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RIGHTS OF INDIGENOUS PEOPLES

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This Report is dedicated to the memory of our late Committee member and friend Professor Jon van Dyke, esteemed scholar, dedicated advocate of the rights of indigenous peoples, great human being. His professional and moral integrity remain with us as a profound source of inspiration.

Final Report

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1. Structure of the Present Report and Methodology of Work^o

In recent years, the topic of indigenous peoples' human rights¹ has captured the attention of international law and its decision makers in an unprecedented manner. The adoption, in 2007, by the General Assembly, of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) – as well as the universal support devoted to this instrument – has opened new and important perspectives in the struggle of indigenous peoples for the full recognition of their particular rights and distinct cultures in the context of the international legal order.

The most significant implications arising from the adoption of the UNDRIP and from the other positive developments of international and domestic law in the field of indigenous peoples' rights have been examined by this Committee in its Interim Report,² submitted to the ILA in The Hague in 2010, which detailed the contemporary state of international law concerning the rights of indigenous peoples.

As established by the Committee at its July 2-3, 2011 Intersessional Meeting in Anchorage, Alaska,³ the present Report and the final conclusions and recommendations of this Committee build upon the Interim Report, which should be considered an integral part of the present Report as well as an essential element of the overall work of the Committee. Hence, the present Report complements the Interim Report through incorporating the new developments that occurred in the field of indigenous peoples' rights since the publication of the Interim Report itself. In addition, it addresses two specific issues which were not the object of assessment in the Interim Report, namely indigenous peoples' language rights and the safeguarding of indigenous peoples' cultural heritage. The present Report is to be intended as replacing the Interim Report *only* with respect to the parts of the text which explicitly modify elements of the latter. The sections of the Interim Report relating to issues which are not discussed in the present Report are to be considered as final.

The present Report also includes – at the end – a number of conclusions and recommendations regarding the present status and/or future evolution of the human rights of indigenous peoples in international law.

2. Understanding the Term “Indigenous Peoples”

Consistent with what was emphasized in the Interim Report,⁴ the indicia that should be used in order to ascertain whether or not a given community may be considered as an indigenous people are the following:

- *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;
- *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 *usually* 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;

^o The Rapporteur of the Committee wishes to thank Professor S. James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples, for his very useful comments on an earlier draft of the present Report. Special thanks also go to Professor Siegfried Wiessner, Chair of the Committee, for his kind and enlightening guidance throughout this project and to Committee members Professor Dalee Sambo Dorough, Professor Bradford W. Morse, Professor Martin Scheinin, Dr Margot Salomon, Professor Willem van Genugten and Professor Ana Vrdoljak, for their incisive comments on earlier drafts of the present Report.

¹ It is important to emphasize that, as stressed by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, S. James Anaya (UN Special Rapporteur), the UNDRIP “does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples”; see “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 (UN Special Rapporteur Report on the UNDRIP), para. 40.

² See International Law Association, Committee on the Rights of Indigenous Peoples, “Interim Report”, The Hague Conference Report, 2010 (hereinafter: “Interim Report”), available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1024>> (last visited on 20 January 2012).

³ The Committee wishes to thank its member Professor Dalee Sambo Dorough for her hard work in organizing and hosting its 2011 Anchorage Intersessional Meeting.

⁴ See Interim Report, pp. 7-8.

- *non-dominance*: forming non-dominant groups within the society;
- *perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities.

Most of these elements cannot be considered as absolutely indispensable to qualify a group as an “indigenous people”, consistent with the “relative flexibility” approach adopted in the Interim Report.⁵ Only two of the listed criteria are to be considered as essential for a community to be considered as an indigenous people; these two criteria are self-identification – which should also be regarded as an essential element of the right to self-determination of indigenous peoples – and its special relationship with its ancestral lands.⁶ This said, it is to be emphasized that – in terms of methodology – the fact of whether or not a community may be considered as an indigenous people is in any event to be ascertained on a case-by-case basis.

Finally, it is important to emphasize that no numerical limitations (in terms of membership) may be imposed on a community as a condition for it to be considered as indigenous under international law.

3. Self-Determination, Autonomy or Self-Government*⁷

With respect to self-determination, autonomy or self-government, it is necessary to focus our attention on two specific issues, which need to be deepened and/or amended with respect to the Interim Report.

The first of the said issues is represented by the possible tension between collective self-determination and autonomy of indigenous peoples and the individual human rights of their members.⁸ In this respect, it is opportune to better clarify the meaning of the expression “international human rights standards”, used by Article 34 UNDRIP in order to determine the limits of indigenous peoples’ autonomy. We conclude that this sentence includes human rights guarantees under both customary international law and relevant treaties ratified by the States concerned, provided that any limitations to the exercise of indigenous peoples’ rights are consistent with Article 46(2) UNDRIP, *i.e.* that they are “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”.

The second issue is related to the problem of free, prior and informed consent, contemplated in particular by Article 19 UNDRIP in the form of a requirement for States to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain” such consent “before adopting and implementing legislative or administrative measures that may affect them”.⁹ As stressed by UN Special Rapporteur S. James Anaya, this provision applies when a measure put into operation by the national government is suitable to produce a “differentiated effect” to the prejudice of an indigenous community, that is “whenever a State decision may affect indigenous

⁵ *Ibid.*, pp. 8-9.

⁶ This is consistent, for instance, with what is affirmed in the “Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries”, Geneva, 2009, p. 5, according to which “self-identification and dependence on land and resources for survival” are – together with “the profound extent of marginalisation suffered” (an element that is particularly frequent for African indigenous peoples) – the elements which are “most consistently used to identify indigenous peoples”. Also, in the World Bank’s International Finance Corporation “Performance Standard 7, Indigenous Peoples”, 1 January 2012, available at

http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES, last visited on 2 June 2012 (hereinafter “IFC Performance Standard 7”), two of the four elements used to define “indigenous peoples” are, respectively, “[s]elf-identification as members of a distinct indigenous cultural group and recognition of this identity by others” and “[c]ollective attachment to geographically distinct habitats or ancestral territories [...] and to the natural resources in these habitats and territories” (see para. 5).

⁷ This Section has been written by the Rapporteur of the Committee, Professor Federico Lenzerini.

⁸ See sections 3 (pp. 9-12) and 4 (pp. 12-16) of the Interim Report.

⁹ See Interim Report, p. 15.

¹⁰ See *ibid.*, p. 14. On this issue see T. WARD, “The Right to Free, Prior and Informed Consent: Indigenous Peoples Participation Rights within International Law”, in *Northwestern Journal of International Human Rights*, 2011, p. 54 ff.

peoples in ways not felt by others in society [...] even when the decision may have a broader impact”.¹⁰ In addition, it is to be emphasized that the “specific characteristics of the consultation procedure that is required by the duty to consult will necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples”.¹¹ Generally speaking, in light of the wording of Article 19, of its comparison with other articles included in the UNDRIP (e.g. Articles 28(1)¹² and 29(2)¹³), as well as of relevant State practice,¹⁴ it is not possible to conclude that Article 19 may be interpreted as establishing a general right of veto in favour of the indigenous communities concerned to block the adoption or implementation of the governmental measures which may affect them per se.¹⁵ This said, it is also to be stressed that “the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved”;¹⁶ therefore, a “significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent”.¹⁷ Indeed, there are particular cases with respect to which international institutions have recognized the existence of a full right of veto in favour of indigenous peoples in relation to specific kinds of measures which may affect them. For example, in the *Saramaka* case, the Inter-American Court of Human Rights (IACHR) – relying on a 2003 report of the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People¹⁸ – affirmed that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.¹⁹ In taking this position the IACHR echoed the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD), which in 2003 observed that, when it comes to

“exploitation of the subsoil resources of the traditional lands of indigenous communities [...] merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general

¹⁰ See “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya” (UN Special Rapporteur Report on consultation), UN Doc. A/HRC/12/34 of 15 July 2009, paras. 43 and 63.

¹¹ *Ibid.*, para. 45.

¹² According to Article 28(1) UNDRIP, “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”.

¹³ Article 29(2) UNDRIP affirms that “States shall 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”.

¹⁴ See, e.g., Constitutional Court of Bolivia, *Constitutional Judgment 0045/2006*, 2 June 2006, described in International Labour Office, *Application of Convention No. 169 by domestic and international courts in Latin America. A Casebook*, Geneva, 2009, p. 67 ff. (the Court found that, while it is mandatory to enter into consultation with indigenous peoples before carrying out exploitation activities in their territories, an obligation to necessarily achieve the consent of the communities concerned as a precondition for such activities would exceed the scope of constitutional provisions safeguarding indigenous peoples’ rights). The existence of a duty of the State – both at the level of the central government and at the territorial level – to ensure prior consultation of indigenous peoples, to be realized through their representative institutions, has also been affirmed by the Constitutional Court of Bolivia in *Constitutional Judgment 2003/2010-R*, 25 October 2010, available at <http://www.tribunalconstitucional.gob.bo/resolucion_20939.html> (last visited on 18 May 2012). See also U.S. Department of State, “Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples”, 16 December 2010, available at <<http://www.state.gov/documents/organization/153223.pdf>> (last visited on 21 January 2012), p. 5 (“the United States recognizes the significance of the [UNDRIP]’s provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken”).

¹⁵ See, consistently, UN Special Rapporteur Report on consultation, para. 46.

¹⁶ *Ibid.*, para. 47.

¹⁷ *Ibid.* See also para. 65.

¹⁸ See “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session)”, UN Doc. E/CN.4/2003/90 of 21 January 2003, para. 66.

¹⁹ See *Case of the Saramaka People v. Suriname*, Series C No. 172, Judgment of 28 November 2007, para. 134 (see also para. 137). See also “Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Addendum: Report on the Situation of Indigenous Peoples in Nepal” (UN Special Rapporteur Report on Nepal), UN Doc. A/HRC/12/34/Add.3 of 20 July 2009, para. 68.

recommendation XXIII on the rights of indigenous peoples [adopted on 18 August 1997]. The Committee therefore recommends that the prior informed consent of these communities be sought”.²⁰

The CERD, consistently, in 2008 recommended that Ecuador “consult the indigenous population concerned at each stage of the process *and obtain* their consent in advance of the implementation of projects for the extraction of natural resources”.²¹ However, with respect to the Russian Federation, in the same year the Committee simply recommended to “*seek* the free informed consent of indigenous communities and give primary consideration to their special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by those communities”.²² More generally, in recent years the Committee has addressed the issue in point using a quite heterogeneous language, which does not allow to establish whether or not, and in which cases, it considers the requirement of obtaining the consent of the indigenous communities concerned as mandatory. In a number of cases, indeed, the CERD has used a language equivalent to the one utilized in the case of the Russian Federation, recommending that the States concerned “consult [and cooperate]” with the communities concerned “in order to obtain” (or equivalent language) the consent of the indigenous peoples concerned before implementing or authorizing development projects or projects concerning the extraction of natural resources on their lands; examples of this trend include Chile,²³ Argentina,²⁴ Cameroon²⁵ and Guatemala.²⁶ This language seems to suggest that the content of the State obligation is a duty of consultation in good faith in order to obtain consent, which would appear not to make obtaining the consent itself mandatory. However, the use of slightly different words can make a big difference. For example, in a case concerning Panama, the Committee recommended to “conduct consultations with communities potentially affected by development projects and the exploitation of natural resources *so as* to obtain their prior, informed and voluntary consent”;²⁷ the use of the expression “so as” appears to establish a stronger duty than the words “in order”. Conversely, in other cases the CERD has referred to the need that a project is carried out only “after consultation with *and* the informed consent of the indigenous peoples”,²⁸ that “the rights to consultation and free, prior and informed consent of the indigenous communities affected by the industrial activities” are *ensured*,²⁹ and even that “*no decisions directly relating to their rights and interests are taken without their informed consent*”.³⁰ In the end, the recommendations of the CERD range from cases in which States seem to have a simple duty *de negotiando* with indigenous peoples, to cases in which there is an obligation to obtain their consent with respect to development projects or projects concerning the extraction of natural resources on their lands, to cases contemplating even a more general duty to obtain the consent of indigenous peoples before taking any “decisions directly relating to their rights and interests”. There are apparently no criteria which allow to establish the reasons justifying such a differential treatment of equivalent situations;³¹ however, one may assume that a different treatment

²⁰ See “Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty second session, 2003)”, UN Doc. CERD/C/62/CO/2, of 2 June 2003, para. 16. According to para. 4(d) of General Recommendation XXIII, States are called to ensure that “no decisions directly relating to their rights and interests are taken without their informed consent”.

²¹ See UN Doc. A/63/18 of 1 November 2008, para. 143 (emphasis added).

²² *Ibid.*, para. 374 (emphasis added).

²³ *Ibid.*, para. 31(22).

²⁴ See UN Doc. A/65/18 of 31 October 2010, para. 31(26).

²⁵ *Ibid.*, para. 35(18).

²⁶ *Ibid.*, para. 40(11)(a). Even softer is the language used by the Committee in a case involving Indonesia, when the CERD stressed the “importance of effectively seeking the free, prior and informed consent of these indigenous peoples before carrying out” a project of exploitation of their lands; see UN Doc. A/66/18 of 6 January 2012, para. 37.

²⁷ See UN Doc. A/65/18 of 31 October 2010, para. 48(14) (emphasis added).

²⁸ *Ibid.*, para. 34(16) (emphasis added), concerning Cambodia.

²⁹ See UN Doc. A/66/18 of 6 January 2012, para. 66(39), concerning Peru.

³⁰ See UN Doc. A/64/18 of 28 November 2009, para. 41(14) (emphasis added); in this case the Committee, with respect to Peru, quoted its own language as used in General Recommendation XXIII of 1997, para. 4(d) (*supra*, note 20). Differently, in a case concerning Suriname, the Committee recommended that “when taking legislative or administrative decisions which may affect the rights and interests of indigenous and tribal peoples, the State party *endeavour to* consult and obtain their informed consent” (emphasis added); see *ibid.*, para. 44(14).

³¹ This differential treatment might be attributed to the fact that, while in General Recommendation XXIII the fact of indigenous peoples being deprived of “their land and resources [for the benefit of] colonists, commercial companies and State enterprises” (see para. 3) is opportunely considered as a form of racial discrimination, no criteria are established allowing to ascertain when such a negative conduct actually amounts to discrimination; in

may be justified by the practical differences characterizing the different situations occurring in the real world.

