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Cultural diversity and indigenous peoples' land claims. Argumentative dynamics and jurisprudential approach in the Americas

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anno accademico 2010-2011

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to my mother's memory

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CHAPTER SIX

JURISPRUDENTIAL DIMENSION OF THE RIGHT TO TRADITIONAL LANDS

THE RIGHT TO COMMUNAL PROPERTY AS A 'VEHICLE' FOR A DIGNIFIED LIFE

ABSTRACT

The present study is divided in two differentiable but conceptually interrelated sections. Within the first section (Chapters I, II, and III), the focus is on the assessment of the argumentative logic behind the multiculturalist proposal for equally divided societies, among equally positioned ethno-cultural groups. A critical and analytical review of the multiculturalist argumentative constructions shows that its justification lies on the dogmatic assumption of the equal worth or dignity of cultures, which is ontologically incorrect. Cultures cannot be axiologically compared. Instead, this study proposes a new approach focused on the *equal functional value* of each culture vis-à-vis the cultural producer and beneficiary (the individual). Therefore, it is argued that multiculturalism plea for equal ethno-cultural partition of the public societal space is based on *political aspirations* and then subjected to –in open, pluralist and democratic societies– the dynamics and methodological procedures of the so-called *'democratic game'*.

The second section of this work (Chapters IV, V, and VI) focuses on the specific case of indigenous peoples from both a theoretical and jurisprudential point of view. First, the very notion of indigenous peoples is deconstructed and critically examined. Their *special relationship with their traditional lands* has been identified as the main objective characteristic that sustains their claims for cultural *distinctiveness* and differential legal treatment. Then, Chapters V and VI refer to a critical legal analysis of the jurisprudence of the Inter-American Court of Human Rights in connection with indigenous peoples' land claims, and the role that the element of *'special relationship with traditional lands'* has played in the recognition of their right to communal property over traditional lands as protected by the American Convention on Human Rights (Article 21 ACHR). In this sense, special attention is given to the interpretative methods applied by the Court, and –in particular–its underlined ontological assumptions.

INTRODUCTION

The overall purpose of this study is to provide clarification on the understanding of different conceptual notions that have been used in socio-political and legal international discourses in order to justify the recognition of differential and exclusive set of rights to (self)-perceived distinguishable ethno-cultural societal groups. In particular, this work addresses –as a case study– the conceptual argumentations that have justified the construction of the notion of indigenous peoples as a differentiated segment of societies. In their case, the analysis has been conducted in two different directions. First, from a conceptual point of view, through the identification of the main components of the notion, and second, though its practical appraisal in concrete judicial cases, namely, the jurisprudence of the Inter-American Court of Human Rights.

The main research question that this study attempts to answer is to clarify the role that certain notions have played in the justification of the multiculturalist proposal for equally divided societies, among equally positioned ethno-cultural groups. That is the role that the notions of culture, culture diversity and culture identity have had in the argumentative justifications of demands for the recognition of differential set of rights. In this sense, multiculturalism attempts to match the alleged cultural distinctiveness of societal ethno-cultural entities or groups. And, in particular, this study aims to enquire how these notions have been applied in the specific case of indigenous peoples, both from a conceptual and practical point of view.

In fact, from a theoretical perspective, the analysis is focused on the epistemological construction of the notion of *indigenousness* and its conceptual implications for the justification of the claims for a separate legal treatment, precisely based on their cultural differentness. In addition, this study aims to analyse the manner in which the cultural dimension of this notion has been practically incorporated into the jurisprudence of the Inter-American Court of Human Rights, when dealing with cases related to indigenous peoples' land claims.

The methodological decision to incorporate and combine the jurisprudence of this regional tribunal with the theoretical enquiry lies in the fact that the critical assessment of this case law provides a concrete and practical opportunity to challenge the theoretical framework developed within the first part of this work, but not only. This jurisprudence also provides the unique opportunity to test, in the concrete case of indigenous peoples, one of the main justifications of the multiculturalist proposal for culturally divided societies, which is the assumption that through a differentiated set of rights, individuals would be better protected, and fully respected in the enjoyment of their cultural identities. In fact, this study takes into account the fact that the Inter-American Court's jurisprudence and competence is based on an instrument with universal character, namely the American Convention on Human Rights, rather than group oriented one. Hence, in its jurisprudence, it would be possible to find a completely different approach consisting of culturally tailored judicial protection, that is, not through a *differential* set of culturally constructed rights (as in the multiculturalist proposal), but through a culturally friendly interpretation of *universally* constructed rights.

This study is divided in two main distinguishable parts: the first part –which includes Chapters I, II, and III– outlines the general theoretical framework; the second one –composed by Chapters IV, V and VI– refers to a critical examination of the case of indigenous peoples from both a theoretical and jurisprudential points of view. In connection with the latter, the focus is on the jurisprudence of the Inter-American Court of Human Rights (I-ACtHR) in connection with indigenous peoples' land claims.

Within the theoretical framework, the complex epistemological notions of culture, plurality of cultures and multiculturalism (Chapter I); cultural dynamics among majoritarian and minoritarian societal aggregations (Chapter II); cultural diversity and cultural identity (Chapter III), are critically analysed, from a multidisciplinary perspective. They remain present throughout this entire work, providing conceptual anchorage and foundation for the theoretical analysis of the specific notion of indigenous peoples, but not only.

In fact, in the case of indigenous peoples, the focus is allocated to the very same notion of *indigenousness*, which is critically analysed and logically disassembled –as a logical and argumentative construction– under the light of the above mentioned concepts (Chapter IV). In this epistemological process, special attention is paid to elements regarded as constitutive of their societal *cultural distinctiveness*, and –in particular– to the composed notion of *"special relationship with traditional lands"*, considered as the core element of their distinguishable cultural identity.

Moreover, the above mentioned notions of indigenousness, and its argumentative equation with the element of "*special relationship with traditional lands*", are examined not just from a theoretical point of view, but also in a concrete and practical context of indigenous peoples' lands claims before the Inter-American Court of Human Rights. As a logical approach toward the critical analysis of the decision adopted in connection with these cases, the focus is given –first– to the interpretative methodology applied by this Court, which has permitted the absorption –within its jurisprudence– of the notions incorporated and discussed in the first chapters (Chapter V).

In this sense, our analysis will move toward the critical legal appraisal of the specific jurisprudence of the Inter-American Court in connection with indigenous peoples' cases, in which the question at stake has been the recognition of their *special* relationship with their traditional lands, as an essential part of their conventionally protected right to communal property (Chapter VI).

Additionally, in this final chapter, the discussion is centred on the value that the regional tribunal has given to the said *special relationship with traditional lands* as a powerful vehicle for the recognition and conventional protection of the right to communal property, as enshrined in Article 21 of the American Convention on Human Rights (ACHR), but not only. Special attention is paid to the interconnection that the Court has made between the latter right and the right to life, or to have a *dignified life*, as guaranteed by Article 4 ACHR. In fact, as it is shown in Chapter VI, under the jurisprudence of the regional tribunal, the latter right has an intimate connection with the notions of culture, cultural identity and, in the specific case of indigenous communities, with the notion of *special relationship* with traditional

lands. Hence, attention is paid to the critical assessment of the epistemological notions used by the court and –in particular– on their regarded (or assumed) ontological interconnections.

CHAPTER ONE
THE RELEVANCE OF CULTURE

> *« Et quel pouvoir, quelle magistrature, quelle royauté peuvent être préférables à une sagesse qui, gardant de haut tous les biens terrestres, et les voyant au-dessous d'elle, ne roule incessamment dans ses pensées rien que d'éternel et de divin, et demeure persuadée que le nom d'homme se prend' vulgairement, mais qu'il n'y a d'hommes en effet que para la culture des connaissances, attribut personnel de l'humanité? »* Cicero, La République.[1]

1. Introduction

If someone asked you what 'culture' is, provably your first reaction would be to say that 'everything is culture', and you will not be wrong. As we will see in this chapter, from a wider perspective, every single societal structure is culturally created, including –of course– legal systems. In addition, if the same person asked you whether there is only just one culture or if culture –as a notion– refers to a sort of universally homogenized manifestation, your answer would be most provably negative; and you will be right too. As we will also see later in this chapter, in our world we find an enormous variety of human expressions and cultural manifestations because –in fact– culture *"takes diverse forms across time and space."*[2]

However, this diversity of cultures, manifestations and expressions not only exist across states' borders, regions and continents, but also within states' territories.[3] In fact, in our modern societies, strongly shaped by the phenomenon of globalization and by its consequential cultural exchange, it is quite difficult to think in terms of

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[1] M. T. CICERO, *La République*, Paris, 1823, p. 30.

[2] See, Article 1 of UNESCO Universal Declaration on Cultural Diversity, adopted by the United Nations Educational, Scientific and Cultural Organization, on 2 November 2001.

[3] As Ermacora has already stressed, *"[o]nly 9 per cent of the States in the world today are ethnically homogeneous. In all other cases majorities and minorities differ to a varying degree ethnically, linguistically, culturally and also religiously."* See, F. ERMACORA, *The Protection of Minorities before the United* Nations, in Académie de Droit International (ed.), *Recueil des Cours*, The Hague/Boston/London, 1983–IV, p. 347.

cultural societal homogeneity and even less in terms of "cultural purity". The reality is that our modern societies are heterogenic in cultural terms. They present distinguishable cultural features, entities or groups, which have their own visions and understandings of the good, of the holy, of the admirable. They bring into the common cultural *public* space different cultural proposals, which are not always compatible.

Moreover, the above mentioned factual cultural heterogenic, which exists in almost all modern societies, does not mean that the relations between the different cultural entities or groups are established in terms of socio-cultural and political equality. On the contrary, the ordinary factual feature in culturally heterogenic societies is to find cultural dynamics between the groups that could be characterized as majority-minority dynamics.[4] Actually, if we pay closer attention to the cultural characteristics of common societal institutions (including the socio-political, economical structures and legal institutions), it would be most likely possible to even identify in them the prevalence of the cultural characteristics, world views, understandings and systems of values of the existing cultural majority; and with the consequential exclusion of those belonging to the minorities.

As we show in this chapter, there are different ideological and axiological approaches with regard to the management of these societal dynamics. Some of them put emphasises on the empowerment of each individual, regardless his or her ethno-cultural alliances or preferences, prioritising the equal enjoyment –without discrimination– of the very same set of human rights and fundamental freedoms. Other approaches, such as that one promoted by multiculturalists, has put –on the contrary– the emphasis on the equal protection of cultural entities or groups, advocating for an equal partition of public spheres and common societal institutions (including legal systems) among the existing cultural *differentiated* entities, in a given society. To put it shortly, the latter approach sees societies composed by *distinguishable* ethno-cultural entities and therefore pleads for cultural groups' equality; on the contrary, the former sees the same societal realities as composed by individuals, and hence advocates for individual equality, regardless their ethno-cultural alliances, appurtenances or preferences.

[4] For a detailed analysis of the societal dynamics between majorities and minorities, you can go directly to the reading of Chapter II.

Therefore, this introductory part of this work, will analyse the above mentioned notions and dynamics, not only from a legal perspective, which lies at the very base of this study, but –specially in this first chapter– also from a socio-political one, paying special attention to the political and ideological discourses that sustain these approaches, from an axiological point of view. I find myself positively persuaded that this *crossover* or multidisciplinary approach is the most appropriate in order to fully embrace (or at least try to do it) the intrinsically multifaceted aspects of these controversial topics.

2. The overarching concept of Culture

Because we will address in this chapter cultural aspects of our societal organizations, the most logical way to start our discussion is through approaching the *overarching concept of culture.* The word "culture" has been used in human history in so many different ways and many different meanings have been attached to it. Culture as an artistic manifestation; culture as a product; culture as an intellectual achievement; culture as collective or individual accumulated knowledge; culture as a human creation; culture as opposed to nature, etc., etc. For example, if we go back in time to one of the greatest civilizations that had existed in the world, namely the ancient Rome, we will find that Cicero has already referred to culture as both, a human action and a human product, but not only. When this great roman affirmed – almost 20 centuries ago (51 BC)– that *"la culture des connaissances"* is the *"attribute personnel de l'humanité"*[5], that is culture as a personal attribute of humanity, stressed the creative nature of human beings, their capacity to accumulate and build knowledge, not only as a product but also as a transformative element of the world. Therefore, culture and knowledge appeared under the eyes of this experienced orator and earlier humanist as in contraposition with what is none essentially human, as in opposition to what is *just* nature.[6]

[5] See, M. T. CICERO, *op. cit.*, p. 30.

[6] Culture, as a cultivation of the human spirit, knowledge and language, has also been at the vary base of the diction between humans and animals. As Cicero said *"…what can be more delightful in leisure, or more suited to social intercourse, than elegant conversation, betraying no want of intelligence on any subject? For it is by this one gift that we are most distinguished from brute animals, that we*

This liminal example of the potential understanding of 'culture' refers perhaps to one of the most common meanings of this complex notion, that is to the contraposition of culture to *nature*, to what has remained *'untouched'* or not yet modified, constructed or influenced by human actions. In fact, culture derives from the Latin root *'cultus'*, which refers to *'a tending, take care of, cultivation of a thing'*.[7] For the Romans it existed as an intrinsic connection between the cultivation of the soil, as a transformative action of the 'wild' nature, and the cultivation of the mind, as a transformative action of the 'wild' or 'savage' human characters and its elevation toward a state of knowledge.[8]

2.1. Culture in social sciences

This earlier understanding of culture has remained upon time and today we can even recognise its presence in any common definition of this term, like –for example– the one provided by the Oxford Dictionary, namely 'culture' as *'the arts and other manifestations of human intellectual achievement regarded collectively',* or as *'the ideas, customs, and social behaviour of a particular people or society'*[9]. In fact, from a broad point of view, all our societies, social structures, institution, tradition, morals, values, understanding and knowledge are part of our culture, and –in that sense- are cultural creations.

But, if we pay a very close attention to the way that the term culture is currently used, we would be able to identify –at least– three different usages of it. First, in a very wide sense, culture is identified with *"accumulated material heritage*

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converse together, and can express our thoughts by speech." See, M. T. CICERO, *On Oratory and Orators*, New York, 1860, p. 14

[7] See *The Pocket Oxford Latin Dictionary*. Ed. James Morwood. Oxford University Press, 1994. Oxford Reference Online. Oxford University Press; and J. E. RIDDLE, *A complete English-Latin and Latin-English Dictionary for the use of college and* schools, London, 1870.

[8] In this sense, Cicero said that *"as the field, however fertile, cannot be fruitful without culture, so with the mind, without learning. Thus, either of the two is abortive without the other. The culture of the mind is philosophy."* See, M. T. CICERO, *The Tusculan* Questions, Boston, 1839.

[9] Oxford Dictionary of English. Edited by Angus Stevenson. Oxford University Press, 2010. Oxford Reference Online. Oxford University Press.

of humankind"[10]; in other words, culture is understood in this sense as the accumulated product of human actions since immemorial times. Hence, under this understanding it would be possible to identify the existence of a *'universal'* culture, beside the fact that this universal culture would not be the exact result of the sum of each national, sub-regional or regional cultures.[11]

Secondly, culture has been understood as *'creativity'*, as the potential outcome of the different societies or individuals. The focal point here is the creative *'instrument'* of cultural products, or –as Stavenhagen said– who *create, interpret* or *perform* cultural works.[12] This could be considered one of the most common usages of the term, especially in everyday life situations, and in general refers to *"...the arts and artistic practices, in particular the creative and expressive art of high culture rather than popular culture or mass culture; [or is] associated with common usages such as 'a cultured individual' or 'lacking culture'"*.[13]

Finally, from an anthropological point of view, culture could be interpreted as *'a total way of life'*, as *"...the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups."*[14] In this different meaning, culture is seen as a *'self-contained system of values'*[15], as a specific set of *practices, customs, understandings* and *values* that distinguish one group from another, and which provides content and meaning to the life of its members, both individually and collectively. Moreover, as a system of values,

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[10] See, R. STAVENHAGEN, *Cultural Rights: A Social Science Perspective*, in UNESCO, *Cultural Rights and Wrongs. A collection of essays in commemoration of the 50th anniversary of the Unversal Declaration of Human Rights*, Paris, 1998, p. 4.

[11] Some authors have nevertheless noticed that the so-called *'universal culture'* has been over emphasised and consequently it has been paid *"...little attention to the fact that in any society, at any given moment, different conceptions of culture compete witch one another. [...] Thus, each community, each people has its own concept of what cultural heritage means..."* See, among others, R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, Organization of American States (OAS), 2002, p. 40. The same author has pointed out that the so-called universal culture is more often than not *"...the world-wide imposition of 'Western' culture through the hegemonic practices of the Western powers, from the time of colonialism onwards."* See, R. STAVENHAGEN, *Cultural Rights: A Social Science Perspective*, cit., p. 4 et seq.

[12] *Ibid.*

[13] See, A Dictionary of Media and Communication. First Edition by Daniel Chandler and Rod Munday. Oxford University Press Inc. Oxford Reference Online. Oxford University Press. Indeed, it is this understanding of the term that has led to a widely held distintion between *'high'* and *'low'* cultural manifestations.

[14] See, R. STAVENHAGEN, *Cultural Rights: A Social Science Perspective*, cit., p. 5 et seq.

[15] See, R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, cit., p. 41.

culture is historically rooted and changes over time, following the changes of the societies that represents, and from which it has generated. Hence, under this conception, culture is not a static product; it is not an immobile societal picture that will remain unchangeable over time. On the contrary, this anthropological view gives us the idea of a process that follows the evolutionary changes of the society.[16]

2.2. Conceptualisation of Culture

As we can see, culture has different broad and polysemic meanings and these varieties of understandings could generate some ambiguity or vagueness in connection with the scope of this work, therefore it would be of a great benefit to agree on a *'conventional'* definition of culture. Especially because –as we will see in future chapters–our critical approach to the jurisprudence of the Inter-American Court of Human Rights would be based –to a large extent– on the analysis of the notion of culture that has been embraced by the regional tribunal and on the legal effects derived from that conceptual assumption.

For this purpose, and in order to have a solid base upon which start our discussion, nothing would be more suitable than the notion adopted by the United Nation Educational, Scientific and Cultural Organization (UNESCO), especially if we take into consideration the worldwide support that this international organization has gained during the last decades. For UNESCO, culture should be considered as *"...the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs."*[17]

Under this definition, culture involves at least two different aspects, which cover the individual and societal dimensions of human beings. From an individual

[16] In fact, according to Stavenhagen, *"...cultural change and the constant dynamic recreation of cultures are a universal phenomenon..."* See, R. STAVENHAGEN, *Cultural Rights: A Social Science Perspective*, cit., p. 5 et seq.

[17] UNESCO, *Mexico City Declaration on Cultural Policies*, adopted by the world Conference on Cultural Policies, Mexico, 6 August 1982, *preamble.* This understanding of culture has been a further development by the World Commission on culture and Development Our Creative Diversity (1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998).

perspective, *'culture'* provides meaning to life, gives the necessary instruments to each human to reflect upon himself or herself, allowing him or her to take rational and grounded decisions.[18] As we will see further in this chapter, this understanding of culture is intrinsically connected with the notion of cultural identity.[19] Moreover, from a societal point of view, culture provides the common meaningful framework over which human beings construct their commonness, their living together (or what has been called *'togetherness'*), and their common supportive societal structures, indispensable of organization and regulation of human societies.[20] It is in this sense that some authors refers to culture as *'societal cultures'*, because involves not just shared memories or values, but also common institutions and practices.[21] In short, culture is *ubiquitous*.[22]

Furthermore, it would be important to highlight that the above two mentioned understandings of culture are interconnected and interrelated, in a sense that societal structures not only strongly determined and molded by individual's identities, but –at the same time– the latter contributes to the reproduction, maintenance and perpetuation of the cultural societal institutions. Actually, the permanent interaction of individuals in a given society generates a dynamic and evolving process that will be reflected on its *'history, mores, institutions and attitudes, its social movements,*

[18] In fact, it is culture that which *"...makes us specifically human, rational beings, endowed with a critical judgment and a sense of moral commitment. It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations."* See, UNESCO, *Mexico City Declaration on Cultural Policies*, *preamble.*

[19] See, Chapter III, Section 4.

[20] For the Committee on Economic Social and Cultural Rights (CESCR), culture *"...encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities."* See, Committee on Economic Social and Cultural Rights (CESCR). *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, Economic and Social Council, United Nations, 2009, p. 3-4, para. 13.

[21] See, W. KYMLICKA, *Multicultural Citizenship. A liberal theory of Minority Rights*, Oxford, 1995, p. 76 et seq. Kymlicka defines *societal culture* as a *"...culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres." Ibid*, p. 76.

[22] See, I. M. YOUNG, *Justice and the Politics of Difference*, Princeton, 1990, p. 23 et seq.

conflicts and struggles, and the configuration of political power...'[23] In fact, culture is dynamic and continually evolves (or changes) upon time.[24] In this sense, we must now regard culture as a process rather than a finished product.[25]

It is important, in order to have an accurate understanding of culture, not to surrender to the temptation to consider *culture* as a *uniform* product, as a unified and already finished system of ideas and beliefs that enclose all regions, countries and societies in the world. In fact, it is quite common to refer to culture as a *universal culture*, as a sort of *accumulated* (and indistinguishable) *material heritage of humanity*. A kind of *'world cultural civilization'* which would consequentially reflect no division of historical periods, no cultural specificities between different groups of human beings, and which would have a moral and logical significance validity of all people in the world. I said moral in a sense that it would provide full content, sense of life and meanings for all existed and existing societies, from the beginning to the end of times; and it would be also logical because it would cover all their (cultural) distinguishable features. So far so good, but… it is quite naïve too.[26]

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[23] See, UNESCO, *Our Creative Diversity: Report of the World Commission on Culture and Development*, Paris, 1996, p. 24.

[24] In one of its latest reports, UNESCO has affirmed that "*[a] current consensus regards cultures as systems that continually evolve through internal processes and in contact with the environment and other cultures. What is certain is that no society has ever been frozen in its history, even if some cultures have been viewed as ´timeless´ from the perspective of others characterized by rapid change."* UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, Paris, 2009, p. 25 et seq.

[25] As UNESCO stressed, *"[c]ultures are no longer the fixed, bounded, crystallized containers they were formerly reputed to be. Instead they are transboundary creations exchanged throughout the world via the media and the Internet."* See, UNESCO, *Cultural Diversity, Conflict and Pluralism - World Culture Report*, Paris, 2000, p. 15. In the following chapters I will come back to this idea of culture as a process rather than as a product, in particular when addressing the boundaries or limits of the indigenous peoples' cultural legal protection.

[26] This way of thinking perhaps is close to what Bentham has defined as one of the anti-rational fallacies (or *ad verecundiam*), most precisely that one called *"too good to be practicable"* or even the *"utopian"* one (see, J. BENTHAM, *The Book of Fallacies*, London, 1824, Ch. 9, p. 295 et seq.) In fact, it would be unreasonable to think of *'culture'* in terms of a universal and a-temporal product, applicable to all human societies from the beginning of human history. Thinking that our cultural values, mores and understanding could be validly applicable to –for instance– the Ancient Egypt, or Ancient Rome, or even to the Middle Ages or the beginning of Modernity, is nothing but a speculative or romantic exercise. Thinking that we can morally judge ancient societies with our current moral parameters (which are indeed cultural), it could be considered as morally sympathetic and perhaps even morally good in theory, but it would be too bad in practice. The mores, values and cultural understanding of "the good" had dramatically changed among societies and civilizations, not only in different times in human history, but also among societies that are contemporary in time. It would be enough to say, in order to exemplify this argument, that just no more than 150 years ago slavery was still considered legal… This is nothing but a little example of how societal moral and legal practises had dramatically changed over a time. What is today considered as one of the most perfidious international crimes, two centuries ago was considered a profitable business enterprise.

However, if we look closely to our societies, the reality shows us that not all cultural manifestations are and were similar. Societies have been very different in the past and they show easy recognisable (cultural) differences in present times. In fact, an all-inclusive concept, such as *'world civilization'*[27] (as a uniform product) is –at least– culturally vague, and perhaps even sketchy and imperfect.[28]

Moreover, when *'culture'* is used in a sense of *'human creations'* or 'products', we have to necessarily arrive at the conclusion that there is no homogeneity in them. In this sense, it would be quite difficult to identify a unique cutting-edge trend, or a unique patron or identical cultural standard among all different societies that would fairly reflect and embrace all their traditions, practices and customs.[29] The reality is quite different. Cultural differences are reflected not only in the structural societal organisations and in configuration of social-political institutions, but also in the values, mores and conventions of each social group.[30] As

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[27] Many authors use the word *'civilization'* as a synonymous of culture, but we rather prefer to use the latter because, as Benhabib stressed, the former term refer more to *"material values and practices that are shared with other peoples and that do not reflect individuality."* See, S. BENHABIB, *The Claims of Culture. Equality and Diversity in the Global Era*, Princeton/Oxford, 2002, p. 2. From a quite different perspective, authors like Samuel P. Huntington consider that it is impossible to think on the development of humanity in any other terms than *'civilizations'*. For the latest author, *"[c]ivilization and culture both refer to the overall way of life of people, and a civilizaiton is a culture writ large. […] A civilization is the brodest cultural entity. […] [I]s thus highest cultural grouping of people and the broadest level of cultural identity people have short of that which distinguishes humans from other species. It is defined both by common objective elements, suchs as language, history, religion, customs, institutions, and by the subjetive self-identification of people.[…] Civilizations are […] meaningful entities, and while the lines between them are seldom sharp, they are real."* See, S. P. HUNTINGTON, *The Clash of Civilizations and the Remaking of World Order*, New York, 1997, p. 41 et seq.

[28] One of the leading anthropologist of the last century, Claude Lévi-Strauss, has stressed that *"...[t]o attempt to assess cultural contributions with all the weight of countless centuries behind them, rich with the thoughts and sorrows, hopes and toil of the men and women who brought them into being, by reference to the sole yard-stick of a world civilization which is still a hollow shell, would be greatly to impoverish them, draining away their life-blood and leaving nothing but the bare bones.[…] There is not, and can never be, a world civilization in the absolute sense in which that term is often used, since civilization implies, and indeed consists in, the coexistence of cultures exhibiting the maximum possible diversities."* See, Claude Lévi-Strauss, cited by UNESCO, *Our Creative Diversity: Report of the World Commission on Culture and Development*, cit., p. 29.

[29] As it has been said, *"...nowadays, it is difficult, except at village level or in very isolated communities, to find culturally homogenous societies which do not include any strand or cultural variety. In the context of increased globalization, the shrinking of spatial and temporal distance and population movements [...]bring with them a multiplication of contacts between different countries and internationalization of social movements and political ideas(via disporas) and a diversification of cultural life within every State."* See, UNESCO, *Towards a constructive pluralism*, Paris, 1999, p. 20.

[30] Under the anthropological point of view, culture would be understood as *"the sum of all practices, activities, and material and spiritual product of a determined social group that distinguishes it from other similar groups. Understood in this way, culture can also be seen as a coherent and self-contained system of values and symbols that a specific (frequently referred to as "ethnic") group*

Lévi-Strauss has said, *"[t]he true contribution of a culture consists [...] in its difference from others."*[31]

The United Nations Educational, Scientific and Cultural Organization (UNESCO), during its decades of existence has paid special attention to the existence and the challenges that cultural pluralism generates in our more closer and intertwining world, stressing the fact that *"[i]n the world in which [...] 10,000 distinct societies live in roughly 200 states, the question of how to accommodate minorities is not of academic interest only but is a central challenge to any humane politics".*[32] If we read *'cultures'* at the place of the term *'societies'* (societies are –at the end of the day– cultural products), and *'different cultural entities'* instead of minorities, then the cultural complexity that indeed exists in the world will come to our mind in no time. Hence, plurality of cultures is a self-imposed reality. Human beings are witnesses, bearers and producers of culture; in most cases it would be quite easy for each of us to identify the approximate boundaries where our own culture ends and where someone else's culture begins, or –at least– what is certainly not part of someone's culture.

Leaving our cultural self-perception or identity for a future analysis[33], what really matters after our factual verification, is to enquire about how to deal with, how to manage this cultural plurality or... diversity. If a society is pluralist, which means that we can identify different and separate groups, with different sets of *cultural* values, structures and institutions, like –for example– as could be the case of indigenous communities vis-à-vis the mainstream society in a given country, then what indeed becomes relevant is to look upon the way that these different social components relate each other. In other words, how societies accommodate their differences in the construction of a common societal milieu.

It is true that different cultures could live next to each other without having any contact and mutually and willingly ignorant, but in most cases and especially in

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reproduces over time, and which provides orientation to its members about the meanings necessary to govern social conduct and relations in daily life. (...) [T]hen the right to culture must be recognized as the right of social groups to their own culture and their own cultural identity". See R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, cit., para. 134–135.

[31] See, Claude Lévi-Strauss, cited by UNESCO, *Our Creative Diversity: Report of the World Commission on Culture and Development*, cit., p. 29.

[32] *Ibid.*, p. 44.

[33] See, Chapter III, Section 4, and 4.1.1

our current globalized world this remain nothing but a theoretical speculation.[34] In today's world, cultures interact and sometimes even overlap each other to the point that it is quite difficult to distinguish them accurately. One clear example of this cultural mixture or *'melting pot'* could be constituted by those indigenous populations that live in urban areas, sharing almost the same cultural habits and practises than their non-indigenous neighbours. Potential internal and external boundaries are less sharply delineated, or intertwined. Therefore, the question of management of their interaction and coexistence become imperative.

In other words, what would be important to reflect upon is how, and to what extent, cultural groups with culturally derived differences contribute –or are able to contribute– to modelling and shaping a given society. How do societies manage (or could manage) the existing cultural diversities? In other words, would it be convenient to ask if it is relevant or desirable to stress cultural differences within pluralist democratic societies, by means of giving them more visibility and distinguishable legal status. Otherwise, would it be better to emphasise what different ethno-cultural groups have in common or should have in common in order to peacefully live together (e.g. through stressing the respect for human rights and fundamental freedoms, or with regard to other foundational principles of modern democracies, such as rule of law, equality and non-discrimination, secularism, etc.).[35]

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[34] Perhaps one of the latest examples of cultural isolation that exist in today's world are the so-called indigenous people communities living in isolation, in a sense that they do not maintain regular contact with the majority populations or they are at the stage of having an initial contact. In connection with these populations see, Human Rights Council Expert Mechanism on the Rights of Indigenous People's Report called *"Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial contact of the Amazon Basin and El Chaco* (UN Doc. A/HRC/EMRIP/2009/6), of 30 June 2009.

[35] In order to avoid potential misinterpretation from the readers, I would like to anticipate here one of the argumentations that will be introduced later in this chapter, and which will transversally last in this work. The fact that almost all modern societies are factually plural does not mean that all societal institutions have to *institutionally* reflect that plurality. Common societal institutions are a synthesis, combined entities that reflect –in one way or another– the existing societal dynamics in each society. These dynamics include majoritarian and minoritarian relations, which most likely would end being institutionally reflected. In democratic and pluralist societies, different cultural entities can –of course– legitimately have political aspirations but this does not mean that they would be able to secure those political claims through legal or judicial protection, which would be a sort of societal *institutional* guarantee. They will have to openly play the democratic game in order to gain consensus and support from all members of the society toward their cultural views and understanding, but without having any guaranteed result. What is nevertheless guaranteed, is the enjoyment of fundamental rights and freedoms for all members of the society, regardless their cultural views or understanding. In short, what is guaranteed and secured is what all members of cultural groups have in common, namely the dignity of being members of the same family, as human beings. This, and no

The extension and specificity of these questions will certainly take us far away from the object and purpose of this dissertation. In fact, a proper answer to these essential questions will require –at least– the dedication of an entirely autonomous work, devoted not only to a systematic analysis of societal dynamics, but also to a profound historical, sociological and legal exploration of the different potential organisational models of intercultural relations and management of cultural diversity in a given societal context.[36]

Instead, the focus will be put only on one of the organizational models that have been largely proposed during the last decades but which is nevertheless currently under discussion and revision by global influential national governments.[37] Moreover, I will argue that this particular model has –in the context of this work– a very important connotation because it has been adopted as one of the most influential regional judicial bodies in the Latin American region, namely the Inter-American

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other, is the common societal agreement that has been reached in our modern societies. For a more detail explanation of this point, see in this chapter, Section 4.2.

[36] Many books have been written on this topic. For a general overview in connection with multiculturalism and cultural pluralism, in particular from their political, social and historical perspectives, see –among other authors– Ch. TAYLOR, *The Politics of Recognition*, in A. GUTMANN (ed.), *Multiculturalism. Examining the Politics of Recognition*, Princeton, 1994; W. KYMLICKA, *Multicultural Citizenship. A liberal theory of Minority Rights*, cit.; and of the same author, W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, Oxford, 2007; I. M. YOUNG, *Justice and the Politics of Difference*, cit.; and from the same author, I. M. YOUNG, *Together in Difference: Transforming the Logic of Group Political Conflict*, in W. KYMLICKA (ed.), *The Rights of Minority Cultures*, Oxford, 2004; M. WALZER, *Pluralism: A Political Perspective*, in W. KYMLICKA (ed.), *The Rights of Minority Cultures*, Oxford, 2004; S. BENHABIB, *op. cit.*; B. PAREKH, *Rethinking Multiculturalism. Cultural Diversity and Political Theory*, New York, 2006; and, from the same author, B. PAREKH, *A New Politics of Identity. Political Principles for an Interdependent World*, New York, 2008; D. BENNETT, *Introduction*, in D. BENNETT (ed.), *Multicultural States. Rethinking difference and identity*, London/New York, 1998; and G. PAQUET, *Deep Cultural Diversity: A Governance Challenge*, Ottawa, 2008.

[37] Just as an example of the current debate around *multiculturalism*, on February 2011, one of the leading French newspapers published, in an article titled *"Sarkozy: le multiculturalisme est un "èchec""*, quoting the President of the French Republic when he was quoting as saying that *"Nous ne voulons pas, en tout cas ce n'est pas le project de la France, d'une socieété où les communautés coexistent les unes à côté des autres."* See, P. FREOUR, *Sarkozy: le multiculturalisme est un "échec"*, *Le Figaro*, Paris, February 10, 2011. Almost at the same time, on the other side of the British Channel/La Manche, British Prime Minister David Cameron has highlithed the very same problem when he said that *"[u]nder the doctrine of state multiculturalism we have encouraged different cultures to live separate lives, apart from each other and the mainstream. We have failed to provide a vision of society to which they feel they want to belong."* See, P. WINTOUR, *David Cameron tells Muslim Britain: stop tolerating extremists*, *The Guardian*, London, February 5, 2011. Finally, we can even quote the German Chancellor, Ms. Angela Merkel, who has said in the same line, but perhaps with even more clarity and precision, that *"German multiculturalism has 'utterly failed'"*, adding that *"...the idea of people from different cultural backgrounds living happily "side by side" did not work."* See, M. WEAVER, *Angela Merkel: German multiculturalism has 'utterly failed'*, *The Guardian*, London, October 17, 2010.

Court of Human Rights (I-ACtHR).[38] Of course, I am referring to *'multiculturalism'*.[39]

3. Plurality of cultures and Multiculturalism: The relevance of the difference

As we said before, what we find in our planet is a multiplicity of cultures; a different understanding of how to organize society, under which principles, values and norms regulate our conducts and behaviours.[40] But if we go beyond the descriptive analysis of this plural cultural landscape and we enter into a more prescriptive discourse, that is, into the domain of what *'should be'* and not what *'it is'*, then we will enter into a different dimension which is related to the *'management'* of this plurality. Indeed, if we take into consideration the fact that the process of *'globalization'* has generated *"...unprecedented conditions for enhanced interaction between cultures",* but –at the same time– represents *"...a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries"*[41], then the analysis of this *'managerial'* dimension become imperative.

When a plurality of cultures is present in the bosom of a given society, inevitably we have to draw our attention to the dynamics generated among those different cultural groups or entities. As we know, in most of the cases these different cultural entities do not relate to each other with a perfect sense of fairness and recognition but with tensions, clashes and intolerance. And perhaps even most relevant for the understanding of this phenomena, is what we will find within those societies is a perfect identifiable majority-minority dynamics.

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[38] As I will argue in Chapter V and –in particular– in Chapter VI that the Inter-American Court of Human Rights has ideologically embraced *'multiculturalism'* when dealing with indigenous people's land claims, and in doing so, it has perhaps gone beyond its conventional mandate. But, of course, in order to be able to arrive at such hypothetical conclusion, we have to not only analyse the specific jurisprudence of this Court, but also critically conceptualize what multiculturalism is and what are its societal effects.

[39] Other forms of diversity management, such as assimilation or integration, will be addressed together with multiculturalism further in this chapter (see, Section 4.2.).

[40] In this sense, broadly speaking, it is possible to refer to Western, Asian, Oriental, African, Latin-American, African-American, etc. cultures and societies.

[41] See, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on its 33rd session. Paris, 20 October 2005. *Preamble.*

However, in order to have a comprehensive understanding of these dynamics we necessarily need to answer some structural questions, such as –for instance– what we understand societal entity or social group to be, but not only.[42] Other central concepts too have to be explored and analysed, such as those of *'majority', 'minority', 'cultural diversity'* and *'cultural identity'*. Therefore, in order to start dealing with these notions, we can perhaps start clarifying our understanding of *'societal entity'*. In this sense, I believe that the definition provided by Iris Marion Young is quite accurate; she refers to *social groups* as *"...a collective of persons differentiated from at least one other group by cultural forms, practices, or way of life."*[43]

In fact, when a given aggregation of individuals is perceived, both internally and externally, as objectively identifiable by its specific societal characteristics (e.g. by its share language, religion, ethnicity, etc.) as different and culturally separate than other individuals or groups of individuals, then it would be possible to refer to it in terms of *societal entity* or *group.* As we can see, a social group is identified by the *cultural* characteristics of its members, which –at the same time– make them different and distinguishable from the members of other groups, which possess different *cultural* features. In short, what really matters here is nothing but culture.

3.1. Plurality of cultures and diversity

Members of the same societal aggregation or entity can not only be seen in term of *cultural similarities* among themselves but also in terms of *cultural differences* vis-à-vis members of other groups. These cultural similarities/differences can be more or less visible, according to the degree of externalisation that they could have.[44] However, what really matters here is the self-identification, recognition and

[42] Just as a matter of clarification, this approximation to the concept of *'social groups'* does not refer to the legal understanding of *'group'* as a legal subject in international law. For further reading in connection with the latter understanding see, among others, N. T. CASALS (ed.), *Group Rights as Human Rights. A Liberal Approach to* Multiculturalism, Dordrecht, 2006.
[43] See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 42 et seq.
[44] Differences that could be laid at the bottom of a group configuration could have more evident externalization, such as ethnicity, race, colour, language, sex, etc., or less evident one, like in the case of education, income, nationality, religion, etc.

affinity between the members of a given group, because it is their similar experiences or ways of life –as group's members– which *"...prompts them to associate with one another more than with those not identified with the group."*[45]

Therefore, social groups are not only defined by those similar and objectively recognizable attributes shared by its members, but also for what they perceive as different in the outsiders, in those that are considered as no-members of the group. It is perhaps the *'sense of identity'* than the highly visible attributes or objective characteristics that influence or configure in a more decisive manner the affiliation to a given group or even the existence of the group itself.[46] But, that sense of identity is –at the same time– shaped and influenced by the internal and external perception of those visible cultural features.[47]

Moreover, because societal groups are not a mere aggregation of individuals, like –for example– those statistically constructed that could perhaps include individuals that have less than a specific income or a certain age; on the contrary, societal entities are composed by individuals that recognise themselves –with different degrees of consciousness– as part of that group.[48] In fact, self-awareness is a key factor for the identification of a social group, but not the only one. The external perception that a particular social aggregation constitutes a *'different social entity'* is as well another relevant factor that determinate the existence and individualization of the group. When *'other'* members of the society see all of those that share those essential attributes of a given social aggregation as "different" from themselves, then the group gain a sort of external *objectivization* that makes it visible vis-à-vis all other different social entities. And it will be this sense of *otherness*, or separateness

[45] See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 43.
[46] As Young has also said, *"...objective attributes are a necessary condition for classifying oneself or others as belonging to a certain social group, it is identification with a certain social status, the common history that social status produces, and self-identification that define the groups as a group." Ibid.*, p. 44.
[47] The relationship between the plurality of cultures or the cultural diversity and the cultural identity of the members of the society will be addressed later in Chapter III, Section 4.
[48] For Wellman, *"...a social group is its individual members in their relationships* [which] *enable its members to act as one or on behalf of the whole and to have joint interests distinct from the interests of any or all members as individuals."* See, C. WELLMAN, *Alternatives for a Theory of Group Rights*, in Ch. SISTARE, L. MAY, L. FRANCIS (eds), *Groups and Group Rights*, Lawrence, 2001, p. 25.

and differentiation, that will most likely condition, determine and shape the social dynamics between the different entities.[49]

In a given society, no social groups live in a vacuum, in isolation. As it happens with individual identities, which are formed, modelled and conditioned by a permanent interaction of *'the self'* with *'other selves'* (especially with those that are part of nuclear social groups, such as family, friends, school, etc.), group's identity is molded and shaped by groups interactions. Even when individuals are not entirely aware of their potential connection or appurtenance (membership) with one of those societal groups, the perception of that membership by others, either members of the same group or outsiders, will most likely condition and shape their socio-behavioural conduct.

From a *social theory* perspective, self-recognition and voluntary membership are not exclusive requirements for being perceived as a member of a given group. In fact, membership can be impose by other's perceptions and, therefore, individuals which involuntarily fulfil the externally recognised or visible features of a given group, could be subjected to social constrains and affected by the negative or positive assumptions related to that affiliation.[50] It is in this sense that G.H. Mead has said, *"[i]t is the social process itself that is responsible for the appearance of the self…"*[51]

For these reasons, we can logically conclude that the mere idea of a social group –as a differentiated societal entity– ontologically requires the existence of *'other'* groups.[52] People living in complete isolation, without any contact with other

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[49] As Christine Sistare said, *"…the perceived character of the group, its image in the larger society, may have these effects of attraction and repulsion […] Self-identification through a group, the possible attainment of certain goods only as a member of the group, and external identification by others based on one's group membership(s) are concerns of great significance."* See, Ch. SISTARE, *Groups, Selves, and the State*, in Ch. SISTARE, L. MAY, L. FRANCIS (eds), *Groups and Group Rights*, Lawrence, 2001, p. 7 et seq.

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[51] See, G. H. MEAD, *Mind, Self, & Society, from the standpoint of a Social Behaviorist*, Chicago, 1934, p. 142.

[52] As the father of the *'British Empirism',* George Berkeley, was one of the first philosophers to elaborate the connection between perception and existence, arriving at a conclusion that it is impossible to know the externality of bodies; what we only know is the perception that we have of them. His *'immaterialism',* or *'subjective idealism'*, could be found concentrated in his famous answer to the following dilemma: *"[But say you, surely there is nothing easier than to imagine trees, for instance, in a park, or books in a closet, and nobody by to perceive them. I answer, you may so, there is no difficulty in it]: [but what is all this, I beseech you, more than framing in your mind certain ideas which you call books and trees, and at the same time omitting to frame the idea of any one that may perceive them? but do not you yourself perceive or think of them all the while ?] this therefore is nothing to the purpose; it only shows you have the power of imagining or forming ideas in your mind;*

social aggregations, are not a group but… just people. In other words, without having the image of *'difference'* mirrored in the eyes of those that look upon us as *'others'*, our *'otherness'* could not possibly exist.

In fact, individuals define their identity by what they are not; by perceiving what make them different from those that they are not; by their differentiation from *"the others"*.[53] The same happen with groups. Indeed, in the case of groups, it could even possibly happen that the existence of the group as such, as a societal separate entity, is identified by outsiders previous to the very self-identification of the *"new"* members of the group that is prior to *"...having any specific consciousness of themselves as a group"*.[54]

Moreover, as in the case of individuals, groups' identity is formed and shaped within a *dialogical* process, in which actions are followed by reactions which –at the same time– will condition a chain of new mutual interactions and reciprocal influences.[55] In fact, it is within a process of cultural *dialogical* interrelation that different social groups construct their own collective identities, and differences themselves from others' cultural entities. Furthermore, it is important to notice that this interaction and dialogue is hardly ever based on grounds of equality and pacific mutual respect. In most cases, relationships among different ethno-cultural groups in a given society is tense, and full of different episodes which involve certain degree of violence and which could result –in extreme cases– to an open societal violence, clashes and strife.

[but it doth not show that you can conceive it possible the objects of your thought may exist without the mind: to make out this, it is necessary that you conceive them existing un-conceived or unthought-of, which is a manifest repugnancy.]" See, G. BERKELEY, *Of the Principles of Human Knowledge*, in G. N. WRIGHT (ed.), *The Works of George Berkeley, D.D., Bishop of Cloyne*, London, 1843, para. XXIII, p. 95.

[53] As Huntington has stressed, *"...people define themselves by what makes them different from others in a particular context: "one perceives oneself in terms of characteristics that distinguish oneself from other humans, especially from people in one's usual social milieu…"* This perception of difference has been magisterially exemplified by this author when he argues that *"[t]wo Europeans, one German and one French, interacting with each other will identify each other as German and French. Two Europeans, one German and one French, interacting with two Arabs, one Saudi and one Egyptian, will define themselves as Europeans and Arabs."* See, S. P. HUNTINGTON, *op. cit.*, p. 67.

[54] As Young pointed out, *"[s]ometimes a group comes to exist only because one group excludes and labels a category of persons, and those labelled come to understand themselves as group members only slowly, on the basis of their shared oppression."* See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 46.

[55] *"Civilizations, societies and cultures, like individuals, exist in relation to one another. As one historian has noted, 'consciously or otherwise […] civilizations observe one another, seek each other out, influence one another, mutually define one another."* See, UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, cit., p. 39.

When cultural clashes are not so evident, and therefore are not reflected in an open violent situation, this does not mean that the existing different cultural views coexist in a condition of equal footing. In most cases, societies resemble the cultural features of the majoritarian societal entities, and exclude or give less visibility to one of the minoritarian groups. In fact, when paying attention to the existing societal dynamics in a given society, and in particular the power dynamics between groups, some authors have perhaps excessively referred to them as *'cultural domination'* or even *'cultural imperialism'*. In other words, according to them, it would be possible to identify a sort of cultural hierarchy that legitimatise as *universal* what in reality is nothing but the very particular experience and views of the majoritarian group… in detriment of the minority ones. [56]

Finally, it is important to bear in mind that cultural plurality –and the existence of differentiated cultural identities– it is not a characteristic that describe modern societies from an exclusive external point of view. Most of the social groups that can be seen and individualised as self-sustained cultural entities most probably enshrine a multiplicity of identities and sub-groups in their interior. Social groups are not themselves homogeneous and –in most cases– they tend to reflect within themselves the same *'cultural'* differentiations (e.g. ethnicity, religion, language, gender, etc.) that distinguish them from other groups in the broader society.

In conclusion, the relationship between different cultural groups in society is permeated by social dynamics and tensions which have to be addressed and managed in order to avoid anarchy and social disruption. But, of course, the question is how to do it. How to address the demands for cultural recognition put forward by various types of historically marginalised socio-cultural minorities. Or, how to accommodate

[56] It would be quite naïve from our side if we do not take into consideration those situations in which the identity of groups is forged, or have been forged by relationships of imposition, oppression and exclusion. Some authors, identified with what has been called *'literature of the oppressed'*, consider that the structures inherent to a particular social relations are not neutral, in a sense that those structures have been built in order to maintain oppressed social groups, for the benefits of those that retain the power in a given society. Among them, Young –for example– has identified five different faces systems of oppression that describes the interrelations between groups in society. According to her, these categories are: exploitation, marginalization, powerlessness, cultural imperialism and violence. For her, *"[c]ultural imperialism involves the universalization of a dominant group's experience and culture, and its establishment as the norm. […] [T]he oppressed group's own experience and interpretation of social life finds little expression that touches the dominant culture, while the same culture imposes on the oppressed group its experience and interpretation of social life."* See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 59-60.

the cultural differences that exist among those groups. This challenge has been called *'the challenge of multiculturalism'*.[57]

Therefore, in order to gain more epistemological clarity on our incoming discourse regarding the accommodation of indigenous people's claims over alleged traditional lands within the regional juridical Inter-American system, it would be of particular relevance to clarify which ideas are enshrined under the so-called 'multicultural proposal'. And, even perhaps more importantly, whether multicultural proposals have or *should have* legal relevance from a (human) rights based perspective, beside –of course– its clear political dimension.

4. Management of group diversity: multiculturalism and its concerns

During the last decades the word *'multiculturalism'* has been used more and more in the media, in scholarly and political discourses, but not only. It has had positive or negative implications, according to who is using it, for example, by right wing or left wing political parties. And for which purpose it has been used, like –for instance– in the case of the legitimation of policies that would eventually broaden the access to new minorities –in particular migrants– to welfare state services, or –on the contrary– for their disenfranchisement.

These different or even opposed uses of the term *multiculturalism* are perhaps nothing but a consequence of the vagueness and even ambiguity that surround this notion. Some scholars use this concept even as an *'umbrella term'* in order to cover a broad variety of policies designed to provide some level of public recognition and support to non-dominant ethno-cultural groups.[58] If we paid attention to mass media and political discourses, multiculturalism is equally claimed as the responsible policy behind acts of *ethno-cultural* violence and social disturbances (in particular within urban metropolitan areas) and –at the same time– as their possible solution. The former accused multiculturalism for attacking the sense of national identity, for encouraging disrespect towards common social values and principles, which are at

[57] See, W. KYMLICKA, *Multicultural Citizenship. A liberal theory of Minority Rights*, cit., p. 10.
[58] See, W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, cit., p. 16 et seq.

the very base of the common national identity.[59] On the contrary, those that find themselves at the opposite position advocated for a solution that will incorporate the principles, symbols, and values that represent excluded groups into the common national identity. For them the solution consists of the transformation of the national identity and not its mere acceptance by assimilative policies.[60]

These two opposed visions and understandings of multiculturalism reflex the political tensions that are intrinsically present within this term, because –essentially– multiculturalism is about sharing and exercising political power. Actually, what is all about it is *'how'* social structures and institutions are constructed and –even most important– by *'whom'*. In other words, the focus is on "which culture" has been incorporated in and it is intrinsically reflected by societal institutions, and on the socio-political and power dynamics that have permitted or conditioned the constructive process of the common societal enterprise. For Kymlicka, the variable fate of *'liberal multiculturalism'* in different societies may have to do with *"...the larger framework of power relations into which these normative arguments are inserted."*[61] Therefore, multiculturalism is nothing but preserving or changing of power dynamics within a given society.

However, multiculturalism is not and has not been the only socio-political theory addressed to manage potential conflicts on the distribution of political power in those societies in which the component of diversity is present in a high degree. Without the intention to make a detailed account of the different kind of theories or policies that have been historically implemented in dealing –directly or indirectly– with potential or real cultural tension in different pluri-cultural societies, it would be important to mention them, at least in connection with the current historical period of humanity, in order to understand better what multiculturalism stands for.

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[59] Just as an example of this position, we can mention the UK Chairperson of the Commission for Racial Equality, Trevor Phillips, who suggested in 2005 that *"...multiculturalism has brought us into a position of racial segregation where we've focused far too much on the 'multi' and not enough on the common culture"*. See, A. XANTHAKI, *Multiculturalism and International Law Discussing Universal Standards*, in *Human Rights Quarterly*, 32-1, 2010, p. 22.

[60] See, in connection with the topic of multiculturalist transformation of national identities, S. TIERNEY (ed.), *Accommodating National Identity. New Approaches in International and Domestic* Law, The Hague/London/Boston, 2000; O. P. SHABANI (ed.), *Mulciculturalism and Law: A Critical Debate*, Cardiff, 2007; and M. KOENIG, P. d. GUCHTENEIRE (eds.), *Democracy and Human Rights in Multicultural Societies*, Aldershot, 2007.

[61] See, W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, cit., p. 112.

Until the end of the Second World War, or perhaps even further till middle sixties, the most common way to deal with diversity in a given society was through policies of assimilation. Members of the different minoritarian cultural entities were pressed and forcibly (even in some cases violently) assimilated into the majoritarian national culture. Language, education, social and dress codes, just for mention some areas of public life, were molded under the light of the majoritarian culture and imposed on the whole society. Under this paradigm, members of minoritarian or non-dominant groups had no alternative but to embrace the national uniform and monolithic cultural views and understandings. They were pressed to abandon their own ethno-cultural views, understanding, practices and languages in order to be accepted as part of the main society. Members of minoritarian groups were consequentially not able to pursue studies in their mother-tongue languages or freely practice their religion or wear their traditional costumes among the mainstream society because those cultural manifestations were viewed –in most cases– as backwardness and therefore openly rejected by the majoritarian population.

A second period in the management of the diversity could be identified as a period of recognition of cultural differences (but not redistribution or rebalancing of power). Most likely, the starting point of this period can be identified with the adoption of the two international Covenants on Civil, Political, Economic, Social and Cultural Rights, in 1966.[62] Through this transcendental step, the international community substantiated and made operative those rights that were already proclaimed within the Universal Declaration of Human Rights sixteen years before, but not only. In fact, it also opened the door for the recognition of everyone's right to enjoy his or her own culture, regardless of the more or less *dominant* position of his or her (cultural) group within a given society.[63]

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[62] According to Kymlicka, the roots of this second stage on managing diversity can be identified in the decolonisation process, from 1948 to 1966, which was followed temporarily and consequentially by the racial desegregation movement initiated by the African-American civil rights struggles. These two struggles are viewed as inspirational sources for the minority rights revolution, in particular because the latter *"...shares its commitment to contesting ethnic and racial hierarchies, and seeks to apply this commitment more effectively to the actual range of exclusions, stigmatizations, and inequalities..."* See, W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, cit., p. 91.

[63] This clear reference is enshrined in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which reads as follows: *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with*

This new period on the understanding of diversity was deepened by the adoption of other very relevant instruments by the international community, such as –to just mention but a few– the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), or the Indigenous and Tribal Peoples Convention No. 169 of the International Labour Organization (ILO); and gave the possibility and the legitimation to members of minority or non-dominant groups to freely exercise their right on the bosom of the mainstream society.

Under this new paradigm of recognition, members of historically subordinated groups demanded equal recognition on the enjoyment of common recognised rights, they demanded equal treatment and equal opportunities (even through the application of concrete positive actions in order to restore unequal historical imbalances) but not different rights, tailored on their cultural *differentness*. In fact, under the light of the paradigm of recognition, the principle of equality is interpreted as requiring to treat people in a *different-blind* fashion. The focus is put on *'what is the same in all'* and not what make us different.[64] Because every human being is equal in dignity and rights, as the UDHR states in famous first article, then they deserve to be equally treated or –better– identically treated. But, the rigidity of the identical treatment interpretation did not address certain situations of structural inequalities that indeed existed and still exist in society (e.g. the societal situation of historically discriminated groups, such as blacks or indigenous people). As a solution to these structural societal inequalities, legal systems started accepting the application of positive action policies, allowing the introduction of specific different treatment in favour of the members of those disadvantaged societal groups. The latter were not treated alike, because societal *factual* situation positioned them in an objective different situation than the rest of the society. But, as we will see bellow, positive actions did not aim to change societal structures; they were designed just for

the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[64] See, Ch. TAYLOR, *op. cit.*, p. 43.

helping members of disadvantaged groups in order to facilitate or elevate the factual enjoyment of their rights at the same level as that of non-disadvantages members.[65]

However, since middle nineties new revisionist tendencies have gained more visibility among international scholars, especially when stressed not only the inequalities that members of non-dominant groups faced at the time; to have equal access to opportunities and rights, but also started to focus more on legal institutions and social structures that are at the base of the societal organisation. Possibly one of the clearest examples of this new conceptual approach can be found in deconstructive and critical theories put forward by feminist movements[66], according to which the focus should be given to dynamics of domination and oppression that permeate all societies rather than those of distribution of goods and opportunities.[67]

The logic behind deconstructive approaches is the one that identify legal systems, social structures, practises and institutions as a reflection of the culture of a given dominant group. Normative standards that are seen as *'neutral'*, as representative of non-particular group, in reality would be just a normative reflection (normative in a wide sense, including moral norms) of the historical cultural experiences of the dominant social group. In other words, *"[t]he claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture."*[68] As Taylor remarkably put it, *"...this would be bad enough if the mold were itself neutral-nobody's mold in particular"*.[69]

As a direct consequence of this line of thought, we have to conclude that if the society *'only'* reflects on the views, understandings, values and beliefs of the majoritarian/dominant group, then those from minoritarian/non-dominant groups are necessarily excluded. This sort of *'universalisation'* of the dominant group's

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[65] In connection with this topic, see Chapter II, Section 3 et seq.

[66] According to Young, *"...where social group differences exist and some groups are privileged while others are oppressed, social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression."* See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 3.

[67] For feminist movements and scholars, *"...women's oppression consists partly in a systematic and unreciprocated transfer of powers from women to men.* Supporters of this movement affirm –for example– that *"...freedom, power, status, and self-realization of men is possible precisely because women work for them"*, and –in more radical cases– arriving at the point to consider marriage *"...as a class relation in which women's labor benefits men without comparable remuneration."* See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 50.

[68] See, Ch. TAYLOR, *op. cit.*, p. 43.

[69] *Ibid.*

experience and culture, and hence its establishment as a societal norm for all members of the society (including –of course– members of minorities), has been also called –by a more actively combatant or "engaged" doctrine– as *'cultural imperialism'*.[70] Furthermore, before this kind of scenario, the only possible option available to them, in order to be accepted as members of the society, is to assimilate themselves into a culture which is not theirs; a sort of alienation process that will end in the suppression of their former or *"original"* identity.[71] I will come back later to this kind of *'essentialist'* social-cultural interpretation of social synergies and dynamics, toward which I still rest quite sceptical.[72]

The change in the interpretation of the principle of equality consists in shifting the paradigm from the right to have access to the same opportunities and to effective enjoyment of all fundamental rights, on equal footing and without discrimination based on illegal grounds (such as ethnicity, sex, gender, colour, religion, etc.), to the right of equal enjoyment of the differences. In other words, from the right to be equal, or to be different in equality, to the right to be equally different. What matters for these new flows of recognition is to go beyond inclusion in equality to a new model that could be defined as inclusion in difference. In short it is a struggle for the incorporation the non-dominant cultural practices, values and traditions into the common societal understanding of *"good"*; it is a struggle for the

[70] See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 58 et seq.

[71] Taylor goes beyond this, when affirming that *"...the supposedly fair and difference-blind society is not only inhuman (because suppressing identities) but also, in a subtle and unconscious way, itself highly discriminatory"*. Ch. TAYLOR, *op. cit.*, p. 43.

[72] It is true that power relations permeate all societal structures and even legal systems, but to conclude that these structures *'only'* reflect majoritarian views is –at least– quite far reaching. If we understand culture as a permanent process that reflect intra and extra groups dialectic relationships, and not as pure separate compartments, then even majoritarian culture intrinsically and necessarily reflects views from non-dominant group. In fact, if we see for example human rights movement from a historical-power-relation perspective, then we can say that it has appeared as a power limitation for dominant groups vis-à-vis non-dominant groups. Therefore, human rights culture, which is part of all societies and nations today, have to be considered as a synthesis of all cultural entities present in society, and not as an exclusive majoritarian imposition. Actually, if it has to be considered as an imposition, it would be the opposite, namely an imposition from non-dominant groups on dominant ones in order to limit their power. Or, from a very sceptical and quite cynical point of view, as –at least– a self-imposed limitation, were the incorporation of oppressed groups to the enjoyment of equal rights has been conceded by dominant elites in order to guarantee social security and peace… from which the latter would benefit most. As Giuseppe Tomassi di Lampedusa made say to prince Tancredi, in one of the most –perhaps– enlighted paragraph refering to socio-political dynimics in literature, *"[s]e non ci siamo anche noi, quelli ti combinano la repubblica. Se vogliamo che tutto rimanga come è, bisogna che tutto cambi. Mi sono spiegato?"* See, G. TOMASI DI LAMPEDUSA, *Il Gattopardo*, Milano, 2002, p. 50.

transformation of the so-called *'conservative assimilationist society'* to a society in with cultural differences are not only recognized but also supported and encouraged. It is a struggle for a *multicultural* society.

4.1. Conceptualisation of multiculturalism

As we can see, it is not an easy task to try to conceptualise the meaning, the driving idea behind the label of *multiculturalism*. This is especially because, this concept, is often used –as we will see in our incoming chapters– as an inspiring driving force (or perhaps… value), upon which judicial interpretations are built, in a sense to support and guarantee the recognition of certain specific *"cultural friendly"* rights (or their *"multicultural friendly"* interpretations).

Multiculturalism is one of those terms that are conceptually contested, and to which different meanings are attached.[73] From a socio-political point of view, *"...the term 'multicultural' covers many different forms of cultural pluralism, each of which raises its own challenges."*[74] In fact, what we can observe often is that, within socio-political and legal discourses, there exists a sort of interchangeable use of different terms that try to refer to the same phenomena. This is the case, for example, of multiculturalism, pluralism, and plurality of cultures or multicultural (societies). Perhaps the three latter concepts refer more to a factual description of the cultural composition of a given society and the former, to a specific socio-political organisation of that plurality; how to deal or… accommodate that cultural diversity.

In this sense, I will argue that multiculturalism is about accommodation of cultural differences in society through legal and institutional recognition of the ethno-cultural diversity, providing –as a policy– recognition and open public space to all cultural entities that are present in a given society. In this sense, multiculturalism advocates for the incorporation of non-dominant/minoritarian cultural views and understanding into the common societal good. Furthermore, as a policy, it could be

[73] See, among others, D. McGOLDRICK, *Multiculturalism and its Discontents*, in *Human Rights Law Review*, 5:1, 2005, p. 27-56, and J. RAZ, *Ethics in the Plubic Domain. Essays in the Morality of Law and Politics*, Oxford, 1995, p. 170-191.
[74] See, W. KYMLICKA, *Multicultural Citizenship. A liberal theory of Minority Rights*, cit., p. 10.

seeing as giving the theoretical support for backing up and sustaining the aspiration of non- dominant group for a greater accommodation, helping them in gaining more visibility and recognition for their cultural specificities.[75] In fact, the affirmation of this policy *"...asserts the value of groups possessing and maintaining their distinct cultures within the larger community."*[76]

However, if multiculturalism provides theoretical support to States' policies, then it should be something more than just a policy. In fact, as a policy, multiculturalism could lay down at the foundation of governmental actions and plans[77], but those plans of actions, those objectives connected with the organization of the society are not self-justified. These policies find their meaning, their *raison d'être*, their justification on a more elaborate and self-standing structure, on a set of ideas, values and principles that provide content and information with regard to *how* society *"should be"* organized and *how* power *"should be"* distributed among the different cultural entities existing in society. Therefore, as a notion that gives content and informs public policies, multiculturalism is nothing but an *'ideology'*.[78] It is a set of self-standing and driving forced ideas that advocate for the redistribution of power in society, not only through the recognition of cultural differences but also –and perhaps more importantly– for the legitimation of non-dominant cultural entities through the incorporation of their views, values and understanding to societal

[75] For Kymlicka, *liberal multiculturalism* is *"...the view that states should not only uphold the familiar set of common civil, political, and social rights or citizenship that are protected in all constitutional liberal democracies, but also adopt various group-specific rights or policies that are intended to recognize and accommodate the distinctive identities and aspirations of ethnocultural groups."* See, W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, cit., p. 61.

[76] See, J. KANE, *From Ethnic Exclusion to Ethnic Diversity: The Australian Path to Multiculturalism*, in I. SHAPIRO, W. KYMLICKA (eds.), *Ethnicity and Group Rigths*, New York/London, 1997, p. 542.

[77] For policy, I intend *"[a] course or principle of action adopted or proposed by a government, party, business, or individual; the written or unwritten aims, objectives , targets, strategy, tactics, and plans that guide the actions of a government or an organization. Policies have three interconnected and ideally continually evolving stages: development, implementation, and evaluation. Policy development is the creative process of identifying and establishing a policy to meet a particular need or situation. Policy implementation consists of the actions taken to set up or modify a policy, and evaluation is assessment of how, and how well, the policy works in practice."* See, "policy", a Dictionary of Public Health, J. M. LAST (ed.), Oxford University Press, 2007. Oxford Reference Online. Oxford University Press.

[78] For ideology, I intend *"[a]ny wide-ranging system of beliefs, ways of thought, and categories that provide the foundation of programmes of political and social action: an ideology is a conceptual scheme with a practical application."* See, "ideology" The Oxford Dictionary of Philosophy, S. BLACKBURN, Oxford University Press, 2008. Oxford Reference Online. Oxford University Press.

common standards. To put it in another way, *multiculturalism* involves – as ideology– an *'operation of production and redistribution of symbolic resources'*[79] among the different cultural groups; a redistribution of their cultural influence over socio-legal structures and institutions that shape and modulate any given society.[80]

Moreover, as an ideology, multiculturalism advocates for a shift from the ideology of the *'enlightenment'*, which basically consist in changing the substantive focus from individuals to groups. This advocated change would essentially consist in the embracement of a new legal understanding that proposes *"...the conception of equal citizenship embodied in equal rights needs to be replaced by a set of culturally differentiated rights."*[81] Under this new light, culture is still central, but not as a dialogical and relational process and product between individuals, but as a groups related process and product. Since groups become the main cultural actor, it becomes quite logical that the ultimate *ideological* protection is given to the group, to the entity which it has been *'culturally generated'* and not to its *'cultural generator'*, which is the individual.

As we can see, the above mentioned cultural shift changes (or pretend to change) the centre of protection of the legal system, allocating at the very core of the system not any longer the protection of individuals but that one of groups. This is not only a pure theoretical or philosophical exercise. If we take this ideological shift seriously, hence in all of those conflicting situations in which the interests of a given group and those ones of its individual members would not be compatible, then the interests of the group would prevail. This is because the ideological shift generates a subtle ideological subordination of the interests of individuals to the interest of their group of appurtenances.[82] Therefore, we can say that multiculturalism –as ideology–

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[79] See, G. PAQUET, *op. cit.*, p. 54.

[80] According to UNESCO, multiculturalism is a *« ...modèle pouvant se substituer à l'assimilation et à l'integration pour prendre en compte les droits des minorités nationales. [...][C]e nouveau modèle de multiculturalisme permettait une meilleure préservation de la diversité et de l'autonomie culturelles au sein des sociétés, avec l'espoir que les liens de la citoyenneté maintiendraient ensemble des personnes de cultures différentes au sein d'un même Etat. »* See, UNESCO, *L'UNESCO et la question de la Diversite Culturelle: Bilan et stratégies, 1946-2004*, Paris, 2004, p. 19.

[81] See, B. BARRY, *Culture and Equality. An Egalitarian Critique of Multiculturalism*, Cambridge, 2001, p. 9.

[82] I will come back to the problematic relationship between groups and their members, when the question of minorities within minorities (or diversity within diversity) will be addressed. Beside this, and for the sake of the argument, we can also argue that if humans are essentially a cultural product, in a sense that their identities are informed by their surrounded cultural circumstances, then the protection of the latter would be nothing but a protection of the former. The question that perhaps

sees society as constituted by different cultural entities or groups (not by individuals). For this reason, it consequently pleads for the adoption of targeted policies that would accord different rights to each group, according to their own cultural needs and aspirations. However, it would be important to always bear in mind that these cultural needs and aspirations could not necessarily be identical to (or compatible with) those pursued by their individual members.[83]

The struggle for equality and anti-discrimination has been in the last decades a struggle for the achievement of equal treatment regardless of the ethno-cultural affiliation of the subject; it has been a struggle for the eradication of societal differences and for the abatement of group boundaries. Multiculturalism –on the contrary– tries to generate a reverse motion on this process, proposing the maintenance and encouragement of cultural differences but –nevertheless– without reverting the achieved equality. It is an allotment or partition of the neutral public sphere into separate cultural clusters, in which each cultural entity follows its own cultural rules and traditions.[84]

The multicultural reaction against the cultural neutrality of the common universal citizenry –as proposed by the Enlightenment– is based on the understanding of its supporters that public sphere is not neutral.[85] For them neutrality is seen as a euphemism for the perpetuation and transmission of one specific culture, the culture of the dominant groups in a given society. For multiculturalist, cultural

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matters is where to draw the line between the protection of individuals and the recognition of cultural groups; between human rights and *'eventual'* group rights. Or even more radically, what matters could be the focus of the argument, in a sense that focalises excessively on cultural differences could end up being an impediment to effective protection and further realisation of recognised human rights (in particular in connection with the members of excluded/non-dominant/vulnerable groups). Again, these questions will be addressed *infra* in Chapter II, Section 4.3., and 5.

[83] For Kymlicka, the targeted element of multiculturalism is essential. Multicultural policies are built around it, in a sense that *"...the different forms of ethnocultural diversity are governed by different pieces of legislation, which are administered by different government departments, using different concepts and principles."* See, W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, cit., p. 78.

[84] It would be a sort of society in which individuals would indeed be equal, but only within each *'cultural cluster'* (if the given cultural group takes the principle of equality and non-discrimination seriously and truly incorporate it into its traditions and practices). With regard to the other members of the society, or –better– with members of other cultural clusters, the relations would not be based any longer on the principle of equality but rather on the principle of respect of their cultural differences.

[85] According to Barry, *"[i]n advocating the reintroduction of a mass of special legal statuses in place of the single status of uniform citizenship that was the achievement of the Enlightenment, multiculturalists seem remarkably insouciant about the abuses and inequities of the ancient régime which provoked the attacks on it by the Encyclopaedists and their allies."* See, B. BARRY, *op. cit.*, p. 11.

neutrality is not only impossible; it is not even desirable. In fact, for its supporters, society should not be neutral; on the contrary, it should reflect and give space and visibility to all existing cultural manifestations, and –in particular– to incorporate into public spheres and common normative standards the views and understandings of excluded cultures.[86] According to this ideological position, only by embracing the principles enshrined within the *'politics of difference'*, would equality and liberty be achieved.[87] Hence, only through the recognition of the *unique* identity of every individual and –most in particular– of every cultural group, and therefore only through the normative and social acknowledgement of their unique distinctiveness and the adoption of differential treatments, the *'distinctive dignity'* of the members of each cultural group would be fully respected.

The paradox of multiculturalism precisely relies on this sort of *'distinctive dignity'* for which humans must be respected for what is different among them and not for what is equal in them. In other words, under this ideological view, humans have to be treated not equally (in a sense of identically or difference-blind) but differently, according to their cultural affiliations, in order to be… equally respected!

Moreover, as we already anticipated, it would be possible to say –following this line of thought– that the focus of equality is not any longer the individual but the group; equal respect is intended for cultures or the different cultural entities in society –which have to have equal space and visibility– and not for individuals. Consequentially, the latter have to be treated in a different fashion based on his or her cultural group's appurtenance. In a very essentialist and perhaps a little bit forced synthesis, for multiculturalism what matters is culture (and special cultural differences), not equality.[88] As it has been said, *"...multiculturalist debate sought to*

[86] *"Looting"* public sphere among the different cultural entities present in a society could be of course a valid political alternative, but nevertheless we have to ask ourselves if this kind of policy would not erode the common societal contract or understanding that lay down at the bottom of each given society. The central question here perhaps is the possibility or not of being together in differences, and which is the role that the common neutral space (public sphere) plays in society; and in particular if that public place should or not be neutral (in a sense of not embracing any cultural particularism) in order to facilitate the construction of a common and unifying enterprise, which is the national common identity. Without having the pretension of being exhaustive, some of these questions will be discussed further in this Chapter, especially in Section 4.2. See also, Chapter, II, Section 5.

[87] See, Ch. TAYLOR, *op. cit.*, p. 38 et seq.

[88] This is because multiculturalist policies seek to provide advantages to individuals, on the basis of their membership in some culturally defined groups; membership which is not available to non-members. See, B. BARRY, *op. cit.*, p. 15-18.

emphasise the group differences and their fundamental significance, demanding public recognition of groups and their distinct identities."[89]

Further continuing with this argumentation, we can also say that multicultural policies not only advocate for group recognition, in a sense of acknowledgement of cultural differences, but also –and perhaps most importantly– seeks to transform economic opportunities, political powers, and social status available for members of those groups. [90] As a policy, we can embrace it or not according to our own sympathies, but its adoption or implementation would be indeed subjected to the political game existing in every pluralist and democratic society.

In fact, if multiculturalism is an ideology that permeates correlative policies – as I am positively persuaded that it is– then it cannot possibly and logically be a right. To stay with the obvious, as apples are not pears, policies (and their backed ideologies) are not and cannot be rights. Individuals (or even groups) have rights… not policies. An individual member of a minoritarian or non-dominant group has a right to not be discriminated against on the basis of its ethno-cultural appurtenance or membership. This individual has indeed the right to take part in the cultural life of the society, in which he or she lives, or –most specifically– to take part in the particular cultural life of the group in which he or she is affiliated, but … does this person have the right to live in a multicultural society? In other words, has an individual the *'right'* to multiculturalism; the *'right'* to a society that will mandatorily incorporate into its common cultural standards, views, understandings and practises of all cultural entities present in its societal bosom?

Our answer to these pregnant questions is negative, and cannot be otherwise. Even if we could have sympathetic inclinations toward multicultural views, we have no option but to recognise the fact that individuals, either as members of dominant or not-dominant groups, do not have a right to a multicultural society or even to a multicultural state. Why? The answer is simple and strait forward; because multiculturalism is not a right, therefore it cannot either be enforced or claimed

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[89] See, T. MAKKONEN, *Is Multiculturalism bad for the fight against Discrimination?*, in M. SCHEININ, R. TOIVANEN (eds.), *Rethinking Non-Discrimination and Minority Rights*, Turku/Åbo/Berlin, 2004, p. 155.

[90] According to Raz, multiculturalism requires *"…a political society to recognize the equal standing of all the stable and viable cultural communities existing in that society. This includes the need for multicultural political societies to reconceive themselves."* See, J. RAZ, *op. cit.*, p. 174.

before judicial authorities, neither at the national nor at the international level. Nevertheless, this does not mean that individuals cannot have *'multicultural aspirations'*. But again, aspirations and rights are not the same. Aspirations could become rights, following the necessary procedural instances within a democratic system. However, I am fully persuaded that multiculturalism –as a politico-ideological aspiration– has not been incorporated into a format of a self-standing and autonomous right.[91] And this incorporation has not happened yet, simply because –as ideology– it is still quite contested.[92]

Non-dominant cultural entities, minority groups, or any other perceived (or self-perceived) disempowered cultural group could indeed –within a democratic setting– advocate for multicultural policies and push forward a multicultural political claim into a general public debate, with the legitimate aspiration to achieve a specific and particular level of accommodation to their cultural demands. If this would be the case, then multicultural claims would be ideally discussed in an open and inclusive democratic arena, in which all of those interested parties would have to find the necessary consensus in order to achieve –at the institutional decision making levels– agreements that would eventually lead to normative or legislative changes. This is

[91] This –of course– does not mean that other rights cannot be interpreted from a sort of multicultural friendly position. In fact, some individual rights, such as the right to everyone to take part in cultural life (Art. 15, para. 1 (a) of the ICESCR), has been interpreted by for instance the Committee on Economic, Social and Cultural Rights (CESCR) in a quite friendly multicultural manner. Example of this is the interpretation made in connection with the requirement of *'acceptability'* of the mentioned right, for which it was not enough to express *that "...law, policies, strategies, programmes and measures adopted by the state party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved"*, but concluded that this means that *"...consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them."* Consultations and dialogue are always welcome in a democratic life, but –on the other hand– the CESCR seems to forget that democracies are in their overwhelming majority indirect and –therefore– people took valid decisions through their legitimate elected representatives. If we would take seriously the warning made by this body, then we would find ourselves in the paradoxical situation where direct participation of each individual in any decision with potential *cultural* effects or implications would paralyse the entire action of the government, just because everything that the government does (even ordinary administration) has –by definition– *cultural* implications. The right to be consulted will be addressed in the successive chapters, in particular in connection with those policies that could affect indigenous people's rights over their traditional lands and natural resources. See, CESCR, General Comment No. 21: Right to everyone to take part in cultural life (art. 15, pra.1 (a) of International Covenant on Economic and Cultural Rights) (Forty-third session, 2009), U.N. Doc. E/C.12/GC/21, 21 December 2009, para. 16.

[92] In one of the most standing critics to multicultural literature, Barry said *"...I have found that there is something approaching a consensus among those who do not write about it that the literature of multiculturalism is not worth wasting powder and shot on. [...] "* See, B. BARRY, *op. cit.*, p. 6.

what I call "the democratic game", and in an open democratic society, nobody is excluded (or should not be excluded) from it, majorities and minorities alike.

Finally, it would be important to make a last conceptual clarification on this section. It is in the above mentioned sense that I will use in this work the term *'multiculturalism'*. That is, as referring to an ideology that could be reflected in particular policies, which has been advocated by different scholars and non-dominant groups –including indigenous people– around the world, and which is aimed to change the socio-political and legal structure and power dynamics in a given society. I am not using it, and I will not use it for describing the factual ethno-cultural diversity or plurality that exists within modern societies. For factual descriptions of the existing cultural plurality in society, I will use the terms *'plurality'*, *'cultural plurality'* or even *'multiculturality',* but not *'multiculturalism'*. In short, multiculturalism operates within the normative or prescriptive dimension of *"what should be"* (according to any specific multiculturalist agenda, such as –for instance– the programme of the *'politics of difference'* or *'group's identity policies'*) and not within the descriptive dimension of *"what it is"*, namely as a description of a given societal cultural reality.[93]

4.2. Multicultural aspirations and equality of cultures.

As we said before, multiculturalism not only recognises the cultural variety, the plurality that exists in human societies but also added to that factual description a moral argument, a *valuative* dimension, namely the equal value of each culture, but not only. Multiculturalism requires equal distribution of public institutions, legal systems and social structures among the different cultural entities factually existing in society. In the words of its supporters, *"...the demand for equal recognition extends beyond and acknowledgement of the equal value of all humans potentially,*

[93] Barry made an ulterior distinction between the terms *multiculturalism* and *pluralism*. For him, the former should be reserved for reference to political programs of the 'politics of difference', and the latter for political programmes that aim to institutionalise cultural differences by segmenting society. See, B. BARRY, *op. cit.*, p. 23.

and comes to include the equal value of what they have made of this potential in fact."[94]

In fact, in multicultural societies, the different cultural communities want to survive, and therefore they claim to be recognised and accepted as integrative part of the societal *ethos*, but not only. [95] The different cultural entities also claim that their *worth* should be acknowledged, and their equal value institutionally recognised.[96] Because all humans are equal, what they produce, their creations, their social structures, their systems of values should then have equal value. As a system that provides substantive support for human life, all cultures provide to its members a sort of substantive contents regarding the meaning of life and world-views, and therefore, from this point of view, from the perspective of the subject that finds meanings and practical solutions in those contents for their everyday challenges, cultures have indeed *equal valuable functions*.

However, this presumption of equal worth among the different cultural manifestations has been criticised for having been unreal and groundless, in particular because it fails in showing the logical connection between the fact that *'all humans beings are born equal'* and the assumption of the equal value of what they produce, namely between cultures.[97] The fact that all humans are born equal, as members of the same human family, means that all humans have equal *potential* creative capacity, equal opportunities to develop their ideas, beliefs and understandings, and –therefore– equal possibilities to create culture. But nothing in our ontological equality can guarantee *equal success* in our creative activities! Societal cultural success, in a sense that one specific cultural valuational proposal (as a system of values and on the good) will be embraced and supported by larger portions of the society and –therefore– incorporated into foundational societal institutions, it is not guaranteed in a free, open and democratic society.

Some individuals, or group of individuals that constitute a cultural entity, could be more successful than others in adapting themselves to cultural challenges and hence being able to generate better tailored answers to those challenges that –on

[94] See, Ch. TAYLOR, *op. cit.*, p. 42 et seq.
[95] *Ibid,* p. 61.
[96] *Ibid,* p. 64.
[97] See, among others, G. PAQUET, *op. cit.*, p. 47 et seq.

the other hand– would profit them in terms of cultural advantages (in a broad sense). Cultural adaptability has been one of the most obvious cultural patterns in human history and –therefore– there is no need to go further in it regards. In addition, it is obvious too that every human being is entitled to equal respect (at least under our contemporary worldwide recognised human rights philosophy); respect that is extended –of course– to his or her worldviews, understandings and beliefs, which are *'naturally'* culturally created by them. However, what is not obvious is the logical extension of the equal respect principle applicable to every human being, to the societal cultural entity in which each human could eventually be part of. In other words, it is quite difficult to see the logical connection between the principle of equal dignity of every human being and the alleged equal dignity between societal cultural institutions, which enshrine self-standing set of principles and values, regardless of their connection with individuals that could eventually find in them a certain inspiration and identification.[98]

Taylor has tried to give an answer to this *'logical disconnection'*. In fact, he argued that *"...cultures that have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time–that have, in other words, articulated their sense of the good, the holy, the admirable–are almost certain to have something that deserves our admiration and respect, even if it is accompanied by much that we have to abhor and reject".*[99] This could be considered as a very good attempt in giving a reasonable explanation to the above motioned logical misconnection, but –I am afraid– that it is still not sufficient in order to justify the moral claim of equal worth between cultural entities or cultures as such.

