right to life of its members, to the extent that they are deprived of the possibility of practicing their traditional activities that are essential for their dignified surviving (*i.e.* hunting, fishing and harvesting);³¹² in the event that development or investment plans are carried out within indigenous territories, the benefits arising from those plans must be reasonably shared with the indigenous communities concerned;³¹³ the juridical personality of indigenous peoples in relation to their right to property under Article 21 ACHR must be recognized;³¹⁴ appropriate culturally-shaped reparation must be granted to the indigenous communities affected by these human rights breaches, that are effectively adequate to restore the damages suffered according to their own perspective,³¹⁵ including restitution of lands and recognition of the indigenous title of ownership over

³⁰⁶ See CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Paraguay (ratification: 1993) Submitted: 2004, available at <<http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=15936&chapter=9&query=Paraguay%40ref&highlight=&querytype=bool&context=0>> (last visited on 13 September 2009), para. 16 ff.

³⁰⁷ See CEACR: Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Bolivia (ratification: 1991) Published: 2006, available at <<http://www.oit.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=8858&chapter=6&query=Bolivia%40ref&highlight=&querytype=bool&context=0>> (last visited on 13 September 2009), paras. 9 and 12. For a more comprehensive assessment of the ILO practice see CHARTERS, “Reparations for Indigenous Peoples: Global International Instruments and Institutions”, *cit.*, p. 174 ff.

³⁰⁸ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 148 f. (emphasis added).

³⁰⁹ *Ibid.*, para. 149.

³¹⁰ *Ibid.*, para. 71.

³¹¹ See *Case of the Moiwana Community v. Suriname*, para. 98 ff.

³¹² See *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 96.

³¹³ See *Case of the Saramaka People v. Suriname*, para. 138 f.

³¹⁴ *Ibid.*, para. 169 ff.

³¹⁵ For a more comprehensive assessment of this topic see CITRONI and QUINTANA OSUNA, *cit.*, p. 317 ff.

them,³¹⁶ setting up of developmental funds to re-establish the original conditions of indigenous traditional lands affected by environmental devastation,³¹⁷ public recognition by the State of its international responsibility and issuance of apology in favour of the community concerned,³¹⁸ establishment of memorials to keep the memory of the wrong suffered by indigenous peoples,³¹⁹ as well as monetary compensation to redress the material and/or non-material (especially moral) damage suffered in consequence of having been denied the right to enjoy their ancestral lands.³²⁰

Collective rights of peoples (including indigenous ones) are widely affirmed by the *African Charter on Human and Peoples' Rights* (which has been ratified by all African countries)³²¹, particularly by Articles 20 (proclaiming, the right of all peoples to existence, their “unquestionable and inalienable right to self-determination” and their right “to freely determine their political status” as well as to pursue ‘their economic and social development according to the policy they have freely chosen’), 21 (right of peoples to freely dispose of their wealth and natural resources), 22 (right of peoples “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”) and 24 (right of peoples “to a general satisfactory environment favourable to their development”). These rights have been applied to indigenous peoples by the ACHPR in two landmark cases. In the first, decided in 2001, the ACHPR stressed that oil exploitation activities carried out with the direct involvement of the national government in the traditional lands of the Nigerian *Ogoni* people – leading to serious environmental degradation and severe health problems for the members of such a people – had produced not only a breach of Articles 21 and 24 of the African Charter, but also – drawing inspiration from the practice of the IACHR – of the right to property protected by Article 14 (on account of the forced eviction of the *Ogoni* from their lands, which violated the right to adequate housing that “was enjoyed by the *Ogonis* as a collective right”³²²), as well as the right to life affirmed by Article 4, stating that the behaviour of the Nigerian government had affected “the life of the *Ogoni* Society as a whole”.³²³

Such an approach has been confirmed and updated in a more recent case, in which – for the first time – the ACHPR has explicitly recognized the status of a community – the *Endorois* of Kenya – as indigenous people. In dealing with the eviction of this people from its ancestral lands, the Commission has found such a practice had resulted in a breach of the right of the *Endorois* to freely practice their religion (Article 8 of the African Charter).³²⁴ Also, in finding that the *Endorois*’ right to property had been infringed, the ACHPR has reiterated that “the rights, interests and benefits of [indigenous] communities in their traditional lands constitute” *de jure* “property”, conceived as a collective right.³²⁵ Therefore, recognizing the authority of the UNDRIP (in particular of Article 28)³²⁶, the Commission has meaningfully affirmed that “indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds”,³²⁷ and that, *inter alia*, “the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality”.³²⁸ With respect to cultural rights, the ACHPR has interpreted Article 17(2) of the African Charter (stating that “[e]very individual may freely take part in the cultural life of his community”) as having a “dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state

³¹⁶ See, e.g., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 164; *Case of the Moiwana Community v. Suriname*, para. 209; *Case of the Saramaka People v. Suriname*, para. 194; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 210.