As for the Human Rights Committee (HRC), it usually states that States parties should “[c]onduct consultations with indigenous peoples before granting licences for the economic exploitation of the lands where they live, and ensure that such exploitation in no circumstances infringes the rights acknowledged in the [International] Covenant [of Civil and Political Rights]”.³²

According to the Committee on Economic, Social and Cultural Rights, States parties to the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³³ “should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights”.³⁴ In addition, and more specifically, States “should obtain [the] free and informed prior consent [of indigenous peoples] when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk”.³⁵

Last but not least, IFC Performance Standard 7³⁶ – promoting sustainable investment by the private sector in indigenous peoples’ lands – is also notable. With respect to free, prior and informed consent, this Standard applies to situations where the communities concerned are “closely tied to their lands and related natural resources”, whether or not they “possess legal title to these lands as defined by national law”, provided that “their use of these lands [...] [may] be substantiated and documented”.³⁷ In the event that a project “may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives, priority will be given to the avoidance of such impacts”, and, in the event that these impacts are unavoidable, the free, prior and informed consent of the affected communities must be obtained.³⁸ The same requirement applies with respect to projects proposing “to use the cultural heritage including knowledge, innovations, or practices of Indigenous Peoples for commercial purposes”. In this case, “fair and equitable sharing of benefits from commercialization of such knowledge, innovation, or practice, consistent with the customs and traditions of the Indigenous Peoples” must also be ensured.³⁹

In sum, international practice concerning this delicate issue is clearly heterogeneous; this circumstance confirms that the right contemplated by Article 19 UNDRIP does not imply the existence of a right to veto – *in general terms* – with respect to *every kind of measure* that may affect indigenous peoples. This conclusion, however, needs to be reconsidered with respect to some specific measures among the totality of those which may affect indigenous peoples. In particular, as shown by the practice summarily described right above, the position taken by international institutions – although remaining heterogeneous to some extent – seems to be more oriented toward recognizing the existence of a duty to actually obtain the consent of the indigenous communities concerned before carrying out activities of exploitation of their traditional lands. Conversely, with respect to this specific issue, Article 32(2) UNDRIP uses exactly the same language of Article 19,⁴⁰ seemingly supporting the conclusion that, even in such a particular case, no right to veto is recognized in favour of indigenous

the absence of such criteria, it may be difficult for the Committee to ensure perfect coherence in the evaluation of practical situations in which the said conduct takes place.

³² See (as a matter of example) “Concluding observations of the Human Rights Committee – Nicaragua”, UN Doc. CCPR/C/NIC/CO/3 of 12 December 2008, para. 21(c).

³³ 993 UNTS 3.

³⁴ 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. 37.

³⁵ *Ibid.*, para. 55(e).

³⁶ See *supra*, note 6.

³⁷ See para. 13. In addition, a number of steps must be taken by the investor when “adverse impacts can be expected” to the prejudice of “lands traditionally owned by, or under the customary use of, Indigenous Peoples”, including efforts to avoid such impacts, offers of “compensation and due process in the case of commercial development of [indigenous peoples’] land and natural resources, together with culturally appropriate sustainable development opportunities”, guarantees of “continued access to [and usage of] natural resources” by the communities concerned as well as “fair and equitable sharing of benefits associated with project usage of the resources where the client intends to utilize natural resources that are central to the identity and livelihood of Affected Communities of Indigenous People and their usage thereof exacerbates livelihood risk” (see para. 14).

³⁸ See para. 16.

³⁹ See para. 17.

⁴⁰ According to Article 32(2) UNDRIP, “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain* their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources” (emphasis added).

peoples. On the contrary, however, such a right seems to exist with respect to measures of relocation of indigenous peoples from their lands or territories,⁴¹ measures resulting in the taking of indigenous peoples' cultural, intellectual, religious and spiritual property⁴² or lands, territories and resources,⁴³ as well as measures of storage or disposal of hazardous materials in the lands or territories of indigenous peoples.⁴⁴

Having said this, there is one further – essential – consideration to be developed. Indeed, pursuant to a well established rule of interpretation of international law provisions,⁴⁵ they must not be considered in isolation, but rather in their context and in the light of their object and purpose. This is particularly true in the human rights field and, more specifically, in the context of indigenous peoples' rights. With respect to the topic of free, prior and informed consent, the need to proceed to an interpretation of the relevant rules taking into account the general context in which they are operating implies that – although States are not obliged to obtain the consent of indigenous peoples before engaging in *whatever kind* of activities which may affect them – this obligation exists any time that the lack of such a consent would translate into a violation of the rights of indigenous peoples that States are bound to guarantee and respect. This is made clear in the excerpt by the HRC reproduced *supra*,⁴⁶ in which the Committee affirms that, in addition to carrying out consultations with indigenous peoples “before granting licences for the economic exploitation of the lands where they live”, States ought to “ensure that such exploitation *in no circumstances infringes the rights*”⁴⁷ recognized to these peoples. This position is substantially corroborated and clarified by the Committee on Economic, Social and Cultural Rights,⁴⁸ which confirms that the overriding purpose of the safeguarding of indigenous peoples' rights is to preserve their autonomy and cultural integrity, guided by the overarching goal of preserving their cultural identity and, generally, cultural diversity.⁴⁹ When the essence of their cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory.

Finally, one essential precondition to ensure that indigenous peoples may effectively exercise the right in point rests in the need that – especially in cases of projects affecting indigenous lands and/or presupposing exploitation of natural resources – the communities concerned are “provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment”. This impact is to be evaluated through appropriate “environmental and social impact studies” carried out by the State with this purpose in mind.⁵⁰ State authorities must ensure that the said information may be fully and clearly understood by the communities concerned, as well as that “indigenous peoples have adequate technical capacity and financial resources in order to effectively participate in consultations”.⁵¹

4. Language Rights**

4.1 Article 13 UNDRIP in the Context of Related Provisions of the Declaration

⁴¹ See Article 10 UNDRIP, affirming that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation *shall take place without the free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return” (emphasis added).

⁴² See Article 11(2) UNDRIP, according to which “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 in violation of their laws, traditions and customs”.

⁴³ See Article 28(1) UNDRIP, *supra*, note 12.

⁴⁴ See Article 29(2) UNDRIP, *supra*, note 13.

⁴⁵ See Article 31 of the 1969 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331. This rule of interpretation may plainly be extended to instruments of international law other than treaties, including the UNDRIP.

⁴⁶ See text corresponding to note 32.

⁴⁷ Emphasis added.

⁴⁸ See *supra*, text corresponding to note 35.

⁴⁹ See S. WIESSNER, “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges”, in *European Journal of International Law*, 2011, 121, p. 138 f.

⁵⁰ See UN Special Rapporteur Report on consultation, para. 53.

⁵¹ *Ibid.*, para. 70.

** This Section is based on a Report written by Prof. Mahulena Hofmann, with the help of Ricarda Kessebohm and Sophie Simon (paragraph 4.3). Some information included in the text was provided by Ms. Alexandra Tomaselli, Researcher at the Institute for Minority Rights at the European Academy (EURAC).

Article 13 UNDRIP affirms that

“1. 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.

2. States shall take effective measures to ensure that this right is protected and also 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”.

Article 13 is a provision which combines a general principle with special rules. In relation to Article 14, aimed at the protection of education in indigenous languages, and Article 16, which formulates the right of indigenous peoples to establish their own media, Article 13 can be seen as both as a *catch-up rule*, covering all forms of language protection, but also as a provision enshrining several special language situations.

Concerning the general provision, Article 13 para. 1 confirms the right of indigenous peoples “to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures”. This provision is to be read in connection with the provisions of Articles 8 and 11 of the Declaration, devoted to the protection of indigenous culture. In particular, Article 8 prohibits the destruction of the culture of indigenous peoples (including what is usually referred to as “cultural genocide”), while Article 11 formulates their right to maintain the manifestations of their culture; both these expressions of culture are hardly imaginable without the medium of a language. The special characteristic of Article 13 is that it concentrates on the linguistic aspect of the culture: the transmission of histories, oral traditions, philosophies, literatures “to future generations” as specific contents, including languages and writing systems as means of the transmission of these contents. The areas of implementation of this rule are manifold and include, besides the above mentioned educational systems and media institutions, the use of the language both in the private and the public sphere, in the local administrative state institutions or in the form of topographical names.

Article 13 para. 2 is the corollary of the right under consideration: it formulates the State obligation to take effective measures to ensure that the right in point is protected. Such measures represent particular steps in the educational sphere (Article 14) and media (Art. 16), but could involve also the promotion of libraries, cultural centers, museums, archives, academies, the support of new technologies, projects aimed at the creation or modernization of dictionaries or the study of indigenous languages at the universities. The implementation of this rule might be typically paralyzed by (real or disguised) budgetary problems of the State or local institutions.

Parallel to this general rule, Article 13 encompasses several special regulations. The first of them (Article 13 paragraph 1, second sentence) deals with the right of indigenous peoples “to retain their own names for communities, places and persons”. The obligation of States “to take effective measures to ensure that this right is protected” surely involves this issue; the formulation used in the UNDRIP signals that it should not only include the right of indigenous communities to keep their traditional names in the future but it would also include the obligation of the State concerned to enable the relevant communities to re-gain the traditional names.

The significance of indigenous toponyms has been stressed by the UN Conference on the Standardization of Geographical Names (2007).⁵² However, some States might link the realization of the right at issue to quantitative conditions (*e.g.* speakers of the language being 20% or more inhabitants of a certain area) or administrative or local procedures (*e.g.* voting in the local assembly). Typically, they would complain about additional costs connected with the installation of new topographic signs. Another problem could rest in the difficulty to find a consensus on the proper form of the local name as there may be several traditional forms or several variants corresponding to different spellings at different times. Concerning the names of persons, similar problems may exist. In addition, the step of formalization of the procedure may differ, oscillating from registration to a formal application procedure accompanied by fees.

Another special provision can be found in Article 13, paragraph 2 UNDRIP; by virtue of this norm, States are expected “to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings”. In order to reach this aim, States are required to adopt

⁵² See Economic and Social Council, “Restoration of indigenous toponyms: recognition of attachment, identity and dependence”, UN Doc. E/CONF.98/41 of 29 June 2007.

all appropriate means, including, where necessary, interpretation services in favour of the communities concerned. The said “appropriate means” may include, depending on the factual circumstances, the following requirements: governmental authorities – especially the officers who are in contact with the public – should be able to use indigenous languages; indigenous peoples should have the possibility to submit oral or written applications and receive replies written in their own languages; or, if the latter is not possible, the guarantee should exist that users of indigenous languages may submit documents in their languages and that those documents are duly considered by State authorities.⁵³ The exercise of the said rights is particularly important in the judicial context, where courts may be required to conduct the whole proceeding in the indigenous language concerned; when this is not possible, the accused indigenous person must be guaranteed, as a minimum requirement, the right to use his/her own language, and the court must accept documents and evidence formulated in the indigenous language. Concerning the use of interpreters and translators, the presence in Article 13 UNDRIP of the condition “where necessary” may pose difficulties: several international treaties⁵⁴ connect the use of interpreters to the condition that the person concerned cannot understand or speak the official language used in court. On the other hand, the practice on the basis of other instruments⁵⁵ does not contemplate this rather “humiliating” condition and requires a pro-active approach from the courts, which must allow the persons concerned to use their mother tongue irrespective of their ability to master the official language.

4.2 Article 13 in the Context of Article 1 UNDRIP

Article 1 UNDRIP connects the rights formulated in the Declaration (including those related to language) with international human rights law. Language rights are usually categorized as dispositive rights; the consequence of this fact is that indigenous peoples enjoy the rights contemplated by those treaties which have been ratified by the State concerned as well as by customary international law which is possibly applicable to this sphere.

The crucial treaty instrument in this area is the ICCPR, binding 167 States.⁵⁶ Several of its provisions contemplate language-related human rights, the most significant ones being articles 14 and 27.

In general terms, Article 27 provides for the right of ethnic or linguistic minorities to enjoy their own culture or to use their own language. HRC’s General Comment No. 23 to Article 27, issued in 1994,⁵⁷ expressly recognizes these rights as held by indigenous communities;⁵⁸ the HRC has affirmed that these rights are not only “to be respected” by States parties, but all necessary positive measures are also to be taken to protect the minority culture and language concerned. The HRC rightly points out that such positive measures must respect the provisions of Articles 2.1 (prohibition of any distinction based on race, language or national origin) and 26 (equally prohibiting discrimination based on race, language or national origin), both in the relations between different minorities as well as in those between minorities and the predominant part of the population. As stressed by the HRC, the main criterion for the legitimate differentiation between the various groups of the population of the State is the *aim* of the adopted measures: “[a]s long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria”.⁵⁹

More specifically, Article 14 ICCPR is devoted to the right to equality before the courts; its para. 3 guarantees any person charged with criminal offences to be informed promptly and in detail, in a language which he/she understands, of the nature and cause of the charge against him/her. Paragraph 6 entitles the person concerned to obtain the free assistance of an interpreter “if he cannot understand or speak the language used in the court”. The HRC, in its General Comment No. 13 to Article 14,⁶⁰

⁵³ This rule is provided for, e.g., the 1992 *European Charter for Regional or Minority Languages*, CETS 148, at Articles 9 and 10.

⁵⁴ E.g. Article 14(3)(f) of the 1966 *International Covenant on Civil and Political Rights* (ICCPR), 999 UNTS 171.

⁵⁵ E.g. *European Charter for Regional or Minority Languages*, Article 9.

⁵⁶ See United Nations Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-4&chapter=4&lang=en> (last visited on 6 June 2012).

⁵⁷ General Comment No. 23, “Article 27: Rights of Minorities”, UN Doc. CCPR/C/21/Rev.1/Add.5 of 8 April 1994.

⁵⁸ *Ibid.*, particularly paras. 3.2 and 7.

⁵⁹ *Ibid.*, para. 2.

⁶⁰ “General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)”, 13 April 1984, available at

pointed out that the right to a fair hearing requires that the guarantee of Article 14 extends from criminal hearings to “suits at law”;⁶¹ it did not provide for any guidance, however, concerning the interpretation of the sentence “understand or speak the language used in the court”, except for the explanation that this rule extends to both aliens and nationals.⁶²

Important educational rights are formulated in the ICESCR, which has 160 States parties at present.⁶³ In particular, Article 13 formulates in detail the right of everyone to education which, e.g., implies the need that understanding and tolerance among all nations and racial, ethnic or religious groups are promoted. Also the right in point is to be guaranteed without discrimination of any kind as to race or language, pursuant to Article 2, paragraph 2, ICESCR.