Perhaps, this logical misconception is grounded on what we have already described as the philosophical shift that multiculturalist try to introduce, that is the removal of individuals from the centre of the protection of our legal systems, to the ethno-cultural entities or groups in which they find meaning of life, guiding set of values, philosophical conceptions and cultural practises. It seems to me that for

[98] As Taylor clearly expressed it, *"...demand for equal recognition extends beyond an acknowledgment for equal value of all humans potentially, and comes to include the equal value of what they have made of this potential in fact."* See, Ch. TAYLOR, *op. cit.*, p. 42-43.
[99] *Ibid.*, p. 72-73.

multiculturalist, it would be through the protection of cultural identities or cultures that its members would be better protected and respected in their dignity, and not the opposite. Therefore, individuals would receive only indirect protection, through their membership to or identification with a specific cultural group or entity, which is –of course– not quite the same as a direct tutelage based on their individual rights and dignity as… humans; regardless of their particular cultural views and understandings.

In short, for multiculturalist supporters what matter is culture, in a sense of collective product of ethno-cultural entities or groups, and not as a creative expression of individuals; for to egalitarian-liberal supporters what really matters is the latter. For the former, individuals would receive only a mediated protection, which is through the *direct* protection of their culture; for the latter it would be the opposite, in a sense that their culture is safeguarded through a direct protection of the individuals' cultural choices. If this interpretation is correct, then the discussion is actually conducted in two different *parallels* and not necessary connected dimensions.

First, if we focus our discussion on the *'equal value of cultures'*, and their consequential claim of their *equal* representation within the public sphere (through their *equal* incorporation into social-political and legal institutions), then we would allocate the discourse on a dimension that we can qualify as *"political"*. This is because, this dimension, is connected with the particular way in which certain societal actors (cultural groups) would like or aspire to organise a given society, and –in particular– to distribute or allocate political, economic and cultural power. On the contrary, if the focus is given to the individuals, based on the fact that *"[a]ll human beings are born free and equal in dignity and rights"*, as stated in Article 1 of the Universal Declaration of Human Rights (UDHR), then the discourse would be allocated on a different dimension. This would be a dimension of *'rights'*, because we are no longer addressing political aspirations but concrete and enforceable rights.

All humans have the right to be treated equally and without discrimination, according to pacifically recognised international standards; but having a right is –of course– something completely different from having a political aspiration. Every single cultural entity or societal groups (minorities and majorities alike) could have legitimate cultural/political aspirations, but this does not mean that those aspirations

will receive legal protection and support. Again, as apples are not pears, political claims or aspirations are not rights.[100]

As I said before, societal groups or cultural entities could indeed have (and they often have) political aspirations for major levels of influence and recognition in a given society, but those kinds of political aspirations do not *automatically* generate especial rights for the members of those groups. Therefore, groups' members would not always have the possibility to seek judicial protection for the substantive realisation of their political aspirations; what would be indeed protected in a pluralist and democratic society is the possibility to propose to the larger society their views and understanding, seeking adherences and broader support. This is the participative logic behind the recognition, within the Universal Declaration of Human Rights, to all members of the society of the right to *'freely participate in the cultural life of the community'* (Article 27(1) of the UDHR). Alternatively, in the wording of the ESCR Covenant, the reference is given to the recognition of the right to *'take part in cultural life'* (Art. 15, para. 1(a), ICESCR), according to whatever cultural affiliations, understandings or views individuals might have; but –of course– with full respect to the internationally recognised and guaranteed human rights standards.

Therefore, in a democratic society, governed by the rule of law and with full respect of internationally recognised human rights standards, *cultural success* is not guaranteed. As I said before, what is indeed guaranteed is to have the possibility to be part of a cultural life of a given society and to participate in the cultural creative process. But *"to have the possibility"* to take part in the cultural life of a given society does not mean that the success of our potential contribution (individually or in association with others) would be adopted and incorporated into the broad common societal enterprise. That is to have a sort of assurance that the society as a whole would be –to some degree– shaped or molded by the said contribution. In order to do so, the ideas, understandings, views and beliefs of any particular cultural entity or group would have to engage in dialogue with other ideas and beliefs, in a

[100] Among the *'fallacies of confusion'* Bentham has identified a fallacy *'ad judicium'* which he called *"sweeping classification"*, which consist in *"...ascribing to an individual object (person or thing), any properties of another, only because the object in question is ranked in the class with that other, by being designated by the same name."* If we classify cultural entities or groups and human beings in the same group, then it would appear (but *only* appear) quite logical to attribute the essential characteristic of the latter to the former, that is their equality in dignity and rights. See, J. BENTHAM, *op.cit.*, p. 265.

free, open and competitive public space (what we have called "the democratic game"), seeking for support and supporters. In addition, those sets of ideas would only be culturally successful if they would be stimulating and appealing enough to persuade larger portions of the public. If not, those set of ideas, understandings and cultural interpretations of life would –nevertheless– remain fully valid on the private spheres of those that have produced them, and whom still find meaning and content of life on them. As such, those cultural ideas and understandings will be fully protected by the different set of individual human rights, which are available in every democratic liberal society (even when they do not gain major cultural support in that societal milieu).

In short, in those cases where cultural views are unable to get public support within the bosom of the larger society, they nevertheless remain valid and legitimate within the private sphere of their bearers. In addition, these practices will always have the possibility to be visible in the public sphere, in a sense that their bearers would have the possibility to continuously exercise them in public, and even propose them to the larger society (as a legitimate socio-cultural political aspiration of that particular group or societal entity). But, without broad public and political societal support, the pretension of imposing those set of ideas as part of the common societal structure will be nothing but illegitimate in a plural and democratic society.

5. The equal functional value of cultures

Until now, we have approached in this section the topic of *'equality of cultures'* or the *'equal value of cultures'* from a sort of *self-cultural perspective*, that is from the perspective of cultures themselves, as autonomous cultural entities that compete for societal recognition and visibility. In addition, we have arrived at the conclusion that frame the question of the importance of cultures under the application of the principle of equality and non-discrimination, or even as covered by the protection of human dignity, constitute a logical misconception. The only ones *'equal in dignity and rights'* are human beings, and that equality is not ontologically extensible to their cultural expressions, processes and products.

However, if we change our substantive focus and instead centre our attention on cultural groups and entities we turn our eyes toward the individuals again, then perhaps it would still be possible to talk in terms of equality, but from a completely different angle, from the perspective of the *'equal valuative function'* that culture and cultural entities perform vis-à-vis individuals.

In fact, from the perspective of the individual, which is not only the cultural bearer but as well the cultural creator, cultures must indeed have equal functional value, because they proportionate "meaning of life", philosophical and moral contents which are indispensable for the construction of each individual's life. Cultural valuational structures or cultural philosophical constructions of the good provide the essential substantive material indispensable for taking meaningful decisions and choices in life. But this –of course– does not mean that different cultures would have equal acceptance or equal valuational adoption in society, or even equal success (in a sense that they will shape and mould the common societal institutions). Hence, from an individual perspective, from the view of the individual that expresses himself or herself through cultural manifestations, whatever they might be, cultural views and understandings have indeed equal value. Accordingly, individuals should have equal protection in their possibility to express, enjoy and transmit their cultural understandings and views, without entering into the substance of what those views and understandings are.

I will argue that it is in this sense that the *'presumption of equal value'* proposed by Taylor should be interpreted –instead– as a *'presumption of equal functional value'* that cultures have in connection with views and understandings of the cultural bearers. [101] Actually, Taylor has rightfully introduced himself the notion of the *'equal functional value of culture'* in providing horizon of the meaning for large numbers of human beings, but from this functional recognition we cannot logically derive the axiomatic affirmation of the ontological equal worth of cultures, or a presumption of it.[102] Individuals are and should be protected on their

[101] See, Ch. TAYLOR, *op. cit.*, p. 66-69.

[102] In fact, Taylor has said that *"[a]s a presumption, the claim is that all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings."* As we can see, this is nothing but recognition of the functional value that cultures have for the individuals. But, he went further, from this assertion he concluded that we owe equal

possibilities to hold and embrace whatever worldviews and system of values (*as long as* they do not infringe internationally recognised human rights standards).

What could be presumed as having *equal value* is the *equal functional relevance* that each cultural system of values has for each individual, because the latter found his or her meaning of life, the sense of good and bad, on those cultural references. Cultures –as a system of valuative substantial choices– have societal value and relevance precisely because individuals consider them as a valuative functional societal guide; but again, in itself cultures are –in principle– ontologically beyond any legal or even socio-moral estimation.[103] To put it in another way, we can indeed have a *presumption of equal value* in connection with the importance that each individual gives to his or her own cultural system of reference, which lies at the bottom of all individual meaningful choices, but not to the cultural-valuational structure as such.[104] As long as cultural principles and views do not infringe commonly recognised international human rights standards, their substance and content should only matter for the individual that embrace them, not for the whole society. Cultural worldviews in themselves, as cultural entities, are outside of relevant moral *common/societal* considerations, and hence it would be irrelevant –even from a legal point of view– to analyse whether they have –or not– equal value.[105]

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respect to all cultures because they are basically equally in dignity. See, Ch. TAYLOR, *op. cit.*, p. 66-68, and 72-73.

[103] For stay at the obvious, if all cultures have equal value, then no culture will have it. Logically speaking, it could be a contradiction in terms to highlight a certain characteristic in a member of a family of elements, if all members of that family have the same characteristic and there are no other families of elements to compare with. If someone has won a competition, it is because someone has lost. If beauty exists it is because ugliness exists too; if someone can be considered rich it is because someone else it is not… and so on and so forth. If one culture has value, others will not have; but if all cultures have *equal* values… then equal value with regard to what? There are no other cultures to compare them with. In conclusion, it is senseless to discuss the equal or unequal value of cultures, as such.

[104] As Appiah stressed, "*[i]f an individual needs access to his culture to make meaningful choices (and to enjoy self-respect), these sorts of protections are simply in the service of garden-variety liberal individualism."* See, K. A. APPIAH, *The Ethics of Identity*, Princeton, 2005, p. 122.

[105] From even a more critical perspective, Barry has considered the claim of 'equal recognition of cultures' as *"...an absurdly inappropriate demand."* According to him, the absurdity is based on the fact that, the proposal in itself, is logically incoherent, just because "…cultures have propositional content". All cultures include propositional ideas on the good, the bad, on what is true, what is false…, and precisely because of that, those contents –in themselves– are incompatible with any final assessment. In other words, in order to be sure that all cultures have equal value we would have to make a comparative analysis between them. However, a comparative cultural analysis is indeed a cultural valuational exercise, in a sense that it will require to establish a set of common standards under which to evaluate cultures, and –of course– those set of standards would be nothing but

Egalitarian discourse is not about cultural equality but individuals having equal (abstract/concrete) opportunities, equal recognition of (universal) rights as –for instance– the right to take part in cultural life.[106] With regard to culture, this principle could be translated into the possibility for each individual to produce and to enjoy culture, within the bosom of a *common* societal space. Hence, ontologically speaking, what has equal value –at last– is the *function* that cultures performs vis-à-vis human beings, namely cultures equally provide propositional content to those that are eager to build their identities upon them.[107] Hence, the right to take part of the cultural life (individually or in association with others) and to produce and share culture, should be protected by law and should be enjoyed by all humans, regardless their ethno-cultural appurtenance.

Societies can appreciate differently the different cultural proposals existing in its bosom and –based on evaluative choices– they would organise their common institutions, including common legal frameworks, mores and traditions, under the most convincing and appealing cultural light. Logically, the societal support would be most likely given to those cultural proposals coming from the majoritarian

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culturally created/chosen! As we can see, the argument becomes circular. Perhaps the only possible exit to this circular reasoning would be to conduct the comparative analysis under the light of universally accepted common standards, and these cannot be others than the internationally recognized human rights standards which constitute what has been called *'our common universal moral (cultural) system'*, as I will argue in the incoming chapters. But then, our comparative study will be focused on the respect of those standards by the different cultures, and not any longer on the equal value between them. See, B. BARRY, *op. cit.*, p. 269-270.

[106] Even Taylor is hesitant to consider that his proposal of the "presumption of equal value of cultures" could have right based implication from the perspective of the individuals. See Ch. TAYLOR, *op. cit.*, p. 68.

[107] Intellectual fairness obliges me to notice that even when it would be ontologically inadequate to talk about equal value between cultures, for the reasons already expressed, UNESCO has nevertheless incorporated in one of its conventions, namely the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), the so called *'Principle of equal dignity of and respect for all cultures'*. According to its Article 2(3), the protection and promotion of the diversity of cultural expressions presupposes *'the recognition of equal dignity of and respect for all cultures'*. Hence, according to it, the diversity of cultural expressions has to be protected because the cultures that generate them are equal in value. But, I am afraid, that there is not logical connection between these two elements. Even if we would arrive at proving the equal value of cultures, which is ontologically impossible, international community (or any other potential law maker) could legitimately decide not to give any particular protection to their products (their cultural expressions), liberalizing the *"cultural market"*. Consequentially, in this hypothetical case it would be the free choices on hand human societies that will uphold or not, or promote or not, any particular cultural expression. In any case, we have to always take into account that cultures are nurtured by constant exchanges and interactions and therefore their cultural products or expressions would be –as well– subjected to constant changes. And those changes would –at the end– reshape the same original cultures. Thus, in a liberal society where cultures interact freely, individuals would have the possibility not only to change their own culture but also to abandon it, without putting in danger diversity. On the contrary, any cultural change, any free cultural choice enhances human *cultural* diversity.

cultural entity present in a given society. Consequently, minoritarian cultures would have less visibility and participation in the moulding process of the common societal institutions. Their articulated sense of good, of the holy and of the admirable will most probably remain confined within their own cultural milieu.

In free, pluralist and democratic societies, numbers count… and cultural matters are not excluded from this general rule. For this reason, it is almost unavoidable that majoritarian/minoritarian dynamics will end up reflected in the political choices that societies take, especially when defined in its mores and socio-institutional and legal structures. But if numbers count –as they do– then we can rightly ask if minority cultures would have any chance not only on the achievement of equal rights for its members, but also on developing and flourishing within a society which does not reflect or does not embrace their cultural specificities.[108] In other words, we can rightfully ask whether minority cultures are entitled to receive a special protection as such, as entities/groups differentiated from their members, in order to be able –for instance– to have assured participation and guaranteed visibility in public spheres, even against the cultural choices of the larger majority. Alternatively, even whether those non-dominant groups, with specific political/cultural consciousness, are entitled to have specific tailored set of rights that would ideally guarantee their participation and visibility within the common societal-cultural-institutional enterprise.

In the following chapter, we will try to find some answers to these essential questions, especially taking into account the perspective of the social dynamics that exist between majorities and minorities in most of the plural societies.

6. Conclusion

In this chapter, we have analysed different notions, from culture to multiculturalism, from different angles and perspectives, and from several scholarly

[108] As it has been said, *"[w]here democracy is still straight majority rule […] the minority question, if recognized as such, poses itself in its most elementary form: as protection 'conceded' by the majority and as an exception from the principle of equality."* See, F. PALERMO, J. WOELK, *From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights*, in *European Yearbook of Minority Issues*, 2003/4, 2005, p. 8 et seq.

fields, including anthropology, sociology, political science and philosophy and –of course– law. In particular we have focused on the way that multiculturalism and multiculturalist supporters –including even UNESCO[109]– have attempted and are still trying to introduce a multiculturalist re-interpretation of society, in a sense of granting cultural groups (not individuals) the *right* to diversity in the public sphere, through pro-active deconstruction and rebuild of the main socio-political and legal societal institutions.

As we also have had opportunity to discuss, multiculturalist theories find their legitimation in two main arguments. First, in the experience of disenfranchisement and vulnerability that certain ethno-cultural non-dominant and –in most cases– minoritarian groups have endured in a long period of time, both in the past and present societal organisations. Thus, because of that cultural exclusion, it is argued that those societal organisations have reflected and mirrored almost exclusively the cultural practices, system of values and organisational understandings of the most "culturally dominant" groups or entities, which in most cases are the societal majority. Secondly, multiculturalists have argued –and still argue– that substantive equality and justice would only be achieved when all cultural groups would also achieve the same equal level of visibility, representation and space, within societal public spheres in each given society.

The logic behind this argument is subtly clear; each ethno-cultural group or entity has its own unique, specific and essential culture and cultural manifestations, which represent and reflect the *essence* of the group's identity and which provide the essential valuative information for a meaningful life of its members. Therefore, always following this multiculturalist logic, if the socio-economic, political and legal institutions of a given society do not specifically and institutionally incorporate those cultural features that specifically and institutionally represent, reflect or otherwise mirror those cultural particularities that explicitly characterise a given ethno-cultural group (which for reasons of historical processes of domination and oppression have

[109] See, UNESCO, *Cultural Diversity, Conflict and Pluralism - World Culture Report*, Paris, 2000, p. 16-17.

been excluded from that public societal participation), then that given society would be –under the light of this multiculturalist logic– essentially unequal and unjust.[110]

As we can see, the multicultural ideal conception of justice is based on equality between groups, between ethno-cultural societal entities, and not necessarily between individuals. In fact, at the core of multicultural ideas we find the dogmatic assumption (or presumption under the wording of Taylor[111]) of the *equal value of cultures*; dogmatic assumption that has been even incorporated within the official discourse of UNESCO, under the wording of *"Principle of equal dignity of and respect for all cultures"*.[112] Again, if all cultures (and cultural manifestations of each ethno-cultural entity or group) have equal dignity, then it would be quite reasonable to argue –under the multiculturalist logic– that each of them should have equal representative institutional space, within the public sphere of every single human society. This is –of course– regardless of the socio-political and historical processes and societal dynamics that have been and most likely are still in place in those societies.

The call for the empowerment of historically disenfranchised, vulnerable or oppressed portion of the population in our modern and democratic societies is not only an appealing call, but also a moral duty under our current universal philosophical framework, that is under internationally recognised human rights standards. However, the question is how to do it. Multiculturalist proposal focus the answer to this question not only on the societal centrality of ethno-cultural entities or groups (and on the power dynamics between oppressor and oppressed groups), but also –and even most importantly– on the dogmatic assumption of equal axiological dignity of all cultures and groups' cultural manifestations. The provided answer could be perhaps appealing, but it seems to me that its content is both axiologically and ontologically incorrect.

As it has been already maintained, our current internationally recognised philosophical and moral standards, which are nothing but international human rights

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[110] As Young has said, *"Social justice […] requires not the melting away of differences, but institutions that promote reproduction of and respect for group differences without oppression."* See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 47.

[111] See, Ch. TAYLOR, *op. cit.*, p. 66-69.

[112] See, Article 2(3) of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 3 to 21 October 2005, at its 33rd session.

standards, have recognised and allocated at the very centre of its axiological protective system not the dignity of ethno-cultural entities or groups, but the dignity of each individual as members of the human family. If amid all international human rights instruments there is one that has incontestably recognised value among the international community, that one is the Universal Declaration of Human Rights (UDHR). And, in its very first article, we find nothing but the undisputable axiological centrality of the individuals when its states that *"[a]ll human beings are born free and equal in dignity and rights."*[113]

Therefore, even in the case of disenfranchised members of non-dominant or vulnerable ethno-cultural entities, the axiological solution would come –as shown within the following chapters– from their individual empowerment in their enjoyment of those fundamental rights that have been equally recognised to all human beings, just because of their condition as members of the unique human family. This is, regardless of their potential ethno-cultural affiliations or appurtenances. Moreover, through the protection of the human dignity of each member of every potential cultural group, and hence through guaranteeing their possibility to freely enjoy all recognised fundamental rights (including the right to take part in cultural life, in governance, and in all institutional aspects of the society in which they live), those potential ethno-cultural entities would be *indirectly* protected and guaranteed. But only, *as long as* their members consider it worthier and actively seek that cultural preservation.

If cultural entities, or ethno-cultural groups become the axiological centre of our system of international protective norms, societal structures and institutions would –consequentially– be reshaped and redesigned in order to fully incorporate groups' cultural practices, institutions and particular valuative systems, but not only. In this case, we would also face a sort of new cultural *'ghettoization'* of our societies, because the legal status of individuals would depend not on the very fact of their human nature, but on their societal ethno-cultural appurtenances. As it has been already maintained, this is nothing but turning back the page from one of the most *enlightened* times in human history, namely, the stage in which each human –regardless his or her ethno-cultural appurtenance– is equal in dignity. Why? Because

[113] See, Article 1, of the UN *Universal Declaration of Human Rights* (UDHR).

if we follow the multiculturalist path and recognise a different set of special rights that would ideally meet those unique particularities that each ethno-cultural group has –allowing their members to have specific *culturally* tailored rights– then the axiological foundation that lies at the bottom of our fundamental set of rights would change. In fact, it would not be any longer grounded on the equal dignity of each individual, and on the consequential recognition of their equal legal status vis-à-vis the enjoyment of an equal set of rights (as is –for instance– the case of human rights), but on a model based on the equal enjoyment of different legal *cultural* status. That is, the model based on different sets of recognised rights, based on group membership.

To put it in another way, multiculturalist proposals lead to an axiological paradigm that could be summarised as *'equal in differences'*, which is not the same as *'different but equal'*. The former stresses the equal acknowledgement of our cultural differences[114] –what we do not have culturally in common– through recognition of a different culturally tailored set of rights that would lead to the existence of different legal status based on group membership. On the contrary, the latter stresses our commonality, what make us equal besides the potential cultural differences or alliances.

Secondly, I said above that multiculturalist proposals are ontologically inappropriate because they are built upon a dogmatic assumption of the *equal worth or dignity of cultures*. As it has been already maintained, it is a fallacy[115] or logically incorrect to enter into a comparative analysis of the value or ontological worth of cultures simply because we lack an *external comparator*. In fact, in order to analyse the ontological "equal value" of cultures, we would have to make a previous step, which would logically consist in a comparative exercise of their *cultural* "worth"; but –in order to do so– we would need to have an external parameter or yardstick that would ideally provide the cultural (moral) comparative guidelines. Indeed, even in the case that we would be able to identify such parameter, it would undoubtedly be a cultural element! It would be, in fact, a cultural product that would inevitably enshrine a cultural system of values and understandings, which would be ultimately used to assess other systems of values and understandings… As you can see, if we

[114] See, I. M. YOUNG, *Justice and the Politics of Difference*, cit., p. 174 et seq.
[115] See our considerations developed in footnote 100.

use one culture (system of values) to assess the "worth" of other cultures, then we cannot simply and logically talk of "equal worth" of cultures; neither as a dogmatic assumption nor even as a presumption.[116] Humans have ontologically equal universal worth; cultures are beyond moral or valuative comparisons because –at the end of the day– the understanding of good and the nature of "moral goodness" is just *culturally* attributed, that is according to each system of values and understandings, and therefore subjected to an axiological relativity.

Notwithstanding, even if it would be impossible to assess the ontological value of cultures, we cannot deny their *functional* value. Taylor has grounded his proposed presumption of *equal value* of cultures, on the fact that cultures *"have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time…"*[117] Nevertheless, this fact, the fact that individuals have found their meaning of life, their understanding of the good and their behavioural guide on their surrounding cultures or cultural manifestations, does not allow us to conclude (or even to presume) that those cultures have *ontological* equal value. There is no logical connection between this factual and historical proposition and its axiological (I would rather say dogmatic) predicate.

However, what we can indeed reasonably conclude, from the above mentioned historical societal *function* of cultures, is precisely that the meaningful function that they perform –vis-à-vis human beings– is to provide them with an articulated sense of good, of the holy, of the admirable. Cultures supply a pre-assembled system of morals and values that would ideally serve as guidelines and behavioural parameters for life. In short, if there is a presumption that would be applicable to culture, that presumption could only be with regard to the *equal valuable function* that cultures perform in human societies. All of them, without exception, provide valuative and substantial meaningful options to individuals, regardless their *intrinsical moral* value. In other words, cultures have an *equal societal function,* regardless their ontological *goodness* or *badness*.[118]

[116] See, Ch. TAYLOR, *op. cit.*, p. 42 et seq.
[117] *Ibid.*, p. 72.
[118] For an ontological analysis of the meaning of "goodness", see, D. ROSS, *The Right and the Good*, Oxford, 2002, in particular, p. 75 et seq.

Nevertheless, the fact that all cultures execute an *equal societal function* does not mean that all of them would have equal levels of *societal success*. In a modern, pluralist and democratic society, cultures compete or should openly compete for societal support and, as in any other competition, it could happen that some specific cultural valuational proposals (as proposed system of values and institutional organisations) would naturally have more support and wider acceptance than others. In a competition we always have different levels of performance, and cultural grounds are not an exception. Some cultural proposals would definitely be more appealing and responding than others to cope with the specific time and space circumstances that condition a given society in a specific historical period. In fact, "natural" –or better– cultural process of "cultural selection", if we would like to see it in a Darwinist terms[119], it is what is behind what the UNESCO's Universal Declaration on Cultural Diversity states in its very first article, namely that *"[c]ulture takes diverse forms across time and space."* The ontological changeable character of culture is based precisely on the humans' creative capabilities, as almost unlimited source for cultural (including technological) innovation and societal adaptability to the different geo-socio-political, historical and even natural challenges that humanity have faced, faces and will face in the future.

Therefore, because the changeable character of culture is essentially based on the *cultural* adaptability of humans, then we have to forcibly conclude that *cultural success* would only benefit those cultural proposals that would provide better cultural answers to the specific geo-socio-political challenges that each society has to face in different historical stages. If a given cultural proposal becomes successful enough, in the sense as to be able to persuade large numbers of individuals in assuming and adopting its cultural propositions, then that cultural manifestation or proposal would not only be able to perpetuate itself but also to most probably become majoritarian in

[119] Darwin called "natural selection" to the natural process of *"...preservation of favourable variations and the rejection of injurious variations [within the nature]."* See, Ch. DARWIN, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*, New York, 1864, Chap. IV, p. 77 et seq. In connection with the use of the notion "*Cultural Darwinism*", in the contexts of indigenous populations, see R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, Organization of American States (OAS), 2002, p. 20 et seq.

a given societal context.[120] Hence, the existence of cultural majorities in societies tells us nothing but their *cultural success*.

However, what about cultural minorities? One could reasonably argue that if in societies only successful cultural majorities would be able to *'culturally survive'*, then this would necessarily mean that *unsuccessful* cultural minorities would be condemned to perish and vanish from those societies. This kind of argumentation could be considered reasonable but not accurate. As we will see in the following chapter, in an open, pluralist and democratic society, cultural competition does not put under *essential* threat the survival of cultural entities or cultural manifestations (majorities and minorities alike), *as long as* they would be appealing enough to maintain the loyalties of a reasonable number of *cultural* supporters.

[120] As UNESCO has stressed, *"[p]rotecting cultural diversity thus meant ensuring that diversity continued to exist, not that a given state of diversity should perpetuate itself indefinitely. This presupposed a capacity to accept and sustain cultural change, while not regarding it as an edict of fate."* See, UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, Paris, 2009, p. 3.

CHAPTER TWO
THE RELEVANCE OF CULTURE AND SOCIETAL DYNAMICS

MAJORITARIAN AND MINORITARIAN DYNAMICS IN PLURAL SOCIETIES

> *"The cultural identity of a people is renewed and enriched through contact with the traditions and values of others. Culture is dialogue, the exchange of ideas and experience and the appreciation of other values, and traditions; it withers and dies in isolation."* Mexico City Declaration on Cultural Policies, 1982.[1]

1. Introduction

In societies characterised by the presence of a plurality of cultural groups or entities, and in which these different groups relate to each other following majoritarian and minoritarian dynamics, individuals that identify themselves as members of one of those minoritarian cultural aggregations would most likely find it uneasy to advance and fully develop in the society compared to the members of the majority. The reasons for this different performance within the common societal organisation could be found in the fact that cultural majorities would most probably dominate, with their numerical presence, most of the areas of the society, including – of course– its economic, social, and cultural aspects.[2]

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[1] UNESCO, *Mexico City Declaration on Cultural Policies*, adopted by the World Conference on Cultural Policies, Mexico, 6 August 1982, para. 4.

[2] There were and there are exceptions to the majoritarian rule where a cultural minoritarian group was able to dominate the society, from a civil, political, economic, social and cultural point of view. An historical example of it could be found in the extreme case of the Apartheid in South Africa, which established an institutionalised discriminatory system. Today, we can find that certain ethno-cultural elites (e.g. the *criollos* elites in certain Latin American countries) are still able to economically, socially and culturally dominate the society. The reasons behind these historical situations vary and it would not be possible address them here, but it would be important to keep in mind that one of the most decisive factors that allowed these power and economic imbalances, in particular throughout the colonization process, was the broad *cultural* gap between the different cultural entities in the possession and control of technological knowledge and related devices. In fact, the overwhelming cultural differences (with their consequential power asymmetries) were translated into overwhelming institutional/factual inequalities. In fact, *'transfer of technology'* has been identified as one of the

In fact, from a cultural perspective –as we said before– numbers count, and this would be indeed reflected on the socio-political choices that a given society will take, especially when establishing its legal framework or socio-institutional set up. But, the rule of the majority is not and should not be without any sort of limitation. As history taught us, the inexistence of limits on the exercise of the majority's potential power could create a situation where members of minoritarian cultural groups would be unequally treated or even deprived of their fundamental/universal rights.

However, because in modern democratic societies rights are equally recognized without discrimination to all humans, members of cultural minorities would have –at least from a theoretical legal perspective– equal rights like those that regard themselves as members of the majoritarian culture. But –as it has been also quite clear in history– the fact that the same rights are recognised to both, members of majoritarian and minoritarian groups, does not necessarily mean that they will have the same equal opportunity to effectively enjoy them.

If we turn our eyes to history, we find that minorities have been mistreated for centuries, suffering not only structural discrimination and exclusion from mainstream societies, but also persecution, violence and destruction. Only few decades ago international community witnessed the extermination of Jews and other ethno-cultural minorities in Europe under the oppressive boots of the Nazi Germans; or –even more recently– the "ethnic cleansing" and "genocide" that took place in the former Yugoslavia and in Rwanda. These are just examples –among many others in history– of extreme discrimination and persecution based on ethno-cultural and/or religious motives.

Yet, discrimination and disfranchisement of members of cultural minorities have not always resulted in those extreme violent situations, or even to institutionalised discriminatory legal systems, like those racial segregation laws that have been enforced in U.S. or the Apartheid regime in South Africa. In fact, structural discriminations of cultural minorities could have –and often has– more

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possible effective remedies/redress that the Durban Programme of Action envisaged with regard to historical injustices and for develops programmes for the social and economic development of developing countries and the Diaspora. See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, 31 August - 8 September 2001 (A/CONF.189/12), p. 61, para. 158.

subtle and less visible forms, especially when the legal framework of a given society is a reflection of the cultural parameters of the ethno-majoritarian group (as in general it is). Nevertheless, even when non-discrimination laws are enforced, and States have taken a *neutral* position with respect to cultural and religious diversity through the establishment of *difference-blind* societal institutions, new societal movements still see unfair distinction and cultural exclusion in these settings. According to their line of thought, a difference-blind society does not guarantee full cultural equality, because without a profound *deconstructivist* societal process, societal institutions will just continuously mirror or implicitly lean towards the cultural inclinations and needs of the majority.[3]

Perhaps, one of the most quoted examples of less favourable structural conditions for members of minority groups could be found in the education sector. In many countries (not to say in the large majority of them) education is only available in the official recognised languages, which is usually the same language of the ethno-cultural majority of the population. Thus, members of minoritarian cultural groups would most likely have difficulty to have access to instruction in their respective mother tongues. As we know, even when the right to education has been recognised as one of those fundamental rights which are intimately connected with *'the full development of the human personality and the sense of its dignity"*[4], international human rights standards still do not impose on States the obligation to organise an educational system that would include instruction to minorities in their mother tongues.[5] However, in order to enhance the possibilities of members of

[3] As it has been said, *"[t]he choice of public holidays, official languages, national symbols and the content of schooling, not to speak of the many far less obvious social structures and processes, reflect and sustain the identity and the preferences of the culturally dominant group."* See, T. MAKKONEN, *Is Multiculturalism bad for the fight against Discrimination?*, in M. SCHEININ, R. TOIVANEN (eds.), *Rethinking Non-Discrimination and Minority Rights*, Turku/Åbo/Berlin, 2004, p. 168 et seq.

[4] See Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[5] It is true that the Article 13(1) of the ICESCR imposes on the States the indirect obligation to *"…fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples…"* (See, *General Comment No. 13, The Right to Education (Art. 13),* 08/12/99 (E/C. 12/1999/10), UN Committee on Economic, Social and Cultural Rights (CESCR)), but this general obligation does not impose –unfortunately– the specific obligation to organise formal and substantial education in minority languages. In the same line of thought, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, states in its Article 4(3) that *"States should take appropriate measures so that, whatever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue."* If we pay attention to the linguistic configuration of the phrase, and in particular to its verbal tenses, we have to

minority groups to have full access to the right to education, many States (sometimes under the auspices of regional organisations[6]) have *'accommodated'* their national legislations, and gradually incorporated the use of minority languages into their educational systems.[7]

In any case, even when States decided to accommodate their educational systems, in order to facilitate the access of minority groups' members, this does not mean that the State has recognised and put in place a new differentiated set of rights, specifically tailored to meet the *differentiated* cultural needs of these groups. On the contrary, the accommodation of public policies is nothing but the full implementation of the same individual right to education that all members of society have. It is just an interpretative extension of the State's duties outside of what is technically and legally required vis-à-vis the substantial nutshell of these rights. International human rights standards establish a minimum set of rights that States must respect, protect and fulfil, but nothing impede them to recognise a higher standard of protection, based perhaps on their own perception of fairness, in their internal political or even groups dynamics. If we continue with the example of the right to education, when the national legislator has decided to include –for instance– bilingual and multicultural education at the primary level, this does not mean that a pre-existing right has been finally recognised to those favoured minoritarian ethno-cultural groups. This only means that their socio-political aspirations have finally found political support within the society. In a democratic society, it is the so-called *'democratic game'* that provides open channels for the realisation of the socio-political and cultural aspirations of the minority groups, and not forced re-

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necessarily conclude that the direction taken by the international community is that one of trying to induce the States into an accommodation of minority languages in their educational systems. However, there is not a concrete (legal) obligation to do so. Even if the Declaration imposes on the States the (moral) obligation to protect the linguistic identity of the members of minorities groups (as stated in Article 1(1)), it leaves nevertheless a broad margin of appreciation to the States in connection with the legislative and other measures that they will have to adopt in order to do so (Article 1(2)).

[6] Among regional organisations, the Council of Europe has been very active in enhancing the protection of (national) minorities. In this front, two important instruments have been adopted: the *European Charter for Regional or Minority Languages* (1992) and the *Framework Convention for the Protection of National Minorities –FCNM* (1995). In both, State parties are encouraged to incorporate minority languages into their national educational systems; but, as even the explanatory report of the FCNM states, these kinds of provisions *"[have]* been worded very flexibly, leaving Parties a wide measure of discretion." See, FCNM's Explanatory Report, para. 75.

[7] A reflection on this tendency could be found in the fact that, up to date, the *European Charter for regional or Minority Languages* has been ratified by 25 European States.

interpretations or even de-constructions of the existing rights and standards.[8] In short, the question is not about how to reinvent the wheel (as some scholars perhaps wish it, under the auspicious of new fashionable *deconstructivist* theories[9]), but just how to make a full use it![10]

The *'democratic game'* –as I called– is basically a dialogical and methodological process which is contextual by nature, in the sense that the cultural dialogue between minorities and majorities does not happen and cannot occur in an institutional vacuum, but in the bosom of a concrete society which has –of course– its own socio-political institutions. In other words, cultural dialogue cannot occur without a cultural context, which will naturally, substantially and methodologically influence and condition the content of that dialogical process. Therefore, minoritarian socio-cultural and political aspirations and claims will be unavoidably subject to socio-culturally and politically institutionalised channels of the main society. However, once engaged in dialogue and taking into consideration that disagreements cannot always be satisfactorily resolved, we can do nothing but conclude together with Parekh that *"[i]t is difficult to see how a decision can be reached other than by minorities accepting the society's established decisionmaking*

[8] Even when the CESCR has already interpreted Article 13(2) of the ICESCR as including the obligation to *"...fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples..."* However, this extensive interpretation of the text of covenant does not mean that official education has to be bilingual. On the other hand, as Article 5(2) of the Covenant states, the fact that the present Covenant *"does not recognize such rights or that it recognizes them to a lesser extent"* is nothing to prevent States to do it in a wider degree, following their internal socio-cultural and political dynamics. Therefore, it is not for international committees or even international judicial bodies to enlarge the scope of the recognised rights, but for the States, which in doing so enjoy a large margin of manoeuvre, following –as I said– their own internal democratic game. (See in connection with the right to education, Committee on Economic, Social and Cultural Rights (CESCR). *General Comment No. 13 (Twenty-first session, 1999) - The right to education (article 13 of the Covenant).* UN Doc. E/C.12/1999/10, United Nations, 1999).

[9] See, among others, I. M. YOUNG, *Justice and the Politics of Difference*, Princeton, 1990, p. 174-206 et seq.

[10] Minority's members can always organise themselves and –for instance– settle private institutions where the minority language is the main language of instruction, or –at least– to be taught as a second language. In this sense, a full exercise of their rights to freedom of association, freedom of expression, and to take part in cultural life, in combination with the right to education, gives to members of minorities a full range of possibilities for conservation and dissemination of their cultures and languages, among the members of the mainstream society. In this case, States are not obliged (just encouraged) to provide subsidies for these private schools but, if it does it in connection with one cultural group, by virtue of the application of the principle of equality and non-discrimination, it has to extend it to all the other ethno-cultural entities. See, A. EIDE, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, (UN Doc. E/CN.4/Sub.2/AC.5/2005/2), UN Working Group on Minorities, 2005, para. 59-64.

procedure and the values embedded in it."[11] Democracy is substantially a method of taking common valid decisions and peacefully resolving disputes. Therefore, as long as minorities would have genuine possibilities to take part within the democratic dialogical process, putting forward their political aspirations and having concrete chances to gain support and to convince the majority, the outcome of the democratic institutional methods should be respected. In short, *'if the majority remains genuinely unpersuaded, its values need to prevail'*.[12]

Because the discussion has been quite abstract until now, I would like to briefly put the minority/majority dynamics in their historical contexts (at least the most recent one); in this way, it would be easier to understand how important this matter was and still is for our modern pluralist societies.

2. Historical perspective of majority-minority societal dynamics

Minority's demands for overcoming structural and systematic hardships have received –at the international level– different answers over the past decades. If we focus our attention on the developments following the Second World War in connection to the protection of minorities[13], it would be possible to identify an initial period where all legal discriminatory laws that formally targeted minority members were eliminated. Therefore, all individuals were treated equally, irrespective of their ethno-cultural affiliations (e.g. with the elimination of discriminatory laws based on religious or race/ethnic grounds).[14] This phase could be characterised as a *culturally–blind* or *difference-blind* equality, which basically means that cultural differences are

[11] See, B. PAREKH, *Minority Practices and Principles of Toleration*, in *International Migration Review*, 30-1, 1996, p. 259.
[12] *Ibid.*
[13] For an historical overview of the different stages that the protection of minority rights had passed, see –among others– N. LERNER, *Group Rights and Discrimination in International Law*, The Hague/London/New York, 2003, p. 7 et seq.
[14] We can also identify previous historical phases in connection with the treatment of minorities and the minority question, but this would take us out-side the scope of this work. Just as a summary, we can generally say that immediately before this period of *'blind equality'*, we can generally identify the existence of a period in which the relations between minorities and majorities were characterised by *'toleration'*. In fact, in the latter period, minorities were not restricted or even criminalised for developed their own culture *'as long as they do not interfere with the culture of the majority'*. See on this regards, J. RAZ, *Ethics in the Plubic Domain. Essays in the Morality of Law and Politics*, Oxford, 1995, p. 172-173.

not determinant for the equal enjoyment of recognised rights, and not as a policy-period in which minorities were subjected to policies of assimilation, as it has been wrongly considered.[15] In addition, this period could be identified –within international law– by the adoption of the main human rights instruments, namely the Universal Declaration of Human Rights (UDHR), the two Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), together with the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

However, it was clear that the full application of the principle of equality did not resolve those situations of structural hardship that contextually affected the full enjoyment of certain rights by members of cultural minorities. Hence, several exceptions to general rules were introduced in order to enhance the effective enjoyment and protection of those rights (e.g. through the introduction of quotas or grants to facilitate the access of minority members to superior education). This period of targeted protection and recognition of the specific challenges that members of minority groups faced in society were characterised by the introduction of the so-called *affirmative* or *positive actions*. These actions or measures allowed to *exceptionally* treat minority members, not like all other members of the society, but in accordance with their own cultural particularities, in order to diminish less favourable preconditions existing in society. As example of this new minority approach, we can mention the ILO Convention No. 169 on Indigenous and Tribal Peoples[16], or the Council of Europe's Framework Convention for the Protection of

[15] Assimilation policies require positive actions from states organs aiming specifically to overturn or disassemble minority cultural entities. Full application of the principle of equality and non-discrimination never allows to negatively target any cultural practice in society, simply because it would be a negation of the full exercise of the individual (culturally-blind) right to freedom of association, to freedom of expression, to take part in the cultural life, among others. As an avoidable consequence of the full exercise of these individual rights, members of cultural minorities would have the real possibility to enjoy and develop their own cultural views and understandings, and therefore with real and concrete chances of not being assimilated to the mainstream culture. The non-intervention of the State in cultural matters, and therefore their allocation within private spheres, can never be compared with certain assimilative policies that had been applied by certain States against specific sectors of their population (e.g. the case of the removal of aboriginal children from their families by the Australian Federal and State government agencies, under the Aborigines Protection Amending Act of 1915).

[16] In fact, in its Preamble, the ILO Convention No. 169 expressly recognizes the *"aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live…"*

National Minorities –FCNM[17], or even the Convention on the Elimination of all Form of Discrimination Against Women (CEDAW).[18]

Finally, in the Post-Cold War World, with the revival of cultures under the auspicious of globalisation, new *multicultural* winds were blowing over the minority question (in general) and above the managing of diversity (in particular).[19] In fact, under the new fashionable lights of multiculturalism and diversity, scholars and minority advocates started asking for the introduction not just of exceptions to general rules but new group-differentiated, targeted and culturally separate set of rules, which will ideally reflect and promote the distinguishable colours of diversity in society.[20] What it pursued is not only rainbow societies but also colourful legal and institutional systems. In connection with these new approaches, it would not be easy to find –outside of the specialised and self-reflected literature[21]– so many examples of its international codification. In fact, most of the few international instruments that have –to certain extent– incorporated it are in most cases declarations, which constitute in themselves a quite clear indicator of –at least– lack of political will among the States to advance in this matter with more legally constrained instruments. As example of these soft law arrangements, we can mention the UNESCO Universal Declaration on Cultural Diversity[22] or even the recent UN

[17] In this sense the Council of Europe's FCNM clearly states in its preamble that *"...a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity."* This stresses the necessity to undertake all adequate measures to promote effective equality between persons belonging to a national minority and those belonging to the majority (Article 4(2)). But also highlights the need to *'...promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity'* (Article 5(1)).

[18] States Parties of the CEDAW undertook the obligation to introduce *'temporary special measures aimed at accelerating de facto equality between men and women'*, as stated in Article 4(1). Additionally, they are also obliged to *'...modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'* (Article 5(a)). The latter obligation clearly introduced a pro-active duty/function on the hands of the States in order to diminish those less favourable preconditions existing in society.

[19] See, S. P. HUNTINGTON, *The Clash of Civilizations and the Remaking of World Order*, New York, 1997, p. 21 et seq.

[20] See, W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, Oxford, 2007, p. 61 et seq.

[21] See, B. BARRY, *Culture and Equality. An Egalitarian Critique of Multiculturalism*, Cambridge, 2001, p. 6-9.

[22] The *Universal Declaration on Cultural Diversity*, adopted on 2 November 2001, partially shows this linguistic shift, from individual protection to group recognition, when –for example– states that

Declaration on the Rights of Indigenous Peoples, which has fostered indigenous people's *political* claims for more political and legal autonomy and even self-determination.[23]

The reason for this sort of lack of political will from the international community could be seen as quite evident. States were and still are very reluctant in sharing –within their territories– their sovereign powers with other entities, even when the *'devolution'* of powers will not –in theory– affect or threaten their physical integrity and political independence.[24] However, because these new tendencies in the management of the so-called *"minority question"* include –in general– claims for decentralisation processes, based on the configuration of ethno-cultural sub-state entities, it is quite understandable that States would be inclined to fear that this would eventually generate a potential redrawing of their internal political borders, but not only. It could also be seen as a strong encouragement for territorial secession.[25] In fact, under this new interpretative position, what would be required in order to accommodate claims from members of cultural minorities would be to recognise and effectively grant equal rights (together with specific exceptions from general rules). The *multiculturalist* alternative would be –instead– to cede or transfer public powers and competences from the States –at national, regional or municipal level– to the

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'[i]n our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together' (Article 2).

[23] The *UN Declaration on the Rights of Indigenous People*, adopted on 13 September 2007, by the UN General Assembly, starts its preamble by affirming not only that indigenous peoples are equal to all other *'peoples'* but also by recognising the right of all peoples *"...to be different, to consider themselves different, and to be respected as such."* Thus, from its beginnings, the declaration strongly emphasises the needs of the recognition of the differences, within a cultural diversity framework, but not only. The Declaration also utilises a subtle language that put indigenous peoples in a sort of equal entity position vis-à-vis the State, inter alia, when it calls for *'a strengthened partnership between indigenous peoples and States'*, to *'enhance harmonious and cooperative relations between the State and indigenous peoples'*. The use of the language is quite clear in its intention, namely to uphold indigenous peoples as a group with (separate) rights vis-à-vis States. It would be quite unreasonable to talk about a partnership between States and its citizens (which by the way include indigenous peoples). Citizens are a constitutive part of the State; therefore –ontologically speaking– they cannot be in partnership with themselves. But why should indigenous peoples be able to do it, when they themselves are also citizens of the same State in which they live? It seems that the explanation is more political than a legal, and perhaps much connected with a well-articulated indigenous peoples' international lobby…

[24] See, among other authors, K. HENRARD, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination*, The Hague/Boston/London, 2000, p. 306 et seq.

[25] See, W. KYMLICKA, *Multicultural Citizenship. A liberal theory of Minority Rights*, Oxford, 1995, p. 71.

ethno-cultural groups themselves.[26] In other words, instead of fully vesting individuals with their rights, regardless of their ethno-cultural affiliations, this new trend of institutional and political recognition of ethno-cultural minorities proposes nothing but to vest the group as such, as a separate and self-standing entity, with differentiated rights…, which is not quite the same.[27] In fact, the recognition of minorities as self-standing entities not only opens a collective legal dimension, which the consequential shift from individuals to groups as a subject of protection, but even most importantly involves a discussion in a different dimensions, namely a struggle for division of political power within a given society.[28]

I will come back later on in this chapter to the question of the validity of these minoritarian claims for a *multicultural* division of political power, under current international law standards, and –in particular– together with the analysis of the international standards applicable to the case of indigenous people. However, before continuing with this thematic focus, it would be important to make some further clarifications with regard to one of the concepts that has been touched upon in this section and laid just at the bosom of the majority-minority dynamics. Of course, I am referring to affirmative or positive actions and their potentiality in bolstering substantial equality in society.

3. Affirmative actions and substantive equality for groups in vulnerable situations

As it has been already stressed, in our modern societies it could happen (and often happens) that members of ethno-cultural minorities finds themselves affected more adversely of conditions in society which would affect their possibilities to fully enjoy their equal rights and development. These unfavourable conditions are most likely generated by the fact that general rules and social structures in society reflect

[26] See, for general overview on this matter, F. PALERMO, J. WOELK, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, Padova, 2008, p. 139 et seq.

[27] This shift on the paradigm of protection of members of minority or non-dominant groups has irresistibly called to my mind one of those old but wise Italian proverbs that says *"Chi tiene un santo in Paradiso, non va a casa del Diavolo"*. See, N. CASTAGNA, *Proverbi Italiani. Raccolti e Illustrati*, Napoli, 1866, p. 12.

[28] Rightfully, Henrard called this dimension a *"systems of power-sharing"*, which can include –in a broad sense– federalism and other forms of territorial as well as personal autonomy. See, K. HENRARD, *op. cit.*, p. 313 et seq.

and are molded by the cultural dimension of the majority[29]. Hence, it would be possible and even natural to conclude that, for members of minority groups, it would be more culturally demanding to adequate their practices and behaviour to rules that are seen –by the large majority of the society– as *culturally neutral*.[30] What is perhaps seen as a *neutral* cultural practice for the wide society, for minority members could be culturally unfamiliar or could even generate an insurmountable burden for the perpetuation of the minoritarian way of life.[31]

However, the recognition or factual acceptance that in each given society, common public societal structures and institutions would most likely be influenced by its predominant cultural entity, but this does not and must not mean that those institutions would *necessarily* create privileges or prerogatives for members of cultural majorities, to the detriment of non-dominant groups. Of course, it would be naïve to dismiss the fact that the existence of those privileges was a common historical societal feature in our societies, but in today's world our common shared minimum cultural standards (and human rights are indeed a core example of them) do not allow their existence any longer. In fact, any unjustified distinction on the basis of ethno-cultural grounds (or any other prohibited ground) will be considered a discriminatory practice under the light of our current international human rights standards.[32] Thus, before the law, all individuals have the right to be equally

[29] See, F. PALERMO, J. WOELK, *From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights*, in *European Yearbook of Minority Issues*, 2003/4, 2005, p. 8 et seq.

[30] As many scholars have already said, from a cultural point of view, that neutrality is *unattainable*. Societies are cultural products, they are a sort of cultural synthesis that reflects the social and power dynamics that exist in them, and therefore they will not be externally neutral, vis-à-vis other societies, or even internally because they will always have the tendency to reflect the cultural choices of the majority of its population… In free, open and democratic societies, individuals have the possibility to freely decide their cultural alliances and openly propose their cultural views to the society as a whole; but –as it has been already said– there is no guarantee that the latter will embrace, incorporate and reflect them. And this sort of lack of assurance makes societies advance and develop more tailored *cultural* responses to all current socio-cultural challenges. As Appiah wrote *"...without some racialized conception of a group, one's culture could only be whatever it was that one actually practiced, and couldn't be lost or retrieved or preserved or betrayed."* See, K. A. APPIAH, *The Ethics of Identity*, Princeton, 2005, p.137.

[31] See, B. PAREKH, *op. cit.*, p. 263 et seq.

[32] For example, a typical non-discrimination clause present in almost all international instruments could be the one that we find within the ICCPR and ICESCR, in their respective Articles 2(1) and 2(2). These provisions almost equally state that *"...the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."* A more specific non-discrimination clause could be found in Article 1(1) of the ICERD. This article conceptualises the term "racial discrimination" as *"...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing*

positioned or to be treated –as a rule– in the same way, regardless of their ethno-cultural affiliations.

Nevertheless, even when the principle of equality treatment for all individuals is the general rule in democratic societies, the fact that its application in concrete and specific situation can eventually generate situations of uneasiness or disadvantages for certain part of the population, cannot be negated. Precisely for this reason, when the application of an apparent neutral-general-abstract rule will disproportionately affect a specific parts of the population, due to their ethno-cultural characteristics, modern legal systems have introduced tailored special measures that, operating as exceptions from general rules, would ideally equalise the conditions that affect the substantive enjoyment of certain rights by the members of the affected group.

In this sense, the so called *affirmative* or *positive actions* could be designed to strengthen the position of universally defined individuals who find themselves disadvantaged in the enjoyment of their fundamental rights, within societies where certain reminiscences of past systemic discriminations, whether social or political, are still present. In this sense, their main goal is to achieve equality in the enjoyment of human rights for all individuals, majorities and minorities alike.[33] Because the disadvantaged/discriminatory situation that could affect members of minorities is in most cases based precisely on their ethno-cultural affiliation to or identification with a minoritarian group, positive actions are designed to create *"targeted privileges"* (or exclusive rights) *only* for the members of those groups.[34] In fact, affirmative action refers –in general– to specific measures that are aimed at preventing or compensating disadvantages that are linked to ethnicity.[35]

As we said before, specific affirmative provisions have to be considered as an *exception*, in favour of members of the disadvantaged groups, to the general *equal* rule that is applied to all members of the society. This general rule, which establishes

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the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[33] In fact, affirmative action has been defined as a *"...preference, by way of special measures, for certain groups or members of such groups (typically defined by race, ethnic identity or sex) for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms."* See, A. EIDE, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, UN Doc. E/CN.4/Sub.2/1993/34, United Nation, 1993, para. 172.

[34] This would be the case, for example, of members of a given ethno-cultural group that are so overwhelmingly overrepresented among the poor, ill-educated, or unskilled labour force.

[35] See, T. MAKKONEN, *op. cit.*, p. 159.

that people are to be treated equally regardless their colour or ethnic background, would have been equally applied to minority members (in a sort of colour and cultural-blind fashion) if the exception would have not been granted. In fact, this exception to the general rule would actually allow minorities to have access to the enjoyment of certain rights that otherwise they would not have had the possibility to enjoy. Therefore, under the light of the previous considerations, it would be possible to say that the implementation of these measures would be in line and compatible with the accomplishment of the equality principle, especially from a more substantive (or effective) point of view.[36] In other words, the recognition of these kind of privileges would consequently generate a situation of *'reverse discrimination'* for non-minority members (all those considered as culturally affiliated with the majoritarian group) which would be excluded from the enjoyment of these particular benefits. However, this different treatment would be considered justified due the fact that members of the majority are already able to enjoy those targeted rights. In fact, due to their position, members of the majority are not in need of any extra protection, and –even most importantly– they would not be affected by the concession of highest level of protection for those that are not in the same factual position.[37]

Furthermore, since affirmative action creates a privilege situation in favour of members of disadvantaged groups for the achievement of equal enjoyment of certain rights, it would become not only reasonable but also necessary that, when that equal enjoyment is achieved, those privileges would cease. Otherwise, the recognised different treatment would become unjustifiable and therefore would amount to a discrimination vis-à-vis those that are excluded from its enjoyment.[38] To put it in a different way, when structural imbalances in society, that objectively put members of

[36] See, F. PALERMO, J. WOELK, *From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights*, cit., p. 8 et seq.

[37] As UN Special Rapporteur, Mr. Capotorti, has said, *"…equality and non-discrimination imply a formal guarantee of uniform treatment for all individuals, whereas protection of minorities implies special measures in favour of members of a minority group–the purpose of these measures nonetheless is to institute factual equality between the members of such groups and other individuals."* See, F. CAPOTORTI, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1, United Nation, 1979, p. 98, para. 585.

[38] It is important to notice that this interpretation of positive actions has been incorporated into Article 1(4) *in fine* of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which rules that *"[special measures]shall not be continued after the objectives for which they were taken have been achieved."*

minority groups in adverse positions vis-à-vis members of the majority –with regard to the enjoyment of certain rights– have disappeared, then the maintenance of those privileges would be unjustified. In fact, their preservation would violate the very core of the principle of equality, in a sense that people in the same situation would be treated differently and not alike, as it is required by the said principle. Moreover, under the new equal situation, the maintenance of special measures would be nothing but the maintenance of separate sets of rights, based on ethno-cultural group affiliation or even race, under the old-fashionable anthropological and legal denomination.[39]

At this point and for the sake of argument, it would be important to clarify that, even when special measures are established for the benefit of the members of certain cultural groups, this is for the individuals and not for the benefit of the group as such. These measures are not designed to guarantee the survival of any cultural entity (or their *specific* characteristics) within the framework of a free, open and democratic society.[40] Affirmative action just facilitates the enjoyment of individual (abstractly designed) rights by a certain (disadvantaged) segments of the society.

3.1. Affirmative action and cultural groups' demands for a separate set of rights

As it has been said before, when we discuss affirmative action, the reference is always made on individual rights or to the equal protection of individuals in connection with the enjoyment of their rights. The aim of these measures is to remove the existing structural societal inequalities in order to allow equal possibilities for its members in the enjoyment of their rights, regardless their cultural alliances. But, if we continue with this line of thought, we have nothing to do but arrive at the conclusion that the legal scope of affirmative actions does not include

[39] See, K. A. APPIAH, *op. cit.*, p.130 et seq.

[40] Some less radical and *non-utopian* version of multiculturalism, in particular those that are grounded on philosophical-liberal roots, consider that even this ideology is not opposed in principle to the assimilation of one cultural group by others, *"[s]o long as the process is not coerced, does not arise out of lack of respect for people and their communities, and is gradual…"* See, J. RAZ, *op. cit.*, p. 182.

the possibility to grant *different* set of rights to groups, defined by their distinctive cultural features.[41]

In fact, one thing is temporary exceptional measures granted for the reduction of factual imbalances in society, and another –quite different– is to grant permanent differentiated rights to ethno-cultural groups' members, in order not just to foster their equality vis-à-vis the majority, but to conserve, strengthen and develop their *differentness* through a permanent system of *'group-conscious policies and rights'*. If this would be the case, then affirmative action would have as its aim not the *'equal enjoyment of the same set of rights'* but, on the contrary, the *'equal enjoyment of a different set of rights'*, established in accordance with each cultural groups particularities and differences. The dangerousness of this *pretended* new approach is self-evident. In fact, it would imply that the legal and institutional division of the society according to ethno-cultural appurtenances, a sort of new *'ghettoization'* which is nothing but turning back the page from one of the most *enlightened* time in human history, namely, the stage in which each human, regardless his or her ethno-cultural appurtenances, is equal in dignity. To put it in another way, the recognition of a different set of rights would lead to a model not any longer based on the individual equal enjoyment of the same legal status (as it –for instance– is the case of human rights), but to a model based on the equal enjoyment of different legal status, based on group membership.[42]

In addition, this new proposed model of societal division and segmentation would also be contrary to the *'principle of neutrality'*, in a sense that in modern democracies, national states should not set out to encourage, discourage or take active position with regard to the success of any particular form of life or

[41] See, B. BARRY, *op. cit.*, p. 12-13.

[42] In fact, the aim of positive measures is to strength the situation of members of vulnerable non-dominant groups, in order to enhance them to a similar equal position as that held by members of the dominant cultural entities. The goal here is to increase the possibilities of those disadvantages sectors of the society in the enjoyment of the same rights, and the participation in the same societal institutions, as full members of the same society. A quite different thing is what Taylor and other scholars that support what we have called "politics of recognition" proposed as the goal for especial measures for non-dominant groups. In a few words, we can say that "politics of recognition" proposes a paradigm that could be summarised as *'equal in differences'*, which is not the same than *'different but equal'*. The former stresses the equal acknowledgement of our differences, of what we do not have in common, and lead to the existence of different legal status; on the contrary, the latter stresses our commonality, what make us equal beside the potential cultural differences or alliances. See, for an opposite opinion, I. M. YOUNG, *op. cit.*, p. 174 et seq.

understanding of the good. In a plural, open and modern democracy, States should only create those fair structural conditions that would allow an open cultural competition between the different proposed ways of life and understanding of the good, without helping or hindering any of them. Therefore, if States would recognise different sets of rights to all potential groups existing in the society, this would consequentially spawn the artificial perpetuation and even imposition of a certain form of life, or understanding of the good, to those seen as members of those different ethno-cultural groups, but not only. In addition, it would also generate –as I said before– a sort of regression in connection with one of our most important cultural achievement of the modern era, namely, *"that all humans beings are born free and equal in dignity and rights"*, as worded in Article 1 of the Universal Declaration of Human Rights (UDHR).

3.2. A multicultural (and deceptive) reinterpretation of the principle of equality

As we can see in the former section, what would be at stake with this new multicultural proposal is actually the content and scope of the fundamental principle of equality. Why? Well if we read carefully the following sentence written by Young, then perhaps we will start to see the connection, or –better– dis-connection (or a misleading interpretation) between groups' multicultural revindications and equality. According to Young, *"[a] culturally pluralist democratic ideal [...] supports group-conscious policies not only as means to the end of equality, but as intrinsic ideal of social equality itself. Groups cannot be socially equal unless their specific experience, culture, and social contributions are publicly affirmed and recognized."*[43] As we can see, for her (and other multiculturalist scholars), the final aim of the principle of equality in a democratic society would not be the achievement of formal or even substantial equality among individuals, among all human beings regardless their ethno-cultural affiliations (as stated in Article 1 and 2 of the UDHR). For Young, equality is about groups, and concerns the equal division of power and socio-cultural societal influences among them.

[43] *Ibid.*, p. 174.

For this multiculturalist vision, equality is about equal division of powers between ethno-cultural groups. For multiculturalist supporters, what matters is the group rather than its members; not the individual human beings whose fate would be normed and regulated by the ethno-cultural norms of the group in which they just happen to be born or otherwise be part of. In fact, instead of being born *'free and equal in dignity and rights'*, as any other human being, a member of a given group – for the fact of being born within a group– would be equal in rights and dignity *only* with regard to his or her fellow group members. However, this person would not be in equal position vis-à-vis members of other groups, which would have different sets of equal *group* rights. Under this light, only groups would be equal in dignity and rights, in a sense that they would have the equal possibility to regulate the fate of their members. And as human beings? As humans, as individuals… they would not. What would define the essence of their rights would not be their very nature as human beings, but just their group membership.

Most likely, the logical conclusion reached in the previous paragraph would be, I believe, enough to understand why I am saying that multiculturalism and politics of recognition could lead toward a regression on the protection of fundamental rights. If not, then allow me to say that this ideological position could generate a scenario comparable –to certain extent– the one existing prior to the adoption of the Universal Declaration of Human Rights (UDHR), at least from the perspective of the protection of individuals. Let me explain this more in details.

As we know, before the arrival of the current system of human rights protection, whose formal starting point could be identified with the adoption of the UDHR in 1948, the level of recognition of fundamental rights were to a great degree (if not all) in the hands of national states. Therefore, it was a common internationally recognised feature that citizens of different states had not only different levels of effective enjoyment of their rights but also different sets of fundamental rights.[44]

In fact, before our current human rights based era, it would be accurate to say that the legal system in place was not a system of clear and equal common minimum international standards available for the enjoyment (and protection) of all individuals, just for the fact of being humans beings. What was in place was a system of rights

[44] See, F. PALERMO, J. WOELK, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, cit., p. 67 et seq.

recognition and protection based on the membership to a certain politically defined group, namely to be a citizen of one or another country. And it is precisely here where we find similarities with these new multiculturalist ideologies, because –at the end of the day– they propose nothing but to subordinate the recognition of rights to a group membership. What in the past was nationality and citizenship today will be ethno-cultural membership[45]; and all of us know what had happened in the first half of the XX Century to those that did not have any strong international entity or national state able or keen to defend them from State organised and sponsored terror.[46] Our current system of human rights protection has been precisely developed to protect and defend all human beings, regardless of their nationality and ethno-cultural alliances, especially from institutional organised violence and disenfranchisement.[47]

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[45] Example of the old school of thoughts can be found in Mill, who is in fact advocating for the importance of the concept of nationality saying that *"[n]obody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilized and cultivated people–to be a member of French nationality, admitted of equal terms to all the privileges of French citizenship, sharing the advantages of French protection, and the dignity and prestige of French Power–than to sulk on his own rocks, the half-savage relic of past times, revolting in his own little mental orbit, without participation or interest in the general movement of the world."* Besides the obvious observation that these words should be considered under the contextual historical light in which they were written, they are more than adequate to illustrate the importance given to nationality and national membership at the end of the second half of the XIX century. For Mill, the path that will lead to the enjoyment of equal rights and laws is the path of nationhood and citizenship; for multiculturalism is a sort of "grouphood" and ethno-cultural affiliations that pave the way toward equality. See, J. S. MILL, *Considerations on Representative Government*, New York, 1862, p. 314

[46] Perhaps one of the most enlightening pages on this subject have been written by Hannah Arendt in the aftermath of Eichmann's trial. When analysing the conditions and policies that paved the way for the deportation to concentration camps of millions of Jews from the Nazi occupied or otherwise controlled territories in Europe, she rightfully pointed out that *"[t]he legal experts drew up the necessary legislation for making the victims stateless, which was important on two counts: it made it impossible for any country to inquire into their fate, and it enabled the state in which they were resident to confiscate their property."* Moreover, when commenting on the factors and circumstances that have allowed the trial of Eichmann in Jerusalem (in particular with regard to his kidnapping in Argentina), she again sensitively conclude that *"...it was Eichmann's de facto statelessness* [he was never deprived of his German nationality], *and nothing else, that enabled the Jerusalem court to sit in judgment on him. Eichmann, though no legal expert, should have been able to appreciate that, for he knew form his own career that one could do as one pleased only with stateless people; the Jews had had to lose their nationality before they could be exterminated."* As we can see, both the victims and the victimiser, although all the differences between them, were affected by the same sort of weakness of a system exclusively based on the protection of those considered members of a certain given group, namely state's citizens. See, H. ARENDT, *Eichmann in Jerusalem. A Report on the Banality of Evil*, London, 1992, p. 115 and 240.

[47] See, F. PALERMO, J. WOELK, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, cit., p. 75.

Furthermore, if the appurtenance or group's membership is stressed as a decisive factor for the recognition or allocation of rights, then what would matter would be no longer the simple fact of our "humanity", of what we have in common as human beings, but rather the membership criteria. Ironically, what will make us members of a given group, and therefore entitled to the enjoyment of certain specific rights, would make us –at the same time– legally excluded from the enjoyment of other fundamental rights recognised to the members of other ethno-cultural groups. This is nothing but a sort of *new* disenfranchisement under the name of the *old* disenfranchisement! In addition, as a consequence of the fact that group membership would became the decisive factor for the enjoyment of rights, not only the question of *"how"* we become member of a given group would be essential, but also –and perhaps even more importantly– the question of *"who"* would decide upon this crucial matter would be essential too. In other words, if we start granting rights based solely on the criteria of our ethno-cultural alliances, then the entitlement of rights will depend not on our common nature as humans but on *"how", "where"* and by *"whom"* the line between groups would be draw.

Last but not least, the recognition of rights only under the bases of ethno-cultural appurtenances could also lead us to the slippery and dangerous path of *race*. In order to explain this, I will start considering one affirmation made by Kymlicka. He, talking on the natural –and even desirable– changeable characteristic of cultures, stressed the fact that we must *"distinguish the existence of a culture from its 'character' at any given moment"*[48], in a sense that process of modernisation or adaptability to new *cultural* conditions does not change the essence of each given culture or ethno-cultural group. He also added that *"[t]he desire of national minorities to survive as a culturally distinct society is not necessarily a desire for cultural purity, but simply for the right to maintain one's membership in a distinct culture..."* [49] Therefore, if what counts is the *'essential character'* of certain ethno-cultural group, and not its cultural manifestations –which are subjected to change, modification and adaptation to new societal circumstances– then it seems to me that the concept of culture (in this multiculturalist version) is not very far from the

[48] See, W. KYMLICKA, *Multicultural Citizenship. A liberal theory of Minority Rights*, cit., p. 104-105.
[49] *Ibid.*

concept of *race*. As Appiah rightfully stressed, what is left without addressing the character or the expression of a given culture *"is just the fact of descent."*[50] And… if rights would be granted only because of *"descent"*, then allow me also to say that we are not happily navigating the sunny and safety waters of a human rights based system but –on the contrary– we are entering into those dark and dangerous waters of a *"cultural/race"* based conception of rights.[51]

Therefore, it would be important to explore –for the sake of the argument– certain concepts that appear to be relevant to this argumentation. I am referring to the notion of minority and in particular the question of group's membership. In fact, until now we have explored different concepts, such as culture and social groups, which helped us to understand the basis of what is considered a multicultural society. The need for their study is grounded in the fact that these concepts have gained more visibility day after day within the legal and political international discourses, but also because their comprehension would be indispensable in order to critically analyse the legal and jurisprudential (and even perhaps multicultural) developments of indigenous people standards within the following chapters. In effect, if we come back to the central topic under discussion, which is the relevance of culture in society and its potential use in the re-interpretation of fundamental rights, we would realise that much of the discussion has been connected to the existing societal dynamics between the different ethno-cultural groups. These dynamics are –in most cases– influenced by the existing socio-political relationships between majoritarian and minoritarian groups in a given society. But… how do we identify these two different kind of groups? Even a very simplistic analysis over this question will tell us that the mere numerical element would not be enough for a proper identification of majorities and minorities. In fact, the number of members affiliated to each group does not help us to identify the necessary requirements that have to be fulfilled by each of their members, in order to be considered as such.

[50] See, K. A. APPIAH, *op. cit.*, p.136 et seq.

[51] Article 2 of the *Universal Declaration of Human Rights* states that *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."* The wording of this norm absolves me to further explain why a system of rights based on ethno-cultural group membership is a far away conception not only from the wording but fundamentally from the spirit of our very human rights milestone.

Therefore, before continuing with our analysis, and specially before entering into the consideration of the specific case of indigenous people, it becomes indispensable to evaluate these constitutive elements. In fact, it would be relevant for this study to properly answer the question of under which criteria we can consider an ethno-cultural entity or group as a minority, and what role the notion of cultural diversity plays vis-à-vis securing the efficacy of the norms that specifically protect minority members.

4. What is a minority?

Without trying to make an historical account of the development of the notion of minority, it would be –nevertheless– adequate to say that the first attempts to conceptualise this societal notion started at the time of the League of Nation, and especially through the jurisprudence of the late Permanent Court of International Justice (P.C.I.J.).[52]

In fact, in its famous advisory opinion on minority schools in Albania, the P.C.I.J. made an attempt toward the conceptualisation of the notion of minorities. It stated that *"[t]he idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language, or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs."*[53] From this wording we can preliminarily identify two elements that –for the late P.C.I.J.– were necessarily involved within minority provisions: a) the equal treatment that members of minority groups deserve vis-à-vis members of the majority and b) the need for protection and preservation –due to their

[52] Actually, we can say that the 'minority question', started before together with the notion of national state. In fact, it was with the *"Peace of Westfalia"* that ended the religious wars in Europe in the XVII Century, and gave birth to the new conception of national sovereign states. See, F. PALERMO, J. WOELK, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, cit., p. 67 et seq.

[53] P.C.I.J., Advisory Opinion of April 6th, 1935, *Series A./B. No. 64, Minority Schools in Albania*, p. 17.

special situations– of their *"racial peculiarities, their traditions and their national characteristics."*[54]

Beside the relevance of this *obiter dictum* of the P.C.I.J. with regard to the affirmation of the principle of equality[55], there is no much clarification on it in connection with the necessary differentiation criteria between majorities and minorities. However, this was not the only time that the P.I.C.J. dealt with the notion of minority or with similar notions. In fact, even before the issue of the above mentioned advisory opinion, this Court had already the possibility to deal with the fairly similar notion of "community", in its advisory opinion in connection with the issue of emigration of the *Greco-Bulgarian "communities"*. In that opportunity, this Court defined the latter notion as *"the existence of a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their tradition, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another."* [56] Therefore, two other elements can be identified as essential under the view of this Court. First, the specific *external characteristics* of the community, such as race, religion, language and traditions, that make it different from the rest of population *'living in a given country or locality'*. Secondly, the *sentiment of solidarity* among the members of the community, which can be characterised as a sort of an *internal self-identification* of group members, among themselves and with the group as such. As we will see, all these four characteristics have been incorporated into (with just little modifications) the later attempts of definition of the term minority.

Nevertheless, after this short but promising attempt of the League of Nations to deal with the minority question, and especially after the traumatic experience of

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[54] *Ibid.*

[55] In fact, the P.C.I.J. has emphatically affirmed that *"[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."* And, after arguing that it would be easy to imagine cases in which equality of treatment would result inequality; in fact this Court has concluded that *"[t]he equality between members of the majority and of the minority must be an effective, genuine equality…"* See, P.C.I.J., *Series A./B. No. 64, Minority Schools in Albania*, p. 19.

[56] See, P.C.I.J., Advisory Opinion of July 31st 1930, *Series B – No. 17, The Greco-Bulgarian "Communities"*, p. 33.

the Second War World, the discussion of minority issues (and therefore the attempts for its scientific conceptualisation) entered into a stalemate. This, of course, has been also widely influenced –under the wording and spirit of the UDHR– by the belief that general protection of universal human rights would be sufficient to protect minorities.[57]

However, after this initial period and within the new international institutional umbrella of the United Nations, the question of minorities came back to the international arena under the vests of the *decolonisation* process, in particular under the *self-determination* wins that were blowing from the south of the Mediterranean sea, but not only. In fact, as result of the encroachment of the process of decolonisation with new movements, such as civil rights and racial desegregation, minority issues gained a new force among the international community, and within the new codification process of international law.[58] The first, and perhaps still the most important example in international law in connection with the rebirth of the minority question, for its universal range and authoritative character, can be found in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which specifically addresses and recognises the right of persons belonging to minority groups. [59]

But, because the express recognition of the right to persons belonging to minority groups was only made through the incorporation of a quite general rule (Article 27 ICCPR), a need for deeper clarifications appeared, and –most in particular– for a conceptual framework with regard to the notion of minorities itself.

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[57] See, P. LEUPRECHT, *Minority Rights Revisited: New Glimpses of an Old Issue*, in P. ALSTON (ed.), *Peoples' Rights*, Oxford, 2002, p. 116-117.

[58] For a more detailed account in connection with the rebirth of the minority rights political process, see W. KYMLICKA, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, cit., p. 27 et seq ; and for a historical-legal perspective, in particular in connection with the regime that was established by the League of Nations (and even before), see –among others– G. SCELLE, *Précis de Droit des Gens. Principes et Systématique I et II,* Paris, 1984, p. 187-256; A. MANDELSTAM, *La Protection des Minorites*, in Académie de Droit International (ed.), *Recueil des Cours*, Paris, 1923, p. 364-519; N. FEINBERG, *La Juridiction et la Jurisprudence de la Cour Permanente de Justice Internationale en matière de Mandats et de Minorités*, in Académie de Droit International, *Recueil des Cours*, Leyde, 1937-I, p. 591-705; and F. ERMACORA, *The Protection of Minorities before the United* Nations, in Académie de Droit International (ed.), *Recueil des Cours*, The Hague/Boston/London, 1983-IV, 247-370.

[59] Article 27 of the ICCPR reads as follow: *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."*

Under the light of these new needs and trends, the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities ("Sub-Commission") gave a concrete mandate to its Special Rapporteur to develop this conceptual framework. In exercise of his mandate, Mr. Francesco Capotorti presented his *"Study on the Rights of persons Belonging to Ethnic, Religious and Linguistic Minorities"* in 1977. In it, he proposed a definition of minorities which is still today one of the most accurate working definition of the term, even though it was only intended to be understood within the scope of application of Article 27 ICCPR.

Caportorti's definition of the term "minority" reads as follow: *"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members–being nationals of the State–possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."*[60]

As explained by the Special Rapporteur, his definition is deconstructed in two different criteria, one objective and one subjective (as it was also introduced before by the I.P.C.J.).[61] The first criterion can be described as *"objective"* and refers to the factual existence of a minority group within a State's population. This criterion could be also deconstructed into different elements. That is: a) the existence of *"distinct groups possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population"*[62]; b) in connection with their numerical size, *"they must in principle be numerically inferior to the rest of the population"*[63]; c) with regard to dynamics of "power" and "domination", in a sense that considers minorities as those groups which find themselves in a *"non-dominant position"* vis-à-vis the rest of the population.[64] Finally, the last objective criterion

[60] See, F. CAPOTORTI, *op. cit.*, p. 96, para. 568.
[61] See *supra* note 56.
[62] See, F. CAPOTORTI, *op. cit.*, p. 96, para. 566.
[63] Capotorti stressed that *"…in countries in which ethnic, religious or linguistic groups of roughly equal numerical size coexist, article 27 is applicable to them all"*; but he nevertheless clarified –especially in connection with those factual situations in which the existing groups are numerically small– that *"… States should not be required to adopt special measures of protection beyond a reasonable proportionality between the effort involved and the benefit to be derived from it." Ibid.*
[64] According to Capotorti, *"dominant minority groups do not need to be protected"*, especially because *"…they violate, sometimes very seriously, the principle of respect for the will of the majority…"* Clearly, the reference is made to the case of South Africa –at the time– ruling Apartheid regime. *Ibid.*

refers to d) the *juridical status* of the members of minority groups in connection with the State of residence, which is that *"they must be nationals of the State"*. In this sense, "new minorities", such as immigrants, are considered neither under the protection of Article 27 ICCPR nor as minorities as such.

With regard to the second component of the notion of minorities, namely the *"subjective"* criterion, Capotorti defined it as *"...a will on the part of the members of the groups in question to preserve their own characteristics."* According to him, *"...the will in question generally emerges from the fact that a given group has kept its distinctive characteristics over a period of time"*, and –for this reason– he has concluded that this subjective criterion actually *"...is implicit in the basic objective element, or at all events in the behavior of the members of the groups."*[65] If a given minority is officially recognised, as for example the Sami in Sweden or Ladino in Italy, then it would be no need for the application of this sort of *iuris tantum* presumption, precisely because the recognition of the State will give to that group the right to claim the special benefits enshrined in Article 27 ICCPR. But, if this is not the case, then –in case of controversy– even this presumption would not be enough to prove the existence of a minority group; it would be necessary to look for *'objective indicia'* which would externally indicate the existence of such differentiated cultural entity within a given society.

The need for a sort of *"objectivisation"* or *"externalisation"* of the *"subjective"* criterion is required not only in order to enhance the *principle of certainty of the law*, but also because the need to avoid potential abuses –due the controversy that always surround minority issues– of the special protection recognised as guaranteed by Article 27 ICCPR. Some of this necessary external *'indicia'* has been even enumerated by Capotorti in his report. In fact, the Special Rapporteur –when referring to the subjective criterion– has stressed that it would be logical to conclude that members of a given group would have the *will* to develop and preserve their own characteristics when they *"...display in their everyday life a strong sense of identity, unity and solidarity, when they strive to maintain their*

[65] If we read carefully Capotorti's report, it would be possible to assume that the later affirmation was perhaps done in order to avoid potential dangerous inquiries –as a tool to avoid the application of Article 27– tending to determine whether or not groups themselves intend to preserve their individuality. Therefore, it would be fair to say that this *iuris tantum* presumption has been preferred, as the "lesser evil", than open the "Pandora box". See, F. CAPOTORTI, *op. cit.*, p. 96, para. 567.

traditions and culture and persevere, sometimes against heavy odds, in the use of their language, when they regard themselves and are regarded by others as belonging to a distinct group…"[66] Hence, a *contrario sensu* interpretation will clearly lead us to say that if a minority group is not able to keep alive its own ethno-cultural traditions and practices, with the consequential non-external visualisation of them, then such a group cannot and should not be regarded as protected under the scope of Article 27 ICCPR. This is simply because –as he also said– the said group could not be considered as a "minority" or a *distinctive* "cultural entity" any longer.[67] Most of the time, the existence of minority groups is a self-evident factual issue[68], but if it is not, then it would be necessary to look for clear objective indicia which will support the claim of its existence as distinctive cultural aggregation, otherwise it would be nothing but a mere *'cultural mirage'*.