³¹⁷ See *Case of the Moiwana Community v. Suriname*, para. 213 ff.

³¹⁸ *Ibid.*, para. 216 f.

³¹⁹ *Ibid.*, para. 218.

³²⁰ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 167; *Case of the Moiwana Community v. Suriname*, paras. 187 and 196; *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 195 and 205; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, paras. 218 and 224; *Case of the Saramaka People v. Suriname*, paras. 199 and 201. In determining the amount of immaterial damage – which is usually much higher than material one – the Court takes into particular account “the special significance of the land for indigenous peoples [...] [which] entails that any denial of the enjoyment or exercise of their territorial rights is detrimental to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations” (see *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 203).

³²¹ See <<http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>> (last visited on 24 April 2010).

³²² See *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, para. 63 (emphasis added).

³²³ *Ibid.*, para. 67 (emphasis added).

³²⁴ See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 173 (Italics in the original text).

³²⁵ *Ibid.*, paras. 187 and 205.

³²⁶ *Ibid.*, para. 232.

³²⁷ *Ibid.*, para. 207 (emphasis added).

³²⁸ *Ibid.*, para. 209 (emphasis added).

to promote and protect traditional values recognised by a community”;³²⁹ in this respect, a State “has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities”.³³⁰ Finally, the ACHPR has stressed that, when it comes to management of indigenous peoples’ ancestral lands, not only the peoples concerned have the right to be consulted³³¹ consistently to their customs and traditions³³² and to be “well represented in the decision making structure”,³³³ but also to be offered the opportunity to give “their free, prior, and informed consent, according to their customs and traditions” for their removal of from their ancestral lands to be lawful³³⁴ as well as with respect to any development or investment projects that would have a major impact on their lands;³³⁵ in addition, they have the right to share the benefits “made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival”.³³⁶ In light of all the foregoing, the ACHPR recommended Kenya to recognize the rights of ownership of the Endorois and to restore to them their ancestral lands, as well as to pay to the community adequate compensation for all the loss suffered and royalties from existing economic activities within their lands, ensuring that they benefit from employment possibilities therein.

The international practice just summarily described is accompanied by a myriad of soft-law documents proclaiming the same principles stressed above.³³⁷ Also, the various initiatives and operational programmes developed in the field by the major international organizations and institutions in the last decades, including the UN³³⁸ and the World Bank,³³⁹ testify the special concern of the international community for the rights of indigenous peoples.

Overall, there is a massive amount of highly significant international practice recognizing the rights of indigenous peoples, which is accompanied and confirmed by the practice developed at the domestic level by most countries in the territory of which a significant population of indigenous people live. This practice has developed both at the legislative (including constitutional) and jurisdictional level, affirming the right of indigenous peoples to the recognition and safeguarding of their cultural identity, their cultural rights, land rights and their right to autonomy and participation in the decisions affecting them. In addition, in recent years a number of governments have developed reparation policies aimed at redressing indigenous peoples for the lands they have been deprived of as well as for other wrongs suffered. The countries (and groups of countries) in which the said practice has developed (although to an heterogeneous extent) include Argentina,³⁴⁰ Australia,³⁴¹

³²⁹ *Ibid.*, para. 241.

³³⁰ *Ibid.*, para. 248 (footnotes omitted).

³³¹ *Ibid.*, para. 281.

³³² *Ibid.*, para. 289.

³³³ *Ibid.*, paras. 280 and 282.

³³⁴ *Ibid.*, para. 226.

³³⁵ *Ibid.*, paras. 290 and 291.

³³⁶ See para. 295; see also paras. 294 and 296.