Another significant international treaty providing for language rights in favour of indigenous peoples, applicable through Article 1 UNDRIP, is the 1989 ILO *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169),⁶⁴ binding 22 States, mostly Latin American.⁶⁵ According to its Article 28, para. 3, measures shall be taken by the Contracting Parties to “preserve and promote the development and practice of the indigenous languages of the peoples concerned”. Several provisions of the Convention deal with rights concerning indigenous languages related to education: Article 26 obliges States parties to ensure that members of indigenous peoples have the opportunity to enjoy education at all levels on at least an equal footing with the rest of the national community; Article 28 para. 1 recognizes in favour of children belonging to indigenous communities – wherever practicable – the right to be taught to read and write in their indigenous language or in the language most commonly used by the group to which they belong. Information about the rights contemplated by the Convention, about labour, economic opportunities, education and health matters, as well as the traditions and cultures of the peoples concerned, shall be transmitted – when necessary – by means of written translations and communications in the indigenous languages (Article 30).

In addition to “universal” ones, also the relevant regional treaties need to be mentioned. In Europe, the standards for linguistic rights are set out by the 1950 *European Convention on Human Rights* (ECHR),⁶⁶ especially by Article 10, on freedom of expression, as interpreted and applied by the jurisprudence of the European Court of Human Rights. The system of the ECHR is complemented by some specialized agreements, such as the 1992 *European Charter for Regional or Minority Languages*⁶⁷ and the 1995 *Framework Convention for the Protection of National Minorities*.⁶⁸

In the context of the American continent, Article 1 of the 1969 *American Convention on Human Rights*⁶⁹ prohibits any discrimination for reasons of race or language in enjoying all the rights contemplated in its text, including the right of any accused person to be assisted by a translator or interpreter at a trial – provided for by Article 8; this is conditioned to the requirement that the person concerned does not understand or speak the language of the tribunal or the court.

Finally, in Africa, the 1981 *African Charter on Human and Peoples’ Rights*⁷⁰ prohibits any distinction in enjoyment its rights based on colour or language (Article 2), including the sphere of education and participation in the cultural life (Article 17).

4.3 Examples of Protection of Indigenous Languages

A number of States recognize and protect indigenous languages in their domestic legislation. For example, in Australia, the safeguarding of Aboriginal languages⁷¹ is supported by the government through the *Maintenance of Indigenous Languages and Records Program*, which for the years 2011-12

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument)> (last visited on 20 January 2012).

⁶¹ *Ibid.*, para. 2.

⁶² *Ibid.*, para. 13.

⁶³ See United Nations Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> (last visited on 6 June 2012).

⁶⁴ Reprinted in 28 *ILM* (1989) 1382.

⁶⁵ See <<http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>> (last visited on 6 June 2012).

⁶⁶ *CETS* No. 05.

⁶⁷ *CETS* No. 148.

⁶⁸ *CETS* No. 157.

⁶⁹ *OAS Treaty Series* No. 36.

⁷⁰ Reprinted in 21 *ILM* (1982) 58.

⁷¹ According to a *National Indigenous Languages Survey* carried out in 2004, only 145 Indigenous languages were still spoken in Australia at that time, about 110 of which were severely or critically endangered; see About Australia, “Indigenous Languages”, available at <http://www.dfat.gov.au/facts/Indigenous_languages.html> (last visited on 17 January 2012).

is supporting a total of 67 activities, using a budget of Australian dollars 9.6 million.⁷² Other initiative are taken at the local level. For example, in New South Wales, in 2003, the *Aboriginal Languages K–10 Syllabus* was released, leading to the increment in the number of schools undertaking programmes and activities in Aboriginal language; in 2006, 46 Aboriginal language programmes were operated throughout the State.⁷³ Australia is also making some efforts with respect to topographical re-naming, with regard to sites of special cultural and spiritual importance for Aboriginal peoples; the most notable example in this respect is *Uluru*, the site commonly known as “Ayers Rock”: in 1993 the site was renamed with the dual name “Ayers Rock/Uluru”, which was reversed in 2002 to “Uluru/Ayers Rock”, recognizing the Aboriginal name as the “dominant” one.⁷⁴

In Bolivia, according to Article 5 of the Constitution of 2009, all languages spoken on the territory of the State are considered official languages: Castellán, Aymara, Araona, Baure, Bésiro, Canichana, Cavineño, Cayubaba, Chácobo, Chimán, Eese ejja, Guaraní, Guarasúwe, Guayay, Itonama, Leco, Machajuyai-kallawaya, Machineri, Maropa, Mojeño-trinitario, Mojeño-ignaciano, Moré, Mosetén, Movima, Pacawara, Puquina, Quechua, Sirionó, Tacana, Tapiete, Toromona, Uru-chipaya, Weenhayek, Yaminawa, Yuki, Yuracaré and Zamuco. Both central and regional authorities are bound to use at least two of these languages: one of these will be Castellán, while the other will be decided taking into account the use, convenience, circumstances, needs and preferences of the population in the territory concerned. Article 78 affirms that education is multilingual in the whole educational system. Last but not least, pursuant to Article 95, universities must implement programmes for the recovery, preservation, development, learning and spreading of the different languages of the Nation and of peasant indigenous peoples.

A number of indigenous languages are also recognized as official languages in Canada, including Chipewyan, Cree, Gwich'in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tłı̨chǫ in the Northern Territories⁷⁵ and the Inuit Language in Nunavut.⁷⁶ Indigenous persons have the right, *inter alia*, of using their own language – recognized as official language – in the debates and other proceedings of legislative assemblies and in court proceedings.

In Colombia, Article 10 of the Constitution of 1991 proclaims the languages and dialects of national ethnic groups as official languages “in their territories”, adding that education provided in communities with their own linguistic traditions must be bilingual. Decree No. 804 of 1995⁷⁷ establishes that education for ethnic groups is part of public education services and is based on a commitment to collective development; “ethno-education” is based on a number of principles, including “linguistic diversity”, conceived as the different ways of seeing, conceiving and constructing the world of ethnic groups, expressed through the languages that are part of national life on the basis of equal conditions. Law No. 1381 of 2010,⁷⁸ which is specifically aimed at safeguarding indigenous languages, declares such languages as part of the intangible cultural heritage of the peoples concerned. Speakers of indigenous languages have the right to communicate in their language, with no restrictions

⁷² See <<http://www.arts.gov.au/sites/default/files/pdfs/milr-funding-2011-12.pdf>> (last visited on 17 January 2012). Aboriginal languages are not officially protected by Australian national legislation. However, at the moment of this writing, the information was circulated that the Expert Panel appointed by the government had released its final recommendations in view of recognizing the rights of Aboriginal and Torres Strait Islander Peoples in the Constitution through a constitutional referendum; these recommendations included a call to recognize “Aboriginal and Torres Strait Islander languages as the original Australian languages” (information kindly provided by the Committee member Professor Bradford W. Morse; document on file with the Rapporteur of the Committee).

⁷³ See P. CHANDLER, C. HAID, C. JONES, K. LOWE, J. MUNRO, “Aboriginal Languages Research: Impact of Learning an Aboriginal Language on Primary School Students’ Literacy in English”, University of Wollongong, Research online, Faculty of Education, Papers, available at <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1132&context=edupapers>> (last visited on 19 January 2012), p. 1.

⁷⁴ See “Aboriginal Languages”, available at <<http://www.creativespirits.info/aboriginalculture/language/>> (last visited on 19 January 2012).

⁷⁵ See *Official Languages Act*, RSNWT (Nu) 1988, c O-1, available at <<http://www.canlii.org/en/nu/laws/stat/rsnwt-nu-1988-c-o-1/latest/rsnwt-nu-1988-c-o-1.html>> (last visited on 18 May 2012).

⁷⁶ See *Consolidation of Official Languages Act*, S.Nu. 2008, c.10 (not yet in force at the moment of writing), available at <<http://www.canlii.org/en/nu/laws/stat/snu-2008-c-10/latest/snu-2008-c-10.html>> (last visited on 18 May 2012); *Consolidation of Inuit Language Protection Act*, S.Nu. 2008, c.17, available at <<http://www.canlii.org/en/nu/laws/stat/snu-2008-c-17/latest/snu-2008-c-17.html>> (*ibid.*).

⁷⁷ Available at <<http://www.col.ops-oms.org/juventudes/Situacion/LEGISLACION/EDUCACION/ED80495.htm>> (last visited on 20 January 2012).

⁷⁸ Available at <http://www.secretariasenado.gov.co/senado/basedoc/ley/2010/ley_1381_2010.html> (last visited on 20 January 2012).

in both the public and private fields, throughout the whole national territory, in oral or written form, in all social, economic, political, cultural and religious activities, among others. They have the right to use their own language in the administration of justice, in the relations with public administration as well as in the field of healthcare. According to Article 6, dealing with names and toponyms in indigenous languages, geographical names traditionally used within the territories of the peoples and communities speaking indigenous languages are considered “co-official” with Castellan toponyms, to the extent that the latter exist.

According to Article 2 of the Constitution of Ecuador of 2008,⁷⁹ Spanish is the official language of the country, while “Spanish, Kichwa and Shuar are official languages for intercultural ties”; the other “ancestral languages” are in official use by indigenous peoples in the areas where they live. Languages are considered, by Article 379, as “part of the tangible and intangible cultural heritage that is relevant for the memory and identity of persons and groups and the target of safeguard by the State”. Article 343 adds that the national education system will be based on an intercultural vision respectful of the country’s geographical, cultural, and linguistic diversity as well as of the rights of communities, peoples and nations living in the territory of the State. In addition, linguistic rights are proclaimed and safeguarded by a number of further provisions included in the Constitution. Article 16 affirms that all persons have the right to “[f]ree, intercultural, inclusive, diverse and participatory communication in all spheres of social interaction, by any means or form, in their own language and with their own symbols”. Article 29 commends the State to guarantee “the right of persons to learn in their own language and cultural environment”. According to Article 45, children and adolescents have the right “to be educated as a priority in their own language and in the cultural context of their own people and nation”. Indigenous peoples are explicitly recognized, at Article 57, the right to create their own media in their languages. The State has the responsibility to guarantee “the intercultural bilingual education system, where the main language for educating shall be the language of the respective nation and Spanish as the language for intercultural relations [...] with total respect for the rights of communities, peoples and nations” (Article 347).

In Mexico, the *General Law on the Linguistic Rights of Indigenous Peoples*, adopted in 2002,⁸⁰ defines indigenous languages as an integral part of the cultural and linguistic heritage of the Nation. Indigenous languages are valid – to the same extent of Spanish – for all public affairs and processes, as well as to have access to public services and information. The State is responsible to ensure the exercise of these rights. Indigenous persons have also the right to access to courts in their own language. Furthermore, the authorities must ensure that members of indigenous communities have access to bilingual and intercultural education, as well as that in the educational system of the State the dignity and identity of the person are respected. This right is also contemplated by the *General Education Law*, adopted in 1993,⁸¹ according to which those who speak indigenous languages will have access to compulsory education in their own language and in Spanish.

In New Zealand the Māori language (*te reo Māori*) is protected by the 1840 *Treaty of Waitangi* as a Māori treasure (*taonga*).⁸² In addition, the *Māori Language Act* 1987⁸³ declares it an official language of New Zealand, recognizing the right of Māori people to speak their language in legal proceedings. The Māori language is currently taught in New Zealand at pre-school level (ages 0 to 4) and at school level (ages 5 to 16).⁸⁴

In Nicaragua, Article 11 of the 1987 Constitution establishes that Spanish is the official language of the State; at the same time, the languages of the communities of the Atlantic coast will also be of official use in the cases established by law. The *Law of Autonomy of the Atlantic Coast* of 1987⁸⁵ recognizes the right of the Atlantic coast communities to preserve their cultural identity and their languages, as well as the right to use and enjoy the waters, forests and communal lands for their own benefit. In particular, Article 11(5) provides that members of these indigenous communities are entitled

⁷⁹ For the English version of the Constitution see <<http://pdpa.georgetown.edu/Constitutions/Ecuador/english08.html>> (unofficial translation, last visited on 20 January 2012).

⁸⁰ See *Ley general de derechos lingüísticos de los pueblos indígenas*, 15 December 2002 (amended in 2010), available at <<http://www.diputados.gob.mx/LeyesBiblio/pdf/257.pdf>> (last visited on 20 January 2012).

⁸¹ See *Ley general de educación*, 9 July 1993 (amended in 2003), available at <<http://basica.sep.gob.mx/dgei/pdf/normateca/LeyGeneraldeEducacion.pdf>> (last visited on 20 January 2012).

⁸² See Interim Report, p. 27, note 162.

⁸³ Available at <<http://www.taurawhiri.govt.nz/act87/index.shtml>> (last visited on 17 January 2012).

⁸⁴ See “FAQ about the Maori Language”, available at <http://www.maorilanguage.info/mao_lang_faq.html> (last visited on 17 January 2012).

⁸⁵ *Estatuto de Autonomía de la Costa Atlántica de Nicaragua*, No. 28 of 7 September 1987, available at <<http://www.scribd.com/doc/15987568/Ley-28>> (last visited on 20 January 2012).

to be educated in their own languages, through programs which take into account their historical heritage, value systems, traditions as well as the characteristics of their environment, within the framework of the national education system.

The Constitution of Paraguay of 1992 protects Guaraní as one of the official languages of the State (Article 140 paragraph 2) and, as such, part of the cultural heritage of the Nation. The *Law on Languages*, adopted in 2010,⁸⁶ stipulates that the State is obliged to ensure the preservation and promotion of indigenous cultures, including the use of their languages in all social functions. Indigenous persons have the right to be recognized as members of a specific linguistic community, connected with the right to preserve the language and culture of their own people. According to Article 12 of the Law, indigenous peoples have the right to receive State aid in order to ensure the survival and the functionality of their languages and cultures. The General Direction of Documentation and Promotion of Indigenous Languages, regulated by Article 39, has the responsibility to make oral and written records of all indigenous languages in Paraguay, and to promote and revitalize these languages. Article 9 of the Law contemplates a number of linguistic rights, including the right of indigenous persons to know and use their own language in the communications with public officials, the right to obtain information in one's own language, the right not to be discriminated on account of the language used, the right to use one's own language in the context of administration of justice, as well as the right to receive initial education at school in one's own language, on the condition that it is an official language of the country or an indigenous language (the latter right is also contemplated by Article 26).

In Peru, the Constitution of 1993 declares Castellan and – in the regions where these languages are dominant – Quechua, Aymara and other indigenous languages as official languages of the country (Article 48). Article 2 proclaims the right of all Peruvians to use their own language in the relations with the authorities, through the help of an interpreter. Furthermore, according to Article 17, the government must promote bilingual and intercultural education in light of the specific characteristics of each zone, preserve the different cultural and linguistic manifestations existing in the national territory and promote national integration. The *General Law of Education* of 2003⁸⁷ introduces bilingual education in all stages of education, guarantees the instruction in the mother tongue of the pupils together with Castellan as second language of instruction, provides for the obligation of teachers to know both the language of the region where they work as well as Castellan, and requires that the participation of indigenous peoples is ensured in the formulation of educational curricula.