Finally, it would be important to stress that the subjective element of this notion cannot be interpreted as providing room for an *essentialist* protection of a given *"minority culture"*, or absolute tutelage to what could be considered the given *"minority identity"* of a specific ethno-cultural group. As the proposed definition said, its subjective element refers to the existence of the *"sense of solidarity"* among the members of a minority group, a *'sense'* which *tends* toward the preservation of that given culture. Therefore, what is indeed included within the notion of minority is the *'will'*, the purpose of minority members to continue with their cultural practices and to preserve and develop what they consider as their own identity as members of such a group.[69] However, this is not exactly the same as the protection of a given minority culture *"as such"*, as a perpetual and unaltered societal entity that should be guaranteed against any influence of change, in order to preserve its *"cultural essence"*. To put it in another way, what is included within the proposed definition – and hence potentially protected by minority provisions– is the individual *'will'* of

[66] *Ibid.*, p. 97, para. 571.
[67] See, F. CAPOTORTI, *op. cit.*, p. 97, para. 572.
[68] See, G. ALFREDSSON, *Minorities*, *Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law*, in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden – Boston, 2005, p. 172.
[69] Even when the notion of cultural identity will be developed in the following sections, it is nevertheless important to say that nobody should be forced to belong to a minority group; individuals must always have the possibility to leave any given ethno-cultural group. Individual appurtenance to a given ethno-cultural group is and should always be based on individual choices and not on group's will. For this reason, this element has been called also *'self-identification'* requirement. See, G. ALFREDSSON, *op. cit.*, p. 166-167.

each member of the minority group to express and develop himself or herself through the practice and exercise of a "minority" tradition or culture. What is at stake is the respect for the *'will'* of members belonging to minorities to preserve their characteristics[70]; a *'will'* that is manifested and identifiable through the exercise of the cultural freedoms of each of the members (the individuals) of a given ethno-cultural entity, and not by the entity itself. However, this cultural individual choice (the *'will')*, in order to be relevant, should be exercised together (collectively) with the other members of the same given societal entity. In fact, the *"sense of solidarity"* is nothing but the collective manifestation of this individual *will*; this collective dimension –nevertheless– does not change the essential individual protective purpose of the minority notion and legislation.[71]

If we continue with the analysis of the international attempts that have been conducted in order to define these notions, seven years after the Capotorti's report, a new definition was introduced by one of the members of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. Jules Deschênes. He considered that minority refers to *"[a] group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."*[72] The fortune of this new definition did not differ from the fate of Capotorti's definition, in a sense that none of them was adopted by the Sub-Commission as official definition of the term. However, a general agreement was constructed –among the members of the Working Group charged with drafting of the future declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities– with regard to the need to develop a working

[70] See, F. ERMACORA, *op. cit.*, p. 299.
[71] It is always important to keep in mind that it is the *"person belonging to such minorities",* and not minorities themselves, who is the object of protection of all minority provisions, including –of course– Article 27 ICCPR.
[72] See, J. DESCHÊNES, *Proposal concerning a definition of the term "minority*, UN Doc. E/CN.4/Sub.2/1985/31 and Corr.1, United Nations, 1985, para. 181.

definition, as a base on which further norms could be elaborated for the protection of the rights of minorities.[73]

Notwithstanding, what is interesting to highlight on Deschênes' definition is the notion of *temporality*, in a sense that the existence of a minority is a factual issue that would depend on the existing concrete socio-temporal circumstances in each given society (a sort of *factuality* in a broad sense). A given group would not be regarded as a "minority" if its position in society has –for instance– changed into a *"dominant position"*, or does not differ any longer from the mainstream part of the society (because it has lost its cultural particularities), or even when the situation of legal and factual equality (vis-à-vis the mainstream society) has been achieved. In fact, these elements –identified by Deschênes– go in a contrary direction of seeing a minority from an *essentialist* point of view, as an unchangeable entity that always conserve (and will conserve in the future) its ethno-cultural salient characteristics, regardless of time and historical circumstances. On the contrary, the notion that emerges from this new definition is a notion characterised by its fluidity and adaptability and which follows the changeable circumstances of each society. In short, a "minority" is a factual entity (and facts always change), not certainly an *ideological* entity.

Last but not least, a new working definition of "minority" was proposed in 1993, within the framework of the Sub-Commission's decision for the preparation of a report on national experiences regarding peaceful and constructive solutions for problems involving minorities.[74] Mr. Asbjørn Eide was entrusted on this task, and the definition proposed by him reads as follow: *"a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population."*[75]

As we can see, in Eide's working definition there is neither a reference to the nationality of the persons belonging to a minority group (the reference is only made on their residence within a sovereign State), nor to the non-dominant position with

[73] See, UN Commission on Human Rights, *Compilation of proposals concerning the definition of the term "minority"*, UN Doc. E/CN.4/1987/WG.5/WP.1, United Nations, 1986, p. 9, para. 19.
[74] See, A. EIDE, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, cit.
[75] *Ibid.,* p. 7, para. 29.

regard to the majority of the population. Furthermore, no references are made with regard to the *sense of solidarity* and aim of *perpetuation* between its members, as it was mentioned in both Capotorti and Deschênes' definitions. Therefore, for this *'minimalistic'* approach to the definition of the term "minority", the relevance is placed on the *numerical* and *ethno-cultural aspect* of the group. In this sense, this definition includes members of groups which also go by other names, even when the group *"...demands –and is entitled to– more than the minimum minority rights."*[76] The latter could in fact be the case of indigenous people, which could be considered as minorities too, as we will see in the following sections and –in particular– within the next chapters.[77]

As a conclusion, it would be possible to say that to try to define the term "minority" is not an easy and pacific exercise, as it is any legal attempt to define an existing societal factual entity. However, the fact that we are trying to address a factual situation, that is, whether an existing societal group could be considered or not a "minority", actually imposes in itself the need for its legal conceptualisation. That is, in a sense that it would be through its "legal" recognition that legal consequences (e.g. the enjoyment of a set of specific protective rights) would be attributed to that societal factuality.[78] To put it in another way, even when the existence of minority groups is a question of fact, not a question of law (as the PCIJ has said with regard to the notions of *'communities'*[79]), facts need nevertheless to be identified through –at least– a working *legal* notion of what minorities are.

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[76] *Ibid.,* p. 8, para. 32. See also, in connection with those groups that could be considered included within this definition, A. EIDE, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities. Second Progress report*, UN Doc. E/CN.4/Sub.2/1992/37, United Nations, 1992, p. 12 et seq., para. 55-72.

[77] As I will argue in the following chapters, the alleged difference between minorities and indigenous people are not substantial. Being prior in time than the current majorities or even having close ties with the territories in which they inhabit are just factual specifications that do not change their main equal characteristics, that is, their ethno-cultural difference with the majority of the population in a given country. The fact that within international law we can identify certain distinctions in terms of drafting and adoption of different standards and creation of separate forums and monitoring procedures are just a reflection –I will argue– of the better articulated political lobby that indigenous peoples' groups were able to conduct at different international fora, but not of their ontological differences. This, beside the fact that the members of both, minorities and indigenous people alike, are just human beings and therefore equal in dignity and rights (Article 1 UDHR), regardless of their ethno-cultural specifications. See, G. ALFREDSSON, *op. cit.*, p. 168-169.

[78] See, A. EIDE, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, cit., p. 14, para. 66.

[79] See, P.C.I.J., Advisory Opinion of July 31st, 1930, *Series B. No. 17, The Greco-Bulgarian Communities,* p. 22.

Moreover, it is important to bear in mind that minority rights –as any other human rights– have universal character, in a sense that they are recognised to all members of whichever ethno-cultural minoritarian group, *as long as*… those groups qualify as a "minority". [80] In other words, in order to enjoy the especial protection recognised –for instance– in Article 27 ICCPR, prior to establish whether a person belongs to a minority group, it would be indispensable to identify the "minority" character of that group, and in order to do so a common *legal* notion of that term is indeed required.[81] Minorities, as factual societal aggregations are subject to temporal and spatial changes, therefore what has been considered a minority in the past, could not be considered as such in the present, or vice versa. For example, it would be possible to say that an ethno-cultural group would not be considered any longer as a minority –under international law– if there is no longer manifest *'will'* in their members to be seen and considered as a differentiated ethno-cultural entity. If the *sense of solidarity* (or sense of *self-minority-consciousness*) is lost, or has lost its relevance and external *indicial* manifestations (its objectively recognisable expression), this situation would consequentially prevent us from positively identifying the presence of the subjective element of the definition. Therefore, it would no longer be possible to consider that specific ethno-cultural group –from a legal perspective– as a minority. This, of course, does not absolutely mean that members of ethno-cultural groups which do not qualify as "minority" would not receive any protection from international law. They are and still remain what they always have being, that is human beings, and hence they remain under the full protection of international human rights law and standards as any other member of human society.[82]

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[80] Minority rights are –in fact– nothing but human rights which are oriented to redress a specific situation characterised by factual disadvantages, by means of strengthening the position of a person belonging to a non-dominant or vulnerable group. According to UN Special Rapporteur –Mr. Eide– *"[t]he purpose of minority protection is not and should never be to create privileges or to endanger the enjoyment of human rights, on an equal level, by members of the majority"*, and adding that *"…the reason why rights of members of minorities are required is that they make explicit the limits on the power of majority groups, which otherwise might use their majority position to establish or maintain privileges for themselves."* A. EIDE, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, cit., p. 14, para. 2 and 66.

[81] As it has been said, *"[t]he paradox is that the more controversial minority protection is, the more we need an accepted definition of "minority""*. See, A. SPILIOPOULOU ÅKERMARK, *Justifications of Minority Protection in International Law*, London/The Hague/Boston, 1997, p. 87.

[82] See, F. ERMACORA, *op. cit.*, p. 300.

Therefore, considering that Capotorti's definition is the most general one, not only because takes into consideration both aspects of this notion, namely the objective and subjective ones, but also because it was built upon a preceding large and comprehensive debate within the bosom of the UN Commission on Human Rights[83], we will therefore adopt it as our working definition within the framework of the present work.

As a conclusive comment of this conceptual section, it is important to highlight that within the reported definition we can identify many notions that we have already discussed in this chapter. This is –for instance– the case of the dynamics between dominant-non-dominant groups and the value of ethno-cultural appurtenances for group members, but not only. There are other important notions that have not yet been developed, but are –nevertheless– very important within the framework of the present work. I am referring to the related notions of people and indigenous people. For this reason, and in order to gain continuity and more clarity from a methodological point of view, I will confront –within the following paragraphs– the notion of "people" within international law, and leave the following chapters the conceptualisation and analysis of the term "indigenous people". In effect, the particular relevance that the latter notion has for the overall structure of this thesis imposes its analysis –at least– in an autonomous and independent section.

4.1. Cultural societal groups and "peoples"

As we saw in the previous section, individuals could be considered (both by an *internal* self-identification and by an *external* recognition) as belonging to a minority group. This would generate for them not only a factual challenging position vis-à-vis the main society –as a consequence of that identification–, but also legal effects, including –for instance– the possibility to be entitled to enjoy the benefits of special measures or targeted protective rights specifically established for addressing the factual imbalances imposed by the minority/majority societal dynamics.

[83] In the words of Ermacora, the process that ended with the elaboration of the proposed definition of the term "minority", *"[it] was really a success as to the willingness of States to collaborate with the United Nations in a delicate field of problems." Ibid.,* p. 276 and 292.

However, to be a minority is not the only factual/legal situation that could generate a particular legal international status to a given group. In fact, in international law and in particular in international human rights instruments we can find indications to other notions that directly or indirectly refer to ethno-cultural entities or societal groups. In this sense, we can find in those international instruments notions such as "indigenous people", "tribal people" or just "peoples", which have important socio-political and fundamentally legal implications in connection with the ethno-cultural aspirations of the members of cultural entities or societal groups. As in the case of minorities, members of an ethno-cultural group could successfully frame or package their socio-cultural and political aspirations as –for instance– *"indigenous people's claim"* or even *"peoples' claim"*. Under this new *"group label"*, they would have access to a specific set of rights that have been internationally and exclusively recognised to the members of those groups, or to the groups themselves (as in the case of peoples). Therefore, it seems that the relevance or legal importance of the identification of an ethno-cultural group as part of one (or more) of these categories is quite clear. However, because we lack clear legal definitions, then it would be important to briefly clarify which are the requirements that a group has to fulfil in order to be considered as part of them, and –perhaps most importantly– which are the specific legal consequences of that categorisation.

Just in order to show the practical relevance of this "*categorial*" identification, and even for the need for further clarification in connection with the involved notions, it would be enough to say that what is at stake here is nothing but the *'sovereignty'* and *'territorial integrity'* of States, especially with regard to the notion of "peoples". In fact, common Article 1 of the two international Covenants recognises the right to self-determination of "peoples"[84], but *as long as* the latter concept has not been defined in international law, it would be possible to ask… who these peoples are. Are they just the entire population of an existing State, or –on the

[84] Common Article 1 of the ICCPR and ICESCR reads as follow: *"(1) all peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."*

contrary– can they be just only a part of it, or even a different part from different countries? As it would be possible to imagine, for obvious reasons States have had and still have strong concerns in connection with this notion[85], and perhaps they would rather prefer to leave it undefined.[86]

Last, but not lease, there is the problem of intertwinement or superposition between these different notions or legal categories, because the very same ethno-cultural groups could be considered as included within one or more of these notions. For example, what would happen if one specific indigenous peoples' group, which finds itself in a minoritarian situation within the borders of a given country, claims that has the *right* to be regarded as "peoples" according to international law, and therefore that they are bearers of the right of self-determination. Are they entitled to do so? The question is whether the fact that indigenous or minority groups could be regarded as having specific ethno-cultural characteristics, entitle them to be considered as "peoples", under the meaning of international law. In other words, are minorities and indigenous groups "peoples", and hence bearers of the right of self-determination, as recognised within Article 1(2) of the UN Charter and common Article 1 of the ICCPR and ICESCR? [87]

These questions need to be answered, not only because of their self-epistemological importance but also due their intimate connection with the resolution of the indigenous people's land claim cases introduced before the Inter-American Court of Human Rights, as we will see especially in Chapter V and VI. Therefore, for the sake of the argument, and perhaps for a better methodological comprehension of this topic too, we will continue –within the next paragraphs– with the analysis of

[85] Clear examples of the concerns that this disposition has generated could be found at the *travaux preparatoires* of the UN Charter, in which –for example– the Venezuelan delegation expressed that *"[s]i le principe de libre disposition signifie le droit pour un people de se donner un gouvernement, bien sûr nous voudriouns qu'il soit inclus; mais s'il devait au contraire être interprété dans le sens qu'il comporte le droit de secession, nous le considèrerions alors comme identique à l'anarchie international et nous ne voudrions pas qu'il soit inséré dans le texte de la Charte."* See, A. CASSESE, *Article 1 - Paragraphe 2*, in J.-P. COT, A. PELLET (eds), *La Charte Des Nations Unies. Commentaire article par article*, Paris, 1991, p. 42.

[86] See, G. ALFREDSSON, *op. cit.*, p. 163-164.

[87] See, J. CRAWFORD, *The Right of Self-Determination in International Law: Its Development and Future*, in P. ALSTON (ed.), *Peoples' Rights*, Oxford, 2002, p. 58 et seq. See also, in connection with this topic, G. ALFREDSSON, *Different Forms of and Claims to the Right of Self-Determination*, in D. CLARK, R. WILLIAMSON (eds.), *Self-Determination. International Perspectives*, London, 1996, p. 58-86; and A. EIDE, *Peaceful Group Accommodation as an Alternative to Secession in Sovereign States*, in D. CLARK, R. WILLIAMSON (eds.), *Self-Determination. International Perspectives*, London, 1996, p. 87-110.

the notion of "peoples" and we will leave for the next chapter the analysis of the notion of indigenous people.

Then, who are "peoples"? As any other concept, this term could have more than one meaning, according to the perspective from which we will approach it. Anthropologists, archaeologists, political and social scientists, and many others, have different ways of defining who 'peoples' are.[88] However, because the interest within the present work is put on the legal consequences that the identification of a group as "peoples" could generate under the light international law, our focus should be restricted to the latter.[89] For instance, if we start with the foundational document of our modern international legal system, namely the UN Charter, we will find that one of the purposes of the United Nations –according to its Article 1(2) – is to *"…develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."*

A literal interpretation of the above paragraph, in accordance with Article 31 VCLT[90], will lead us to the obvious conclusion that "peoples" are those that hold the right of self-determination, but not only. Additionally, a careful reading of this paragraph will also allow us to conclude that the term "peoples" is not exactly equal to that one of "nations", because the latter refers –in the wording of Article 1(2) of the Charter– to those entities that have the obligation to respect –within their own friendly relations– the principle of self-determination of "peoples". Consequently, "peoples" as the addressee or the receiver of that respect, need to necessarily be a different entity; otherwise, this disposition would have said *…to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of 'nations'* (or states), and not "peoples" as it actually says.[91]

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[88] See, R. McCORQUODALE "peoples" *The New Oxford Companion to* Law, in P. CANE, J. CONAGHAN, Oxford University Press Inc. Oxford Reference Online. Oxford University Press.

[89] See, A. CRISTESCU, *The Right to Self-Determination. Historical and current development on the basis of United Nations instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, 1981, p. 40, para. 275.

[90] As we know, Article 31 of the UN Vienna Convention of the Law of Treaties (23 May 1969), states that *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

[91] In fact, if "people" and "nation" would mean the same thing, as it has been said *"…one cannot but wonder why these words are sometimes used in the same phrase or sentence of important national and international instruments in a redundant way?"* See, E. GAYIM, *People, Minority and*

Therefore, the term "peoples" could mean something different from the notion of "nations"[92], even in those cases where a given "nation" has organised itself as "State". The latter situation happens when a given ethno-cultural and linguistic unity or societal entity gains international recognition as a "State", that is, as an institutionalised political and juridical organisation with exclusive sovereign authority upon the internationally delimitated territory in which its population live).[93] Indeed, if this would be the case, then it would be possible to interpret that other groups, different from nations, could constitute also "peoples", under the understanding of international law, such as –for instance– minorities (including indigenous people).

Although the logical configuration of the former hypothesis, this liminal interpretation has been quite contradicted by the UN Special Rapporteur, Mr. Aureliu Cristescu, who extensively discussed this topic within the framework of a study commanded by the UN Sub-Commission in 1974.[94] Mr. Cristescu defined "peoples" as *"a social entity possessing a clear identity and its own characteristics"*. According to him, this notion *"implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population"*, but which *"should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the international Covenant on Civil and Political Rights."*[95] As we can see, for the Special Rapporteur, minorities cannot be considered as "peoples". The reason is that, under the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the

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Indigenous: Interpretation and Application of Concepts in the Politics of Human Rights, Helsinki, 2006, p. 57 et seq.

[92] According to the Oxford Dictionary, the word "Nation" *"…came via Old French from Latin natio, from nasci, meaning 'to be born'. The link between 'country' and 'birth' was the idea of a people sharing a common ancestry or culture."* On the contrary, the origin of the word "People" *"…is from Anglo-Norman French poeple, from Latin populus 'populace'…"* See, "nation" and "people" in Oxford Dictionary of Word Origins, by J. CRESSWELL. Oxford Reference Online. Oxford University Press.

[93] See, H. KELSEN, *Théorie du Droit International Public*, in Académie de Droit International (ed.), *Recueil des Cours*, Leyde, 1953-III, p. 70 et seq.

[94] Mr. Aureliu Cristescu was appointed as Special Rapporteur by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its twenty-seventh session, by its resolution 3 (XXVII) adopted at the 706th meeting on 16 August 1974.

[95] See, A. CRISTESCU, *op. cit.*, p. 41, para. 279.

United Nations[96], *"...the principle of self-determination cannot be regarded as authorizing dismemberment or amputation of sovereign States exercising their sovereignty by virtue of the principle of self-determination of peoples."*[97]

Without fully addressing here the question of whether minorities could exercise the right of self-determination[98], it would be important just to say that the latter interpretation of this notion has its rightful logic too. In fact, if "peoples" have already exercised their rights of self-determination and –consequentially– constructed a sovereign State by themselves and for themselves, then the exercise of this right would have been already fulfilled, and therefore leaving no room for any other group within that society, such as potential minorities, to attempt a similar exercise. The logic of this interpretation is based on the idea that both minorities and majority have exercised all together the same right of self-determination, as one group, as one "peoples". As it has been said, in international law the emphasis is put on political entities with geographically recognised boundaries (the State, the colony, etc.), rather than on popular or ethno-cultural entities (the nation, the people –without "s"– or any other ethno-cultural group). This would be the case, even when the latter could have a consistent presence and associated configuration within a given the territory, as –for example– it could be the case of indigenous people.[99]

Additionally, one could also argue –in support of this interpretation– that the rights of self-determination cannot be exercised individually, but only by all members of the group(s) as a group, as a collective cohesive societal entity. Hence, a portion or a minority sector within that collectivity would not be able (or be allowed) to reneged or disavow the decision that has been taken by the entire societal entity as composed by all the sub-societal potential factions, or even by its majority in representation of that collectivity; at least as a matter of principle.[100]

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[96] See, General Assembly Resolution 2625 (XXV).
[97] See, A. CRISTESCU, *op. cit.*, p. 41, para. 279.
[98] This topic will be discussed later in this chapter, in section 4.5.
[99] G. ALFREDSSON, *Different Forms of and Claims to the Right of Self-Determination*, cit., p. 59-60.
[100] Only in a very few and extreme situations, will international order accept the exercise of the right to self-determination by a portion of population, which is specific in ethno-cultural characteristics, within a given State. As Prof. Casesse has said, *"...la libre disposition a été conçue soit comme un principe anticolonialiste, anti-néocolonialiste et anti-raciste, soit comme un principe de liberté contre l'oppression par un Etat étranger. En revanche, le principe ne couvre pas le droits des minorités ou des nationalités qui vivent dans un Etat souverain, sauf les cas où l'on refuserait l'accès des groups raciaux ou religieux au processus de décision politique."* See, A. CASSESE, *op. cit.*, p. 49.

Nevertheless, the interpretation of the term "peoples" that exactly *equalises* this legal notion to the current population of a given State (considered as a unity) is actually quite reductive. In fact, this would not be in line with the widest formula adopted by the UN Charter and by the Covenants, which –as we have already seen– refers to "all peoples", regardless of the fact that they have attained or not their own independence[101], but not only. Additionally, it would not be adjustable to States' practice, which has shown –at least– that *"...the international law of self-determination developed in such a way as to create a right to independence for peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation."*[102] According to Nowak, the right of self-determination, and hence the qualification as "peoples", is also available in *independent multinational States* to those peoples not protected as minorities by Art. 27 ICCPR.[103] In addition, Prof. Nowak added in his commentary that, in any case, *"...the question of which ethnic or national groups are to be qualified as "peoples" in the sense of Art. 1 is, highly disputed..."*[104]

Therefore, even if "all peoples" living in a territory of a given State have already exercised their right of self-determination, they still remain holders of this right and –consequentially– they can potentially regain its exercise in the future, as one group (all together, minorities and majority), and decide to change –for instance– the political constitution of the country.[105] However, if just one portion of the

[101] See, M. NOWAK, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2005, p. 20, para. 28.
[102] See, I.C.J., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, Report 2010, No. 141, p. 30, para. 72.
[103] M. NOWAK, *op. cit.*, p. 22, para. 31.
[104] *Ibid.*
[105] If we think carefully, this is what actually happened in Tunisia and Libya as a consequence of the so-called "Arab Spring". After decades of living under authoritarian regimes, perhaps with a sort of *tacit* or even *unconscious* consensus from larger portions of the population, the political lethargy was broken and Tunisians and Libyans decided to re-exercise their right of self-determination as "peoples", and not just as citizens subjected under the former constitutional regime. The case of Egypt is quite different, because the transition process, after the fall of Mubarak, was largely made under the constitutional rules and political organizational structure of the "old regime". I am aware that this affirmation could be controversial, in particular in connection with the possibility of *tacit* or *unconscious* consensus vis-à-vis a totalitarian or dictatorial regime. In the past, political and legal philosophers have tried to make a similar analysis with regard to the potential *consensual* attitudes of Italians or Germans vis-à-vis the Fascist and Nazi regimes, without perhaps arriving at final conclusions. This is not –of course– the right venue for exploring the legal and constitutional meaning of "consensus", but allow me to say that consensus constitute a broader notion than the individual act of giving "free and informed consent". Consensus involves a collective process and a collective outcome, which can potentially be reached not only by conscious active actions but also by *tacit*

population of that State claims the exercise of this right, as could happen in the case of a minority group (including indigenous people), then again, we would face the strict limit established in Article 2(4) of the UN Charter. That is, the defence of the territorial integrity or political independence of State parties. In fact, this limit has been ratified by the *"Declaration on the grating of independence to colonial countries and peoples"* of 1960, and by the *"Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"* (UN Friendly Relations Declaration) of 1970. Both instruments ratified the *principle of territorial integrity and political unity* of the States, which remains as one of the most important and central principles in international law. Indeed, it is in this sense that it has been recognised that *"[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter..."*[106] Therefore, any potential claim to secede should be interpreted in a very restrictive way.[107]

Nevertheless, this principle –as many other principles in international law– is not an absolute one. In fact, the Declaration on Friendly Relations went one step further and added one potential exception, stating that *"[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"*.

In my opinion, the possible answer to our initial question, namely, whether minorities (including indigenous people) could be considered as "peoples" under

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passivity. And it seems to me that, in politics, a passive attitude, consolidated through considerable periods of time vis-à-vis concrete politico-constitutional organisational models, could perhaps end in being a *tacit* or even *unconscious* support for those political models.

[106] See, *UN Declaration on the grating of independence to colonial countries and peoples*, General Assembly Resolution No. 1514 (XV), of 14 December 1960, Article 6; and *UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly Resolution No. 2625 (XXV), of 24 October 1970, preamble.

[107] See, A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, Cambridge, 1996, p. 108 et seq.

international law, could be found precisely in the above mentioned clause.[108] In fact, a literal and logical interpretation of the text of the referred clause –under the rules of Articles 31 and 32 of the VCLT– would certainly lead us to the following conclusion. The respect of the *principle of territorial integrity* of States is conditioned to the compliance by the same States with the *principle of equal rights* and *self-determination of peoples*, but not only. Additionally, the latter principle would have to be respected *as long as* States would possess *"... a government representing the whole people belonging to the territory without distinction as to race, creed or colour."*

Moreover, a *contrario sensu* interpretation would allow us to say that if the government (for it we understand the existing political system in a given State), exclude, disenfranchise or does not allow a portion of its population to take part in the political life of the State, then it would be hypothetically possible for these excluded groups to be granted –by international law– with the possibility to hold and exercise the right of self-determination as "peoples."[109] In this sense, the exclusion or disenfranchisement would take place when the affected populations would not be able to –directly or indirectly– participate in the government and in other essential socio-political institutions, but not only. In addition, the reasons of the said exclusion would have to be exclusively and particularly grounded in the *'race, creed or colour'* of the excluded group, that is in their particular *ethno-cultural* common characteristics, which make the group homogenous, distinguishable and *diverse* from the mainstream society.

4.2. Minorities as "peoples"

As we can see from the precedent paragraphs, the answer to the question of whether minorities could be considered as "peoples" is –at least– quite complex; a

[108] *Ibid.,* p. 111.
[109] According to Cassese, the Declaration *"simply demands that States allow racial and religious groups to have access to government institutions."* A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, cit., p. 114-115.

complexity which imposes the argumentative need to strive for analytical clarity and further clarifications.

First of all, it is important to bear in mind that the possibility for minorities (including indigenous people) to be considered as "peoples", and therefore to be regarded as holders of the right of self-determination, constitute an exception to the application of one of the most basic principles in international law, namely, the *principle of territorial integrity and political unity* of the States. In addition, and as a direct consequence of this exceptional character, the interpretation of this legal possibility should always be done in a very restrictive manner. Therefore, if a minoritarian group argues that it has been excluded from governance, based on the grounds referred within the Declaration on Friendly Relations, this plea should be interpreted very strictly. Again, the applicable legal principle is that minorities do not have the right of self-determination; the very exception to this rule is that they might have it.

The first consequence of the above mentioned restrictive interpretative character consists in the fact that –in case of minorities– it would not be possible to talk of *"guaranteed"* participation, in a sense of having secured chances to effectively take part in government or even to being able to modify or otherwise influence public policies.[110] In fact, the guiding rule is that the government should represent the whole population of the State *'without distinction as to race, creed or colour'*, and this means that the population (which in most cases coincides with "peoples") has to be seen as a whole integral entity, and not as a sort of aggregation of different ethno-cultural groups. In other words, a representative and democratic government should represent all individuals (which are at the same time the population of a distinct territorial or geographical entity)[111] and not the potential existing groups (regardless the fact that individuals could see themselves as affiliated

[110] I am referring here to "guaranteed chances" to participate in governance exclusively from the point of view of the exercise of the right of self-determination. Therefore, these comments are not directly applicable vis-à-vis those potential positive actions that, in different and concrete socio-political and societal circumstances, could be seen as needed by the application of the principle of equality and non-discrimination and the need to deal with those potential factual imbalances in society.

[111] See, G. ALFREDSSON, *Minorities*, *Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law*, cit., p. 170.

to those groups).[112] Hence, the participatory requirement could only refer to a *"real and effective participation of the people in the decision-making processes",* understanding "people" as the aggregation of individuals that –in most cases– constitute the whole population of a given State, and not as referring to potential ethno-cultural groups that could be present within the State's territory.[113]

The above mentioned interpretation finds –in my opinion– a clear further support on the wording of the UN Vienna Declaration and Plan of Action, adopted at the World Conference on Human Rights, held in Vienna in 1993. The Declaration, when making references to the Friendly Relations Declaration, has strongly and emphatically reaffirmed the principle of territorial integrity and political unity of sovereign and independent State. In fact, it clearly states that that Declaration *"shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part [their] territorial integrity or political unity…"*[114], but not only. The Vienna Declaration also –and perhaps more importantly– has clarified the condition under which this essential principle will be respected by the international community. That is, that independent States have to conduct themselves *"…in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people…"*[115]

But again, it would be possible to ask which is the "people" referred by the latter Declaration. The people that represent the entire population of the said State or might it also refer to an ethno-cultural minority that occupies just a portion of its territory? In my opinion, the answer is given in the final line of the above mentioned

[112] To put it in another way, "peoples" is always composed by individuals that conform "a group" which is seen by the international community as holding the right to self-determination in a sense of Article 2(1) of the UN Charter and common Article 1 of the two international Covenants. Moreover, "groups" are also composed by individuals who hold special ethno-cultural affiliations, but within the bosom of a larger aggregation, namely that one that constitute "peoples". For further reading on this topic, see among other authors, M. SCHEININ, *What are Indigenous Peoples?*, in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden/Boston, 2005, 3-13.

[113] See, Article 67, UN Vienna Declaration and Programme of Action. Just in addition to the topic under discussion, and with the purpose to make a further clarification, if the clause of this Declaration target individuals who conform the population of a given State, and not potential existing groups, then it could not be used as a valid argument, for exemplified lack of participation in the decision-making process, the fact of the inexistence of a quota system that will guarantee and secure the participation of minority groups or even the fact that they do not enjoy certain degrees of political, legal or territorial autonomy. As it has been already said, the latter are valid potential political claims, based on legitimate political aspirations, but certainly not in existing rights.

[114] See, *Vienna World Conference on Human Rights Declaration and Programme of Action* of 12 July 1993, UN Doc. A/CONF.157/23, I.2.

[115] *Ibid.*

paragraph when the Declaration refers to *"a Government representing the whole people belonging to the territory without distinction of any kind."* The Declaration always makes reference to a Government of an independent State; therefore the referred "*territory"* should necessarily be the territory of that State, and not a potential territory in which a potential ethno-cultural minority has consistent presence. And if this argumentation is not convincing enough, as I think it is, the very final wording of the paragraph erases any potential doubts; the "people" belonging to that territory has to be considered *"without distinction of any kind."* Hence, ethno-cultural considerations are not allowed, as a matter of principle.[116]

Having this general principle in mind, one could argue that members of minorities (as part of a whole population of a given State) would have the very exceptional possibility to exercise the right of self-determination in so far as they could be considered as "peoples", under the above mentioned extremely unbearable conditions and circumstances. The latter would include a systematic and grave denial of their fundamental rights that would generate their complete marginalisation from the political decision-making processes, with exclusion from or any likelihood for a possible peaceful solution within the existing State's institutional structure.[117]

Last but not least, an additional extreme factual situation should be added to those exceptional circumstances that would pave the way for the potential exercise of the right of self-determination by minorities. This would be the case in which members of minorities would face a concrete threat of physical elimination, not just in their individual capacity, but as members of a given ethno-cultural group.[118]

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[116] Therefore, the current "people" in a given State's territory, is still –as a matter of principle– the very same "people" or ethno-cultural societal aggregation that has exercised in the past their right of self-determination. As Grotius has said, *"...a People [...]is reckoned the same now as it was a hundred years ago, though none of those who lived then is alive now, as long as that communion which makes a people and binds it together with mutual bonds preserves its unity, as Plutarch expresses it."* As we can see, for this great jurisconsult, "peoples", as a societal entity, does not change with the past of time if it can still be seen as a unity. See, H. GROTIUS, *The Rights of War and Peace (De Jure Belli et Pacis)*, 1st. ed. 1625, London, 1853, Chap. IX., p. 135, para. III(2).

[117] See, A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, cit., p. 119-120.

[118] In fact, another particular circumstance that could lead to the consideration of members of minority groups as "peoples", it would be the case of genocide, as understood in the UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, which is aimed at protecting national, ethnical, racial and religious groups from *"acts committed with intent to destroy, in whole or in part,"* those groups (Article II). As it has been said, Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of protected groups. Therefore, if an ethno-cultural group is persecuted and face physical extermination, then they would be allow under international law to

As we can see, there are exceptional situations in which ethno-cultural groups can exercise the right of self-determination, even when they do not constitute the whole population of a given country. In current international law, the case of Kosovo is perhaps a clear example of it.[119] But there is one last question that still has to be answered. As it has already been maintained, minority or other differentiated groups can be exceptionally considered as holders of the right of self-determination, but… which version of it? In fact, nowadays it would be possible to recognise in the practice of international community –at least– two different kinds of self-determination, namely internal and external self-determination. Therefore the question that still remains unanswered would be whether minorities (including indigenous people) and other ethno-cultural groups with specific territorial projection are entitled or not to either both understanding of these rights, or just one of them, and in this case, to which of them. In the following section, I will attempt to answer this relevant issue.

4.3. Minorities and Self-determination: a 'rights' based approach

As we saw, when analysing within the precedent pages the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, there were two hypothetical situations that could be considered as potential exceptions to the *principle of territorial integrity* and political unity of the States. The first one refers to the *absolute political exclusion* and disenfranchisement in a democratic system of an ethno-cultural minority. Secondly, to the case in which members of a minority group are under threat of *physical destruction* and annihilation, just because of their ethno-cultural appurtenance to the said group. In my view, these two different situations lead toward different exercises of the right of self-determination.

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exercise the right of self-determination, as long as they occupy a homogeneous territory. As a matter of clarification, it is necessary to say that the so-called *'cultural genocide'* is not included within the legal definition of 'genocide' and –therefore- it cannot be used as a weapon against the territorial integrity and political unity of States. On this regard, see –among other authors– F. ERMACORA, *op. cit.*, p. 312 et seq.

[119] See, I.C.J., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, Report 2010, No. 141, p. 29, para. 78 et seq.

In fact, if the complete political exclusion and disenfranchisement of minority groups does not arrive at extreme situations in which their very physical integrity or survival would be at stake, they would only be entitled to be granted with a sort of *internal* autonomy in governance, but within the political organisational structure of the national State in which they live. In other words, if ethno-political minorities are absolutely excluded from political participation in a democratic society, which means that they do not have access to the institutional channels in which they would be able to strive for their legitimate political aspirations, and if that exclusion is based exclusively on their ethno-cultural *differentness*, then the *principle of political unity* of the State will be at stake. This means that totally politically excluded minorities, whose members have been systematically and gravely impaired in the very exercise of their most fundamental rights (because of their ethno-cultural membership), would have the possibility to rightfully claim for the recognition of political autonomy –but not only– within the territorial borders of the State.[120]

Hence, because the territorial integrity of the State is not at stake, then it would be possible to conclude that –in this first case– we are facing a situation of potential exercise of the right of *internal* self-determination.[121] This right is the right that has been recognised within common Article 1 of the ICCPR and ICESCR, and basically means the possibility to have broad autonomy in the administration of their internal affairs, that would allow them to achieve political and –to a certain extent– economic, social and cultural self-determination, within the democratic political framework of the existing national State.[122]

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[120]The right to internal self-determination has been defined –in a very broad sense– as *"...le droit d'un peuple d'exercer un libre choix dans le cadre d'un système étatique don't on ne veut pas modifier le statut international."* See, A. CASSESE, *Article 1 - Paragraphe 2*, cit., p. 45. Nowak interpreted this right in a more restrictive manner, strassing that this right can be achieved by *"...providing broad autonomy within a given State and by granting the relevant people corresponding participation in the State's political decision-making process."* See, M. NOWAK, *op. cit.*, p. 24, para. 34. For detailed explanations in connection with the potential scope and extension of the right of *internal* self-determination, see –among other authors– G. ALFREDSSON, *Different Forms of and Claims to the Right of Self-Determination*, cit., p. 58 et seq.

[121] In the same words of Cassese, *"le principe [de la libre disposition] ne couvre pas les droits des minorités ou des nationalités qui vivent dans un Etat souverain, sauf les cas où l'on refuserait l'accès des groupes raciaux ou religieux au processus de décision politique."* See, A. CASSESE, *Article 1 - Paragraphe 2*, cit., p. 49.

[122] In his commentary, Nowak in fact stressed the democratic essential nature of this right, when he said that *"[t]he right to internal political self-determination is based on a democratic element, which is to be exercised together with the Covenant's other political rights and freedoms..."*See, M. NOWAK, *op. cit.*, p. 23-24, para. 34.

However, if the political exclusion of an ethno-cultural entity, that has consistent geographical territorial presence within the boundaries of a given State, would be accompanied with other actions leading to grave and gross violations of fundamental human rights, to the extreme point in which the very physical survival of the members of that given ethno-cultural group –as individuals, as human beings– would be under specific threat (just because of their ethno-cultural appurtenance), then the legal implications with regard to the right of self-determination seems to be quite different. In effect, if the life, liberty and physical existence of the members of an ethno-cultural entity are under concrete and specific threat, and if their complete political exclusion leads also –as Prof. Cassese has said– to an *'exclusion of any likelihood for a possible peaceful solution within the existing State structure'*, then it would be perhaps possible for that specific ethno-cultural group to claim the exercise of *fullest version* of the right of self-determination.[123]

In other words, under the most extreme and existential threat (e.g. as the case of genocide, Apartheid, colonial domination, or even foreign military occupation), and without having any possibility to resolve this extreme violent situation within the institutional channels of a democratic system, then it would be possible for a threatened ethno-cultural group to claim and exercise a right of *external* self-determination. In this sense, the threatened group would be able to build their own political organisational structure, with clear territorial borders, and to seek –in the vest of "peoples"– its international recognition.[124]

As we know, this version of the right of self-determination has been called *"external"*, and –in my opinion– it is the version referred by the UN Charter (Article 1(2)).[125] The exercise of this right would involve the possibility to choose the international status of the *peoples* and territories concerned, and –for this reason– it would be only open to those persecuted groups that also occupy a clear and

[123] As Prof. Cassese has said, *"denial of the basic right of representation does not give rise per se to the right of secession. In addition, there must be gross breaches of fundamental human rights, and, what is more, the exclusion of any likelihood for a possible peaceful solution within the existing State structure."* See, A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, cit., p. 119-120.
[124] In the words of Prof. Cassese, *«[a] racial or religous group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach. Extreame and unremitting persecution and the lack of any reasonable prospect for peaceful challenge may make secession legitimate. »* See, A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, cit., p. 120.
[125] See, A. CASSESE, *Article 1 - Paragraphe 2*, cit., p. 49.

homogeneous territory and who are politically and economically sustainable and organised. To put it shortly, ethno-cultural groups facing potential or current acts of genocide would have the possibility to self-determine their international status only if they could also be considered as "peoples" under international law.[126]

Additionally, it would be important to bear in mind that the recognition of the right of *external* self-determination has to be interpreted in a very restrictive manner.[127] This is the case, especially because of the fact that the possibility to legally *secede* from the territory of an already recognised State, could basically be seen as a sort of *revolt* against a previous exercise of the very same right. Indeed, the previous exercise of the right of self-determination by the population of the State in question has led –precisely– to the creation of the said State.[128] Hence, the exercise of this sort of "*remedial secession*"[129] should be considered limited to those very exceptional cases in which the targeted ethno-cultural population would face absolute extreme circumstances which do not give any room for any other action than to revolt against their own imminent physical destruction.[130] Therefore, beyond these very exceptional and specific cases in which it would be possible to consider ethno-cultural groups as "peoples", minorities (including indigenous people) are not holders of the right of self-determination.

As we can see, although our slight digression in connection with the right of self-determination has been quite extensive, in my view it has helped us to confirm

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[126] See, G. ALFREDSSON, *Minorities*, *Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law*, cit., p. 170 et seq.

[127] We have to always remember that *'[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'*. See, *UN Declaration on the granting of independence to colonial countries and peoples*, No. 1514 (XV) of 14 December 1960, Article 6.

[128] As Cassese said, *'the peoples' right to external self-determination is seen to have been limited by the perceived need to safeguard territorial integrity and political unity.'* See, A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, cit., p. 73-74.

[129] As Weller has said, *"[w]here a central government persistently and systematically represses a territorially organised, and perhaps also constitutionally recognised, segment of the population, a right of secession might be constituted. Similarly, it is argued that persistent and discriminatory exclusion from governance or a constitutionally relevant or recognised segment of the population gives rise to a right to remedial self-determination."* See, M. WELLER, *Escaping the Self-Determination Trap*, Leiden/Boston, 2008, p. 59 et seq.

[130] Nevertheless, even in those absolute extreme cases, the proposed solution is not pacific among members of the international community. In fact, the ICJ, in its advisory opinion regarding the case of Kosovo, has recognised that *"…differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances"*, and preferred to not take a clear stand in the matter. See, I.C.J., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, Report 2010, No. 141, p. 31, para. 82.

our main liminal hypothesis with regard to the connection between multiculturalism and ethno-cultural groups' political aspirations. In fact, only under very exceptional circumstances will general international law provide the necessary legal grounds over which ethno-cultural groups would be able to channel the realisation of their *own* political aspirations and claims for a multicultural society. That is a society in which public societal institutions would ideally reflect and mirrored the ethno-cultural particularities of *that* given ethno-cultural group, and which will back up and give visibility to *their* cultural diversity and differentness.

5. Conclusion

As it has been already maintained, in an open, pluralist and democratic society, all individuals, regardless their ethno-cultural appurtenances, should be able to freely and culturally express themselves, individually or in community with the other members of the ethno-cultural entity or group in which they culturally recognise themselves. Hence, in this sense, they would be able to freely *'enjoy their own culture, to profess and practise their own religion, or to use their own language'*.[131]

In an open, pluralist and democratic society, societal entities or cultural groups –majorities and minorities alike– should have (and they indeed have) the possibility to freely express and make public their cultural proposals. This basically means that all their members would not only be able to culturally express themselves –in their own individual societal interventions– but also to seek larger societal support for their cultural views and understanding from the rest of the society, including –of course– members of the cultural majorities. In other words, members of cultural minorities could –in an open, pluralist and democratic society– freely and publicly advocate for the societal adoption of their cultural proposals, including their pleas for *deconstruction* or rebuild of the common socio-political and legal societal institutions and structures, as multiculturalist supporters have suggested.[132]

[131] See, Article 27 ICCPR.
[132] See, I. M. YOUNG, *op. cit.*, p. 174 et seq.

But again, to be able to freely advocate for one specific socio-politico-cultural programme does not mean that cultural minorities would have the "right" to impose on the mainstream society the assumption of their *legitimate* political aspiration for institutional cultural change. To put it in a different way, to have political aspirations of cultural change is perfectly legitimate in an open, pluralist and democratic society. For this reason everybody (members of minorities and majorities alike) are and should be guaranteed the exercise of their cultural rights, including –of course– the right to enjoy their *specific* culture *'in community with the other members of their group'*. What is not (and should not be) guaranteed in a democratic society is the *success* of those political cultural aspirations.[133] Let me explain this more in detail.

In an open, pluralist and democratic society, political aspirations of all societal entities or ethno-cultural groups are subjected to what has been called above the *"democratic game"*, which basically consists of a dialogical process that permits to methodologically channel all political aspirations and cultural understandings and views into a common societal decision-making process. In fact, the *'democratic game'* not only guarantees a fair decision-making procedure, where the views and aspirations of the majority find their institutional mould, but also where members of cultural minorities find the possibility to freely express and pursue their own views, cultural understandings and political aspirations. Within this democratic framework, members of minoritarian societal groups are indeed guaranteed in the enjoyment of their fundamental rights (including –of course– cultural rights); what they do not have guaranteed is their socio-political and cultural *success*.[134]

Therefore, even when the socio-political structures, cultural and legal institutions of a democratic society have incorporated and mainly mirror the cultural views, understandings and meaningful valuative systems of the societal majority,

[133] See, UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, Paris, 2009, p. 3.

[134] In connection with the degree of success that minorities could achieve within a democratic framework, and the difficulties that they objectively face in trying to gain support, within democratic institutions, for their proposals, has been clearly pictured by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), which has stated that *"[a]lthough parliamentary systems differ, indigenous parliamentarians should have access to leadership positions within the parliament. Without the support of parliamentary leaders, indigenous parliamentarians experience difficulty in getting their proposals onto the parliamentary agenda and in moving them through the parliamentary process."* See, Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Progress report on the study on indigenous peoples and the right to participate in decision-making*, UN Doc. A/HRC/15/35, Human Rights Council, 2010, in particular, p. 19, para. 78.

members of the societal minorities do not have the *right* to legally impose the de-construction of the common societal institutions –as claimed by multiculturalists– in order to forcibly incorporate into them their own cultural views and understandings. As I said before, *"in a pluralist and democratic societies, numbers count… and cultural matters are not excluded from this general rule."*[135] In democratic societies, minority members would have indeed guaranteed the possibility to freely and openly engage in dialogue and publicly advocate for incorporation of their own cultural views and value systems within the common societal institution, but not only. They also would have the possibility to claim and compete for broad public support vis-à-vis their own cultural position, trying to persuade the mainstream society on the need for cultural change and on the necessity of culturally deconstructing common societal institutions. They can even propose the embracement of the multiculturalist societal model. However, what they cannot do –as a matter of principle– is to culturally (or even legally) force the common cultural *will/understandings* of the entire society, which would be most likely influenced by the cultural preferences of the majoritarian cultural societal aggregation.

In a democratic society, common societal cultural institutions (including legal systems) are constructed through societal consensual agreements among all its members, including –of course– minority members. However, within a democratic framework, a *consensus* based agreement does not mean –of course– to require the specific and active *consent* of all individual members of the society. In fact, a democratic consensus means the acceptance of the decision that has been built through the dialogical, inclusive and methodological channel, which guarantees the effective (direct or indirect) participation of all members of the society, including –of course– members of minoritarian societal aggregations. In other words, what is absolutely required in a democratic society is to have inclusive participatory *decision-making procedures*, which guarantees the effective –direct or indirect– participation of all societal members, majorities and minorities alike, in an open, constructive and inclusive socio-political dialogue.[136]

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[135] See above, Section I.

[136] According to the UN *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, *"[d]emocracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and*

However, what is not guaranteed in a democratic society is the *cultural outcome* of this dialogical process. Majority and minority members alike, have to democratically accept the cultural outcome of this *"democratic game"*, even when this process would most likely lead to the ratification and enhancement of cultural values and worldviews of the majority. As I said before, in democratic systems, numbers count *as long as* they respect and do not infringe internationally recognised human rights minimum standards and fundamental freedoms, which protect minorities from any potential *forced* cultural alienation.

In our modern world, democracy and human rights are interdependent and mutually reinforced concepts.[137] This means that there is no truly democratic system if the human rights and fundamental freedoms, including the right to *effectively* participate in the socio-political and cultural life of the society, are not respected and guaranteed. For this reason, the dialogical outcome of the *"democratic game"* cannot and must not lead to neither the disenfranchisement, limitation, or otherwise arbitrary restrictions on the enjoyment of fundamental human rights by the members of the ethno-cultural minorities, nor to threaten their physical survival. But, in the event that those grave violations occur, the overall validity of those foundational principles enshrined in the Charter of the United Nations, *"including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism…"*[138], could be at stake. It is for this reason, that international law exceptionally recognises, and restrictively admits, just a very few exceptions to another foundational principle of our international legal construction, which is the so-called *"principle of territorial integrity or political unity of sovereign and independent States"*.[139]

In fact, as we have already maintained[140], when members of minorities –just because of their ethno-cultural appurtenance to a minoritarian societal entity– are

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protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached." (See, para. I.8).

[137] *Ibid.*

[138] See, UN *Vienna Declaration and Programme of Action,* Preamble.

[139] See, UN *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly Resolution No. 2625 (XXV), of 24 October 1970.

[140] See in this Chapter, Section 4.3.

subjected to unbearable conditions, then it would be possible for them to exceptionally exercise the right of *internal* self-determination[141], not as minorities but just as "peoples".[142] The recognition of this exceptional right is grounded on the gravity of the conditions, which would not only implicate a systematic and grave denial of their fundamental rights, but also their *complete marginalisation* from the political decision-making processes, and therefore the absolute impossibility of any dialogical peaceful solution within the existing State's institutional structure. Hence, ethno-cultural minorities, which are totally excluded in political terms, would have the possibility to rightfully claim the recognition of political autonomy (including economic, social and cultural aspects), within the territorial borders of a given State, under the right of self-determination, recognised within common Article 1 of the ICCPR and ICESCR.[143] In other words, in this case they will have the possibility to rightfully and legally claim the incorporation of their world views, institutional understandings and system of values within the common societal institutions, as a guaranteed remedy against structural and fundamental human rights violations. Notwithstanding, this does not mean the recognition of a multiculturalist society, but just a remedial arrangement for a dysfunctional democratic society.

Last but not least, in case of threat to the very *physical existence* of the members of an ethno-cultural minority, based on their membership in a group (as in the case of genocide), it would be even possible for that specific societal entity to claim the full exercise of the right of self-determination. This means, to rightfully claim and exercise a *remedial secession*, under the light of Article 1(2) of the UN Charter.[144] In this case, the threatened minority group would have the possibility to build –under the vest of internationally recognised "peoples"– its own socio-political, cultural and legal state-organisation, with clear territorial borders. Hence, this latter case cannot be considered either as an example of acceptance and forcible imposition

[141] It is important to notice that, the use of the term *self-determination* for these cases that refer to the possibility of minorities gaining socio-political and institutional autonomy and self-governance label does not help, on the contrary, it may create false expectations and negative reactions. As it has been said, *"[t]he self-determination label does not offer improved chances of obtaining autonomy; on the contrary, it is more likely to alienate states and to disappoint the beneficiaries. The rights offered, in this case autonomy, should be called by their correct names and their image not misrepresented by convenient labelling."* See, G. ALFREDSSON, *Different Forms of and Claims to the Right of Self-Determination*, cit., p. 72.
[142] See, A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, cit., p. 119-120.
[143] See above, footnote no.120.
[144] See, M. WELLER, *op. cit.*, p. 59 et seq.

by international law of a multiculturalist society. On the contrary, it would just be a *remedial* construction of a "cultural" –rather than "multicultural"– State.

However, if open, pluralist and democratic societies cannot guarantee the politico-cultural success of ethno-cultural minorities, in a sense of shaping and moulding common societal institutions, then we can still introduce the question of what minority members can do in order to effectively achieve their legitimate ethno-cultural-political aspirations. My answer to this question is simple and quite straightforward, and perhaps for that reason it could be quite controversial too. In an open, pluralist and democratic society, members of minorities can make full use of all recognised human rights and fundamental freedoms, in order to freely enjoy and practice their cultures, individually or in community with others, but not only. In addition, and perhaps even most importantly from a socio-political perspective, they would be able to broadly and publicly make full advocacy and promotion –vis-à-vis the mainstream society– of the "ontological" goodness of their own *differential* cultural understandings, world views and overall system of values.

But, if in that open, inclusive and pluralist dialogical process they are not culturally convincing, and therefore they do not succeed in attracting wide public societal support for their own cultural proposals, then the very same democratic principles that guarantee their freedom of expression and open participation, impose them to accept the fair *cultural outcome* of the *'democratic game'*. Within the said "*democratic game*", everybody is taken on board and welcomed to participate, but –in ultimate terms– not everybody would politically (or even ideologically) *win*. Nevertheless, everybody would have a dimension that is excluded from the said game, a dimension that cannot be *discretionally* restricted or subjected to political or even ideological bargain; in a democracy, everybody –members of majorities and minorities alike– has human rights and fundamental freedoms fully guaranteed… or should have.

In short, as it has been already mentioned, the question is not about how to reinvent the wheel (or to deconstruct common societal institutions in multicultural terms), but just how to make full use it (in human rights terms)!

CHAPTER THREE
CULTURE DIVERSITY

> *"[T]here are nowadays many multicultural societies, and the attention due to the cultural diversity seems to us to constitute an essential requisite to secure the efficacy of the norms of protection of human rights, at national and international levels. Likewise, we consider that the invocation of cultural manifestations cannot attempt against the universally recognized standards of observance and respect for the fundamental rights of the human person."* I-ACtHR, Community Mayagna (Sumo) Awas Tingni case.[1]

1. Introduction

In the previous chapter, we have been slightly introduced to the idea that culture diversity is a notion that lies at the very bottom of multiculturalist discourses and –therefore– gives continuous nourishment to political multiculturalist aspirations of disenfranchised ethno-cultural minorities.

It has also been maintained that culture or cultural diversity and multiculturalism are notions intimately related. Multiculturalism has built its ideological proposals upon a concrete factual description of the societal reality existing in our modern societies. The diversity of cultural expression, ideas, practices and understanding that indeed exist in our societies have provided the necessary factual substratum for the ideological construction of an "ideal" society in which each ethno-cultural entity or group would have the possibility to recreate and build its own socio-cultural institutions, that would ideally reflect its own cultural specificities and particularities. In this sense, cultural diversity is a notion that lies at the very bottom of multiculturalist discourses and –therefore– gives continuous nourishment to political multiculturalist aspirations of disenfranchised ethno-cultural

[1] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I-ACtHR, Series C No. 79. Judgment on Merits, Reparations and Costs of August 31, 2001, Joint Separate Option of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, para. 14.

entities, in their *deconstructivist* attempts of building (perhaps, the most accurate term would be… rebuilding) a different society. That is, a society in which each ethno-cultural group and cultural expression would be equal in dignity and –therefore– equally able to shape, mould and influence all economic, social, cultural and legal institutions that regulate societal dynamics within the society.

However, what is cultural diversity? Is it possibly a factual reality that just refers to the existing plurality of cultures? Or is it perhaps an ideology such as multiculturalism, and therefore giving substance to rallying calls among those who denounce persistent socio-economic inequalities in developed societies? Is it maybe a *societal value*, just like justice or tolerance, which could possibly be articulated into a legal principle, as for instance the principle of equality and non-discrimination, or even providing potential content and substance to a concrete and exercisable right, such as the right to take part in the cultural life of a given society? Does a right of cultural diversity exist?

As we can see, all of the above mentioned questions not only indicate that cultural and culture diversity are not only those kinds of notions that are difficult to be conceptualised, but also –and perhaps even most relevantly– that they are located at the centre of large and complex ideological battles. For these reasons, and for the importance that culture diversity has gained within the human rights discourses and in particular –as we will see in the following chapters– within the jurisprudence of one of the main regional human rights courts, that is, the Inter-American Court of Human Rights, it would be important to try to conceptualise or –at least– to sketch a basic understanding of the concept of culture diversity.

2. The notion of Culture (or Cultural) Diversity

The point of departure in any discussion in connection with cultural diversity is obviously the notion of culture; notion that we have already discussed in the previous chapter, together with the social implications that the plurality have within our modern societies. In this sense, it has already been maintained that for the United Nations Educational, Scientific and Cultural Organization (UNESCO), culture

"*...should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."*[2] But if we take into consideration the fact that in the world exist a wide range of distinct cultures, then our research analysis will be necessarily led toward the notion of plurality, versus the idea of coexistence between more than one cultural manifestation within the same societal milieu. In fact, we have already seen that when societies have at their bosom a presence of diversified ethno-cultural expressions, different societal dynamics appear between those cultural entities and –in most cases– those relations reflect majority-minority dynamics. Moreover, a sociological and even ethno-political analysis of these dynamics will certainly place them –as we saw in the preceding chapter– at the centre of potential multiculturalist claims, put forward by disempowered ethno-cultural groups.

But, if the existing cultural diversity in a given society lies at the very base of multicultural political aspirations and claims, then it could be possible that we are facing a different dimension of this notion, that is not just a mere factual dimension but perhaps a sort of valuative, moral or even legal dimension. As a factual notion, culture diversity could be substituted with those other similar notions that we already analysed, such as –for example– cultural plurality or cultural pluralism.[3] But then again, if cultural diversity has been used as justification for the reorganisation of societal institutions and the redistribution of powers and rights among existing socio-cultural entities, then we have to do nothing but recognise that these notions have or could have strong valuative or moral aspects that have to be explored.

Consequently, it seems necessary to analyse the normative implications that the presence of a diversified number of cultural entities could have, that is the way that culture diversity is perceived and incorporated into the international legal order

[2] This definition is in line with the conclusion of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982), of the World Commission on culture and Development Our Creative Diversity (1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998).

[3] According to UNESCO, these two notions have not exactly the same meaning. For this institution, plurality of cultures in a given society is a necessary but not a sufficient pre-condition for cultural pluralism, *'because the simple juxtaposition of diverse cultures does not in itself create the interconnections and bonds which characterize cultural interplay'*. In fact, for UNESCO, cultural pluralism is *"...less about this coexistence of cultures than about an interaction which leads them to break out of their isolation and become part of a wider context."* See, UNESCO, *Towards a constructive pluralism*, Paris, 1999, p. 19.

and –in particular– its potential or concrete impact on human rights standards. Indeed, in order to continue with our critical analysis (in particular vis-à-vis multiculturalist postulates), it would be important to consider whether diversity could condition the legal interpretation of the scope and content of those individual rights, under the interpretative light of the ethno-cultural appurtenances.

In this sense, and coming back to UNESCO's consideration of culture and cultural diversity, this organisation has recently published a large and deep study, integrally dedicated to the question of culture diversity, in which the latter is seen not only as factual description but also as having important political implications, in particular in connection with its role as a *"resource"* for managing –and perhaps accommodating– cultural differences.[4] In fact, cultural diversity is defined as the *"positive expression"* of one of the general objectives that this organisation sees as to be attained, namely *"the promotion and protection of the cultures of the world, which are faced with the danger of uniformisation."*[5]

As we can see, reference to *'resource'* or even *'positive expression'* gives us a clear understanding that cultural diversity is seen from a normative perspective or –at least– as a valuative element that could be used for the achievement of a societal aim. Furthermore, the fact that cultural diversity has to be protected against *"uniformisation"*, against –for instance– the loss of diversity, put the notion of cultural diversity in a sort of pro-active and *political* role. Indeed, it would be possible to argue that cultural diversity becomes a "*societal value*" that has to be not only protected but also pursued, and therefore with the potentiality to inform and give content to legal principles and rights. In other words, if cultural diversity might have to be considered as a guiding value that would ideally provide a sort of roadmap to socio-cultural and institutional organisation of our modern societies, then it would also provide axiological contents to those fundamental legal principles over which the entire legal system of a given society is constructed, such as the principle of equality and non-discrimination, but not only. Its potential axiological interpretative incorporation within those basic legal principles would also pave the way for a

[4] See, UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, Paris, 2009, p. 21 et seq.

[5] See, UNESCO, *Meeting of the Experts Committee on the Strenghening of Unesco's role in Promoting Cultural Diversity in the context of Globalization*, (Doc. No. CLT/CIC/BCI/DC.DOC 5E), 2000, para. 7.

possible reinterpretation of recognised fundamental rights, in a "cultural diversity friendly" sense.

This axiological understanding of 'cultural diversity', as a *societal* value, is again reaffirmed by UNESCO when said that *"[a] more constructive view of cultural diversity is that it should not simply be tolerated, but fully recognized and integrated into the democratic game-plan."*[6] In fact, the integration of cultural diversity within the *"democratic game-plan"* is nothing but a reaffirmation of the axiological importance that cultural diversity has within a democratic system. In this sense, in this valuative vest, it would be possible to use cultural diversity as an *axiological tool* for social, political and institutional re-organisation of the society. This would be possibly done through the incorporation, into the socio-political system, of the different cultural views and understandings that are already present in society; or –at least– through their *'difference-friendly'* reinterpretation. Furthermore, as a *value*, cultural diversity would necessarily have an intimate connection with principles and rights that are part of the legal system of a given society, and therefore, would bring into the operative interpretation of those rights and principles the existing different societal cultural views. In other words, as it happens within all legal systems, culture and even cultural diversity –as *societal values*– would *axiologically* inform legal principles, and they would provide interpretative substantial content to fundamentally recognised rights.

The above analysis of the notion reflects –without any doubt– a social view of the worth of cultural diversity for a given society. If cultural diversity is a *societal value*, it is because it has an axiological worth for that society, and hence indeed represents a societal point of view. But this is not the only valuative aspect of cultural diversity. In fact, from an individual perspective, the existence of a plurality of cultures in the world also means that different human beings, different groups and cultural entities enjoy the benefit of culture in different ways. That is, allowing them to recognise themselves in a different understanding of *'the good'*, finding meaning for life in the variety of views and traditions proposed by the different cultures.[7] In

[6] As it has been said, *"[c]ultural pluralism thus leads to a conception of personal identity open to the most diverse influences, using any of them according to its needs and free of the obligation to move within a single cultural sphere…"* See, UNESCO, *Towards a constructive pluralism*, cit., p. 23 et seq.

[7] Referring to the notion of *'national identities'* UNESCO has highlighted the fact that *"[i]n a world made more complex by the unprecedented reach, intensity and immediacy of human interchanges,*

addition, if we consider that their individual identities would most likely mirror those cultural peculiarities that characterise one or more of those cultural traditions, then it is quite clear that the acknowledgement of the *value* of cultural diversity would have a considerable impact on the *'culture bearer'*. In fact, the latter is the person who would ideally find himself or herself in front of a diversified variety of cultural choices, and who would also see legitimised his or her own cultural traditions vis-à-vis other members of the society.[8] As it has been said, the right to culture *"...must be understood not as an abstract right, but as the right of a social group (nation, people, tribe, community) to its own culture. Thus, each community, each people has its own concept of what cultural heritage means."*[9]

Consequently, it would be important to keep in mind that the notion of *'cultural diversity'* could not only refer to a multiple manifestations and conceptions of culture that exists in almost all societies (factual aspect), but also a *societal value* that could operate not only as an argumentative political tool that provides legitimation for different groups or cultural entities in their struggle for having positive recognition and presence in the societies where they live, but also as an axiological tool for the interpretation (or perhaps re-interpretation) of legal principles and fundamental rights. From this political angle, the notions of cultural diversity and multiculturalism overlap, in a sense that both could be used to channel political aspirations which ideally pursue a re-dimensioning of the socio-political structures and institutions of a given society. The differences between them are nevertheless substantial. Multiculturalism is –in essence– an ideology, and cultural diversity is in essence a factual situation whose preservation has become –according to UNESCO– an axiological standpoint for modern societies. But, when the factual situation is penetrated with axiological content, that is when cultural diversity is not seen any longer as a mere description of the reality but as a societal value that has to be protected and pursued through its institutional articulation in democratic societies, then the difference between these two concepts still remain substantial but at a

national identities no longer represent the sole dimension of cultural identity. Reflecting a reality defined and constructed in response to projects of a political nature, the foundation of national identity is typically overlaid with a multiplicity of other affiliations." Ibid., p. 20.

[8] As we will see further in this chapter, in terms of rights, the enjoyment of someone's culture it has been labelled as the right to cultural identity.

[9] See, R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, Organization of American States (OAS), 2002, para. 130.

different level. In this sense, as an ideology, multiculturalism provides the political "ideological" content for the identification of those essential societal values that a *multiculturalist* society should pursue; instead, cultural diversity could be (and perhaps is) one of those identified societal values. To put it bluntly, cultural diversity is –or could be– a factual reality in a given society; multiculturalism provides –or could provide– the socio-political ideological foundations for its axiological interpretation as an essential *societal value*.

After having explored these conceptual but nevertheless important angles, it is time to focus on another essential aspect of the multiculturalism-cultural diversity tandem, which is nothing but the legal aspects or consequences of the (multiculturalist) re-interpretation of cultural diversity, and –in particular– its potential effect upon individual human rights. Within the following section, we will briefly analyse this interrelation and, in order to do so, we will shortly review UNESCO's Convention and other international legal instruments that have dealt with this topic.

3. *The UNESCO understanding of Cultural Diversity and Pluralism*

In the last decades the United Nations Educational, Scientific and Cultural Organization (UNESCO) has engaged itself in a process of normative regulation of the concept of cultural diversity. Since the creation of the World Commission on Culture and Development in 1992, with the mandate to prepare a World Report on Culture and Development, UNESCO convincingly turned its eyes toward the world's needs for respect of culture and management of diversity. But even before the issue of this report, UNESCO had approached cultural diversity and cultural policies in its "Mexico City Declaration on Cultural Policies" of 1982. This Declaration, not only ratified the understanding that every culture represents a unique and irreplaceable body of *values*, but also that the recognition of the presence of variety of cultural identities constitutes the very essence of cultural pluralism.[10]

[10] See, UNESCO, *Mexico City Declaration on Cultural Policies*, adopted by the World Conference on Cultural Policies, Mexico, 6 August 1982, para. 1 and 6.

Additionally, the *'inseparable'* connection between cultural diversity and cultural identity has also been expressly acknowledged by this international organisation, especially by means of putting emphasis on the fact that individual cultural identities are enriched in diversity. That is through the contact with the traditions and values of others.[11] In addition, it has opening the institutional doors of the international community for the establishment of active policies that would *'protect, stimulate and enrich each people's identity and cultural heritage'*.[12]

In fact, after its first institutional approach to the topic of cultural plurality in the world, UNESCO issued other four reports directly concerning the question of culture and, two of them, specifically addressing the challenges generated by the world cultural diversity.[13] As a result of this long process of institutional reflection, conducted mainly during the 1980s and 1990s, in 2001 UNESCO produced one of its most relevant contributions in this field, namely the adoption of the Universal Declaration on Cultural Diversity (here in after "UNESCO Declaration" or "UDCD").[14]

The 2001 Universal Declaration, not only ratified the central value of culture within the contemporary debate in connection with identity, social cohesion, and the development of a knowledge-based economy (preamble), but also stressed the idea of multiplicity of cultures, when affirming that *"[c]ulture takes diverse from across time and space"* (Article 1). In addition, this instrument has highlighted the value of cultural diversity in human life, saying that *"[t]his diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind"*, but not only. It also added that *"culture diversity is as necessary for humankind as biodiversity is for nature,* [because] *it is the common heritage of humanity and* [therefore] *should be recognized and affirmed for the benefit of present and future generations"* (Article 1).

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[11] *Ibid.*, para. 4.
[12] *Ibid.*, para. 8.
[13] See, UNESCO, *Our Creative Diversity: Report of the World Commission on Culture and Development*, Paris, 1996; UNESCO, *Culture, Creativity and Markets. World Culture Report 1998*, Paris, 1998; UNESCO, *Cultural Diversity, Conflict and Pluralism - World Culture Report*, Paris, 2000; and UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, Paris, 2009.
[14] The *Universal Declaration on Cultural Diversity* was adopted by the 31st session of the United Nations Educational Scientific and Cultural Organization (UNESCO) General Conference, Paris, 2 November 2001.

Moreover, under the reading of the UNESCO Declaration, the notion of "*plurality of cultures*" goes hand in hand with the need to open the common or *public space*. The Declaration claims for the accommodation –within the *public sphere*– of all different cultural manifestations present in a given society; not only in order to give them more public visibility but also –and perhaps more importantly– more public legitimation under a pluralist and democratic *umbrella*. In fact, the Declaration also states that *"[i]ndissociable form a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing to creative capacities that sustain public life"* (Article 2). UNESCO sees the protection of cultural diversity as a guarantee for social cohesion and peace, because it *'ensure[s] that harmonious interaction among people and groups, with plural, varied and dynamic cultural identities as well as their willingness to live together'* (Article 2).

Under this logic, "living together" in a democratic setting would necessarily lead toward the accommodation of cultural differences and to a construction of a common space in which all cultural identities would be able to freely develop and flourish. But the question, of course, is how? One way could be to forcibly impose a cultural change; to undergo into a deep *deconstruction* of societal institutions and socio-cultural practices –including the legal systems– in order to give space, visibility and legitimation to those cultural minoritarian expressions that have been partially or totally excluded from the public sphere. On the contrary, another way would be to just set up minimum guarantees that would ideally secure fair possibilities to all existing cultural expressions in order to be present, develop and compete within the democratic societal game. In this latter sense, the different cultural proposal would have the possibility to openly and fairly compete for societal public support, within a *neutral* and equidistant *public space*, but without having any institutionally secured or guaranteed results.

In my opinion, the second of the above mentioned approaches is the one that generate better conditions for the accommodation of cultural diversity within an open, pluralist and democratic society. But, one can rightfully ask whether this interpretative view is in line with the understanding enshrined within the UNESCO Declaration, in particular because a first-glance analysis of its dispositions could actually give us the opposite interpretative impression. In fact, this Declaration

stands for a sort of *'multiculturalist'* accommodative solution. However, an appropriate and careful critical examination of its provisions would certainty lead us toward the reaffirmation of the interpretation that I am arguing here. Why? Well, because it is the same text of the Declaration that support this interpretative view, if read it –of course– accurately and under the light of Article 31(1) VCLT. In fact, the Declaration states that *"...cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life"*, which basically means that the quintessence of pluralist societies is to have an open *'cultural exchange'*. And cultural exchange is and should be free; it cannot and must not be forced. It is in the open, neutral and public sphere where the different understanding of "the good" compete to provide meaning to people's life, but nobody can be and should not be forced to accept and to internalised the worth of one of those specific cultural proposal. In a democratic system, individuals always remain (and should remain) free to choose their cultural alliances, and to embrace those meaningful cultural philosophical views that best fit their cultural needs.[15] In other words, cultural diversity –in fact– not only widens the range of options open to everyone in a given society, but also become a *"means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence"* (Article 3).

Furthermore, in order to create the conditions that would allow a free and fair development of cultural choices, public sphere should and must be *neutral*. Public neutrality constitutes an essential factor for the protection of cultural diversity. This means that it establishes those minimum elements indispensable for the creation of a balanced relationship between the necessary normative framework that would guarantee to each cultural manifestation, the possibility to express and propose themselves to the society. In addition, it would also generate the rightful conditions that would ideally guarantee the essential space of freedom that would allow a fair competition among them. In fact, it is the *cultural neutrality* of the public sphere that generates the necessary institutional framework that would make possible for all persons to have *"the right to participate in the cultural life of their choice and conduct their own cultural practices..."* Moreover, it also consents *"the possibility*

[15] See, K. A. APPIAH, *The Ethics of Identity*, Princeton, 2005, p.130 et seq.

for all cultures to have access to the means of expression and dissemination…"[16] Indeed, it is only in a free and neutral (public) cultural space that culture can freely interact and be a *"source of exchange, innovation and creativity"* (Article 1).[17]

The idea that the notion of cultural diversity intrinsically involves a free flow of cultural expression, and therefore within a *neutral space* of fair cultural competition, has been effectively embraced by the definition of this term incorporated in the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions of 2005. In fact, this Convention states that *"Culture Diversity refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies"* (Article 4(1)).[18] As we can see, the second phrase refers to the free exchange of cultural expression and contents; exchange that not only put cultures in contact across (cultural) borders, but also modifies and constantly reshapes them in a perpetual process.

For all of these reasons, we can do nothing but conclude –together with UNESCO– that *"culture diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between people and cultures, is indispensable for peace and security at the local, national and international levels."*[19] Additionally, it would be also possible to conclude that *"[t]he defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity."*[20] However, the defence of the diversity must not be understood as a forced imposition of diversity or even artificial perpetuation of one specific cultural expression. The essence of culture is *freedom*. Culture takes diverse forms across time and space in a free perpetual movement, and then is necessarily subjected to changes that –under certain circumstances– could bring it toward its *natural* societal disappearance…[21] But, of course, the natural societal vanishing of one particular

[16] See, Articles 5 and 6 of the UNESCO Declaration.
[17] In the same line the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005 states that *"culture diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures"* (preamble). This Convention entered into force on 18 March 2007, and until today it has 118 States Parties.
[18] *Ibid.*
[19] *Ibid.*, preamble.
[20] See, Article 4, *Universal Declaration on Cultural Diversity*.
[21] If we will accept the biological parallel proposed by the UNESCO Declaration on Cultural Diversity, in which the importance of cultural diversity for mankind is compared with the relevance

cultural expression from the societal milieu cannot be considered as endangering the diversity of the society. On the contrary, it would be just part of its perpetual process of renovation and adaptability to the changeable socio-temporal conditions existing in a given society[22]; processes which are nothing but the veritable channels for cultural creation, innovation and regeneration.

Finally, it is important to highlight that cultural diversity not only influences societies –taken as a whole– but also –and perhaps most importantly– individuals. That is, cultural diversity provides a plural framework in which *cultural identities* are shaped and moulded. In effect, as long as every person's life is immersed within a specific cultural framework, the latter will always substantially shape his or her identity. This means that his or her identity would reflect those cultural ties that he or she has with the society in which he or she lives or feels connected to by bonds of appurtenance and membership. Therefore, it would be possible to state that one of the most important *cultural manifestations* of our societal cultures is precisely our identity, our *cultural identity*.[23] The latter, is unavoidably influenced and constructed by the former; but for its future perpetuation, the former also depends on the collective interaction, acknowledgment and visibility of the latter. And this is because, as we will see below, culture and cultural identity are –at least– interdependent notions. However, they do not relate to each other as merely two sides of the same coin; but rather, they relate to each other perhaps as fruit to root, where the former is a consequence of the vital support of the latter, but also permit the regeneration of the entire natural cycle.

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that biodiversity has for nature, then, we perhaps would have to also accept the natural "biological" decadence of cultures. (See, Article 1 of the Declaration). However, in my view this biological parallel is quite (if not all) misleading. Culture, as a human expression, never dies; it just suffers transformation, and changeable adaptations. What could indeed perish is just one or more cultural expressions, as many cultural expressions did in history, without prejudice of the cultural legacy that they could leave for the posterity.

[22] In this line, the first objective of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is precisely *"to protect and promote the diversity of cultural expression"* (Article 1(a)), which is not exactly the same as to protect and promote *'each'* cultural expression…

[23] In this sense, at the 1st paragraph of the Istanbul Declaration on Cultural Diversity, made at the UNESCO Third Round Table of Ministers of Culture on 17 September 2002, it was recognised that *"The multiple expressions of intangible cultural heritage constitute some of the fundamental sources of the cultural identity of the peoples and communities as well as a wealth common to the whole of humanity. Deeply rooted in local history and natural environment and embodied, among others, by a great variety of languages that translate as many world visions, they are an essential factor in the preservation of cultural diversity…"*

In the following section, we will explore the above mentioned intimate relation between cultural diversity and identity and –in particular– we will try to briefly analyse what has been called the *right* to cultural identity, as one of the current potential manifestation of the value of culture, from a legal point of view.

4. Cultural diversity and Cultural Identity

If it is true that it is culture that '*makes us specifically human, rational beings, endowed with a critical judgment and a sense of moral commitment*', and that through culture we not only discern values and make meaningful choices, but also recognise and express ourselves, as it has been stressed by UNESCO's Mexico City Declaration.[24], then we have to do nothing but recognise that culture (in all its diversified forms) shapes, conditions and moulds our *'identity'*. In this sense, our identities are nothing but a *'cultural creation'*. To put it in another way, identities are culturally constructed by definition; they are ontologically relational in a sense that they *'indicate a relationship between two persons or groups'*.[25]

In fact, it is within the group, through the interaction with other group members (e.g. within our own families), and after with the dialectic interactions with members or other groups, that peoples and cultural entities build and define their own identity. To put it bluntly, what represents and constitutes *'us'* and *'them'* (or just *'others',* in a sense of outsiders) is the historical and cultural interrelationships between societal cultural entities, which live and interact within the same societal framework or through their culturally created borders.[26]

Paradoxically, the constitutive process of our common cultural identity, as members of a given group, is –essentially– a *process of separation and differentiation* from other cultural entities, which are generally considered as

[24] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., preamble.
[25] In fact, as it has been said, identities imply an affirmation of difference and possibly an antagonism. See, UNESCO, *Cultural Diversity, Conflict and Pluralism - World Culture Report*, cit., p. 27 et seq.
[26] As Donders has said, *"…the identity of an individual or a community is based on opposing other communities that are considered different or subordinate in the sense of class, race, culture, etc. This creates the image of 'the rest' or 'us and them'.* See, I. M. DONDERS, *Towards a Right to Cultural Identity?*, Antwerpen/Oxford/New York, 2002, p. 34 et seq.

outsiders.[27] The common features of a group, which conform the base of the group cultural identity, are defined externally rather than internally, in a sense that the common characteristics of the members of a given group are those that make them different from *'other'* groups. In this sense, internal similarities are less constitutional than external differentiations.[28] In other words, having an identity requires defining that identity in relation to other local cultures and also to regional and international ones.[29] As UNESCO has stressed, *"[t]he elusive notion of identity stands at the intersection of self-perception (what we notice and consider important about ourselves) and other-perception (what others notice and consider important about us), neither of which is inherent or immutable."*[30]

In fact, the same Mexico City Declaration stresses the importance of this notion which states that cultural identity is *"a treasure that vitalizes mankind's possibilities of self-fulfilment by moving every people and every group to seek nurture in its past, to welcome contributions from outside that are compatible with its own characteristics, and so to continue with the process of its own creation."*[31] In this sense, cultural identity is an exogenous and endogenous cultural product (and very changeable too); exogenous because is generated by the external cultural circumstances, by the cultural inputs that each individual receive since he or she was born; and endogenous because this cultural information is subjected to a unique and unequalled process within each human being.[32]

Moreover, cultural identity has both a collective and an individual dimension. The collective dimension represents and tends to mirror the cultural inputs received from the ethno-cultural group in which the individual belongs, and represents what

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[27] *Ibid.*

[28] As we said earlier in this chapter, indigenous people could be considered *'indigenous'* (and not just people) because they can be compared with and differentiated from other cultural groups or people whom *'indigenous'* are not. Before the discovery of the Americas by European settlers, the inhabitants of the Americas were just simple inhabitants, the people living and ruling their lands. But, when the colonisation process began, it was certainly the cultural encounter that made them *'indigenous'* people by opposition with the European colonisers/settlers.

[29] See, UNESCO, *Cultural Diversity, Conflict and Pluralism - World Culture Report*, cit., p. 37.

[30] See, UNESCO, *Towards a constructive pluralism*, Paris, 1999, cit., p. 9.

[31] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 3.

[32] As Jeffrey Weeks said, *"[i]dentity is about belonging, about what you have in common with some people and what differentiates you from others. At its most basic it gives you a sense of personal location, the stable core to your complex involvement with others…"* See, J. WEEKS, *The Value of Difference*, in J. RUTHERFORD (ed.), *Identity - Community, Culture, Difference*, London, 1990, p. 88.

members of the group have in common and make them different from the *'outsiders'* or members of other groups. On the contrary, the individual dimension reflects what is unique in each individual, what makes that specific individual a different human being vis-à-vis members of another given ethno-cultural group.[33] In this sense, it would be possible to say that one individual has a predominant cultural identity (that would match its collective dimension) and several specific cultural identities, which would reflect all of those unique individual experiences that each human being would have during his or her life.[34]

For all of these reasons, we have to consider cultural identity as a "dialogical" in nature, in a sense that it *"is renewed and enriched through contact with the traditions and values of others."*[35] Indeed, as more numerous cultural options would be, as richer and more diversified, the meaningful choices for each individual would be. Therefore, the protection and promotion of a diversified number of cultural choices could be considered as a positive *societal value*, in order to stimulate and enrich each people's identity. [36] In addition, it would be in the interest of the States to establish and foster cultural policies in order to facilitate this dialogical process, but this does not mean that those policies would have to be addressed toward the perpetuation of one specific cultural expression. If culture, cultural expressions and even cultural identities are subjected to change, then they must not and should not be *artificially frozen* or *essentialised* by any public policy, action or intervention, under the misleading justification of their protection against cultural perishability.[37] This interpretation of culture as a sort of *'perpetual product'* is nothing but a

[33] As it has been stressed by the UN independent expert in the field of cultural rights, Ms. Farida Shaheed, *"[e]ach individual is the bearer of a multiple and complex identity, making her or him a unique being and, at the same time, enabling her or him to be part of communities of shared culture."* See, F. SHAEED, *Report of the independent expert in the fild of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36, United Nations, 2010, p. 10, para. 23.

[34] See, I. M. DONDERS, *op. cit.*, p. 33 et seq.

[35] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 4.

[36] The inseparable relationship that exist between cultural diversity and cultural identities has been highlighted by the Mexico City Declaration, when states that *"recognition of the presence of a variety of cultural identities wherever various traditions exist side by side constitutes the very essence of cultural pluralism".* See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 6.