³³⁷ See, e.g., 1992 *Rio Declaration on Environment and Development*, UN doc. A/CONF.151/26 (Vol. I) of 12 August 1992, Annex I, Principle 22: “[i]ndigenous peoples and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development”; 1992 UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135 of 18 December 1992, affirming that “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity” (Article 1) and that “[p]ersons belonging to national or ethnic, religious and linguistic minorities [...] have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination” (Article 2); 1993 *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 of 12 July 1993, recognizing “the inherent dignity and the unique contribution of indigenous people to the development and plurality of society”, strongly reaffirming “the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development”, and calling upon States “to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them [...] [as well as to] take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization” (see Part I, para. 20). See also the *Draft American Declaration on the Rights of Indigenous Peoples*, *supra*, note 254.

³³⁸ See, e.g., the two International Decades of the World’s Indigenous People and the establishment of the *Permanent Forum on Indigenous Issues* by the Economic and Social Council.

³³⁹ See *Operational Policy 4.10*, OP 4.10, July 2005, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>> (last visited on 25 April 2010), having the main purpose to ensure “that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples” (para. 1).

³⁴⁰ See the cases described by ROSTI, *cit.*, p. 345 ff.

Bangladesh,³⁴² Belize,³⁴³ Bolivia,³⁴⁴ Botswana,³⁴⁵ Brazil,³⁴⁶ Cambodia,³⁴⁷ Canada,³⁴⁸ Chile,³⁴⁹ Colombia,³⁵⁰ Costa Rica,³⁵¹ Ecuador,³⁵² European Union,³⁵³ India,³⁵⁴ Japan,³⁵⁵ Laos,³⁵⁶ Malaysia,³⁵⁷ Mexico,³⁵⁸ New Zealand,³⁵⁹ Nicaragua,³⁶⁰ Norway,³⁶¹ Paraguay,³⁶² Peru,³⁶³ Philippines,³⁶⁴ South Africa,³⁶⁵ Taiwan,³⁶⁶ United States of America³⁶⁷ and Venezuela.³⁶⁸ The practice in point constitutes a direct manifestation of the will of the States or

³⁴¹ See, e.g., *Mabo v. Queensland (No 2)*, 175 CLR 1, 1992; *Wik v. Queensland*, 187 CLR 1, 1996. See also the measures of reparation indicated *supra*, note 272.

³⁴² See CHINGMAK, *cit.*, p. 438 ff.

³⁴³ See the very recent case of *Aurelio Cal et al. v. The Attorney General of Belize and the Minister of Natural Resources and Environment*, Supreme Court, Judgement of 18 October 2007 (text of the judgement available at <<http://www.elaw.org/node/1620>>, last visited on 13 September 2009); for a comment on this case see S. J. ANAYA, "Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law – The Maya Cases in the Supreme Court of Belize", in LENZERINI, *Reparations for Indigenous Peoples*, *cit.*, p. 567 ff.

³⁴⁴ See Article 30(II)(6) of the Constitution, which guarantees the right of the indigenous nations and peoples to the collective registration of their lands and territories. See also Law 3897 of 26 June 2008, which attributes to the "46 articles of the Declaration of the United Nations on the rights of Indigenous peoples" the status of national law in Bolivia.

³⁴⁵ See *Sesana and Others v. Attorney General*.

³⁴⁶ See Article 231 of the Constitution, affirming that "Indians shall have [...] recognized, their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property".

³⁴⁷ See the *Ratanakkiri Land Dispute*, described and commented by CHINGMAK, *cit.*, p. 449 f.

³⁴⁸ See s 35(1) of the Constitution Act, stating that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". See also *Sparrow v the Queen* (1990) 1 *Supreme Court Reports* 1075, and *Delgamuukw v British Columbia*. See also the measures of reparation indicated *supra*, note 273.

³⁴⁹ See Indigenous Law No. 19.253 of 1993, regulating land rights.

³⁵⁰ See Article 330 of the Constitution, according to which the exploitation of natural resources within the indigenous territories must be made without any negative effects on the cultural, social and economic integrity of the indigenous communities. See also *Sentencia No. T-380/93*, para 7.

³⁵¹ See the Indigenous Law, No. 6172 of 1977.

³⁵² See Article 57 of the Constitution, recognizing, *inter alia*, the rights of indigenous peoples to develop and reinforce their identity, to the imprescriptible collective property and the possession of their lands (which are inalienable), to participate in the use, usufruct, administration and conservation of the natural resources located in their lands as well as to participate in the law-making process and be consulted before taking any decision that may affect their rights.

³⁵³ See Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *supra*, note 281.