In several other Latin American countries indigenous languages are officially recognized at the constitutional level. These include Argentina,⁸⁸ Brazil,⁸⁹ Guatemala⁹⁰ and Venezuela.⁹¹

The right of “all of its peoples [...] to preserve their native language and to create conditions for its study and development” is guaranteed by Article 68(3) of the Constitution of the Russian Federation of 1993.⁹² Article 69 also guarantees “the rights of the indigenous small peoples according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation”. The criteria for qualifying the category of “numerically small indigenous peoples” are defined by the law *On Guarantees of the Rights of Numerically-small Indigenous Peoples of the Russian Federation* of 1999, according to which they must satisfy the following requirements: they must live in territories traditionally inhabited by their ancestors, maintain a traditional way of life and economic activity, be composed by less than 50,000 members and identify

⁸⁶ *Ley de Lenguas* No. 4251, 29 December 2010, available at <<http://www.scribd.com/comfeminista/d/46569831-Ley-4251-2010-De-Lenguas>> (last visited on 20 January 2012).

⁸⁷ See *Ley general de educación*, No. 28044 of 28 July 2003, available at <www.minedu.gob.pe/files/253_201109141438.doc> (last visited on 20 January 2012).

⁸⁸ Article 75 para. 17 of the Constitution indirectly recognizes indigenous languages through affirming the duty of the Congress to guarantee the right of indigenous peoples to bilingual education; see <http://pdpa.georgetown.edu/Constitutions/Argentina/argen94_e.html> (last visited on 18 May 2012).

⁸⁹ See Article 231 of the Constitution, according to which “Indians shall have their social organization, customs, languages, creeds and traditions recognized” (see <<http://www.v-brazil.com/government/laws/constitution.html>>, last visited on 18 May 2012).

⁹⁰ See Article 66 of the Constitution, available at <<http://www.constitutionnet.org/files/Guatemala%20Constitution.pdf>> (last visited on 18 May 2012).

⁹¹ See Article 9 of the Constitution, affirming that, while Spanish is the official language in the country, the “use of native languages also has official status for native peoples, and must be respected throughout the territory of the Republic, as constituting part of the cultural heritage of the Nation and humanity”. The English translation of the Constitution of Venezuela is available at <http://axisoflogic.com/artman/publish/Article_29878.shtml> (last visited on 8 May 2012).

⁹² The English text of the Constitution of the Russian Federation is available at <<http://www.constitution.ru/en/10003000-01.htm>> (last visited on 20 January 2012).

themselves as distinct ethnic communities.⁹³ The *Common List of Numerically Small Indigenous Peoples of Russia* of 2008 identified forty-six communities meeting these conditions living on the Russian territory,⁹⁴ about ten of which are at risk of extinction.⁹⁵ The period of expansion of national languages in Soviet Union, during the first post-revolutionary decades, led to the creation of writing systems for indigenous languages, publication of newspapers and teaching of indigenous languages. However, this period was followed – in the second half of the Twentieth Century – by a process of “russification” of the indigenous school system; this led to disruption of communication ties between the different generations of indigenous communities.⁹⁶ The 1996 *Federal Law on National-Cultural Autonomy*⁹⁷ bases the national-cultural autonomy on, *inter alia*, the principle of respect of the language, culture, traditions and customs of different ethnic communities; in addition, according to Article 10, the citizens of the Russian Federation “who consider themselves to belong to certain ethnic communities have the right to receive basic general education in the national (native) language and to the choice of the language of upbringing and teaching within the [available] opportunities”. Although it was reported that, still in 2001, education in indigenous languages was practically non-existent and that the number of students learning native languages was quite limited (being 48,8%),⁹⁸ in his recent mission to the Russian Federation the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People “witnessed several successful and positive initiatives enacted by regional governments and educational institutions to document, preserve and teach native languages”;⁹⁹ at the same time, he also heard “accounts of endangered and dying languages”.¹⁰⁰

All the three Nordic countries with a Sámi population are equipped with domestic rules safeguarding the Sámi traditional language. In Finland, the *Sámi Language Act*¹⁰¹ has the purpose of ensuring the constitutionally enshrined¹⁰² right of the Sámi to maintain and develop their own language and culture; it recognizes a number of language-related prerogatives to the Sámi people, including the right to use their language before the authorities and in representative bodies, as well as the right to declare Sámi as their mother tongue in the Population Register. The Finnish government has recently operated language revitalization efforts, and a comprehensive programme to revive the Sámi language – focusing on early childhood education, teaching, social welfare and health care, culture, the media and economic policy – is being prepared.¹⁰³ In Norway, the right of the Sámi people “to preserve and develop its language” is recognized in the 1988 Constitution, at Article 110a; the Act of 12 June 1987 No. 56¹⁰⁴ proclaims that the Sámi and Norwegian are languages of equal worth, recognizing the rights to, *inter alia*, use Sámi in the judicial system as well as in the health and social sector. The 1998 *Education Act* establishes that in Sámi districts “all children at the primary and lower secondary level

⁹³ See “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Addendum: Situation of indigenous peoples in the Russian Federation” (UN Special Rapporteur Report on Russian Federation), UN Doc. A/HRC/15/37/Add.5 of 23 June 2010, para. 19.

⁹⁴ *Ibid.*, para. 7.

⁹⁵ See G. DIATCHKOVA, “Indigenous Peoples of Russia and Political History”, *The Canadian Journal of Native Studies*, 2001, 217, p. 221.

⁹⁶ *Ibid.*, p. 221.

⁹⁷ Adopted on 22 May 2006, available at <<http://www.regione.taa.it/biblioteca/minoranze/russia3.pdf>> (last visited on 20 January 2012).

⁹⁸ See DIATCHKOVA, “Indigenous Peoples of Russia and Political History”, *cit.*, p. 222.

⁹⁹ See UN Special Rapporteur Report on the Russian Federation, para. 73.

¹⁰⁰ *Ibid.* The Special Rapporteur adds that “[t]here are efforts to support publishing of books and textbooks in native languages, and to develop a methodology for teaching indigenous languages. Many institutions of higher learning and cultural centres have set up laboratories or departments for the study of indigenous languages. Even when textbooks and books in native languages are printed, however, they may not reach the remote settlements where the languages are used”.

¹⁰¹ Act No. 1086/2003, available at <<http://www.ciemen.org/mercator/butletins/58-03.htm>> (last visited on 19 January 2012).

¹⁰² See Article 17.3 of the 1999 Constitution of Finland, stating that “[t]he Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act” (official English translation found at <<http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>> (last visited on 18 May 2012).

¹⁰³ See “Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. Addendum: The situation of the Sami people in the Sámi region of Norway, Sweden and Finland” (UN Special Rapporteur Report on the Sami People), UN Doc. A/HRC/18/35/Add.2 of 6 June 2011, para. 66.

¹⁰⁴ See Act of 12 June 1987 No. 56 concerning the *Sameting (the Sami parliament) and other Sami legal matters (the Sami Act)*, available at <<http://www.regjeringen.no/en/doc/laws/Acts/the-sami-act-.html?id=449701>> (last visited on 19 January 2012).

have the right to receive their education both in Sami and through the medium of Sami”, while outside Sámi districts “if at least ten pupils in a municipality wish to receive instruction in and through the medium of Sami, they have the right to such education as long as there remain at least six pupils in the group”.¹⁰⁵ In addition, the Norwegian government is developing an extensive “Action Plan to Strengthen Sami Languages” having the specific purpose of revitalizing such languages.¹⁰⁶ In Sweden, the *Language Act*, adopted in 2009,¹⁰⁷ affirms that Swedish is the principal language in the country; at the same time, however, it also recognizes five minority languages, which include Sámi, as well as the right of persons belonging to a national minority to learn, develop and use the minority language.

Finally, in the United States, the *Native American Languages Act* of 1990¹⁰⁸ affirms that “the United States has the responsibility to act together with Native Americans to ensure the survival of” the unique cultures and languages of Native Americans, encouraging and supporting “the use of Native American languages as a medium of instruction in order to encourage and support”: Native American language survival; educational opportunity; increased student success and performance; increased student awareness and knowledge of their culture and history; increased student and community pride. In addition, the Act also declares that the right of Native Americans “to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs”. In 1992 a new *Native American Languages Act* was also enacted,¹⁰⁹ with the purpose of “assist[ing] Native Americans in assuring the survival and continuing vitality of their languages”.

4.4 Language Rights and Customary International Law

The examples just described are quite encouraging for the near future. A progressively growing number of States are introducing and/or reinforcing specific rules for the safeguarding of indigenous languages, and a general awareness is forming within the international community on the need to ensure their protection as an element of indigenous peoples’ cultural identity. At the moment, however, the legal evolution occurred in this respect has probably not yet reached the point of leading to the existence of a rule of customary international law dictating a *positive* State obligation to take all possible measures in order to allow indigenous peoples to preserve their languages and transmit them to future generation. At the same time, it is clear, from the history and context of the UNDRIP, that such an obligation actually exists in *negative* terms, in the sense that States are bound not to create any obstacles to the efforts and activities carried out by indigenous peoples in order to preserve their own languages as an element of their cultural identity. This is consistent with the conclusion reached in the Interim Report, according to which “all the prerogatives that are essential to preserve the cultural identity of indigenous peoples *according to their own perspective* must be preserved”¹¹⁰ as part of the rule of customary international law which safeguards the right of indigenous peoples to cultural identity. It is opportune to specify that, with respect to language protection, the obligation just referred to – although of *negative* character – may in some concrete cases be the source of certain *positive* duties which States are bound to respect. For example, when indigenous children are forced to frequent public State schools as result of a State policy of compulsory education, and this prevents them the opportunity of being educated in indigenous schools where they would be taught in their native language, the government has the duty to provide teachers speaking such a language to the benefit of the children in point; otherwise, the implementation of the national system of compulsory education would place a huge obstacle to the right of indigenous peoples to preserve their own languages, giving rise to a breach of the *negative* obligation at issue. In line with this interpretation, on 16 February 2012 the Canadian House of Commons unanimously released an order in which declared that “all First Nation children have an equal right to high-quality, culturally-relevant education”; according to this order, the government has the duty to take a number of measure and initiatives to make this right effective, including “working collaboratively with First Nation leaders to establish equitable norms and

¹⁰⁵ See Act of 17 July 1998 no. 61 relating to Primary and Secondary Education and Training (the Education Act), available at http://www.european-agency.org/country-information/norway/norwegian-files/Education_Act_Norway.pdf (last visited on 27 May 2012), Section 6-2.

¹⁰⁶ See UN Special Rapporteur Report on the Sami People, para. 64.

¹⁰⁷ See *Language Act* (2009:600), issued on 28 May 2009, available at <http://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/Sweden/languageact.pdf> (last visited on 19 January 2012).

¹⁰⁸ Public Law No. 101-477, 30 October 1990, available at <http://www.nabe.org/files/NALanguagesActs.pdf> (last visited on 19 January 2012). For background, see A. M. DUSSIAS, “Indigenous Languages Under Siege: The Native American Experience”, in *Intercultural Human Rights Law Review*, 2008, p. 5 ff.

¹⁰⁹ Public Law No. 102-524, 26 October 1992, *ibid*.

¹¹⁰ See Interim Report, p. 51 (Italics in the original text).

formulas for determining class sizes and for the funding of educational resources, staff salaries, special education services and indigenous language instruction”.¹¹¹

5. Cultural Rights and Cultural Heritage¹¹²

As emphasized in the Interim Report, the protection of cultural identity and cultural rights represents a predominant theme throughout the whole text of the UNDRIP.¹¹³ This approach is grounded on the centrality of culture for indigenous peoples – in its special holistic construction as entity which covers all aspects of their existence – as the cornerstone around which the entire edifice of indigenous identity is built. Consistent with this reality, the overall work of this Committee is pervaded by a markedly cultural approach, in the context of which all relevant issues are evaluated having in mind their implications for the survival and flourishing of the cultures of indigenous peoples.

The said approach – among other things – requires that the specificity of indigenous cultural heritage and the special repercussions of its management on the peoples concerned are assessed, in order to ascertain whether and to what extent the existing international law on cultural heritage needs to be adapted to the peculiar needs of indigenous communities. This operation may be carried out either through adopting a culturally sensitive evolutionary interpretation of the existing rules or – when this is not possible – through fostering the creation of new provisions specifically aimed at safeguarding indigenous cultural heritage. In this respect, the UNDRIP establishes a number of results to be achieved but remains quite vague in terms of concrete measures to be adopted in order to reach those goals. Indeed, given the special nature of the issue in point, any different approach would have yielded inappropriate results, for the simple reason that – each cultural model differing from all others, and, consequently, the specific needs of any cultural group differing from the others’ – such concrete measures inherently need to be established on a case-by-case basis. Consistently, Article 31 – which is the main provision in the UNDRIP dealing with indigenous cultural heritage – after specifying the relevant rights owned by indigenous communities simply affirms, at paragraph 2 that, “[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights”.

As for the specific cultural-heritage-related rights that indigenous peoples are entitled to exercise and enjoy, paragraph 1 of the same article includes the rights “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, literatures, designs, sports and traditional games and visual and performing arts”. Indigenous peoples “also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.

In addition, ad hoc provisions of the UNDRIP concentrate their attention on some specific cultural rights of indigenous peoples involving elements of their cultural heritage. In particular, Article 11(1) recognizes the right of the peoples concerned “to practise and revitalize their cultural traditions and customs”, which includes “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”; in the event that the relevant “cultural, intellectual, religious and spiritual property” is taken without the free, prior and informed consent of the communities concerned or in violation of their laws, traditions and customs, paragraph 2 of the same article requires States to provide redress through effective mechanisms – to be developed in conjunction with indigenous peoples – which may include restitution.¹¹⁴ Article 12(1) is also of significance to the present Section, as it establishes the right of indigenous peoples “to maintain, protect, and have access in privacy to their religious and cultural sites”, “the right to the use and control of their ceremonial objects”, as well as “the right to the repatriation of their human remains”. Also with respect to this provision, a reparatory mechanism is contemplated, requiring States to “seek to enable

¹¹¹ See House of Commons, *Journals*, No. 84 (Unrevised), Monday, February 27, 2012, 41st Parl., 1st sess., available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5401022> (last visited on 18 May 2012).

¹¹² This Section has been written by the Rapporteur of the Committee, Professor Federico Lenzerini.

¹¹³ This Section is to be considered as a supplement to Section 5 of the Interim Report, on “Cultural Rights and Identity”, pp. 16-20.