[37] When the UNESCO *Universal Declaration on Cultural Diversity* states that States have to formulate *"...polices and strategies for the preservation and enhancement of the cultural and natural heritage..."* does not refer, of course, to the forceful maintenance of cultural practises by members of cultural groups. The lively maintenance of the culture is a cultural group's affair, but if they do not want to continue with that traditions, then States would have the possibility to preserve and protect that cultural information for the benefit of posterity (See, Annex II of the Declaration, para. 13).

misrepresentation of the changeable and dialogical essence of culture.[38] To put it in another way, if identities are dynamic and multi-layered rather than monolithic and static, then the cultural identity of a given group is never truly homogeneous. This is because no culture is truly *'unmixed'*, *'pure'* or *'uncontaminated'* (the only exception to this general rule, that I can imagine in our modern world, could be constituted by those indigenous populations that still live in absolute and complete isolation; but because they live in isolation, this exception is just a mere hypothesis). [39] Cultures –and the identities that they generate– are always subjected to processes of change, modification and regeneration that make ontologically impossible –and rationally unfeasible– any attempts to artificially freeze or essentialise them.[40]

Therefore, if we accept that culture, and then cultural identities, are in essence subjected to time and socio-geographical factors, if we accept that they are impermanent and mutable, then the modification of cultural structures and understandings of past generations –to the point in which they are no longer recognisable in the features of current societal structures– cannot be considered as a destruction or annihilation of those previous cultural expressions. On the contrary, it must be seen as just their "natural" cultural mutability, adaptation or regeneration within a permanent and unavoidable process of cross-cultural fertilisation.[41] In this sense, cultural enrichment is ontologically incompatible with a sort of *essentialist*

[38] Even from a biological metaphorical point of view, we can say together with Raz that *"[t]he dying of cultures is as much part of normal life as the birth of new ones."* The extinction of a cultural entity has to be seen as just a normal stage in our perpetual changeable cultural journey; its contents will remain as part of our human heritage. See, J. RAZ, *Ethics in the Plubic Domain. Essays in the Morality of Law and Politics*, Oxford, 1995, p. 182.

[39] For an accurate report on the current situation of indigenous people living in isolation see the Human Rights Council Expert Mechanism on the Rights of Indigenous People's Report called *"Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial contact of the Amazon Basin and El Chaco*, UN Doc. A/HRC/EMRIP/2009/6, of 30 June 2009.

[40] As Appiah wrote, quoting Walter Been Michaels, *"without some racialized conception of a group, one's culture could only be whatever it was that one actually practiced, and couldn't be lost or retrieved or preserved or betrayed."* The only way to think about culture as something *"pure"* would be in biological terms, and that would necessarily conduct us to the idea of race, to a genetic-descendant-based idea of culture. But, because history has taught us the barbarous implications of a race-based idea of humanity, then we must accept that culture and cultural identities cannot be lost, they are just subjected to change. See, K. A. APPIAH, *op. cit.*, p. 136-137; see also W. B. MICHAELS, *Our America: Nativism, Modernism, and Pluralism*, Durham, 1996, p. 125, and 128-129.

[41] Appiah magisterially exemplified this sort of cultural essentialism saying that *"... the words and images with which people speak of cultural destruction–or, more neutrally, cultural change–typically refer to the destruction of human life. Assimilation is figured as annihilation."* See, K. A. APPIAH, *op. cit.*, p. 130 et seq.

view of culture and culture identity, which relegates cultural expressions to perpetual isolation, and pretends to freeze them out of time.[42]

Perhaps it would be important to clarify one important aspect of culture identity and diversity. As the UNESCO's Universal Declaration states *"[i]n our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities…"*[43] This means that what should really be protected and promoted is the *'interaction between cultures'*, from a neutral standpoint, and not certainly one specific cultural expression or manifestation. Therefore, it is quite clear that cultural separateness, or the partition of the public spheres among the different cultural entities recognisable in a given society, as trumpeted by multiculturalist, is not a positive *value* pursued by the Declaration. On the contrary, what is promoted by this instrument is *'harmonious interaction'* between cultural expressions, which is basically a dialogical cultural exchange and mutual cross-fertilisation.[44] Furthermore, this is the only possible interpretation that makes compatible the respect and promotion of diversity on one hand, and the respect and protection of individual autonomy and cultural freedom, on the other hand. Individuals cannot and must not be subjected to any group's cultural imposition, not even that one that could come from their own cultural group of appurtenance.

However, the concern for survival that members of one specific ethno-cultural entity could have is perfectly consistent –in abstract terms– with respect for individual autonomy. In fact, if our current values, views and understandings are or would be appealing to our next generations, most likely they would embrace them and –hence– that specific cultural expression would survive, with –of course– the necessary geo-temporal societal adjustments.[45] In other words, it is perfectly understandable and culturally consistent that each societal entity –including minority

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[42] As the Mexico City Declaration states *"[c]ulture is dialogue, the exchange of ideas and experience and the appreciation of other values, and traditions; it withers and dies in isolation."* See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 4.

[43] See, UNESCO's *Universal Declaration on Cultural Diversity*, Article 2.

[44] The value of cultural exchange has been repeatedly stressed by UN related bodies. Just as an additional example, we can mention the *Human Rights Resolution 2005/20* of the UN Commission on Human Rights, which expressed its determination to *"...prevent and mitigate cultural homogenization in the context of globalization, through increased intercultural exchange guided by the promotion and protection of cultural diversity"* (Preamble).

[45] See, K. A. APPIAH, *op. cit.*, p. 137.

groups and indigenous people– would have the legitimate expectation to perpetuate their own cultural understandings and views and traditions to the next generation and further. However, these expectations cannot and must not impose any limits on the free and autonomous development of individual identities of group's members. The autonomy and cultural freedom of the individuals shall be protected also against the legitimate desires of cultural perpetuation that a given ethno-cultural group could have, even at the price of cultural extinguishment or –better– substantial change.[46]

In fact, it is in the above mentioned understanding that UNESCO states that *"[c]ultural policies should promote creativity in all its forms, facilitating access to cultural practices and experiences for all citizens regardless of nationality, race, sex, age, physical or mental disability, enrich the sense of cultural identity and belonging of every individual and community and sustain them in their search for a dignified and safe future"*, but *"...within the framework of national unity."*[47] Whatever *cultural* future individual would like to have, search and build for themselves, public policies have to provide the supportive societal framework that would generate the rightful conditions for them to do it. In this sense, all cultural practises would have the possibility to freely and openly compete for societal support, with the only requirements –of course– that those cultural practises would have to be fully in line with the principle of respect of human rights, fundamental freedoms, but not only. Additionally, they would also have to respect the territorial integrity and political unity of the State in which they exist. These are the limits that protection and promotion of cultural diversity cannot and must not cross. Even when we consider that the defence of cultural diversity is an *'ethical imperative'*, this defence is always subjected to the *'respect of human dignity'*, as stated by the same UNESCO's Universal Declaration.[48] Indeed, the same instrument expressly clarify that *"[n]o one*

[46] As Appiah said, *"...it is far from clear that we can always honour such preservationist claims while respecting the autonomy of future individuals."* Even when parents, relatives of wider cultural circles would like to preserve cultural practises and expressions, and therefore *'impose'* them on the next generation, such as could occur with arranged marriage practises in India or Pakistan, their preservationist views could be protected against the individual will of the person that would be subjected to the said practise. See, K. A. APPIAH, *op. cit.*, p. 130 et seq.

[47] See, UNESCO, *Intergovernmental Conference on Cultural Policies for Development - Final report*, CLT-98/Conf.210/5, Stockholm, 1998, Preamble, para. 6 and 7.

[48] See Article 4, UNESCO *Universal Declaration on Culture Diversity*, cit. The principle of respect for human rights and fundamental freedoms has been also expressly adopted by the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, in its Article 2; and also by the UN *Declaration on the Rights of Indigenous Peoples* of 13th September 2007, which in

may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."[49]

As we can see, respect for human rights and cultural identity are intimately connected. The process of construction of the latter cannot infringe the inviolability of the former. And this conclusion leads us toward one extra question that would be important to answer before we start analysing the specific case of indigenous people and the way that the tutelage of *their* cultural diversity has contributed to the protection of their right to traditionally occupied lands. This last issue is connected with the legal understanding of cultural identity, and in particular whether cultural identity has been incorporated –and therefore protected– as human rights. In the following section, we will attempt to provide a brief answer to this question.

4.1. Cultural identity as a 'legal' concept

If we come back to Article 4 of the UNESCO's Declaration, which states that *"[t]he defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity"*, then we have to necessarily conclude that the respect for cultural identity intrinsically involves the respect for every person's human dignity. And this is not irrelevant. If human dignity is involved, in a sense of providing valuable justification for the protection of the societal cultural diversity, then individual's cultural identity gains another dimension. As we know, the notion of human dignity lies at the very core of the system of human rights protection, starting with Article 1 of the UDHR. The latter states that *"[a]ll humans beings are born free and equal in dignity and rights…"*; it is our equal dignity as humans that make us equal subjects entitle to an *equal set* of fundamental rights.[50]

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its Article 46(2) states that *"[i]n the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected"*, but not only. The Declaration also establishes that all its provisions must be interpreted in accordance with *"the principles of justice, democracy, respect of human rights, equality and non-discrimination, good governance and good faith"* (Article 46(3)).

[49] See, Article 2(1), UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

[50] According to the Inter-American Court, *"[h]uman rights must be respected and guaranteed by all States. All persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are,*

Respect for human dignity implies that individuals should not be treated as objects, as mere instruments on the hands of others, deprived of their own will, of their own selves.[51] And if we consider the respect of human dignity not just in abstract terms, but in connection with concrete and real situations in which individuals are involved within a specific societal milieu, then the circumstances that surround and condition individuals' life must be taken into account.[52] In other words, what makes a case "a concrete case", and not just a mere hypothetical and abstract case, is –of course– the circumstances of the case, and in a human society those circumstances are nothing but *cultural*.

Therefore, human dignity and cultural identity are intimately related, they live in a permanent and uninterrupted interrelation that could be described as from the general to particular. Our identity, as an individual representation or manifestation of our cultural appurtenance or appurtenances, is a channel in which our abstract and universal dignity, as humans, finds its concretisation, its personification.[53] And it is for this reason that each individual must have the possibility to develop his or her own cultural identity, even against or in a different direction from the predominant identity of the ethno-cultural group which she or he feels affiliated with, because it is through our identity that our dignity –as humans– finds its concrete meaning. Then it becomes quite natural that the protection of human dignity –as a *core value* of our human rights system[54]– should include as well the protection of our *cultural* identity under a format of a *right*, or at least as integrative part of already recognised human rights.[55]

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consequently, superior to the power of the State, whatever its political structure." See, I-ACtHR, *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion AC-18/03 of September 17, 2003. Series A No. 18, para. 73.

[51] See, I. M. DONDERS, *op. cit.*, p. 16 et seq.

[52] As Donders has said, *"[c]ultural identity is important to individuals and communities, because it gives them a sense of belonging and, as such, concerns their human dignity". Ibid.*, p. 30 et seq.

[53] I. M. DONDERS, *op. cit.*, p. 45-47.

[54] The core value of human dignity has been ratified, in connection with the Council of Europe system of human rights protection, by the European Court of Human Rights, which has said –for example– that *"[t]he very essence of the Convention is respect for human dignity and human freedom."* See, *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III.

[55] As the UN independent expert in the field of cultural rights, Ms. Farida Shaheed, has said, *"...cultural rights are pivotal to the recognition and respect of human dignity, as they protect the development and expression of various world visions –individual and collective– and encompass important freedoms relating to matters of identity."* See, F. SHAEED, *op. cit.*, p. 3-4, para. 3.

It would be too ambitious, in connection with the objective of this work, to undertake a full-range legal analysis of this so-called right to cultural identity. However, it would be a positive contribution to –at least– briefly describe its legal nature and scope in order to be able to better understand the way in which this right could affect the enjoyment of other fundamental rights (*interdependency)*. This could be the case –for instance– of the right to *communal* property over traditional lands in the case of the indigenous people.

4.1.1. The right to cultural identity

As we know, the so-called right to cultural identity has not been expressly incorporated into international human rights instruments. However, it would be possible to consider and interpret that this right constitutes an integrative part of the right to take part in cultural life, as recognised by Article 15(1.a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is without prejudice of all other international legal provisions that refer to culture in general, and therefore, incidentally raise issues connected with this right.[56]

The right to take part in cultural life in fact protects and includes our right to cultural identity in a sense that the "cultural life" that we can take part in is basically the life that we would be able to choose in liberty (in socio-cultural terms, that is a liberty which is always and ontologically conditioned). This means, in essence, the cultural life that better reflects our inner identity and in which we can freely develop

[56] The same right it has been recognised at the UDHR, in its Article 27(1), which states that *"[e]veryone has the right freely to participate in the cultural life of the community"*, or indirectly in Article 27 of the ICCPR, when states that *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture…"* And, the right to enjoy our own culture is nothing but the right of our own cultural identity. Partial reference to the right to take part in cultural life could be found it also –among other international instruments– in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 5 (e) (vi); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 13 (c); Convention on the Right of the Child (CRC), Article 31, para. 2; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), Article 43, para. 1(g); Convention on the Rights of Persons with Disabilities (CRPD), Article 30, para. 1; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 2, paras. 1 and 2; UN Declaration on the Rights of Indigenous Peoples (DRIP), Articles 2, 5, 8, and 11-15.

ourselves, and our project of life. The decision of taking part in a particular cultural life, and the respect that it is indeed endowed to that decision by the other members of the society, have to be seen as part of the larger freedom that each individual should enjoy free from unlawful discriminations, and –in particular– those based on his or her ethno-cultural affiliations and choices.[57]

In fact, according to the UN Committee on Economic, Social and Cultural Rights (CESCR), the right to take part in cultural life can be characterised as a *freedom*.[58] For the CESCR, the decision to take part in cultural life, either in the life of the mainstream society or in that one of a specific ethno-cultural minority group, is a cultural choice that should be protected and respected.[59] Additionally, it includes –as one of its main components– the right of everyone to *"choose his or her own identity, to identify or not with one or several communities or to change that choice…"*[60] The recognition of this right allows persons belonging to diverse cultural communities to engage freely and without discrimination in their own cultural practises and those of others, and –perhaps even most importantly– to choose freely their way of life.

Furthermore, because the right to cultural identity could be considered as an integral part of the right to take part in the cultural life of a given community, then States would have, vis-à-vis the individuals who are the right holders, a certain number of obligations. In fact, as duty bearers, States would have to respect the enjoyment of the right to cultural identity by everybody without discrimination (including –of course– the complete exclusion from forced assimilation), which requires States to refrain from directly or indirectly enacting any illegitimate or

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[57] As Adalsteinsson and Thórhallson have stressed, *"[t]he core content of the right to participate in cultural life may be thought to include a number of aspects, such as: the right to manifest one's own culture; freedom to choose one's own culture (or whether to belong to a certain culture) and the right to change one's mind in this regard; respect for one's culture, its integrity and dynamism; equality of access; respect for the principle of non-discrimination; and protection and development of cultures in which to participate."* See, R. ADALSTEINSSON, P. THÓRHALLSON, *Article 27*, in G. ALFREDSSON, A. EIDE (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague/Boston/London, 1999, p. 592.

[58] See, Committee on Economic Social and Cultural Rights (CESCR), *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, United Nations, 2009, p. 2, para. 6.

[59] *Ibid.*, p. 2, para. 7.

[60] According to this Committee, this right covers also the rights of everyone –alone, in association with others or as a community– *"to know and understand his or her own culture and that of others through education and information and to receive quality education and training with due regard for cultural identity…" Ibid.,* p. 4, para. 15(a) and (b).

arbitrary interference with that enjoyment, but not only. States should also protect this enjoyment from potential violation or interferences generated by third parties or non-state agents; and finally they have to fulfil this enjoyment through the adoption of the necessary measures, at administrative, judiciary and parliamentary levels, that would allow the full realisation of this right.[61]

4.1.2. Limits of States' obligations

As it has been maintained, States have to take a different variety of measures (including positive actions) in order to facilitate the enjoyment without discrimination of the right to take part in cultural life (including the right to cultural identity). These measures would include –among others– the institutional recognition of cultural practices, and the refrainment from interfering with their development and enjoyment, but not only.[62] Because we are dealing with cultural rights, one might argue –under the light of Article 2(1) ICESCR– that the obligation of States to provide for "progressive" full realisation of this right must involve the continuing obligation to take deliberate and concrete measures (including –of course– positive actions) aimed at the its full implementation.[63]

States obligations are –therefore– quite far reaching, but this –of course– does not mean that these obligations are unlimited. In fact, the same ICESCR has

[61] This obligation will include the responsibility of States to establish the conditions that would make the enjoyment of this right not only available, but as well accessible, acceptable, adaptable and appropriate. This would include positive actions –when necessary– in order to facilitate, promote and provide better conditions for the full enjoyment of this right. As an example of these measures, the members of the Committee has mentioned the need to adapt national legislations in order to facilitate the enjoyment of *"the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life."* I mention this example here because this interaction, between the right to cultural identity and the right to have access to their traditional lands, will be assumed by the jurisprudence of the Inter-American Court of Human Rights that refers to indigenous people land's claims. As we will see, the reasoning used by this Court was even further reaching. In fact, the Court drew a direct connection not only between the access to land and cultural identity, but also between the latter and the right to property, which it is not exactly the same. I will come back to this topic in the following chapters, when we will discuss the above mentioned jurisprudence. See, CESCR, *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*, cit., p. 4-5, para. 16, and p. 11 et seq.

[62] *Ibid.*, p. 11, para. 44.

[63] *Ibid.*, para. 45.

established the obligation for States Parties to take steps *"…to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant"*. This is nothing but a clear recognition of the *budgetary* limitations that all States have to face at a given time to set public priorities within the State's budget. Because economic resources are limited, States parties of the Covenant have to –at least– ensure the satisfaction of minimum essential levels of each of the recognised rights, including –of course– the right to cultural identity as integrative part of the right to take part of the cultural life. It is in this sense that the CESCR Committee has stressed that *"[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations"*[64]

The recognition of the division between core obligations, and others less essential obligations, in connection with the level of protection that should be guaranteed by each State party to the Covenant, is nothing but the recognition –by the CESCR Committee– of the existing gap between ideals and aspirations, on one hand, and what is possible in reality, on the other hand. This realistic approach, which is coming closer to my personal understanding of human rights as minimum standards and not just as unachievable ideals, have to be considered as a positive step toward the effective realisation of human rights in the world. Unfortunately, the tendency today is quite the opposite one. Instead of focusing on the concrete and effective enjoyment and realisation of a common minimum standard of human rights for all individuals in the world, international organisations, judiciary and quasi judiciary bodies and scholars focus on how to better expand the scope and content of recognised human rights, extending their limits almost to their impossible realisation. Of course, I have nothing against the recognition of new and tailored rights, but –for practical and ontological reasons– I am against their incorporation as "human rights".

[64] See, Committee on Economic Social and Cultural Rights (CESCR), *General Comment No. 3 - The nature of States parties obligations (Art. 2, par. 1)*, United Nations, 1990, para. 10. See also, Commitee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17 (2005) - The right to everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c)*, UN Doc. E/C.12/GC/17, United Nations, 2006, p. 11, para. 41.

Let me explain this, because I think it is vital for the understanding of my philosophical position, which will surely be reflected along this entire work. As we said above, the very foundation of human rights is the recognition and protection of human dignity; dignity that is equally present and shared by all humans in the world. Therefore, every single human right that we incorporate within our common human rights standards, should be available and ready to be enjoyed by all humans around the globe. However, how we can consider –for example– the right to have access to internet as a new human right, when still larger parts of the world population do not have access to safe and clean drinking water or even a minimum amount of food? Minimum standards means *minimum*; that is a short catalogue of indispensable rights that should be respected, protected and fulfilled in order to guarantee that human dignity would not be at stake, even not within the most recondite or isolated part of our planet.

It is for the above reasons that I am absolutely convinced that all efforts of international community, including the judicial and quasi-judicial bodies, as –for instance– the UN Treaty or Charter based bodies, should be addressed to make those minimum standards a daily reality for all humans in the world. This is not certainly the same as what could be seen as an impracticable and methodologically –or even ontologically– misguided effort of over-expanding the scope, nature, and even the numbers of human rights. The latter possibility is impracticable because it would only lead to the enjoyment of a far-reaching and extensive (and expensive) range of rights by a very small part of the human population. In addition, it would increase the gap between different regions in the world in connection with the enjoyment of what is meant to be just a "minimum standard" of rights, and also –and even most important– condemning large portions of human population to live undignified life, just because they would not be able to match the "new" minimum standards.

Moreover, this kind of approach would be methodologically misguided, because it involves a *fallacy*, which would consist in fictitious divisions between "human" rights and rights in general; if all rights ended being "human rights" then it would be pointless to used different conceptual categories for them.[65] Furthermore, it

[65] This fallacy could be considered as a fallacy of false classification, in a sense that one object cannot be classify in two or more different exclusive categories. Human rights is an exclusive category of rights, therefore if one right is classify as human rights, is not just "a right" any longer, but if all right

would be ontologically misguided, because if the *raison d'être* of human rights consists in their connection with human dignity, then their scope and nature should be restricted exclusively to those situations in which this core value would be at stake. In fact, all other situations within the society should not be regulated by these kinds of specific and fundamental rights. Instead, they could just be addressed by normal rights (rights *tout court*), that is by a societal recognition of an exclusive legal position made by the legislative organs of a given society. This recognition would depend –in our modern democratic societies– on the dialectic political and societal dynamics, rather than on the fulfilment of those obligations that universally protect human dignity, as in the case of human rights.

Therefore, when CESCR Committee has stated that *"[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être"*[66], we can do nothing but to applaud. But core obligation, should be interpreted as "core", nucleus or the very nutshell of the right that we cannot do without, because if that very essential part of the right is not protected, then what would be infringed would not be just a right, but our essential human dignity. It is vis-à-vis these minimum "core obligations" that States Parties have to *"...demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy [them], as a matter of priority."*[67] Indeed, it is in this sense that I personally consider that priorities have to be settled at the level of an *achievable minimum* for all humans, regardless their ethno-cultural affiliations or geographical locations.

Coming back to the CESCR Committee's interpretation and understandings, the minimum core obligations enshrined within the right to take part in cultural life (Article 15, para. 1(a)), includes –among others– the obligation to take the legislative measures tending to guarantee the application of the principle of non-discrimination and equality. And also the obligation *"...to respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change*

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became human rights, then it would be no human rights any longer! See, J. BENTHAM, *The Book of Fallacies*, London, 1824, Ch. 10, p. 316 et seq.

[66] See, CESCR, *General Comment No. 3 - The nature of States parties obligations (Art. 2, par. 1)*, cit., para. 10.

[67] *Ibid.*

their choice…" In short, States' minimum obligations include the respect for every person's cultural identity.[68]

However, it is important to bear in mind that when we talk about *budgetary allocations*, it is a primary and exclusive responsibility of States to set their policy priorities and therefore to allocate and divide the limited public resources among them. For this reason, the *'maximum available resources'* principle has to be interpreted within the framework and under the light of the all-comprehensive and wide-ranged State's obligations and responsibilities. Consequently, States should have –and they indeed have– a large *margin of appreciation* and autonomy in deciding and establishing their own policies and budgetary priorities. Judicial quasi-judicial international bodies cannot and must not substitute States in the fulfilment of their governmental responsibilities, not even in those cases in which they rightfully exercise their authoritative interpretative competencies attributed by the very same international instruments.

The impassable frontier between political decision making processes and judicial or quasi-judicial conflict resolution mechanisms should always remain as such… if we still would like to talk in terms of rule of law and democracy. Any other options will certainty lack of democratic legitimation. This does not mean –of

[68] See, CESCR, *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*, cit., p. 14-15, para. 55. In the latter mentioned paragraph, the Committee also recognised as one of the core obligations of the States under this article, *"to allow and encourage the participantion of persons belonging to minority groups, indigenous peoples or to others communiiteis in the design and implementation of laws and policies that affect them"*, which is a basic requirement in any democratic system, but also considered that States *"should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associeted with their way of life and cultural expression, are at risk"* (para. 55 (e)). The need for *'free and infromed prior consent'* in connection with the use of resources (especially natural) will be examinated in detail in Chapter IV and VI. However, it would be important to say that its interpretative incoporation as a "core obligation" of the right to take part in cultural life seems to be quite forced. Cultural resources could cover a vast variety of goods, or natural elements that could have a cultural symbolic meanings, dimentions or values, therefore to condition their public use, which will benefit the entire popolation of a given society, to the *will* of those individuals or groups of individuals that give cultural meaning to those resources (and which are indeed included as benefeciaries of the potential public use of the same resources), it would be quite disproportionate and even potentially anti-democratic. In pluralist and democratic societies, the public interest cover the entire popolation of a given country, which means that its contents are decided through those democratic and representive channels which do not always uphold the cultural aspirations of minority groups. This –of course– without prejudice of the protection and guarantee of the human rights of the members of those minoritarian groups. But even human rights can be restricted in their enjoyment if that is so required by pressing needs in a pluralist and democratic society. And the right to take part in cultural life is not and must not be considered an exception to this general rule. In the following section I will continue with the analysis of the lawful limitations that can rightfully restrict the enjoyment of this right.

course– that judicial or quasi-judicial bodies cannot review politically grounded administrative and legislative decisions, or actions. These actions or decisions can and should be reviewed every single time when there is a possibility that an infringement of rights has been committed, especially if the violated right is a fundamental right. But again, one thing is to recognise –to those judicial or quasi-judicial bodies– the competence to judicially review or monitor a given governmental action or omission with regard to the fulfilment of States' obligations, vis-à-vis the protection of fundamental human rights. But, another quite different one, would be to explicitly or implicitly recognise –to those same monitoring bodies– the faculty or competence to create new fundamental rights, or to extend the scope and nature of those already recognised rights, beyond any acceptable degree of proportionality and reasonability. [69] This would be nothing but an undue use of their judicial competences, or –even better– a politically motivated use of them.

Therefore, as we can see, budgetary constraints are not the only and perhaps not even the main possible limitations that the recognition and enjoyment of the right to cultural identity could face within a pluralist and democratic society. As any other economic, social and cultural rights, its enjoyment could be legally restricted and subjected to limitations. This could happen when they are *"...determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."* [70] The latter of course include the protection of the rights of others. These are lawful limitations, because their content and nature are intimately connected with the margin of socio-political appreciation that States and governments should have in order to *politically* accommodate differences within society. Additionally, these limitations could be

[69] In connection with the budgetary constraints, the interpretation of the CESCR has been also ratified by the most important regional judicial bodies dealing with human rights issues, namely the Inter-American and European Courts of Human Rights. In fact, the former has stressed that *"[t]aking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities."* See, See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* Judgment on Merits, Reparations and Costs of March 29, 2006. Series C No. 146, para. 155. With the same talk, the European Court of Human Rights has said that *"[b]earing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."* See, *Kiliç v. Turkey,* no. 22492/93, § 63, ECHR 2000-III.

[70] See, ICESCR, Article 4.

seen as nothing but a reflection of the *non-absolute nature* of the right to take part in cultural life, which is shared with most of the currently recognised human rights.

Because of its transcendental importance, within the following section, we will analysed the ontological connection between the above mentioned legal restrictions and the protection of cultural diversity and cultural identity, making particular references to those cultural practices that are considered as against international human rights standards.

5. General limits to the legal protection of cultural diversity and cultural identity

As it has been already maintained, the protection and promotion of cultural diversity (including cultural identity) is intimately connected with the respect and protection of human dignity, and –consequently– with the respect and promotion of human rights. In fact, for the UNESCO's Universal Declaration, the defence of cultural diversity *'implies a commitment to human rights and fundamental freedoms'*, not only because it is *'an ethical imperative'*, but also –and perhaps most importantly– because *'cultural rights are an integral part of human rights'*.[71]

But, as we have already said, the fact that cultural diversity and identity are protected as cultural rights, and most in particular as contained by the right to take part in cultural life, ontologically implies their own limit of protection. In other words, because their protection is enshrined within a cultural right, their enjoyment can be restricted by State authorities, so far as they do it lawfully. In fact, the same UDHR states –in its Article 29(2)– that *"[i]n the exercise of his rights and freedoms, everyone shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms*

[71] See, Article 4 and 5, UNESCO *Universal Declaration on Culture Diversity*, *supra* note 14. In the same line, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions recognises in its Article 2(1) –as guiding principle– that *'[c]ultural diversity can be protected and promoted only if human rights and fundamental freedoms […] as well as the ability of individuals to choose cultural expressions, are guaranteed."*

of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[72]

The wording of the above paragraph is clear; the exercise of rights and freedom can and must be restricted in order to guarantee the general good of everybody, in a context of a democratic society.[73] The enjoyment of someone's rights and freedoms ontologically depends on the respect of the rights and freedoms of others.[74] This is nothing but a consequence of the equal dignity of all human beings, announced in Article 1 of UDHR, in a sense that the respect of the dignity of others ontologically requires a limitation or a self-restrain on the exercise of our own freedoms and liberties.[75] Article 4 of the ICESCR follows the same rationale, but making a more general reference to *"the general welfare in a democratic society."* In fact, regardless of the differences in wording, the scope of the limitations of these two articles are similar, namely to make possible the general good in a pluralist and democratic society. The said scope allows not only the respect of each individual's rights and freedom, but also the satisfaction of the common societal needs, which allow governance and socio-political-economical-cultural preservation of the common societal enterprise. However, pursuing *'general welfare'* is not the only requirement that a limitation in the exercise of a recognised right should observe in order to be lawful. They have to be imposed by law and they must be proportional in connection with the societal need that they intend to fulfil (e.g. national security, public safety and order, health, morals, rights and freedoms of others, etc.).

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[72] For a detailed explanation of the meaning and scope of Article 29 of the UNDHR, see –among others- T. OPSAHL, V. DIMITRIJEVIC, *Article 29 and 30*, in G. ALFREDSSON, A. EIDE (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague/Boston/London, 1999, p. 633-652.

[73] The limitation to the exercise of the recognised rights contained in Article 29(2) of the UDHR is complemented in the same Declaration by the prohibition of misuse (or abuse of rights) contained in the subsequent Article 30. This provision reads as follow: *"Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."*

[74] As it has been said, *"[t]o define a right is, in fact, to limit it: what a right does not cover, it excludes, and what is positively described as the content of a right at once indicates its limits."* T. OPSAHL, V. DIMITRIJEVIC, *op. cit.*, p. 642-643.

[75] As Rousseau has said *"…le pacte social établit entre les citoyens une telle égalité qu'ils s'engagent tous sous les mêmes conditions et doivent jouir tous des mêmes droits."* In fact, the mutual obligations that each member of the society must have vis-à-vis all the other members, not only constitute a guarantee against a violation of their rights but also implies a limitation on their exercise. In other words, it would be possible to *"…c'est demander jusqu'à quel point ceux-ci peuvent s'engager avec eux-mêmes, chacun envers tous, et tous envers chacun d'eux."* See, J.-J. ROUSSEAU, *Le Contrat Social ou Principes du Droit Politique*, Paris, 1839, Livre II, Chapitre IV, p. 65.

Without entering or anticipating here the analysis of the so-called *'necessity test'*, which will be examined in Chapters V and VI, it is nevertheless important to stress –for the sake of the argument– that the restriction or interference that could affect the enjoyment of the recognised rights, in this case the right to take part in cultural life and the right to cultural identity, should be *established by law* (principle of legality), but not only. Additionally, it should pursue a *legitimate aim* in a democratic society (such as public order, protection of morals or even protection of the same cultural diversity, as societal *value*), should be *necessary* in order to achieve that aim. Last but not least, it should also be *proportional* in connection with the said aim. This means that there should exist a reasonable relation of proportionality between the measure adopted (the restriction in the enjoyment of the right) and the aim or the purpose to be achieved, such as –for example–the protection of the general welfare in a democratic society.[76]

However, as you can imagine, perhaps the key element of this legal approach consists in defining whether a restriction of a given recognised right, such as the right to take part in a cultural life of a community (including the right to cultural identity), is necessary or not in a democratic society. But, how could it be done? I believe that the answer to this question is simpler than what could appear from its first glance,

[76] In connection with the application of the 'necessity test' as an interpretative tool for the evaluation of the lawfulness of the interference in the enjoyment of a recognized right, there is almost a general convergency on the practice of the different international or regional judicial or quasi-judicial bodies. As a matter of examples it would be possible to make reference –among others– to the decisions adopted by the UN Human Rights Committee (HRC), in connection with Article 27 ICCPR, on Communications No. 24/1977, *Sandra Lovelace v. Canada*, 30 July 1981(UN Doc. CCPR/C/13/D/24/1977), para. 15-16; No. 197/1985, *Ivan Kitok v. Sweden*, 10 August 1988 (UN Doc. CCPR/C/33/D197/1985), para. 9.8; No. 549/1993, *Francis Hopu and Tepoaitu Bessert v. France*, 29 December 1997 (CCPR/C/60/D/549), para. 10.3. The European Court of Human Rights (ECHR) has also systematically applied this test, which is today a nutshell of its jurisprudence. See, among other judgements, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium (Merits)"* (Plenary), nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, judgment of 23rd July 1968, § 10, ECHR Series A no. 6; *Thlimmenos v. Greece (GC),* no. 34369/97, § 44-47, ECHR 2000-IV; *Handyside v. The United Kingdom*, no. 5493/72, Judgment of 7th December 1976, § 48-49, ECHR Series A n° 24; *The Sunday Times v. The United Kingdom (N° 2)*, no. 13166/87, Judgement of 26th April 1979, § 50-56, ECHR Series A n° 30. Finally, in the same line with the precedent bodies, the Inter-American Court of Human Rights (I-ACtHR), has also introduced in its jurisprudence the use of the *'necessity test'*. Just as an example of the use of this interpretative tool by this Court, and without prejudice of subsequent specific analysis of its application in those cases in which the I-ACtHR has dealt with indigenous people's claims, see –among others– I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, para. 138; and See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs of June 17, 2005. Serie C No. 125, para. 143-149.

but –nevertheless– not deprived of controversy. Within the international system, which is guided by the principle of justice and international law (Article 1(1) UN Charter), and intended to maintain international peace and security together with promoting and encouraging respect for human rights and fundamental freedoms (Article 1(2) UN Charter), the main responsibility to respect, protect and fulfil human rights lies fully upon the shoulders of the main international actors, namely the States.[77] Thus, the search for a fair balance between the protection of the *'general welfare'* and the fulfilment of that responsibility should repose on the same States' shoulders. This is nothing but coherency.

Therefore, States should have –and indeed they have– a sort of *margin of appreciation* or political space for manoeuvring not only with regard to the identification of the general needs that have to be pursued in a democratic society, but also in connection with the means or measures to be adopted for the achievement or fulfilment of those needs. And, if the situation or the circumstances of a given case so justify, those measures could include a lawful restriction in the enjoyment of a given recognised right, including –of course– the right to take part in cultural life and to develop our cultural identity. In other words, in the realisation of the general welfare, or in the selection of the appropriate measures for guaranteed respect, protection and fulfilment of all recognised rights, States have a wide margin of

[77] The general obligation to respect and ensure human rights is enshrined in various international instruments. Among these instruments we can mention: Charter of the United Nations (Article 55(c)), Universal Declaration of Human Rights (Preamble), International Covenant on Civil and Political Rights (Article 2(1) and 2(2)), International Covenant on Economic, Social and Cultural Rights (Article 2(2)), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 7), International Convention on the Elimination of All Forms of Racial Discrimination (Preamble), American Convention on Human Rights (Articles 1 and 2), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 1), European Convention for the Protection of the Human Rights and Fundamental Freedoms (Article 1), European Social Charter (Preamble), African Charter of Human and People's Rights "Banjul Charter" (Article 1), and the Arab Charter of Human Rights (Article 2). Moreover, according to Article I(1) of the UN Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in Vienna on 25 June 1993, *"[h]uman rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments."* The message of the Declaration is quite clear; but, in case of remaining doubts, additionally states that *"…it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms"* (Article I(5)).

political discretion –within a plural and democratic framework– in perusing the concretisation of the legitimate political aspirations of a given society.[78]

However, the fact that States have a margin of appreciation on the determination of when and to what extent a limitation on the enjoyment of a right is *"necessary in a democratic society"* does not absolutely mean that States can apply them arbitrarily. States have to always observe not only the strict application of the *principle of legality* and *rule of law*, in a sense that the said interference has to be imposed by law, but also all other above mentioned requirements (necessity, proportionality, and legitimacy). Furthermore, States can be –and they are indeed– supervised by monitoring mechanisms which are part of the international and regional systems of human rights protection, such as the UN Treaty Bodies, Special Procedures, or Regional Courts (e.g. the I-ACtHR and the ECtHR). In fact, the ECtHR has repeatedly said that *"[t]his margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it."*[79] This is because the European Convention gives to its Court that monitoring mandate[80], but not only; according to the ECtHR *"[t]he Court's task is to determine whether the measures taken at national level were justified in principle and proportionate."*[81] The Inter-American Court has as well expressly exercised this sort of supervisory power, as its late jurisprudence has revealed, under the denomination of *"conventionality control"*.[82]

Last but not least, there is one specific limitation to the exercise of the right to take part in cultural life and the right to cultural identity, which has not been

[78] See, CESCR, *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*, cit., p. 17, para. 66-67.
[79] See, among others, *Leyla Şahin v. Turkey (GC)*, no. 44774/98, judgment 10 November 2005, Reports 2005-XI, § 110; and *Manoussakis and Others v. Greece,* no. 18748/91, judgment of 26 September 1996, *Reports* 1996-IV, p. 1364 § 44;
[80] See Article 19 and 46 of the *European Convention for the Protection of Human Rights and Fundamental Freedom* (ECHR).
[81] See, ECtHR, *Leyla Şahin v. Turkey (GC)*, cit., § 110.
[82] See, among other authorities, I-ACtHR, *Case of Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 219, para. 176; *Case of Cabrera-García and Montiel-Flores v. Mexico.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 26, 2010. Series C No. 220, para. 225-226, and –in particular– the Concurring Opinion of Judge *Ad Hoc* Eduardo Ferrer Mac-Gregor Poisot, para. 13-63; *Case of Almonacid Arellano v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 26, 2006. Series C No. 154, para. 123-125; and *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, Dissenting Opinion of Judge A.A. Cançado-Trindade, para. 6-12.

commented upon, but which deserves –for its transcendental importance– an analysis on its own. I am referring –of course– to the limitation of the recognition and protection of ethno-cultural practises, expressions or manifestations that infringe or harm human rights guaranteed by international law, or otherwise limit their scope.[83]

5.1. Harmful cultural practices, cultural diversity and international human rights standards

As it has already been maintained, cultural diversity –as such– cannot be considered as a right that an individual can effectively claim as protected by international law (it could be considered as a factual reality or even a guiding principle or societal value, but not a right). This, nevertheless, does not exclude a sort of subsidiary right based tutelage through the protection of those rights that are intimately connected with it. In fact, we have already sustained that it is precisely through the protection and guarantee of the enjoyment of certain individual rights, such as the right to take part in cultural life, that individuals can enjoy and freely exercise their own culture, individually or in association with others.

In addition, we have to bear in mind that exercise of a right is –in most cases– never absolute. Just a few rights could be considered absolutely free from legal limitations. Among those rights, it would be possible to mention the right to be free from slavery or servitude; not to be subjected to torture and inhuman or degrading treatment or punishment; the right to access to justice and fair trial; or the right not to be *unjustifiably* discriminated against; and not to be *arbitrarily* deprived of his or her life. As we can see, in the case of the last two rights, they are subject to rightful conditions, which means that someone could be *lawfully* subjected to a discriminatory or differentiate treatment[84], or even *lawfully* deprived of his or her

[83] See, UNESCO's *Universal Declaration on Cultural Diversity*, Article 4.

[84] According to current human rights standards, when the discriminatory act, that is an act that treats differently persons in analogous situations, has an objective and reasonable justification then it is not considered discriminatory any longer but just a *"justifiable different treatment"*. In this sense, the Inter-American Court has expressly said that *"[t]he term distinction will be used to indicate what is admissible, because it is reasonable, proportionate and objective. Discrimination will be used to refer to what is inadmissible, because it violates human rights. Therefore, the term "discrimination" will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights."* See, I-ACtHR, *Juridical Condition and Rights of the Undocumented*

life.[85] Hence, without the consideration of those legal conditions, these two different actions would have to be considered as a violation of fundamental rights. Therefore, we can do nothing but conclude –as we already did– that the right to take part in cultural life (including the right to cultural identity) can and must be lawfully limited. This, of course, has to be done according to the circumstances of the each given case, in order to guarantee the *'general welfare'* of the entire society and without *unlawful* discriminations of any kind, in particular, those based on ethno-cultural features.[86]

For the above mentioned reason, international human rights instruments have paid strong attention to avoid any violation of fundamental human rights meanwhile upholding or promoting cultural diversity. To put it bluntly, international human rights standards protect and/or promote cultural diversity, and therefore guarantee its enjoyment though the protection of the exercise of individual cultural rights, *only* if

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Migrants…, cit. *supra* note 50, para. 84. See also, among the case law of the European Court of Human Rights, *Thlimmenos v. Greece (GC),* no. 34369/97, § 44-46; and from the Human Rights Commitee (HRComm.), the *General Comment No. 18: Non-discrimination*, United Nations, 1989, para. 13.

[85] This without prejudice of the provisions of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the General assembly resolution 44/128 of 15 December 1989, which has just 73 States parties (updated until 27/12/2011). In addition to this *universal* instrument, at the regional level, the Council of Europe has adopted two different instruments equally aiming at the abolition of the death penalty, namely Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (18/4/1983), and Protocol No. 13 concerning the abolition of death penalty in all circumstances (3/5/2002). These two latter instruments have received almost a full ratification by the State members of this regional organisation, and for this reason, the ECtHR has considered not only that *"…the right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in Articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe"* (see, *mutatis mutandis, Al-Saadoon and Mufdhi v. The United Kingdom* (No. 61498/08), judgment of 2 March 2010, § 118), but also that due to the psychological suffering that this penalty has generated to the convicted, it constitutes in itself, and by its nature and degree, an inhuman treatment (see, *Ibid.* § 144). Therefore, at regional level, it would be possible to consider that –in Europe– the application of death penalty has been fully banned. Unfortunately, this regional development cannot be applied as universal human right standards, beside the latest developments within the UN machinery, calling for moratorium on executions with a view of abolishing the death penalty (See, General Assembly Res. No. 65/206, *Moratorium on the use of the death penalty*, of 28 March 2011 (UN Doc. A/RES/65/20).

[86] According to the Inter-American Court, *"[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights that are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character."* And differences in treatment that are basically anchored on ethno-cultural features always hint – as a matter of principle– the equal congenerous nature of humans. See, I-ACtHR, *Legal Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 45.

no other fundamental human rights are violated or endangered, including –of course– cultural rights of others.

We find explicit examples of this limitation in almost all international instruments that have been cited until now. In this sense, the UNESCO's Universal Declaration on Cultural Diversity states that *"[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope"* (Article 4). And additionally that *"...all persons have the right to participate in the cultural life of their choice and to conduct their own cultural practices, subjected to respect for human rights and fundamental freedoms"* (Article 5). The message is clear: protection of cultural diversity (including someone's cultural identity) can never be used as an excuse for justification of human rights violations or unlawful restrictions.

The idea of human rights standards, as a clear limitation of the protection of cultural diversity, is reinforced by the subsequent UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This Convention considers the respect for human rights and fundamental freedoms as a *'guiding principle'*, stressing the fact that *"[n]o one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms [...], or to limit the scope thereof."* Again, this is a clear prohibition for the subordination of the enjoyment human rights and fundamental freedoms to cultural practises that would not be in line with these international consented standards. Indeed, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, have adopted the same approach. In fact, they have established, as a limit for the protection of indigenous ethno-cultural institutions, the respect of international human rights standards.[87]

Furthermore, in addition to these instruments referring to indigenous people, it would be possible to mention other relevant instruments that indeed recognise

[87] See, Articles 4(2) and 8(2)(4) of the UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*; Articles 34 and 46 UN *Declaration on the Rights of Indigenous Peoples*; and Articles 8(2) and 9(1) of the ILO *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries*.

stricter limitations on harmful cultural practises based on ethno-cultural societal understandings. These are the cases of UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention), in its Articles 3, 5(a) and 13[88], and the two mentioned international Covenants. In fact, both Covenants contain in their common Article 5(1) exactly the same *'prohibition of misuse'*, which also corresponds to almost the same wording of Articles 30 of the UDHR, Article 17 of the ECHR, and 29(a) ACHR. Thus, this prohibition prevents persons, groups or even States from misusing the rights ensured by those international instruments to limit, hinder or even destroy the enjoyment of someone else's rights.[89] Therefore, the principle that clearly emerges from international human rights instruments (and practise) is that nobody can claim the exercise of his or her rights to dismiss or prevent the exercise of the rights of others or preclude the general welfare of the society. [90]

Consequentially, the exercise of the right to take part in cultural life (or even the enshrined right to cultural identity), and –hence– the possibility to enjoy and contribute to the cultural diversity of a given society, cannot and must not be considered as an exception to this general rule. In fact, the CESCR Committee, when commenting on the limitations that could affect the enjoyment of the right to take part in cultural life (Article 15, para. 1(a) of the ICESCR), has clearly said that *"...no*

[88] The UN CEDAW Convection clearly states in its extensive introduction that *"the third general thrust of the Convention aims at enlarging our understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental rights. These forces take shape in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women. [...] States parties are therefore obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (article 5)."*

[89] Common Article 5(1) of the both international Covenants reads as follow: *"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."*

[90] On this regard, the Human Rights Committee has clearly said, referring to lawful limitations of cultural practises that, *"[s]tates parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors."* See, Human Right Commitee (HRComm.), *General Comment No. 28: Equality of rights between men and women (article 3): 29/03/2000*, UN Doc. CCPR/C/21/Rev.1/Add.10, United Nations, 2000, para. 5.

one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope." Thus, it has concluded saying that *"[a]pplying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights."*[91]

As an example of these negative ethno-cultural practices, we can mention the Female Genital Mutilation (FGM) and other practises that are harmful to the health of women. These practices generate serious consequences to the health and well-being of women and children, which are so obvious and severe that their prohibition under the light of international human rights standards is out of any question[92], but not only. There are other ethno-cultural practices that could also be considered as in violation of our current international human rights standards.[93] In fact, the respect of the principle of equality and non-discrimination between men and women requires the elimination of all those ethno-cultural practices and traditions that prevent women form participating fully in the cultural, economic, social, civil and political life of the societal community in which they live.[94]

Moreover, the UN Human Right Committee, while interpreting Article 27 of the Covenant under the light of the non-discrimination provisions of Article 2(1), the gender equality provision of Article 3 and the provision concerning equality before

[91] Even when the CESCR Committee has emphasized *"…it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms"*, has nevertheless reminded States that *"…account must be taken of national and regional particularities and various historical, cultural and religious backgrounds."* See, CESCR, *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*, cit., p. 5, para. 17-20.

[92] See, CEDAW Committee General Recommendation No. 14 (night session, 1990) on Female Circumcision. For a detailed analysis of different harmful cultural practices vis-à-vis women and children, see H. EMBAREK WARZAZI, *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children - Chairman-Rapporteur: Mrs. Halina*, UN Doc. E/CN.4/1986/42, United Nations, 1986.

[93] Just as an example of harmful practises against the rights of the child, we can mention the customary practice in the south-eastern region, which consists in considering the birth of twins as a bad omen; as a consequence of this ethno-cultural understanding, only one of the new-borns is kept by the family, while the other is automatically abandoned. See, *Concluding Observations of the Human Rights Committee: Madagascar*, U.N. GAOR, HRComm., 89th Sess., U.N. Doc. CCPR/C/MDG/CO/3, 2007, para. 17.

[94] See, among other publications, Report of the Secretary General. *In-depth study on all forms of violence against women.* UN Doc. A/61/122/Add.1, General Assembly, Sxty-first session, United Nations, 2006. See also, for a more general overview of the current women situation in the world, UN Women, *In pursuit of Justice. 2011-2012 Progress of the World's Women*, 2011.

the law of Article 26 of the same instrument, has arrived at the same conclusion. This is that the rights recognised to persons belonging to minority groups in Article 27 ICCPR cannot be extended to the protection of harmful cultural practises or expressions. In this sense, this Committee has said, *"[t]he rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law."*[95]

Therefore, we can do nothing but conclude that the exercise of cultural rights and the promotion of cultural diversity have to always go in line with the principles enshrined in the Charter of the United Nations. In particular when it refers to the need of *"including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity…"*[96]

In short, there can be no contradictions between the intangibility of human rights and fundamental freedoms and cultural diversity; consequently all of those cultural practises that –in one way or another– clash against the above mentioned fundamental principles, must be considered outlawed and banned.[97] In other words, human rights norms only admit and guarantee cultural practices that are compatible with the very same principles upon which human rights standards are based. These are –among others– human dignity, equality, non-discrimination, rule of law, etc.[98] We can perhaps even conclude that the limitation of cultural practises is not only a necessary requirement in order to guarantee the *'general welfare'* within a pluralist

[95] See, HRComm., *General Comment No. 28: Equality of rights between men and women (article 3): 29/03/2000*, cit., para. 32. See also, among other resolutions, *CCPR, Lovelace v. Canada*, Communication No. 24/1977, adopted 30 July 1981, U.N. GAOR, HRComm., 13th Sess., U.N. Doc. CCPR/C/13/D/24/1977, 1981.

[96] See the UN *Vienna Declaration and Programme of Action*, Preamble.

[97] As UNESCO has said, *"[t]he statement that cultural diversity constitutes an asset for humanity as a whole and consequently should be safeguarded is not the same as saying that any cultural value, tradition and practice must be preserved as intangible heritage…"* See, UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, cit., p. 223.

[98] See, M. K. ADDO, *Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights*, in *Human Rights Quarterly*, 32-3, 2010, p. 622.

and democratic society, but also it configures a sort of *'individual societal duty'*, in the terms of Article 29(1) of the UDHR.[99]

6. Conclusion

In this chapter, we have given a closer look at the question of cultural diversity and its legal implications and direct effects upon the enjoyment of fundamental human rights and freedoms. In addition, particular attention has been given to the right to take part in the cultural life of a given society. As a preliminary conclusion, this chapter has shown that cultural diversity is much more than a mere description of the factual cultural plurality that exists in modern societies.

In fact, cultural diversity has become in our pluralist and democratic societies a pursuable *societal value*, whose defence –in the wording of the UNESCO Universal Declaration on Cultural Diversity– *"is an ethical imperative, inseparable from respect for human dignity."*[100] It is ontologically true that cultural diversity and human dignity are connected or even interconnected, but not to the point in which they have to be seen as *"inseparable"*, as reported in the Declaration. As it has been argued above, the diversity of cultures could provide the necessary substratum in which individual personalities can flourish and identities can be enriched by means of having different cultural meaningful choices. Nevertheless, these pluralities of cultural expressions are not directly linked to the essential equal dignity of human beings; the latter is directly connected with the enjoyment of fundamental human rights and freedoms, while cultural diversity is clearly not. This is quite clear if we take into consideration that cultures change and take diverse forms across time and space.[101]

Hence, what individuals need is to have the possibility to freely express themselves and to freely engage in cultural creative activities within a given society.

[99] Article 29(1) of the UDHR states that *"[e]veryone has duties to the community in which alone the free and full development of his personality is possible."* Because societal communities, where individual personalities are developed, are in themselves culturally plural, the respect of all cultures impose on all members of the society a duty of cultural respect and self-restrain, that is the obligation not to develop, practises or exercise cultural practises that harm or prevent the enjoyment of someone else's fundamental rights and freedoms.

[100] See, UNESCO *Universal Declaration on Cultural Diversity*, Article 4.

[101] *Ibid.,* Article 1.

It is the cultural potential of each human being, which is protected in an open, pluralist and democratic society. That is, the possibility for each of them to express themselves and to engage in cultural activities, individually or in community with others (members or not of the ethno-cultural groups in which they feel affiliated). The relevance of the human *cultural potential* is reflected on its protection as part of international human rights standards (e.g. by the right to take part in cultural life of Article 15(1.a.) ICSECR or the right to enjoy culture as a minority member in Article 27 ICCPR), but also on its intimate connection with the notion of human dignity. In fact, it is through having *creative cultural possibilities* that human beings could find their dignity, and not in the unforeseeable cultural result of their cultural actions. To put it bluntly, without having the *possibility* to culturally express themselves as humans, they would become just mere instruments or tools subjected to the *will* of others.

Therefore, we have to do nothing but conclude that the above mentioned intimate or inseparable connection indeed exists, but between human dignity and cultural freedom, because without the latter the former would not find its necessary and vital space. This conclusion does not have any intention to decrease the importance that cultural diversity has in increasing individuals' cultural possibilities, that is, through presenting different cultural options that would obviously expand individuals' cultural choices. But one thing is to say that cultural diversity generates better societal conditions for the exercise of cultural freedoms (and rights), and for that reason should be considered as a pursuable societal *value*, and another thing would be to say –as UNESCO did– that cultural diversity is *"...an ethical imperative, inseparable from respect for human dignity."*

Again, what is inseparable with regard to human dignity is the respect and defence of human (cultural) freedom, that is, the creative motion of human beings and not the perpetually changeable product of it. To put it in another way, the enjoyment of this product, namely culture, has to be indeed protected because it constitutes the channel through which individuals can expand their "selves" and perhaps reach their own fulfilment, regardless the particular cultural specificities pursued. Indeed, the diversity of this mutable product generates better societal conditions for further development of the individual "self", and hence it could be

rightfully considered as a pursuable *societal value.* But then again, the question would be why UNESCO fell into this sort of *fallacy of confusion*[102], building on the *illogical* intimated connection between these two *ontologically different* notions, which are cultural diversity and human dignity. Perhaps the logic behind this misguided interpretation is –at this point– not strange to us, because it seems to me that it follows a kind of multiculturalist approach.

In fact, when UNESCO underwent a process of identification of principles that would eventually rule the international cultural co-operation, arrived at the conclusion that because of the reciprocal influences that the rich variety and diversity of cultures exert on one another, they have to be considered as *"...part of the common heritage belonging to all mankind."*[103] This is nothing but acknowledging the value, that both past and present expressions of cultural diversity have for human societies, but not only. UNESCO also stated that *"[e]very people has the right and the duty to develop its culture"*[104], which literally means that individuals, human beings, have obligations (duties) vis-à-vis their own cultural expressions, that is, a sort of separated cultural entity which would have rights vis-à-vis those that have created it.

The above disconnection between cultural entities and individuals, in which the former have gained subjectivity and value on its own, without the "natural" intermediation of the latter, is confirmed when UNESCO indeed stated that *"[e]ach culture has a dignity and value which must be respected and preserved."*[105] In this sense, cultures would have values of their own, regardless of their instrumental function on the hands of individuals; it seems that they have gained their own dignity as societal entities that would have to be respected and preserved… but by whom? Certainly not by other cultures or artificial entities; they would have to be protected and perpetuated by individuals, human beings, who –under this new interpretative light– would not be any longer allocated at the centre of the legal protection, but –on the contrary– at its periphery, being displaced by the new ideological centrality of

[102] See, J. BENTHAM, *op. cit.*, Ch. 10, p. 314 et seq.
[103] See, UNESCO *Declaration of Principles of International Cultural Co-operation*, of 4 November 1996, Article I(3).
[104] *Ibid.,* Article I(2).
[105] *Ibid.,* Article I(1).

societal cultural entities or… groups.[106] In short, this new ideological understanding could be resumed as *individuals at the services of cultures,* instead of the opposite.[107]

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (2005) has later reaffirmed these new ideological waves. In fact, this Convention has introduced the so-called *'Principle of equal dignity of and respect for all cultures',* by stating –in its Article 2(3)– that *"[t]he protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures…"* Unfortunately, as we have had the possibility to explain above, there is no such logical and ontological connection between these two concepts, because what the protection or promotion of cultural diversity presupposes is the equal dignity of the cultural maker, namely humans, and not of their created societal entities.[108]

Furthermore, as it has already been said in the previous chapter[109], it would be important to bear in mind that the UNESCO's proposed *"equal dignity of cultures"* [110] is deprived of ontological meaning, simply because we lack the *external comparator*. In fact, the affirmation that all cultures have equal value, ontologically presupposes the possibility of a comparative exercise among them, but the lack of an external comparator –which would also be cultural– make the entire exercise impossible. To put it simply, we cannot compare two objects that are identical; we necessarily need an external element that would provide the external comparative standards.

Therefore, in order to escape from this *dialectical trap*, we have to do nothing but conclude that cultures deserve to be respected not because of their intrinsic equal dignity –as postulated by UNESCO– but because they equally provide cultural

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[106] See, Chapter 1, Section 4.2.
[107] We have to always bear in mind the wording of Article 1 of the UDHR, which says that *"[a]ll human beings are born equal in dignity and rights"*; humans not ethno-cultural entities.
[108] As Prof. Kelsen has said, *"[t]he lack of moral order may be very undesirable, but from the fact that a certain state of affairs is undesirable does not follow that the conditions of the desirable state of affairs exist."* Multiculturalist strives indeed for the incorporation into international legal standards of this sort of ethno-cultural reinterpretation of the concept of dignity, with the consequential relegation of individuals to a second level; but this is just their *"desirable"* aspirations, and fortunately not the real *"state of affairs"*. See, H. KELSEN, *What is Justice? Justice, Law, and Politics in the mirror of science*, Berkeley/Los Angeles/London, 1971, p. 179.
[109] See, Chapter 1, Section 5, and 6.
[110] See Article 2(3) of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expression*.

meaning to people's life, broadening their cultural choices and possibilities. To put it bluntly, cultures' equality lies in their function, not in their substance; the contrary would be nothing but *cultural essentialism*.

6.1. Human rights as a cultural parameter and restrictor

Someone might perhaps argue that the above socio-political or even ontological analysis does not fully embrace the complexity of the impact of the notion of culture diversity within a given society because it lacks its human rights based component. This would be a most appropriate observation, but –I must say– the incorporation of the latter element into this picture will only change its colours (leaving nevertheless unchanged its substance).

As we have already concluded, culture diversity cannot be considered in itself as a *right*, and much less as a fundamental human right. But, of course, this does not mean that there are no interconnections between all these notions. In fact, a human rights based analysis would certainly reinforce the protection of those aspects of cultural diversity that could be considered enshrined within the scope of certain cultural rights. This could be the case of the right to take part in cultural life (Article 15(1.a.) ICSECR), or the right to enjoy culture in community with the other members of a given ethno-cultural group (Article 27 ICCPR), but not only. The incorporation of this human rights based approach also provides an *intrinsic limitation* for the protection of cultural diversity, because fundamental rights provide the external *cultural comparator* that we lacked before.

Indeed, internationally recognised human rights and freedoms have become the external comparative factor that can and should be used for the scanned analysis of all cultures in the world, even when they themselves are also cultural entities. They draw the bottom line over which cultural practises cannot cross, and if they do, then they would lose their moral (cultural) justification under the view of "humanity", which is represented by the so-called international community. One could argue that human rights, as any other right, are cultural creations and therefore not superior to other cultural expressions. True, but the difference here is not

ontological in nature but *consensual*. Indeed, the difference between the international human rights standards (as a cultural product) and all other cultural expressions or understandings of "the good" (with moral regulatory pretensions) that exist in the world consist in the fact that the former has received the *universal consensus* from the international community. This means that international human rights standards can be used as a universal common moral parameter, and therefore as a *cultural restrictor* too.

Human rights have gotten the consensual primacy of the *"ought"* over the cultural *"is"*, they represent the ultimate *cultural valuative system* that operates as a *cultural comparator* vis-à-vis the multifaceted and diversified cultural reality.[111] Culture make us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment[112], but what makes us equal in dignity and rights is just one specific cultural valuative system, namely the universally accepted human rights system. In fact, international human rights minimum standards legitimately operate as both a *cultural comparator* and *cultural restrictor* at the same time. This affirmation is firmly anchored in the fact that no State in the world negates the *legal value* of the UN Universal Declaration of Human Rights¸ as a common standard of achievement for all peoples and all nations, and each and all of them have also ratified one or more of the nine core human rights treaties. [113]

Consequentially, these minimum *cultural* standards have gained international consensual legitimacy in order to operate as a moral and legal universally common yardstick for the evaluation of cultural practises and understandings around the world. This also means that they cannot be diminished, restrained or otherwise affected by the allegation of cultural particularities, duties to communities or by references to different societal values. Indeed, no societal values could have a primacy over what has been adopted as a *"universally consented value"*, because the latter is intimately connected with the equal dignity of all members of the human

[111] See, H. KELSEN, *op. cit.*, p. 84.
[112] See, UNESCO *Mexico City Declaration on Cultural Policies*, *Preamble.*
[113] As it has been said, *"[t]he rights set forth in the UDHR may not have been realized in all countries of the world, but today people everywhere are increasingly demanding and gaining respect for their rights and freedoms. The performance of governments, and even their legitimacy, is being measured against the standards, and all governments are bound to feel their impact at home and in external relations."* See, A. EIDE, G. ALFREDSSON, *Introduction*, in G. ALFREDSSON, A. EIDE (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague/Boston/London, 1999, p. xxv.

family, but not only. It is also –and perhaps most importantly– because all people in the world, organised within the framework of the United Nations, have decided to establish these rights *"as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society […] shall strive […] to secure their universal and effective recognition and observance…"*[114] Moral principles and values (including legal ones) are consensual, and –among them– international human rights standards are the most accepted ones.[115]

Therefore, the respect for pluralism and the different cultural manifestations does not mean that it is extended to those practises that are harmful or disrespectful of international human rights law and standards. Those practices are no longer protected, neither are they guaranteed by international human rights law simply because they breach human rights, and therefore they violate –in most cases– the common universal understanding of human dignity. This line is straightforwardly embraced by the UNESCO Declaration which states that *"[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope".*[116]

In the same line, and even closely related to the topic of the incoming chapters, the International Labour Organisation (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries, Convention No. C 169 of 27th of June 1989 (here in after ILO Convention), affirms in its article 8(2) that indigenous and tribal peoples *"...shall have the right to retain their own customs and institutions..."* In addition, it establishes the *sine qua non* condition for the recognition of this right, in a sense that this recognition would be possible only in those cases *"... where these* [customs and institutions] *are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."* The limitation is clear; cultural diversity and all cultural

[114] See, UN *Universal Declaration of Human Rights*, *Preamble*.
[115] As Ross has said, *"[g]oodness is always a consequential attribute; that which is good is good by virtue of something else in its nature, by being of a certain kind"*. Therefore, cultural practices would be considered culturally (or even morally) "good" or "bad" according to whether they fully respect or not internationally recognized human rights standards. To put it in the very same Ross words, 'morally good' means *"...good in one of certain definite ways to a certain sort of character. [Indeed,] only what is a certain sort of character or is related to a certain sort of character in one of certain ways, can be good in virtue of being a certain sort of character or of being so related to it."* See, D. ROSS, *The Right and the Good*, Oxford, 2002, p. 155.
[116] See, UN *Universal Declaration of Human Rights*, *Preamble*.

practices, traditions, customs enshrined in it must respect international (and national) human rights law and standards. Therefore, *only* if the latter condition is fulfilled, these practices and customs would be protected under the *umbrella* of the fundamental rights' guarantee. So far, so good.

But then, how do we interpret and explain the understanding of cultural diversity, made by UNESCO, built upon what has already been considered as an ontologically and logically unsustainable affirmation of the *'equal dignity of cultures"*? The answer to this question largely exceeds the length and scope of this work and, for its complexity and importance, it would certainly require a study of its own. However, we can try to build, certainly not a proper answer, but –at least– a grounded presumption.

We have already stressed that cultures are not unchangeable and essentialised entities; on the contrary, they are under permanent change simply because they reflect the creative actions of all human beings. And creation precisely means modification and change. However, when UNESCO affirmed that *"[e]very culture represents a unique and irreplaceable body of values"*[117] it has unfortunately essentialised the notion of culture, considering it not as a changeable expression of the human creativity, but as an unalterable *'body of values'* whose uniqueness would rather consist in its *unchangeableness*. But if those values are subjected to change, taking diverse forms across time and space[118], as the same UNESCO has properly recognised[119], then it would be quite difficult to make essentialist comparisons among them, even in terms of *"dignity"*. Culture is nothing but a *tool*, a self-created tool that provides humans (its creators) with the possibility not only to *'reflect upon themselves'*, but also to make valuative and meaningful choices, regardless of their substantial contents. In fact, several societal institutions and practises that were considered culturally valuative in past societies and civilizations, today infringe our much based moral and legal concerns, which are indeed cultural too.[120]

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[117] See, UNESCO *Mexico City Declaration on Cultural Policies*, cit., para. 1.

[118] Cultures are always suffering change or flux, *"…like a river ever passing way, and never for two successive moments preserving the same numerical or aggregate identity…"* See, PLATO, *Contra Atheos*: *Plato Against the Atheists; or, The Tenth Book of the Dialogue on Laws*, T. LEWIS, New York, 1845, Ch. XXIV, p. 170.

[119] See, UNESCO *Universal Declaration on Cultural Diversity*, Article 1.

[120] As we have already said, slavery is perhaps one of the clearest examples of the change of cultural values in human history. See, in connection with the historical different societal (including legal)

The reason for this contradictory UNESCO's approach to culture and cultural diversity could –perhaps– be found in its own mandate.[121] In fact, this organisation has as a mission –among others– the protection and promotion of culture and it is within that framework that –for instance– UNESCO has identified in the respect of cultural diversity *"the best guarantee of peace in our world."*[122] Of course, we can agree with the latter statement, but perhaps not in the way that it has been interpreted. Respect for cultural diversity, that is, the different forms that human expressions take across time and space and –even most importantly– for the possibility of each individual to freely and culturally express himself or herself, is quite different from *essentializing* those diverse cultural manifestations. The latter situation would happen through considering them as defined, unique and unchangeable products that *claim* their substantial space within the institutional (and therefore cultural) structure of a given State. In fact, the same UNESCO has unveiled its agenda by affirming that *"[t]he goal may be not just a multicultural society, but a multiculturally constituted state; a state that can recognize plurality without forfeiting its integrity"*; but not only. UNESCO has also suggested that *"[l]ocal forms of autonomy, formerly swept aside by nation states, should perhaps be reinstated today and offered certain guarantees…"* [123]

I have nothing against UNESCO having its own *multiculturalist* agenda, but it has to be called what it is, without euphemisms. The agenda could be good, and certainty there are clear advantages in starting decentralisation or devolutionary processes at the national level, giving more institutional space and visibility to those cultural entities with clear concentrated and homogenised geographical presence. However, these processes are *political* in nature, and therefore have to be dealt with at the national level, in an open, constructive and –above all– democratic dialogical process. The essential element of this democratic method (which has also been called

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appreciation of slavery within human societies, H. GROTIUS, *The Rights of War and Peace (De Jure Belli et Pacis)*, 1st. ed. 1625, London, 1853, Chap. V., p. 105, para. XXVII et seq. See also, J.-J. ROUSSEAU, *op. cit.*, L. I, Chap. IV, p. 32 et seq.

[121] I would like to emphasise here the world "perhaps" because in order to have certainty on this affirmation, further studies are required, in particular in connection with the different historical steps that UNESCO has taken in dealing with culture and, in particular, with cultural diversity. For an overview on this issue, see UNESCO, *UNESCO and the question of Cultural Diversity - 1946-2007 Review and Strategies*, Paris, 2007.

[122] *Ibid.,* p 67.

[123] See, UNESCO, *Our Creative Diversity: Report of the World Commission on Culture and Development*, Paris, 1996, p. 72.

as "the democratic game") is its participatory aspect, in a sense that political participation should be open to all individuals in each society, regardless of their ethno-cultural appurtenances. Hence, in a democratic society, the stress is given to the participative method rather than to its outcome, and surely not to the outcome of the institutional partition of the society among the existing ethno-cultural entities or groups.

Moreover, and perhaps even most importantly, we have to always keep in mind that UNESCO "*...is prohibited from intervening in matters which are essentially within [States Parties] domestic jurisdiction."*[124] Therefore, when promoting the diversity of cultures, their interaction and exchange, UNESCO cannot and must not intervene in the internal national *democratic game* of States members, which also prevents it from making *devolutionary* or *autonomist* pleading on behalf or in benefit of specific ethno-cultural entities present within the territory of those States. As it has been said before, those constitutional processes that involve transfer of competences and powers are political in nature and therefore must be reserved to the internal democratic decision making processes within each society.

UNESCO, as any other international institution or –in more general terms– as any other entity that exist within a given society, can have its own political agenda, which can –of course– include *multiculturalist* goals and aims; this is nothing but absolutely legitimate.[125] However, this agenda has to be called by its proper name and must show its real purpose. That is, political aspirations for a multiculturalist change of the existing society. Change that –I am afraid– would put at stake the very *subject* of our internationally recognised human rights system of protection, namely, the individuals, in a sense that the latter would be replaced –as ultimate beneficiaries and as a *raison d'être* of the system– by an inhomogeneous constellation of ethno-cultural entities. We can agree or not with this new ideological postulate that pretends to introduce a fundamental shift in our current international human rights standards (I certainly do not agree with it), but what we cannot accept is the use of

[124] See, UNESCO, *Constitution*, Article I(3).

[125] In fact, UNESCO sees its own *political* institutional mission as *"to remain the place where frameworks for thought and action concerning culture can be endlessly reinvented, so as to ensure that culture retains its unique and rightful place on the international political scene."* See, UNESCO, *UNESCO and the question of Cultural Diversity - 1946-2007 Review and Strategies*, cit., p. 138.

euphuisms or misguiding classifications just in order to make the new politico-ideological message more appealing to the general public.

Last, but not least, respect for cultural diversity and protection of the cultural human creativity and expression has ontologically nothing to do with the pretended political aspiration of some ethno-cultural entities or groups in having more institutional visibility and structural societal participation, including even constitutional transference of political and law making powers. To put it in a different way, the *'ought'* or *'should be'* level of the socio-politico-ideological discourse must not be confused or misguidedly vested in the neutral and ascetic level of the *'is'* discourse. The latter just refers to the present socio-political-cultural reality (including internationally recognised human rights standards) existing in our modern and democratic societies, and not –as in the case of the former– in those *'pretended'* or *'inspired'* ones.[126]

The *multiculturalist proposal* is one ideological way to deal with multi-ethnic or multicultural societies, but the harmonious and respectful coexistence of all individuals in the society could also be achieved under the guarantee of equal opportunities and equal respect for all, regardless their ethno-cultural appurtenances. And this is what I believe is the best way to accommodate cultural differences in the society, that is, through the reinforcement of what all of us have in common as members of the very same human family, which is our ontologically common dignity as humans. In other words, making the enjoyment of fundamental human rights and freedoms available for all, without discrimination and distinction of any kind, and not through the institutional enhancement of what circumstantially or contextually make us different, that is, our cultural preferences or ethno-cultural appurtenances.

[126] See, H. KELSEN, *op. cit.*, p. 84.

CHAPTER FOUR
INDIGENOUS PEOPLES AND THEIR "INTRINSIC" DIVERSITY

> *"[I]ndigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different and to be respected as such."*[1]

1. Introduction

According to the International Labour Organization (ILO), indigenous and tribal peoples constitute at least 5,000 distinct societal aggregations with a population of more than 370 million, living in 70 different countries.[2] This quantitative information shows –at least– the numerical relevance of this societal segment. However, in connection with the scope of this work, it would be perhaps more important to ask certain theoretical questions connected with their ontological character as *distinguishable* segments of human population. In other words, it would be useful to enquire under which criteria a person can be identified as "indigenous", and –even most importantly– why human beings have to be dichotomously identified as either "indigenous" or "non-indigenous" persons, and what are the consequences of such identification.

From a more practical point of view, someone can say that he or she knows who is an indigenous person when he or she sees this person. However, when this ideal observer does it, actually he or she cognitively refers to conceptual notions that he or she has previously acquired within a certain specific societal framework, namely notions referring –at least– to what an indigenous person should resemble.[3] Of course, this is just a simple example, which –without having scientific

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[1] See, UN *Declaration on the Rights of Indigenous Peoples*, Preamble.
[2] See, ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO Convention No. 169*, International Labour Standards Department, 2009, p. 9.
[3] It has been said, in connection with the identification of minority groups, that *"[m]uch of the time, after all, it is self-evident which groups qualify for protection. The former Organization for Security and Co-operation in Europe (OSCE) High commissioner on National Minorities, Max van der S*

pretensions– nevertheless help us to see the need for a more accurate and systematically based study of this notion and its legally attached consequences.

The term "indigenous people", like those other terms that have been analysed within the precedent chapters, is elusive and difficult to be conceptualised. This is not only because it is a composed notion that incorporates the noun "people", which would almost immediately lead our thoughts to the notion of "peoples" in international law that we have already addressed in the first chapter. This is also because the notion incorporates the adjective "indigenous" which operates as a *qualifier* of the above mentioned noun.

Therefore, within the following paragraphs we will attempt to approach this composed and multi-faceted notion, exploring the composition of "people", as a societal aggregation, and its qualifying notion of "indigenous", in order to identify its boundaries and limitations, if possible. Why? Because, as we already saw in the case of minorities[4], the notion of "indigenous people" is not legally and societally *neutral*. In fact, if a social aggregation of individuals is able to frame its own legal claims or political demands/aspirations within the particular legal framework that regulates this specific type of human aggregation, then they would be able to enjoy and rightfully claim the protection of a specific set of tailored rights, which are not available to members of other societal aggregations.

Hence, if the above referred tailored rights are recognised to these "people" on the bases of their "*indigenousness*", then it becomes imperative to understand which characteristics make *special* these kinds of societal aggregations, not only with regard to the rest of the society but also vis-à-vis other societal aggregations with the same pretension of distinguishability. Indeed, as it has been already maintained in the case of minority groups, their existence within a specific societal milieu could be established through the positive identification of the factual presence of certain objective and subjective elements that factually *objectivise* or make them socially visible. In other words, the objective presence of these elements gives visibility and contextualises their existence as a differentiated societal entity, within the bosom of a larger societal setting, but not only. The positive identification of those factual elements (such as numerical minority, non-dominant position, ethno-cultural

[4] See, Chapter II, Section 4.4.

differential traditions, sense of solidarity, etc.) would also make it possible –for the members of those minoritarian groups– the enjoyment of a specific set of rights. In fact, those rights are addressed to overcome the disadvantageous factual situation in which they are placed by the minoritarian *unfriendly* societal structural configurations of the mainstream society.[5]

But, what does this mean in the case of indigenous people? Is this minority related reasoning directly or *mutatis mutandis* applicable to the case of indigenous people? In other words, it would be necessary to elucidate whether there is an ontological differentiation between indigenous people and other ethno-cultural societal aggregations, such as minorities, that would eventually allow a justifiable legal *differential treatment* between the former and all other eventual societal aggregations. In addition, it would be important to address –at least briefly– the question of whether indigenous people could be considered as "peoples" in the understanding of international law, and therefore whether they are entitled to rightfully claim and exercise the internationally recognised right of self-determination, and perhaps even to have the possibility to build their own ethno-cultural national State.

In answering these crucial questions, I will make specific reference to the theoretical and conceptual conclusions that have been achieved within the three precedent chapters, in particular to those connected with the notion of multiculturalism, cultural diversity and cultural identity, but not only. After this first theoretical approach, the current internationally recognised standards applicable to the case of indigenous people will be reviewed and critically analysed under the light of the above mentioned theoretical framework.

Therefore, within the following paragraphs, we will start discussing the conceptual notion of the term "indigenous people", together with its societal dimension.

2. Indigenous peoples: General understanding and Conceptualisations

[5] See, Chapter II, Section 4.2.1.

As I said before, the conceptual distinction between indigenous people and minorities in general has not always been clear and –allow me to even say– that even today it is quite *ontologically* unclear. Perhaps this unclearness is not absolutely casual, in a sense that conceptual confusion or vagueness could always be considered a good *escamotage* or –at least– functional to either States' interests in avoiding the empowerment of certain ethno-cultural societal entities or indigenous people's socio-political aspirations for a differential societal institutional setting.[6] In fact, as it has been already maintained with regard to the notion of *"minority"*, there is no adopted legal definition of "indigenous people" in international law, perhaps in order to avoid those legal implications that are connected with the notion of "peoples" and the potential exercise of the right of self-determination.[7] Nevertheless, as we will see below, during the last decades the international community has been quite active in drafting and adopting specific standards in connection with indigenous people; standards which have ultimately generated differentiated international legal regimes applicable to these two societal aggregations, without clarifying –however– certain ontological aspects, which would also be addressed.

From a linguistic perspective, the term "indigenous" is frequently used interchangeably with other terms, such as "aboriginal", "native", "first nations", "indios", "pueblos originarios", "original population", etc. In this work we will use the generic term "indigenous people" (without the "s") to refer to these kinds of societal aggregations, not only in view of *'escaping the self-determination trap"*[8], but

[6] In fact, indigenous representatives have manifested in several occasions, before the UN Working Group on Indigenous Populations (WGIP) that a definition of the concept of "indigenous people" was not necessary or desirable. In fact, it seems that *'indigenous organizations did not want the term to be defined for fear some indigenous persons would not be covered by the scope of the definition."* See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, United Nations, 1996, p. 12, para. 35, and p. 14, para. 40.

[7] As Prof. Alfredsson pointed out in a very clear manner, "*...definitions are incomplete largely because States are reluctant to deal with rights of groups and peoples. In part, as far as group rights are concerned, ignorance, lack of tolerance and undoubtedly racism play a role in the lack of codified definitions. This reluctance has to do with the unfortunate but frequent (mis)conception that such rights may lead to separatist claims which would threaten the sovereignty and territorial integrity of States. (...) Peoples' rights may indeed constitute a threat as far as the right of self-determination is concerned, but minority and indigenous and tribal rights do not."* See, G. ALFREDSSON, Minorities, *Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law*, in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden – Boston, 2005, p. 163-164.

[8] See, M. WELLER, *Escaping the Self-Determination* Trap, Leiden/Boston, 2008.

also because this is the most common dominant use in international law and by the international community.

In fact, if we draw out attention toward one of the first attempts –in modern times– to define the notion of "indigenous people", we will be able to see that, the *'Bureau international du Travail'* (hereinafter "B.I.T.") used, in 1953, the denomination "aborigines" (*aborigènes* in French) instead of the denomination "indigenous" (*indigènes* in French). In any case, the definition attempted by the B.I.T. stated that *« [s]ont aborigènes les descendants de la population autochtone qui habitait un pays déterminé à l'époque de la colonisation ou de la conquête (ou de plusieurs vagues successives de conquêtes) réalisée par certains des ancêtres des groupes non autochtones détenant actuellement le pouvoir politique et économique »*[9]

In this preliminary conceptual attempt, the international community constructed the notion of indigenous people around two main factors, namely *descent* and *societal power*. The first element referred to the factual opposition between the descendants of the original population in a given territory, and those from a non-original population that came in a subsequent period of time, but not only. In fact, the second element of this notion refers to the relation of power that has been established between these two different societal aggregations, in a sense that the latter descendants currently keep the economic, political and even societal power vis-à-vis the former. This relationship could be considered –in a broad sense– as dynamics of power domination. In this sense, asymmetries with regard to power and relationship of dominations has been attributed by certain authors to the existing knowledge and technological gap between the two above mentioned societal aggregations, at the time when they ancestors had met.[10]

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[9] See, B.I.T., 1953, p. 27; cited by F.V. LANGENHOVE, *Le Problème de la Protection des Populations Aborigènes aux Nations Unies*, in Académie de Droit International (ed.), in *Recueil des Cours*, Leyde, 1956-I, p. 327. Almost the same wording was used by the Eighth International Conference of American States, which declared in its Resolution XI of 21 December 1938, that *"...the indigenous populations, as descendants of the first inhabitants of the lands which today form America, and in order to offset the deficency in their physical and intellectual development, have a preferential right to the protection of the pulic authorities."* Cited by, E.-I. A. DAES, *op. cit.*, p. 7, para. 16. Here we find even an additional element, namelly the need of protection with regard to these populations, by means of adoption of positive measures by the States.

[10] According to Langenhove, *« [d]eux éléments forment donc la définition de l'aborigène : le premier est l'antériorité de l'occupation du territoire ; le second est celui de l'infériorité et de la subordination à l'égard des descendants des nouveaux arrivants colonisateurs ou conquérants. Ceux-*

Moreover, it is important to highlight that this early definition already stressed the so-called *'temporal factor'*, which refers to the fact that indigenous people (*aborigènes*) would be those populations whish ancestors were established *'prior in time'* in a given territory (descendancy factor). This means, temporal presence vis-à-vis another population that *currently* inhabit the same territory but which ancestors arrived, occupied or conquered it later in time.[11] In fact, *"priority in time"* has been considered as the common element that the different denominations used in connection with these populations.[12]

The latter characteristic, namely the fact of descendant from "original" inhabitants of a given territory has led different authors toward the conclusion that what really differentiated indigenous people from other societal entities is *"the race element"*[13], using the term "race" from a biological sense to describe *"...groups of individuals who have a specific combination of physical characteristics of genetic origin."*[14] In fact, as we will see within the following paragraphs, this idea of *ancestry* or *descendancy* could lead toward the construction of the indigenous people's notion, as a *distinguishable* societal entity. Thus, a notion based on a biological factor, which is not far from the notion of "race"[15], which is indeed a very problematic concept, not only because it is scientifically false[16], but also because it cannot be used –under the light of our current internationally recognised human right

ci disposent à l'égard des aborigènes d'un pouvoir supérieur qui résulte de connaissances plus étendues et des moyens matériels plus efficaces. » See, F.V. LANGENHOVE, *op. cit.*, p. 329-330.