³⁵⁴ See *Samatha v. State of Andhra Pradesh*.

³⁵⁵ See *Kayano and Others v. Hokkaido Expropriation Committee* (Nibutani Dam Decision).

³⁵⁶ See CHINGMAK, *cit.*, p. 456 ff.

³⁵⁷ *Ibid.*, p. 442 ff.

³⁵⁸ See Articles 2 and 27 of the Constitution, concerning land rights.

³⁵⁹ See the sub-section on New Zealand, in Section 9 *supra*. See also *Ngati Apa v Attorney General of New Zealand*, as well as the recent agreements through which the New Zealand government has returned to the Maori some major indigenous traditional territories, including Maungawhau/Mt. Eden, Maungakiekie/One Tree Hill and Puketapapa/Mt. Roskill in Auckland, in addition to financial compensation for the taking of such territories (see "Agreement in principle reached over Auckland claim 3/6/2006", 9 June 2006, available at <<http://www.ngatiwhatuaorakei.com/Media/aip-orakei.html>>, last visited on 2 July 2010; "Ngati Whatua o Orakei Signs Preliminary Settlement Agreements", 12 February 2010, available at <<http://www.ngatiwhatuaorakei.com/Media/ngati-whatua-o-orakei-signs-preliminary-settlement-agreements.html>>, *ibid.*).

³⁶⁰ See Article 89 of the Constitution, concerning land rights.

³⁶¹ See Article 110(a) of the Constitution, stating that "[i]t is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life".

³⁶² According to Article 63 of the Constitution, indigenous peoples have the right to preserve and develop their ethnic identity within their respective habitat. Pursuant to Article 64, they also have the right to communal property of the land, with sufficient extension and quality for the preservation and development of their particular ways of life; their lands are non-seizable, indivisible, imprescriptible, cannot be sold, cannot be used for guaranteeing contractual obligations and are not subject to taxes.

³⁶³ See Art. 83 of the Constitution, stating that Peasant and Native Communities "are autonomous in terms of their organization, communal working, use and free disposal of their land".

³⁶⁴ See CHINGMAK, *cit.*, p. 452 ff.

³⁶⁵ See, in particular, *Alexkor Ltd and the Government of the Republic of South Africa v. the Richtersveld Community and others*; for a comprehensive assessment of the South African case law on indigenous peoples see VAN GENUGTEN, "Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems", *cit.*, p. 54 ff.

³⁶⁶ See the practice described by CHINGMAK, *cit.*, p. 460 ff.

³⁶⁷ See the practice described in LENZERINI, "Sovereignty Revisited", *cit.*, p. 167 f. See also the measures of reparation indicated *supra*, note 274.

³⁶⁸ See Article 119 of the Constitution recognizing "the habitat and original rights to the lands ancestrally and traditionally occupied" by indigenous peoples and communities, and which are necessary to develop and guarantee their way of life; see also Article 120, affirming that the exploitation by the State of the natural resources in native habitats shall be carried out

of international institutions that originate from the will of States, expressed through the adoption and ratification of the relevant international treaties that have established such institutions. In addition, the findings of these institutions have never been disputed by the States concerned on the merits. This confirms that the pertinent practice is accompanied by the “evidence of a belief that [it] is rendered obligatory by the existence of a rule of law requiring it”,³⁶⁹ making the requirement that the element of state practice is accompanied by the necessary *opinio juris* – in order to have customary international law – fully satisfied. It is therefore indisputable that indigenous peoples are of concern of customary international law.

Having ascertained the foregoing, it is opportune to make clear that it is not important to investigate whether the relevant rules of customary international law actually correspond, in their precise content, to the provision of UNDRIP in their actual formulation. By its own nature a declaration of principles, even when its content partially reproduces general international law, has in fact also a propulsive force, aimed at favouring further evolution of its subject matter for the future. What is really significant for the present enquiry is that the adoption of UNDRIP, after more than twenty years of negotiations, confirms that the international community has come to a consensus that indigenous peoples are a concern of international law, which translates into the existence of customary rules of binding force for all States irrespective of whether or not they have ratified the relevant treaties (which, on their part, taken together bind virtually all countries in the world). Therefore, it is today indisputable that “customary norms concerning indigenous peoples and their pull toward compliance” are actually a reality in the context of the contemporary international legal order.³⁷⁰ These rules of customary law correspond to the following provisions:

- indigenous peoples have the right to self-determination, that secures to indigenous peoples have the right to decide, within the territory of the State in which they live, what their future will be;
- indigenous peoples have the right to autonomy or self-government. It translates into a number of concrete prerogatives, including: the right to be represented in the national government; the right to participate in national decision-making with respect to decisions that may affect their rights or their ways of life; the right to be consulted with respect to any project that may affect them as well as the related right that projects suitable to significantly impact their rights and ways of life are not carried out without their prior, free and informed consent; the right to regulate autonomously their internal affairs according to their customary law and to establish, maintain and develop their own legal and political institutions, in a way that is consistent with the rules on fundamental human rights. States have the obligation to recognize and ensure respect for the laws, traditions and customs of indigenous peoples;
- indigenous peoples have the right to recognition and preservation of their cultural identity. This includes not only the right to not be subject to genocide (which amounts to a rule of *jus cogens*), but also the right to be free from ethnocide. The latter right presupposes that all the prerogatives that are essential to preserve the cultural identity of indigenous peoples *according to their own perspective* must be preserved, including, *e.g.*, the right to use ancestral lands and natural resources according to their own tradition, the right to profess and manifest their religion in community with the other members of the group, the right to pursue their traditional medicines and burial traditions, etc.;
- indigenous peoples have the right to their traditional lands and natural resources. This right is not only confined to that of not being removed from the lands that they possess at present, but extends to restitution of the ancestral territories from which they have been removed in the past (except when restitution is *absolutely* impossible; in this event, equivalent effective reparation is to be granted in favour of the community concerned), provided that their cultural link with those lands continues to exist. Land rights also imply that the peoples concerned must be allowed to manage their lands autonomously and according to their customary rules; this prerogative is strictly connected with the rights to self-determination and autonomy or self-government;
- indigenous peoples have the rights to reparation and redress for the wrongs suffered. This right amounts to a rule of customary international law to the extent that it is aimed at redressing a wrong resulting from a breach of a right that is itself part of customary international law. In fact, redress is an essential element for the effectiveness of human rights; therefore, any human rights-related obligation brings in itself the *inherent* requirement that any breach of the relevant right is effectively and adequately repaired. This implies, *a fortiori*, that, with respect to any human right protected by customary international law, a corresponding obligation exists – *also pursuant to customary international law* – according to which whatever violation of the right concerned presupposes that the victim(s) of such a violation must be granted access to effective and adequate reparation. Therefore, this logical legal reasoning eventually leads to the conclusion that, to the extent that certain rights of indigenous peoples are protected by

without harming the cultural, social and economic integrity of such habitats, and likewise shall be subject to prior information and consultation with the native communities concerned.

³⁶⁹ See International Court of Justice, *North Sea Continental Shelf Cases*, p. 44.

³⁷⁰ See, ANAYA, *Indigenous Peoples in International Law*, 2nd ed., *cit.*, p. 70. See also LENZERINI, “Sovereignty Revisited”, *cit.*, p. 180 ff.; WIESSNER, “Rights and Status of Indigenous Peoples”, *cit.*, p. 127; IBID., “Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples”, *cit.*, p. 1152 ff.

customary international law – as it is actually the case – parallel obligations exist also in the realm of general international law binding States to grant effective and adequate reparation in favour of indigenous peoples for any breach of the said rights. Although in principle States may decide what kind of reparatory measures are to be granted in each concrete situation, reparation must be in any case *adequate* and *effective*, *i.e.* capable to remove – to the maximum extent possible – the effects of the wrong *as they are perceived by the communities concerned*. This means, in practice, that in some cases States may not be really free to choose the kind of redress to be granted; in particular, when an indigenous community has been deprived of its traditional lands, in principle the form of reparation to be accorded is restitution, whether and to the extent that it is actually feasible. The rule in point includes the requirement that effective mechanisms for redress are available and accessible in favour of indigenous peoples;

- indigenous peoples have the right to expect that all treaties, and other agreements to which they are a direct party with a State, that were fairly negotiated, shall be honoured and fully implemented in a manner respecting the spirit and intent of the understanding of the Indigenous negotiators as well as the living nature of the solemn undertakings made by all parties. The enforcement of this right is inextricably linked to the various provisions of UNDRIP that guarantee access to “effective mechanisms” for redress, “just and fair redress” and “just and fair procedures for the resolution of conflicts and disputes”.