¹¹⁴ See Interim Report, p. 16.

¹¹⁵ On Article 11(2) see Interim Report, pp. 40-41.

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".¹¹⁵

There are a number of specific cultural-heritage-related issues in the context of which unique implications arise when the heritage concerned belongs to indigenous peoples, implying that specially-tailored measures are to be taken in view of ensuring that the said peoples are allowed to properly enjoy their own heritage consistent with their expectations and needs, as determined by their own cultural legacies and traditions.

The first problem which needs to be addressed concerns the impact that may be caused to indigenous peoples by the operation of the 1972 UNESCO World Heritage Convention.¹¹⁶ In concrete terms, this impact may translate into at least three different situations: 1) the case when the territorial State decides to propose the inscription of an indigenous property on the World Heritage List,¹¹⁷ established by the Convention in point, *without* the consent of the indigenous peoples concerned; 2) the opposite situation, taking place when the State *refuses* to propose the inscription of a property belonging to an indigenous community who would like that property to be inscribed on the World Heritage List; 3) the management of an indigenous property after its inscription on the World Heritage List.

No solution to these problems is available in the Convention's text. On the contrary, the Convention entrusts territorial States with all responsibilities concerning proposals for inscription of cultural and natural properties on the World Heritage List (provided that no inscription can be made on the List without an official proposal advanced by the State party on the territory of which the property concerned is located) and relating to the management of such properties after their inscription. Therefore, apparently the World Heritage Convention does not give any recognition to indigenous peoples' rights over cultural and natural heritage. With this conclusion in mind, one could argue that a potential conflict exists between the World Heritage Convention and article 31 UNDRIP. This conflict, at first sight, should be resolved in favour of the former, due to its status as an international treaty, in contrast to the UNDRIP as a General Assembly resolution. However, as stressed in the Interim Report, a specific rule of customary international law has developed recognizing the right of indigenous peoples to recognition and preservation of their cultural identity, which presupposes that all the prerogatives that are essential to preserve their cultural identity must be preserved;¹¹⁸ their rights to protect and use their own cultural heritage according to their needs and traditions is included among these prerogatives. In this respect, it could be asserted that the said rule of customary international law is a *lex posterior* with respect to the World Heritage Convention; as noted by a scholar, a new customary rule "creates a legal obligation for States to follow that one particular rule. Inherent in such obligation is, logically, the duty to abstain from applying another rule, whether customary or conventional, on the same subject matter; otherwise, it would no longer be an obligation to follow one rule".¹¹⁹ However – even leaving aside the fact that, according to the law of treaties, a treaty is to be considered as extinguished *only* when a later incompatible norm is of *jus cogens* character¹²⁰ – this position is not consistent with the generally agreed upon characterization of treaty law as *lex specialis*,¹²¹ and, in any event, seems too strong to be applied to the situation in point. In fact, even if one would follow the said mechanism, in order for it to be applicable the later customary rule should have led the earlier conventional provision to fall into desuetude; certainly this cannot be said to have happened with respect to the mechanism of inscription of properties on the World Heritage List, which is constantly applied and represents one of the most successful mechanisms of international law as a whole. However, the foregoing does not preclude that the customary provision in point is taken into account – to the maximum extent possible – as a relevant rule of international law applicable in the relations between the parties to the World Heritage Convention, pursuant to the rule codified by Article

¹¹⁵ See Article 12(2).

¹¹⁶ *Convention concerning the Protection of the World Cultural and Natural Heritage*, 1972, available at <http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html> (last visited on 9 December 2011).

¹¹⁷ See <<http://whc.unesco.org/en/list>> (last visited on 9 December 2011).

¹¹⁸ See Interim Report, p. 51.

¹¹⁹ See M. E. VILLIGER, *Customary International Law and Treaties*, Dordrecht, 1985, p. 216. Generally on this issue see also N. KONTOU, *The Termination and Revision of Treaties in the Light of New Customary International Law*, Oxford, 1995.

¹²⁰ See Article 64 of the *Vienna Convention on the Law of Treaties*.

¹²¹ See International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, I.C.J. Reports, 1986, p. 137, para. 274. See also H. THIRLWAY, "The Law and Procedure of the International Court of Justice 1960-1989: Part I", *British Yearbook of International Law*, 1989, 1, p. 147.

31(3)(c) of the 1969 *Vienna Convention on the Law of Treaties*.^{122 123} Hence, when deciding whether or not a property belonging to an indigenous community is to be proposed for inscription on the World Heritage List, a State should take into primary account the opinion of the community concerned. Even more, consistently with Article 19 UNDRIP,¹²⁴ States should propose an indigenous property for inscription on the World Heritage List only after consulting and cooperating “in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent” to the inscription, the decision to propose such an inscription being a legislative or administrative measure. Similar considerations are valid, *mutatis mutandis*, for the issue of management of indigenous properties after their inscription on the List.

The conclusion just reached is confirmed by a number of provisions included in the *Operational Guidelines for the Implementation of the World Heritage Convention* (Operational Guidelines), last revised in November 2011.¹²⁵ Among the relevant rules, in particular, that of “[e]nhanc[ing] the role of **Communities** in the implementation of the *World Heritage Convention*”¹²⁶ is one of the current strategic objectives pursued by the World Heritage Committee. In addition, States parties are encouraged to ensure the participation of, *inter alia*, “local communities” (a concept which obviously includes indigenous peoples) “in the identification, nomination and protection of World Heritage properties”¹²⁷ as well as in the preparation of their Tentative Lists (which include the properties that in the future may be proposed for inscription on the World Heritage List).¹²⁸ Local communities are also explicitly considered as possible “[p]artners in the protection and conservation of World Heritage”.¹²⁹ Furthermore, with specific respect to the category of “cultural landscapes”, the Operational Guidelines recommend that the nominations for their inscription on the List are “prepared in collaboration with and the full approval of local communities”.¹³⁰ Last but not least, in the context of International Assistance for world heritage properties, the Operational Guidelines indicate as objective of “Conservation and Management Assistance” that of “improv[ing] management at a property inscribed on the World Heritage List with special attention to community involvement”.¹³¹

The approach just described is also confirmed by notable examples of domestic legislation. In particular, according to U.S. law, “[n]o non-Federal property may be nominated by the Secretary of the Interior to the World Heritage Committee for inclusion on the World Heritage List unless the owner of the property concurs in writing to such nomination”;¹³² in light of this provision, no indigenous property located in the territory of the United States may be proposed for inscription on the World Heritage List without the written consent of the Native community concerned.

In any event, at present the consideration devoted to indigenous peoples’ rights in the context of the operation of the World Heritage Convention is far from being adequate. It is for this reason that, in 2011, the UN Expert Mechanism on the Rights of Indigenous Peoples recommended UNESCO to

¹²² 1155 UNTS 331.

¹²³ See, consistently, Iran-US Claims Tribunal, *Amoco International Finance Corporation v. Iran*, 15 IRAN-U.S. C.T.R., p. 189, also available at <<http://www.trans-lex.org/231900>> (last visited on 21 December 2011), p. 222, para. 112; according to the Tribunal, “[a]s a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions”. See also “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 of 13 April 2006, para. 224: “customary behaviour undoubtedly affects the interpretation and application of treaties and may, in some cases, modify treaty law”, to such an extent that “the relationship between a particular treaty and a particular customary norm will always remain to be decided on a case-by-case basis”.

¹²⁴ See *supra*, Section 3.

¹²⁵ See <<http://whc.unesco.org/archive/opguide11-en.pdf>> (last visited on 7 December 2011).

¹²⁶ See Operational Guidelines, para. 26(5) (bold and italics in the original text).

¹²⁷ *Ibid.*, para. 12. See also para 123, according to which “[p]articipation of local people [including local communities] in the nomination process is essential to enable them to have a shared responsibility with the State Party in the maintenance of the property”.

¹²⁸ *Ibid.*, para. 64.

¹²⁹ *Ibid.*, para. 40.

¹³⁰ *Ibid.*, Annex 3, para. 12.

¹³¹ *Ibid.*, Annex 8.

¹³² See 16 USC 470 - Sec. 470a-1, *World Heritage Convention*, available at <<http://vlex.com/vid/sec-world-heritage-convention-19240009>> (last visited on 5 December 2011), at (c).

“enable and ensure effective representation and participation of indigenous peoples in its decision-making, especially with regard to the implementation and supervision of UNESCO Conventions and policies relevant to indigenous peoples, such as the 1972 World Heritage Convention. Robust procedures and mechanisms should be established to ensure indigenous peoples are adequately consulted and involved in the management and protection of World Heritage sites, and that their free, prior and informed consent is obtained when their territories are being nominated and inscribed as World Heritage sites”.¹³³

In the same year, the African Commission on Human and Peoples’ Rights manifested its deep concern over the fact that “there are numerous World Heritage sites in Africa that have been inscribed without the free, prior and informed consent of the indigenous peoples in whose territories they are located and whose management frameworks are not consistent with the principles of the UN Declaration on the Rights of Indigenous Peoples”.¹³⁴ The Commission emphasized that that the inscription of Lake Bogoria on the World Heritage List (as part of the site of Kenya Lake System in the Great Rift Valley)¹³⁵ without involving the Endorois people “in the decision-making process and without obtaining their free, prior and informed consent contravenes the African Commission’s Endorois Decision¹³⁶ and constitutes a violation of the Endorois’ right to development under Article 22 of the African Charter [on Human and Peoples’ Rights¹³⁷]”.¹³⁸ The Commission therefore urged UNESCO and its World Heritage Committee

“to review and revise current procedures and [the] Operational Guidelines [...] in order to ensure that the implementation of the World Heritage Convention is consistent with the UN Declaration on the Rights of Indigenous Peoples and that indigenous peoples’ rights, and human rights generally, are respected, protected and fulfilled in World Heritage areas”,¹³⁹

as well as to “consider establishing an appropriate mechanism through which indigenous peoples can provide advice to the World Heritage Committee and effectively participate in its decision-making processes”.¹⁴⁰

The position expressed by the African Commission confirms that indigenous peoples should be directly involved in every stage of any process of implementation of the World Heritage Convention which may have an impact on their internationally recognized human rights.

The same problems just described for tangible immovable heritage (which is the object of the World Heritage Convention) also exist – *mutatis mutandis* – with respect to intangible cultural heritage. The safeguarding of the latter heritage gives rise to a particularly delicate issue when it comes to indigenous peoples, for the reason that it often embodies the very cultural identity of many indigenous communities. Therefore, it represents an element the proper safeguarding of which is a crucial prerequisite for allowing these communities to preserve and transmit their distinctiveness to future

¹³³ See “Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making”, available at <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf> (last visited on 2 June 2012), para. 38.

¹³⁴ See “Resolution on the Protection of Indigenous Peoples’ Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site” (No. 197), 5 November 2011, available at <<http://www.achpr.org/sessions/50th/resolutions/197/>> (last visited on 18 May 2012), 8th Preambular paragraph.

¹³⁵ See <<http://whc.unesco.org/en/list/1060>> (last visited on 2 June 2012).

¹³⁶ 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, discussed in the Interim Report, at pp. 8, 22, 24, 42, 48-49.

¹³⁷ Article 22 of the African Charter affirms that “[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development”.

¹³⁸ See “Resolution on the Protection of Indigenous Peoples’ Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site” (No. 197), para. 1. The Commission also urged “the Government of Kenya, the World Heritage Committee and UNESCO to ensure the full and effective participation of the Endorois in the decision-making regarding the ‘Kenya Lake System’ World Heritage area, through their own representative institutions” (*ibid.*, para. 5).

¹³⁹ *Ibid.*, para. 2.

¹⁴⁰ *Ibid.*, para. 3.

generations. Differently from the World Heritage Convention, the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*¹⁴¹ includes a few provisions which are specifically aimed at promoting the involvement of local communities in the different phases of the safeguarding of the heritage concerned. The first of these provisions is Article 11(b), which commends States to ensure the “participation of communities, groups and relevant non-governmental organizations” in the identification and definition of the elements of intangible cultural heritage present in its territory. The second is Article 15, which affirms the duty of States parties to “endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit [intangible cultural] heritage, and to involve them actively in its management”. These provisions appear to be in harmony with the principles expressed by the UNDRIP. In addition, the Convention even mentions indigenous peoples explicitly, as the sixth sentence of the Preamble recognizes that “communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity”. The opposite side of the coin, however, rests in the fact that neither Article 11 nor Article 15 of the Convention produce real State obligations, as the evaluation in practice of the degree to which the local communities concerned are to be involved in the identification, safeguarding and management of their intangible cultural heritage rests in the hands of States parties. In fact, they only have a *duty to endeavour* to ensure the involvement of such communities in the various activities related to the safeguarding of intangible cultural heritage, which is hardly enforceable on the basis of the Convention, enjoying therefore a position of factual freedom as to the conditions and modalities for the implementation of the said articles. However, similarly to what happens for the World Heritage Convention, the conventional text is integrated by the *Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage* (Operational Directives),¹⁴² which include key provisions having the specific purpose of ensuring adequate involvement of local communities (including indigenous ones) in the identification and definition of their own intangible heritage. It is notable, in particular, that no element of the heritage in point may be inscribed on the Representative List of the Intangible Cultural Heritage of Humanity established by Article 16 of the Convention in the event that the nomination process has not ensured “the widest possible participation of the community, group or, if applicable, individuals concerned”, who *must* have given their “free, prior and informed consent” in that respect.¹⁴³ Therefore, differently from the World Heritage Convention, the system set up by the Convention for the Safeguarding of the Intangible Cultural Heritage presupposes that no element of such a heritage belonging to an indigenous community may be inscribed on the lists established by the Convention without the express consent of such a community. On the other hand, however, States parties are not bound to propose the inscription on the said lists of an element of intangible cultural heritage when it is requested to do so by an indigenous community. Therefore, they retain the primary role in deciding which manifestations of intangible cultural heritage are to be proposed for inscription and may decide not to inscribe elements representing indigenous communities if they are not willing to do so.

The Operational Directives also encompass a number of provisions concerning the involvement of local communities (including indigenous ones) in the management of the intangible heritage of which they are creators and bearers. Among the other requirements, the States parties to the Convention are called to “to create a consultative body or a coordination mechanism to facilitate the participation of communities, groups and, where applicable, individuals”, in a number of activities, including “the identification and definition of the different elements of intangible cultural heritage present on their territories”.¹⁴⁴

¹⁴¹ The full text of the Convention is available at http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on 9 December 2011).

¹⁴² Adopted in June 2008 and amended in June 2010; the full text of the Operational Directives is available at <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00026> (last visited on 7 December 2011).