[11] This temporal factor, or being 'prior in time' is intimately connected with the factor of *'ancestry'*, because those that were *'prior in time'* went the ancestors of certain parts of the current population of a given society constituted under the organisational structure of a national State. In this sense, *'ancestry'* has been defined as *"[t]he biological factor or the fact of descent from members of the native population of a country…"*, and –according to the UN Special Rapporteur Mr. Martínez Cobo, this factor *"...is always present when persons or groups are described as "indigenous", "autochthonous", "aboriginal", "Indian", etc."* See, J. R. MARTÍNEZ COBO, *Study of the Probelm of Discrimination against Indigenous Populations,* UN Doc. E/CN.4/Sub.2/1982/2/Add.6, United Nations, 1982, p. 6, para. 15.

[12] In fact, according to Daes, *"Ehglish and Spanish share a common root in the Latin term indigenae, which was used to distinguish between persons who were born in a particular place and those who arrived from elsewhere (advenae). The French term autochtone has, by comparison, Greek roots and, like the German term Ursprung, suggests that the group to which it refers was the first to exist in the particular location."* See, E.-I. A. DAES, *op. cit.*, p. 5, para. 10.

[13] See, F. ERMACORA, *The Protection of Minorities before the United* Nations, in Académie de Droit International (ed.), *Recueil des Cours*, The Hague/Boston/London, 1983-IV, 293-294.

[14] See, J. R. MARTÍNEZ COBO, *op. cit.*, p. 7, para. 19.

[15] See, K. A. APPIAH, *The Ethics of Identity*, Princeton, 2005, p. 136-137.

[16] See, J. R. MARTÍNEZ COBO, *op. cit.*, p. 7, para. 17-18.

standards– as a factor of attribution of specific rights.[17] I will come back later to this question, at the time of analysing in detail the different elements that compose this notion.

2.1. Martínez Cobo's definition of indigenous populations

Facing the above mentioned conceptual difficulties, the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, commissioned its Special Rapporteur, Jose R. Martínez Cobo, to conduct a profound and wide-ranged study of the problem of discrimination against indigenous populations. The report was finalised and published in 1984 under the title of *"Study of the Problem of Discrimination Against Indigenous Populations"* (hereinafter *"Martínez Cobo's Study"*)[18]. This study is rightfully considered –until today– one of the most accurate studies ever conducted in connection with indigenous people, but not only. In this study, Martínez Cobo proposed one definition of these populations, which has been widely used and quoted, and which is –in fact– known within the international community as *'Martínez Cobo's definition'*. The definition states as follow:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant

[17] In fact, all international human rights instruments have incorporated the non-discrimination clause, starting with the UN Universal Declaration of Human Rights, which states in its Article 2 that *"[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other statues."*

[18] The Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned this study to the appointed Special Rapporteur, Mr. José R. Martínez Cobo, by resolution 8 (XXIV) of 18 August 1971, in order to make *"...a complete and comprehensive study of the problem of discrimination against indigenous populations and to suggest the necessary national and international measures for eliminating such discrimination, in co-operation with the other organs and bodies of the United nations and with the competent international organizations."* The study lasted for a decade, and in 1984 the sub-Commission had before it the full report. See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations,* UN Doc. E/CN.4/Sub.2/1986/7/Add.4, New York, 1987, p. 1 et seq. For an entire overview of this Study, see UN Doc. E/CN.4/Sub.2/1986/7 and E/CN.4/Sub.2/1986/7/Add.1-3, which include the other remaining volumes I to IV.

sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[19]

This proposed definition, as in the case of minorities, contains both objective and subjective elements. Within the following paragraph, we will proceed to their conceptual analysis, but not only. In fact, in this analysis we will go beyond the limits of the definition, which nevertheless has a highest degree of conceptual completeness, and hence extending our scrutiny to other criteria not mentioned or not fully present in it.

2.2. Objective elements

The Martínez Cobo's definition can be deconstructed into different conceptual elements, both objective and subjective, which epistemologically integrate the notion of indigenous people as a distinctive societal aggregation. Among its objective elements, it is possible to individualise not only those two elements already mentioned, namely *being first in time* and *non-dominant position*, but also other interconnected and perhaps even implicit criteria.

In fact, as we will see within the following sections, this proposed definition refers also to additional implicit or explicit elements, such as the *cultural distinctiveness* of these populations; the conceptual importance of their *traditional lands* ('ancestral territories' in the wording of the definition); and their *ethnic identity*, which also introduces a *biological* factor into the notion of *indigenousness*. Last but not least, it is worth to mention that all these objective criteria also have conceptual interconnections and perhaps potential epistemological elusiveness. Thus, in this chapter we will critically attempt a comprehensive exploration of all these

[19] This definition was constructed after reviewing and comparing 37 different definition used by 37 different countries covered by the study, and it was meant to be used as *"…a guide when seeking to develop concrete rules defining the specific rights and indispensable freedoms of indigenous populations…"* See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 28-29, in particular, para. 367 and 379.

conceptual shadows, in order to assess or –at least– rationally understand the conceptual (and legal) societal segmentation of the human population.

2.2.1. Being first in time

The first objective criterion proposed by the Martínez Cobo's definition that have to be present in a societal aggregation, in order to be identified as an *indigenous* population, is the so-called "*being first or having priority or precedence in time*" criterion. This element is reflected in the text of the definition when it mentions the "*historical continuity*" of these populations with the *"pre-invasion and pre-colonial societies"* that inhabited their current territories (therefore, indigenous people would be connected –in principle– with those pre-dated societies by *biological* ties of "*ancestry*").[20] The historical continuity is envisaged in connection with "pre-invasion" and "pre-colonial" societies.[21] In this sense, the latter qualifier does not present many complications, because it is quite clear that it refers to the historical phenomenon of *colonialism*[22], but the former is quite vague, especially because in

[20] It is interesting to see that, for the Special Rapporteur, the factor of historical continuity is not only constituted by the *'common ancestry with the original occupants of these lands'*, but also by the continuative presence *'for an extended period reaching into the present'*, of one or more different factors, such as the total or partial occupation of ancestral lands, the residency in certain parts of the country or region and even the maintenance of culture, cultural manifestations and language. As we can see, his approach to the requirement of "historical continuity" is quite broad and not exclusively connected with ancestry. See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 29, para. 379.

[21] It has been stressed that the term indigenous people has denoted from its very beginning a *"…opposition between 'racially' or 'culturally' differing 'new comers' and 'original inhabitants'. The term nevertheless did not, at least not in the League of Nations era, refer to distinct 'ethnic' groups, but to 'original' populations of a colony or a mandate as a whole."* See, T. MAKKONEN, *Identity, Difference and Otherness. The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law.* Helsinki, 2000, p. 110-111.

[22] According to Prof. Scelle, *« [l]e phénomène colonial est une des forme générales et constantes des rapports humains. […] La colonisation a existé de tout temps, si l'on admet qu'elle se confonde originairement avec le système de conquête et d'expansion des grands Empires de l'Antiquité. […][L]a colonisation, au sens étroit, suppose une occupation territoriale et l'établissement sur une collectivité arriérée d'une administration directe. »* See, G. SCELLE, *Précis de Droit des Gens. Principes et Systématique I et II,* Paris, 1984, p. 142-143. In connection with colonialism, the Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, 31 August to 8 September 2001, states that *"…colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences."* See, *Report of the World Conference*

human history, almost all societal entities suffered from one or another kind of invasion, conquest or external violent attacks.[23] In fact, one might argue that, if the requirement to "being first in time", as a settler in connection with a given territory, would be applied seriously, it would be quite difficult to establish who really is indigenous to *that* given territory. If we look back in time, peaceful migratory flows or –on the contrary– violent invasions have indeed been a normal state of affairs in human history. In fact, almost in all cases, civilisations came from somewhere else… if one goes back in time far enough.[24]

Therefore, it would be quite difficult to clearly establish a specific period of time, besides the case of colonialism which made references to the political control exercised by European powers outside of their continent[25], from which point it would be possible to start counting and applying the "previous in time" criterion, but not only. Also identification of the territory over which we will apply this criterion could be problematic, in a sense that even descendants of different migratory flaws could claim to be native of the soil of the country as those groups that claim to be "indigenous" to that territory. Therefore, it seems that if temporal and territorial references would be constructed through referring just to those current settlers who constitute the predominant sectors of the society (as a reference parameter), within the specific borders of an existing national State, then this historical and geographical analysis would be much easier. That is, making references to those regarded as the historical successors of those who had invaded or otherwise besieged the territory of *indigenous* ancestors and who –as it has been said– *"eventually prevailed over them and imposed on them colonial or other forms of subjugation."*[26]

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against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/CONF.189/12, 2001, p. 12, para. 14.

[23] According to Martínez Cobo, indigenous people *"...consider themselves to be the historical successors of the peoples and nations that existed on their territories before the coming of the invaders of these territories, who eventually prevailed over them and imposed on them colonial or other form of subjugation, and whose historical successors now form the predominant sectors of society."* See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 29, para. 376.

[24] See, H. HANNUM, *Indigenous Rights*, in G. M. LYONS, J. MAYALL (eds.), *International Human Rights in the 21st Century. Protecting the Rights of Groups*, Lanham/Boulder/New York/Oxford, 2003, p. 72-73.

[25] See, G. SCELLE, cit., p. 145.

[26] See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 29, para. 376; see also, E.-I. A. DAES, *op. cit.*, p. 20, para. 64.

In addition, there is perhaps a more substantial question that we can ask in connection with this criterion, that is whether the factual element of "being first in time" really matters from a socio-political and legal perspective. In today's world, national boundaries are already established, and all individuals count for their inherent worth and dignity, regardless of their ethno-cultural origin, race, religion, colour, culture, gender, age, or national origin. Moreover, it would be quite logical to add to this list of non-relevant legal matters (from the point of view of the equal enjoyment of rights and freedom), the *biological* factor of *being descendant* of the historical dwellers that, at a certain point in history, *first* inhabited a given territory vis-à-vis all other *current* inhabitants. That is, with regard to those that are not considered as *biologically* connected with the same historical *indigenous* aggregation. In today's world, under the harmonious light of the golden rule enshrined within the UDHR, which states that *"[a]ll human beings are born free and equal in dignity and rights"*[27], it would be quite difficult to admit that certain segments of the population of the world are entitled to have a different set of *exclusive* rights. This is the case, especially because those differential rights would just be grounded on the sole factual element of being descendants of those that *first inhabited* a given territory, at certain point in history. All humans equally descend from historical societal aggregations, which, according to the wording of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, have to be considered as equal in worth.[28]

As we have seen, the objective element of "being first in time" is considered as intimately and *conceptually* connected with the historical arrival of a pervasive external societal force, which has historically dominated the invaded territory and whose descendants are still in control of the main current societal structures and institutions. However, one could perhaps ask what would happen if those dynamics of domination and socio-political, economic and cultural subjugations lose their conceptual, practical or even legal interconnections and relevance. In other words, one can ask if it would still be possible to construct the notion of *indigenousness* in terms of which group was in a given location first, when all members of that given

[27] See, Article 1 of the UN Unversal Declaration of Human Rights.
[28] See, Article 2(3) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. In connection with the principle of "equal dignity and respect for all cultures", see our considerations in Chapter I, Section 3.4.1.

society are conceptually and practically equally treated.[29] The answer to this question leads us to the analysis of the second objective element contained within the Hernández Cobo's definition, which is the conceptual relevance of indigenous people's *non-dominant position* in current societies.

2.2.2. Non-dominant position

The second mentioned objective element refers to the dynamics of power and domination, and is included within the definition which requires that indigenous people *"form at the present non-dominant sectors"* within a given society. The question in this case would be if, as result of measures taken for the full realisation of its rights, a given indigenous population would no longer be *"non-dominant."* Would that population lose its legal status as "indigenous"? According the interpretation made by another former UN Special Rapporteur, Mrs. Erica-Irene A. Daes, they would not.[30] However, one could argue that perhaps it would be important to make a distinction between the "*legal status*", which is ascribed to indigenous populations by international law (or even by national laws), from their *"indigenousness"*. The former refers to their possibility to enjoy separate sets of rights, particularly tailored in order to overcome their "vulnerability". The latter –on the contrary– denotes their particular cultural characteristics that make them *culturally* different from the rest of the society, which would not necessarily need a separate set of rights in order to be protected.[31]

In fact, from a sociological or societal point of view, it would be possible to identify specific ethno-cultural characteristics that would represent a given societal aggregation, even if we would not take into account the dynamics of power and domination that could exist. Power dynamics are politically relational by nature and even when they can influence the construction of groups' identities, they are not *identitarian* in themselves, in a sense that a *cultural identity* cannot be exclusively constructed in connection with an experience of exclusion and non-domination, as

[29] See, H. HANNUM, *op. cit.*, p. 72-73.
[30] See, E.-I. A. DAES, *op. cit.*, p. 10, para. 26.
[31] Because of its importance in connection with the present discussion, I will come back later to this crucial point.

we have already seen in the precedent chapter.[32] Therefore, because in a given society power dynamics change, it could happen that the involved indigenous societal entities would no longer be under domination, or would no longer be in *'lack of political control'*, and would not be otherwise structurally discriminated against – in the enjoyment of their fundamental rights and freedoms– by other sectors of that society. However, this would not affect the cultural *"indigenousness"* of those groups.[33] In other words, what I am arguing here is the fact that when indigenous people would not be in a vulnerable, non-dominant or otherwise powerless position, they would not be affected in their "*indigenousness*", that is, in their cultural identity.[34]

However, as we will see in the conclusive part of this chapter, the loss of the vulnerable or non-dominant societal position by indigenous people's societal entities, and therefore the achievement of a situation of *factual* equality and non-discrimination vis-à-vis- the other members of the society in which they live, cannot be considered deprived of legal effects. In fact, because the entire construction of special measures in connection with indigenous people is grounded (or would be grounded) not in the fact of their cultural specificity or *"indigenousness"*, but rather on their overwhelming situation of vulnerability, exclusion, and disenfranchisement, the overthrow or subversion of this structural situation would deprive the legal justification for this special treatment. In other words, without a situation of "domination" or structural discrimination, a differential treatment between individuals (indigenous and non-indigenous people alike) that would be in the same factual position in terms of "non-vulnerability", would not be justified. The contrary would be against the principle of equality and non-discrimination.

To put it in another way, losing the "legal status" as indigenous people under the light of common international standards, due the fact of not being in a vulnerable position any longer, does not absolutely mean that they lose their cultural "*indigenousness*". In this sense, the latter feature would be culturally enjoyed and freely developed through the enjoyment of the very same fundamental rights that all the other members of the population have. In fact, the enjoyment of culture and

[32] See, Chapter III, Section 4.
[33] See, M. SCHEININ, *What are Indigenous Peoples?*, in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden/Boston, 2005, 3-4.
[34] See, T. MAKKONEN, *op. cit.*, p. 131-132.

cultural rights intrinsically presupposes the possibility of the enjoyment of cultural diversity.

In short, one thing is to be able to fully enjoy our cultural differences, and another –quite different– is to claim a *differentiated* (and hence exclusive) set of rights based on the ethno-political argumentation of protection of ontologically irreconcilable cultural differences. If culture would matter up to the point in which cultural differences would be irreconcilable, in a sense that societal organisations would have to be constructed around differential sets of rights, ideally indispensables in order to meet the cultural *"uniqueness"* of each ethno-cultural group, then no societal enterprise would be even possible. At least, not a society based on the axiological equality and dignity between all its individual members.[35]

2.2.3. Cultural distinctiveness or "indigenousness"

Beside the relevance of the above preliminary conceptual appreciation, the precedent discussion has introduced us to the analysis of an additional elements that could be considered as part of those objective elements identified by the Special Rapporteur that theoretically characterise indigenous populations, namely the cultural indigenous *"distinctiveness"* that culturally differentiate them from all the other societal aggregations.

[35] Notwithstanding the rationale behind this argumentation, indigenous activists and scholars, have exactly the opposite view. In fact, in connection with this crucial topic, Prof. Anaya has said that *"[t]he nondiscrimination norm, viewed in light of broader self-determination values, goes beyond ensuring for indigenous individuals either the same civil and political freedoms accorded others within an existing state structure or the same access to the state's social welfare programs."* See, S. J. ANAYA, Indigenous *Peoples in International Law*, New York, 2004, p. 131 et seq. Therefore, for him, recognising equal rights to all members of the society –including indigenous people– would be discriminatory because the law would not allow to treat differently those who are *culturally* different. However, the relevant question is not whether indigenous people are culturally different, which they obviously are as any other societal aggregation, but whether that difference should be relevant from a legal point of view, in a sense to allow the recognition of a different (and hence exclusive) set of rights. The answer to this question is hiding perhaps in the same wording of Prof. Anaya when he emphasised that his interpretation is constructed *'in light of broader self-determination values'*; "values" not "rights". As we will see later in this chapter, his views –and other similar discourses– are based on indeed legitimate but *political* societal aspirations of indigenous groups; political aspirations that include their plea for the legal recognition of their societal institutions, their inclusion within the legal structure of the concerned States. As we can see, this plea does not substantially differ from the multiculturalist claims analysed in the precedent chapters. As I said, because the theoretical importance for this work that this question has, I will come back to it later.

Just for the sake of the argumentation, it is important to clarify that this criterion has not been expressly incorporated into the wording of the proposed definition. Nevertheless, we can consider it obliquely included in it under different wording, most precisely when it mentions the indigenous people's *"continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."* Therefore, according to this, their *'distinctiveness'* basically refers to the fact that indigenous people have their *"own cultural patterns, social institutions and legal systems."* In summary, it would refer to the fact that they have… a different culture and cultural institutions, which not only lead us to a rather circular argumentation, but also toward the unavoidable question of "*different from whom*"?

A second and holistic reading of the proposed definition could provide us –at least– with an answer to our second question, in a sense that it seems that it refers to those cultural differences that they have vis-à-vis the mainstream society, or its dominant sectors.[36] If this interpretative reading is correct, and it seems that it is, then the *"cultural distinctiveness"* would be placed not at a substantial level but at a different comparative level, regardless the entity of the cultural comparative substance. In other words, if the "distinctiveness" element would consist in the fact of being "different" from the mainstream society, then the distinction is not ontological but relative. Relative because it would depend on the substance, on the cultural contents and entity of the *comparator*, which seems to be –in this case– the mainstream society. Whatever cultural entity or substance mainstream society would have, indigenous people would be those that just have a different one, regardless of the cultural entity of the difference.

Indeed, because cultures change across time and space, the dialogical and mirror construction of indigenous people's cultural distinctiveness would take as well different forms, following exactly the opposite or –at least– a different cultural development with regard to those taken by the mainstream society. As it would be possible to imagine, this approach does not really help in order to provide substantive elements neither for a general conceptual definition nor for a more specific

[36] This is what we can literally and logically conclude from the wording *"…consider themselves distinct from other sectors of the society now prevailing in those territories, or part of them."* See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 29, para. 379.

individualisation of the cultural content that would substantiate their *"distinctiveness"*, beyond the obvious cultural contrast that they might have, as any other differential societal aggregation has.

But then, the question is still open. One could still ask what it means to have a *distinguishable* culture, in the particular case of indigenous people. As it has been mentioned in precedent chapters, cultures and cultural manifestations assume diverse forms across time and space[37], but not only. Cultures, and cultural manifestations are changeable and mutable, they are under permanent chance because they reflect the creative actions of all human beings based on the *cultural* human adaptability.[38] Therefore, the intrinsically changeable character of cultures has to be born in mind at the time to approach the "*distinguishable*" cultural specificities of indigenous people, in order to avoid the *"essentialist trap"*, that is to *freeze* cultures out of time, without acknowledging their unavoidable changes and mutable substances.[39]

Having in mind the precedent observation, we can perhaps say –from a holistic cultural perspective– that indigenous people's distinguishable culture includes *all aspects of indigenous life*. That is, *inter alia*, their different understandings of the world, the holy and admirable, languages, religion and culture, their own social structures and institutional organisations (including their legal systems, if they have retained them) and their own traditions and histories. However, these *cultural* characteristics[40], which can be summarised in the wording of the Vienna Declaration and Programme of Action as *"...their distinct identities, cultures and social organizations"*[41], do not appear to differ very much from the general characteristics of all other ethno-cultural societal entities present in a given society.[42]

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[37] See, Article 1 of UNESCO *Universal Declaration on Cultural Diversity*, adopted by the United Nations Educational, Scientific and Cultural Organization, on 2 November 2001.
[38] See, Chapter I, Section 5.
[39] See, K. A. APPIAH, *op. cit.*, p. 130 et seq.
[40] It is important to bear in mind that culture, in a wide sense, refers to *"...the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs."* See, UNESCO, *Mexico City Declaration on Cultural Policies*, adopted by the World Conference on Cultural Policies, Mexico, 6 August 1982, *preamble.*
[41] See, the UN Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in Vienna on 25 June 1993, Paragraph 20 of Part I.
[42] In fact, for Prof. Ermacora considered that *"[t]he problem of aborigines falls into the category of the protection of minorities. However [he added], aborigines are not considered and not legally treated as minorities."* See, F. ERMACORA, *op. cit.*, p. 279. In the same line, the UN Special Rapporteur, Mr. Asbjørn Eide, has stated, when discussing constructive solutions for the problems

In fact, because the changeable, dialogical and hence mutually influential character of cultures[43], the cultural expressions, manifestations, and characteristics of all societal entities –including indigenous people's culture– are "*unique*".[44] But then again, if all cultures are "unique" –as they are from a sociological point of view– then it is pointless to still try to identify the most salient cultural characteristics enshrined within indigenous people's distinctiveness. This is nothing but logical. Indeed, if we explore a little bit further this logical angle, we can even arrive at the conclusion of the *inadequacy* of the said quality, because if all cultures are "unique" then no one would be "unique". Again, another *fallacy trap*.[45]

Perhaps, as it happens in other cases of theoretical constructions, it could be that the case of indigenous people escapes this logical conceptual constrain, in a sense that their cultural "uniqueness" is… or *"should be"* considered more culturally "unique" than other "unique" cultural expressions and manifestations. In order to attempt to resolve this conceptual *galimatias*, and before commenting on its prescriptive dimension (the *"should be"* aspect), I will focus on its descriptive dimension (its *"is"* aspect).[46] Hence, we will make an extra effort in this conceptual enquiry, trying to identify those cultural aspects that would be able to show the "*uniqueness*" of indigenous culture that –consequentially– make it more "*unique*" vis-à-vis the cultural "*uniqueness*" as well presented in all other cultural manifestations and entities (majorities and minorities alike).[47] This is –of course–

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involving minorities, that the chosen definition of minorities *"also includes indigenous peoples"*, but –he nevertheless clarified– *"it being recognized that they may have stronger rights than other minorities in areas where they live compactly together."* See, A. EIDE, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, UN Doc. E/CN.4/Sub.2/1993/34, United Nations, 1993, p. 9, para. 40. As we can see, both authors put more emphasis on the recognised legal differences (different legal status) between indigenous people and minorities in general, rather than on the cultural ones. Because of its importance within the framework of this work, I will come back to it later in this chapter to discuss the differences between these two societal aggregations.

[43] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 4.

[44] In the wording of UNESCO, *"[e]very culture represents a unique and irreplaceable body of values…"* See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 1.

[45] This kind of fallacy has been named as a fallacy of false classification, within the general fallacies *ad judicium.* See, J. BENTHAM, *The Book of Fallacies*, London, 1824, Ch. 10, p. 316 et seq.

[46] In connection with these two discursive dimensions, see, H. KELSEN, *What is Justice? Justice, Law, and Politics in the mirror of science*, Berkeley/Los Angeles/ London, 1971, p. 84.

[47] See, in this regard, our comments and conclusions in connection with the topic of *cultural diversity*, in Chapter III, Section 2.

without prejudice the observation that –in themselves– indigenous cultures are quite far from being homogeneous.[48]

In order to address this new theoretical challenge, it would be perhaps a good departing point to come back to Martínez Cobo's Study and see which extra conceptual elements we can find in it. According the Special Rapporteur, indigenous people have *"...a deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture."*[49] Here we can find a new focal point, which is the special relationship that indigenous people have with their lands, especially because is considered as *"deeply spiritual"*. The centrality of the land tenure systems in their cultures, and the special relationship that indigenous people have with them, has been acknowledge not only by Mr. Martínez Cobo, but also by other UN Special Rapporteurs[50], the Working Group on Indigenous Populations (WGIP) of the former UN Sub-Commission[51], and other international mechanisms.[52]

Just as an example of the UN focus on this matter, among UN Special Rapporteurs, Mrs. Erica-Irene A. Daes, issued in 2001 a working paper related

[48] These conceptual complications have been acknowledged by the UN Special Rapporteur, Mr. Martínez Cobo, when he concluded that *"...the culture criterion, although it is very useful, is not enough to classify a person as indigenous or non-indigenous."* See, J. R. MARTÍNEZ COBO, *Study of the Probelm of Discrimination against Indigenous Populations*, cit., p. 18, para. 79.

[49] See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 16, para. 196.

[50] According to another UN Special Rapporteur, Mr. Rodolfo Stavenhagen, *"[f]rom time immemorial indigenous peoples have maintained a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as identifiable territorial communities. The right to own, occupy and use the land is inherent in the self-conception of indigenous peoples and in generally it is in the local community, the tribe, the indigenous nation or group that this right is vested."* See, R. STAVENHAGEN, *Indigenous Issues. Human rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, subitted pursuant to Commission resolution 2001/*57, UN Doc. E/CN.4/2002/97, United Nations, 2002, p. 14, para. 39. See also, E.-I. A. DAES, *op. cit.*, p. 10, para. 27.

[51] The Working Group on Indigenous Populations, which was established pursuant to Economic and Social Council resolution 1982/34 is a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights, and has a two-fold mandate, which consist in, first, to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples, and second, to give attention to the evolution of international standards concerning indigenous rights.

[52] Among those mechanisms, the Human Rights Committee has stated, for example, that *"...culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."* See, Human Rights Committee (HRComm.), *General Comment No. 23: The rights of minorities (Art. 27)*, U.N. Doc. CCPR/C/21Rev.1/Add.5, United Nations, 1994, para. 7; see also, Committee on the Elimination of Racial Discrimination (CERD). *General Recommendation No. 23: Indigenous Peoples.* United Nations, 1987, para. 3 and 5.

specifically to this question.[53] In that opportunity, she expressly stressed the fact that, for indigenous people themselves, *"…it is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies."*[54]

Because the importance of this *"special relationship"* within the framework of this work, it will be analysed in a separate section, even when thematically it is indeed connected with, and is part of the present issue of *cultural distinctiveness*.

2.2.4. Special relationship with traditional lands

As we will see bellow, the so-called *'special relationship'* element has also been acknowledged within the currently recognised international human rights related instruments. These are –for instance– the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries No. 169 of 1989 (hereinafter "ILO Convention No. 169"), or even the most recent UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on the 13th September 2007 (hereinafter "UN Declaration"). In fact, within the former, we find – as a sort of interpretative principle– the clear recognition of the *"…special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories."*[55] The Declaration, makes even a more verbal and vivid exposition of the axiological centrality that lands play in indigenous people culture, when it states that *"[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditional owned or*

[53] See, E.-I. A. DAES, *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2001/21, United Nation, 2001.

[54] *Ibid.*, p. 7, para. 13. The Special Rapporteur also highlighted the words of Prof. Robert A. Williams, whom stated, within the discussion hold with the Working Group on Indigenous Populations, that *"…indigenous peoples have emphasized that the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories." Ibid.* See also, R. A. WILLIAMS, *Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples*, in *Duke Law Journal*, 1990, p. 981et seq.

[55] See, Article 13(1) of the International Labour Organisation (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries, C 169 of 27th of June 1989.

otherwise occupied and used lands…"[56] In another words, or –to be more precise– in the words of Martínez Cobo, for indigenous people, *"…the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications."*[57]

In the same line, another UN Special Rapporteur, Mrs. Daes, has stressed certain elements that –according to her inquiry– delineate this special relationship. In particular, she highlighted the fact that *"…this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; [that] the collective dimension of this relationship is significant; and […] the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability."*[58] As we can see, the accent is put on the holistic and comprehensive impact that *traditional* lands have in the way that these populations culturally understand their own lives. According to this view, it seems that their philosophical understanding of life is constructed around this special relationship, which remains at the very centre of their *cultural* existence, and –as I will argue bellow in this chapter– assuming a kind of metaphysical if not a *dogmatist* character.[59]

Furthermore, because the centrality of the lands in indigenous life, during the past decades till today, indigenous people started to be involved in numerous conflicts involving indigenous communities claiming for the rights that they believe

[56] See, Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted at the 107th plenary meeting of the UN General Assembly, on 13th September 2007.
[57] See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 16, para. 197. As Phillip Wearne said, *"[t]he land is identity – past, present and future. The earth is literally and figuratively the home of the ancestors, the people who gave the current generations life and who demand veneration in traditional rituals and custom."* See, P. WEARNE, *Return of the Indian*, 1996, p. 23-24, cited by L. RAY, *Language of the land. The Mapuche in Argentina and Chile*, Copenhagen, 2007, p. 11. The importance of land for indigenous people can also be seen in their groups' denominations; for example we find among the indigenous people living in the southern region of South America, within the Argentinean and Chilean Patagonian regions, that they have designated themselves by the comprehensive name of *"Alapu-ché"*, which literally means *"Children of the Land"*. See, E. R. SMITH, *The Araucanians; or, Notes of a tour among the Indians Tribes of Southern* Chili, New York, 1855, p. 129.
[58] See, E.-I. A. DAES, *Indigenous peoples and their relationship to land*. *Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, cit., p. 9, para. 20.
[59] *Ibid.*, p. 7, para. 14.

they have over what they still consider their traditional lands and territories.[60] Consequently, judicial and quasi-judicial international bodies, under the legal label of human rights violations, have dealt with cases connected with these conflicts. In this sense, I would just like to quote one of the various cases in which the Inter-American Court of Human Rights (I-ACtHR) has dealt with the question of indigenous people's land claims. This, of course, is without resting the importance of the jurisprudence of those quasi-judicial instances, and in particular, the UN Human Rights Committee (HRComm.), which has indeed recognised the indigenous people's interaction with their lands as part of their culture and therefore as included within the scope of Article 27 ICCPR.[61] However, the focus on the Inter-American Court is not only because of the fact that in the following chapters I will precisely deal with the jurisprudence of this Court, but also –and perhaps even most importantly within the framework of this work– due the fact that it has paid *unusually* deep attention to the above said relationship.

In effect, the I-ACtHR, in its first case dealing with indigenous people's land claims, made consistent efforts on the conceptualisation and identification of the elements enshrined by the notion of "property" as interpreted by indigenous communities. In this sense, the Court stated that *"[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory* [as any other human being, I would rather say]*; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."* Additionally, and in order to clarify what the Court intended with regard to "fundamental basis of their cultures", it has stressed that *"[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual*

[60] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, in UNDP Occasional Paper, 2004/14, 2004, p. 3 et seq.

[61] See, among other resolutions from the UN Human rights Committee (HRComm.), Communications No. 24/1977, *Sandra Lovelace v. Canada*, 30 July 1981(UN Doc. CCPR/C/13/D/24/1977), para. 15-16; No. 197/1985, *Ivan Kitok v. Sweden*, 10 August 1988 (UN Doc. CCPR/C/33/D197/1985), para. 9(2); No. 549/1993, *Francis Hopu and Tepoaitu Bessert v. France*, 29 December 1997 (CCPR/C/60/D/549), para. 10(3); No. 511/1992, *Ilmari Länsman et al. v. Finland*, 26 October 1994 (CCPR/C/52/D/511/1992), para. 9(2); No. 1023/2001, *Jouni Länsman et al. v. Finland*, 15 April 2005 (CCPR/C/83/D/1023/2001), para. 10(1-2).

element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[62]

For this Court, beyond the material element of economic use and production, the indigenous relationship with their lands seems to be characterised by the presence of a *"spiritual element"* connected with their cultural traditions and world's views, which would make this ethno-cultural aggregation more… culturally "*unique*" than all the others. This *"spiritual element"*, according to the opinion of three out of the seven members of the Court's bench, have to be understood in a sense that *"without the effective use and enjoyment of [their lands], [indigenous people] would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communitarian."*[63] As we can see, under this interpretative light, we have arrived at a sort of *"essentialist point"*, in a sense that if we go beyond this cultural element then we would not be conceptually able to properly refer to the members of a given societal aggregation that has lost its *"spiritual"* connection with their traditional lands, as indigenous people.[64]

In short, it seems that for this Court, without the possibility of having a direct relationship with the lands in which their forebears used to live, in accordance with their *special* traditions and cultural understandings, these people would lose their own *"indigenousness"*. That is, the essential cultural element that makes them

[62] See, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I-ACtHR, Series C No. 79. Judgment on Merits, Reparations and Costs of August 31, 2001, para. 149.

[63] *Ibid.* See, Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, para. 8. These Judges have also introduced an additional cultural component to the above mentioned *"spiritual element"*, which is the so-called *"intertemporal dimension."* This dimension is connected with the self-cultural understanding that indigenous people have that *"…the land they occupy belongs to them, they in turn belong to their land"*; in a sense that they have to *"…not only […] preserve the legacy of past generations* [which is supposed to be culturally connected with the same lands]*, but also to undertake the responsibilities that they have assumed in respect of future generations* [which will necessarily be connected with those very same lands too]*."* For this reason, these people have –according to the said Judges– *"…the right to preserve their past and current cultural manifestations, and the power to develop them in the future."* (*Ibid.,* para. 8-9). As we can see, it seems that it would be possible to find also in this interpretation a very powerful *essentialist* element, which is connected with the idea of *intemporalité* or timelessness unchangeability of indigenous people's culture. For its importance in the framework of this work, I will come back later to this in the following chapters.

[64] The *spiritual* aspect of the relationship that indigenous people have with their lands, has been also acknowledged by the UN Durban Declaration, which stated that *"We also recognize the special relationship that indigenous peoples have with the land as the basis for their spiritual, physical and cultural existence and encourage States, wherever possible, to ensure that indigenous peoples are able to retain ownership of their lands and of those natural resources to which they are entitled under domestic law."* See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, cit., p. 16, para. 43.

distinctive from the rest of the society.[65] If this is true, then one cannot possibly be considered as *indigenous* if living outside of those areas regarded as "traditional lands", which I believe is just another *essentialization*.[66] Because the relevance of the above jurisprudence in this work, I will come back to it later in this and in the following chapters.

Therefore, as a consequential preliminary conclusion of the above considerations, it would be that the relationship that indigenous people have with their "traditional lands" plays a central or very important role in their culture, and for this reason is –or has been considered as– reflected in their *'cultural distinctiveness'*.[67] But, on the other hand, it could also lead toward a sort of cultural "*essentialist*" understanding of these populations, which would potentially force them into historically frozen cultural conceptions.

Coming back to our conceptual effort, and bearing in mind the holistic impact that lands have (or could have) on indigenous cultural practices, we can even say that the integral conceptual apprehension of the "traditional land" element is (or could be) also considered as inter-connected with one of the already mentioned objective requirements of the definition, namely the "priority in time" factor. In fact, as we have already seen, the "*primogeniture*" or the characteristic of "being first in time"

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[65] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 3 et seq.

[66] Talking about "urban mapuches", that is, individuals that identify themselves as *Mapuche* (one of the indigenous cultural aggregation present in the southern cone of South America, in Argentina and Chile), it has been said that *"...leading academics have affirmed that a Mapuche culture as such does not exist today [, ...] this is not the case, thanks principally to the role of the machi, who has taken on the burden of keeping the "ancient" knowledge alive in the city."* See, L. RAY, *op. cit.*, p. 20 et seq. From this anthropologic perspective, the indigenous culture does not necessarily depend on the daily contact (or just contact) with those lands in which their forebears were established; culture is more flexible than that, it is rather reflected –in this case– on the oral transmission of their traditions and history as a distinguishable societal entity. Again, it seems to me that the problem of the different understandings lies in the conceptual confusion of indigenous people as a "legal category" and the cultural identification of certain societal aggregation of individuals as "indigenous". The former refers to a group or societal entity that should fulfil certain requirements in order to be protected with certain specific (and exclusive) set of rights. The latter, on the contrary, refers to a socio-cultural notion of how individuals (or societal aggregation of them) are culturally self-perceived (self-identification), or externally perceived by others (external attribution of group membership), by the externalisation of certain cultural practices (e.g. language, religion, philosophy, etc.), regardless whether they would be entitled or not to an exclusive and differentiated "legal" status. See also, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 25-26.

[67] In the views of UN Special Rapporteur, Mrs. Erica-Irene A. Daes, *"...the cultural distinctiveness of indigenous peoples, which is central to the concept of "indigenous" in contemporary international law, is inseparable from "territory".* See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 16, para. 43.

refers to a specific period in history (e.g. at the time of conquest or colonisation), but not only. It is also related to a specific territory that has been colonised, occupied or otherwise besieged by an external societal aggregation; "external" at *that* precise moment in history, and with regard to those that "originally" inhabited or occupied that given territory. Therefore, the two elements are –from a conceptual point of view– intrinsically connected, because it would be impossible to identify which societal aggregation was "first in time", without first identifying the lands and territories over which that temporal analysis have to be conducted, and *vice versa*.[68]

Moreover, traditional lands could be considered "*traditional*" precisely because their cultural-economical interconnection with the *traditional* activities developed by these groups (e.g. hunting, fishing, forest dweller, etc.), which –in most cases– highly depend on the exploitation and use of the natural resources specific to the area in question.[69] Additionally, and perhaps even most importantly, when we refer to "traditional" lands, we are making reference to a specific geographical area. That is, to those lands historically occupied by a certain societal aggregation (indigenous group) at the time in which a specific historical situation took place, namely, at the time of their invasion, colonisation or dispossession by an external ethno-cultural or societal entity.

Furthermore, the importance of the specific relationship with traditional lands, as a central cultural aspect of the indigenous people's notion, it could be considered also evidenced in the so-called societal power dynamics of domination and exclusion which –in most cases– are connected with them. In this sense, as it has been already mentioned above, the same proposed definition denotes these dynamics, which refer to indigenous people as those having *"historical continuity with pre-invasion and pre-colonial societies now prevailing in those territories, or parts of them."* Because those territories are nothing but the said traditional lands, then the act of invasion or colonisation has necessarily taken form precisely against those lands. It is in this sense that some authors refer to this historical-factual situation as

[68] The relevance of "being the first people" and the strong ties to the land have also been identified, by indigenous people themselves, as constituted important elements of a possible definition, together with the principle of self-identification, which will be discussed latter, in connection with the *subjective* elements of the notion. See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 14-15, para. 41.
[69] See, M. SCHEININ, *op. cit.*, p. 3-4.

an autonomous or independent criterion, the so-called *"dispossession of lands"* element.[70]

We have to keep in mind that this new potential objective criterion has to be epistemologically considered as an integrative part of the notion of "traditional lands" and the *special relationship* that indigenous people culturally have with them; however, because of its diverse conceptual ramification I would rather prefer to critically analyse it in the following self-standing section.

2.2.5. Dispossession of lands and its axiological interpretation

Under this new conceptual angle, indigenous people would be those that have suffered dispossession of their land, territories and resources, by means of colonisation or other comparable societal events in the past. These grievances are still today at the very centre of indigenous people's overall situation of disenfranchisement, and socio-political, economic and cultural exclusion from the *dominant* societal structures and institutions in a given current society. To put it in another way, according to this interpretative line, indigenous people's cultural *"differentness"* would be also grounded in the fact that they have suffered from *"historic injustices as a result of, inter alia, their colonization and dispossession of their lands…"*[71]

Recognising the appealing force of this new interpretative angle, it is nevertheless not deprived of certain conceptual problems. Let me explain this more in detail. The element of *historical* dispossession of lands by colonialism, invasion or other historical events involves –at least– two different aspects, which are (a) *the historical act of dispossession* and (b) its *perception of historical injustice*.[72] The first

[70] See, M. SCHEININ, *op. cit.*, p. 3-4.

[71] This line of interpretation has been adopted by the UN Declaration on the Rights of Indigenous Peoples, which states –in its preamble– that the General Assembly is *"concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus prevailing them from exercising, in particular, their right to development in accordance with their own needs and interests."*

[72] See, among other authors, in connection with a sociological account of the "processes of dispossession", R. J. EPSTEIN, *The Role of Extinguishment in the Cosmology of Dispossession*, in G. ALFREDSSON, M. STAVROPOULOU (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes. Essay in Honour of Erica-Irene A. Daes*, The Hague/London/New York, 2002, p. 45 et seq.

aspect, that is, the historical act of dispossession of their ancestral lands, by means of colonisation, invasion or other historical events that have involved the unwilled (or even unwarranted) relinquishment of their traditional lands in favour of the *cultural* newcomers[73], has already been analysed above. Thus, we will concentrate our considerations on the second involved aspect, namely the perception of historical injustice.

Just in order to have a firm and well-founded base as a starting point in this complex matter[74], I will draw our attention to the wording of the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (hereinafter "Durban Declaration"), held in Durban in 2001. This Declaration clearly states that *"...colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of*

[73] Just as an historical viewpoint, we can reproduce here just one of the observations made by one worldwide recognised eye-witness of the South American societal dynamics, in the first half of the nineteenth century. Charles Darwin, in his account of his *voyage* in the southern cone of South America, he has remarked the *"immense territory over which the Indians roam; [but he also added that] yet, great as it is, I think there will not, in another half century, be a wild Indian north of the Rio Negro [he refers to a river in a the southern Argentinean's Province of Rio Negro]. The warfare is too bloody to last; the Christians killing every Indian, and the Indians doing the same by the Christians."* See, Ch. DARWIN, *Journal of Researchers into the Natural History and Geology of the countries visited during the voyage of H. M. S. Beagle Round the World*, New York, 1846, p. 133. Darwin wrote this notes in 1833, almost 50 years after, in 1884, one of the latest *Mapuche* cacique, Namunkurá, surrendered to the Argentinean army, putting almost an end to more than half a century war, which has been called *"la conquista del desierto"* (the conquest of the desert). See also, L. RAY, *op. cit.*, p. 64 et seq. These past wars, were indeed wars in the classical sense of the notion; the motivation of the belligerent counterparts were most likely different, for indigenous populations, it was perhaps the need to defend what *they* considered their sovereignty, as internationally independent and sovereign societal entity. For the non-indigenous "invaders", it was perhaps a war motivated to secure *their* territorial integrity and effective occupation of what they consider *their* rightful territory, and even perhaps on reasons imposed on them by *"civilization and modernity"* (at least under *their* cultural world-views), but not only. In fact, these wars were also *"unequal"*, from a pure and classical military point of view. The belligerent counterparts did not have equal military power; the technological gap was enormous. In the words of Langenhove, *« [u]ne grande supériorité d'armement fournit au peuple qui en dispose un pouvoir à peu près sans limite sur celui qui en est privé : il peut le refouler, lui enlever ses terres, le soumettre à sa domination, l'asservir, voire même l'exterminer. »* See, F.V. LANGENHOVE, *op. cit.*, p. 340 et seq. More in general, and especially in connection with the legal justifications behind the Spanish conquest of America, see L. HANKE, *The Spanish Struggle for Justice in the Conquest of America*, Philadelphia, 1949, p. 23 et seq. For a sociological perspective, see R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, Organization of American States (OAS), 2002, p. 3 et seq. Finally, for a graphical description of the cultural opposite views or even clashes between the encountered cultures, see D. F. SARMIENTO, *Life in the Argentine Republic in the Days of the Tyrants; or, Civilization and Barbarism*, New York, 1868.

[74] In order to clarify to the reader the scope of addressing this indeed complex topic, I would like to just say that my intension here is neither to build a theoretical framework of a general theory of justice nor to analyses the involved phenomenon or societal events from a "legal history" viewpoint. The scope of the consideration that will follow is purely connected with the conceptual impact that this new element has or could have on the notion of indigenous people.

African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences"[75], but not only. In this document the international community has also acknowledged *"…the suffering caused by colonialism and [therefore affirmed] that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today."*[76] Additionally, the Durban Declaration not only acknowledged the effects of colonialist practices, but also equated these practises to other events that have generated *"…massive human suffering and the tragic plight of millions of men, women and children"*, such as *'slavery', 'the slave trade', 'the transatlantic slave trade', 'apartheid'*, and *'genocide'*.[77] As a consequence of this acknowledgment, the Declaration ended by not only inviting *"the international community and its members to honour the memory of the victims of these tragedies"*, but also, due to the moral obligations connected with them, called upon the concerned States *"to take appropriate and effective measures to halt and reverse the lasting consequences of those practices."*[78]

Before we continue with our considerations, it would be important to clarify that the equation between *colonialism* and the others *practices* mentioned above, has generated quite a controversial debate at the bosom of the Conference, especially in connection with those countries that could be considered as *"concerned"* in past colonialist practices. In fact, Australia[79], New Zealand[80], and to a certain extent

[75] See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, cit., p. 12, para. 14.
[76] *Ibid.*
[77] In fact, the Durban Declaration, specifically *"…acknowledge[s] and profoundly regret[s] the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, apartheid, genocide and past tragedies." Ibid.*, p. 23, para. 99-100.
[78] *Ibid.*, p. 23-24, para. 101-102.
[79] The representative of Australia made at the Conference the following statement: *"Australia is a country whose good governance and strong democratic traditions and institutions derive directly from its colonial history. In relation to the text on the past, we therefore express serious concerns at the use of the same language in paragraphs 11 and 116 to condemn colonialism as is used in paragraph 12 to condemn apartheid and genocide."* See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, cit., p. 118.
[80] The representative of New Zealand expressed at the Conference clearly that *"…the concern of the New Zealand delegation at the unqualified references, at some points in the texts to colonialism,*

Belgium, on behalf of the European Union[81], expressly manifest their discomfort to this plain conceptual equation, basically because they considered that these practices have to be kept differentiated from an axiological (moral) point of view. In this sense, the statement of the representative of New Zealand is quite clear in making the point; he stated that *"...New Zealand recognizes that injustices occurred under colonialism in many countries that would be abhorrent by today's standards. Where those injustices were founded on racist attitudes and practices, colonialism can be viewed as having been a source of racism."*[82]

As we can see, the *perception of historical injustice* cannot be considered as a specific qualifying element that exclusively refers to indigenous people.[83] The same can be said in connection with colonialism, which –as a system of governance– was applied in larger geographical scales, far beyond the potential ethno-cultural distinctions between those populations that could be considered indigenous and those that could not.[84] In fact, the same declaration recognises that *"...colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences."*[85] Hence, the factual perception of having been subjected to historical injustices has to be considered as a *common* societal feature that indigenous people

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placing it on a par with scourges such as slavery, apartheid and genocide." See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, cit., p. 130.

[81] The representative of Belgium, on behalf of the European Union, manifested that *"The European Union acknowledges and deplores the immense suffering caused by past and contemporary forms of slavery and the slave trade wherever they have occurred and the most reprehensible aspects of colonialism."* See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, cit., p. 144.

[82] See, footnote no. 80. As we can see, the expressed concern could be summarised in the following two elements. First, "today's standards", moral standards, cannot be considered as the very same standards that were applied during the past colonist era; and second, according to those historically applied standards, the effects of colonialism could be considered as regrettable "only" when they were generated by *"racist attitudes and practices"*. Hence, to this representative, colonialism was not an *ontologically* racist phenomenon. The same conclusion can be deducted from the statement of the representative of European Union, who has *only* acknowledged and deplored *"...the most reprehensible aspects of colonialism."* See, footnote no. 81.

[83] With regard to this kind of perception, it has been said that, *[t]he dispossession of indigenous peoples of their lands is the morally repugnant historical fact that underlies the creation of several modern democratic States, the United States of America, Canada, Australia, and New Zealand, to mention only a few."* See, R. J. EPSTEIN, *op. cit.*, p. 45.

[84] In connection with the manner in which colonialism, as a system of governance, was organised and implemented, see, G. SCELLE, *op. cit.*, p. 142 et seq.

[85] See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, cit., p. 12, para. 14.

share with other ethno-cultural aggregations; consequentially, it cannot be considered as a *distinctive* character of their cultural *"uniqueness"* or, as it has been called, their *"indigenousness"*. As it has already been said, *"there are few ethnic groups in the world with no experiences of historic or present-day injustices…"*[86]

Furthermore, and perhaps even most importantly, the conceptual equation of indigenous people with past experiences of domination, exploitation, structural exclusion, discrimination and disenfranchisement, can lead –and it seems to me that it has led– toward a kind of *"victimisation"* trend[87], which could be considered also as another aspect of the *"essentialization"* of their group identity. The logic behind this interpretative trend could be summarised as follows: (a) indigenous people's identity is essentially based and constructed in connection with their *special relationship* with their lands; (b) they have suffered and are still suffering the loss of their traditional lands and resources on the hands of non-indigenous people (colonists, commercial companies, State enterprises, etc.); and (c) as a consequence of this land deprivation, their cultural identity and their survival as a *distinguishable* cultural societal aggregation has been and still is jeopardized[88], but not only. An extra element could be incorporated into this logical chain.

In fact, as a result of the above mentioned logical steps, it would be possible to add a subsequent element. That is to recognise and grant indigenous people with a *special legal regime*, as a matter of compensation of the land loses and as special measures tending to guarantee and protect indigenous people's cultural identity. This means, a regime containing exclusive rights regarding the use and enjoyment of those remaining traditional lands.[89] To put it bluntly, if identity *essentially* depends

[86] See, T. MAKKONEN, *op. cit.*, p. 131.

[87] *Ibid.,* p. 131et seq. According to Epstein, it is clear that *"…the indigenous peoples consider themselves to be victims of dispossession of their lands, their very status, and the right to enjoy the fruits of their status and rights."* See, R. J. EPSTEIN, *op. cit.*, p. 47.

[88] This type of reasoning can be found in many policy documents and recommendations of a variety of international bodies. Just as an example, we can mention –for instance– the *General Recommendation No. 23: Indigenous Peoples* of the Committee on the Elimination of Racial Discrimination (CERD), of 18 August 1997, in particular its third paragraph.

[89] It has stressed that, *"[s]ince indigenous lands were commandeered through territorial expansion, an ideal starting point for mechanisms of forgiveness and reconciliation should be the return of these lands. […]Modern norms on this issue […], express the view that peoples should not be dispossessed of their lands […] The question that remains is the extent to which these contemporary developments reinforce the notion that ancient acquisition of territory by expansionist colonisers is beyond the realm of critique since it is covered by the protection of the intertemporal rule."* See, J. CASTELLINO, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, in N.

on the *special relationship* with traditional lands, and because those lands have been taken or otherwise affected, then the better (or the only) way to protect the former (the said cultural identity) would necessarily be through the protection of the latter (the traditional lands).[90] This argumentation could be considered as based on a theory of *historical distributive justice*, in a sense of providing redress to those that have suffered from past wrongdoings, but, as a substantive ground for the conceptual construction of a distinguishable societal entity, it seems not to be enough.[91]

Furthermore, it has to be said that the above mentioned logical chain could not be considered as *exclusively* applicable to the case of indigenous people. To be considered as a victim of past wrongdoings, such as the injustices mentioned above, could open the door for the enjoyment of specific set of rights for other ethno-cultural entities seeking cultural recognition and societal redress. In fact, taken into consideration the legal possibilities connected with the exercise of the right of self-determination that indigenous populations claim to have, it could happen that more and more ethno-cultural societal entities would plead to be considered as *"indigenous"* too, in order to receive the same equal *"differential"* legal treatment that the latter claims to be entitle to have.[92] In other words, *"[i]ndigenousness is seen in terms of victimization, as well as subsequent claims to justice, to sovereignty and land rights that once were taken from them."*[93]

Hence, for an ethno-cultural societal entity, which has suffered the past institutional or structural injustices and which find itself in a current non-dominant political position vis-à-vis the ethno-cultural majority of a given national State, it would be a *"winning choice"* to frame its ethno-cultural and socio-political claims under the label of "*indigenousness*", rather than just a minoritarian one. The reason seems to be quite clear: the better and far reaching international legal framework

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GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden/Boston, 2005, p. 71-72.

[90] *Ibid.*, para. 5.

[91] In fact, the establishment of special measures, addressing to compensate the damages generated by historical wrongdoings, that not necessarily means the specific recognition of a differential societal identity character, as a separate societal entity, and even less, the possibility to have as such, a differential, distinguishable and exclusive legal status.

[92] In this sense, it has been stressed that *"[t]he emergence of 'wannabe' indigenous peoples and individuals seems to be an universally inevitable by –product of the growing recognition of the special protection measures attached to indigenousness."* See, T. MAKKONEN, *op. cit.*, p. 127.

[93] *Ibid.*, p. 133.

applicable to the former, especially in connection with the hypothetical and potential exercise of the claimed right of self-determination and autonomy.[94]

Finally, for concluding with the exploration of the conceptual interconnections that the *objective* element of *"cultural distinctiveness"* has (or could have) with other elements that potentially compose (or could compose) the notion of "indigenous people", as a distinctive societal aggregation, we still have to address one additional interlink. In fact, so far we have explored these interconnections between the elements that compose the *objective* criterion of the notion, but not with regard to the *subjective* one. Therefore, in order to avoid undesirable discursive interruptions, I would rather prefer to anticipate the consideration of this potentially remaining conceptual interlink, before entering into the full evaluation of the *subjective* criterion that conceptually integrate (or could integrate) the notion of indigenous people.

As we will see in the following paragraphs, the main subjective element that integrates the notion of "indigenous people" as a distinctive identifiable societal community is the so-called *"self-identification"* requirement. Without entering into the full analysis of this element, we can say that it refers to the recognition or appreciation that each "self" has of being different, of being *"indigenous"*, as individual and as a member of a given community. Self-identification of being different, as a part of a distinguishable societal aggregation, and of wanting to be different, that is to not be considered as part of a different (or even opposed) societal entity, which in most cases would be the mainstream society.[95] Therefore, self-identification has to be considered as intimately connected with *"cultural distinctiveness"*, in a sense that it is the latter that gives cultural content to the former, and vice versa.[96]

Therefore, if none of the enumerated objective elements would be effectively able to show the uniqueness, or cultural distinctiveness of indigenous people's

[94] More detailed considerations will be made in connection with this relevant argument, later in this chapter, when we will address the potential conceptual differences between the notions of "indigenous people" and "minority". Additional comments will be made also within the following chapters, when dealing with the cases of the Inter-American Court of Human Rights in connection with tribal people.
[95] See, M. SCHEININ, *op. cit.*, p. 3-4.
[96] We have already discussed in the precedent chapter the inter-relation between culture and cultural identity, and the way in which culture shapes humans' identity and the manner that the latter constructs culture. See, Chapter III, Section 4.

societal aggregations, this subjective aspect will certainly do it. In fact, from a cultural point of view, it would be more than enough to claim to be different, as a collective aggregation, in order to build a differential group identity. In other words, if all members of a given group, seeing themselves as culturally different from other members of the society, and if they would also be *dialectically* able to convince all of those non-members to see them as culturally different, then it would be quite clear that they would *"become"* culturally different. This is, regardless of the potential ontological or relevant cultural differences that could exist (or not) between two given societal entities. To put it bluntly, if I perceive myself as different, and others see me as different, then I *"am"* different. Culture and cultural identities are *dialogically* constructed[97]; they are subjected to a circular and permanent process of cultural exchange, in which the self is shaped in the mirrored view of external eyes, as we already saw in the precedent chapter.[98] Consequentially, "cultural differences" cannot escape from this dialogical construction too.

In conclusion, beside the existence of potential objective elements that would be able to *empirically* support and visualise the claim to *"cultural distinctiveness"*, indigenous people's culture would have to be considered differentiated and culturally unique, vis-à-vis all other members of a given society (including other potential minority groups). This is not only because these people perceive themselves as culturally different, but also –and perhaps even most relevantly– due to the fact that they want to be perceived (and treated) by others members of the society as such.[99]

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[97] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 4.

[98] See, Chapter III, Section 4.

[99] In fact, for the *Aboriginal and Torres Strait Islander Commission* certain definitions, and in particular the meaning of "indigenous peoples", *"are matters which should be determined by the world's indigenous peoples themselves."* In fact, according to them, the elements that have to be considered in defining "indigenous people" have to be *"[t]he right of indigenous peoples to self-identify as such; [t]he meaning implicit in the terms "indigenous" and "aboriginal peoples"; [t]he consequent rights of primogeniture as "first peoples"; [t]he rights which this implies in relation to land, self-determination and culture; [t]he right to accept others into groups classed as indigenous or aboriginal; and [t]the right to determine finally the indicia and definition for "indigenous peoples."* As we can see, all the alleged rights that ideally in their view have to be included into the notion of *"indigenousness"*, basically refer to the right to consider themselves as *"culturally different"*, and to claim external respect for the *differential* legal status that should be –in their opinion– consequentially attached to that specific difference. See, Aboriginal and Torres Strait Islander Commission, *Standard-Setting Activities: Evolution of Standards concerning the rights of Indigenous People: The concept of "Indigenous Peoples"*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2/Add.1, United Nations, 1996, para. 1 and 13. See also, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, cit., p. 14-15, para. 41.

Therefore, after having analysed the different objective elements that could be enshrined in the notion of indigenous people, we will proceed with the full consideration of the subjective elements, and in particular of the *self-identity* requirement, slightly introduced in the precedent paragraphs.

2.3. Subjective elements

As it has been maintained above, *cultural distinctiveness* has not only objective implications within this conceptual effort, as an external visible cultural characteristic, but is also intimately connected with the *subjective* element that composes this notion of indigenous people. This is –of course– the *will* of indigenous people to be –and to be seen and considered– *culturally different* from the rest of the society.

If we come back to the Martínez Cobo's proposed definition, we will find that, in fact, it refers to those indigenous people that *"consider themselves distinct from other sectors of the societies."* This introduces us to the subjective requirement of *'self-identification'* as indigenous people, as the historical successor of their "indigenous" ancestors, as "peoples" with a *distinctive* culture that *differentiate* them from the rest of the society. As in the case of any other societal group, from an individual perspective, the self-identification criterion can be seen as composed of two main factors. First, the self-identification of the individual as a member of a given indigenous group, which can be called *"group consciousness"*; and second, the recognition made by the group that that given individual (which recognise himself or herself as a member of that specific ethno-cultural aggregation) is indeed its member, that is the *"group's acceptance"*.[100]

Moreover, Martínez Cobo has stressed –in his study– the importance of the *self-identification* element in the construction of the notion of indigenous people. In this sense, he stated that *"...indigenous populations must be recognized according to their own perception and conception of themselves in relation to other groups"*, and for that reason, he has also concluded that even *"...the question of the definition is*

[100] See, J. R. MARTÍNEZ COBO, Study of the Problem of discrimination *Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 29, para. 375.

one that must be left to the indigenous communities themselves."[101] In fact, the self-consciousness of being different is not only applicable vis-à-vis the mainstream society but also with regard to "other" groups that seek the recognition of differential societal status in the society, as it would be –for instance– the case of minority groups.[102]

In fact, the self-identification element not only refers to the internal individual and collective process of cultural identity construction, as we already saw in the previous chapter[103], but also involves an external element, which is intrinsically dialogical and dynamic, and refers to the recognition of that societal entity as differential. Cultural identities are interactively and dialogically constructed, they are *"...renewed and enriched through contact with the traditions and values of others."*[104] Thus, cultural identities are mutable, changeable –the same as culture[105]– and, for this reason, collective cultural identity depends, in order to be considered distinguishable, on the recognition of "distinguishability" by external members of the collective entity that seek the said cultural differentiation, and –of course– indigenous people's cultural identity does not escape from this general societal rule.

As we have said in the previous chapter, the mere idea of a social group –as a differentiated societal entity– ontologically requires the existence of *'other'* groups.[106] In this sense, those sociological remarks, that were opportunely made in connection with "groups" in general, are indeed applicable to the case of indigenous societal aggregations. In fact, without having a *dialogical exchange* or contact with "other" external societal groups, with those that *are not* considered by indigenous people as *'indigenous'*, it would not be logically possible to place the discussion in a "group" dimension, just because we would not have –in this theoretical situation– any other "group" to be used as a comparator. In this hypothetical case, we would be only able to talk in terms of… *'people'*, but not in terms of *'indigenous'* people. In other words, and in order to be *graphically* clear, we can again say that *"without*

[101] *Ibid.*, p. 28, para. 368.
[102] *Ibid.*, p. 29, para. 376.
[103] See, Chapter III, Section 4.
[104] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 4.
[105] See, Article 1 of the UNESCO, *Universal Declaration on Cultural Diversity*, cit.
[106] See, Chapter II, Section 3(1); and more in general in connection with the *empirical* implications of this affirmation, see –among classic authors– G. BERKELEY, *Of the Principles of Human Knowledge.* , in G. N. WRIGHT (ed.), *The Works of George Berkeley, D.D., Bishop of Cloyne*, London, 1843, para. XXIII, p. 95.

having the image of 'difference' mirrored in the eyes of those that look upon us as 'others', our 'otherness' could not possibly exist."[107]

Therefore, the notion of indigenous people, as a separate and distinguishable cultural entity, in order to produce factual cultural effects (including legal ones) in a given societal milieu, needs the existence of a clear internal *self-consciousness*, that is from the indigenous communities themselves, but not only. In addition, it needs a *mirrored societal reaction*, in a sense of acknowledgement and acceptance, by all the other groups or populations –including of course the mainstream society– that forms part of the same societal setting.[108] In fact, in an open, pluralist, and democratic society, it would not be enough for a group (indigenous and non-indigenous alike) to just have an internal *self-consciousness* in order *'to be'* a *distinctive* cultural entity, separate and distinguishable from the rest of the population and other existing cultural groups.

The alleged *cultural distinctiveness* has to be *culturally* acknowledged by the other members of the society, in a dialogical and dynamic process of cultural exchange, in order to *culturally* exist. That is, in order *'to be considered'* as culturally *relevant* by all members of the society and not just by those societal aggregations that put forward their cultural *pretentions* of –in this case– *'indigenousness'*. When referring to *"culturally relevant"*, I intend to highlight the fact that the acknowledgement of the cultural *'uniqueness'* of the indigenous group, by group's outsiders, would give cultural visibility –and in this sense objective existence– to the hypothetical cultural boundaries. In addition, would eventually generate certain *societal* effects –in particular– in connection with eventual changes on the socio-political, economic and legal, *common* societal institutions and structures. To put it bluntly, it would not be enough to claim *cultural distinctiveness*

[107] See, Chapter II, Section 3(1), p. 17 et seq.

[108] In this sense, it has been stressed that *"...people define themselves by what makes them different from others in a particular context: "one perceives oneself in terms of characteristics that distinguish oneself from other humans, especially from people in one's usual social milieu…"* See, S. P. HUNTINGTON, *The Clash of Civilizations and the Remaking of World Order*, New York, 1997, p. 67. For a different, but not opposed view, see I. M. YOUNG, *Justice and the Politics of Difference*, Princeton, 1990, p. 46.

or –in this case– *'indigenousness'*, in order to be considered as "indigenous"; what would be required, is also to be acknowledged as such.[109]

In fact, conscious of the need for this external recognition, indigenous organisations and indigenous lobby groups have put their efforts in building the understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance of their lands, territories and resources for their continued *cultural* survival and vitality.[110] Of course, this preliminary conclusion has to be taken for what it is, namely, a pretended description of societal dynamics that, within a given society, lies at the bottom of the perception of ethno-cultural groups' cultural differences. Hence, the level of the discourse is allocated to what "is" (the descriptive level) and not in what "ought to be" (the prescriptive level)[111], according to the political and cultural aspirations of one or more *potential* differentiated societal entities, such as –for instance– could be the case of indigenous groups struggling for the societal recognition of their cultural *uniqueness*.[112]

However, the discourse could also be allocated at a *prescriptive* level. In this sense, all individuals that perceive themselves as members of an indigenous societal aggregation, and hence *self-identified* with it, should have the possibility to fully exercise, individually or collectively in association with all others that also consider themselves as members of the same indigenous entity, all his or her internationally recognised human rights and fundamental freedoms. This, of course, without suffering any discrimination or unequal treatment based on his or her cultural self-identification and constructed identity. No discriminatory or unequal treatment

[109] In order to be clear, I will give you a plain but graphical example that will eventually clarify potential remaining doubts. If I claim to be "*blue*", and I *perceive* myself as blue, but nobody seems to notice that *I am* blue, and, as a consequence of that lack of external acknowledgement, nobody treats me according to what it should be –according to *my own* understanding– the *special* treatment deserved as "blue"; then, it would perhaps be the case to start reviewing this *self-perception* and, in particular, the "*unique*" –in a sense of "unshared"– conceptual self-understanding of my *"blueness"*.

[110] See, E.-I. A. DAES, *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, cit., p. 7, para. 12; and E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, cit., p. 14-15, para. 41.

[111] See, H. KELSEN, *op. cit.*, p. 84.

[112] It has been said, in connection with migrants' societal aggregations, *"[t]he main reason for the people who are considered "different" by the wider society, and because of their alleged difference they are defined as potential victims of ethnic or cultural discrimination, to be engaged in, for example, anti-discrimination programmes, is not to receive socio-economic support, in the first place. They are aspiring to recognition of their identity."* See, R. TOIVANEN, *Contextualising Struggles over Culture and Equality: An Anthropological Perspective*, in M. SCHEININ, R. TOIVANEN (eds.), *Rethinking Non-Discrimination and Minority Rights*, Turku/Åbo/Berlin, 2004, p. 200.

should be allowed based on ethno-cultural appurtenance, *self-identification* or individual and/or collective cultural perception (internal and/or external), as a member of an indigenous societal aggregation. In other words, all persons, without consideration of their ethno-cultural or otherwise culturally constructed distinctions, should have the possibility (and indeed have it, under the current internationally recognised human rights standards[113]) to enjoy his or her *self-perceived* or otherwise *acknowledged* cultural diversity and identity, either individually or in association with others.[114] And, of course, indigenous people are not and should not be an exception to this general rule.[115]

However, if we approach this prescriptive level from a collective or even group's perspective, then it seems that the answer is not so clear. The *'ought to be'* collective or group dimension refers to the indigenous group's aspirations for political and institutional recognition (including –for instance– the incorporation into publicly *enforceable* legal systems of their own traditional legal institutions), and, it has to be said, it is –at least– less pacific than the former (the "is" dimension). This group *prescriptive* dimension leads us toward the broad question of the *relevance* of cultural differences and cultural self-identifications, within a given societal framework. In short, this issue could be summarised under the question of whether the cultural freedom to consider ourselves different (self-identification), and our individual right to be acknowledged and respected in our cultural choices (external recognition), have to necessarily be translated into a distinguishable legal framework. That is, a framework that would ideally grant us with a differential and hence exclusive set of rights (the *"ought to be"* dimension).

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[113] See, among other international instruments, Article 2 of the UDHR; Article 27 of the ICCPR; Article 15(1)(a) reading jointly with Article 2(2) of the ICESCR; etc.

[114] As is stated in Article 5 of the UNESCO Universal Declaration on Cultural Diversity, *"[c]ultural rights are an integral part of human rights, which are universal, indivisible and interdependent. […] All persons have therefore the right to express themselves and to create and disseminate their work in language of their choice, and particularly in their mother tongue; […]and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms."*

[115] In this sense, the UN *Declaration on the Rights of Indigenous Peoples*, expressly affirms that *"…indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different and to be respected as such"*; and, as a direct consequence of the ontological equality among people, its reaffirms that "*indigenous people, in the exercise of their rights, should be free from discrimination of any kind."* (Preamble).

As we saw in the previous chapters[116], the recognition of different legal status based on the ethno-cultural group's appurtenance, with differential and exclusive set of rights, could lead (and I am positively persuade that it does) toward a divided society where the only real equal entities would no longer be the individuals but the groups. Individuals would have *differential* and hence *unequal* rights, based on their *equal* possibility to be considered as *equal* members of *equal* –but distinguishable– cultural societal entities. Therefore, if we take seriously this multiculturalist prospective of society, we will ideally find within the national territory of each State, different societal aggregations (including –of course– indigenous ones in those countries in which they exist), equally treated in their possibility to grant *differentiated* set of rights to their members. These members would perhaps be treated equally and would not be discriminated against, vis-à-vis their fellows group members; but they would indeed receive a completely different structural, institutional and legal treatment vis-à-vis the members of other societal aggregations. In this sense, *cultural differences* between groups would be indeed relevant, in a sense that they would constitute not just an imaginary cultural boundary between ontologically equal humans, but also structural, institutional and legal borders that would distinguish and separate individuals according to their ethno-cultural group appurtenances. Consequently, individuals would be divided in institutional cultural slots and –therefore– they would start to be less equal, from an ontological point of view.

Beside these ontological considerations, which are mostly connected with legal philosophy than socio-political understandings, would nevertheless be important to stress a final aspect with regard to the relevance of the cultural *distinctiveness* of indigenous people's claims. In their case, as in the case of other minoritarian groups that do not perceive their own cultural views, societal practices and institutional organisation as included or otherwise taken into consideration by the *common* public societal structures and existing institutions of a given State, they could always take effective and direct part in the so-called *"democratic game"*. However, this possibility would necessarily require that the effective enjoyment of their fundamental individual rights would be fully guaranteed.

[116] See, Chapter II, Section 4.3.

As it has been already maintained[117], in an open and plural democratic setting, cultural ideas, world's views and even differential understandings of how to institutionally organise and social structure the society at large (totally or partially), have to be *dialogical discussed* in an open and inclusive debate. In this sense, "peoples" that are all members of a given society, without making ethno-cultural distinctions between them (even if based in socio-anthropological *primogeniture*, such as in the alleged case of indigenous communities), would have to democratically decide which societal setting they would like to apply. Their decision would be logically shaped and influenced by the cultural views and understandings of potential majorities, which in most cases would be a non-indigenous majority.

However, as in any system that would be properly recognised as democratic, the ideas, understandings and cultural interpretations of life and world's views of the eventual minorities would still be fully protected and guaranteed, including –of course– those of indigenous aggregations. In fact, those minoritarian or *indigenous* views would be fully protected by individual human rights, which are and should be available in every democratic liberal society. Indeed, it is through the enhancement of human rights that the full development of the personality and identity of each member of the society (majorities and minorities alike) would be guaranteed; especially when their substantive views have not gained major cultural support within the *common* societal milieu.

2.4. Conceptual conclusive remarks

Therefore, after having conducted a conceptual exploration of the meaning and potential characteristics involved under the notion of *"indigenous people"*, which perhaps has not been fully exhausted but yet extended and accurately analysed, it would be possible to say –at least– that this notion is still logically and epistemologically problematic.

From a cultural point of view, all cultures (including of course indigenous' cultures) cannot be compared –as a matter of principle– in valuative or even moral

[117] See, Chapter II, Section 3.4.

terms.[118] However, because all cultures provide equal functional substantive content or mining of life and a sense of fullness to all those that recognise themselves in them[119], then we have to do nothing but admit the cultural *uniqueness* of all cultural manifestations and expressions. Hence, from this point of view, indigenous cultures are not *"more unique"* than non-indigenous cultures. All of them are equally unique, because all of them provide an equally functional and essential content to human beings.[120]

Moreover, even without taking into consideration this general observation, and entering into the cultural features of indigenous cultures, and taken for granted that they indeed show –as one of its most relevant characteristics of their *distinguishable* culture– a *special relationship* with their traditional lands, then we would arrive at a sort of *dogmatic "essentialization"* of their identity, but not only. In fact, this is an essentialist view of indigenous identity, in a sense that without having the possibility to enjoy their *special relationship* with their traditional lands, indigenous people would not be *"indigenous"* any longer, due the fracture of the ontological and *dogmatic* equation (indigenousness = special relationship with traditional lands).[121] Consequently, those large majorities of self-identified indigenous people living in urban areas for generations would not be rightfully able to neither consider themselves as indigenous nor to claim their consequential external recognition.[122]

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[118] The incomparability of cultures, and therefore the impossibility to express a valuative judgement in their regard, actually has one sole exception, which allows us to compare all of them with an internationally accepted comparator, which is nothing but the internationally recognised human rights standards. See, Chapter II, Section 3.4.

[119] We have called this societal function as "the equal functional value of cultures". See, Chapter II, Section 3.4.1.

[120] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 1.

[121] I say dogmatic equation because is constructed upon indigenous cultural believes. One can legitimately believe, for instance, that *"...al products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world"*, as indigenous people have (See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 26). This beliefs is as legitimate and deserving respect as any other, such as for instance religious beliefs that the existence of metaphysic entities that rule the universe; all these beliefs fulfil the essential function in human life, that is the need of *meaningful life*. But these beliefs cannot be neither impose to others nor incorporated into common societal structures, because they are dogmatically constructed and hence beyond any potential dialogical democratic negotiation. This way, in modern democratic societies, common public domain remains secular, and beliefs are left to the private but fully protected sphere of individuals.

[122] In this sense, a former UN Special Rapporteur, Mr. Rodolfo Stavenhagen, when analysing the relationship of indigenous people with their lands, has stressed that a question frequently asked of

In addition, this essentialist view of indigenous culture presupposes not only its unchangeable character, but also its uncontaminated existence across time and space, which is ontologically inadequate, in a sense that culture is in essence a *"dialogical process"*, which necessarily presupposes the existence of cultural exchange of values and traditions. Without and open exchange, cultures wither and die in isolation.[123] Therefore, the notion of the *intertemporal dimension* that has been claimed as characterising the relationship of indigenous communities with their traditional lands[124], has –at least– certain epistemological problems, and perhaps cannot escape from the so-called *essentialist trap.*

Then, if the cultural distinctiveness loses its conceptual relevance, then what remains, in order to attempt a generic conceptualisation able to embrace the distinguishable elements of these populations are the objective factor of descendancy and the subjective element. In this sense, the conceptual notion of indigenous people would ideally be connected with those populations that identify themselves as descendants of the historical inhabitants of a given territory. These were the inhabitants that, as a consequence of an invasion, colonisation or otherwise unwilling domination by external (and even extra-continental) forces, and by their consequentially generated non-dominant positions within the society, have suffered and still suffer from a general disenfranchisement (including the loss or dispossession of their traditional lands and territories), discrimination and socio-political exclusion from the mainstream societal structures and institutions.[125]

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indigenous people is *"...whether cultural identities can survive in a deterritorialized environment, that is, in dispersed settlements and urban centers where indigenous migrants live interspersed with non-indigenous populations."* His answer is quite clear but not definitive. He said that the answer *"...depends on particular circumstances and is contingent on the specific definition of indigenous identity in each case."* If the answer has to be identified case by case, which I think is very reasonable, and then it would not be logically possible to refer to indigenous people as one generic societal aggregation, but as a different entity with different cultural characteristics. See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 25-26.

[123] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 4.

[124] See, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, para. 8.

[125] According to Prof. Anaya, in general terms, indigenous people refers to those segments of humanity that *"...have suffered histories of colonization, that retain continuity with their pre-colonial cultural identities, and that now find themselves engulfed by social and political constructions dominated by others and built upon colonial settlement."* See, S. J. ANAYA, *The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples*, in G. ALFREDSSON, M. STAVROPOULOU (eds.), *Justice Pending: Indigenous Peoples*

However, because *victimisation* cannot be used as an exclusive characteristic of indigenous groups (almost every single societal aggregation in the world has suffered and/or generated an historical injustice or wrongdoing), then what remains is the factual element of ancestry from those *primus* historical inhabitants, and the self-identification with their traditional culture. But again, self-identification cannot be considered either as an exclusive characteristic of this kind of societal aggregation because, as we already saw, this subjective element is consubstantial with every single societal aggregation. In an open, pluralist and democratic society, group membership cannot be forced; it always requires and always depends of *self-recognition*.[126]

Therefore, if this logical conceptual deconstruction[127] is correct, then the only element that remains, as potentially able to show the distinguishable features of indigenous people's societal *uniqueness*, would be *'descendancy'*. In other words, if all other elements, including the dimension of dispossession or subordination in relation to other ethno-cultural societal aggregations, are common or shared with all societal aggregations, then the only factor that would truly characterise indigenous people as a differential and distinguishable societal aggregation is their ethno-cultural descendancy from a specific group. A group that used to inhabit a defined territory at certain precise time in history, or –at least– from a precedent time than the ancestors of the societal ethno-cultural *dominant* group.[128]

As we can see, the notion of indigenous people if based just on the fact of descendancy, is nothing but an ethno-cultural *biological* notion[129]; and –as we have

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and Other Good Causes. Essay in Honour of Erica-Irene A. Daes, The Hague/London/New York, 2002, p. 6.

[126] See, Chapter II, Section 4.4.

[127] This could be considered another paradoxical scholarly situation; in previous chapters, when dealing with cultural diversity, I quite strongly disagreed with deconstructivist scholars, especially in connection with interpretation of power dynamics between majorities and minorities in society; and now, it seems that I am becoming a deconstructivist too… at least from a conceptual point of view.

[128] In this sense, it has been said that *"[a]s to the meaning of 'indigenous', I believe this is a 'political' term with no clear scientific meaning today. It appears to signify 'original' inhabitants when western colonial powers arrive to colonize/conquer/rule some other area. […] I have rarely seen the term applied to the 'subject' peoples of non-western nations, e.g. Tibetans, Mongolians, Druze, Kurds, the various 'tribal' peoples recognized for special treatment in India, Tomorians, the Ainu, Taiwanese, Okinawans, 'pygmies' etc."* See, T. MAKKONEN, *op. cit.*, p. 133-134.

[129] According to Prof. Scheinin, however, this biological notion cannot fully embrace the idea of indigenousness, precisely because it*"...does not include the dimension of a relationship of dispossession or subordination in relation to another group that arrived latter."* See, M. SCHEININ, *op. cit.*, p. 4-5.

already mentioned– the idea of a society divided among groups based on ancestry or descendancy, or biological factors, it is not far from the notion of "race" and racially divided societies.[130] We have to always keep in mind the courageous fights conducted in the last century against racial purity laws, racial segregation and apartheid, in a sense of not forgetting their lasting and durable lessons, especially in order to avoid the reoccurrence of these social tragedies.[131] Hence, if the essential factor that conceptually composes the nuclear element of *indigenousness* or indigenous people's cultural *distinctiveness* is the descendancy factor, then the division of societies between indigenous and non-indigenous societal aggregations would be just based on and constructed over a given *biological* factor, and on the consequential *political aspiration* to maintain the political relevance of the ethno-cultural difference. This process would ideally consist of the unchangeable perpetuation of indigenous cultural *distinctiveness* and the protection of the essentialised *"indigenous purity"* vis-à-vis the mainstream societal cultural aggregation.[132]

Therefore, seeing the epistemological complications that the conceptualisation of the notion of indigenous people involves, especially in connection with the above mentioned biological aspects, it would be better perhaps to discontinue these epistemological efforts, and just open the floor for the most flexible political evolution of this notion, within the inclusive and dialogical dynamics of the so-called *democratic game*. When legal epistemology cannot resolve

[130] See, K. A. APPIAH, *op. cit.*, p. 136-137. In the opinion of Prof. Ermacora, *"...a predominat character or aborigines is the race element. This whit the understanding that the expression race should be understood in a biological sense of the word to describe groups of individuals who have a pecific combination of physical characteristics of genetic origin. [...] Indeed it seems that the racial element as to aborigines is the different specifics which make them different from other minorities."* However, he has also logically concluded that *"[i]n any case the self-consciousness of the group as "indigenous" is necessary."* See, F. ERMACORA, *op. cit.*, p. 294.

[131] Fortunately, the current international community is united in its strong condemnation of all of these practises, as it has been reaffirmed in the UN Durban Declaration, when recalling that *"...persecution against any identifiable group, collectivity or community on racial, national ethnic or other grounds that are universally recognized as impermissible under international law, as well as the crime of apartheid, constitute serious violations of human rights and, in some cases, qualify as crimes against humanity."* See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, cit., p. 13, para. 28.

[132] See, T. MAKKONEN, *op. cit.*, p. 133-134; K. A. APPIAH, *op. cit.*, p. 136 et seq., and R. H. THOMPSON, *Ethnic Minorities and the Case for Collective Rights*, in *American Anthropologist*, 99(4), 1997, p. 793.

a certain conceptual *galimatias*, perhaps politics can.[133] In fact, as Mr. J. Bengoa, alternate member of the Working Group on Indigenous Populations of the former UN Sub-Commission, said that *"...the discussion clearly had two side: a theoretical one and a political one"*[134]; but not only. Another member of the Working Group, Mr. R. Hatano, has bluntly exposed one of the reasons that lie at the bottom of this conceptual problem, namely the fact that *"...indigenous organizations did not want the term to be defined for fear some indigenous persons would not be covered by the scope of the definition."*[135]

From the above argumentations, it seems quite clear that indigenous people, as a matter of self-determination and recognition, have generally manifested their political choices, desires or aspirations to remain distinct, in a sense to maintain and perpetuate those cultural features that make them a distinguishable societal entity, but not only. They also have consistently advocated for the perpetuation of their societal and economical structures and –perhaps even most importantly– their institutional organisations, including legal systems, judicial bodies and traditional political authorities.