¹⁴³ See Operational Directives, para. 2. An identical provision is contemplated at para. 1 with respect to the inscription of elements of intangible cultural heritage in the List of Intangible Cultural Heritage in Need of Urgent Safeguarding established by Article 17 of the Convention; in the same paragraph it is also stressed that, in respect of the elements inscribed in such a List, safeguarding measures must be elaborated “that may enable the community, group or, if applicable, individuals concerned to continue the practice and transmission of the element”.

¹⁴⁴ *Ibid.*, para. 80. See also paras. 79, 81, 82 and 85.

Another topical issue relating to indigenous peoples' cultural heritage concerns the problem of trade in such heritage.¹⁴⁵ This is another delicate matter, as neither international cultural heritage law nor international trade law are properly equipped to face the specific challenges determined by the situations in which a good which is object of trade is part of indigenous cultural heritage. Even the UNDRIP deals with the subject in point only in an indirect way; in particular, one may assume that Article 11(2) – in referring to the right of indigenous peoples to redress (which may include “restitution”) for cultural heritage *taken* without their free, prior and informed consent or in violation of their laws, traditions and customs – includes cultural property *taken* to make it the object of trade. In any event, to the extent that cultural heritage represents a vehicle to ensure the enjoyment by indigenous peoples of their internationally recognized rights, a legal requirement exists that their specific needs are adequately taken into account also in the context of the operation of international trade rules, when the traded object is an indigenous cultural property. In fact, the legal regime of international trade law (essentially defined by the World Trade Organization (WTO) context) does not escape the duty to respect the fundamental principles of international law, which include human rights in general and indigenous peoples' rights in particular. This is demonstrated, *inter alia*, by Article XX GATT (*General Agreement on Tariffs and Trade*) 1994,¹⁴⁶ which explicitly contemplates the possibility to derogate from the basic principles of the WTO system when it is necessary in order to safeguard a number of fundamental values that must be protected to defend essential interests of States individually and of the international community as a whole.

Strictly related to the topic just dealt with is the problem of restitution and/or return of indigenous cultural property. As previously noted, this aspect is explicitly addressed by the UNDRIP, particularly by articles 11(2)¹⁴⁷ and 12(2) (commending 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”). As for international cultural heritage law, the specificity of indigenous peoples' cultural heritage in the context of restitution of cultural property is perceived by the 1995 *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*.¹⁴⁸ This Convention, in particular, recognizes the special significance of the said heritage for its creators and bearers in a number of provisions, starting from the third sentence of the Preamble, which expresses deep concern for the damages frequently caused by illicit trade in cultural objects “to the cultural heritage of national, tribal, Indigenous or other communities”. In addition, pursuant to Article 5(3)(d), a court or other competent authority of a State party must order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs “the traditional or ritual use of the object by a tribal or Indigenous community”. Provisions aimed at safeguarding indigenous peoples' cultural heritage against trade not authorized by the communities concerned are included in a number of other international legal instruments, particularly of a soft law nature, which affirm, most notably, the same principle expressed in Article 11(2) UNDRIP.¹⁴⁹

In recent times, the general diffusion of the perception of the strong requirement to return cultural property when it belongs to indigenous peoples has been shown by a number of examples of domestic practice. Many of these examples concern cases of repatriation to New Zealand of mummified Māori heads (*Mokomokai*), following a campaign promoted to this end by the Museum of New Zealand Te Papa Tongarewa, in Wellington. These heads will be either returned for burial according to Māori traditions to the relatives of the person to whom the head belonged in life – when they may be identified – or kept in the Museum. In recent years, about 300 of the 500 heads held in museums or in private collections around the world have been returned to New Zealand from Australia, Europe and the United States, and cases of return of *Mokomokai* continue to take place at the moment of this writing. This practice shows a growing recognition by the international community of the right of indigenous peoples to obtain the return of objects of special spiritual significance for their cultural identity, especially when these objects are human remains,¹⁵⁰ although the present normative apparatus

¹⁴⁵ Generally on this topic see J. SCOTT and F. LENZERINI, “International Indigenous and Human Rights Law in the Context of Trade in Indigenous Cultural Heritage”, in C. B. GRABER (ed.), *International Trade in Indigenous Cultural Heritage*, Cheltenham, forthcoming (2012).

¹⁴⁶ The full text of the GATT 1994 is available at <http://www.wto.org/english/docs_e/legal_e/legal_e.htm> (last visited on 9 December 2011).

¹⁴⁷ See *supra*, note 42.

¹⁴⁸ 34 *ILM* 1322.

¹⁴⁹ See Ana F. VRDOLJAK, “Reparations for Cultural Loss”, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International and Comparative Perspectives*, Oxford, 2008, 197, p. 211 ff.

¹⁵⁰ On the case of the *Mokomokai* see F. LENZERINI, “The Tension between Communities' Cultural Rights and Global Interests: The Case of the Māori *Mokomokai*”, in S. BORELLI and F. LENZERINI (eds.), *Cultural Heritage*,

of international law applicable to the issue of restitution and/or return of indigenous cultural property still needs to be reinforced.¹⁵¹

Strictly related to indigenous cultural heritage is indigenous traditional knowledge, which is at present the object of a vivid debate in the context of the most important international institutions competent in the field (particularly WIPO, WTO and the Convention on Biological Diversity). The legal significance of the problem in point emerges first of all in terms of intellectual property rights. Article 31 UNDRIP, as previously seen, establishes that indigenous peoples have the right “to maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge, and traditional cultural expressions”, as well as, at paragraph 2, that States, in conjunction with indigenous peoples, “shall take effective measures to recognize and protect the exercise” of this right among the others. The main problem in this respect is that – again – international law is at present not equipped to properly address the peculiar problems concerning intellectual property rights of indigenous peoples. As a result, in recent decades these peoples have been in many cases victims of misappropriation of their own traditional knowledge (so-called “biopiracy”), which has been patented by self-styled “inventors” passing such knowledge off as their own invention. Only in a few cases has it been actually possible to efficiently react against such an unfortunate trend, persuading the competent patent office to revoke the patent previously granted. In this context, it is to be noted that the usual schemes of intellectual property rights existing in international law are inherently inappropriate to properly safeguard the significance of traditional knowledge for indigenous peoples. The best solution to overcome the present impasse of the international legal order in this respect – which is presently discussed in various fora, including the ones previously mentioned – consists in the establishment of *sui generis* regimes specifically aimed at safeguarding indigenous peoples’ traditional knowledge, which take into account the specificity of this knowledge and its significance for the peoples concerned. These regimes should contemplate, *inter alia*, the possibility of patenting indigenous knowledge by the community as a whole (rather than by a single person) as well as the provision of intellectual property rights which are subject to *no* time limits. Given the heterogeneity of the cultural realities subsumed within the expressions “indigenous peoples” and “traditional knowledge”, the said *sui generis* regimes – although based on a common international regulatory framework – should be specifically developed at the local level, on the basis of the specific needs of the communities living in a given area.¹⁵²

Another relevant aspect of the safeguarding of indigenous traditional knowledge relates to the issues of access to it – as well as to related genetic resources – and of the sharing of benefits arising from their utilization. In this respect, the recent adoption of the *Nagoya Protocol* to the Biodiversity Convention¹⁵³ is to be welcomed. The Protocol “notes” the UNDRIP in the Preamble¹⁵⁴ and obliges States parties, *inter alia*, to take measures to ensure that “traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities”.¹⁵⁵ In addition, appropriate national measures must be adopted “in order that the benefits arising from the utilization of

Cultural Rights, Cultural Diversity: New Trends and Recent Developments in International Law, Leiden/Boston, 2012, p. 157 ff. The practice consisting in repatriating human remains of indigenous peoples is not limited to the case of the *Mokomokai*; for other examples see, e.g., European Network for Indigenous Australian Rights, “Repatriation of Aboriginal Human Remains”, available at <<http://www.eniar.org/repatriation.html>> (last visited on 2 June 2012). Examples of national legislations providing for repatriation of human remains of indigenous peoples also exist; the most renowned one is probably represented by the U.S. *Native American Graves Protection and Repatriation Act* (NAGPRA), Public Law 101-601 of 16 November 1990, available at <<http://www.nps.gov/nagpra/mandates/25usc3001etseq.htm>> (last visited on 2 June 2012).

¹⁵¹ On the inadequacy of the present international law regime for the protection, repatriation and return of stolen and illegally exported cultural property to effectively safeguard indigenous peoples’ cultural heritage see A. YUPSANIS, “Cultural Property Aspects in International Law: The Case of the (Still) Inadequate Safeguarding of Indigenous Peoples’ (Tangible) Cultural Heritage”, in *Netherlands International Law Review*, 2011 p. 335 ff.

¹⁵² For a more comprehensive assessment of this topic (including the sources of the information included in the text) see F. LENZERINI, “Traditional Knowledge, Biogenetic Resources, Genetic Engineering and Intellectual Property Rights”, in D. WÜGER and T. COTTIER (eds.), *Genetic Engineering and the World Trade System*, Cambridge, 2008, p. 118 ff., and the sources quoted therein. See also 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.

¹⁵³ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 29 October 2010, available at <<http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>> (last visited on 2 June 2012).

¹⁵⁴ See 26th Sentence.

¹⁵⁵ See Article 7.

traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge”.¹⁵⁶ The provisions of the Protocol are less encouraging when it comes to access and benefit sharing concerning genetic resources *as such*. Indeed, with respect to both aspects States parties are required to take national measures “with the aim of ensuring”, respectively, “that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources”¹⁵⁷ and “that benefits arising from the utilization of genetic resources that are held by indigenous and local communities [...] are shared in a fair and equitable way with the communities concerned”,¹⁵⁸ but only in accordance with domestic legislation regarding the established rights of the indigenous and local communities concerned over the relevant genetic resources. In this respect, the lack of any reference to the rights of indigenous peoples over genetic resources existing pursuant to *international* rules is to be noted.

As a whole, indigenous peoples’ cultural heritage (including traditional knowledge) raises a number of specific problems with respect to which the experimented schemes of international cultural heritage law are not always properly applicable. For this reason, ad hoc measures need to be developed in order to adequately safeguard the specificity of the said heritage and its special spiritual significance for the peoples concerned. The inspiring philosophy of these measures must be based on the understanding that contemporary models of life of predominant societies are usually at odds with the holistic and spiritual vision of life of indigenous peoples. Consequently, the said measures should be capable to properly face all daily challenges which threaten the integrity of indigenous peoples’ cultural heritage in all its multifaceted dimensions. As just one example of this reality, one may point to the possible detrimental impact effectuated by tourism on indigenous cultural heritage. Indeed, in order to meet the expectations of tourists, States often tend to adapt certain expressions of national cultural heritage (especially intangible heritage) to the “ethical codes” prevailing at a given time. This may lead to modify some elements of these expressions, which, although may seem irrelevant to an external observer, play indeed a decisive role in qualifying the spiritual and cultural significance of the expression concerned.¹⁵⁹ This process ultimately leads to trivializing the cultural heritage in point and making it lose its cultural significance for the communities that have created, developed and transmitted it from generation to generation. In this and in all similar cases, the essential significance of cultural heritage for the preservation of indigenous peoples’ cultural identity requires that the effect just described is prevented through adopting specific measures to this end, even when this course of action may conflict with the interests of the national government.

6. Land Rights*

The practice developed at the international and domestic levels in the last two years confirms the conclusion expressed in the Interim Report¹⁶⁰ that indigenous peoples’ land rights – grounded on the special, in many cases spiritual, relationship of indigenous communities with their traditional territories typically considered their *motherland* – have attained the status of customary international law. In present times we bear witness to a progressively growing number of cases – almost on a daily basis – in which the said rights are recognized and adjudicated. These include, *inter alia*, cases of restitution of ancestral lands of which indigenous peoples had been deprived for a long time or cases in which projects of exploitation of indigenous lands have been blocked due to the prejudice that such exploitation would have caused to the communities concerned. Many examples additional to those listed in the Interim Report illustrate this point.

¹⁵⁶ See Article 5 para. 5.

¹⁵⁷ See Article 6 para. 2.

¹⁵⁸ See Article 5 para. 2.

¹⁵⁹ See the example of Native Americans’ sun dance, described in F. LENZERINI, “Intangible Cultural Heritage in Danger: A Part of the Human Memory that Is Disappearing”, in *Symposium: The Transmission and Present State of Cultural Heritage*, Kyoto, 2002, p. 72 ff.

* This Section has been written by the Rapporteur of the Committee, Professor Federico Lenzerini. Some information included in the text was provided by Ms. Alexandra Tomaselli, Researcher at the Institute for Minority Rights at the European Academy (EURAC).

¹⁶⁰ See Interim Report, p. 23 and p. 51.

For instance, on 21 December 2010 the government of Bolivia passed the *Ley de Derechos de la Madre Tierra*,¹⁶¹ which, at Article 4, protects the “life systems of Mother Earth”, including the cosmology of peasant indigenous peoples and nations.

In Brazil, in a judgment of 2007, the Judicial Section of Maranhão of the Fifth Federal Trial Court found that the activities of an aerospace base located in proximity of the traditional lands of a local community – the *surviving communities of quilombos* – negatively affected the traditional forms of production of the said community, preventing the access by its members to their farm plots. The Court, basing its decision, *inter alia*, on land rights as recognized by ILO Convention No. 169, consequently ordered the aerospace base to abstain from affecting the activities of traditional farming by the community concerned.¹⁶² Also, following the Supreme Federal Tribunal judgment of 19 March 2009 concerning the territory of the Raposa-Serra do Sol reservation,¹⁶³ recognition and demarcation of indigenous lands has been hugely intensified; the demarcation and registration process is carried out through using an advanced methodology and with the participation of the indigenous communities concerned, while non-indigenous occupants of a demarcated area are being resettled.¹⁶⁴

In Canada, the government continues to implement the Comprehensive Land Claims (“CLC”) Policy, having the purpose of recognizing in favour of Aboriginal peoples precise and clear collective fee simple title to certain parts of the traditionally used lands, in addition to financial compensation.¹⁶⁵ Usually the indigenous peoples concerned receive between 1/5 and 1/4 of the total area claimed as traditional lands in fee simple.¹⁶⁶

In India a British company, Vedanta Resources, intended to dig a bauxite mine (for the estimated value of U.S. \$ 2 billion) in the sacred hills of the Dongria Kondh community, on the Niyamgiri Hills, in the Eastern state of Orissa. This would have caused irreparable damages to the said community, under both a spiritual perspective (the Niyamgiri Hills are the seat of the community’s god, Niyam Raja) and in terms of subsistence, as the life of the Dongria Kondh depends on the forests which would have been destroyed if the project had been completed. The exploitation project at issue was stopped by the decision of the Indian Minister of the Environment, in August 2010,¹⁶⁷ not to grant clearance for Vedanta’s mine, giving rise to what activists have defined as a victory in a historic battle.¹⁶⁸ Among the reasons justifying the authorization to the British company, the Minister referred to the fact that the execution of the work would have violated the rights of indigenous peoples in the area.¹⁶⁹ The attempt of Vedanta Resources to exploit the sacred land of the Dongria Kondh had also led to harsh reactions by several entities holding shares in the company, which withdrew their investments and sold their shares due to the scant concern shown by the company for indigenous peoples’ rights; these entities include the government of Norway.¹⁷⁰

¹⁶¹ See *Ley de Derechos de la Madre Tierra* – Ley 071 (21 December 2010), available at <<http://omarpal.blogspot.com/2011/05/bolivia-ley-de-derechos-de-la-madre.html>> (last visited on 14 January 2012).