For these reasons, and in order to achieve their political goals, and ultimately regain the institutional and territorial autonomy lost during centuries of domination and exclusion[136], indigenous people insist on their right to define themselves, and hence to apply the *subjective* approach in the construction of this notion. This means, that an indigenous person would be that one that not only recognises himself or herself as such, but is also accepted as such by the other members of his or her own indigenous community.[137] In short, the self-construction of the societal notion of

[133] Perhaps politics it is not only the art of the possible, as it has been said, but also, *the art to make possible the impossible…*

[134] See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 14, para. 41.

[135] *Ibid.*, p. 14, para. 40.

[136] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 28-30.

[137] See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 13-15, para. 35 et seq. However, this kind of thought constitutes, as it has been stressed, a sort of circular thinking, because a given group cannot determine its membership criteria, before the group itself is assigned with members; in other words, what is needed first is to identify the group and group's specific cultural distinguishable features. See, T. MAKKONEN, *op. cit.*, p. 137.

indigenousness, as the essential characteristic over which to build a perfectly distinguishable societal group, could be considered as one of the best *political tools* on the hands of auto-defined indigenous groups in order to achieve their political aspiration for economic, social and cultural autonomy. Moreover, it could even be a vehicle for self-government and –in ultimate terms– for regaining the lost auto-determination as a sovereign and fully independent societal entity.

However, it seems that we are facing again the permanent dichotomy of the descriptive and prescriptive discursive levels. In fact, in the precedent paragraph, I *described* indigenous people's aspirations and ultimate political goals, and this of course is nothing but an approximate *description* of them; but this is not necessarily what has been *prescribed* as legitimate or accepted in modern, open, pluralist and democratic societies, under the light of the current internationally recognised human rights standards. As it has been expressed, it could happen that the meaning given to the term indigenous people in those international human rights instruments differs from the general usage of the term.[138] Again, the factual and cultural self-identification as "indigenous", will not necessarily lead (or have to lead) to the enjoyment of a specific legal status or exclusive rights attached to the "legal" notion of the term. These new potential conceptual angles will be examined more in detail in the following sections; and, as we will see, under the *current* international standards, not all *political claims* could be considered legally protected within a modern democratic setting, even when backed by historical societal legitimation.[139]

3. Indigenous peoples and international law

[138] See, T. MAKKONEN, *op. cit.*, p. 132-133. According to Prof. Scheinin, for the use of the term indigenous in human rights law, *"...it is insufficient that an ethnic group is constituted of the descendants of the first known inhabitants of the area in question. There must be another ethnic group and a power relationship involved before the descendants of the original inhabitants are understood as indigenous in the legal meaning of the term."* See, M. SCHEININ, *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*, in T. ORLIN, A. ROSAS, M. SCHEININ (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach*, Turku/Åbo, 2000, p. 161.

[139] In fact, we have to take into account that legal systems do not always reflect or consider historical events under the same interpretative light as those proposed by different ethno-cultural and political parties. For instance, if we have two opposed interpretations, it would be quite logical to think that a common legal system will either construct an intermediate and balanced possession or just embrace one of the two opposed visions; what it cannot logically do is to incorporate both.

First of all, it would be important to clarify –since from the beginning– that this section has not have the intention to fully examine and systematically study all recognised international legal standards concerning indigenous issues that have been developed for their specific legal protection. This kind of study will certainly require –for its extension and complexity– a work on its own. Thus, in order to not lose our theoretical path, the focus would rather be allocated –within the following paragraphs– on the conceptual incorporation that the notion "indigenous people" has received within those international instruments specifically dedicated to the question of indigenous people. Among them, especial attention will be given to the UN Declaration of the Rights of Indigenous Peoples and the ILO Conventions No. 107 & 169 on indigenous and tribal peoples.

In addition, we will briefly examine the legal implications that the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights conceptually have in connection with indigenous people notion and –most in particular– with regard to their political aspiration for autonomy and self-determination. In order to contextualise our legal analysis, and to properly see the conceptual evolution of this notion, we will follow the historical process of adoption, at least in connection with the three instruments mentioned in the precedent paragraph that specifically address the situation of indigenous populations.

3.1. The ILO Convention No. 107: indigenous and tribal populations

The first international legal instruments exclusively dealing with indigenous people issues was the ILO Convention No. 107 concerning the Protection of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted in 1957 and entering into force two years later in 1959. Even when this Convention was revised in 1989 by the Convention No. 169, as we will see bellow, it is still in force in connection with those countries that have not ratified the latter instrument.[140]

[140] This Convention, which is now closed for ratification, has received 27 ratifications, but only remains in force in connection with 17 States Parties; all the other States Parties (with the exception of

Beside the legal relevance that this Convention has in connection with its current States Parties, and taken into account that it has been considered as a *"reflection of the paternalistic and assimilation-oriented assumption of the time"*[141], it has, however, a historical importance for being the first attempt that broadly embraced indigenous people's complex issues. Thus, the Convention contained important provisions on non-discrimination in connection with the regulation of the labour market[142], such as recruitment and conditions for employment, social security and measures of assistance, but also introduced positive actions for the equal enjoyment of rights and opportunities, in particular in connection with their traditional lands[143], education[144], health[145], languages[146], customs and institutions[147]. In addition, and perhaps even most importantly for the scope of this chapter, this Convention also engaged in the conceptual exercise of defining indigenous and tribal populations.

In fact, Article 1 of the ILO Convention No. 107, when defining the scope of application of the Convention, made a conceptual distinction between three different societal aggregations, namely "tribal", "semi-tribal" and "indigenous" populations. In connection with the first two notions, the Convention stated that it applies to *"members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."*[148] In addition, it clarifies that *"…the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community."*[149]

Portugal) had denounced it when they ratified the ILO Convention No. 169. (Source: ILOLEX: 18.1.2012).

[141] See, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc. A/HRC/9/9, Human Rights Council, 2008, p. 11, para. 31.

[142] See, Articles 15-18 of the ILO Convention No. 107.

[143] *Ibid.,* Articles 11-14.

[144] *Ibid.,* Articles 21-26.

[145] *Ibid.,* Articles 19-20.

[146] *Ibid.,* Article 23.

[147] *Ibid.,* Articles 2-10.

[148] *Ibid.*, Article 1(1)(a).

[149] *Ibid.*, Article 1(2).

As we can see, tribal and semi-tribal populations were characterised in connection with two main elements: (a) their degree or –in the words of the text– their *'less advanced stage'* of development, taken as an external comparator the mainstream society of the national territory in which these populations live and are part of. And (b) their *cultural* and *institutional distinctiveness*, in a sense that these population are regulated or governed (totally or partially) by a different normative setting, constituted either by their own customs and traditions, recognised as legally enforceable and binding by the given national legal system (including –of course– judicial bodies), or by special national norms.

Within the reasoning of the Convention, the fact that those populations were still regulated and living under their own traditional societal organisation and cultural practises, it was seen as one of the potential causes or factors *"...which have hitherto prevented them from sharing fully in the progress of the national community of which they form part".*[150] Thus, positive actions or special measures would eventually enable *"...the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other members of the population."*[151] In other words, in order to allow their "development", special measures of protections should be taken for *"...their progressive integration into the life of their respective countries"*[152], but excluding measures *"...tending towards the artificial assimilation of these populations."*[153] To put it bluntly, under the light of the Convention, these populations were *"...prevented by their backwardness from 'sharing fully in the progress of the national community of which they form part'."*[154]

Therefore, within the conceptual scheme of the ILO Convention No. 107, *'tribalness'* represents *"...the lower stage on the scale of human evolution, and also the extreme of the process leading to a final state of 'integration'."*[155] In fact, semi-

[150] *Ibid.*, *Preamble.*
[151] *Ibid.*, Article 2(2)(a).
[152] *Ibid.*, Article 2(1).
[153] *Ibid.*, Article 2(2)(c).
[154] See, P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, 2002, p. 327.
[155] See, L. RODRÍGUEZ-PIÑERO, *Indigenous Peoples, Postcolonialism, and International Law. The ILO Regime (1919-1989)*, Oxford, 2005, p. 167. Aditionally, this author has stressed that *"[t]he idea of 'tribe' was articulated as a relational concept vis-à-vis so-called 'modern' societies, denoting a stage of political evolution. In this intellectual milieu, the very use of the term 'tribal' in the ILO 1957 standards referred automatically to one end of the bipolar representation of change in human societies characteristic of anthropological theory, occupying the same conceptual space as notions such as 'primitive', 'traditional', 'pre-modern', 'pre-industrial', and 'folk'." Ibid.*, p. 168.

tribal populations are those that are already engaged in the process of *'losing their tribal characteristics'*, but which have not arrived yet to the final stage of the said process, in a sense that they *"...are not yet integrated into the national community."*[156] And… what about indigenous people? Within the following paragraph, we will address the conceptual approach of this Convention to the notion of indigenous *populations*, and the potential difference with the above mentioned notions.

The Convention refers to the notion of indigenous people as *"...members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong."*[157]

In this Conventional approach to the notion, we find some elements that have already been analysed within our previous theoretical section. But we also find a new element. This new element is refers to (a) the fact that indigenous populations are *also* tribal or semi-tribal populations. In fact these populations, according to the text of the Convention, *'can be regarded as indigenous'* if they additionally fulfil other requirements. This means that all the considerations already made in connection with tribal and semi-tribal populations are applicable to the case of indigenous populations. Hence, indigenous people are also characterised by their (b) *cultural* and *institutional distinctiveness*, and by their (c) *'under-developed'* position vis-à-vis the mainstream national society, which is quite similar to the criterion of *'non-dominant position'*, but –nevertheless– is not exactly the same. In fact, under this conventional criterion, there is no reference to the situation of exploitation, exclusion, or land dispossession due to historical processes such as colonialism or conquest. The disadvantaged situation in which these populations live is potentially adjudicated to their own cultural practices, and the solution is their integration to the mainstream culture. However, colonialism and conquest are mentioned within the notion, but not

[156] See, Article 1(2) of the ILO Convention No. 107.
[157] *Ibid.*, Article 1(1)(b).

as an autonomous element or criterion, but just as a historical and temporal contextualisation of the additional criterion which is (d) *'being first in time'*.

Consequently, this Convention considers that indigenous populations distinguish themselves from tribal and semi-tribal societal aggregations by the fact of being descendant *'from the populations which inhabited the country'* at the time of – for instance– their colonisation or external invasion. Finally, the conventional enshrined notion also includes an indirect mention of the (e) subjective criteria of *self-identification*, which states that indigenous populations are those that also live *"in conformity with [their] social, economic and cultural institutions."*

Therefore, according to this Convention, all indigenous peoples are tribal or semi-tribal (in accordance with their stage of development), but not all tribal and semi-tribal people are indigenous. What matters here is not being a descendant of historical victims of process of conquest or colonisation, but just the fact of being descendant from the historical inhabitants of a given territory.

As we can see, here again the conceptual notion of indigenous people, their essential *distinguishable* character that makes them different from other societal organisations, such as tribal or semi-tribal populations, is reduced to an ethno-cultural or even biological factor, which is the factual descendancy of the historical inhabitants of a given territory.

As a conclusion, we can say that the intention of this early legislative attempt by the ILO was very positive, in a sense that its main objective was to enhance the protection of vast sectors of the human populations that were living in vulnerable conditions. For historic reasons, the balance between cultural distinguishable development and the enhancement of the living conditions of these populations was resolved through an "integration" formula, and not by granting more societal institutional autonomy.[158]

3.2. The ILO Convention No. 169: indigenous and tribal peoples

[158] See, A. XANTHAKI, *Indigenous Rights and United Nations Standards*, Cambridge, 2007, p. 66-67.

As it has already been said, the ILO Convention No. 107 was replaced thirty years later, under the pressures from indigenous peoples groups, associations and lobbyists, thus producing an up-to-dated version that shifted the approach to a *'nonassimilationist and nonintegrationist text.'*[159] The new ILO Convention No. 169, concerning Indigenous and Tribal Peoples in Independent Countries, was adopted on 27 June 1989, by the General Conference of the International Labour Organisation, and came into force on 5 September 1991. Moreover, as states in its *preamble*, has introduced a *"...new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards"*[160], but not only. This new Convention also aims at *"...recognising the aspiration of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."*[161]

As we can see, the Convention is quite far reaching in its goals, and perhaps for this reason has received nothing but just a few ratifications from ILO States members[162], which to great length waters down its legally binding effects. However, this Convention has also generated great reluctance on States, especially in connection with those provisions that recognise degrees of autonomy to indigenous groups and –in particular– the fact that that recognition implies the acknowledgment of groups within States' territory.[163] But also this instrument has generated large dissatisfaction on the side of advocates for indigenous people rights. In fact, they viewed the Convention's provisions as not sufficiently constraining government's conduct in relation to their own *indigenous* concerns. This is particularly applicable to the case of indigenous people's aspirations for the recognition of full decision-making powers with regard to all matters connected with them, but not only. In addition, and perhaps most importantly, this concerns the lack of recognition of the

[159] See, H. HANNUM, *op. cit.*, p. 87-88. See also, See, S. J. ANAYA, Indigenous *Peoples in International Law*, cit., p. 58 et seq.
[160] See, ILO Convention No. 169, *Preamble.*
[161] *Ibid.*
[162] This Convention has received –until now– 22 ratifications, from which 15 refer to Latin American States Parties. (Source: ILOLEX: 18.1.2012).
[163] See, L. SWEPSTON, G. ALFREDSSON, *The Rights of Indigenous Peoples and the Contribution by Erica Daes*, in G. ALFREDSSON, M. STAVROPOULOU (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes. Essay in Honour of Erica-Irene A. Daes*, The Hague/London/New York, 2002, p. 75-76.

right of self-determination and their full international acknowledgement as a full self-standing and autonomous subjects within the international community, and not just subjected to the authority of national States, as the Convention assumed.[164]

In general terms, and beside its specific provisions connected with the applicable labour rights and working conditions[165], this Convention refers to the principle of respect and recognition of the cultural diversity of these populations. The said principle is incorporated through a co-ordinated and systematic action for the protection of their rights and to guarantee respect for their integrity[166], including the respect for their customs, traditions, institutions and social and cultural identity, *when* they are not incompatible with national legal systems and with internationally recognised human rights.[167] Also through the incorporation of the general principle of consultation in all matters that directly affect these populations[168]; and the recognition of their right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, spiritual well-being and traditional lands.[169] In connection with the latter, the Convention has not only acknowledged the *special relationship* that these populations have with their traditional lands[170], but also it has extensively regulated the right of ownership and possession of the people concerned over those lands[171] and natural resources *traditionally* used[172], including their right to return and compensation in case of forced relocation.[173]

Within the second part of this work, when the jurisprudential analysis of the indigenous people's lands claims before the Inter-American Court of Human Rights will be undertaken, we will address more in detail the legal scope and practical implications of the above mentioned land rights. In particular, we will focus on their

[164] In fact, according to Prof. Anaya, the indigenous people *"...overriding reason for disappointment appeared to be a grounded simply in frustration over the inability to dictate a convention in terms more sweeping than those included in the final text."* See, S. J. ANAYA, Indigenous *Peoples in International Law*, cit., p. 59.
[165] See, Articles 20-25 of the ILO Convention No. 169.
[166] *Ibid.*, Article 2(1).
[167] *Ibid.*, Articles 2(3), 5 and 8.
[168] *Ibid.*, Article 6.
[169] *Ibid.*, Article 7.
[170] *Ibid.*, Article 13.
[171] *Ibid.*, Articles 14 and 17.
[172] *Ibid.*, Article 15.
[173] *Ibid.*, Article 16.

interconnection with indigenous people's cultural diversity, which is and remains one of the main topics of this dissertation.

Coming back to our conceptual inquiry, the first sign that capture our attention is the terminological shift between these two Conventions, starting with their proper denominations. That is, the Convention No. 169 changed the term *'populations'* to *'peoples'*. In fact, using the term "peoples" was strongly insisted upon by some advocates, scholars and representatives of indigenous people participating in the drafting process. For them this change implied a greater and more visible recognition of their group identity, as separate distinguishable and identifiable societal aggregations, and –even perhaps most importantly– as a semantic legitimation and support for their claims for self-determination and aspirations for the construction of an independent statehood.[174]

In fact, within the drafting process of the Convention, representatives of States strongly reacted vis-à-vis this *political pretension*, and finally managed to avoid any connection between the use of the term "peoples" in this Convention and legal understanding of the term "peoples" in international law.[175] This conceptual tension was resolved by the drafters by means of reaching a quite balanced position, which led to the incorporation of the term "peoples" within the title and throughout of the text of the Convention. Though, with the reassuring clause that clearly states that *"[t]he use of the term peoples in this Convention shall not be constructed as having any implications as regards which may attach to the term under international law."*[176] As we can see, indigenous people were terminologically recognised as such, but this recognition has not bestowed on them any legal benefit to their original legal claims and aspirations. In other words, this acknowledgment as "peoples" can just only be interpreted as what it is, the reaffirmation that indigenous "peoples" are entitled to the same equal treatment, without discrimination of any kind and –in particular– without discrimination based on ethno cultural appurtenance, exactly as and together with all other "peoples" living in the world.[177]

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[174] See, S. J. ANAYA, Indigenous *Peoples in International Law*, cit., p. 60.
[175] See, Chapter II, Section 4.1., 4.2, and 4.3.
[176] See, Article 1(3) of the ILO Convention No. 169.
[177] In fact, as it has been said, the collective dimension involved in the term "peoples" *"...does not, however, take the form of substantive rights adjudged to indigenous peoples as such, but instead reflects States obligation towards those peoples."* See, I. M. DONDERS, *Towards a Right to Cultural Identity?*, Antwerpen/Oxford/New York, 2002, p. 210 et seq.

In short, "peoples" here, is just the plural version of "people", that is an aggregation of human beings.[178] Why? Because terms in international law should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in which they are included.[179] And, in this case, the text of the Convention is absolutely clear in a sense that the term "peoples" has not the same specific meaning that it has in international law; therefore, within this Convention can only have the general meaning attached to it.

Consequentially, for this convention, indigenous "peoples" are not, as such, the "peoples" mentioned in Article 1(2) and 55 of the UN Charter, which are entitled by international law to the right of self-determination. Mere semantic engineering does not establish rights, however.[180] This does not absolutely mean –of course– that indigenous people will *never* qualify for the exercise of these rights. It just means that under the application of this Convention, indigenous peoples are not "peoples" in the *technical* sense of international law.[181] But, of course, this Convention does not have either negative implications of denying the status of "peoples" to any human societal aggregation that fulfil the legal requirement to be "peoples" under international law. Therefore, it could happen indeed that a societal entity that is regarded as "indigenous" also qualifies as "peoples" under international law, not because of its *cultural distinctiveness* or distinguishability as "indigenous", but because it could be seen as an aggregation of (individuals) human beings that qualify as such, and –hence– able to gain international recognition under the legal status of "peoples".[182]

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[178] From Oxford Dictionary of English in English Dictionaries & Thesauruses.

[179] See, Article 31(1) of the UN Vienna Convention of the Law of Treaties (1969).

[180] For a contrary position, see S. J. ANAYA, *The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples*, cit., p. 9 et seq.

[181] In connection with the meaning of the term "people" in international law, see Chapter II, Section 4.1. In Addition, see, among other authors, A. CASSESE, *Self-Determination of Peoples. A legal Reappraisal*, Cambridge, 1996, in particular p. 141 et seq.; J. CRAWFORD, *The Right of Self-Determination in International Law: Its Development and Future*, in P. ALSTON (ed.), *Peoples' Rights*, Oxford, 2002, p. 7 et seq.; A. XANTHAKI, *The Right to Self-Determination: Meaning and Scope* in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden – Boston, 2005, p. 15 et seq.; and J. SUMMERS, *Peoples and International Law. How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Leiden/Boston, 2007, p. 1 et seq.

[182] See, M. SCHEININ, *What are Indigenous Peoples?*, cit., p. 7. Moreover, it would be important to add that, if an indigenous people's societal aggregation finds itself in a *minoritarian position*, within the territory of a given national State, then the same specific criteria, in order to be considered as "peoples" under international law, would be applicable to the case. In this sense, see –in particular– our considerations in Chapter II, Section 4.3.

Coming back to our definitional track, this Convention from the beginning stressed the fundamental importance of the subjective criterion, that is (a) the *self-identification* element.[183] In fact, its Article 1(2) clearly states that *"[s]elf-identification as indigenous or tribal shall be regarded as fundamental criterion for determining the groups to which the provisions of this Convention apply."* Hence, in case of doubts, with regard to whether a group is classified or not as indigenous or tribal, the interpreter should pay special consideration to how members of the group perceive themself. However, this does not mean that –under the wording of the Convention– *self-identification* is the *sole* definitional applicable criterion. As we will see in the following paragraphs, objective criterions are also required.

Moreover, the incorporation of the above mentioned subjective element is not the only substantial conceptual modification introduced by the text of the new Convention. This Convention also abandoned the distinction between "tribal" and "semi-tribal" populations (or "peoples" under the new terminological denomination), but maintained the distinction between the former and "indigenous peoples". It refers to "tribal peoples" as those whose *"...social, cultural and economic conditions distinguish them from other sections of the national community"*[184], that is those that are *culturally distinguishable* from the mainstream society. This is nothing but the objective criterion that has already been mentioned under the letter (b), namely, *cultural distinctiveness*. In addition, a societal aggregation is considered as "tribal" if its *"...status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."*[185]

As in the case of the previous Convention No. 107, "tribal people" are objectively identified by (c) the maintenance of a different "*status*", that is a legal status, than the rest of the national community. This additional objective criterion has actually been considered as complementary to the previous one, because it basically refers to the existence of an institutional legal setting ("status") which –if you allow me the redundancy– institutionalises their *cultural distinctiveness*. This differential *status* or regulatory framework refers, as in the previous Convention, to the recognition –within the legal system– of the legal force of their traditions and

[183] In fact, the self-identification element has been rightfully called as *"a major novelty in ILO No. 169."* See, A. XANTHAKI, *Indigenous Rights and United Nations Standards*, cit., p. 73.
[184] See, Article 1(a) of the ILO Convention No. 169.
[185] *Ibid.*

customs (consuetudinary norms) or through their specific incorporation into *"special laws or regulations."*[186] As you can see, the main change introduced in connection with the previous conceptualisation of the notion of "tribes" refers to the elimination from the text of any reference to their *"less advanced stage"* vis-à-vis the mainstream society. In this sense, it has been said that the axiological approach of the Convention changed from an assimilationist orientation to a new stage of acknowledgement and respect of their cultural diversity.

In connection with "indigenous peoples", this Convention introduced the same objective criterion of (c) *'being first in time'*. That is, being *"descent from the populations which inhabited the country […] at the time of conquest or colonisation or the establishment of present state boundaries…"*[187] The sole modification that this criterion introduces, refers to the fact that has broadened the referential historical period in which this requirement has to be measured. In fact, the referred ancestors should be those not only present at the time of conquest, external invasion or colonisation, but also those present –within the current territory of a given national State– at the time when its present boundaries were fixed. The latter reference has to be considered as a truly conceptual novelty, not only because it differs from the text of the previous Convention, but also –and even most importantly– because it completely diminishes the importance of the *'being first in time'* element. Let me explain this more in detail.

Therefore, it would be possible to regard as "indigenous" the descendants of those inhabitants present within the territory of a national State, at the time of the *'establishment of the present state boundaries'*. However, and as a consequence of this new interpretative light, the *primus inter pares* element (being first in time) cannot be used any longer as an ontological argument for the justification of the

[186] The UN former Special Rapporteur, Mrs. Daes, interpreted this latter objective criterion in a sense that societal aggregations could be considered as "tribal" *"…either by its own choice (that is, by maintaining its own laws and customs), or without its consent (as a result of special legal status imposed by the State)."* I rather disagree with this interpretation, because the imposition of a different *status* or regulatory framework to a given group, based on ethno-cultural characteristics (what we have called *cultural distinctiveness*) would be against the very principle of equality and non-discrimination. All individuals should indeed enjoy the same legal status; exceptional special treatments –as a matter of principle– should be consented. See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 11, para. 29.

[187] See, Article 1(b) of the ILO Convention No. 169.

establishment of a differential set of rights, vis-à-vis the descendants of those other settlers that have arrived later in time (a sort of *ultimus inter pares*).[188]

Moreover, this Conventional modification also affects two additional elements that have been considered as integrative parts of the objective criteria for the conceptual definition of the notion of indigenousness; I am referring to the historical *act of dispossession* of their traditional lands, and its current *perception of historical injustice*.[189] In fact, if the *primogeniture* element is not any longer considered as constitutive or as essential in the configuration of the indigenous people's *'indigenousness'*, then the reference to a certain temporal incident in history, e.g. act of colonisation, external invasion or otherwise dispossession of their historical traditional lands, would consequentially lose its discursive relevance, but not only. In addition, without that temporal reference, we would also lack a reasonable legitimation to legally (and perhaps even morally) condemn those passed incidences as historical injustices.

To put it differently, the act of dispossession of traditional lands has been considered as a historical injustice precisely because those same lands were possessed –before the act of dispossession– by those historical ancestors whom inhabited the said territories *first*. But again, without having a concrete *biological* link with those ancestors who have suffered historical wrongs, the current inhabitants of the present national territory would not be able to either claim the legacies of those historical wrongs nor the remediation of the continuing effects of those historical injustices.[190] Furthermore, even the very notion of *"traditional lands"* would lose its historical contextual meaning. In short, without the *'being first in time'* connection, *indigenousness,* seen in terms of *victimisation,* cannot be sustained any longer.[191]

As we can see, without the ontological *temporal* connection with those that were the first inhabitants of the national territory, the entire epistemological

[188] Just in order to give you an example, with the application of this criterion to a country like Argentina, my home country, in which its present boundaries were –in general terms– fixed at the end of the XIX Century. In this case, almost all inhabitants would be regarded as "indigenous" in a sense that they would more certainly have an ancestor that inhabited the said national territory at that time. Even the descendants of the *'criollos'* elites that were in charge of the governance of the country since its independence, at the beginning of the above mentioned century (1816), would be able to legitimately claim their *indigenousness*…

[189] See above, Section 2.2.5.

[190] See, in a *contrario sensu* interpretation, S. J. ANAYA, *The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples*, cit., p. 7.

[191] See, T. MAKKONEN, *op. cit.*, p. 133.

construction of the notion tumbles. In fact, without the presence of this objective element, it becomes quite difficult to see the ontological differences between indigenous and non-indigenous people, and therefore the need for a distinguishable and exclusive legal status. The reason for this epistemological confusion lies perhaps in the fact that this Convention focuses on cover a social situation, rather than to establish a priority based on whose ancestors had arrived in a particular area first.[192] In other words, it would be possible to say that, in order to take a more inclusive approach that would allow the extension of the special protection delivered by the Convention to largest possible number of societal aggregations, this instrument not only goes beyond the distinction between tribal people and indigenous people, but even further.[193] It seems that, paradoxically, this Convention in its ambitious protective project has conceptually diminished the ontological importance of being *"indigenous"*.

Last but not least, the remaining objective criterion incorporated within the ILO Convention No. 169 for the conceptual identification of "indigenous peoples" is –of course– the already mentioned element of (d) *'cultural distinctiveness'*. The Convention refers to those peoples who have managed to *"...retain some or all of their own social, economic, cultural and political institutions."*[194] The wording has certain (but not conceptual) variations from its predecessor instrument. Indigenous peoples are those that maintain their traditional practises and societal institutions, regardless their legal *'status'*. The latter observation is important because it establishes a particular difference with regard to "tribal people". In fact, in order to be considered as such, it has to have a recognised legal status integrated by consuetudinary or special laws or regulations; indigenous peoples do not. For the Convention, the latter is considered to be a pre-existing factual entity, regardless its legal recognition or status.[195]

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[192] See, A. XANTHAKI, *Indigenous Rights and United Nations Standards*, cit., p. 72-73; see also, J. WALDRON, *Indigeneity?: First peoples and Last Occupancy?*, in *New Zealand Journal of Public and International Law*, 1, 2003, p. 56-77.

[193] See, ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, cit. p. 10.

[194] See, Article 1(b) of the ILO Convention No. 169.

[195] According to the ILO Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts), *"...the legal personality of indigenous groups is a pre-existing fact of reality and requires unconditional and unqualified recognition by the State; what already exists is thus declare, namely the pre-existence of the personality of indigenous communities*

In addition, some authors considered that the *cultural distinctiveness* element in the case of indigenous people differs from that of tribal peoples, in a sense that in connection with the latter, *political institutions* are not mentioned. Thus, for them, the distinction between indigenous and tribal peoples lies in the fact that indigenous peoples have retained their cultural institutions rather than just on their *"customs or traditions"*.[196] Although the wording differences, I would rather not put much emphasis on this, because if the status of tribal people is regulated by their customs and traditions, logically speaking, it has to involve a traditional institutional framework too.

Finally, as a concluding remark in connection with the revised conceptual elements, we can say that this new Convention does not resolve our epistemological doubts in connection with the notion of *"indigenousness"*, on the contrary, it increases them. In the words of the former UN Special Rapporteur, Mrs. Daes, *"...the ILO did not achieve greater semantic precision, but on the contrary succeeded only in merging the definition of "indigenous" and "tribal into a single broad test of distinctiveness."*[197] In fact, according to her, this Convention has reduced the indemnificatory criteria in two main elements, one objective and one subjective. The objective criterion refers to their extrinsic *cultural distinctiveness*; and the subjective one to their choice *to be* and *to remain distinct*, which is nothing but their *self-identification* as such.[198]

We cannot but agree with Mrs. Daes, adding that if this is the case, then we have to forcibly conclude that what really and ontologically constitutes the notion of *"indigenousness"* is just the subjective element of *self-identification* as such. That is the voluntary choice of the members of a given societal aggregation to be seen as a differentiated societal unit, with distinguishable cultural practises and institutions. You can rightly ask why the above mentioned objective element is excluded from

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and organizations." What this Committee omitted to refer to is the need for the logical previous steps, namely the identification, through the verification of the presence of objective and subjective criterion and indicia, of the concrete existence of that *pre-existing* reality. See, *Committee of Experts, 77th Session, 2006, Individual Direct Request, Argentina, Submitted 2007*, in ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, cit. p. 11-12.

[196] See, A. XANTHAKI, *Indigenous Rights and United Nations Standards*, cit., p. 72.

[197] See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 11, para. 32.

[198] *Ibid.*, para. 30.

this conclusive remark. The answer to this question is enshrined in the intrinsic equal *uniqueness* of all cultural manifestations, including –of course– the indigenous people's *distinctiveness*. From a cultural diversity perspective, they are as distinctive as all the other distinctive cultural manifestations and traditions in the world.

However, one question still remains unanswered. This is whether the fact that one cultural entity among other entities in a given society, which sees itself as different and even chooses to be culturally different from the rest of the society, would justify the recognition of a distinguishable and exclusive set of rights and status, vis-à-vis all the other members of the society. In other words, the question could be framed as to whether in an open, pluralist and democratic society an exception to the principle of equality and non-discrimination between individuals –based on their ethno-cultural self-identifications and appurtenances– would be first necessary and second justified. Until now, the answer seems to be negative… but, before arriving at final conclusions, let us explore first the epistemological notions contained within the UN Declaration on the Rights of Indigenous Peoples.

3.3. The UN Declaration on the Rights of the Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (hereinafter "the UN Declaration" or "the Declaration") was adopted on 13 September 2007, by the UN General Assembly Resolution No. 61/295, and is the most recent international instrument entirely dedicated to indigenous people issues.

Following a universal vocation, the Declaration started not only by reaffirming the principle of equal dignity and equality between all human beings, but also by recognizing the right of all people to be different, to consider themselves different and to be respected as such.[199] In other words, the Declaration strongly reaffirmed the principle of cultural freedom and cultural auto-determination of all human beings, together with the principle of equality and non-discrimination.[200]

[199] See, UN *Declaration on the Rights of Indigenous Peoples*, Preamble.
[200] In fact, the Declaration in its Article 2 states that *"[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."*

However, almost immediately after, the Declaration engaged itself in the acknowledgement of the link between indigenous identity and the *suffering from historic injustices*, which implies a complete change in the approach to *indigenousness*, especially with regard to the ILO Conventions. In fact, the Declaration expressly states that *"[i]ndigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interest."*[201]

As we can see, the Declaration has retroactively recognised –as an historical injustice– the suffering of those inhabitants present in a given national territory at the time when the colonisation or dispossession of lands occurred, but not only. It has also accepted the *genealogical* linkage between those historical inhabitants and their current descendants, and the consequential connection between their current living conditions and the said historical injustices. Thus, the Declaration consequentially stresses the *'urgent need'* to respect and promote the *inherent* rights of indigenous peoples *"...which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources."*[202] This latter paragraph has been interpreted as giving to the Declaration an essential *'remedial purpose'*, in a sense that the current recognition of these rights is intended as a compensation for the historical suffering of their ancestors and for their current living conditions of exclusion and disenfranchisement.[203]

Therefore, even when the Declaration has not incorporated any definition of the notion "indigenous peoples", it has nevertheless reaffirmed –stating in the wording of its preamble– almost all above mentioned objective criteria for the identification of these segments of the population as a distinguishable part of it. In this sense, it would be possible to identify as enshrined in its text the following

[201] See, UN *Declaration on the Rights of Indigenous Peoples*, Preamble.
[202] *Ibid.*
[203] In fact, the UN Special Rapporteur, S. James Anaya, has stressed that the Declaration *"...aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights affirmed in international instruments of general applicability."* See, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, cit., p. 12, para. 36.

criteria: (a) the *'being first in time'* factor, that is the ethno-cultural or biological element of being descendant of the historical inhabitants of the present national territory; (b) the temporal element that historically contextualise the societal aggregation indicated by the previous element, which is the said act of *colonisation* or *dispossession of lands*, territories and resources; (c) the cultural relevance of those lands, as part of their *cultural distinctiveness*[204]; (d) the current situation of prevention in the full exercise and enjoyment of their rights, which is nothing but a reference to their factual societal *non-dominant position* vis-à-vis other societal aggregations present in the territory in which they live; and (e) the perception of *historical injustice* of the act of dispossession of their lands; and hence their axiological allocation as *current victims* of those past wrongdoings (the so-called element of *victimization*).

Therefore, it seems that all explicit and implicit objective elements included in Martínez Cobo's proposed definition are present within the conceptual understanding of the indigenous people's notion as enshrined in this Declaration. But, what about its subjective element? The subjective element is included too, but implicitly. In fact, if we come back to the *preamble* of the Declaration, is affirmed and recognised the right of all peoples –including of course indigenous people– *"to be different, to consider themselves different, and to be respected as such."* In other word, an indigenous person has, as any other individual, the right to build his or her own identity, to *self-identify* with it, and to be recognised by it, in a sense of his or her *self-identification*. In addition, the Declaration also recognises to each individual, in association with his or her fellow group members, the *"...collective right to live in freedom, peace and security as distinct peoples..."*[205], but not only. She or he also has the right to be protected in *"...their integrity as distinct peoples, or of their cultural values or ethnic identities"*[206]; the right to *"...belong to an indigenous community or nation, in accordance with the traditions and customs of the*

[204] The preamble of the Declaration does not refer to the so-called *special relationship* that these people have with their traditional lands. However, its Article 25 expressly states that they have the right to maintain and strengthen *"...their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regards."*

[205] See, Article 7(2) of the UN Declaration on the Rights of Indigenous Peoples.

[206] *Ibid.*, Article 8(2)(a).

community or nation concerned."[207] Last but not least, she or he has the right to *"…determine their own identity or membership in accordance with their customs and traditions."*[208]

As we can appreciate, through the incorporation of a variety of rights connected with indigenous identity, the Declaration has fully recognised their right to *self-identification* as members of an indigenous group, and therefore the protection of the individual self-perception as such. Additionally, it has also incorporated the collective perception of *cultural distinctiveness*, that is, to live as *distinct peoples* as is worded in the Declaration.[209] The latter, refers to what Martínez Cobo has mentioned as *'group consciousness'*.[210] Moreover, this group dimension is perhaps the most innovative element introduced by the Declaration in comparison with the previous two analysed ILO Conventions. In fact, in those Conventions, indigenous people were addressed as individuals, as human beings with specific and *distinctive* ethno-cultural identities, which justified the recognition of tailored rights in order to facilitate the full enjoyment of their rights and freedoms. Though, in case of the Declaration, we do not only find the incorporation of this individual dimension but also a group dimension, which seems to attribute rights to indigenous groups themselves, as a societal cultural entity with its own subjectivity and not just as an aggregation of individuals that share the same cultural identities and distinctiveness.

One may argue that one *indicia* of the recognition of indigenous peoples as a societal entity or group lies on the fact that they are addressed under the denomination of "peoples" and not as mere "populations", as in the case of the ILO Convention No. 107. This observation, however, does not –in itself– make a decisive contribution in order to answer the question, as we have already discussed when reviewing its terminological incorporation within the text of the ILO Convention No. 169. However, the answer could be different if we add to this semantic observation the fact that the Declaration refers to itself as *"a standard of achievement to be pursued in a spirit of partnership and mutual respect…"*[211] Why? Because when we

[207] *Ibid.*, Article 9.
[208] *Ibid.*, Article 33(1).
[209] *Ibid.*, Article 7(2).
[210] See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations*, cit., p. 29, in particular, para. 381.
[211] See, UN Declaration on the Rights of Indigenous Peoples, *Preamble*.

talk about partnership and mutual respect, then the question is between… whom? The answer now seems to be quite clear, between the Indigenous peoples and –of course– the States.[212]

It would be quite difficult to admit, from the point of view of international law and even public law in general, that the relationship between a national State and its citizens is based on standards of *"partnership and mutual respect."* If not for other reasons, this is just because the very same individuals or citizens intrinsically represent one of the ontologically constitutive elements of every national State, which is its population. Hence, the State cannot –by a matter of logical principles– have a relationship of partnership, which is a relationship between two or more separate entities that associatively interact at the same level, with… itself. Then, if this is correct, it seems that we will have to acknowledge that the Declaration addresses indigenous peoples not only as an aggregation of individuals, with individual and collective cultural interests, but also as a *group*, with its own subjective personality and even rights.[213]

The same conclusion has to be drawn from the different obligations that, according to the Declaration, States have to perform *"in consultation and cooperation with indigenous peoples"*, such as –for instance– *"...take the appropriate measures, including legislative measures, to achieve the ends of this Declaration"*[214], but not only.[215] It seems to be clear that, in modern democracies, legislative bodies have the representation of the *will* of the people, and therefore –as a matter of principle– they do not need to act *"in consultation and cooperation"* with their citizens any time that they pass a piece of legislation. The mere act of

[212] In fact, the same preamble states that *"...treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States."* Constructive arrangements, like –for instance– it could be even considered the same Declaration.

[213] According to Prof. Anaya, in his vest of UN Special Rapporteur, the declaration however *"...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."* As we will see within the following section, this does not seem to be the case. See, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, cit., p. 13, para. 40.

[214] See, Article 38 of the UN Declaration on the Rights of Indigenous Peoples.

[215] Other provisions of the Declaration that incorporate the above mentioned wording, are Articles 15(2), 17(2), 36(2), 37, and last, but not least, the Preamble itself.

legislating presumes –in itself– the said consultation and cooperation. Hence, if in the case of indigenous people States have to act in consultation and cooperation with them, then it is because they do not constitute an integrative part of the population but just as a different societal entity, a group, with which States have to engage in *'partnership'*.[216]

Last but definitely not the least, the Declaration clearly affirms that indigenous peoples have the right to *self-determination*, in a sense that by virtue of this right, they *"...freely determine their political status and freely pursue their economic, social and cultural development."*[217] The only semantic difference between Article 3 of the Declaration and the common Article 1(1) of the two 1966 International Covenants consists in the use of the term "indigenous peoples" at the place of "all peoples". Vis-à-vis this clear terminological connection, it would be quite difficult to argue that indigenous people are not "peoples" in the sense of holders of the right to self-determination, but… someone could rightfully ask which version of the right to self-determination. A plain version of it, including the right of secession from the territory of the current State in which they live, or just a diminished version of it, consisted on what has been called *'internal self-determination"*?[218]

As we know, the right to self-determination should be understood –in its widest or general sense– as the right to all people to choose their own political, economic and social systems and their own international status.[219] Indigenous people

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[216] This relationship between States and indigenous people, has been framed, by the former UN Special Rapporteur Mrs. Daes, as a process of "belated State-building", that is a process *"through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion."* It seems that for the author, indigenous people did not participate and are not part of the "peoples" that currently constitute the population of a given State. Rather than controversial, this position seems to be an *essentialization* of the existing societal dynamics in open, pluralist and modern democracies. See, E.-I. A. DAES, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, in *Transn' L. & Contemp. Probs.*, 3(1), 1993, p. 9, cited by S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, cit., p. 14, para. 46.

[217] See, Article 3 of the UN Declaration on the Rights of Indigenous Peoples.

[218] For a brief account on the distinction between internal and external self-determination, see M. NOWAK, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2005, p. 22 et seq. For a more detailed explanation, see, A. CASSESE, *op. cit.*, p. 67 et seq. For our own account of this distintion, see Chapter II, Section 4.1 to 4.3.

[219] See, A. CRISTESCU, *The Right to Self-Determination. Historical and current development on the basis of United Nations instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1, Special Rapporteur of the

are indeed "peoples" in a sense of being an undifferentiated part of "all peoples", considered without ethno cultural discriminations. In fact, according to the former UN Special Rapporteur, Mr. Aureliu Cristescu, the term "people" denotes a social entity possessing a clear identity and its own characteristics, which implies a relationship with a territory, and until now indigenous people fulfil those criteria; but –he clarified– that they should not be confused with ethnic, religious or linguistic minorities.[220] And in this latter case, indigenous people also match the criterion of being an "ethnic" minority (when indigenous peoples find themselves in a minoritarian situations vis-à-vis the dominant majority, which happens in most cases).[221] According to Mr. Cristescu, the reason for this exception lies on the fact that the rights of minorities are regulated by a different disposition, that is by Article 27 of the ICCPR[222], but not only. In fact, he also found grounds for this exception on the content and meaning of the *'principle of territorial integrity and political unity of sovereign and independent States'*, developed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA res. 2625 XXV).[223]

For the above mentioned reasons, indigenous populations living in the territory of sovereign and independent States, and –therefore– being an integrative part of its independent and sovereign political unity, would not have the possibility –as a matter of principle– to exercise the right of self-determination. That is, in a sense of *"...authorizing dismemberment or amputation of sovereign States exercising their sovereignty by virtue of the principle of self-determination of peoples."*[224] In fact, this general limitation, which lies at the bottom of the international community's structure (Articles 1(2) and 55 of the UN Charter)[225], has also been rightfully incorporated into the text of the Declaration on the Rights of Indigenous Peoples. In effect, the Declaration clearly states that, nothing in it *"...may be interpreted as*

Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, 1981, p. 39, para. 268.

[220] *Ibid.*, p. 41, para. 279.

[221] See, M. SCHEININ, *What are Indigenous Peoples?*, cit., p. 9 et seq.

[222] According to Prof. Ermacora this argumentation was not acceptable. For this eminent professor, *"[a] minority can well be considered a people if a given minority has the elements of a people."* See, F. ERMACORA, *op. cit.*, p. 327-328.

[223] See, A. CRISTESCU, *op cit.*, p. 41, para. 279. In connection with this declaration and its application to the case of minorities, see also our considerations in Chapter II, Section 4.2.

[224] *Ibid.*

[225] See, A. CASSESE, *op. cit.*, p. 73-74.

implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nation or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[226]

Therefore, it seems to me that the Declaration does not authorise by any means the full exercise of the right to self-determination, or what has been called the right to *external* self-determination, and therefore, the possibility for indigenous societal aggregation to *secede* from the national territory of the State of which they form part.[227] However, this does not absolutely mean that they would not be able to exercise –under any circumstance– this full version of the right to self-determination. Indigenous people are indeed peoples.[228] In fact, we have to bear in mind that nothing in the Declaration may be used to *"...deny any peoples [including –of course– indigenous people] their right to self-determination, exercised in conformity with international law."*[229]

As it has been already maintained[230], ethno-cultural groups which find themselves in a minority situation living within the territory of an independent and sovereign State –such as the case of indigenous people– could indeed have the possibility to exercise the right of external self-determination, and therefore legitimately secede *'in conformity with international law'.*[231] And, this could happen

[226] See, Article 46(1) of the UN Declaration on the Rights of Indigenous Peoples.

[227] The extension of this full version of the right of self-determination has been clearly configured by the above mentioned UN Declaration on Friendly Relations and Co-operation among States, which states that *"[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by the people."*

[228] See, S. J. ANAYA, *The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples*, cit., p. 10. According to Mrs. Daes, the only potential distinction between "indigenous" peoples, and "peoples" generally, would be no other than *"...the fact that groups typically identified as "indigenous" have been unable to exercise the right of self-determination by participating in the construction of a contemporary nation-state."* See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 22-23, para. 72. See also, A. XANTHAKI, *Indigenous Rights and United Nations Standards*, cit., p. 140 et seq.

[229] See, UN Declaration on the Rights of Indigenous Peoples, *Preamble.*

[230] See, Chapter II, Section 4.3.

[231] This argumentation introduces us to the topic of the legitimacy of self-determination. For its extension and complication it is not possible to develop it within the framework of this work, but we can just briefly say that the main aspect of legitimation lies on the recognition and support that the

in those cases of absolutely exceptional circumstances in which the group itself and its members would be subjected to a situation of extreme violence, just because of their ethno-cultural appurtenances (e.g. genocide or ethnic cleansing). Situations, which –for their extreme characteristics– do not give any room for any other action other than *revolt* against their own imminent and certain physical destruction.[232] Again, the exercise of this sort of "*remedial secession*"[233] could be exceptionally authorised by international law[234] not because of their character as indigenous people, but because of their nature as just "peoples", without consideration of their cultural distinctiveness or *indigenousness.*

But then, how do we interpret the scope and legal extension of the right to self-determination enshrined in the Declaration? As in most cases, the answer is provided by the text of the Declaration itself. In fact, Article 4 clearly states that *"[i]indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs…"* Hence, the right to self-determination, in a sense to *"freely determine their political status and freely pursue their economic, social and cultural development"*, as recognised in Article 3 of the Declaration, actually means that these populations can channel their exercise by means of seeking *autonomy* and *self-government*. However, the recognition of this right does not absolutely mean that they are free and not obliged by the limitation contained in Article 46 of the Declaration, that is, the

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pretended exercise of the right to self-determination (in its secession form) can gain from the relevant international organisation and community. In words of Prof. Ermacora, *"[l]egitimacy of self-determination must take into consideration whether by the claim of self-determination international harmony would be favoured; whether the international community is confronted with an already accepted form of new entity (such as a condominion, a small State, a protectorate) and whether the entity can prove its future viability."* See, F. ERMACORA, *op. cit.*, p. 330. The case of Kosovo is perhaps a good concrete example on this matter. In this sense, see, I.C.J., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, Report 2010, No. 141, p. 29, para. 78 et seq.

[232] Nevertheless, even in those absolute extreme cases, the proposed solution is not pacific among members of the international community. In fact, the ICJ, in its advisory opinion regarding the case of Kosovo, has recognised that *"…differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances"*, and preferred to not take a clear stand in the matter. See, I.C.J., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, Report 2010, No. 141, p. 31, para. 82.

[233] See, M. WELLER, *Escaping the Self-Determination* Trap, Leiden/Boston, 2008, p. 59 et seq.

[234] We have to always remember that the general principle of international law applicable to the case of cession is that *'[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.* See, *UN Declaration on the granting of independence to colonial countries and peoples*, No. 1514 (XV) of 14 December 1960, Article 6.

prohibition to engage in any acts that could disrupt the territorial integrity and political unity of the national State of which they form an integrative part. And this is nothing but the recognition of the right to *internal* self-determination.[235]

Furthermore, in case of potential interpretative problems, as could be the case in connection with the scope and extension of the recognised right of self-determination, the Declaration clearly states –in its last but not least paragraph– that all its provisions *"...shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."*[236] To state the obvious, this means that even the right to self-determination has to be interpreted and applied under the light of these legal principles; which also mean that it has to be exercised within the framework of the *democratic* national institutions that guarantee the *good governance* and *political unity* of a territorially integrated State. Indeed, in modern, open, and pluralist democratic societies, the claims for autonomy and self-government have to follow the political channels of *good governance* in full respect of the principles of rule of law and democratic decision making procedures.

As it has been already maintained, democracy is in essence a *method*. In fact, it is a procedural methodology in which all societal claims and political aspirations find room for an open and constructive dialogical negotiation. It implies that decisions are taken by majorities but with due protection of potential minorities –as in the case of indigenous people– under the safeguarding lights of the principles of equality, non-discrimination and full respect for recognised human rights and fundamental freedoms.

Therefore, the right to autonomy or self-government recognised to indigenous peoples, in order to be institutionally implemented, has to be necessarily subjected to the democratic procedures of good governance, which in essence refers to the democratic dynamics of the national decision-making bodies. It is in this political dimension that indigenous people's claims for autonomy and self-government in economic, social and cultural spheres have to be deal with. Professor Anaya, in his vest of UN Special Rapporteur, has considered that the implementation of the Declaration requires the *'transformation of broader legal structures in key areas'*,

[235] See, A. CASSESE, *op. cit.*, p. 101 et seq.
[236] See, Article 46(3) of the UN Declaration on the Rights of Indigenous Peoples.

carrying in this sense *'a number of implications for broader State governance'*, which realization implies *'a whole package of legal and administrative transformations, particularly regarding property and natural resources law and administration."*[237]

If the above interpretation is correct, then the legitimate channel in a democratic society for pursuing those changes necessarily consist in introducing them into the hands of the decision-making legislative bodies, in an open, pluralist and inclusive manner. Moreover, in order to be inclusive, that democratic process should grant participation to indigenous people's representatives, not necessarily through their incorporation into the very corps of the legislative body (which is necessarily subjected to the societal political dynamics of each society), but –at least– through fair and effective mechanism of consultations.[238] But this also means that indigenous peoples would have to accept in *good faith* the democratic outcome of that democratic participation, even when they find themselves in disagreement with the said democratic result.

Furthermore, it is under the above democratic light that we have to interpret the introduced requirement of consultation. This is particularly the case of the provision of the Declaration that states that, before adopting and implementing legislative or administrative measures that may affect indigenous people's rights, *"States shall consult and cooperate in good faith [...] in order to obtain their free, prior and informed consent."*[239] This means that States' authorities and indigenous people's representatives have to engage in an open and constructive dialogical process, with the objective to reach in *good faith*, an acceptable agreement for all interests involved.[240] Act *'in order to obtain'* means just that. It means to establish an open, inclusive and dialogical democratic process, methodologically able to reach

[237] See, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, cit., p. 15-16, paras. 50-51.

[238] In fact, Article 18 of the Declaration introduces the principle of consultation, when states that *"[i]indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."*

[239] See, Article 19 of the UN Declaration on the Rights of Indigenous Peoples.

[240] For up-dated information in connection of the participation of indigenous peoples in decision-making processes, see the Report of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Progress report on the study on indigenous peoples and the right to participate in decision-making*, UN Doc. A/HRC/15/35, Human Rights Council, 2010, in particular, p. 17 et seq.

balanced positions between the different interests at stake.[241] The contrary would be nothing but the "*democratic tyranny*" of a given ethno-cultural group.

Finally, and as a conclusive remark with regard to this Declaration, we can say that this instrument, under the influences of indigenous activist, scholars and lobbyists, has not engaged in the conceptual exercise of defining the notion of indigenous people, perhaps conscious of the epistemological and conceptual difficulties that this notion enshrines.[242] Instead, the drafters focussed on the creation of a differentiated set of rights that will ideally match the *cultural differentness* of its beneficiaries. It seems to me that indigenous movements have succeeded in achieving –at least under a declaratory form– their *political claims* for a separate and distinguishable society, in which its members would enjoy a *differential* set of culturally tailored rights based on their ethno-cultural appurtenances. Indeed, this would be an *exclusive* society with exclusive members, in a sense that all other fellow humans would be excluded.

Within the new philosophical standing of the Declaration, the full participation of indigenous people within the political, economic, social and cultural life of the State, in full equality and non-discriminatory guaranties, is regarded as a second option. Meanwhile, the strength and further development of their distinct political, legal, economic, social and cultural institutions, as a societal framework for a concrete separate and differentiated society, is considered as a the main and purported goal.[243]

In this sense, it seems that the multiculturalist option for equally divided societies, composed of equal and distinguishable ethno-cultural societal entities or

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[241] This interpretation has been endorsed by UN Special Rapporteur, Mr. Anaya. In fact, he has concluded that Article 19 of the Declaration *"...should not be regarded as according indigenous peoples a general "veto power" over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples."* See, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya*, UN Doc. A/HRC/12/34, Human Right Council, 2009, p. 16, para. 46.

[242] According to UN Special Rapporteur, Mrs. Daes, *"[i]ndigenous representatives on several occasions have expressed the view, before the working Group that a definition of the concept of "indigenous people" is not necessary or desirable."* See, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 12, para. 35.

[243] See, Article 5 of the UN Declaration on the Rights of Indigenous Peoples.

groups, but with equally *unequal* individual members, has won this particular *declaratory* battle under the new indigenous people's cultural clothes.[244] However, the future fate of this Declaration is still unclear; we will have to wait for a new ideological battle, the battle for its implementation.[245] Hopefully, this battle would be conducted within the dialogical argumentative arena of democratic institutions, giving to all parties the possibility to participate, but also with civic respect for the democratic outcome of the so-called *'democratic game'*.

4. Conclusion

Coming back to our initial question, namely, whether or not indigenous people should enjoy special and tailored rights, as a distinctive segment of human society, after analysing the two ILO Conventions and in particular the UN Declaration on the Rights of Indigenous Peoples, the answer seems to be quite clear. In fact, the international community has –at least– *declared* that they are entitled to be considered as a separate and distinguishable societal aggregation. Especially, within the Declaration, the recognition of the right to self-determination goes in that direction. In effect, this right –even in its reduced version of *internal* self-determination– involves a collective dimension that is not escapable.[246] As the same Declaration has recognised, *"...indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as*

[244] In connection with our considerations with regard to multiculturalism and its societal concerns, see Chapter I, Section 3 and 4.

[245] If we stay with the words of Mrs. Daes, the idea of having separate societies divided by the ethno-cultural notion of *indigenousness* would continuously make its path. In fact, at the very end of her explorative conceptual exercise, she stressed that *"...we must ensure that the eventual implementation of a declaration on the rights of indigenous peoples is entrusted to a body which is fair-minded and open to the views of indigenous peoples and Governments, so that there is room for the reasonable evolution and regional specificity of the concept of "indigenous" in practise."* E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, cit., p. 23, para. 74.

[246] Even if the right to self-determination has been incorporated within human rights instruments, that is, the two 1966 International Covenants, it goes beyond the individual dimension of each person, and incorporates a collective dimension that is enshrined within the notion of "all peoples", in the case of the Covenants, or "indigenous peoples", in case of the Declaration. This collective dimension, as we already saw in this and previous Chapters necessarily conducts to the notion of group or societal aggregation, in a sense that is the collectivity, the group rather than each individual, who can claim and exercise this right. See, M. NOWAK, *op. cit.*, p. 14 et seq.

peoples."[247] Thus, their claim for being considered as a separate and distinguishable societal entity, as a specific group of peoples with specific rights[248], seems to have been fulfilled.

In this sense, the chosen path for the protection of their cultural diversity and their specific cultural manifestations, traditions, knowledge, values and world views, has not been the practical reinforcement and full implementation of the internationally recognised human rights and fundamental freedoms. In fact, the latter can be deemed to have universal implications. This means that fundamental rights have to be recognised *"...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*, as was clearly stated in what has been considered as the most enlightened and inspirational page of modern international societal regulation, namely, the Universal Declaration of Human Rights (UDHR).[249] After the proclamation of this *"common standard of achievement for all peoples and all nations"*[250], the Universal Declaration has put words that could frame the demands of all peoples in the world, for an equal respect of their inner dignity as members of the human family; asking for an equal recognition and respect for equally recognised rights.[251]

Nevertheless, as we already saw in the first chapter of this work[252], having the same human rights and fundamental freedoms for all human beings seems not to be satisfactory enough for all humans. Some humans, aggregated within societal distinguishable cultural entities, have claimed and still claim for a differential and exclusive set of rights that would ideally match their cultural *distinctiveness*. And we can possibly say that, in the case of indigenous peoples, they have successfully done so… at least under the light of the UN Declaration on the Rights of Indigenous Peoples.

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[247] See, UN Declaration on the Rights of Indigenous Peoples, *Preamble.*
[248] See, Report of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Progress report on the study on indigenous peoples and the right to participate in decision-making*, cit., p. 17, para. 67 et seq.
[249] See, Article 2 of the Universal Declaration of Human Rights.
[250] *Ibid.*, Preamble.
[251] See, A. EIDE, G. ALFREDSSON, *Introduction*, in G. ALFREDSSON, A. EIDE (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague/Boston/London, 1999, p. xxxii.
[252] See, Chapter I, Section 3 et seq.

As I said before, this is nothing but the multiculturalist recognition of equally culturally divided societies, composed by equal and distinguishable ethno-cultural groups, but with equally *unequal* individual members. In fact, the multiculturalist logic, behind the recognition of a differential and exclusive set of rights to a societal aggregation exclusively composed of indigenous people, lies on the cultural fact of their cultural distinctiveness. That is, on the need to preserve their *uniqueness* through a unique (and exclusive) set of rights. But, on the other hand, this also means that those excluded from the enjoyment of these culturally tailored rights, are considered less culturally "*unique*" than those in possession of the said cultural distinctiveness, who have been identified under the term *'indigenousness'*.

However, even when the conclusion reached in the previous paragraphs seems to satisfy one element of the inquiry developed in this chapter, that is, the determination of the legal dimension and reception of the notion of indigenous people in international law, this finding is just connected with one of the two dimensions presented in this notion. The remaining dimension refers –of course– to the ontological implications of this notion; that is its axiological legitimation as a societal concept that enshrines and reflects the unique and distinguishable societal nature of indigenous groups that also gives justification to its differential (and exclusive) normative treatment.

In this sense, our enquiry in connection with the different objective and subjective criteria used for the identification of indigenous people as a *distinguishable* people, and therefore as culturally *"unique"* vis-à-vis the rest of human cultural societies, was quite unsuccessful. First of all, indigenous people's culture cannot be considered as more *"unique"* than other cultural manifestations. All cultures are *equally unique*, because all of them provide an equally functional essential content to human beings.[253] From the perspective of the individual, the cultural bearer, his or her own culture is as unique as all the others; it is in his or her cultural construction where the individual finds his or her meaning of life, his or her understanding of the world, his or her articulated sense of the good, the holy, the admirable.[254] In fact, as it has been already stated, all cultures have *equal functional*

[253] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 1.
[254] See, Ch. TAYLOR, *The Politics of Recognition*, in A. GUTMANN (ed.), *Multiculturalism. Examining the Politics of Recognition*, Princeton, 1994, p. 72-73.

value, indigenous or non-indigenous cultures alike. [255] Hence, from an ontological point of view, the alleged intrinsic *cultural distinctiveness* of indigenous cultures does not make them different or more distinctive than non-indigenous cultures; both are equally distinctive.

Furthermore, if we just focus on what has been identified as the most relevant *distinguishable* cultural feature of these populations, which is their *special relationship* with their traditional lands, as we saw in the previous sections, the final result does not change. In fact, this conceptual understanding involves what we have called a sort of *dogmatic "essentialization"* of their identity. This is because, it enshrines the *dogmatic equation* of *indigenousness = special relationship with traditional lands*[256], which deprives of indigenous identity those large majorities of self-identified indigenous people living in urban areas for generations[257], but not only. It is also based on an additional *essentialization*, which is the assumption of the unchangeable, timeless and even culturally uncontaminated character of indigenous cultures. Culture is in essence a dynamic dialogical process; thus, even indigenous cultures change and adapt under the societal influences of external cultures and – even most importantly– under the effect of time and space circumstances. [258]

For the above mentioned reasons, we would have to perhaps understand as a *dogmatic essentialization* those views that consider that, without having a current and permanent relationship with their traditional lands, an indigenous person would lose his or her *indigenousness*, and therefore would be deprived of his or her cultural identity. As culture, cultural identities are complex, dialogical and relational by nature. And, as culture, identities are subjected to change, and reach their potential through a dialogical perpetual exchange.[259] In other words, the idea of *deprivation* of cultural identity, by means of the *essentialization* of its objective components, is quite contrary to the same ontological understanding of culture and identity.[260]

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[255] See, Chapter II, Section 3.4.1.
[256] For further explanation of why we have chosen the sematic construction "dogmatic equation", see in this Chapter, Section 2.4.
[257] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 25-26.
[258] See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit., para. 4.
[259] For more detailed explanation of the notion of "cultural identity", see our considerations in Chapter III, Section 4 et seq.
[260] Perhaps one exception to this general understanding could be found in those few indigenous communities living in isolation or which do not maintain regular contact with external societal

Furthermore, even the construction of indigenous identity over the objective criterion of being descendants of those first inhabitants that populated the current national territory at the time of the colonisation, invasion or otherwise *unjust* dispossession of their traditional lands, has been retained as ontologically problematic, for its biological and hence *racially* related connotations. [261]

Therefore, as we have concluded above, without having any grounded objective elements that can ontologically sustain the cultural claim of *distinctiveness*, what rests is the subjective element of *self-understanding* as being different. Indigenous people's culture is (more) different and unique than other cultures because indigenous people perceive it as more different and unique (descriptive dimension), and then all the other members of the society *should* perceive it as such (prescriptive dimension). In fact, the same Declaration on the Rights of Indigenous Peoples seams to subscribe to this position when in its forefront affirms the recognition of the right *"...of all peoples to be different, to consider themselves different, and to be respected as such."*[262] As you can see, the Declaration semantically refers to "all peoples", but actually, if we read this *passage* under the light of its object and purpose[263], we will promptly realise that it refers rather to the right of "indigenous" peoples to be culturally different, to be seen as different, and to be treated as such. Indeed, the right of indigenous peoples "as peoples", was already recognised and guaranteed because they form part of the undistinguishable and integrative societal notion of "all peoples", regardless their ethnicity, race, colour, or cultural appurtenance.

The right to every single person to enjoy his or her cultural identity, as he or she defines it, and to take part in the cultural life of both, his or her group of appurtenance (if it is the case) and with regard to the mainstream society, is beyond any question.[264] However, the enjoyment of this individual right is not the same as a potential claim of a given group to be seen as different, and to constrain all the other

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aggregations. In connection with them, see the Human Rights Council Expert Mechanism on the Rights of Indigenous People's Report called *"Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial contact of the Amazon Basin and El Chaco*, UN Doc. A/HRC/EMRIP/2009/6, of 30 June 2009.

[261] For a more detailed explanation, see in this Chapter, section 2.4. See also, K. A. APPIAH, *op. cit.*, p. 136-137; and F. ERMACORA, *op. cit.*, p. 294.

[262] See, UN Declaration on the Rights of Indigenous Peoples, *Preamble.*

[263] See, Article 31(1) of the Vienna Convention on the Law of the Treaties.

[264] See our considerations in connection with these rights in Chapter III, section 4.1. et seq.

members of the society to treat it as being different. That is, through granting to it a special and exclusive set of rights, for the –allow me the redundancy– exclusive enjoyment of its exclusive culturally defined members.

In other words, from an individual perspective, an indigenous person, who is indigenous because he or she sees himself or herself as such (self-identification), can fully enjoy his or her life and therefore his or her *indigenousness* in association with all other persons that identify themselves in the same manner, almost without any restriction. Nevertheless, from a group perspective, the answer does not seem to be the same. In fact, if an indigenous group, because it considers itself as ontologically different from the rest of the society –and therefore culturally distinguishable as a different societal entity– requests to be granted with a differential set of rights for the *exclusive* enjoyment of its indigenous members, then the very idea of all human beings being *equal* in rights and dignity seems to start suffering.[265]

Then, what can be done about this? Just continue in this axiological *multiculturalist* path of segmentation of human society in equal societal ethno-cultural entities or groups, biologically divided according to the criterion of descendancy (as we saw is the case of indigenous people) and therefore –even when we would not like to admit it– *racially* divided under the new conceptual clothes of ethnicity (as Appiah warned us[266])? A multiculturalist society is the one in which human beings –individuals– would have the possibility to enjoy and share the same equal rights of their fellow group members, but not the same equal and undistinguishable status in rights and fundamental freedoms than the rest of the human family. In short, the multiculturalist proposal, in which, it seems that the indigenous people's claim for culturally and institutionally divided societies finds its axiological contents, would conduct us to a society of equal groups and cultural entities, but not necessarily to a society composed of equal human beings, in rights and dignity.[267]

Moreover, we can still ask ourselves whether the ethno-cultural segmentation of the society is the beginning of the realisation of a more effective equality among ontologically equal human beings, or if it is –on the contrary– the beginning of its

[265] See, Article 1 of the Unversal Declaration of Human Righs.
[266] See, K. A. APPIAH, *op. cit.*, p. 136-137.
[267] For further consideration in connection with this axiological analysis, see Chapter I, Section 6.

end. In fact, it seems that the materialisation of this *'end'* starts through the construction and recognition of differential legal status, with differential and exclusive rights and freedoms, for each ethno-cultural group. Indeed, the latter situation would consequentially generate nothing but the allocation of humans in *distinguishable unequal positions*, according to their ethno-cultural appurtenances, that is, according to their *cultural distinctiveness*.

At least for now, the political direction taken by the international community it is quite clear, and the success of the increasingly effective lobby carried out by indigenous organisations, within the different international and regional fora, too.[268] What still remains doubtful is whether these developments take us toward a better and full realisation of the inspirational values enshrined within our axiological international cornerstone, that is, the Universal Declaration of Human Rights, or not. Personally, I remain sceptical and unconvinced of the ontological goodness of *human divisiveness*.

The question is still the same, and it is about how we can ontologically interpret human rights. In effect, they could be seen as equal minimum standards for all, based on our equal dignity, regardless of potential different ethno-cultural appurtenances, but which nevertheless guarantee the full realisation of our cultural self. Alternatively, they could also be seen as equal rights for equal human societal aggregations or groups, culturally distinguishable and composed by individuals who would enjoy a differential set of rights and legal status, based on their ethno-cultural memberships. The former interpretation ideally leads toward a society of culturally diverse but equal humans; the latter, toward a society of equally culturally diverse humans, but not necessarily equals. To say it straightforwardly, *diversity in equality* or *equality in diversity*, this is the question.

But again, what can we do? What is the answer to this axiological *galimatias*? Because the problem is indeed axiological, then the answer should be necessarily axiological too. This valuative answer will certainly depend on which axiological understanding of equality we would like to embrace. Equality for groups, or equality for individuals, again, this is the question.

[268] See, H. HANNUM, *op. cit.*, p. 90 et seq.

In attempting to provide –at least– a potential answer to this question, we will –within the following chapters– critically examine the jurisprudence of the Inter-American Court of Human Rights (I-ACtHR) in connection with indigenous people's land claims. Why? Because this regional court, as a culturally *neutral* judicial body (at least from the theoretical point of view of its conventional mandate), has legally dealt with the objective element that has been identified as constitutive of the indigenous people's *cultural distinctiveness*, namely, their *special relationship* with their traditional lands, but not only. Also –and even most importantly– because it has done it from a perspective of a regional instrument that recognises equal human rights for all individuals, regardless their ethno-cultural affiliations, that is, the *American Convention on Human Rights* also known as *"Pact of San Jose, Costa Rica."*[269]

In other words, the analysis of this regional jurisprudence will provide us with the possibility to see if the claim for justice and redress advanced by indigenous people can be fulfilled without falling into the axiological *multiculturalist trap.*[270] That is, without the need to segment our common societies into culturally distinguishable societal aggregations, in which their human members would enjoy equally distinguishable but unequal rights.

[269] The American Convention on Human Rights (ACHR) was adopted by the delegates of the member States of the Organization of the American States (OAS) in the Inter-American Specialized Conference on Human, which was held in San José, Costa Rica, on the 22nd of November 1969, and entered into force on July 18, 1978. The ACHR has received 25 ratifications from the 35 OAS's member States, but today has only 24 States Parties (Trinidad and Tobago denounced it in 1998). Source: OAS's Department of International Law, 23/01/12.

[270] See, Chapter I, Section 4.2.

CHAPTER FIVE

THE INTER-AMERICAN SYSTEM

JUDICIAL INTERPRETATION AND INDIGENOUS PEOPLES' LAND CLAIMS

> *"In the present domain of protection, International law has indeed been made use of, in order to improve and strengthen, and never to weaken or undermine, the protection of the recognised rights inherent to all human beings."* Judge Antônio Augusto Cançado Trindade, ICJ.[1]

1. Introduction

As it has been maintained within the precedent chapters, at the theoretical level, indigenous people's claims for justice and redress for the suffering caused by past injustices, such as colonialism[2], and for modification and amelioration of their current general living conditions of disempowerment and societal exclusion[3], have assumed –in most cases– the form of claims for their legal recognition as a specific group of peoples with specific, exclusive and tailored rights.[4]

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[1] See, A. A. CANÇADO TRINDADE, *The Developing Case Law of the Inter-American Court of Human Rights*, in *Human Rights Law Review*, 3-1, 2003. p. 25.

[2] As an example of the current acknowledgement by the international community of these past tragedies, and their present consequences, we can always quote the UN Durban Declaration, especially when it states that *"[w]e acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today"* See, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc. A/CONF.189/12, 2001, p. 12, para. 14

[3] As the UN Special Rapporteur, Mr. Martínez Cobo, has concluded –in his famous study of the problem of discrimination against indigenous people populations– *"…the social conditions in which the majority of indigenous populations lived were favourable to the specific types of discrimination, oppression and exploitation in various fields […]. In many countries they were at the bottom of the socio-economic scale."* See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations,* UN Doc. E/CN.4/Sub.2/1986/7/Add.4, New York, 1987, p. 1.

[4] See, Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Progress report on the study on indigenous peoples and the right to participate in decision-making*, UN Doc. A/HRC/15/35, Human Rights Council, 2010, in particular, p. 17, para. 67.

In fact, as we saw in our previous chapter, indigenous people's struggles were and are still focused on their recognition as "peoples", in a sense given to this term by international law. That is, as a societal aggregation, fully entitled to their own self-determination in order to *'freely determine their political status and freely pursue their economic, social and cultural development'*, *'freely dispose of their natural wealth and resources'*, and in order to *'not be deprived of its own means of subsistence'*, as the common Article 1 of the two 1966 International Covenants recognise to *"all peoples"*.[5]

As it has been maintained, indigenous people are indeed "peoples", in a sense that they are indistinguishably included as integrative part of the notion "all peoples", considered without any ethno-cultural distinction.[6] However, indigenous people's self-perception as being "peoples" does not mean to be an *undistinguishable* part of "all peoples". On the contrary, it means to be a differential segment of peoples, with clear ethno-cultural differential boundaries, constructed as a reflection of their cultural differentness, which places them in a culturally separate but equal position –as a distinguishable societal aggregation– vis-à-vis the mainstream or non-indigenous society.[7] As members of the UN Expert Mechanism on the Rights of Indigenous Peoples stressed, for these populations *"[s]elf-determination is an ongoing process which ensures that indigenous peoples continue to participate in*

[5] See, S. J. ANAYA, *The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples*, in G. ALFREDSSON, M. STAVROPOULOU (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes. Essay in Honour of Erica-Irene A. Daes*, The Hague/London/New York, 2002, p, 6 et seq. See also, G. ALFREDSSON, *Different Forms of and Claims to the Right of Self-Determination*, in D. CLARK, R. WILLIAMSON (eds.), *Self-Determination. International Perspectives*, London, 1996, p. 71 et seq.

[6] In connection with the understanding in international law of indigenous people as "peoples", see our consideration in Chapter IV, Section 3. See also –among other authors– J. CASTELLINO, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden/Boston, 2005, p. 55 et seq.; A. XANTHAKI, *The Right to Self-Determination: Meaning and Scope*, in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden/Boston, 2005, p. 15 et seq.

[7] See, Aboriginal and Torres Strait Islander Commission, *Standard-Setting Activities: Evolution of Standards concerning the rights of Indigenous People: The concept of "Indigenous Peoples"*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2/Add.1, United Nations, 1996, para. 5 and 13; see also, E.-I. A. DAES, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People. Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "Indigenous people"*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, United Nations, 1996, p. 14-15, para. 40-41.

decision-making and control over their own destinies", as –I will add– distinguishable ethno-cultural entities.[8]

Furthermore, if we stay to the conclusions reached in the precedent chapter, it seems that the trend of international law is going in the direction of greater affirmation of indigenous people's rights of self-determination, in particular in a sense of socio-political, economical and institutional autonomy and self-government.[9] However, the ultimate goal of the self-determination political campaign, which refers to the achievement of ethno-cultural indigenous *statehood*, seems to be –from a perspective of international law– quite unreachable, at least in the foreseeable future.[10]

As we can see, after a few decades[11], the political battles fought by indigenous movements, activists, lobbyists and even scholars within the international area, have been quite successful.[12] They have conditioned international discourses and the way that international community dealt with indigenous people's issues in a quite decisive manner. Examples of this political path can be found reflected in international law, passing from the early patronising but protective approach of the ILO Convention No. 107, to the tepid autonomic approach of the ILO Convention No. 169, and to the final recognition of the right to *internal* self-determination of the Declaration on the Rights of Indigenous Peoples.

However, the political approach is not the only possible one. In fact, the above mentioned political actions have resulted in the affirmation of, within internationally recognised human rights standards, a concrete number of rights –that have been constructed in a tailored fashion– in order to better protect indigenous

[8] See, Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Progress report on the study on indigenous peoples and the right to participate in decision-making*, cit., p. 9, para. 31.
[9] See, Article 3, 5, 18, 36 and 37 of the Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007, by the UN General Assembly Res. No. 61/295. In connection with this Declaration, see our considerations in Chapter IV, Section 3.3.
[10] In connection with the possibility to exercise the right to *remedial self-determination,* see -among other authors- M. WELLER, *Escaping the Self-Determination* Trap, Leiden/Boston, 2008, p. 59 et seq.
[11] United Nation has declared, following its standing tradition to promote specific rights, two International Decades of the World's Indigenous People. The first one covered the period 1995-2004 (General Assembly Res. No. 48/163 of 21/12/1993), and the second one for the on-going period 2005-2014 (General Assembly Res. No. 59/174 of 20/12/2004). In addition, and with the same purpose, UN has also declared in 1993 the International Year of the World's Indigenous People, 1993 (General Assembly Res. No. 48/133, of 18/02/1994).
[12] See, S. J. ANAYA, *op. cit.*, p. 7.

people's enjoyment of their traditional way of life and dignity. Even when it seems that indigenous people have got a differential set of rights, culturally made in order to match their *cultural distinctiveness* or *indigenousness*, some authors authoritatively argue that they have not.[13] They affirm that this new indigenous standards, in particular those enshrined in the Declaration, have been elaborated upon the existing fundamental human rights and freedoms, but taking into account the specific cultural, historical, social and economic circumstances of indigenous peoples.[14]

In other words, indigenous people's distinguishable norms would be nothing but a re-interpretation of the very same catalogue of fundamental rights available to all humans, just under a culturally friendly and inclusive light. A light under which indigenous people's culture would ideally regain its *distinctive* dimension. If this is the case, then it would be possible to overtake one of the main and central weakness of indigenous people legal regime, namely the lack of specific judicial or even quasi-judicial mechanism with concrete jurisdiction to supervise the full respect, applicability and enforcement of these rights, in concrete and specific cases.[15]

It would be far away from the scope of this work to review and analyse –even briefly– all international bodies that, with greater or lesser degree, have judicial, quasi-judicial or just political monitoring functions or competences in connection with indigenous people's rights and claims. Therefore, instead of engaging in a sort of enumerative action vis-à-vis these bodies, which have been already undertaken[16], I

[13] For detailed explanation of these two expressions, see Chapter IV, Section 2.2.3.

[14] See, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc. A/HRC/9/9, Human Rights Council, 2008, p. 13, para. 40.

[15] As it has been said, the problem of a "protection gap" between existing human rights legislation and specific situations facing indigenous people *"…is indeed of major significance and presents a challenge to international mechanism for the effective protection of human rights."* See, R. STAVENHAGEN, *Indigenous Issues. Human rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, subitted pursuant to Commission resolution 2001/*57, UN Doc. E/CN.4/2002/97, United Nations, 2002, p. 28, para. 102.

[16] See, among other authors, A. XANTHAKI, *Indigenous Rights and United Nations Standards*, Cambridge, 2007, p. 47 et seq.; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, 2002, p. 116 et seq.; S. J. ANAYA, Indigenous *Peoples in International Law*, New York, 2004, p. 217 et seq.; E. STAMATOPOULOU, *Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic*, in *Human Rights Quarterly*, 16, 1994, p. 58 et seq.; E. STAMATOPOULOU, *United Nations Permanent Forum on Indigenous Issues: A Multifaceted Approach to Human Rights Monitoring*, in G. ALFREDSSON, J. GRIMHEDEN (eds), *International*

would rather prefer to focus on one specific international body with the specific competence to adjudicate in human rights cases, through binding resolutions whose observance is mandatory for States.[17] The reference is made in connection with the Inter-American Court of Human Rights (hereinafter "the Court" or "I-ACtHR"). I will explain within the following paragraphs the *rationale* behind this substantive and methodological choice.

First of all, being an Argentinean Lawyer, I am naturally interested in the Inter-American System of human rights protection which is in force in the Americas, and in particular in the jurisprudence of its highest judicial organ, that is the above mentioned Inter-American Court. Of course, this argument would not be enough to persuade an attentive reader of the methodological and substantive connection between the jurisprudence of this judicial body and the conceptual framework that has been developed within the former chapters. Quite right, the geographical contexts do not lie at the bottom of this choice or –at least– not essentially.

What has been the decisive factor is the landmark jurisprudence that the Inter-American Court has developed in the recent years with regard to indigenous peoples' rights, especially in connection with their right to communal property over their traditional lands and –fundamentally– their right to enjoy their own culture and traditions as different peoples. This remarkable jurisprudence, created by a regional judicial body, could be perhaps considered the result of the continuous battles by indigenous peoples recognised as such, as culturally diverse societal aggregation, with a distinguishable and differential cultural practices, understandings and worldviews vis-à-vis the rest of the human component of national societies.

In fact, within the jurisprudence of this Court, we will be able to find almost all conceptual notions that we have critically analysed within our previous theoretical chapters. However, those notions will gain –in this case– a different interpretative light through their practical application within specific human rights cases,

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Human Rights Monitoring Mechanisms. Essay in Honour of Jakob Th. Möller, 2nd revised Edition, Leiden/Boston, 2009, p. 355 et seq.; R. STAVENHAGEN, *op. cit.*, p. 7 et seq.; J. M. PASQUALUCCI, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, in *Human Rights Law Review*, 6, 2006, p. 281 et seq.

[17] According to Article 62 (1) of the American Convention, *"[a] State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention."*

introduced into the Inter-American System of human rights protection, by the offended indigenous communities. Therefore, it would be possible also to see –as reflected or mirrored in these judicial cases– their own aspirations and claims for justice, which also echoed their *political battles* for the recognition of a differential set of exclusive rights, as a different and separate cultural entity. However, instead of giving support to the cultural partition of the society, these judicial cases will show us that it is possible to gain redress and justice –in cases of cultural wrongdoings– through innovative and perhaps even indigenous-oriented interpretation of *common* human rights standards. And this is not minor.

Until now, the theoretical discussion was organised around the multiculturalist argument for divided societies between equally positioned ethno-cultural aggregations, in a sense of each societal entity having the possibility to be regulated by a differentiated set of culturally tailored rights, and leading toward a society of unequal individuals, affiliated to equal groups.[18] But again, here we could find a completely different approach that consists of granting culturally tailored judicial protection not through a differential set of culturally constructed rights, but through a culturally friendly interpretation of *universally* constructed rights; and hence –in principle– culturally *neutral*.