¹⁶² See *Joisael Alves and others v. General Director of the Alcântara Launch Centre*, Judgment No. 027/2007/JCM/JF/MA, Case No. 2006.37.00.005222-7, Judgment of 13 February 2007, described in International Labour Office, *Application of Convention No. 169 by domestic and international courts in Latin America. A Casebook*, cit., p. 61 f.

¹⁶³ See Interim Report, p. 42, footnote 263.

¹⁶⁴ See “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Addendum: Report on the Situation of Human Rights of Indigenous Peoples in Brazil”, UN Doc. A/HRC/12/34/Add.2 of 26 August 2009, paras. 38-43.

¹⁶⁵ See “General Briefing Note on Canada’s Self-Government and Land Claims Policies and the Status of Negotiations – January 2012”, available at <<http://www.aadnc-aandc.gc.ca/eng/1100100031774>> (last visited on 16 January 2012).

¹⁶⁶ To provide a few examples, the Sahtu Dene and Métis were given approximately 15%, the Inuit of Nunavut 17%, the Labrador Inuit 22%, the Inuvialuit 27% and the Gwich’in almost 40%. The information on Canada has been provided by Ms. Katja Göcke, LL.M., University of Sydney, Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany.

¹⁶⁷ See Survival International, “David v. Goliath: Indian tribe in ‘stunning’ victory over mining giant”, 24 August 2010, available at <<http://www.survivalinternational.org/news/6385>> (last visited on 14 January 2012).

¹⁶⁸ See Survival International, “The Dongria Kondh. Victory over British mining company”, available at <<http://www.survivalinternational.org/tribes/dongria>> (last visited on 14 January 2012).

¹⁶⁹ See “India Bars Company From Mining Bauxite”, The New York Times, 24 August 2010, available at <http://www.nytimes.com/2010/08/25/business/global/25vedanta.html?_r=1&src=busln> (last visited on 14 January 2012).

¹⁷⁰ See Survival International, “British mining company under pressure over mine”, 20 August 2008, available at <<http://www.survivalinternational.org/news/3611>> (last visited on 14 January 2012).

Also in India, on 30 September 2010, the High Court of Karnataka issued an order to the Revenue Department to return 3,000 acres of land to the indigenous Dalit community, bringing the total amount of land regained by such a community in the last few years to about 10,000 acres.¹⁷¹

In Norway, by effect of the *Finnmark Act* of 2005,¹⁷² which recognizes the Sami people and other local communities' property rights over lands and natural resources in Finnmark, 95% of the landmass of Finnmark has been transferred from the State to local ownership.¹⁷³ In addition, following consultation with the Sámi Parliament, a "Coastal Fishing Committee" was established, in order to make it possible that "people living along the fjords and coast of Finnmark have the right to fish in the ocean off Finnmark based on historical use and the rules of international law regarding indigenous peoples and minorities".¹⁷⁴

In Panama (where Article 127 of the Constitution affirms the duty of the State to guarantee in favour of indigenous communities the necessary land reserves and the collective ownership of them to achieve their economic and social wellbeing), in March 2011 President Ricardo Martinelli revoked a reform to the country's mining law which would have paved the way for the exploitation of indigenous traditional lands, belonging in particular to the Ngöbe community, by means of investments carried out by foreign governments in mining projects.¹⁷⁵

In an official document released by the Department of State in December 2010, announcing U.S. support for the UNDRIP,¹⁷⁶ the government of the United States recognized that "some of the most grievous acts committed by the United States and many other States against indigenous peoples were with regard to their lands, territories, and natural resources", noting that, for this reason, "the United States has taken many steps to ensure the protection of Native American lands and natural resources, and to provide redress where appropriate", as well as that "the United States stresses the importance of the lands, territories, resources and redress provisions of the Declaration in calling on all States to recognize the rights of indigenous peoples to their lands, territories, and natural resources".¹⁷⁷ Consistently, the United States understands the relevant provisions of the UNDRIP "to call for the existence of national laws and mechanisms for the full legal recognition of the lands, territories, and natural resources indigenous peoples currently possess by reason of traditional ownership, occupation, or use as well as those that they have otherwise acquired".¹⁷⁸ In addition, the United States expresses its commitment "to recognize, as appropriate, additional interests of indigenous peoples in traditional lands, territories, and natural resources" and "to facilitate, as appropriate, access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest".¹⁷⁹ The document subsequently lists a notable number of initiatives taken by the U.S. government in order to realize these purposes, including the acquisition by the Obama Administration of "over 34,000 acres of land in trust on behalf of Indian tribes, which is a 225 percent increase since 2006".¹⁸⁰

In Venezuela, in a recent judgment, the Tribunal Supremo de Justicia (Supreme Court) rejected an application by the municipality of Aguasay claiming that the lands occupied by the indigenous community of Jesús, María y José de Aguasay were common lands belonging to the municipality, confirming the existence of a title of ancestral ownership of the land by the said community.¹⁸¹

In general terms, a progressively growing number of States is incorporating provisions concerning indigenous peoples' land rights in their domestic legislation, including at the constitutional

¹⁷¹ This information was passed to the Rapporteur of the Committee by the Dalit leader Manickam Casimir Raj in an email dated 22 December 2010 (on file with the Rapporteur).

¹⁷² See *Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act)*, available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=244972> (last visited on 27 May 2012).

¹⁷³ See UN Special Rapporteur Report on the Sami People, para. 44.

¹⁷⁴ *Ibid.*, para. 54.

¹⁷⁵ See Survival International, "Panama Campaign Update: Ngöbe Protesters Persuade President to Revoke Mining Law Reform", 4 March 2011, available at <<http://www.culturalsurvival.org/news/panama/panama-campaign-update-ng-be-protesters-persuade-president-revoke-mining-law-reform>> (last visited on 14 January 2012).

¹⁷⁶ See "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples", *supra*, note 14.

¹⁷⁷ *Ibid.*, p. 6.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ See *Municipality of Aguasay, State of Monagas v. the Indigenous Community of Jesús, María y José de Aguasay et al. on full declaratory judgment action regarding ownership*, Judgment No. 01035 of 27 April 2006, described in International Labour Office, *Application of Convention No. 169 by domestic and international courts in Latin America. A Casebook*, cit., p. 173 ff.

level. In addition to the examples already included in the Interim Report,¹⁸² the case of the Constitution of the Republic of Vanuatu is notable, as it dedicates an entire chapter (ten articles) to the issue in point.¹⁸³ The basic principle proclaimed by the relevant provisions is that all land in the territory of Vanuatu belongs – on a perpetual basis – to indigenous owners who have acquired it on the basis of customary law and who have the right to pass it on their descendants. Another example is provided by Article 346 of the Constitution of Honduras, which affirms the duty of the State to enact measures of protection of the rights and interests of indigenous communities existing in the country, especially with respect to the lands and forests where they are settled.¹⁸⁴

Also the competent international institutions continue to remind States about their obligations related to indigenous peoples land rights. This holds true, in particular, with respect to ILO supervisory bodies¹⁸⁵ and to the UN Committee on the Elimination of Racial Discrimination,¹⁸⁶ as well as, at the regional level, with respect to the Inter-American Commission and the IACHR. In a number of recent cases, the Commission granted precautionary measures in favour of various indigenous communities of Latin America – including, *inter alia*, the Ngöbe people and the Naso people of the Bocas del Toro Region in Panama, the Maya people in the area of San Marcos in Guatemala, the Maho community in Suriname, the communities of the Xingu River Basin of Pará in Brazil and the Lof Paichil Antriao community of the Mapuche people in Chile – for assumed violations of their land rights.¹⁸⁷

As for the IACHR, it has recently reiterated that “the close relationship of indigenous peoples to their traditional lands and the natural resources relevant to their culture that are found there, as well as the intangible elements resulting from them” must be safeguarded.¹⁸⁸ As a consequence, the lack of access to their traditional lands and, more in general, the limitations to their land rights have negative effects for the cultural identity of indigenous peoples, which are fundamentally the result of a community’s lack of territory and the natural resources found on it, resulting in a breach of the right to property provided for by Article 21 of the *American Convention on Human Rights*.¹⁸⁹ In addition, “the sorrow that [the indigenous persons concerned] and the other members of the Community feel owing to the failure to restore their traditional lands, the gradual loss of their culture [...] give rise to sufferings that necessarily violate the mental and moral integrity of all the members of the Community”, resulting in a breach of the right to human treatment defended by Article 5 of the same Convention.¹⁹⁰ Furthermore, an additional profile of international responsibility arising from the violation of indigenous peoples’ land rights is represented by the fact that the separation of indigenous children from their traditional territories brings about the loss of traditional practices which “particularly affect the cultural identity and development of the children of the Community, who will not be [consequently] able to develop that special relationship with their traditional territory and that particular way of life unique to their culture”; this situation translates into a violation of the rights of the child safeguarded by Article 19 of the American Convention, as children are denied the right to a cultural life.¹⁹¹

The judgment in point also took a position on the forms of reparation that are to be implemented in favour of indigenous peoples whose land rights have been breached. In particular, in light of the fact that the connection of an indigenous community to its own traditional lands “is indissoluble and fundamental for its cultural subsistence and its food supply [...] its return is so important”; for this reason, the reparatory measure to be implemented when indigenous peoples are deprived of their land is return, *i.e.* the one “that comes closest to *restitutio in integrum*”.¹⁹² In the event that return cannot be

¹⁸² See Interim Report, particularly p. 49 f.

¹⁸³ See Constitution of the Republic of Vanuatu, Consolidated Edition 2006, available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=195746> (last visited on 16 January 2012), Chapter 12, Articles 73-81.

¹⁸⁴ The Constitution of Honduras is available at <<http://pdba.georgetown.edu/Constitutions/Honduras/vigente.html>> (last visited on 16 January 2011).

¹⁸⁵ See International Labour Office, *Monitoring Indigenous and Tribal Peoples’ Rights through ILO Conventions: A Compilation of ILO Supervisory Bodies’ Comments 2009-2010*, Geneva, 2010.

¹⁸⁶ See the latest reports of the Committee, docs. A/63/18 of 1 November 2008, A/64/18 of 28 November 2009, A/65/18 of 31 October 2010 and A/66/18 of 6 January 2012.

¹⁸⁷ For a description of the relevant cases see <<http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>> (last visited on 16 January 2012).

¹⁸⁸ *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Series C No. 214, Judgment of 24 August 2010, para. 85.

¹⁸⁹ *Ibid.*, para. 180 ff.

¹⁹⁰ *Ibid.*, para. 244.

¹⁹¹ *Ibid.*, para. 262 ff.

¹⁹² *Ibid.*, para. 281 ff.

practiced on an immediate basis, all necessary measures must be taken by the State to ensure that the land concerned retains its value for indigenous peoples; in specific terms,

“until the traditional territory has been awarded to the Community, the State must ensure that the territory is not harmed by the actions of the State itself or of private third parties. Thus, the State shall ensure that the area is not deforested, that the sites that are of cultural importance to the Community are not destroyed, that the land is not transferred, and that it is not exploited in such a way as to cause irreparable harm to the area or to its natural resources”.¹⁹³

In addition, it is also essential that, in the event that the violation of indigenous peoples’ land rights has occurred due to the fact that the State concerned has “failed to adapt its laws in order to guarantee the indigenous communities’ right to ownership of their traditional territory”, such a State must “adopt in its domestic law the necessary legislative, administrative and any other measures to establish an effective system for indigenous peoples to claim their ancestral or traditional lands, which makes it possible to implement their right to property”.¹⁹⁴

Needless to say that, since the rights enshrined by the articles of the American Convention considered by the IACHR also exist by virtue of many other international treaties as well as customary international law (and, with respect to the right not to be subjected to inhuman treatment, arguably *jus cogens*), the conclusions drawn by the Court may plainly be extended outside the Latin American continent, to cover the whole planet.

Of course, negative examples – in the context of which indigenous peoples’ land rights are not properly recognized and implemented – also exist in some countries, but they cannot be considered as militating against the existence of a customary international law rule including these rights. In fact, as emphasized by the International Court of Justice in its 1986 judgment in the *Case concerning Military and Paramilitary Activities in and Against Nicaragua*, “for a rule to be established as customary, the corresponding practice must [not] be in absolutely rigorous conformity with the rule”, on the condition that “instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule”.¹⁹⁵ The fact that the said negative examples are actually treated as violations is demonstrated by the univocal and virtually unanimous condemnation of them by the international community, including UN bodies.¹⁹⁶ And, even when the criticism expressed by international bodies is based on the prospective violation that the behaviour in point may produce with respect to obligations arising from treaties binding the State concerned, the multilateral treaties pertinent to indigenous peoples’ land rights – taken as a whole – form a thick network of obligations which affect virtually every government in the world. This confirms that indigenous peoples’ land rights have become a concern of customary international law, since – as is well known – the transposition of treaty law into general international law “constitutes indeed one of the recognized methods by which new rules of customary international law may be formed”.¹⁹⁷

While the fact that indigenous peoples’ land rights are protected by customary international law is not reasonably disputable as a matter of positive law, more difficulties arise when it comes to establish the exact practical contours of these rights according to customary international law. In reality, providing an answer to this question appears possible if one takes into account the rationale and purpose of indigenous peoples’ land rights. Indeed, they are not aimed at safeguarding a “property right”, *i.e.* an exclusive absolute right to use, enjoy and dispose of a thing (*uti, frui, fui*) – conceived, according to the common meaning of this expression in the Western world, as a right having first of all an *economic* connotation – but rather as a prerogative with a primarily spiritual, *i.e.* cultural, purpose. In other words, the right in point is functional to the safeguarding – through ensuring the maintenance of the special link between indigenous peoples and their traditional lands – of the very distinct cultural identity of indigenous peoples as well as of their survival and flourishing as *different* human

¹⁹³ *Ibid.*, para. 291.

¹⁹⁴ *Ibid.*, para. 309 f.