Indeed, the Inter-American Court's jurisprudence and competence is based on an instrument with universal character, rather than a group oriented one. In fact, the rights and freedoms included within the American Convention on Human Rights or "Pact of San José, Costa Rica" (hereinafter, "the Convention"; "American Convention or "ACHR") [19] are recognised *"without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."*[20] In short, fundamental human rights and freedoms are recognised without any discrimination, and in particular, without making any distinction in connection with the ethno-

[18] For further reading in connection with this topic, see our considerations in Chapter I, Section 4.
[19] The American Convention on Human Rights (ACHR) was adopted by the delegates of the member States of the Organization of the American States (OAS) in the Inter-American Specialized Conference on Human, which was held in San José, Costa Rica, on the 22nd of November 1969, and entered into force on July 18, 1978. The ACHR has received 25 ratifications from the 35 OAS's member States, but today has only 24 States Parties (Trinidad and Tobago denounced it in 1998). Source: OAS's Department of International Law, 23/01/12.
[20] See, Article 1(1) ACHR.

cultural appurtenances of the individuals subjected to the jurisdiction of the Court. As we can see, the approach, the semantic, and the philosophy behind this instrument is quite different from what we have called the *multiculturalist proposal*.[21]

It would be possible to say that, an individual who identifies himself or herself as –for instance– an indigenous person would consider that an important part –perhaps the very essential one– of his or her identity is based on the *special relationship* that this person has with those lands that he or she regards as traditional.[22] Therefore, for that individual, the semantic construction of both Article 13 of the ILO Convention No. 169 and Article 25 of the Declaration on the Rights of Indigenous Peoples, it would perhaps be more culturally appealing and axiologically persuasive than Article 21 of the American Convention. In fact, Article 25 of the Declaration states that *"[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regards."*[23] On the contrary, if we focus on Article 21(1) ACHR, we find that it only states that *"[e]veryone has the right to the use and enjoyment of this property. The law may subordinate such use and enjoyment to the interest of society."*

The different semantics of the above mentioned articles is quite obvious. The former has a clear-cut ethno-cultural inspiration, with a spelt-out recognition of what is perceived as the main objective element of the indigenous people's cultural distinctiveness, which is their dual (material and spiritual) special relationship with traditional lands.[24] The latter, on the contrary, only recognises –as a general universal right– the right to property of *'everyone'*. Everyone, of course, includes *'everyone'* (if you allow me the redundancy), that is all individuals without ethno-cultural distinctions; indigenous people included. However, the *"right to property"*, as such,

[21] See above, Chapter I, Section 6.
[22] See above, in Chapter IV, Section 2.2.4.
[23] Article 13(1) of the ILO Convention No. 169 reads as follow: *"In applying the provisions of this Part of the convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."*
[24] See, E.-I. A. DAES, *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2001/21, United Nation, 2001, p. 7, para. 12 et seq.

does not necessarily include the above mentioned *special relationship* with lands or territories… neither exclude it!

Therefore, for the above mentioned *self-identified* indigenous person, if the latter instrument does not exclude the possibility to receive institutional safeguards with regard to his or her claim for land protection, especially if he or she takes into account the binding character of the resolutions emitted by this Court, then this option becomes quite more attractive. But, before taking the strategic decision to frame his or her claim as "just" as another human rights claim, and not as a claim based on his or her differential status as a member of a distinguishable societal aggregation with rights to a culturally tailored and exclusive legal treatment, he or she would like to be sure of the feasibility of this "human rights" avenue. In other words, he or she would need to know if it would be possible to read within the phrase "the use and enjoyment of his property" of Article 21(1) ACHR, the socio-cultural and axiological concept of *"distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands."*

Within this and the following chapter we will attempt to answer that question, using as a pivotal working material the judgments that the Inter-American Court has delivered in connection with indigenous people's land cases, but not only. In addition, special attention will be given to the *innovative* interpretative method used by the Court in its jurisprudential construction referring to the traditional or communal property rights.

Hence, in order to have a more systematic and better methodological approach to the substance of this jurisprudence, that is in connection with the jurisprudential understanding of the right to communal property over traditional lands, we will focus –first– on the interpretative methods applied by the Court and –in the subsequent chapter– on the proper analysis of the above mentioned right. But, before doing so, and even before sketchily introducing the Inter-American Human Rights System, and taking into consideration that every juridical instrument, and regional system, are products of its own temporal and spatial circumstances, in a

sense that law does not operate in a vacuum[25], let me very briefly refer to the indigenous people's general situation in the Americas.

2. Indigenous Peoples and their cultural struggle in the Americas

The Americas is a vast region in which live together different cultural traditions in everyday interaction. According to a report issued by the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission"; "the Commission" or "I-ACHR"), around 400 aboriginal ethnic groups exist in America, distinguished by different cultural practices (including languages, world views and lifestyle), which encompass a population surpassing 30 million people, according to approximate estimations. This figure could be considered as representative of 10% of the total population of Latin America.[26] Additionally, this report highlights the fact that, in particular in Latin America, indigenous people are *"...the poorest of the poor, and the most excluded of the excluded"*[27], hence those who find themselves within the most vulnerable, excluded and disempowered societal position.

The encounter between European settlers and autochthone populations happened more than 500 years ago (1492). However, inequalities still exist between those that perceive themselves (or are identified) as descendants of those populations that were present within the Americas territory with precedence to that encounter, and those descendants of those who had arrived with the process of colonisation, or even after as later settlers.[28]

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[25] See, A. A. CANÇADO TRINDADE, *The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights*, in S. YEE, J.-Y. MORIN, *Multiculturalism and International Law*, Leiden/Boston, 2009, p. 497.

[26] See, Inter-American Commission on Human Rights (I-ACHR), *The Human Rights Situation of the Indigenous People in the Americas*, OEA Doc. 62 OEA/Ser.L/V/II.108, 2000, Ch. II.

[27] *Ibid.*, Introduction.

[28] In this sense, it has been said that *"[t]he profound economic inequalities between indigenous and non-indigenous peoples, as well as the social exclusion of the former, their political disenfranchisement and cultural subordination, are part of a history of ongoing discrimination that can be described as structural racism; in other words, rooted in the power and control structures that have defined Latin American societies for centuries."* See, R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, Organization of American States (OAS), 2002, p. 23, para. 79.

However, before the colonisation process began, important *civilizations*[29] were present in the Americas territory, especially in Mesoamerica (Maya and Aztec) and in the Andes (Inca). Their knowledge, understanding, practises (including religious practices) and traditions remained lively throughout the entire process of colonisation until the present. However, not only did the greatest civilisations present in the Americas manage to survive until present days, according to their own practices and beliefs, but also many other indigenous peoples have managed to continuously live within their own traditions during all of these centuries. In fact, this is the case of many indigenous populations, from the far south as Tierra del Fuego until the far north as Canada, from the Pacific till the Atlantic coasts, passing over the pampas, deserts and estuaries, the steppes and tropical jungles of the Amazon basin.[30]

What is in common, among all indigenous people in the region, is that all of them were involved in the same struggle for the recognition and respect of their traditions, customs and culture, for the acceptance of their diversity and the worth and value of their traditional knowledge and understandings. In other words, indigenous people in the Americas region have been implicated in the same *socio-political battles*, struggling for the same aims, fighting for the recognition and respect of what they consider to be their separate and cultural *distinguishable* societal structures, socio-political and institutional organizations, and –last but not least– distinctive cultural identities. As Stavenhagen pointed out, *"...the majority of indigenous peoples have not managed to identify with the dominant model of the nation and its symbolic, but very real, attempts to occupy the cultural and social space of the national territory. In contrast, contemporary indigenous movement (a social and political phenomenon of the last twenty-five years at most) dispute the*

[29] See, with regard to civilisations dynamics, S. P. HUNTINGTON, *The Clash of Civilizations and the Remaking of World Order*, New York, 1997, in particular, p. 40 et seq.

[30] It has been pointed out that *"Mexico's indigenous population (around 15 million) is larger than that of Latin America and accounts for 15 % of the population. In contrast, the Indians of Guatemala and Bolivia comprise the majority of the national population, while in Peru and Ecuador they number almost half. In Brazil, Indians represent less than 0,5 % of the total population, but as the original inhabitants of the Amazon basin they have been pivotal in the resistance to the plundering of their lands, demanding respect for their territorial rights and political representations…"* See, R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, cit., p. 17, para. 61.

hegemonic intentions of the national state and have proposed alternative discourses as part of their social and political struggles."[31]

In addition, the survival of indigenous people as *distinctive people*, with their own traditions and cultural identity, was inextricably bound up with their struggle for their land rights because of the perceived intimate connection between their traditional territories, in which they live and manage to conserve their traditions, customs, and practices (even religious one), and their constructed cultural identity. These three factors (territory, culture and identity), as we saw in our previous chapter, are regarded as intimately interconnected in the current understanding of the complex and epistemological controversial notion of *indigenousness*[32], in a sense that it would be theoretically impossible to understand one of them without the said conceptual interconnections. As it has been already stated, the logic behind this argumentation is the following: without access to their traditional lands, these populations would not be able to practise their own traditions and beliefs. This is because their culture was and still is built upon and developed in close connection with those territories; in a certain sense, their culture is a product of their lands, grew up in them as part of that specific *cultural biosphere*, under the influences of those specific temporal and spatial conditions.[33] Therefore, the logical conclusion of this reasoning would be that, without having access to those traditional lands, their culture would become meaningless; and without the possibility to freely enjoy and practise their cultural traditions, their own identity –as different people– would peril or –at least– would be under a serious threat.

However appealing this conceptual construction could be, as we already saw, involves a sort of *dogmatic "essentialization"* of their identity. In fact the *dogmatic equation* (indigenousness = special relationship with traditional lands)[34] not only deprives of indigenous identity those large majorities who have been living in urban areas for generations, besides their *self-identified* indigenousness[35], but is also based

[31] *Ibid.*, p. 23, para. 77.
[32] See, Chapter IV, Section 2, and in particular, 2.2.3.
[33] See, Article 1 of UNESCO *Universal Declaration on Cultural Diversity*, adopted by the United Nations Educational, Scientific and Cultural Organization, on 2 November 2001.
[34] For further explanation of why we have chosen the sematic construction "dogmatic equation", see Chapter IV, Section 2.4. and 4.
[35] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, in UNDP Occasional Paper, 2004/14, 2004, p. 25-26.

on an additional *essentialization*, which is the assumption of the unchangeable, timelessness and even culturally uncontaminated character of indigenous cultures. In short, the very idea of *deprivation* of cultural identity, by means of the *essentialization* of one of its regarded objective components, that is the special relationship with traditional lands, is quite contrary to the same ontological understanding of culture and identity. [36]

Nevertheless, it would be important at this point to incorporate, to our ontological interpretation of what we have called *'essentialist trap'*, an additional interpretative angle, nonetheless because the former has been successfully incorporated into the legal and –as we will see in this and the upcoming chapter– jurisprudential discourses in the Americas. In fact, if we would rather address our attention to the ontological and interpretative channels that the above mentioned *threefold* relationship has went through, then it would be possible to realise that indigenous people have been focused on the Inter-American System as an effective vehicle for their land's claims. In particular, it seems that they have found, within this regional system of human rights protection, judicial and quasi-judicial bodies with an increasingly *sensitive attitude* toward their ethno-culturally based petitions.

Indeed, this receptive institutional approach has produced not only tailored responses in connection with those specifically introduced petitions aiming at the recognition of indigenous people land's rights, but also has generated very high expectations among the indigenous communities (and not only) alongside the Americas region.[37] These positive prospects have been raised, not only because of the innovative and culturally friendly language used in them, but also due the binding legal character of the Inter-American Court's resolutions. In fact, it is important to bear in mind the fact that the I-ACtHR is the unique judicial body that has competence in human rights matters all over the Americas; therefore the potentiality of its jurisprudence for the legal harmonisation across the region, must not be disregard.

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[36] See, See, UNESCO, *Mexico City Declaration on Cultural Policies*, adopted by the World Conference on Cultural Policies, Mexico, 6 August 1982, para. 4; in addition, see our own understandings in Chapter IV, Section 2.4. and 4.

[37] See, L. HENNEBEL, *La Protection de l'"Intégrité Spirituelle" des Indigènes. Rèflexions sur l'arrêt de la Cour interaméricaine des droits de l'homme dans l'affaire Comunidad Moiwana c. Suriname du 15 juin 2005*, in *Rev. trim dr. h.*, 66, 2002, p. 253 et seq.

Last but not least, because of the increasing regional awareness among indigenous populations in connection with these regional mechanisms, together with the influential *"political"* authority that the Court has gained since its establishment in 1979, *vis-à-vis* national authorities[38], we can conclude that its jurisprudence could be regarded as a powerful tool for change. In fact, it could be used to overturn centuries of abandonment and degradation of indigenous communities all over the Americas. And –at the very end– perhaps it could even make a contribution in order to match and fulfil indigenous peoples' aspirations for reversing the historical processes of cultural integration in the Americas and to reinvigorate their cultural distinctiveness, as socio-politically distinguishable and separate ethno-cultural aggregations.[39]

For these reasons, within this and the following chapter we will attempt to critically and systematically analyse the jurisprudence of the Inter-American Court of Human Rights, or –at least– its most relevant part, in order to identify how the Court has incorporated into its own judicial reasoning the above described *threefold relationship* (*traditional lands → culture → identity*). In fact, what will be under our scrutiny will be the reasoning provided by the Court when it has been called to resolve contentions cases in which indigenous peoples' traditional lands –and the right to property over them– was at stake. In other words, the focus will be put on the legal argumentation of the Court and –last but not least– on whether and how the Court has dealt with those multiculturalist challenges mentioned in the precedent chapters, and in particular, with the above mentioned *'essentialist trap'*.

However, before starting to focus on the Court's argumentative reasoning and interpretative methods, let me very briefly introduce the Inter-American System, together with its main bodies and legal instruments.

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[38] See, L. R. TANNER, *Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights*, in *Human Rights Quarterly*, 31-4, 2009, p. 989 et seq.

[39] As it has been said, "*[w]ith the rise of 20th-century liberalism, Latin American states opted, at least formally, for policies to assimilate and integrate the indigenous peoples. In the name of national unification and development, another form of discrimination was in fact put in practice, based on the proposition that the only way for indigenous peoples to "progress" was through enculturation, which is to say, the abandonment of their own identities."* See, R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, cit., p. 32, para. 109. See also, L. ABAD GONZÁLEZ, *Etnocidio y rsistencia en la Amazonía Peruana*, Cuenca, 2003, p. 105 et seq; and A. BELLO, *Etnicidad y ciudadanía en América Latina. La acción colectiva de los pueblos indígenas*, Santiago de Chile, 2004, p. 75 et seq.

3. Human Rights instruments and Procedures in the Americas

It has been said that, *"…if the saving of lives and the securing of broad reparations to victims are appropriate measurements of the effectiveness of any such supervisory goodies, then arguably no other system has been more successful than the Inter-American System."*[40] We can agree or disagree with the views of one of the former members of the Inter-American Commission on Human Rights, but before to do so, it would be necessary to understand what we mean when we refer to the Inter-American System of human rights protection. Thus, and for the sake of better discursive flow, we will sketch its main elements in this section.[41]

Conceptually speaking, the Human Rights System for the promotion and protection of human rights refers to the numerous regional instruments and institutional mechanisms that have been adopted and put in place by the American States, with the scope to promote and protect human rights in the Americas region. In other words, we can say that the Inter-American system is a combination of human rights norms and supervisory institutions within the Americas; a system that provides recourses to people (all people, including –of course– indigenous people) in the Americas who have suffered violations or arbitrary interferences in the enjoyment of their rights, by States members of the OAS.

In fact, within the very same constitutive instrument of the Organization of the American States (OAS)[42], that is the Charter of the OAS[43], the members of this

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[40] See, R. K. GOLDMAN, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, in *Human Rights Quarterly*, 31, 2009, p. 857.

[41] In connection with a general overview of the Inter-American System of human rights protection, see among other authors, L. HENNEBEL, *La convention Américaine des Droits de L'Homme. Mécanismes de Protection et Étendue des Droits et Libertés*, Bruxelles, 2007, in particular p. 22 et seq. ; H. TIGROUDJA, I. K. PANOUSSIS, *La Cour interaméricaine des drois de l'homme. Analyse de la jurisprudence consultative et contentieuse,* Bruxelles, 2003, p. 21 et seq.

[42] The Organization of the American States (OAS) is the oldest and most important intergovernmental regional organisation within the western hemisphere, dating back to the First International Conference Held in Washington D.C., in 1889-1890. The official institutional departure of the OAS happened in 1951, when its Charter entered into force. OAS was established in order to achieve among its members, according to Article 1 of the Charter, *"an order of peace and justice, to promote their solidarity to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."* Currently, all 35 independent States of the hemisphere are members of the Organization, which are represented within the General Assembly, supreme organ of the OAS. Other important organs are the Permanent Council, the Meeting of Consultation of Ministers of Foreign

regional organisation proclaimed *"the fundamental rights of the individual without distinction as to race, nationality, creed and sex"*[44], as one of the basic principles of the OAS. In addition, they has also recognised –as a guiding principle for the realisation of the aspirations of the Organisation– that *"[a]ll human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security."*[45] The Inter-American System of human rights protection was already in place, although in an embryonic form, since the beginning of this regional common enterprise.

However, even when the OAS's Chapter has to be considered the cornerstone of the system, it was with the adoption of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration"), in Bogotá, Colombia, in April of 1948, that the system truly emerged.[46] With the Declaration, the Americas' States established a set of standards or ideals to strive for[47], considered as being suited for the social and juridical conditions of the region which –together with the guarantees given by the internal regimes of the States– have to be considered as the initial system of protection and affirmation of essential human rights.[48]

Even when this Declaration does not particularly address any specific issue concerning indigenous people, due to its undistinguishable universal character, in its *Preamble* we can already track the importance that the system has given, and still gives to culture and cultural expressions. In fact, it states that *"[a]ll men are born free and equal, in dignity and in rights […]; [i]nasmuch as spiritual development is*

Affairs and the Councils; but its most visible organ is its General Secretariat, impersonated by the Secretary General, and which is the central and permanent OAS's organ, with its headquarters in Washington, D.C. For more information about the Organisation, visit: www.oas.org.

[43] The Charter of the OAS was adopted at the Ninth International Conference of American States, the meeting in Bogotá, Colombia, in 1948, with the participation of 21 American States. The Chapter, was subsequently ammended by the Protocol of Buenos Aires (1967); the Protocol of Cartagena de Indias (1988); the Protocol of Managua (1993); and the Protocol of Washington (1992).

[44] See, Article 3(l) of the OAS Charter.

[45] *Ibid.*, Article 45(a).

[46] The American Declaration of the Rights and Duties of Man, was adopted in the same Ninth International Conference of American States in which was adopted the OAS's Charter, by Res. XXX. At the time of its adoption (April 1948), it was the first proper international human rights instrument, even preceding the UN Universal Declaration of Human Rights of 1948 with just a few months.

[47] See, C. MEDINA QUIROGA, *The Inter-American System for the Protection of Human Rights*, in C. KRAUSE, M. SCHEININ (eds.), *International Protection of Human Rights: A Texbook*, Turku/Åbo, 2009, p. 475 et seq.

[48] See, American Declaration, *preliminary considerations.*

the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources; [and]][s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice, and foster culture by very means within its power." The latter phrase does not only constitute a eulogy to culture and cultural human capacity[49], but also a guiding statement, a *roadmap* for the interpretative action of the national and regional institutions responsible for the application of these core instruments, such –for instance–has been the case of the Inter-American Court.

Someone could –of course– argue that a declaration is always a declaration, in a sense that could have just certain relative legal value, as a merely a non-binding statement of moral obligations[50] or –at least– as an interpretative guiding parameter, and –in general terms– this person would be right. Nevertheless, the American Declaration has superseded its own *declarative* status, gaining *legal force* among the States members, although it was originally adopted as a declaration and not as a legally binding treaty.[51] Moreover, according to the Inter-American Court, in order to *"...determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948."*[52] Therefore, in interpreting the legal binding value of this instrument, the Court has made use of one of the interpretative techniques that allowed to build its innovative jurisprudence, that is the *evolutive* interpretation of international human rights law.

Finally, it would be important to stress that, in addition to its preamble, the American Declaration consists of 38 articles containing the recognised protected rights, including civil, political, economic, social and cultural rights, and also the corresponding duties.

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[49] See our consideration with regard to the notion of culture and cultural identity in Chapter I, Section 2 et seq.
[50] See, R. K. GOLDMAN, *op. cit.*, p. 863.
[51] See, C. MEDINA QUIROGA, *op. cit.*, p. 477.
[52] See, I-ACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14,1989, Series A No. 10, para. 37. See also, Article 20 of the Statute of the Inter-American Commission on Human Rights, OAS General Assembly Res. No. 447, 1979.

Yet, as you can imagine, the Inter-American System has not only been built over the text of the Declaration. In fact, after the adoption of this instrument, the next important step was the creation in 1959 of the Inter-American Commission on Human Rights (hereinafter "the Commission" or "IACHR")[53], which stated its operative function in 1960.[54] The Commission is a principal and autonomous organ of the OAS, whose mission is to promote and protect human rights in the Americas region, and to serve as a consultative organ in these matters.[55] The mandate of the Commission initially consisted of monitoring and observing, including on-site visits, the general situation of human rights in the region; but in 1965, it was authorised to examine complaints or petitions regarding specific cases of human rights violations.[56] According to official data, by 2010 the Commission had received thousands of complains with regard to alleged violations, bringing the total number of cases and petitions to over 14,000.[57]

Hence, the Commission became the monitoring body of the observance and implementation –by Members States– of the rights enshrined within the American Declaration, which provided the necessary materialisation and corporeity –through a specific list of fundamental human rights– to the obligation assumed by OAS's States members at the time of the adoption of its Charter. In other words, the Charter authorises the Commission to protect human rights, but it does not list or define them; hence, according to the Inter-American Court, those rights are none others than those enunciated and defined in the Declaration.[58]

After the amendment of the IACHR's competences, in 1969 the American Convention on Human Rights (hereinafter "the American Convention", "the

[53] The Inter-American Commission is composed of seven persons, elected in their personal capacity by the OAS's General Assembly, who shall be persons of high moral character and recognised competence in the field of human rights (Article 34-36 ACHR). They are elected for a four year term and may be reelected only once. No two nationals of the same state may be members of the Commission (Article 37 ACHR).

[54] The Inter-American Commission was created by Resolution VIII, of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago de Chile, in 1959.

[55] See, Article 106 of the OAS Charter.

[56] The competence of the IACHR was broadened by the Second Special Inter-American Conference, held in Rio de Janeiro, Brazil, in November 1965.

[57] See, IACHR, *Annual Report of the Inter-American Commission on Human Rights 2010*, OAS Doc. No. 5, rev. 1 OEA/Ser.L/V/II, 2011, p. 5, para. 5.

[58] See, I-ACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, cit., p. 11, para. 41.

Convention", or "ACHR") was adopted, and came into force in 1978.[59] This new instrument, which has become the second instrumental pillar of the system (together with the Declaration), having the legal nature as a proper binding international treaty[60], introduced concrete and defined human rights that States Members have the obligation to respect and to ensure[61] within their own national jurisdictions.[62] The recognised rights are –therefore– directly enforceable within the territory of the members States, in a sense that their enjoyment can be directly claimed by all the beneficiaries of the Convention, that is by all persons subject to their jurisdictions.[63] In addition, and in order to guarantee the full enjoyment of these conventional rights, States Parties are obliged to adopt *"...such legislative or other measures as may be necessary to give effect to those rights or freedoms."*[64]

The Convention broadened the scope and content of the American Declaration by means of the incorporation of more detailed and elaborated catalogue of civil and political rights, which resemble the text of the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[65] However, the Convention also presents certain differences vis-à-vis those

[59] The American Convention on Human Rights (ACHR), also denominated "Pact of San José, Costa Rica", was adopted by the delegates of the member States of the Organization of the American States (OAS) in the Inter-American Specialized Conference on Human, which was held in San José, Costa Rica, on the 22nd of November 1969, and entered into force on July 18, 1978. The ACHR has received to this date 25 ratifications from the 35 OAS's member States, but today has only 24 States Parties (Trinidad and Tobago denounced it in 1998). Source: OAS's Department of International Law, 23/01/12. The 25 current States parties of the Convention are: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

[60] In connection with the minimum legal requirements that an international treaty should fulfil, in order to be considered as such, see –among other authors– J. KLABBERS, *The Concept of Treaty in Internatinal Law*, The Hague/London/Boston, 1996, p. 15 et seq.

[61] According to the Court, the obligation to ensure *"...implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."* See, I-ACtHR, *Case of Velásquez-Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988. Series C No. 4, p. 30, para. 166.

[62] In this sense, Article 1(1) of the American Convention clearly states that *"...States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."*

[63] *Ibid.*

[64] See, Article 2 of the American Convention.

[65] The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was opened for signature by the States Parties of the Council of Europe (CofE) in Rome on 4 November 1950, and entered into force on 3 September 1953.

instruments, such as the incorporation of new rights (e.g. the right to asylum)[66], the inclusion of a generic article refereeing to economic, social and cultural rights[67], or the incorporation of –together with these rights and guarantees– their means of protection.[68]

In fact, In addition to these substantive provisions, the Convention also created the inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court", or "I-ACtHR")[69] and established the functions and procedures of the Court and the Inter-American Commission in order to receive individual complains refereeing to violations of the human rights and freedoms contained within the Convention. In this sense, the Commission added to its previous competence of monitoring the respect and implementation of the human rights as recognised within the American Declaration –including the consideration of individual petitions in connection with their alleged violations (in accordance with the OAS Charter and its own Statute)–, a new competence exclusively based on the Convention.[70] This new competence consists precisely on the examination of complaints regarding alleged violations of the rights enshrined within the American Convention, committed by States Parties.

Therefore, with the entry into force of the Convention, it would be correct to say that the Inter-American System of human rights protection is composed of a *twofold* or dual system, vis-à-vis OAS's State Members. On one hand, with regard to the States Parties to the American Convention on Human Rights, the American Convention has to be considered the primary source of the human rights obligations

[66] See, Article 22 of the American Convention.
[67] Article 26 of the American Convention states as follow: *"The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."*
[68] See, R. K. GOLDMAN, *op. cit.*, p. 866.
[69] The Inter-American Court consists of seven judges, elected in their own capacity by the OAS's General Assembly, from among jurist of the highest moral authority and of recognised competence in the field of human rights, and who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates (Article 52(1) ACHR). They are elected for a term of six years and may be reelected once (Article 52(2) ACHR), and no two judges may be national of the same state (Article 51(2) ACHR). The Court elects from among its members a President and Vice-President who shall serve for a period of two years, and who may be reelected (Article 12(1) of the Statute of the Court).
[70] See, Articles 34-51 of the American Convention.

of those State Parties. In connection with them, the Commission is competent to receive individual petitions regarding alleged violations of the human rights as enshrined in the Convention[71] and other applicable instruments[72]; and to report on the merit of the case, declaring or not the existence of a violation of the said rights in a given case.[73] In addition, the Commission has the power to refer the case to the Court if the State involved has not complied with the recommendations made by the same Commission in its resolution on the merit of the case, but *only* if the State in question has accepted the jurisdiction of the Court, in accordance with the provisions of Article 62 of the Convention.[74] Finally, in connection with those States that are not Parties of the American Convention, the Commission has retained its competence to examine communications (petitions) concerning allegations of human rights violations, as defined by the American Declaration and the OAS Charter.[75] With regard to these OAS's States members, the Commission cannot –of course– refer the cases to the Court, just because the Court is an organ of the Convention, but not of the OAS Charter.[76]

To summarise, the Inter-American System of human rights protection is substantially based on both the American Convention and the American Declaration (read together with the OAS Charter). It has as its main institutional pillars, for the substantial implementation of these instruments –together with its quasi-judicial and judicial monitoring– two main bodies, namely, the Inter-American Commission and

[71] See, Article 41 of the American Convention; Article 19 of the Statute of the Inter-American Commission; and Article 23 of the Rule of Procedure of the Inter-American Commission.

[72] According to Article 23 of the Rule of Procedure of the Inter-American Commission, *"[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights "Pact of San José, Costa Rica", the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará", in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure."*

[73] See, Article 50 of the American Convention; and Articles 43-44 of the Rule of Procedure of the Inter-American Commission.

[74] See, Article 51(1) of the American Convention; and Articles 45 of the Rule of Procedure of the Inter-American Commission.

[75] See, Article 20 of the Statute of the Inter-American Commission; and Article 51-52 of the Rule of Procedure of the Inter-American Commission

[76] See, R. K. GOLDMAN, *op. cit.*, p. 866.

the Inter-American Court. At this regional dimension, we have to add the national judicial one. In fact, because the main responsibility of the implementation of the rights enshrined within the above mentioned regional instruments lies at the national level, then national judicial systems have to be also considered as integrative part of the Inter-American System. The latter authorities are those that have to deal first with petitions alleging human rights violations, and have also the obligation, as State organs, of deliver justice and redress in order to overcome the effects of such fundamental breaches. In fact, the regional bodies represent a subsidiary mechanism of protection vis-à-vis the national judicial systems, in a sense that national judges are and have to be considered the first guarantors of the observance of the regional norms.[77]

In connection with the individual complains, the system allows any person, or group of persons, or any nongovernmental entity legally recognised in one or more member States, to submit to the Commission –on their behalf or on behalf of third persons– complaints alleging violations by Members States of the American Convention and the American Declaration.[78] Those petitions would be subjected to one of those two parallel complain systems that have briefly been described above. Though, let me make an additional remark in connection with this significant issue.

First, it is important to notice that, within the Inter-American System not only the victim is authorised to personally summit his or her complaint to the Commission[79], but also any person or association on his or her behalf. This latter remark is quite important in connection with the cases submitted by indigenous people to the system. The victim has to be an individual, and identify or identifiable individual[80], not a group.[81] In fact, according to the text of the Convention, the States

[77] See, L. HENNEBEL, *La convention Américaine des Droits de L'Homme. Mécanismes de Protection et Étendue des Droits et Libertés*, cit., p. 167 et seq. See also, among the jurisprudence of the Court in connection with the requirement of subsidiarity and the exhaustion of domestic remedies admissibility requirement (Article 46(1)(a) of the American Convention), I-ACtHR, *Case of Velásquez-Rodríguez v. Honduras,* Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 87; *Case of Godínez-Cruz v. Honduras*, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 89; *Case of Fairén-Garbi and Solís-Corrales v. Honduras*, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 86;

[78] See, Article 45(1) ACHR and 23 of the Rule of Procedure of the Inter-American Commission.

[79] Individual complains can only be submitted to the Commission (Article 44 ACHR); victims cannot submit directly their complaints to the Court, only the Commission and the State concerned can submit cases to the Court (Article 51(1) ACHR).

[80] According to the Court, *"the victim must be properly identified and named in the application…"*See, I-ACtHR, *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Preliminary

Parties undertake to respect the rights and freedom recognised in it and to ensure *"to all persons"* subjected to its jurisdiction the enjoyment of those rights and freedoms. It is clear that, for "person", the Convention means *"every human being."*[82] As we can see, the commitment is toward *"all persons"*, in their *individual* character, not with regard to societal entities or groups.[83]

Therefore, and indigenous group, as a distinguishable societal entity, as a group, cannot vest the cloths of a victim before the complaint mechanism of the Inter-American System. However, this does not mean that a group, even the very same indigenous group, regarded as a collective entity or association, if *"legally recognized in one or more member states of the Organization"* (Article 44 ACHR), would not be able to submit a complain *on behalf* of its identified or identifiable *individual* members, whose rights have been *concretely* violated.[84]

This distinction is not minor, especially in the case of indigenous communities, where geographical and societal conditions (including cultural barriers such as language or a different traditional judicial system) could diminish their possibilities to successfully reach a judicial or quasi-judicial regional body. These difficulties would be even more constringed in the case, *inter alia,* of those communities living in complete isolation or just in a phase of initial external societal contact.[85] In fact, in most cases litigated within the Inter-American System, it has been the active and engaged support of local and international NGOs, together with Academia and even in same cases with the assistance of National Human Rights

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Objections, Merits, Reparations and Costs, Judgment of September 2, 2004. Series C No. 112, para. 109.

[81] See, L. HENNEBEL, *La convention Américaine des Droits de L'Homme. Mécanismes de Protection et Étendue des Droits et Libertés*, cit., p. 130 et seq.

[82] See, Article 1(2) ACHR.

[83] In the words of the Court, *"…in order for the Court to hear a case […], it is essential that the Commission receive a communication or petition alleging a concrete violation of the human rights of a specific individual."* See, I-ACtHR, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 45.

[84] It has been stressed that, Article 44 ACHR *« organise un double droit d'action: le premier est le droit d'action de'une victime de la violation de la Convention, et le second est une action en dénonciation qui peut être opérée par toute personne. »* See, L. HENNEBEL, *La convention Américaine des Droits de L'Homme. Mécanismes de Protection et Étendue des Droits et Libertés*, cit., p. 142.

[85] In connection with this communities, see the report elaborated by the UN Human Rights Council Expert Mechanism on the Rights of Indigenous People's Report called *"Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial contact of the Amazon Basin and El Chaco*, UN Doc. A/HRC/EMRIP/2009/6, of 30 June 2009.

Institutions (NHRIs), which have facilitated first the legal theoretical construction of the cases, and second their successful regional litigation.[86] In fact, not only thousands of miles separate the Paraguayan forests, where –for instance– the *Yakye Axa*[87] and *Sawhoyamaxa*[88] indigenous communities live, from Washington D.C., where the Inter-American Commission is located, or San José de Costa Rica, where the Court is based.

As we can see, the Inter-American System, even when it is not ontologically constructed for the protection of "groups" –including indigenous communities as differentiated societal aggregations– counts nevertheless with the necessary mechanism for effective protection and redress of human rights violations. In fact, it has a system of *individually* and *universally* constructed human rights, recognised to *'every human being'* present within the territory of the States Parties, including –of course– indigenous people… individually regarded. As we will see in this and the following chapter, when the Court has declared the violation of the right to property enshrined in Article 21 of the Convention, it has nevertheless clarified that that violation has been *"to the detriment of the members"* of the involved indigenous communities, and not with respect of the community itself.[89] In short, there rights bearers –within the axiological configuration of the convention– remains the individuals, which in the case of indigenous communities –for instance– could indeed enjoy those rights in communal association with the other members of the very same ethno-cultural group.

For these reasons, it has became indispensable to try to understand the interpretative mechanism through which this system, ontologically anchored around

[86] Just as an example of the role of all these actors within a litigation process of a concrete case, see S. J. ANAYA, C. GROSSMAN, *The Case of Awas Tingni v. Nicaragua: A new step in the International Law of Indigenous Peoples*, in *Arizona Journal of International and Comparative Law*, 19, 2002, p. 1 et seq.

[87] See, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs of June 17, 2005. Serie C No. 125.

[88] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

[89] See, among other resolutions, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I-ACtHR, Series C No. 79. Judgment on Merits, Reparations and Costs of August 31, 2001, para. 155, and operative para. 2; I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 156, and operative para. 2; and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 144, and operative para. 2.

the centrality of the individual[90], could nevertheless provide tailored legal answers to claims based –at last– on the socio-political and cultural aspirations of ethno-cultural societal entities for distinguishability and differentness.

4. The Inter-American Court and its involvement in the adjudication of Indigenous Peoples' cases

As result of the indigenous people struggles for the recognition and protection of their human rights, the Inter-American Court has developed in recent years a landmark jurisprudence on indigenous peoples' rights. This jurisprudence refers –in particular– to their right to communal property over their traditional lands and –most in particular– to their right to enjoy their own *distinguishable* culture and cultural traditions as differential societal aggregations.

Moreover, this remarkable jurisprudence, inedited for a regional judicial body, could be considered as a result of the continuous *political* battles of indigenous peoples to be recognised as such, as a culturally diverse people with different cultural understandings and worldviews vis-à-vis the majoritarian parts of the national societies.[91] Connected with this, it appears important to bear in mind that the Court has only *subsidiary* jurisdiction. Hence, as a requirement to lodge a petition before the Inter-American Commission (first step within the Inter-American system of human rights protection), alleged victims of human rights violation must exhaust the local remedies available to them under national laws and within domestic jurisdiction (Article 46.1 (a) of the Convention).[92] Therefore, before arriving at the final

[90] In the words of the Judge A.A. Cançado Trindade, *"...the Inter-American Court bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the droit des gens. [...] [T]he Inter-American Court contributes to the construction of the new jus gentium of the XXIst century, oriented by the general principles of law (among which the fundamental principle of equality and non-discrimination), characterized by the intangibility of the due process of law in its wide scope, crystallized in the recognition of jus cogens and instrumentalized by the consequent obligations erga omnes of protection, and erected, ultimately, on the full respect for, and guarantee of, the rights inherent to the human person."* See, I-ACtHR, *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion AC-18/03 of September 17, 2003. Series A No. 18, Concurring Opinion of Judge A.A. Cançado Trindade, para. 89.

[91] See, Chapter IV, in particular, Section 2.2.3.

[92] Article 46.1 of the Convention states that: "*Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following*

judgment of the Court, indigenous people –as all other alleged victims– must follow a very long path, alongside of several years of litigation at national and regional levels, affording unaffordable costs, and wishing that the Commission first, and the Inter-American Court later, would consider their pleadings and –ultimately– embrace their suffering providing a final release. That is, a solution that would ideally overcome the injustice committed to them.[93]

A good departing point for the analysis of the Court's jurisprudence is –of course– the *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, decided on August 31, 2001[94] (here in after *the Awas Tingni Case*). Without any doubts, this is a *landmark case* in the Court's history.[95] In this case the Court recognised for the very first time in its history, as protected by article 21 of the Convention[96], the right to a collective or communal property of indigenous peoples to their traditional lands, but not only. The IACtHR recognised at the same time that the *members* of the community of *Awas Tingni* have the right to have their traditional

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requirements: a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law…"

[93] According to Article 61.1 of the Convention, the only ones that have the right to lodge a complaint against a State Party is the Commission itself –in representation of the victims- and others Member States. Therefore, victims of human rights violation only have recognised, within the Inter-American system of human rights protection, *jus standi* before the Commission but not before the Court. Nevertheless, according to the established case law of the Court and the evolution of the Court Rules of Procedure, victims have gained *locus standi in judicio* throughout the proceedings before the Court. In fact, in its last version, the Court's Rules of Procedure granted participation to the alleged victims, in its article 24.1 that states at following: *"When the application has been admitted, the alleged victims or their duly accredited representatives may submit their pleadings, motions, and evidence autonomously throughout the proceedings."* (Rules of Procedure of the I-ACtHR, approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009). In addition, and in connection with the legal capacity of the individual as subject of international law, and most in particular, with regard to their direct access (Jus Standi) to international human rights tribunals, see A. A. CANÇADO TRINDADE, *International Law for Humankind: Towards a New Jus Gentium*, in Académie de Droit International, *Recueil des Cours*, 216, Leiden/Boston, 2005, p. 285 et seq.

[94] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I-ACtHR, Series C No. 79. Judgment on Merits, Reparations and Costs of August 31, 2001.

[95] Nevertheless, the importance of the *Awas Tingni Case*, as long as the very focus of this essay is the transversal reasoning of the Court, a resume of the fact is not provided, as it will not be provided in all the other cases that will pass under our scrutiny. I am sure that the reader will accept this little liberty. Therefore, not following a chronological approach, the relevant Court's cases will be quoted alongside the evolving reasoning of the substantive discussion.

[96] Article 21 of the Convention read as follow: *"Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of this property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."*

lands clearly demarcated and –in that regard– the State has the duty to provide them with a proper title for it, *based upon their customary law and resource tenure patterns*. [97]

This revolutionary interpretation of Article 21 of the Convention not only opened the door for similar cases from all over the region, but also fundamentally legitimised indigenous customary law *as a source of law*, as a valid source of law toward which Member States have to pay due respect and observance. In fact, when the Court afforded the problematic nature of the indigenous people's diversity, it has done so manly in connection with the right to communal property over their traditional land and resources with the exception of just only one case. The latter was the *Case of Yatama v. Nicaragua*[98] (hereinafter "the Yatama Case"), in which the Court had been called to decide with regard to the effective enjoyment of political rights by an indigenous group.

Coming back to Article 21 of the Convention, its *literal* reading drives us toward a preliminary *formal* interpretation consisted on the clear recognition of the right to *private* property, as an *individual* protected right. In fact, in its first paragraph we only *literally* read, *"[e]veryone has the right to the use and enjoyment of his property."* In addition, another conclusion that can be draw from its *literal* interpretation is that the right to property is recognised as a *non-absolute* right. This mean that this right can suffer limitations in its enjoyment, but *only* when those restrictions are imposed by law, pursued in the realisation of a *pressing* social need as "*public utility"* or "*social interest"* (in the wording of the article), and when exists a (reasonable) relation of proportionality between such aims and the established limitation. In fact, on the second part of the first paragraph, Article 21 *literally* states

[97] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 151-155, and operative para. 4. For the commentaries that this case has generated between scholars, see –among others– S. J. ANAYA, C. GROSSMAN, *The Case of Awas Tingni v. Nicaragua: A new step in the International Law of Indigenous Peoples*, cit., p. 1 et seq.; S. J. ANAYA, *Divergent Discourses about International Law, Indigenous People, and rights over lands and natural resources: toward a realist trend,* in *Colo. J. Int'l Envtl. L. & Pol'*, 16, 2005, p. 237; L. J. ALVARADO, *Prospects and Challenges in the implementation of Indigenous Peoples' human rights in International Law: lessons from the Case of Awas Tingni v. Nicaragua,* in *Ariz. J. Int'l & Comp. L.*, 24, 2007, p. 609; and J. A. AMIOTT, *Environment, equality, and Indigenous Peoples' land rights in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua,* in *Envtl. L.*, 32, 2002, p. 873.

[98] See I-ACtHR, *Case of Yatama v. Nicaragua*, Judgment on Preliminary Objections, Merits, Reparations and Costs of June 23, 2005. Series C No. 127.

that *"[t]he law may subordinate such use and enjoyment to the interest of society"*. Additionally, in its second paragraph, declares that *"[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."*

Therefore, it is beyond any doubts that private property is recognised and protected under the American Convention, thus there is no need to go further in its regard. The real question here is to determinate whether such recognition could be extended to different understandings of property, different from the *civilist* (private law) conception[99], such as –for instance– the collective or communal understanding of property that indigenous peoples have in connection with their traditional lands.[100] At this stage, we know that that is possible indeed, because of the outcome of the *Awas Tingni Case*, but we can still ask which the reasoning of the Court behind this judgment was. Or, alternatively, which was the interpretation performed by the Court in its reading of Article 21 of the Convention? This question introduces our discussion within the general sphere of interpretation and –most in particular– to the interpretative rules applied by the Court on the indigenous people's communal or traditional lands cases.

5. Inter-American Court's interpretational general rules

As a matter of principle, the Court applies in its interpretation of the Convention what we can call the traditional international law method of interpretation. In this sense, it relies both on general and supplementary rules of interpretation, which find expression in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (here in after "the Vienna Convention" of "VCLT")[101], as the

[99] See, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, para. 9.

[100] In connection with the communal understanding of property, and special relationship that indigenous communities have with their lands, see our comments in Chapter IV, Section 2.2.4.

[101] The Vienna Convention on the Law of the Treaties was done at Vienna on 23 May 1969 and entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

Court itself recognised in its very first advisory opinion, during the early eighties.[102] As we know, Article 31 VCLT states –at its first paragraph– that *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". In addition, and in case of need, Article 32 VCLT recognises the possibility to recourse to supplementary means of interpretation. The latter includes *"the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."*

Accordingly, the first guide in the interpretation of the Convention is provided by its own *object and purpose*, which in the case of the American Convention on Human Rights is –as the Court clearly stated– is the *"...effective protection of human rights."* As the Court said, this method of interpretation *"...respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation."*[103] Moreover, the I-ACtHR has stressed the fact that, in the case of human rights treaties, *objective criteria of interpretation* is more appropriate that *subjective criteria* because the latter seeks to ascertain *"only"* the intent of the Parties.[104]

Therefore, in the interpretation of the Convention, the Court must *"...do it in such a way that the system for the protection of human rights has all its appropriate effects (effet utile)"*.[105] According to this, the Convention (article 21 included) must not be interpreted in a sense that would reduce, restrict or limit the recognition and

[102] See I-ACtHR, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 33.

[103] See I-ACtHR, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29.

[104] The Court justified its position on the very nature of the human rights treaties, on the fact that these treaties *"...are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;" rather "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States."* See, I-ACtHR, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 50.

[105] See I-ACtHR, *The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 58.

effective protection of the fundamental rights included on it.[106] In other words, the Convention has to be interpreted in its most *effective* manner.[107]

The *principle of effectiveness* requires, for its positive application, unlimited or unrestricted application of the rights recognised in the Convention. In other word, its effective application would not be possible if the interpretation of the Convention is done in a restrictive manner. A perfect complement for this principle is found in Article 29 of the Convention, which incorporates another *sine qua non* requirement, merely the *principle of non-restrictive interpretation* of human rights instruments. In fact, this article precludes any restrictive interpretation of the rights and freedoms recognised in the Convention[108], at domestic level or even within any other convention subscribed by the States parties.[109]

Consequently, the interpretation of the rights and freedoms included within the Convention must be done in a good faith[110] and in a non-restrictive manner, in a

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[106] In the wording of Judge García Ramírez, *"...the principle of interpretation that requires that the object and purpose of the treaties be considered (Article 31(1) of the Vienna Convention), referenced below, and the principle pro homine of the international law of human rights –frequently cited in this Court's case-law- which requires the interpretation that is conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement."* See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., Concurring Opinion of the Judge Sergio García Ramírez, para. 2.

[107] According to the Court, *"...States Parties to the Convention must guarantee compliance with its provisions and its effects (effet utile) within their own domestic laws. This principle applies not only to the substantive provisions of human rights treaties (in other words, the clauses on the protected rights), but also to the procedural provisions […] That clause, essential to the efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties..."* See, I-ACtHR, *Case of the Constitutional Court v. Peru.* Competence. Judgment of September 24, 1999. Series C No. 55, para. 36.

[108] In this sense, the Court has stressed, in connection with the application of Article 29(a) of the Convention, that "*[a]ny interpretation of the Convention that […] would imply suppression of the exercise of the rights and freedoms recognized in the Convention, would be contrary to its object and purpose as a human rights treaty, and would deprive all the Convention's beneficiaries of the additional guarantee of protection of their human rights that the Convention's jurisdictional body affords."* See, I-ACtHR, *Case of Ivcher-Bronstein v. Peru.* Competence. Judgment of September 24, 1999. Series C No. 54, para. 41.

[109] Article 29 of the American Convention (Restrictions Regarding Interpretation) read as follow: *"No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."*

[110] The central importance of *'good faith'* in international law has been notice since its beginnings, and even before. In fact, Grotius in his famous *De Jure Belli et Pacis* recalled the importance of it within

sense to allow an effective and plain application (and enjoyment) of the given rights. However, a full guarantee of fundamental rights requires an additional element. Effective and unrestrictive protection of a given right would not be possible if this protection would not take into account all circumstances of the case, all relevant elements that shape the situations that have to be analysed by the Court. To put it differently, when the interpretation does not take into account the evolution of the social institutions (including the evolution of legal systems) and the general and permanent societal transformations, especially with regard to its social-cultural evolution or our societies, that interpretation would simply not be able to generate an *effective protection* of the fundamental rights at stake. In other words, the interpretation of the fundamental rights recognised on the Convention must be *contextual* and *evolutive*.

In the wording of the Court, *"... evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention"*, adding –for even more clarification- that *"... human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."*[111] Moreover, the Court stated that the *dynamic evolution* of the *corpus juris* of international human rights law has had a positive impact on international law. Therefore, the Court *"...must adopt the proper approach to consider [the interpretation of a given right] in the context of the evolution of the fundamental rights of the human person in contemporary international law."*[112]

Coming back to Article 29 of the Convention, it is important to clarify that the principle of *non-restrictive interpretation* refers not only to the right or freedom at stake (the right to property in this case), but also to all other rights recognised and guaranteed by the Convention. As all fundamental rights are inter-connected and interdependent, the restriction over one of them can possibly generate limitations over the others. This means that, in a given case, the less restrictive interpretation of

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Roman law, when he referred that *"Cicero, in his Office, gives so much weight to promises, that he calls Good Faith the foundation of Justice. So Horace: and the Platonists often call Justice, Truth, or Truthfulness, which Apuleius translates Fidelitas."* (p. 147-148) Moreover, quoting again Cicero, Grotius stressed the fact that *"[i]n good faith, what you thought, not what your said, is to be considered"* (p. 192). See, H. GROTIUS, *The Rights of War and Peace (De Jure Belli et Pacis)*, 1st. ed. 1625, London, 1853, p. 147-148.

[111] See I-ACtHR, *The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cit., para. 114.

[112] Ibid, para. 115.

the right at stake has to take into account not only the full enjoyment of that right but also the complete enjoyment of all other fundamental rights connected with.[113]

Finally, the last element that has to be accounted for the interpretation of the conventional rights is that the interpretation must take into account the *legal system* of which it is a part, merely the system built by and for the *international human right law.*[114] In the wording of the International Court of Justice *"...an international instrument has to be interpretated and applied within the framework of the entire legal system prevailing at the time of the interpretation."*[115]

Therefore, on the interpretation of the rights enshrined in the Convention, the Court does not limit itself to the text of the Convention, but would rather scrutinise all other regional or universal human rights instruments that, for different circumstances (as e.g. because the States Parties in the controversy have ratified it), would become applicable to a case at stake. Of course, this does not mean that the Court would resolve a given case through the direct and exclusive application of a different instrument than the Convention (which would be clearly in violation of its own mandate and competence). On the contrary, this only means that the Court would use other relevant instruments, part of the *corpus juris* of international human rights law, that would provide a better understanding of the rights recognised within the same American Convention.[116]

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[113] For the Inter-American Court, *"...when there be conflicting interests it must assess in each case the legality, necessity, proportionality and fulfilment of a lawful purpose in a democratic society"*, and adding that, for proportionality, she means a *"...restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right."* See, first, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 138; and second, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 145.

[114] See, *The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cit., para. 113.

[115] See. ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, I.C.J. Reports 1971, p. 16 *ad* 31.

[116] As the Court said, *"[t]he corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law."* See, I-ACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, cit., para. 120; and see, I-ACtHR*, The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cit., para. 115.

In the following paragraphs, we will see how the Court applies this *systemic interpretation* of the *corpus juris* of international human rights law to those cases in which indigenous people claimed the protection of the right to collective property.

5.1. Indigenous peoples' land claims: specific interpretative rules

As we said above, the interpretation of the conventional rights must be done in *good faith*, taking into account the interdependence and interconnection with other fundamental rights; it must be non-restrictive and respectful of the social context and cultural evolution of a given society in which the enjoyment of the right at stake is under question. But, of course, if we take into account that in our modern and globalised societies we can find a plurality of cultural expressions, practices, religions, different understandings of the "good", the "evil" and diverse world views, our interpretative task becomes more difficult.[117]

Why? Because the *contextual* and *evolutive* interpretation of the conventional rights has to be done precisely *in context*, that is not with regard to an abstract and idealised societal landscape, but –on the contrary– in consideration of a specific societal temporal and spatial environment that is permeated by a given and concrete cultural expressions and traditions. In short, due regard has to be paid to the existing cultural expressions, according to their cultural stage at the time in which the interpreter is performing his or her task. But also, special attention has to be operated in order not to fall into what we have called the *'essentialist trap'*, that is to *essentialize* the understanding of a given cultural expression or entity, through the *dogmatic* construction of its ontological cultural elements or characteristics.[118]

Therefore, the interpretation of the rights embodied within the Convention must take into consideration the society as a whole, paying due account to the complex plurality of cultural understandings that are present in it, especially in the recognition of the right pleaded before the Court. In fact, in the case of divergent cultural views, which are reflected in the different understandings of the rights

[117] See, in connection with the plurality of cultures, our considerations in Chapter I, Section 3; with regard to cultural diversity, Chapter III, Section 1 et seq.
[118] See, with regard to this notion, our consideration in Chapter IV, Section 2.4. and 4.

protected by the Convention (such as the case of indigenous peoples), the *principle of pluralism* in a democratic society requires –from public authorities– to take *positive* measures that would guarantee a fair protection for those different understandings.[119] In addition, it demands to implement the *less possible* restrictive interpretation toward the enjoyment of those rights that are regarded as *incompatible* with the enjoyment and protection of another conventionally recognised right, according to the circumstances of a concrete and specific case. Indeed, the same approach has to be applied in connection with the *need* to secure an acceptable degree of tolerance among the antagonist cultural manifestations.[120] In fact, this interpretative approach has been applied by the European Court of Human Rights (hereinafter "European Court" or "ECtHR") in different occasions, especially in all of those cases in which religious minorities were involved.[121]

Consequently, as a matter of principle, the strict and sole reference to only one cultural manifestation among the plurality of cultural traditions, expressions and understandings present in a given society (even when they refer to the majoritarian societal entity), would not necessarily satisfy the requirements of the principle of equality and non-discrimination. This would be the case when that *sole* culture reference would be used as a *contextual cultural standard* for the determination of the socio-cultural evolution the society as a whole. Indeed, this would be the case if –for example– through that restrictive interpretation no different treatment would be provided, without a reasonable justification, to those situations that are substantially and *culturally* different. [122]

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[119] In connection with positive or affirmative actions, see Chapter II, Section 3.

[120] See, Chapter II, Section 1.

[121] On this sense, the ECtHR has stated that *"...the court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."* See, among others, ECtHR, *Case of Serif v. Greece (Application no. 38178/97)*, Judgment of 14 December 1999, Reports of Judgments and Decisions 1999-IX, para. 53; and ECtHR, *Case of platform "Ärzte für das Leben" v. Austria (Application no. 10126/82)*, Judgement of 21 june 1998, Series A no. 139, p. 12, para. 32.

[122] As the I-ACtHR said, *"[i]t is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognizes said differences is therefore not necessarily discriminatory."* See I-ACtHR, *the Case of Saramaka People v. Suriname*; Judgment on Preliminary Objections, merits, Reparations, and Costs of November 28, 2007. Series C No. 172, para. 103. In the same line, but in a more clear fashion, the European Court of Human Rights (ECtHR) has stated that *"[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the*

As an example of the above mentioned case, we can perhaps refer to the case of certain indigenous cultural expressions and practises (e.g. language, religion, or communal method of productions), that would require specific measures of protection in order to be equally developed and practised.[123] Otherwise, it would be possible that they would not be able to enjoy the same level of protection that the other members of the society have. In short, without the application of positive actions when required, indigenous people would be discriminated against.

Notwithstanding, the need for *positive measures* and culturally tailored actions does not absolutely mean that cultures, in themselves, as complex and integrative manifestations of the human spirit, or "*highest social and historical expression of that spiritual development"* –in the wording of the American Declaration[124]–, have to receive –as such– a special or favourable treatment. All cultures have *equal functional value* vis-à-vis the individual that build his or her identity (cultural identity) on them[125]; and hence, all of them are placed or should be placed in a non-differential legal position –at least– in an open, pluralistic and democratic society. Cultures cannot be regarded as an edict of fate; and indigenous cultures, as such, as an integrative cultural expression, should not be considered in this sense as a cultural exception.[126]

It is important to bear in mind, especially when we talk about indigenous people, that the American Convention does indeed recognise the right of *everybody* to equal protection before the law, without discrimination of any kind (Article 24)[127], but not only. Additionally, it also puts over the Member States' shoulders the duty to respect and ensure –under equal basis– the full exercise and enjoyment of the rights of *all individuals* who are subject to their jurisdiction (Article 1.1.).[128]

Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different". See, ECtHR, *Case of Thlimmenos v. Greece (Application no. 34369/97)*, Judgment of 6 April 2000, Reports of Judgments and Decisions 2000-IV, p. 11 § 44.

[123] See our consideration in Chapter II, Section 3 and 3.1.

[124] See, American Declaration of the Rights and Duties of the Man, *Preamble.*

[125] See our consideration in Chapter I, Section 5.

[126] See, UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue – World Report*, Paris, 2009, p. 3.

[127] Article 24 of the American Convention read as follow: *"All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."*

[128] Article 1.1. of the American Convention read as follow: *"The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination*

The above mentioned duty generates for the Member States the obligation to take *positive measures* to not only protect and guarantee those rights, but as well to generate the conditions that would make it possible the full enjoyment of those recognised rights. In addition, in the particular case of the *members* of indigenous communities (and not with regard to the communities themselves, as differential societal entities), the States –according to the understanding of the Court– *"...must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity."*[129]

Accordingly, the obligation to treat differently a member of an indigenous community, who finds himself or herself in a concrete and circumstantiated differential position –generated by the structural difficulties that he or she faces in order to be able to equally enjoy his or her traditional culture and cultural identity– vis-à-vis the other members of the society (or even with regard to the members of his or her own cultural group), could not be considered as an option at the hands of the States. In fact, they have the conventional obligation to ensure the enjoyment of the recognized rights, and therefore to enact all those affirmative actions that are required by the contextual circumstances. Moreover, because this is a positive obligation, the failure in its achievement would amount to a violation of fundamental rights guarantee by the Convention.

However, in the formulation and application of these measures, I would argue that States enjoy a *margin of appreciation*, or –at least– a certain margin of manoeuvre. Nevertheless, regarding to the detailed level of specification in connection with the reparation measures ordered by the Court –in cases involving indigenous people's land claims– in order to eliminate the effects of the breaches perpetrated (especially in connection with the redress of non-pecuniary damages), seems quite the opposite.[130]

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for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[129] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs of June 17, 2005. Serie C No. 125, para. 51.

[130] See, among other judgments, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 211-232, and operative paragraphs 6-13. See also, G. CITRONI, K. I. QUINTANA OSUNA, *Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International & Comparative*

6. Indigenous peoples and the right to land: Article 21 of the American Convention under a new interpretative light

Coming back to article 21 of the American Convention, the Inter-American Court did not make an exception in connection with the application of the interpretative rules that were described within the precedent section. Indigenous communities have claimed before the Court the recognition of the right to collective property over their traditional lands. As we already pointed out, Article 21 ACHR does not make any *literal* mention to *this* kind of property but –at the same time– does not *literal* exclude it.

For this reason, and in view of the impossibility to resolve this interpretative *quiz* through the –if you may allow me the redundancy– literal interpretation of the text of the Convention (Article 31(1) VCLT)[131], and bearing in mind its object and purpose (the effective protection of human rights), the Court has recurred –as a supplementary means of interpretation (Article 32 VCLT)[132]– to the preparatory work of the American Convention on Human Rights. In fact, when the *literal* interpretation of text of a treaty leaves an *ambiguous or obscure* meaning, or even absurd or unreasonable, it would be possible to make recourse to supplementary means of interpretation, such as *"the preparatory work of the treaty and the circumstances of its conclusion"*.

Perspectives, Oxford, 2008, p. 317 et seq. More in general, see also, S. J. ANAYA, *Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law - The Maya Cases in the Supreme Court of Belize*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, Oxford, 2008, p. 567 et seq.; F. FRANCIONI, *Reparation for Indigenous Peoples: Is International Law Ready to ensure Redress for Historical Injustices*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, Oxford, 2008, p. 27 et seq.; and D. SHELTON, *Reparations for Indigenous Peoples: The Present Value of Past Wrongs*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, Oxford, 2008, p. 47 et seq.

[131] Article 31(1) of the Vienna Convention on the Law of Treaties (1969) reads as follows: *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

[132] Article 32 VCLT reads as follows: *"Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*

In fact, at the time of the elaboration of the Convention, it has been decided to refer to Article 21 only to "*use and enjoyment of his property"* instead to *"private property"*. Therefore, the phrase *"[e]veryone has the right to the use and enjoyment of private property, but the law may subordinate its use and enjoyment to public interest"* was replaced by *"[e]veryone has the right to the use and enjoyment of his property",* according to the quotation of the Court.[133] Consequently, it was not possible for the Court to exclude, from the protection offered by Article 21 of the Convention, the exercise of the right to property in a communal manner, because –as it has been already said– the same article precludes, when read together with article 29 of the Convention, a restrictive interpretation of rights.

Nevertheless, we must bear in mind that the use of supplementary methods of interpretation remains always as a subsidiary and complementary means for interpretation. In fact, the Court has emphasized that *"...the preparatory works are completely insufficient to provide solid grounds to reject* [or to accept] *the interpretation..."*[134] Hence, for the Court, the recourse to the 'preparatory works' is only the *last* resource of interpretation and, before making use of it, all principal elements of interpretation of the Vienna Convention should be applied.

Moreover, even when the text of the Convention, or of the other treaties subject to the interpretation of the Court, could appear clear, that –in itself– does not authorise a straightforward, direct and literal interpretation of them, without previously exploring all the elements that are included within the rule of interpretation of Article 31 of the Vienna Convention. In fact, the Court has said that the "usual meaning" of the terms *"...cannot be a rule in itself, but should be examined in the context and, especially, from the perspective of the object and purpose of the treaty, so that the interpretation does not result in a deterioration in the protection system embodied in the Convention".*[135] In short, the interpreter should proceed to apply, before reaching a final conclusion, a *'systemic interpretation'* of the norm under scrutiny.

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[133] See, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 145.
[134] See, I-ACtHR, *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 73.
[135] *Ibid.,* para. 42.

6.1. Systemic interpretation of Article 21 of the Convention

In its recent jurisprudence, the Inter-American Court has emphasised that, according to the systemic interpretation, *"...norms should be interpreted as part of a whole, whose meaning and scope must be established in function of the juridical system to which they belong."*[136] Accordingly, the second interpretative steps made by the Court was the application of Article 29(b) of the Convention[137], which means to analyse the conventional right to property under the light of other conventions that are part of the same *human rights international law system* applicable to the case.

In this regard, the Court found that, in most cases in which indigenous people's property rights were at stake, the ILO Convention No. 169[138] was –among other international treaties– the most suitable instrument for the interpretation of the rights enclosed within the American Convention. This is because a systemic interpretation of the Convention must be made in *"...accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law."*[139]

However, before entering into the analysis of the reading that the Court has made of the American Convention, under the light of the specific provision contained within the mentioned ILO Convention, it would be very constructive to address one of those *pregnant* questions whose answer would most likely contribute to the better understanding of the entire system of human rights protection. The question in this case could be formulated as follows: which treaties should be taken into account for the interpretation of the rights included in the Convention? Could they only include treaties adopted within the framework of the Inter-American system or perhaps even also those that have been adopted outside of this regional framework?

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[136] *Ibid.*, para. 43.
[137] Article 29(b) ACHR reads as follow: *"No provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."*
[138] See the International Labour Organisation (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries, C 169 of 27th of June 1989.
[139] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 127.

Since the beginning of its jurisprudence, the Court has clearly realised that the very nature of the above questions was intimately connected with the distinction between *universalism* and *regionalism*. In fact, the I-ACtHR, relying in the wording of the *Preamble* of the American Convention, which recognises that the essential rights of all human beings *"...are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention..."*[140], stated that it would be improper *"...to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the common core of basic human rights standards."*[141]

For these reasons, the Court concluded that it was absolutely necessary to complement the regional system with the universal system, adding that that complementation was *"...entirely consistent with the object and purpose of the Convention, the American Declaration and the Statute of the Commission."*[142] In this sense, we can conclude that the inter-American judges have a truly *universal* understanding of Human Rights, beside the attention that they pay to the particular features of the region, as –for instance– the cultural diversity that strongly characterises this part of the world.[143]

Moreover, the Court has also interpreted that it has the competence, within the exercise of its jurisdiction, to examine and interpret any treaty with the purpose of *enlightening* the reading of the Convention. In fact, the regional tribunal affirmed that *"...provided that the protection of human rights in a member State of the Inter-American system is directly involved, even though the said instrument does not belong the regional system of protection."*[144] Even when this quotation has been

[140] See, *Preamble*, 2nd para., ACHR.
[141] See I-ACtHR, *"Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)*. Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 40.
[142] *Ibid.,* para. 43.
[143] In this sense, international scholars have said, not without reasons, that *"...le juge interaméricain indiquait la nécessité qu'il y a à rejeter une vision régionaliste des droits de l'homme, en rappelant que la Convention ne fait que reprendre et intégrer les principes de la Déclaration universelle des droits de l'homme et du Pacte international relatif aux droits civils et politiques."* See, H. TIGROUDJA, *L'Autonomie du Droit Applicable par la Cour Interaméricaine des Droits de l'Homme: En Marge d'Arrêts et Avis Consultatifs Récents*, in *Rev. trim. dr. h.*, 69, 2002, p. 82 et seq..
[144] See I-ACtHR, *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 54.

taken from one of the *advisory opinions* delivered by the Court[145], it does not mean that it would not be applicable to the cases raised within its contentious jurisdiction[146]; this is precisely because of the application of the principle of *systemic interpretation* of the American Convention. For this reason, the said principle has to be considered as a *mainstream principle* of interpretation that permeates the entire adjudicatory activity of this international body.

Based in its own jurisprudence[147] and in the findings of other international and regional judicial bodies[148], the Court has characterised human rights instruments as *live instruments,* whose interpretation must *"...consider the changes over time and present-day conditions."*[149] As it has been highlighted above, under the views of the Court, international human rights law conform an integrated *corpus juris.* In a sense that, all international instruments that are part of it does not live isolated one from each other, on the contrary, they interact and influence each other in a way that generate a *critical mass* capable to put pressure toward the enhancement of the protection of the existing human rights in the region.[150]

To conclude, under the view of the Court, the *dynamic evolution* of the international human rights law should be considered as a *main* factor that *"...has had a positive impact on international law in affirming and building up the latter's*

[145] With regard to the advisory competence of the Court, see Article 64 ACHR.
[146] See, Articles 51(1) and 62 ACHR.
[147] See, among others, I-ACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 192 et seq..; *Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs.* Judgment of July 8, 2004. Series C No. 110, para. 165.
[148] In fact, in its 16th Advisory Opinion (see below), the Court made references to the jurisprudence of the International Court of Justice and of the European Court of Human Rights; more precisely, in the case of the former, references have been made to its *Advisory Opinion* delivered in *"Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971; p. 16 *ad* 31; and in the case of the ECtHR, to the following cases: *Tyrer v. United Kingdom*, judgment of 25 April 1978, Series A no. 26; pp. 15-16, para. 31; *Marckx v. Belgium,* judgment of 13 June 1979, Series A no. 31; p. 19, para. 41; and *Loizidou v. Turkey (Preliminary Objections)*, judgment of 23 March 1995, Series A no. 310; p. 26, para. 71.
[149] See I-ACtHR, *The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cit., para. 114.
[150] In the opinion of two judges of the Inter-American Court, through the exercise of their judicial function, they *"...must enhance the awareness of all inhabitants of our region so that facts such as those of the instant case do not happen again, to the detriment of those who most need protection, who have no one else to resort to in our societies, and of all those who are socially marginalized and excluded, who suffer in silence, but who in no way can be forgotten by the law."* See, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit.; Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, para. 24.

faculty for regulation relations between States and the human beings within their respective jurisdictions."[151]

6.1.1. The application of the ILO Convention No. 169

After scanning those international instruments that might provide a supportive light for a *dynamic* and *evolutive* reading of the Convention, and taking into account the related developments in international human rights law, the Court concluded that it would be appropriate for the analysis of the scope of Article 21 of the Convention to resort to the ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter "the ILO Convention").[152]

The reason for this interpretative decision lies on the fact that the ILO Convention has been considered by the Court as integrative part of the *international human rights system.*[153] Moreover, because it is one of the few *specific* instruments that deals with the relationship between indigenous and tribal peoples and their traditional lands and territories through its numerous provisions, the I-ACtHR expressly recognised its pertinence and adequacy for the interpretation of the

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[151] See I-ACtHR *The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cit., para. 115.

[152] Notwithstanding the importance of this Convention, it is important to recall that in the first case in which the Court was called to decide upon this matter, the ILO Convention was not even mentioned. I am referring to the *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. This attitude of the Court is justified –under my point of view- because Nicaragua did not ratify the ILO Convention No. 169. Nevertheless, one of expert witness, Mr. Rodolfo Stavenhagen Gruenbaum, mentioned this Convention in the Court´s room, in his capacity as anthropologist and sociologist. See, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 83(d).

[153] As we saw in Chapter IV, the International Labour Organisation (ILO) was one of the first international bodies that addressed the situation of indigenous people in the world, of course, from a labour perspective but with a broader far reaching effect. In fact, the ILO Convention No. 107 (1957) and its subsequent revision in the form of the ILO Convention No. 169 (1989), were the first international instruments specifically addressing the situation of 'indigenous and tribal' peoples within the broad frame of the international law. Nevertheless, this fact has been seen as a *"historical anomaly"*, as a *"contemporary incongruity that can only be explained through history"*. In fact, the ILO organisation is predominantly, but not exclusively, *"...a factory of international legal standards aimed at creating 'human conditions of labour'"*; in other words, it has not as main purpose of the solution of the so called *"indigenous problem"*. For further exploration of this topic, see our consideration in Chapter IV, Section 3, and –among other authors– L. RODRÍGUEZ-PIÑERO, *Indigenous Peoples, Postcolonialism, and International Law. The ILO Regime (1919-1989)*, Oxford, 2005, p. 8 et seq..

American Convention in connection with the current stage of the International Human Rights Law.[154] In the own wording of the Court, the ILO Convention *"...can shed light on the content and scope of Article 21 of the American Convention."*[155]

Consequently, under the *systemic interpretation* of the Article 21 ACHR, the Court preceded to analyse the meaning of its terms under the light provided by the regulations enshrined within the ILO Convention. In this sense, the Court has tried to reconstruct the norms enshrined in the mentioned article *"...in accordance with the evolution of the Inter-American System considering the development that has taken place regarding these matters in international human rights law."*[156]

As it has been already mentioned, the reference to instruments that could have been adopted even outside of the Inter-American System does not mean that the Court will directly apply their respective norms in a solution of a given case.[157] If the latter would be the case, this hypothetical adjudicative action would be allocated outside of the *material competence* of the Court, according to the clear wording of Article 62(3) of the American Convention.[158] In fact, only violations of the rights guaranteed in the Convention, or within other treaties that expressly or implicitly recognise its competence[159], will open its adjudicatory jurisdiction. Hence, the

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[154] As the Committee of Experts observed in its 1999 Annual Report, *"[the] Convention No. 169 is the most comprehensive instrument of international law for the protection in law and in practice of the right of indigenous and tribal peoples to preserve their own laws and customs within the national societies in which they live."* See General Report of the Committee of Expers on the Application of Conventions and Recommendations, 1999, 87th Session of the ILO Conference, Geneva (CEACR General Report – Ilolex No. 041999), para. 99.

[155] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 130.

[156] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, para. 117.

[157] In connection with the direct inapplicability of international instruments outside of the Inter-American System, see –among other resolutions- the following cases: *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala.* Merits. Judgment of November 19, 1999. Series C No. 63, paras. 192-195; *Case of Bámaca-Velásquez v. Guatemala.* Merits. Judgment of November 25, 2000. Series C No. 70, paras. 208-210; and *Case of the Plan de Sánchez Massacre v. Guatemala.* Merits. Judgment of April 29, 2004. Series C No. 105, Separate Concurring Opining of Judge Sergio Garcia-Ramírez, para. 19.

[158] Article 62(3) of the American Convention reads as follow: *"The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."*

[159] In this sense, it is important to bear in mind that Article 23 of the Rule of Procedure of the Inter-American Commission on Human Rights makes an enumeration of all of those treaties that, within the Inter-American System, have recognised the competence of the Commission, and the Court, for the reception of the individual petitions, if all the extra requirements are fulfilled. Article 23 reads as follow: *"Any person or group of persons or nongovernmental entity legally recognized in one or more*

material competence of the Court does not cover those cases in which what is at stake is an *exclusive* violation of a *pure* extra regional international instrument.[160] In the words of the I-ACtHR, *"...in adjudicatory matters it is only competent to find violations of the American Convention on Human Rights and of other instruments of the inter-American system for the protection of human rights that enable it to do so."*[161]

Notwithstanding, the Court has reaffirmed that its *material competence* in contentious cases which were included the *assessment of compatibility* between different national or international laws applied by a State Party of the American Convention; in those cases the Court proceeded to the scrutiny of the former normative instruments under the light of the latter. It is within this interpretative framework that we have to interpret the affirmation of the Court that, in the exercise of its jurisdiction, *"...has no normative limitation: any legal norm may be submitted to this examination of compatibility."* [162]

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of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights "Pact of San José, Costa Rica", the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará", in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in a separate document." (The underlined is added by the author).

[160] The I-ACtHR has said that *"...[a]lthough the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (cf. Articles 33, 44, 48.1 and 48). Cases in which another Convention, ratified by the State, confers competence on the Inter-American Court or Commission to hear violations of the rights protected by that Convention are excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons."* See *Case of Las Palmeras v. Colombia. Preliminary Objections.* Judgment of February 4, 2000. Series C No. 67, para. 34. (The underlined is added by the author).

[161] See I-ACtHR, *Case of the Plan de Sánchez Massacre v. Guatemala. Merits*. Judgment of April 29, 2004. Series C No. 105, para. 51.

[162] The whole citation read as follow: *"[w]hen a State is a Party to the American Convention and has accepted the contentious jurisdiction of the Court, the Court may examine the conduct of the State to determine whether it conforms to the provisions of the Convention, even when the issue may have been definitively resolved by the domestic legal system. The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility. In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of*

Therefore, in accordance with what has been said in the precedent paragraphs, the conclusion reached by the Court cannot generate any surprise, more so when assessing the scope of Article 21 of the American Convention under the light of principles and regulations enshrined in the ILO Convention No. 169. In fact, it is within this framework that the Court has recognised that *"...the close relationship of the indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economical survival, and preservation and transmission to future generations."*[163]

Moreover, it is through the reading of the ILO Convention that the Court drew an interconnected line between identity, culture and traditional land (right to property). The reference is made with regard to the Article 13, paragraph 1 of the ILO Convention. In this sense, this provision specifically states that governments "*...shall respect the especial importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."*

When the ILO Convention refers to *"lands"* it includes, according to what has been established in the second paragraph of the above mentioned Article 13, not only their *traditional lands* but as well their *"territories"* which *"...covers the total environment of the areas which the peoples concerned occupy or otherwise use."*[164] In addition, Article 14(1) of the ILO Convention expressly recognises *"[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy..."* It is important to emphasise the fact that this Convention uses the term *"shall"* rather than any other weaker configuration, underlining the obligation of the State Parties in connection with the recognition of these rights and their incorporation within their national laws.[165]

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the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention." See, I-ACtHR, *Case of Las Palmeras v. Colombia. Preliminary Objections*. Judgment of February 4, 2000. Series C No. 67, para. 32 and 33 (The underlined is added by the author).

[163] See I-ACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community*, *supra* note 94, para. 149; and I-ACtHR, *Case of Yakye Axa Indigenous Community, supra* note 129, para. 131.

[164] See ILO Convention No. 169, Article 13(2).

[165] On this regards, our consideration in Chapter IV, Section 3.2. et seq. See also, among others, A. XANTHAKI, *Indigenous Rights and United Nations Standards*, cit., p. 81 et seq..

Furthermore, the same Article 14 of the ILO Convention clarifies the extent to which these rights have been recognised, adding that *"... the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."*[166] According to the International Labour Organization (ILO), when the Convention refers to *lands*, the concept *"...embraces the whole territory they use, including forests, rivers, mountains and coastal sea, the surface as well as the sub-surface."* Additionally, when it alludes to those lands that they have *"traditionally occupy"*, the Convention indicates those lands as *"...where indigenous peoples have lived over time, and which they want to pass on to future generation."* [167] Whether those *traditional* lands have to be *presently* occupied or not, or –in other words– whether it would be sufficient to exhibit a historical occupation or possession of them, as some scholars referred to them with the expression *"lands whenever occupied"*, will be addressed in the following chapter, together with the position adopted by the Inter-American Court in this matter.[168]

Therefore, bearing in mind these notions, the Court has understood that the referred close relationship between lands and culture could be considered as enshrined within the wide-ranged area of protection of Article 21 of the American Convention. In other words, this article covers not only *"...those material things which can be possessed,* [but] *as well as any right which may be part of a person's patrimony"*, which also means that the protection of this norm can be extended to *"...all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."*[169]

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[166] See ILO Convention No. 169, Article 14(1). In the same line, Article 26 of the United nations Declaration on the Rights of Indigenous Peoples, in its 1st paragraph establishes that *"Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired";* adding in its 2nd paragraph that they have *"...the right to own, use and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."*

[167] See ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, International Labour Standards Department, 2009 (here-in-after *'The ILO Guide'*), p. 91.

[168] On this matter, see –among others- P. THORNBERRY, *op. cit.*, p. 353 et seq.

[169] See I-ACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79, para. 144; and *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment February 6, 2001. Series C No. 74, para. 122.

Having as a pivotal notion of this broad understanding of *"property"*, the Court has constructed an evolutionary reading of Article 21 of the American Convention, under the light of the dispositions of the ILO Convention No. 169, as we said before. This *evolutionary* and *systemic* reading, led to the incorporation of the indigenous conceptual understanding of property, with the consequence of the extension of the conventional protection to the *"communal form of collective property of the land."*[170]

Moreover, the incorporation of the indigenous understanding of the right to property in the reading of Article 21 ACHR has conducted the Court to an even more innovative reading, merely, to the extension of the conventional protection to those regarded *especial ties* that *spiritually* connect these peoples with their traditional lands and territories. In fact, based on these considerations, and taken from the above quoted Article 13 of the ILO Convention almost as a *blueprint model*, the Court has stated that *"...the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations."*[171] In addition, and explaining even deeply this cultural connection, it has affirmed that *"[t]he culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity".*[172]

Hence, for the Courts, the relationship between indigenous people and their traditional lands has to be considered as a *twofold* relationship. On one hand, it is composed of a *material* element in a sense that those lands provide to these people essential means of subsistence and, on the other hand, it is possible to even identify a *spiritual* element on it, because it is through this relationship that indigenous peoples

[170] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 149.
[171] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 131.
[172] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 135.

find their own identity.[173] Without this relationship, their entire understanding of the world, life and death, would become *meaningless*.[174]

As you can see, the Court has done nothing but fully incorporate one of the identified objective elements that conceptually composes the notion of indigenous people, namely their *special relationship with their lands*, with its particular characteristics, as described within the precedent chapter, but not only.[175] Through the constructed conceptual interconnection between traditional lands and cultural identity, and the *dogmatic* understanding of the ontological dependency between the latter with the former, I will argue that the Court has also fallen into what we have called the *'essentialist trap'*.

In fact, as it has been already anticipated in the previous chapter[176], it seems that for the Court, without the direct enjoyment of the said *special relationship* with the lands in which indigenous forebears used to live, in accordance with their *special traditions* and cultural understandings (including the spiritual dimension), these people would lose their *"indigenousness."* Indeed, without this special connection, they would lose their *'cultural identity'* (in the wording of the Court), that is, the essential cultural element that would make them *distinctive* (or distinguishable) from the rest of the society.[177] As I concluded before, if a person cannot possibly be considered as *"indigenous"* due the fact that is living outside of those areas regarded as "traditional lands", then we must admit that the very notion of being indigenous has been *essentialized*, in a sense of being conceptually (and perhaps even dogmatically) reduced to one specific character or element.[178]

Notwithstanding, if we stay with the interpretative rules contained in Article 29 of the American Convention, then any possible restrictive interpretation of the

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[173] See *infra* note 203.

[174] In the words of the former UN Special Rapporteur, Mr. Martínez Cobo, *"...for indigenous populations, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture."* See J. R. MARTÍNEZ COBO, *op. cit.*, para. 509.

[175] See, Chapter IV, Section 2.2.4.

[176] *Ibid.*

[177] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 3 et seq.

[178] See, in connection of *urban* indigenous population, L. RAY, *Language of the land. The Mapuche in Argentina and Chile*, Copenhagen, 2007, p. 20 et seq.; and also R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 25-26.

conventional rights is precluded, but not only. A restrictive interpretation of those rights *"...recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party"*[179], is also precluded. Therefore, it could be seen as quite logical that an *evolutive* interpretation of Article 21 of the American Convention, under the light of the dispositions enshrined at the ILO Convention No. 169, has led the Court to the interpretation of the right to property in a sense that includes –among others– the right to communal property of the members of the indigenous groups (and tribal communities).[180] This without prejudice of the conceptual considerations mentioned above.

6.1.2. References to common Article 1 of the 1966 International Covenants

The ILO Convention No. 169 has not been the only international instrument that the Court used for its *evolutive* and *systemic* interpretation of Article 21 ACHR. In effect, in two cases regarding the State of Surinam[181], whose domestic legislation does not recognise the right to communal property of members of tribal peoples[182], and has not ratified any of the two ILO Conventions, the Court has made references to two additional international instruments. In fact, it has recurred to both the International Covenant on Civil and Political Rights (here in after ICCPR) and to the International Covenant on Economic, Social, and Cultural Rights (here in after

[179] See Article 29(b) of the American Convention on Human Rights.
[180] See, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 148.
[181] See, I-ACtHR, *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124; and I-ACtHR, *the Case of Saramaka People v. Suriname*, cit.
[182] In the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court has acknowledged the fact that the Constitution of Nicaragua *also recognizes* the right to communal property of indigenous people (Articles 5, 89 and 180 of the 1995 Constitution of Nicaragua), but it did not nevertheless subordinate the conventional protection of the right to communal property –and therefore its recognition– to the potential scope and meaning that the same rights could have within the national legislation of the said country. In fact, the Court has stated that *"[t]he terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law."* See, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 146.