¹⁹⁵ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports*, 1986, p. 14, para. 186.

¹⁹⁶ See, *e.g.*, the reaction to the case of the Gibe III dam in Ethiopia, the planned constructions of which threatens the existence of the local indigenous communities, the Omo Valley Tribes; see Survival International, “UN demands urgent answers from Ethiopia over Gibe III dam”, 13 October 2011, available at <<http://www.survivalinternational.org/news/7783>> (last visited on 14 January 2012).

¹⁹⁷ See International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, *ICJ Reports*, 1969, p. 3, para. 71.

communities.¹⁹⁸ Therefore, it is neither possible nor proper to establish a fixed content of indigenous peoples' land rights under customary international law *ex ante*. On the contrary, such content is to be established on case-by-case basis, according to what is necessary in order to preserve the special, typically spiritual relationship of the indigenous community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its own cultural identity and distinctiveness. The validity of this construction is epitomized in a recent statement by the IACHR, in which the Court affirmed that the obligation of States to "to promote and protect the cultural diversity of indigenous persons [...] [including] the right to cultural life of indigenous children" arises from "the deep material and spiritual relationship of the indigenous peoples with their traditional lands".¹⁹⁹ This statement implies that the preservation of the said relationship must be ensured to the extent necessary to promote and protect the cultural integrity and diversity of indigenous peoples. In practical terms, this usually translates into a number of specific obligations, including, *as a minimum*: 1) a prohibition to deprive indigenous peoples of the ownership of their lands or their rights to use it in their traditional ways, such as hunting or fishing; no indigenous communities may be relocated from their lands without their free, prior and informed consent *and* appropriate compensation; 2) an obligation to create the conditions to allow indigenous peoples to properly enjoy their land rights; this includes the obligation to prevent any external interferences which may be carried out by private actors (particularly execution of projects of exploitation), to the extent that such interferences may prejudice the spiritual relationship of indigenous peoples with their traditional lands; 3) an obligation to return indigenous peoples the lands taken from them without their free, prior and informed consent *and* appropriate compensation; this point has been reaffirmed by a most recent judgment of the IACHR, affirming that "the spiritual and physical foundations of the identity of the indigenous peoples are based, above all, on their unique relationship with their traditional lands, so that as long as this relationship exists, the right to claim those lands remains in force".²⁰⁰

7. Rights of Indigenous Peoples under Customary International Law

As shown by the several examples described in the previous sections, international law on indigenous peoples is presently developing in a very speedy manner. As already seen in the Interim Report,²⁰¹ the multiplication of international practice in the field shows the existence not only of the element of State practice, but also of a clear *opinio juris*, contextually satisfying both elements traditionally needed to prove the existence of a rule of customary international law. In 2008 the UN Special Rapporteur S. James Anaya noted how the UNDRIP "can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law".²⁰²

The evolution of international law in the very days in which the present Report is being written further reinforces the position supported herein. For example, on 19 January 2012, the Expert Panel appointed by the Government of Australia for the recognition of the rights of Aboriginal and Torres Strait Islander Peoples in the national Constitution through a constitutional referendum²⁰³ circulated its final recommendations. These recommendations – which presuppose an historical change in the approach of the Australian government towards indigenous peoples – include removal of the right of governments to make laws to the detriment of Aboriginal and Torres Strait Islander Peoples, recognition of the prior occupation of Aboriginal and Torres Strait Islander Peoples' traditional territories, and recognition of Aboriginal and Torres Strait Islander languages as the original Australian languages.

In addition, in January 2011 the position supported by this Committee in its Interim Report was very favourably referred to by an ICSID Arbitral Tribunal, constituted under Chapter 11 of the North American Free Trade Agreement (NAFTA), in the *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* award. The Tribunal stated:

¹⁹⁸ See S. WIESSNER, "Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime", in *UCLA Journal of International Law and Foreign Affairs*, 2010, p. 239 ff.

¹⁹⁹ See *Case of Chitay Nech et al. v. Guatemala*, Ser. C No. 212, judgment of 25 May 2010, para. 168.

²⁰⁰ See *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, *cit.*, para. 112.

²⁰¹ See Interim Report, p. 43.

²⁰² See UN Special Rapporteur Report on the UNDRIP, para. 41.

²⁰³ See *supra*, note 72.

“It may well be [...] that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them. One member of the Tribunal has written that there is such a customary rule. Moreover, a recent study by a committee of several international law experts assembled under the auspices of the International Law Association, after an exhaustive survey of relevant state and international practice, found a wide range of customary international law norms concerning indigenous peoples, including ‘the right to be consulted with respect to any project that may affect them’. As pointed out by the Claimants, the duty of states to consult with indigenous peoples is featured in the UN Declaration of the Rights of Indigenous Peoples, particularly in its Article 19 as well as in several other articles. In its Counter-Memorial the Respondent maintained in sweeping terms that the Declaration does not represent customary international law, as did Canada in its non-disputing party submission. However, when questioned by the Tribunal on this point at the hearing, the Respondents’ counsel stated that some parts of the Declaration could reflect fundamental human rights principles and emerging customary law”.²⁰⁴

In conclusion, the Committee reiterates its position on the rights of indigenous peoples under customary international law expressed in its Interim Report,²⁰⁵ which may be considered as further reinforced by the developments of international law on indigenous peoples occurred after the presentation of the said report at the ILA Hague Conference in August 2010.

8. Conclusions and Recommendations

In conclusion of its work, the results of which are recorded in the Interim Report and in the present Report, the Committee on the Rights of Indigenous Peoples of the International Law Association expresses the following conclusions and recommendations:

1. Indigenous peoples are holders of collective human rights aimed at ensuring the preservation and transmission to future generations of their cultural identity and distinctiveness. Members of indigenous peoples are entitled to the enjoyment of all internationally recognized human rights – including those specific to their indigenous identity – in a condition of full equality with all other human beings.
2. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law. It, however, includes key provisions which correspond to existing State obligations under customary international law.
3. The provisions included in the UNDRIP which do not yet correspond to customary international law nevertheless express the aspirations of the world’s indigenous peoples as well as of States in their move to improve existing standards for the safeguarding of indigenous peoples’ human rights. Their recognition by States in a Declaration subsumed “within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a non-discriminatory basis”²⁰⁶ and passed with overwhelming support by the UN General Assembly leads to an expectation of maximum compliance by States and the other relevant actors. The provisions included in the UNDRIP represent the parameters of

²⁰⁴ See *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, 12 January 2011, available at <<http://www.state.gov/documents/organization/156820.pdf>> (last visited on 20 January 2012), para. 210, quoting, in footnote 55, “ILA Committee on the Rights of Indigenous Peoples, Interim Report (2010), p. 51”. See also the transcripts of the Hearing of the Merits, Saturday, February 13, 2010, available at <<http://www.naftalaw.org/Disputes/USA/GrandRiver/Transcript-06-Merits.pdf>> (last visited on 27 May 2012), where the legal advisers of the United States admitted that the UNDRIP “can reflect customary international law and it can provide evidence that customary international law is evolving in some circumstances” (see p. 2162), as well as that even in the 1989 ILO *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* “there could be aspects that may reflect customary international law” (see p. 2164).

²⁰⁵ See Interim Report, p. 51 f.

²⁰⁶ See UN Special Rapporteur Report on Nepal, para. 49.

reference for States to define the scope and content of their existing obligations – pursuant to customary and conventional international law – towards indigenous peoples.

4. States ought to restructure their domestic law in view of adopting all necessary measures – including constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparations procedures and awareness-raising activities²⁰⁷ – in order to make the full realization of indigenous peoples' human rights possible within their territories, consistent with the rules and standards established by the UNDRIP.
5. States must comply with the obligation – consistent with customary and, where applicable, conventional international law – to recognize, respect, protect, fulfil and promote the right of indigenous peoples to self-determination, conceived as the right to decide their political status and to determine what their future will be, in compliance with relevant rules of international law and the principle of equality and non-discrimination.
6. States must also comply – according to customary and, where applicable, conventional international law – with the obligation to recognize and promote the right of indigenous peoples to autonomy or self-government, which translates into a number of prerogatives necessary in order to secure the preservation and transmission to future generations of their cultural identity and distinctiveness; these prerogatives include, *inter alia*, the right to participate in national decision-making with respect to decisions that may affect them,²⁰⁸ the right to be consulted with respect to any project that may affect them and 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, as well as 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.
7. States are bound to recognize, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith – through all possible means – in order to ensure its preservation and transmission to future generations. Cultural rights are the core of indigenous cosmology, ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples.
8. States must comply – pursuant to customary and, where applicable, conventional international law – with the obligation to recognize, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past. Indigenous peoples' land rights must be secured to the extent that is necessary to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions.
9. States must recognize the right of indigenous peoples to establish their own educational institutions and media, as well as to provide education to indigenous children in their traditional languages and according to their own traditions; States have the obligation not to interfere with the exercise of these rights.

²⁰⁷ See UN Special Rapporteur Report on the UNDRIP, para. 87; see also paras. 50-58.

²⁰⁸ For a good practice of indigenous participatory mechanisms – confirming the position taken in the text – one may refer to the Laponia management system; see UN Permanent Forum on Indigenous Issues, "Indigenous participatory mechanisms in the Arctic Council, the Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat and the Laponia management system", Study by Professor Dalee Sambo Dorough, UN Doc. E/C.19/2012/10 of 3 March 2012.

10. States must cooperate in good faith with indigenous peoples in order to give full recognition and execution to treaties and agreements concluded with indigenous peoples 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.
11. States must comply with the obligation – according to customary and, where applicable, conventional international law – to recognize and fulfil the right of indigenous peoples to reparation and redress for the wrongs they suffered, in particular their lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress – established in conjunction with the peoples concerned – must be available and accessible in favour of indigenous peoples. Reparation must be adequate and effective, and, according to the perspective of the indigenous communities concerned, actually capable to repair the wrongs they have suffered.
12. The competent bodies, specialized agencies and mechanisms of the United Nations system – including the Human Rights Council, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples²⁰⁹ – are encouraged to carry on and reinforce their action, in cooperation with States and indigenous peoples, in order to ensure further promotion, protection and improvement of indigenous peoples' rights throughout the world, consistent with the rules and minimum standards of human rights established by the UNDRIP.
13. Civil society, in all its components, ought to promote a favourable environment for the affirmation of indigenous peoples' rights,²¹⁰ especially through nurturing a positive understanding within society as a whole of the value of indigenous cultures as well as of the positive role which may be played by indigenous peoples to further sustainable life in the world.
14. Indigenous peoples are encouraged to cooperate actively and in good faith with States,²¹¹ to facilitate the implementation of the States' international obligations related to indigenous peoples' rights, consistent with the rules and standards established by the UNDRIP. Indigenous peoples are obligated to respect the fundamental human rights of others and the individual rights of their members, consistent with internationally recognized human rights standards.

ANNEX

International Law Association 75th Biennial Meeting, Sofia, Bulgaria
Committee on the Rights of Indigenous Peoples Open Session, August 28, 2012

Statement of Endorsement of Committee Final Report and Resolution

By S. James Anaya

James J. Lenoir Professor of International Human Rights Law and Policy, The University of Arizona College of Law, United Nations Special Rapporteur on the Rights of Indigenous Peoples

It is with great pleasure that I endorse the final report and resolution presented to you by the Committee on the Rights of Indigenous Peoples. When I joined the move to establish this committee within the International Law Association some seven years ago, I was aware and greatly appreciative of the global distinction and authority this organization has achieved over the nearly 140 years of its existence.

²⁰⁹ See UN Special Rapporteur Report on the UNDRIP, para. 88.

²¹⁰ *Ibid.*, para. 90.

²¹¹ *Ibid.*, para. 89. See also paras. 74-79.

Since the 1970s, indigenous peoples have made a concerted effort to gain recognition of their rights not only domestically, but also at the international level. Their success was highlighted by the 2007 United Nations Declaration on the Rights of Indigenous Peoples. An overwhelming majority of UN Member States voted in favor of the Declaration upon its adoption by the General Assembly, and the few states that voted against Declaration subsequently changed their positions and endorsed it. Even before the formal vote on the Declaration, the initiative was underway to have the ILA analyze the international legal significance of the expanding global attention to the demands of indigenous peoples.

I appreciate the positive response to this initiative with the establishment of the ILA committee on the rights of indigenous peoples in 2006, which I served as the initial chair. I thank all the wonderful scholars and experts from around the globe who embarked on this journey with me. In 2008, the UN Human Rights Council appointed me as its Special Rapporteur on the Rights of Indigenous Peoples. As I could not continue in the position as chair of the committee, I asked my trusted friend and eminent scholar in the field, Professor Siegfried Wiessner, to continue this work, and he was confirmed as chair of the committee during the ILA's biennial meeting in Rio de Janeiro in 2008.

I am extremely grateful to Siegfried for his willingness to take over as chair of the committee and for the dedication with which he has served in that capacity. He has done a yeoman's job in working with and guiding the committee toward its goal of authoritative clarification, elucidation and guidance in respect of the provisions of the UN Declaration, including their development, context and status in international law. Upon the unfortunate resignation of Gregory Marks as the committee's first rapporteur due to health reasons, Siegfried asked Professor Federico Lenzerini of the University of Siena to serve in that role. Federico, himself a distinguished scholar in the field, has worked very hard and most successfully with the members of the committee in putting together the interim and final reports as well as the final resolution.

The committee's work before you reflects the highest standards of our profession. It is structured thematically around key aspects of indigenous peoples' rights, including culture and identity, lands and resources, and self-determination and autonomy. It recognizes the goal of protection of cultural diversity, which undergirds the novel phenomenon of communal and collective rights being introduced into international law. Importantly, on the basis of accepted methods of international legal analysis, the report not only expounds upon the content of the various provisions of the UN Declaration on the Rights of Indigenous Peoples, it also engages in a review of pertinent international and state practice to ascertain the international legal status of the various rights formulated in that document. One example is the thoughtful discussion of the principles of consultation and consent in the final report.

Given the thorough research undertaken by the committee, the conclusions as formulated in its final report and resolution are highly authoritative. I am confident that, as intended, this expert commentary will reduce confusion and contention over the content and normative status of the provisions of the UN Declaration and of indigenous peoples' rights in general. It will help me in my work as Special Rapporteur as I endeavor to guide states toward ever closer compliance with the new regime of indigenous peoples' human rights.

The commentary will be available to practitioners and advocates, governments, courts and tribunals, academics and indigenous organizations, to draw on and refer to in dealing with the important issues that concern indigenous peoples. Accordingly, it will be a hallmark of the work of the International Law Association in the new environment of the values-based international law of the 21st century. I enthusiastically urge its approval.