ICESCR), in order to reach the same evolutive interpretative outcome in connection to Article 21 of the American Convention.[183]

Indeed, being unable to highlight the importance of the ILO Conventions as an international standard that could be used for the interpretation of the conventional regulations applicable to those cases regarding Suriname, precisely because they have not been ratified by the said country, the Court has made references to both International Covenants, and in particular to their common Article 1.[184] As it has been said before, in the case of the ILO Convention 169, the Court made reference to it not only because the especial pertinence of its norms, in connection with the substance of the case at stake, but also because of its ratification made by the respondent State in the case.[185]

As we said, the first reference made by the Court, in connection with both International Covenants, has been to their common Article 1, and in particular to the *right of self-determination* enshrined on them. As we know, this common article recognises the right that *"all peoples"* have to *"...freely pursue their economic, social and cultural development* (Article 1(1)), to *"...freely dispose of their natural wealth and resources..."*, and to *"...not be deprived of its own means of subsistence* (Article 1(2)).[186]

The Court took as granted, based on the interpretations made by one of the monitoring bodies of the Covenants, that indigenous people are also beneficiaries of this right that has been recognised to *"all peoples"*. In this sense, it seems that the Court has taken a very strong stance in this controversial matter.[187] In fact, the Court

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[183] See, for instance, I-ACtHR, *The Case of Saramaka People v. Suriname*, cit., para. 92-95.

[184] Article 1 of the both International Covenant in Civil and Political Rights and in Economic, Social and Cultural Rights, reads as follow: *"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."*(The underlining is made by the author).

[185] See, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 130; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 117;

[186] See, as a general comment of this Article 1 ICCPR, M. NOWAK, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2005, p. 5 et seq.

[187] See, our comments in the previous chapters, in particular in Chapter IV, Section 3.3. and 3.4.; see also, among other authors, J. CASTELLINO, *op. cit.*, p. 55 et seq.; A. XANTHAKI, *The Right to Self-*

quoted one of the Concluding Observations made by the Committee on economic, Social and Cultural Rights (CESCR) in connection with the Russian Federation, in which the Committee showed its concern about *"...the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant."*[188] Beside the institutional prestige of this international body, this quotation seems to be a rather weak reference in order to ground the legal basis for the recognition of the right of communal property of indigenous or tribal people over their traditional lands.

Nevertheless, if we read common Article 1 of the 1966 International Covenants under the light of the UN Declaration on the Rights of Indigenous Peoples, in which it is expressly recognised that indigenous people are beneficiaries of the right of self-determination, although not in its full version (as we saw within the precedent chapter), then perhaps the above conclusion would have been different.[189] In fact, as it has been already mentioned, the Declaration has clearly recognised the right of indigenous people to *internal* self-determination, in a sense that these populations can channel their exercise by means of seeking *autonomy* and *self-government*, and to *"freely determine their political status and freely pursue their economic, social and cultural development."*[190] Additionally, the said Declaration expressly recognises that indigenous people have the *"the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired"*[191]; and even stressing that they have the right *"to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands…"*[192]

Hence, as long as the Declaration stresses the *vital* importance of indigenous peoples' *"distinctive spiritual relationship"* with their traditional lands and territories (Article 25) and –based on that relationship– has recognised the right to

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Determination: Meaning and Scope, cit., p. 15 et seq.; and A. XANTHAKI, *Indigenous Rights and United Nations Standards*, cit., p. 131 et seq..

[188] The Court referred to UNCESCR, *consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations on Russian Federation (Thirty-first session),* U.N. Doc. E/C.12/1/Add.94, December 12, 2003, para. 11. See, I-ACtHR, *The Case of Saramaka People v. Suriname*, cit., para. 93.

[189] See our consideration in Chapter IV, Section 3.3.

[190] See, Article 3 and 4 of the UN Declaration on the Rights of Indigenous Peoples.

[191] *Ibid.,* Article 26 (1).

[192] *Ibid.*, Article 25.

the lands, territories and resources which they traditionally owned (Article 26(1)), it would be possible to argue that –under the rationale of the Declaration– this special right to property could be considered as a specific materialisation or concretisation of the right to *internal* self-determination enshrined in Article 3 of the said instrument.

However, the Declaration is not a legally binding instrument, as it has been rightfully pointed out[193], and therefore it could be said that it would not be possible to properly use it –as a supportive legal argumentation– within the Court case under analysis. In fact, the Declaration has not binding force but –nevertheless– it could be used as an *interpretative tool*. This means that it could be regarded as having elaborated upon the already existing human rights obligations of States, through the incorporation of the general existing principles of international law[194], at least under the authoritative view of the UN General Assembly, which has adopted it.[195]

Therefore, it would be possible to consider the Declaration on the Right of Indigenous Peoples as integrative part of the *corpus juris* of international human rights law, in a sense of being part of that *"...set of international instruments of varied content and juridical effect (treaties, conventions, resolutions, and declarations)."*[196] Then, a systemic, dynamic and evolutive interpretation of the right to property protected under Article 21 ACHR, interpreted in light of the right recognised under common Article 1 of the 1966 Covenants (until this point, the construction of the argumentation is semantically equal to the interpretation made by the Court in the case of Saramaka)[197], but *as read under the light of the dispositions enshrined within the said Declaration*, would perhaps lead toward a stronger interpretative construction. Stronger, from the point of view of the protection that, this norm, would be able to deliver.

Of course, at the time of the adoption of this judgment, the Declaration was still a draft; therefore, it would have been improper for the Court to incorporate it

[193] See, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc. A/HRC/9/9, Human Rights Council, 2008, para. 41.
[194] The Declaration was adopted by the UN General Assembly resolution 61/295 of 13 September 2003, by the majority of the Member States: 143 voting in favour, 4 against and 11 abstaining.
[195] *Ibid.*
[196] See, I-ACtHR, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 115.
[197] See, I-ACtHR, *The Case of Saramaka People v. Suriname*, cit., para. 95.

into its own reasoning. Nevertheless, as an alternative theoretical construction, from the point of view of the systemic interpretation of the international human rights *corpus juris*, it has interesting applicative and perhaps innovative angles.

6.1.3. References to Article 27 ICCPR

In addition to common Article 1 of the 1966 International Covenants, the Court has made references to Article 27 of the ICCPR[198] and, most in particular, to the interpretation that the UN Human Rights Committee has made of it, in its General Comment No. 23 on *"The rights of Minorities"*.[199] In fact the Court has referred to the section in which the Committee has considered that *"...minorities shall not be denied the rights, in community with the other members of their group, to enjoy their own culture* [, which] *may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority."*[200]

The above mentioned interpretation of the said Article 27 ICCPR, has also been considered by the Court as part of the dynamic evolution of the interpretation of human rights law, and hence integrative part of its *corpus juris*. In other words, an *evolutive* reading of international instruments for the protection of human rights imposes also a *contextual*, *systemic* and *non-restrictive* interpretation of Article 21 of the Convention. Hence, as a direct consequence of this interpretative approach, the right to property recognised in the said provision would have to be considered also as integrative part, in the case of minority groups, of their right to enjoy their own culture, individually or in community with the other members of their group. In addition, in the case of indigenous communities, the enjoyment of this right would be closely associated with their territories or lands (General Comment No. 23).

[198] Article 27 of the ICCPR read as follow: *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."*

[199] See, I-ACtHR, *The Case of Saramaka People v. Suriname*, cit., para. 94.

[200] Human Rights Committee (HRComm.), *General Comment No. 23: The rights of minorities (Art. 27)*, U.N. Doc. CCPR/C/21Rev.1/Add.5, United Nation, 1994, paras. 1 and 3.2.

Therefore, the obvious conclusion of a systemic and non-restrictive interpretation of Article 21 ACHR would necessarily be that the said right includes the right to communal property of the members of the indigenous communities –as minorities– to their traditional lands.[201]

This kind of interpretation is based on the consideration that indigenous people's *customary law* (as a source of law) recognises a communal form of collective property of the land[202], in which the ownership of the said land is not centred on the individual but rather on the group and its community. In fact, it is in this sense that this traditional understanding of the right to property is regard as an essential element of the indigenous cultures, spiritual life, integrity and economic survival of these populations.[203]

Following this line of thought, the Court has added that *"[d]isregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons."*[204] Indeed, this notion of ownership and possession of land does not necessarily conform to the classic concept of property[205], but –nevertheless– deserves *equal protection*

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[201] In this sense, the term "property" under the new interpretative light of Article 21 ACHR, includes *"...material things which can be possessed, as well as any right which may be part of a person´s patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value."* See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 121.

[202] It is important to bear in mind that the ILO Convention No. 169 states, at the first paragraph of article 8 that *"[i]n applying national laws and regulations (...) due regard shall be had to their customs or customary laws"*, and at its second paragraph that *"[t]hese peoples shall have the rights to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."*

[203] The I-ACtHR has stated that *"[t]o guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connections with nature, culinary art, and customary law, dress, philosophy, and values. In connection with their milieu, their integration with nature and their history, the members of the indigenous communities transmit this non-material cultural heritage from one generation to the next, and it is constantly recreated by members of the indigenous groups and communities."* See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 154.

[204] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 120.

[205] As Judge Sergio García-Ramírez pointed out in one of his separate opinions, *"...the property rights* [of indigenous peoples] *are "qualified", that is to say it has unique characteristic, which correspond in some aspect to ordinary ownership, but differ radically form it in others. The idea of putting the indigenous form of ownership (...) on the same footing as that of the civil law also preserved under Article 21 of the Convention my prove extremely disadvantageous to the legitimate interest and lawful*

under the understanding of the Court. Consequentially, Article 21 of the American Convention protects –according to the Court– both the private property of individuals and communal property of the members of indigenous communities.[206]

Furthermore, it would be important to clarify that this innovative interpretative line does not absolutely mean that the American Convention authorises the recognition of a collective property right as a "group right". In fact, as we will see also within the following chapter, the right to collective property recognised by the Inter-American Court is indeed an *individual* right, whose right holders are the members of the regarded indigenous communities rather than the community as such (as a separate entity with autonomous personality).[207] But, because this *sui generis* or special *individual* right to property is enjoyed in community or association with other members of the same indigenous community, then we can also conclude that it can be seen as an individual *collective* right to property.[208]

In conclusion, Member States of the Convention have to respect the special relationship that indigenous peoples have with their territories, but not only. Additionally, the conjunction reading of Article 21 with Articles 1(1) and 2 of the Convention[209], places upon the States *"...a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal*

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rights of the indigenous people". See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., Separate Opinion of Judge Sergio García-Ramírez, para. 16.

[206] See, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 143.

[207] As we have already said, the Court has declared the violation of the right to property enshrined in Article 21 of the Convention, has done so *"to the detriment of the members"* of the involved indigenous communities and not with respect of the community itself. See, among other resolutions, I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I-ACtHR, Series C No. 79. Judgment on Merits, Reparations and Costs of August 31, 2001, para. 155, and operative para. 2; I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., para. 156, and operative para. 2; and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 144, and operative para. 2.

[208] Prof. Stavenhagen, former UN Special Rapporteur, referring to the special relationship that indigenous people have with their lands, has nevertheless said that *"[t]he right to own, occupy and use land collectively is inherent in the self-conception of indigenous peoples and generally this right is vested in the local community, the tribe, the indigenous nation or group. For productive purposes it may be divided into plots and used individually or on a family basis, yet much of it is regularly restricted for community use only (forests, pastures, fisheries, etc.), and the social and moral ownership belongs to the community."* See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, in UNDP Occasional Paper, 2004/14, 2004, p. 3-4.

[209] Article 2 of the American Convention reads as follow: *"Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."*

exercise of their right to the territories they have traditionally used and occupied."[210]

Last but not least, and as a final general conceptual remark, allow me to say that it seems that we can identify here again the conceptual configuration of the above mentioned *threefold relationship* (*traditional lands* → *culture* → *identity*) but with the addition of an ulterior element, that is, the right to property. Under this new version, not only the relationship with traditional lands is interpreted as essential for the *culture* of indigenous people, and therefore essential for the maintenance of their *identity*, but also the protection of the right to *property*, as a guarantee for the preservation of the said *especial relationship* has become essential too. It seems that not only the threefold relationship[211] has increased its components, becoming a *fourfold* one, but also the above mentioned *essentialist trap* has grown in *trapped* conceptualisations.

6.2. Other possible interpretations?

As we have seen within the previous paragraphs, in the views of the Inter-American Court, the close ties that indigenous peoples have with their traditional territories and natural resources constitute a central element of their culture. This is also regarded as integrative part of their own *distinctive* identity, and –as such– deserves to be guaranteed under the protection of Article 21 of the Convention, which –as we already know– protect the right to property.

Therefore, if their traditional communal understanding of the right to property is protected because it constitutes an essential part of indigenous cultural identity, it seems that the very focus on the protection here is –at last– their *cultural identity* in itself. If this is true, as it seems to be, then the protection of the indigenous communal property –as guaranteed by Article 21 ACHR– would become a powerful vehicle, a useful tool in the hands of indigenous peoples for the protection of their

[210] See, I-ACtHR, *The Case of Saramaka People v. Suriname*, cit., para. 91.
[211] See, in this Chapter, Section 2, and in Chapter IV, Section 2.4. and 4.

culture and identity as such. This –of course– despite the fact that it would be a vehicle ontologically trapped in an essentialised view of *indigenousness.*[212]

If traditional lands constitute an essential part of indigenous peoples' culture, as the Court has clearly interpreted, and if we add to that interpretation the conceptual assumption that that *essential* part of their culture also constitutes the central element of their cultural *distinctiveness*, as a differential societal aggregation, therefore, it would be possible to conclude that the cultural aspect of the ties between indigenous peoples and their lands represent a *constituent factor of their identity*. That is, a factor that allows them to self-identify as such, as different peoples, as indigenous peoples. This inter-relatedly regarded dependency was clearly pictured by Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli when, in a joint separate opinion, stressed that *"[w]ithout the effective use and enjoyment of these [traditional lands], they would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communitarian. The feeling which can be inferred is in the sense that, just as the land they occupy belongs to them, they in turn belong to their land. They thus have the right to preserve their past and current cultural manifestations, and the power to develop them in the future."*[213]

Furthermore, under this new interpretative light, it would be possible to say that what was really at stake in these cases –at least under the understanding of the Court– was *not only* the right to indigenous people to communal property and its interpretative recognition, as enshrined by the scope of Article 21 of the Convention. Indeed, it would be possible to argue that what was really at stake in these cases was the right of indigenous people to enjoy their own identity, their own culture, and their right to live their lives according to their own cultural traditions, their own understandings, and their own spiritual conception of the world.

In short, under this new interpretative light, the traditional right to communal property is protected, not just because fells into the scope of protection of Article 21 ACHR as a *mere* right to property; but because it has to be considered as an essential

[212] See, Chapter IV, Section 2.2.3.
[213] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, para. 8.

part of the indigenous peoples' cultural identity. Hence, under this view, the non-recognition of this right to collective property would generate a violation of the right to property, but not only. Under this logic, it would also amount to a *deprivation* of their culture, because it would put under threat their *distinguishable* identity as different people. Consequentially, it would amount to a violation of their *human dignity*, as indigenous.[214]

7. Conclusion

We started the present chapter with the observation that perhaps one of the central weaknesses of indigenous people's legal regime –as described within the precedent chapter[215]– is the lack of specific judicial or even quasi-judicial mechanisms with concrete jurisdiction to supervise the full respect, applicability and enforcement of those that are regarded as specific indigenous people's rights.

In this sense, our inquiry moved toward one of the main regional systems of human rights protection, namely, the Inter-American System and –more in particular– in connection with the jurisprudence that the Inter-American Court of Human Rights has developed in the recent years. This decision was a quite obvious step, if we take into consideration that the jurisprudence of this Court, regarding indigenous people's right to communal property over their traditional lands, have to be considered as absolutely innovational vis-à-vis other international judicial bodies.

In fact, the Inter-American Court, through an innovative and integrative method of legal interpretation, namely through a *dynamic*, *systemic*, *evolutive*, *non-*

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[214] It is interesting to see the conceptual parallels between the interpretative lines of the Court and the famous study elaborated by the former UN *Special Rapporteur*, Mr. Martínez Cobo, with regard to the relationship between traditional lands and indigenous peoples' identity. In fact, in his views, *"[t]oday as yesterday, land is part of the existence, as indigenous persons, of these populations and serves as the basis for their entire physical and spiritual environment. It is land that defines the group (clan, tribe, people or nation), its culture, its way of life, its life style, its cultural and religious ceremonies, its problems of survival and its relationships of all kinds within the community and with other groups and, above all, <u>its own identity</u>. Land is synonymous with <u>the very life</u> of indigenous populations."* See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations - Final Report (last part) submitted by the Special Rapporteur, Mr. José R. Martínez Cobo*, UN Doc. E/CN.4/Sub.2/1983/21/Add.4, United Nations, 1983, para. 73 (underline added).

[215] See, Chapter IV, Section 3.

restrictive and *effective* interpretation of the regional and universal human rights instruments –which are integrative part of the *corpus juris* of international human rights law[216]– has incorporated specific indigenous people rights into the text of the American Convention. Consequently, under the interpretative light of the said *corpus juris*, the Court has re-elaborated Article 21 of the American Convention in a sense to extend its scope of protection beyond the borders of a *mere* right to property; even far away from the *mere* recognition of the right of indigenous people to communal property over traditional lands. Indeed, the Court has extended the scope of protection of this article to the protection of indigenous people's *cultural identity*.

The reasoning applied by the Court started with the consideration that indigenous people have a *special relationship* with their traditional lands.[217] Then, the Court understood that that *special relationship* was also the *essential* and determinative factor of the *distinguishable* cultural identity pertained to indigenous people. Moreover, it concluded that, without the enjoyment of that relationship, what was at stake was not only their identity, as *distinguishable* peoples, but also –and even most importantly– their possibility to enjoy a *life in dignity*, or a *dignified life*, according to their own cultural traditions, their own understandings and their own spiritual conception of the world.

Therefore, for the Court, the scope of protection of Article 21 ACHR is extended far beyond the right to property, to the point of confusing its own limits with those of the right to life, as protected by Article 4(1) ACHR.[218] In this sense, without the right to use and enjoy their traditional land, according to the indigenous people's traditions and customary law, these people would not have access to a *dignified life*. In the views of Judge Cançado Trindade, *"here the question of the ownership of ancestral land becomes one of the very essence, including the preservation of the right to life in a broad sense which encompasses the conditions of*

[216] See, I-ACtHR, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*, cit. para. 115.
[217] See, Chapter IV, Section 2.2.4. et seq.
[218] Article 4(1) ACHR reads as follow: *"Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."*

a life with dignity and the necessary preservation of cultural identity."[219] If some doubts have remained in connection to what was his understanding with regard to these interconnections, he has clarified them when he bluntly stated that *"[c]ultural identity is a component of, or an addition to, the fundamental right to life in its wider sense. As regard members of indigenous communities, cultural identity is closely linked to their ancestral lands. If they are deprived of them […], it seriously affects their cultural identity, and finally their very right to life latu sensu, that is, the right to life of each and every member of each community."*[220]

Accordingly, in the reasoning of the Court, when Article 21 of the Convention has to be interpreted –under this new interpretative light– in connection with indigenous peoples' communal property cases, due attention would have to be paid to their *right to life*, as guaranteed under Article 4 of the same instrument. In addition, according to the principle of non-restrictive interpretation (Article 29 ACHR), it would not be possible to interpret the right to property in any manner that could lead to an unjustified restriction with regard to the full enjoyment of the right to life (or to have a *dignified* life).

Finally, and as a conclusive remark, I would like to address the above conclusion from a different point of view, which is from the standpoint of the theoretical framework that has been developed in the first part of this work. I have already maintained that with the incorporation of the right to property into the conceptual configuration of the notion of *indigenousness*, the latter has become a multifaceted concept that enshrines a *fourfold relationship*. In this sense, it does not only include the already mentioned *trinomial* configuration (*traditional lands → culture → identity*) but has also incorporated a fourth element that is constituted by the right of communal property over their traditional lands. In short, the *fourfold relationship* is configured as follows: *traditional lands → culture → identity → right to communal property over traditional lands.* Indeed, because the right to communal

[219] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., Separate Opinion by Judge A.A. Cançado Trindade, para. 15. See also, I-ACtHR, *The Case of Saramaka People v. Suriname*, cit., para. 122.

[220] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., Separate Opinion by Judge A.A. Cançado Trindade, para. 28.; see also *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, para. 4, 18-20.

property is recognised over the very same traditional lands, the *fourfold relationship* has also become *circular*.

Furthermore, there is still one conceptual element missing within this *fourfold circular relationship*. And, as you can imagine, this element is nothing but the right to have a *dignified life*, or a life in dignity. This right has been retained as configured –in the case of indigenous people– as a life conducted according to their own cultural traditions, to their own moral understandings of the good and the evil, and to their own spiritual conception of the world. Moreover, if we understood correctly the latest remark made by Judge Cançado Trindade, then we have to do nothing but surrender to the evidence that –in the views of the Court– the above relationship has become *fivefold*.

In fact, under this new version, the special relationship with traditional lands is interpreted as essential for the *culture* of indigenous people, and –in that sense– indispensable for the maintenance of their *distinguishable* cultural *identity* as a differential societal aggregations, that is, their *indigenousness*. Moreover, the enjoyment of their cultural identity is regarded as essential in order to have the possibility to enjoy a life in dignity, which is in accordance with their cultural traditions, understandings and world views (right to life in *lato sensu*).[221] Thus, in order to protect and ensure the indigenous people's enjoyment of their right to life *in dignity*, the protection of their special relationship with their traditional lands has been regarded as indispensable, and it has been made effective by means of its inclusion within the scope of protection of the right to property (Article 21 ACHR). As we can see, the new *fivefold* relationship has not lost it *circular* configuration.

Therefore, according to this new understanding, the current configuration of the *fivefold circular relationship* is the following: *traditional lands → culture → identity → right to dignified life → right to communal property over traditional lands*. Indeed, because the right to communal property is recognised as a vehicle for protection of the said special relationship with traditional lands, this conceptual construction has to be understood as *circular* too.

[221] For further reading in connection with the Court's understanding of the right to life in *lato sensu*, see –among others judgments– I-ACtHR, *The Case of the Pueblo Bello Massacre v. Colombia,* Judgment on Merits, Reparations and Costs of January 31, 2006. Series C No. 140, para. 120; and I-ACtHR, *The Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala,* Judgment on Merits of November 19, 1999. Series C No. 63, para. 144.

Last but not least, if the above conclusion is correct, then we can even redraft the conceptual dogmatic equation that has been previously introduced in this chapter[222], in a sense to incorporate into it the latter element referring the right to a *dignified* life. Hence, the new equation would be configured as follows: *indigenousness = special relationship with traditional lands = dignified life*. Consequentially, as an ultimate stage of the Court's reasoning path, we can even conclude that a disrespect of indigenous people's special relationship with their lands would not only amount to a violation of their *right to communal property*, but also –and most importantly– would amount to a deprivation or violation of their *right to a dignified life*. In other words, without having the possibility to fully enjoy the said special relationship, their cultural identity would be seriously affected[223] and, because the latter is considered as a component of the fundamental right to life (in its wider sense)[224], it would also affect their right to life.

This conceptual construction could be regarded –at last– as a *dogmatic "essentialization"* of indigenous identity. In fact, the above mentioned *dogmatic equation* would have –as an epistemological effect– the deprivation of their self-identified *indigenousness* to those large majorities living in urban areas for generations, who have continuously asserted their self-perceived indigenous identity.[225] But also, from an ontological point of view, it has to be regarded as based on an ulterior or additional *essentialization*, which is the assumption of the unchangeable, timeless and even culturally uncontaminated character of indigenous cultures.

Finally, as it has been already stated, the very idea of *deprivation* of indigenous cultural identity, by means of the *essentialization* of one of its regarded objective components, that is, the special relationship with traditional lands, it has to

[222] See above, Section 2, and, for further explanation on why we have chosen the sematic construction of "dogmatic equation", see Chapter IV, Section 2.4. and 4.
[223] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., Separate Opinion by Judge A.A. Cançado Trindade, para. 28.
[224] *Ibid.*
[225] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 25-26; and L. RAY, *op. cit.*, p. 20 et seq.

be considered as quite contrary to the very same ontological understanding of culture and cultural identity. [226]

In short, it seems that not only the *fourfold* relationship has increased its components, becoming a *fivefold* one, but also the above mentioned *essentialist trap* has been growing in *trapped* conceptualisations… and we are still counting.

[226] See, See, UNESCO, *Mexico City Declaration on Cultural Policies*, cit. para. 4; in addition, see our own understandings in Chapter IV, Section 2.4. and 4.

CHAPTER SIX
JURISPRUDENTIAL DIMENSION OF THE RIGHT TO TRADITIONAL LANDS

THE RIGHT TO COMMUNAL PROPERTY AS A 'VEHICLE' FOR A DIGNIFIED LIFE

> *"Cultural identity has historical roots […], it is tied to ancestral lands. We must emphasize that cultural identity is a component or is attached to the right to life lato sensu; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitable suffers."* Judges A. A. Cançado Trindade and M. E. Ventura Robles, I-ACtHR.[1]

1. Introduction

As we saw in the precedent chapter, the Inter-American Court, through an innovative and integrative method of legal interpretation, has recognised as protected under the scope of Article 21 of the American Convention the right of indigenous people to communal property over traditional lands. This method can be characterised as a dynamic, systemic, evolutive, non-restrictive and effective interpretation of the regional and universal human rights instruments (*corpus juris*).[2]

Moreover, the Court has extended the scope of protection of the above mentioned article to the protection of indigenous people's cultural identity, under the understanding that the *special relationship* that they have with their traditional lands is also *the* essential and determinative factor of their *distinguishable* cultural identity. Furthermore, due to the essential role that the said relationship played in connection with their identity and life, the regional tribunal concluded that the maintenance of

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[1] See, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs of June 17, 2005. Serie C No. 125, Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, para. 18.

[2] See, I-ACtHR, *The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 115.

this special relationship is essential for their possibility to enjoy a *life in dignity*, or a *dignified life*. That is, a life in accordance with their own cultural traditions, their own understandings and their own spiritual conception of the world.

Therefore, for the Court, the scope of protection of Article 21 ACHR is extended far beyond the mere tutelage of the right to property. In fact, in the case of indigenous community, this right confuses its own limits with those of the right to life, as protected by Article 4(1) ACHR.

Moreover, under this interpretative light, the access to their traditional territories and natural resources has been considered as indispensable for the preservation of their culture identity and survival as different peoples, but also for the enjoyment of *dignified* standard of living. In this sense, it would be even possible to say –following this argumentative line– that what is truly at stake when indigenous people are deprived of their traditional lands is their own right to life (*lato sensu*), in a sense of being able of develop a life in dignity according to their own cultural parameters and understandings.

In this chapter, we will analyse the implications that this new interpretative angle has in connection with the relevant jurisprudence of the Court, that is, the one related to the cases in which the right of indigenous people to their traditional lands was claimed. In this sense, the most logical starting point will be to address our enquiry in direction of the understanding that the regional tribunal has on the right to life and, in particular in connection with the right to have a *dignified life.*

The methodological approach that we will use in this chapter will be slightly different from the method applied in the precedent chapters; in this case, because our focus will be on the substantive and analytical review of the jurisprudence of the Court, space will be given to the very same *voice* of the regional tribunal. This means that the reader will find in this chapter extensive quotations of the court's rulings but also, and perhaps most importantly within the framework of this study, our own critical legal analysis on these matters. However, before starting with this substantive task, allow me to partially introduce *'the voices'* that you will hear through this chapter.

In effect, with regard to the above mentioned interrelations between cultural identity and the right to life, I would like to quote one of the several enlightening

dissenting opinions Judge A.A. Cançado Trindade formulated in this case together with Judge M.E. Ventura Robles in which they clearly pictured the essence of the regarded relationship. In fact, they have stressed that *"the fundamental right to life takes on higher dimension when the right to personal and cultural identity is taken into consideration; the latter cannot be disassociated from the legal personality of the individual as an international subject."*[3]

Moreover, and with the purpose to clarify the connection between cultural identity and the right to life, the above mentioned Justices also affirmed that *"...cultural identity is a component or is attached to the right to life lato sensu; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitable suffers"* [4], but not only. Additionally, they have concluded with the admonishing reminder that *"...the right to life is a non-derogable right under the American Convention, while the right to property is not [...] the latter is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life."*[5]

Last but not least, it is important to stress the fact that, even if these quotations appertains to a separate opinion of two Judges (in a bench of seven), they are able to reflect an accurate synthesis of the understanding of the Court in this crucial matter.

Therefore, in order to understand better the identified interconnection between the enjoyment of the right to property over traditional lands, indigenous cultural identity and the right to life, or to have a *dignified* life, within the following sections we will undertake a critical analysis of the legal understanding that the Court has in connection with the latter right. That is, the right to property as recognised in Article 4 of the American Convention.

2. The right to (dignified) life and positive measures for its effective protection

[3] See, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*, cit., Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, para. 4.
[4] *Ibid.*, para. 18.
[5] *Ibid.*, para. 20.

According to the jurisprudence of the Court, the right to life –as guaranteed in Article 4 ACHR[6]– is not only a fundamental right; it is an *essential* right for the exercise of all other human rights. If this right is not respected, all other rights do not have sense. For instance, the Court rejects any restrictive approaches to it.[7] In fact, by virtue of the fundamental role that this right has within the Convention, the Court has allocated under the responsibility of the States Parties *"...the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right."*[8]

Therefore, in the views of this regional tribunal, the recognised scope of the right to life is very broad, and includes *"... not only the right of every human being not to be deprived of his life arbitrarily"*, that is, the right to life understood in *stricto sensu*, but not only. It also includes *"...the right that he will not be prevented from having access to the conditions that guarantee a decent existence"*, which means the right to life *lato sensu*.[9] Moreover, it would be possible to read this *twofold* understanding of the right to life together with the general obligation to respect and ensure the enjoyment of fundamental rights incorporated in Article 1(1) of the American Convention.

Consequently, through the joint reading of the above mentioned articles, it would be possible to affirm that States Parties of the Convention have the *negative* conventional obligation to prevent and restrain arbitrary deprivations of the protected

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[6] Article 4 of the American Convention reads as follow: *"(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. (2) In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. (3) The death penalty shall not be reestablished in states that have abolished it. (4) In no case shall capital punishment be inflicted for political offenses or related common crimes. (5) Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. (6) Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."*

[7] See, among others, I-ACtHR, *The Case of the Pueblo Bello Massacre v. Colombia,* Judgment on Merits, Reparations and Costs of January 31, 2006. Series C No. 140, para. 120; I-ACtHR, *The Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala,* Judgment on Merits of November 19, 1999. Series C No. 63, para. 144.

[8] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 151.

[9] See I-ACtHR, *The Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, cit., para. 144.

rights. In addition, they also have the *positive* obligation to guarantee the existence of the necessary conditions that would permit –for instance– indigenous peoples (and all others persons protected by the Convention) to have a *'decent life'*. Accordingly, the Court has stressed the positive obligation of the Member States in the adoption of all appropriate measures, in the light of their obligation to secure the full and free enjoyment of human rights, in order to protect and preserve the right to life.[10]

Additionally, we have to bear in mind that the obligation to take positive measures *vis-à-vis* the protection of the right to life increases its imperativeness in connection to *"...the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face, such as extreme poverty, exclusion or childhood."*[11] In this sense, the Inter-American Court has emphasised –as part of its *'jurisprudence constant'*– that in the case of the right to life, *"...its observance appears in "special ways" in certain circumstances, particularly when the individuals in questions are found in a situation of serious vulnerability."*[12] Therefore, in a case of persons or communities that live in situations of vulnerability or submerged in unacceptable conditions of degradation, States have to adopt all necessary measures that *'reasonably'* and foreseeable could be taken in order to protect and guarantee –in a given concrete situation– the full enjoyment of the right to life and dignity of all people involved.[13] This could be indeed the case of several indigenous communities within the Americas region.[14]

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[10] See, among others, I-ACtHR, *The Case of the Pueblo Bello Massacre v. Colombia*, cit., para. 120; and *Case of the Mapiripán Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 134, para. 232.

[11] See, I-ACtHR, *The Case of the Pueblo Bello Massacre v. Colombia*, cit., para. 111 and 112.

[12] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., Separate Opinion by Judge Cançado Trindade, para. 29; and I-ACtHR, *The Case of the Gómez-Paquiyauri Brothers v. Peru,* Judgment on Merits, Reparations and Costs of July 8, 2004. Series C No. 110, para. 124.

[13] As an example of concrete situation in which States have the obligation to take positive measures to protect and prevent possible restriction or deprivation on the enjoyment of the rights guaranteed by the Convention, we can recall the living conditions of the members of the *Sawhoyamaxa Community*. They were not only deprived of their traditional land, but also and as a consequence of that, were characterised by *"...unemployment, illiteracy, morbidity rates caused by evitable illness, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes..."* See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 168.

[14] In connection with the situation of indigenous people in Latin America, see our considerations in Chapter V, Section II; and –among other authors– R. STAVENHAGEN, *Cultural Diversity in the Development of the Americas. Indigenous Peoples and States in Spanish America*, Organization of American States (OAS), 2002; L. RAY, *Language of the land. The Mapuche in Argentina and Chile*,

As we also saw in our previous chapters[15], positive measures have to be *concrete* and determined, according to the particular needs for protection of the subject of law, either owing to his or her personal situation or to the specific situation in which a concrete individual finds himself or herself.[16] Moreover, they also have to be *reasonable* in the sense that States have to be able to accomplish them. In fact, any positive measure that exceeds the available resources of the State, in a sense that generate an impossible or *disproportionate burden* that would impair the accomplishment of its current affairs, can no longer be considered as reasonable. Therefore, in case of the latter situation, it would most likely not generate States' responsibility for the lack of preventive measures that –consequentially– could have led or contributed to a violation of one of the conventionally protected rights. In other words, States cannot be considered responsible for *all* situations in which the right to life it would be at risk.

In this sense, the Inter-American Court has acknowledged that *'budgetary'* restrictions could indeed affect the adoption of public policies and –hence– the operative choices that Member States have to take in order to combine the available resources with the priorities that have to be addressed and satisfied in a democratic society, but not only. The Court has also recognised that *"...positive obligations of the state must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities."* [17] Moreover, the Court has added, as a pre-condition for the raising of these positive obligations, that in every given case *"...it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or a group of individuals, and that the*

Copenhagen, 2007, and L. GIRAUDO, *La Questione Indigena in America Latina*, Roma, 2009, in particular p. 13-39. For a more general overview in connection with the situation of indigenous people in the world, see Chapter IV, Section 1 et seq.; see also, ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, International Labour Standards Department, 2009; R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, in UNDP Occasional Paper, 2004/14, 2004; and R. STAVENHAGEN, *Indigenous Issues. Human rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, subitted pursuant to Commission resolution 2001/*57, UN Doc. E/CN.4/2002/97, United Nations, 2002.

[15] See, Chapter II, Section 3.

[16] Particular needs could be grounded on personal conditions, such as illness, elderly, pregnancy, etc., or on specific situation that under which members of these populations could be subjected to, such us extreme poverty, exclusion, childhood or forced displacement.

[17] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 155.

necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk."[18]

Therefore, according to the Court, in order to establish the international responsibility of the States, three elements must be present at the time in which the violation of the general obligations –embodied in Articles 1(1) and 2 of the American Convention– occurred. These three elements are the following: (a) the existence of an objective and concrete situation of risk for –in this case– the life of the individuals involved; (b) the acknowledgement by the State of that specific situation, in a sense that the State knew it or should have known it through the deployment of a due diligent conduct; and (c) the inactivity of the authorities in taking all of those measures that could be *reasonably* expected in a pluralist and democratic society –according to available resources– to prevent or avoid such risks. Moreover, in connection with the latter element, it would be necessary to establish its causal relation with the vulnerable situation in which the members of the affected groups live; in other words, a *relationship of causality* must exist between the State action, negligence or omission and the deplorable living conditions of the alleged victims.[19] If these conditions are met in a given case, the international responsibility of the State would arise, as a consequence of the violation of the general obligations embodied in Articles 1(1) and 2 of the American Convention.[20]

This jurisprudence on positive measures is indeed applicable to those cases in which indigenous communities' interests and claims are involved. In these cases, in order to establish the States' responsibility for possible violations of their obligation to guarantee the full enjoyment of the conventional rights, the analysis has to be focused on what the Court has regarded as their *distinctive* characteristics. That is,

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[18] *Ibid.* See also, I-ACtHR, *The Case of the Pueblo Bello Massacre v. Colombia*, cit., paras. 123 and 124, see also *Kiliç v. Turkey* (2000) III, EurCourt HR, 63, *Öneryildiz v. Turkey*, application no. 48939/99, EurCourt HR [gc], Judgment 30 November 2004, 93, and *Osman v. the United Kingdom* (1998) VIII, 116.

[19] See on this point, J. M. PASQUALUCCI, *The right to a dignified life (vida digna): The integration of economic and social rights with civil and political rights in the Inter-American Human Right System*, in *Hastings International and Comparative Law Review*, 31, 2008, p. 1 et seq.; and S. R. KEENER, J. VASQUEZ, *A life worth living: Enforcement of the right to health through the right to life in the Inter-American Court of Human Rights*, in *Columbia Human Rights Law Review*, 40, 2009, p. 595 et seq..

[20] See –among others– I-ACtHR, *The Case of the Pueblo Bello Massacre v. Colombia*, cit., para. 111; I- *Case of the Mapiripán Massacre v. Colombia.*, cit., para. 111; and *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 140.

with due regard to their different manner or *way of life* and of their life aspirations[21] –both individual and collective– and taking into account the existing international *corpus juris* regarding the especial protection deserved by its members.[22] This means that –for the Court– positive measures, in order to be adequate and effective in the prevention and abolition of those concrete risks that affect or could affect the life of the members of the indigenous communities, have to take into account the *factual* vulnerability in which these communities live, but not only. In addition, they also –and perhaps even most relevant for the purpose of our study– have to be adapted, accommodated to their different worldviews and valuative systems, which include –as we saw in the precedent chapter– their *special relationship* with their traditional lands.[23] To summarise, positive measures have to pay due regard to indigenous peoples' cultural identity and diversity.[24]

Relevant, in order to test this jurisprudential approach of the Court, are those cases in which the regional tribunal has dealt with displaced indigenous communities, especially because the said displacement has factually generated –for the members of those communities– situations of extreme vulnerability. Therefore, the Court has required a pro-active role of the public authorities in order to neutralise the risks against their lives. This has happen specifically in the cases of the *Yakye Axa*[25] and *Sawhoyamaxa*[26] Indigenous Communities in Paraguay. In fact, according to the Court, the lack of lands and access to natural resources has generated –for the members of these communities– extreme destitute conditions. Moreover, it has

[21] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118, 146(a), and Separate Opinion of Judge Ventura-Robles, p. 13. See also, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs of June 17, 2005. Serie C No. 125, Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, para. 18

[22] In order to draw a clear legal framework in which the expected positive measures would be grounded *vis-à-vis* the protection of right to life of the members of these communities, the Court made reference to the connected articles of the Convention, merely Article 1(1) and 26 (duty of progressive development), but not only. It also referred to the pertinent provisions of the ILO Convention No. 169 and to those enshrined on the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and cultural Rights "Protocol of San Salvador" (El Salvador, November 17, 1988), in particular to Article 10 (Right to Health); Article 11 (Right to Healthy Environment); Article 12 (Right to Food); Article 13 (Right to Education); and Article 14 (Right to The Benefits of Culture). For our considerations in connection with the ILO Convention, see Chapter V, Section 6.1.1. and 6.2.

[23] See, Chapter V, Section 6.2. and 7. See also, for a more theoretical approach, Chapter IV, Section 2.2.4.

[24] See I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, cit., para. 163.

[25] *Ibid.*

[26] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit.

deprived them of appropriate housing with basic minimum services (clean water and toilets), and generated a general malnutrition among the population. In particular, the Court has emphasised the *"...special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing and gathering."*[27]

Therefore, in the case of these displaced communities, the Court has considered that the lack of access to traditional lands and the use and enjoyment of the natural resources (traditionally used by them), have prevented their members from the full exercise of the right to food and access to clean water[28], but not only. It has also produced *"...a major impact on the right to a decent existence and basic conditions to exercise other human rights, such to a right to education or the right to cultural identity."*[29] Indeed, under the views of the Court, their displacement and the consequent deprivation of access to their traditional lands and resources have jeopardised the very enjoyment of their *right to life* in a *broad sense*[30], which encompasses the conditions of a *life with dignity* and the necessary preservation their cultural identity.[31]

Therefore, following the reasoning of the Court, it would be possible to say that the right to life (in a broad sense) has been affected by the displacement. This is

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[27] *Ibid.*, para. 164-167.

[28] The Court made references in this regard to the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR). In particular, referred to those in which the special vulnerability of the indigenous peoples' groups were highlighted by the Committee because of lack of access to means of obtaining food and clear water due the imposed threat on their access to their traditional lands. See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117, cited by the I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, cit., para. 167.

[29] *Ibid.,* para. 167.

[30] In the case of the Sawhoyamaxa Community, the Court emphasised the fact that they had suffered the deprivation of their lands, but not only. Additionally, it stressed the fact that the life of their members was characterised by *"...unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes..."* See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 168.

[31] Judge A.A. Cançado Trindade described the situation of the situation of the *Sawhoyamaxa Community* as follow: *"Some of the members of the Sawhoyamaxa Indigenous Community died when they were only days, or weeks, or months, old. They died in total want, as they had lived, in the humiliation of total want (that is the deprivation of all human rights), along the roadside (...), most probably unable to develop a life project."* See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., Separate Opinion by Judge A.A. Cançado Trindade, para. 18.

because the intrinsical disruption that any displacement has in the life of those affected by it (indigenous or non-indigenous alike); but also because –according to the reasoning of the Court– for these communities, *"[l]iving on their ancestral lands is essential to cultivate and preserve their values, including communication with their forebearers."*[32]

In this sense, as Judge A.A. Cançado Trindade concluded in his separate opinion in the case of *Sawhoyamaxa Community* (views shared in this case with the majority of the Court[33]), *"[a]n attack against cultural identity […] is an attack against the right of life lato sensu, the right to live, with the aggravating circumstances of those who actually died. A State cannot release itself from the due diligence duty to safeguard the right to live."*[34] Consequently, the Court has considered that such deaths were attributable to the *"...lack of adequate prevention and the failure by the State to adopt sufficient positive measures, considering that the State had knowledge of the situation of the Community and that action by the State could be reasonably expected."*[35]

Therefore, from the reading of the Court's jurisprudence –taken as a whole– related to those cases in which indigenous peoples' right to communal property was involved, it would be possible to identify *three main logical steps* that tie together the legal protection of this right with the enjoyment of a *dignified life*. These three logical steps are the following: (a) first, the protection of the right to life includes not only the prohibition of its arbitrary deprivation (negative obligation) but as well the generation of all of those conditions that would permit and facilitate its full enjoyment, merely, those that would generate conditions for a *decent life* (positive

[32] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., Separate Opinion by Judge Cançado Trindade, para. 30.

[33] In the *Yakye Axa Case*, the majority of the Court (five votes to three) decided that the evidence to prove the violation of the Right to life, vis-à-vis sixteen members of the Community, was not sufficient in order to consider such deaths as attributable to the States. See, I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, cit., operative para. No. 4.

[34] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., Separate Opinion by Judge A.A. Cançado Trindade, para. 33.

[35] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 176 and –additionally– Operative Paragraphs No. 3. As illustration of the inappropriate response gave by the State of Paraguay, the Court stressed the fact that a mere declaration of state of emergency cannot be considered sufficient and adequate, adding that *"...for six years after the effective date of the order, the State only delivered food to the alleged victims on ten opportunities, and medicine and educational material in two opportunities, with long intervals between each delivery. […] These deliveries, as well of the amounts delivered, are obviously insufficient to revert the situation of vulnerability and risk of the members of this Community and to prevent violations to the right to life…" Idid.,* para. 170.

obligations)[36]; (b) secondly, positive obligations include the generation of those conditions that would permit an equal enjoyment for each member of the society of their own right to cultural identity; (c) and finally, in the case of indigenous peoples, *as long as* their cultural identity is seen as intimately connected with their traditional lands, positive measures must include adequate legal and material protection for this especial relationship.

In other words, among those *positive obligations* that each State Party to the American Convention has to take, in order to guarantee the full enjoyment and access to *'decent'* conditions of life for all members of the society (and especially for those that find themselves in a vulnerable situation)[37], the Court has included the recognition and legal protection –within the national legal system– of the right of indigenous people to *communal property* over their traditional lands and resources. This would be nothing but a full observation of the general obligation of domestic implementation enshrined in Article 2 of the Convention.[38]

Moreover, it is important to bear in mind that this particular and consequential reasoning of the Court is grounded on the specific *vulnerable* situation in which these people live in general. But also, and perhaps more relevant for the scope of this study, it could be considered as based on the intrinsic and constitutive nature that traditional lands have *vis-à-vis* their identity, and –hence– on the enjoyment of *'decent'* conditions of life (dignified life); conditions that have to necessarily take into account their own culture, understandings, traditions and world

[36] See I-ACtHR, *Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 7, 2003. Series C No. 99, para. 110.

[37] Under the *'jurisprudence constant'* of the I-ACtHR, the obligation to take positive measures *vis-à-vis* the protection of the right to life increases its imperativeness according to *"…the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face, such as extreme poverty, exclusion or childhood."* See, I-ACtHR, *The Case of the Pueblo Bello Massacre v. Colombia*, cit., para. 111-112.

[38] According to the Court, the adjustment of the domestic legislation to the parameters established in the Convention implies the adoption of two different measures: "*i) the elimination of any norms and practices that in any way violate the guarantees provided under the Convention or disregard the rights therein enshrined or obstruct its exercise; and ii) the promulgation of norms and the development of practices conductive to the effective observance of those guarantees. The first kind of measures is satisfied with the amendment, the repealing or annulment, of the norms or practices that are within such scope, if applicable. The second one imposes an obligation on the States to prevent further violations of human rights and therefore, to adopt all legal, administrative and other measures necessary to prevent further occurrence of similar facts."* See, I-ACtHR, *Case of Salvador-Chiriboga v. Ecuador. Preliminary Objections and Merits.* Judgment of May 6, 2008 Series C No. 179, para. 122.

views.[39] In short, under the views of the Court, positive actions have become an integrative part of what has been called in the precedent chapter a conceptual *fivefold circular relationship*, which –in this sense– it has become a *sixfold relationship.*[40]

Furthermore, this intrinsic interconnection between the enjoyment of traditional lands and resources and the access to decent conditions of life, would lead to an additional conclusion. That is, without the recognition of the communal property over their traditional lands, in accordance with its regulation in their customary laws, the life of the members of indigenous communities (in its all-inclusive understanding) would be under threat.[41] Indeed, within the *axiological construction* made by the Court, it is in the intimate and close union with their land that indigenous peoples find the possibility to build and develop their life, according to their own understanding, worldviews and traditions. Furthermore, without that connection, their own *'project of life'*[42] would become *meaningless* due the impossibility to live a *'dignified life'*, merely, according to their own understanding of dignity.[43]

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[39] The line of thought drawn in this paragraph was fully embraced in the *Case Yakye Axa Community*, especially when Judges Cançado Trindade and Ventura Robles emphasized the fact that even if the right to life *"...is a non-derogable right under the American Convention, while the right to property is not [...] the latter is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life."* See, I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, cit., Separate Dissenting Opinion of Judges A.A. Cançado trindade and M.E. Ventura Robles, para. 20.

[40] We have already defined as a *fivefold circular relationship* the conceptual notion integrated by the following notions: *traditional lands → culture → identity → right to dignified life → right to communal property over traditional lands* (see, Chapter V, Section 7). With its new configuration, the *sixfold relationship* it would be composed as follow: *traditional lands → culture → identity → right to dignified life → positive actions → right to communal property over traditional lands*. I will come back later in this chapter to the conceptual implication of this notion, in particular vis-à-vis the notion of *indigenousness* and its ontological implications. But for now, as it has been stated in the introductory section, let us to continuously listen to the *voice* of the Court.

[41] In fact, the Court expressly recognised that in the case of indigenous communities *"...any denial of the enjoyment or exercise of their territorial rights is detrimental to value that are very representative for the members of said peoples, who are at risk or losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations."* See, I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, cit., para. 203.

[42] In connection with the understanding of the Court toward the concept of project of life, see I-ACtHR*, The Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, cit., para. 144; and I-ACtHR, *The Case of Loayza-Tamayo v. Peru*, Judgment on Reparations and Costs of November 27, 1998. Series C No. 42, para. 147 and 148.

[43] This kind of legal reasoning has already been considered as a sort of *essentialization* of the indigenous people identity, in a sense that their identity is conceptually reduced to the existence of a single objective element, namely the *special* relationship with traditional lands. For more detailed explanations in connection with this *dogmatic equation* (indigenousness = relationship with traditional lands), se our considerations in Chapter IV, Sections 2.2.4., 2.4. and 4; and Chapter V, Section 2 and 7.

In conclusion, according to the jurisprudence of the Court, in the specific case of indigenous communities, the negation of the recognition of the right to property of their traditional lands, would amount to a violation of Article 21 of the American Convention, but not only. It would also comprise of an infringement of the right to life as protected by Article 4(1), read in accordance with the dispositions contained within Article 1(1) of the same instrument (Obligation to Respect and Protect)[44]. Obviously, this would always be dependent upon the specific and concrete circumstances of a given case.

Finally, and as a *colophon* of this section, it would be important to clarify that the responsibility of the States Parties of the Convention to *'positively'* guarantee the enjoyment of the recognised rights generates a consequential and equal responsibility on the *assessment* of the situation of vulnerability that could possible affect these populations, but not only. It would also generate the connected responsibility regarding the *determination* of the adequate and efficient positive measures that have to be taken in order to neutralise possible violations in connection with potential rights at stake. This means that the States have –or *must have*– a *margin of appreciation* on the determination of the factual situation of a given case, and with regard to the individualisation and implementation of tailored solutions.[45] Indeed, States are those that have to assess the real situation of vulnerability that affect these populations, and have to establish the adequate remedies for the protection of their members, but –of course– with due consideration of the available *budgetary possibilities*. In fact, in balancing the operative choices among the different public policies that state authorities have to take, in order to satisfy the different social needs in a democratic society, they always have a *certain* margin of appreciation... *as*

[44] In the case of the members of the Yakye Axa Community, the Court established that the State of Paraguay not only did not guarantee their right to communal property, but as well the Court deemed that *"...this fact has had a negative effect on the right of the members of the community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clear water and to practice traditional medicine to prevent and cure illnesses."* See, I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, cit., para. 168.

[45] Without entering at this stage on the analysis of the doctrine of the national margin of appreciation or discretion, it is important to clarify that –generically speaking– it refers to *"...the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, to constitute a violation of one of the Convention's substantive guarantees."* See, H. Ch. YOUROW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, The Hague/Boston/London, 1996, p. 13.

long as they do not infringe with their operative choices on the rights and freedoms conventionally guaranteed.[46]

Without a certain degree or margin of appreciation States would have their hands tied and –hence– they would not be able to provide a rapid and adequate solution to those cases at stake. This –of course– does not mean that they would have absolutely free hands in their assessments and decisions; whenever conventionally protected rights are involved, the Inter-American Court has the competence to analyse whether the State ensured the human rights of the members of the involved communities.[47] Notwithstanding, from the reading of the case law, it seems that would be possible to perceive a certain *reluctant* attitude on the side of the Court with regard to properly name and openly verbalise the use of the *'margin of appreciation doctrine'*. This without prejudice to say that, it seems to be quite clear what the Court has had in mind, when it has adjudicated the above mentioned indigenous lands' claims... Because of the relevance of this topic, we will continue with its analysis within the incoming sections.

3. Jurisprudential regulation of the right to communal property over traditional lands and territories

As it has been established in the precedent paragraphs, the right to communal property that indigenous peoples enjoy upon their traditional lands is recognised –by the Inter-American Court– as protected by Article 21 of the American Convention. Accordingly, and for *imperium* of the dispositions enshrined in Articles 1(1) and 2 of the same instrument, States Parties have the positive obligation to adopt special measures that will guarantee the full and equal exercise of their rights over the territories they have traditionally used and occupied, especially taking into account –for that purpose– indigenous peoples' customary law.[48] In other words, for the Court,

[46] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 155.
[47] *Ibid.*, para. 136.
[48] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I-ACtHR, Series C No. 79. Judgment on Merits, Reparations and Costs of August 31, 2001, para. 151; and I-ACtHR, *the Case of Saramaka People v. Suriname*; Judgment on Preliminary Objections, merits, Reparations, and Costs of November 28, 2007. Series C No. 172, para. 91.

the recognition of the right to communal property should be done in accordance with indigenous people's own traditions and land-tenure systems.[49]

The States obligation to protect and guarantee indigenous land-tenure systems, when recognising the right to property over their traditional lands in accordance with the disposition of the Convention, has been explicitly held by the Court in the *´Saramaka Case´*. In it, the regional tribunal has recognised that the right of the member of these communities to *"...freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied."*[50] This recognition finds its ground not only in the *'praetorian'* jurisprudence of the Court, but also in the wording of the UN Declaration on the Rights of Indigenous Peoples which states in its article 26(3) that *"[s]uch recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."*[51] Similar references can be found within the dispositions of the ILO Convention No. 169. [52]

For the Court, the inclusion of the indigenous peoples' understanding of communal property under the protective umbrella of Article 21 of the Convention responds to the general obligations that lie upon the States, according to Articles 1(1) and 2 of the same instrument, but not only. Additionally, also it is by virtue of the application of the *principle of effectiveness* and *non-restrictive* and *dynamic interpretation* of the right to property, which permits its expansive and inclusive interpretation.[53] In other words, for the Court, the interpretation of the right to

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[49] According to the Court, *"...indigenous communities might have collective understanding of the concepts of property and possession, in the sense that ownership of the land "is not centered on an individual but rather on the group and its community". The notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention."* See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 120.

[50] See I-ACtHR, *the Case of Saramaka People v. Suriname*, cit., para. 95-96.

[51] With regard to the UN Declaration on the Rights of Indigenous Peoples, see our considerations in Chapter IV, Sections 3.3.; and Chapter V, Section 6.1.2.

[52] In fact, the ILO Convention not only recognises the right to ownership and possession over the lands traditionally occupy (Article 14(1)), but as well emphasises the fact that *"[i]n applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws",* adding also that *"[t]hese peoples shall have the right to retain their own customs and institutions"* (Article 8(1)(2)). Therefore, for the ILO Convention, the recognition of the right to communal property shall be done under the light of these two premises. In connection with this Convention, see our consideration in Chapter IV, Sections 3.2.; and Chapter V, Section 6.1.1.

[53] In connection with the general rules of interpretation applied by the Court, see Chapter V, Section 5.

property would have to necessarily take into account the culture, uses, customs, and beliefs of each ethno-cultural aggregation (or at least an accommodative synthesis of its main understandings or salient cultural characteristics). Otherwise, it *"...would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons."*[54]

However, we have to bear in mind that the terms and notions incorporated and recognised within the Convention have *autonomous* and *independent* meanings and –hence– cannot and must not be considered as subordinated to the national legal systems. Therefore, it would be equally unavoidable to conclude that the same notions and terms enshrined within the Convention cannot and must not be subordinated to the indigenous peoples' notions and traditional regulations. In other words, when the Court states that the regulation of the communal property has to be done taking into account the indigenous' lands tenure-systems, means that the right to property conventionally recognised includes –in its autonomous meaning– the collective dimension of it. Hence, States have to incorporate this notion into their respective domestic legislations by virtue of the generic obligation enshrined within Article 2 of the Convention. Nevertheless, this does not absolutely mean that States have the conventional obligation of recognise general legal status to the traditional legal systems that could have remained in force among indigenous communities.[55]

Notwithstanding, the legal recognition of the indigenous peoples' communal property *per se* would be absolutely worthless or meaningless, if their traditional lands and territories are not physically individualised and delimited. In fact, it would only consist in an abstract recognition of this right without any concrete and

[54] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 120.

[55] In fact, another aspect of the recognition of the autonomous meaning of the right to communal property that could be stressed is that its jurisprudential acknowledgement does not mean that the Court directly or indirectly has recognised the existence of the plurality of legal orders in the Americas. In other words, it does not mean that the indigenous peoples' legal systems have gained conventional enforceable authority within the territories of the Members States. The hypothetical conventional recognition of this plurality would not only be contrary to the very legal structure of the American Convention, that sees the States as the exclusive responsible actors (and therefore with the exclusion of parallel legal systems), but also it would exceed the proper material competence of the Court. From a broadest perspective, which is from a socio-political point of view, indigenous legal systems could indeed be incorporated within the national legal systems, but this incorporation would depend on the results of what we have called *the democratic game*. In connection with this latter remark, see our considerations in Chapter I, Section 4.2.; and Chapter II, Section 5.

protective effect. Indeed, according to the Court, *as long as* the special relationship that these populations maintain is related to their *'traditional'* lands and territories, it seems that that particular spiritual/material connection would *only* exist if is related to those *specific* and *particular* lands, namely, their *'traditional'* lands, and not others. In this sense, the Court has stated that *"...a strictly juridical or abstract recognition of indigenous lands, territories or resources lacks true meaning where the property has not been physically established and delimited."*[56]

Therefore, following the reasoning of the Court, among the *positive measures* that state authorities have to take, in order to ensure the enjoyment of the right to collective property of indigenous people, we have to include the *obligation to identify, delimit, demarcate, grant title deed and formal transfer of these traditional lands*. In fact, it is the State that has the technical and scientific means to carry out these tasks.[57] In other words, it is not for the regional judicial body to define or identify the traditional territory that should be demarcated and titled; the obligation of identification and demarcation rebound over the Member States. However, it is important to bear in mind that the Court always retains the competence to analyse whether the State in question has ensured and guaranteed the right of the members of the indigenous communities to their traditional lands, as enshrined in Article 21 of the American Convention.[58]

Because of its importance for the concretisation or materialisation of the right to property over traditional lands, within the incoming sections, we will try to identify, the jurisprudential requirements delineated by the Court, for the identification, demarcation and titling of those lands, for the benefit of the involved indigenous communities.

4. Identification and delimitation of traditional lands: the role of 'traditional' possession

[56] See, I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment on Merits, Reparations and Costs, cit., para. 143.
[57] See I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay. Interpretation of the Judgment of Merits, Reparations and Costs.* Judgment of February 6, 2006. Series C No. 142, para. 23.
[58] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 215.

Since the beginning of its jurisprudence in addressing indigenous people's land claims, the Court stressed the responsibility of the States in the delimitation, demarcation and titling of the territories belonging to these communities.[59] And –consequently– their conventional obligation on the adoption of the national regulations and all other necessary measures for the creation of effective domestic mechanisms needed in order to fulfil these duties.[60]

Furthermore, the Court has interpreted the above obligations as part of the compensations that States owe to the affected populations (due the international responsibility generated by an attributable violation of a right conventionally guaranteed)[61]; for this reason, it has even clarified that the State obligation to identify the traditional territories has to be honoured *free of charge*.[62] This holding can be seen as in line with the standards enshrined within Article 14(2) of the ILO Convention No. 169, which states that *"[g]overnments shall take steps as necessary*

[59] According to the UN *Special Rapporteur* Mrs. Erica-Irene A. Daes *"[d]elimitation of the lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked."* In this last remark, we can find a great similarity with the reasoning showed by the Inter-American Court that lay at the very base of the recognition of these obligations lying on the head of the States. See E.-I. A. DAES, *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2001/21, United Nation, 2001, para, 50 et seq.; see also –from the same author– E.-I. A. DAES, *Indigenous Peoples' Rights to Land and Natural Resources*, in N. GHANEA, A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination*, Leiden – Boston, 2005, p. 82.

[60] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., op. para. 4; see also, *Case of the Moiwana Community v. Suriname. Interpretation of the Judgment of Merits, Reparations and Costs.* Judgment of February 8, 2006. Series C No. 145, para. 19.

[61] The restitution of the traditional lands as one of the reparation measures that the Court recognised in its jurisprudence will be addressed at the final stage of this chapter. Nevertheless, for introductory analysis of this topic, see –among others- G. CITRONI, K. I. QUINTANA OSUNA, *Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, Oxford, 2008, p. 317 et seq.; S. J. ANAYA, *Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law - The Maya Cases in the Supreme Court of Belize*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, Oxford, 2008, p. 567 et seq. For and oerview of the jurisprudence of the Court in this matter, see also C. GROSSMAN (ed.), *Reparatinos in the Inter-American System: A Comparative Approach*, in *American University Law Review*, 56, 2007, p. 1375-1433.

[62] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., op. para. 6.

to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession."[63]

Pursuant to the foregoing, the Court has provided *pregnant* and consistent guidelines in connection with the premises under which the State has to conduct and fulfil the above mentioned obligations. At the core of those guidelines we can identify –as an overarching principle– the obligation that the entire process connected with the traditional lands has to be conducted in *consultation* with the affected indigenous communities (the so-called "*the duty to consult*" or "*principle of consultation*"). The right to participate in this process is not only a very well established standard in international human rights law[64], it has also been embraced and enforced by the Court in its jurisprudence.

In fact, according to the Court, in the process of identification, demarcation and titling of the traditional lands, the States Parties have to give *"...careful consideration to the values, uses, customs and customary laws of the members of the community, which bind them to an specific territory."*[65] Moreover, in order to identify which is the land-tenure system connected with their traditions and customary laws, the responded State must conduct a *"...previous, effective and fully informed consultations"* with the communities involved.[66] Furthermore, this process of consultation has to be –in itself– conducted with due respect for their customs and

[63] Similar disposition can be found within the UN Declaration on the Rights of indigenous Peoples, in particular in Article 26(3), which states that *"States shall give legal recognition and protection to these lands, territories and resources...",* and Article 27, which states –in its first part– that *"States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems…"*

[64] The ILO Convention No. 169 has taken a clear stand in this sense, by establishing –as a State responsibility– in its Article 6(1)(a), the obligation to *"...consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly"*; the same principle can be found in Article 27 of the UN Declaration on the Rights of Indigenous Peoples. In connection with this obligation, see S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya*, UN Doc. A/HRC/12/34, Human Right Council, 2009, p. 12 et seq. See also, Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Progress report on the study on indigenous peoples and the right to participate in decision-making*, UN Doc. A/HRC/15/35, Human Rights Council, 2010, in particular, p. 17 et seq

[65] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 26.

[66] See I-ACtHR, *the Case of Saramaka People v. Suriname*; Judgment on Preliminary Objections, merits, Reparations, and Costs, cit., para. 194(a).

traditions, including the designation of the representatives of these communities with which States have to interact in *good faith* during the necessary consultations.[67]

Therefore, after the establishment of the land-tenure system's framework applicable to the case, the claimed traditional lands have to be physically identified and delimited. For this purpose, the Court has recognised the *'traditional'* possession exercised by indigenous communities as a central and decisive element. In fact, the lands that have to be identified and titled to these communities would be those that indigenous peoples *traditionally have had* under their possession; this means that *"possession of land should suffice when it comes to obtaining official recognition of the property and the consequential registration."*[68] Indeed, bearing in mind the unique and enduring ties that bind indigenous communities to their ancestral lands, the Court has emphasised that *"...in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices –yet who lack real title to the property– mere possession of the land should suffice to obtain official recognition of their communal ownership."*[69]

The recognition of the protection of the communal understanding of the right to property, according to the traditional normative systems of the indigenous communities, has –as one of its fundamental consequences– the modification of the requirements for its legal *domestic* recognition and titling. In fact, States Parties of the American Convention cannot argue, after the authoritative interpretation made by the Court[70], that the lack of registration or real title of property, in the specific case of indigenous communities, makes impossible or unfeasible its legal recognition.[71]

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[67] See I-ACtHR, *Case of the Saramaka People v. Suriname, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185, para. 15 et seq.

[68] See I-ACtHR, *Case of the Moiwana Community v. Suriname*, *Interpretation of the Judgment of Merits, Reparations and Costs*, cit., para. 8.

[69] See I-ACtHR, *Case of the Moiwana Community v. Suriname. Merits, Reparations and Costs.* Judgment of February 8, 2006. Series C No. 145, para. 131.

[70] In this sense, Article 62(1) ACHR clearly states that *"[a] State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention."*

[71] According to the former UN Special Rapporteur, Mr. Martínez Cobo, *"...[m]illenary or immemorial possession should suffice to establish indigenous title to land, official recognition and subsequent registration, in the absence of specifically applicable legislative or executive measures explicitly extinguishing aboriginal rights."* And, in order to explain why the traditional possession should prevail over any domestic limitation, he added that *"...[a]s these rights are not "created" by legislation, neither should they be extinguished by unilateral acts."* Even if this last statement could

Domestic requirements or regulations cannot and must not limit or restrict the recognition of the conventional rights or modify the consequential obligations lying on the Member States' shoulders.[72] Moreover, according to the jurisprudence of the Court, for the involved communities, *possession* relates to traditional occupation[73], and the latter to the recognition of the right to communal property.

Therefore, from the above argumentations, we can conclude that the establishment and elucidation of the factual existence of the *traditional possession* is essential for the recognition of indigenous' property rights over the claimed lands and territories. In this sense, the natural flow of the argumentation shifts toward the analysis of the traditional possession in itself, to its elements and burden of proof, and –in particular– with especial regard to its cultural aspects which are the very nutshell of this enquiry.

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be interpreted in a sense that the foundation of the indigenous people's right to property would be grounded in *'natural law'* or in pre-existed legal systems (*vis-à-vis* the national modern legal orders), that have no real importance because the protection granted by the Court is based in none of these argumentation. The Court's acknowledgement is exclusively based on the formal and conventional recognition of the right to property made by the Convention. The fact that the indigenous' communal understanding of the right to property is conventionally protected, has to be considered as a reflexion of the original decision made by the Member States when they decided to draft and adopt the American Convention. Of course, not under the original reading of that particular *momentum* but according to accommodative reading made by the Court, which is the authoritative organ predetermined by the States for the final and authentic interpretation of the Convention. The factual situation of the immemorial possession becomes juridically relevant *exclusively* because it is considered as enshrined within the scope of protection of conventional the right to property (Article 21 ACHR). In fact, if we read the following paragraph the of the *'Cobo's Study'* when he expressly admitted that *"...[r]ecognition here means acknowledgement of a 'de facto' situation that provides a basis for the existence of a right..."*, we can probably conclude that what was the real intention of the author was to stress the historical process of the emergence of the indigenous rights in international law. See, J. R. MARTÍNEZ COBO, *Study of the Problem of discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations,* UN Doc. E/CN.4/Sub.2/1986/7/Add.4, New York, 1987, para. 214-217.

[72] As it has been pointed out before, pursuant to Article 2 of the Convention, *"...States not only have an affirmative obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognized in the Convention, but must also refrain both promulgating laws that disregards or impede the free exercise of these rights and from suppressing or modifying the existing laws protecting them."* See I-ACtHR, *Case of Dacosta-Cadogan v. Barbados. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 24, 2009. Series C No. 204, para. 68. See also, *Case of Castillo-Páez v. Peru. Reparations and Costs.* Judgment of November 27, 1998. Series C No. 43, para. 207; *Case of Heliodoro-Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 12, 2008. Series C No. 186, para. 57; and I-ACtHR, *Case of Salvador-Chiriboga v. Ecuador*, cit., para. 122.

[73] Possession remains central for the recognition of the right to property; nevertheless, in connection with the right to use those lands not exclusively occupied by these communities, possession is not an essential requirement. What is relevant in the latter case is the fact to have had traditionally access to them for the purpose of their subsistence and the development of traditional activities. The same could be applied with regard to the situation of nomadic peoples and shifting cultivators in this respect (See, Article 14(1) of the ILO Convention No. 169).

4.1. Traditional possession: international legal standards

As it has been pointed out before, a rightful departing point in connection with the international standards applicable to indigenous people's land-tenure systems, and in particular to their traditional possession, is the ILO Convention No. 169. In fact, with regard to the latter, this instrument states –in its Article 14(1)– that *"[t]he right of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised…"* Additionally, it clearly imposes a convergent obligation to the States Parties, who *"...shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy..."*[74]

In the same line, the UN Declaration on the Rights of Indigenous Peoples holds, in its Article 26(1), that *"[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."* Moreover, in order to clarify which lands are included within these rights, the following paragraph clearly states that *"...the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use..."*[75]

From the join reading of these two instruments, it would be possible to conclude that the *'traditional occupancy'*, in terms of possession or different use of the lands or territories, has to be regarded as essential for the recognition and enjoyment of these culturally tailored rights. But, what does it mean to *'traditionally'* occupy a land? Which are the elements of *'traditional occupancy'*? Has the Inter-American Court elaborated upon these two questions any consistent jurisprudence? Within the following paragraphs, we will attempt to provide a reasonable answer to these questions.

First of all, if we focus on the interpretation made in the *ILO Guide* of Article 14 of the ILO Convention No. 169, the lands traditionally occupied are defined as those *"...lands where indigenous peoples have lived over time, and which they want*

[74] Article 14(2), ILO Convention No. 169.
[75] Article 26(2), UN Declaration on the Rights of Indigenous Peoples.

to pass on to future generations." In addition, the guide expressly emphasises the fact that *"[t]he establishment of indigenous peoples' land rights is thus based on the traditional occupation and use..."* [76]

As we saw within the previous chapters, *'traditional practices',* in connection with the regime of possession and occupancy of the lands, are regarded as vital for the construction of the indigenous peoples' identity.[77] In fact, it has been stressed that it is the particular way through which these communities relate with their lands, and the centrality these lands have in their spiritual conception of the world and life, that make them –as a group– *different* and *distinctive* from the largest part of the modern societies. Indeed, the justification of the protection of right to communal property, under a differential legal regime is precisely grounded on the need of protect their culture, traditions and worldviews, which are seen as reflected in their traditional attachment to the land, and –in other words– in their traditional possession and use.[78]

Therefore, under the light of the ILO Convention No. 169 regimes, *traditional possession or use* of the lands requires the *objective* or *material* subjection of these lands to *traditional practises* and *traditional ways of life.* That is, cultural practices that have been practised since *immemorial times* and which are intrinsically connected with the self-perceived traditional *distinctiveness* of the involved indigenous communities.[79] Without the *objective existence* of material and spiritual practices that culturally connect these communities with their lands and which are regarded as reflected in their *traditional* possession or use, it would be quite difficult to argue that the members of these communities have a *'unique',*

[76] See ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, cit., p. 94.
[77] See, Chapter III, Section 4, and Chapter IV, Section 2.4.
[78] See, our considerations in Chapter IV, Section 4, and Chapter IV, Section 7.
[79] In the *Yakye Axa Case*, one of the expert witness who testified before the Court declared with regard to the possession of indigenous land, that *"[o]ccupation is expressed in a different manner and is not always evident due to the cultural mode of production that does not include the practice of massively transforming nature, due to the noteworthy adjustment to the environment attained by these peoples in the course of many generations. Despite the subtlety of the signs of possession, sites periodically settled, watering places, water deposits, hunting territories, gathering or fishing areas, almost imperceptible cemeteries, and so forth, are an indelible part of the historical memory of these peoples. This historical memory, inseparably associated with geography, is the main sign of traditional possession."* See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 38(d), Statement by José Alberto Braunstein, expert witness.

'special' or *'all-encompassing'* relationship with them.[80] The following could be considered as examples of these material and spiritual practices: settlements or sporadic cultivation, seasonal or nomadic gathering, hunting and fishing, in connection with the former; and religious ceremonies, sacred places, ancestral burial grounds, etc., with regard to the latter.[81]

In fact, without the presence of these objective elements or *'indicia'* it would be quite difficult to identify the existence of *"traditional occupation"* of those lands, in the legal sense of the terms enshrined within the ILO Convention. Hence, it would not be possible to justify the existence of a particular and special legal regime addressed to protect a different cultural understanding of property rights. Why? Just because it would be no longer possible to identify a *distinguishable* or culturally *differential* understanding of it!

Notwithstanding, some scholars have also argued that traditional occupation does not mean *'in a traditional manner'*, in a sense that also includes the development and changes in their lifestyles and traditions.[82] Of course, cultures and cultural traditions are always in evolution or –better– in permanent change according to and under the influence of different factors and circumstances (e.g. geographical, historical, sociological, etc.), and in this sense indigenous cultures are not an exception.[83] Every single culture is in a permanent movement and evolution, under

[80] This is, of course, without entering into the question of *essentialization* that this kind or reasoning ontologically has. For more detailed explanations in connection with this argument, see Chapter IV, Section 2.4. and 4.

[81] The importance of the burial practices for the difference societies has been emphasized through the centuries. As an example of its human relevance, in one of the founding works on the field of international law, Hugo Grotius stated that the *'Right of Sepulture'* has been voluntarily instituted by the Laws of the Nations, in the (implicit) understanding that *"...the office of burial is conceived as rendered, not so much to the man, that is, the particular person, as to Humanity, that is, to Human Nature."* See, H. GROTIUS, *The Rights of War and Peace (De Jure Belli et Pacis)*, 1st. ed. 1625, London, 1853, II, Chapter XIX , p. 218. Today, under the light of the jurisprudence of the Court, it would be possible to say that the recognition and protection of the *right to burial* is connected with the principle of *human dignity*. Therefore, its protection would include the protection of the cultural/religious/spiritual practices related to it and –through the materialisation of those practices– would be extended to the physical place in which those practices are carried out or to which they are intimately connected. See on this topic I-ACtHR, *Case of the Moiwana Community v. Suriname. Merits, Reparations and Costs*, cit., Separate Opinion of Judge A.A. Cançado Trindade, para. 60 et seq.

[82] See, P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, 2002, p. 353.

[83] According to the UN *Special Rapporteur* Ms. Daes, *"[i]t must be acknowledged that legal concepts and rights and, indeed, indigenous peoples themselves cannot be frozen in time. Indigenous communities and societies change and evolve like all other societies."* See, E.-I. A. DAES, *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, cit., para. 118.

the influence of other cultural manifestations, in a mutually enriching process. Those that are regarded as *petrous* or *impermeable* to changes upon time, would probably be so because they would most likely be expressions of extinguished populations or groups, which have perished and do not exist anymore at the present time.[84]

However, it would be important to stress –for the sake of the argument– that the fact that *traditional practices* can suffer modification with the passing of the time, and –hence– can accommodate themselves to the new technologies... does not mean that they are no any longer *traditional*! When hunting practises are conducted with the help of fire arms instead of bows and arrows, it does not mean that the practise of hunting –as part of indigenous tradition– has despaired; in this case it would be only possible to talk of cultural *'adaptation'* of the practise through the use of modern devises. What is important (and legally relevant) is the fact that hunting practices (together with all the other practices) remain as a manifestation of the *traditional* use or possession of the land, and hence justify –under the wording of the ILO Convention and the jurisprudence of the Court– its special protection.[85]

The identification of *objective* cultural practises, that connect indigenous peoples with those lands that they claim as *'their traditional lands'*, correspond –of course– to the *'spatial'* or *'objective'* characteristics of the very same *traditional occupancy*. But –we must say– this is not the only element that has to be identify in order to grant special protection to the right to property claimed by these communities.[86] As you can imagine, the second complementary element that has to be considered is the *temporal* requirement.

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[84] See, UNESCO *Mexico City Declaration on Cultural Policies*, adopted by the World Conference on Cultural Policies, Mexico, 6 August 1982, para. 4. See also, our considerations in Chapter I, Section 2.2.; and Chapter IV, Section 2.2.3. and 2.4.

[85] See, UNESCO *Mexico City Declaration on Cultural Policies*, cit., para. 4. According to the UN Human Rights Committee (HRComm.) the right to enjoy one's culture (Article 27 of the ICCPR) cannot be determined *in abstracto* but has to be placed in context, which means that *"...article 27 does not only protect traditional means of livelihood of national minorities […]. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant."* See, Human Rights Committee (HRComm.), Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, 26 October 1994 (CCPR/C/52/D/511/1992), para. 9(3).

[86] Traditional occupation does not mean *'exclusive occupation'*. It just depends on which is the right that is under stake; if what is claimed is the right to property, then exclusivity is required but if the claimed right is the right to use the land in a traditional way, this is not a requirement. In the latter case Article 14(1) of the ILO Convention only requires to have *"...traditionally had access for their subsistence and traditional activities"*, such as in the case of nomadic pastoralists, hunters or shifting cultivators in a rotational or seasonal basis. As we can see, in this latter case, what is protected is the

In fact, if we pay attention to the wording of Article 14 of the ILO Convention, the present tense in which the verb *"to occupy"* is used, could lead us to the conclusion that *"...the occupancy must be connected with the present in order for it to give rise to possessory rights."*[87] In fact, the ILO Convention not only use the expression *'traditionally occupy'* in its Article 14(1) –which recognises the right to ownership and possession– but as well the same expression is used in its second paragraph, which stresses the obligation of the State Parties in the identification of the indigenous' lands. Indeed, Article 13 the ILO Convention refers to the lands that indigenous *'occupy or otherwise use'*, in connection with the importance of those lands in their culture. In addition, the use of the same *present* tense is also extended to their rights that concern natural resources (Article 15) and to the right to return in case of removal (Article 16), according the clear disposition contained in the second paragraph of the mentioned Article 13. In the same line, the UN Declaration on the Rights of Indigenous Peoples, in its Article 26(2) recognises the right to own, use, develop or control the lands that they *'possess by reason of traditional ownership or other traditional occupation or use'*, stressing the same *present* tense and as well as the *objective* requirement of *'traditional'* occupation or possession.

Therefore, the reasonable and logical conclusion of the combined reading of these two instruments would indicate that, in order to successfully claim the right to communal property over traditional lands and territories, the members of the indigenous communities would have to demonstrate that they *'traditionally'* occupy those lands. In addition, they would have to prove that that occupation is a *'present'* or a *'current'* one.

Notwithstanding the reasonability of the above conclusion, it cannot be absolute. First of all, the recognition of the *right to return* in cases of forced displacement (Article 16 of the ILO Convention) implies *–a contrario sensu–* the possibility to be dispossessed or deprived of the traditional lands at the time of the introduction of their claims. Therefore, in this case, the exercise of the right to property would be considered as incompatible with requirement of present

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traditional access to land and territories (not traditional and exclusively possessed) for the performance of traditional activities, hence those intrinsically connected with their cultural identity. See on this point, P. THORNBERRY, *op. cit.*, p. 355; see also ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, cit., p. 95.

[87] See, S. J. ANAYA, Indigenous *Peoples in International Law*, New York, 2004, p. 144 et seq.

occupation, viewed in *absolute* terms. Secondly, to see the requirement of present or current possession in absolute terms could lead toward a sort of empty or even *abstract recognition* of the right to communal property. In fact, it would not offer protection to those that would have been unwillingly or forcibly deprived of their lands in relative *recent* times.[88]

For the above mentioned reasons, the ILO Guide on the Convention No. 169 has stressed that *"[i]indigenous peoples' lands might in some cases include lands which have been recently lost or lands that have been occupied by indigenous peoples in more recent time..."*[89] The position adopted by the ILO Guide has to be considered as an intermediate position between those that have interpreted *'traditionally'* as a recognition of land rights whenever occupied and those ones that recognise only rights of lands *presently* occupied.[90]

In those situations where indigenous communities have been deprived of their lands, it has been argued that it would be sufficient to establish a *'present connection'* with the lost lands, in a sense that have to be demonstrate –at least– the existence of a *'continuing cultural attachment to them'*, but not only. It would be necessary –in addition– to respect a *reasonable time framework*, between the act of dispossession and the claim regarding the affected lands, in order to be able to exercise the right to return (or even the right to be compensated in case of their definitive loss). This also means that the right to return (which is based and is a complement of the right to property) does not and must not cover claims grounded *exclusively* on historical or ancestral lands whose possession had been lost in the colonisation process or in the formation of the modern States.[91]

In conclusion, without a *recent traditional possession or occupation* of the claimed lands, it would not be successfully possible to claim property rights over those lands. These requirements have to be considered as indispensable for having a successful *legal* claim; their absence would most likely vanish any possibility to effectively claim the lands back and –consequently– to return to them. In fact, the

[88] See, P. THORNBERRY, *op. cit.*, p. 354.
[89] See, ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, cit., p. 94.
[90] See, among others, P. THORNBERRY, *op. cit.*, p. 353 et seq.; A. XANTHAKI, *Indigenous Rights and United Nations Standards*, Cambridge, 2007, p. 82.
[91] See, A. XANTHAKI, *op. cit*., p. 82.

dispositions of the ILO Convention do not recognise any historical claim in connection with those lands or territories that have been lost long time back in history.[92]

4.2. Traditional possession and its jurisprudential interpretation. The recognition of the traditional title

The Inter-American Court has been very conscious of the practical problems connected with the identification, demarcation and titling of the indigenous' traditional lands. In fact, since the beginning of its jurisprudence in these matters –with the *Awas Tingni Case*– it has not only emphasised the central responsibility of the States in the demarcation process but also has stressed the key role played in it by their cultural traditions, and customs and –in particular– by their *traditional* way of possession and occupancy.

As it has been stressed before, because indigenous peoples are living in their traditional territories since immemorial times, under their own customs and traditions, they have been recognised with the rights to own and use them according to their own specific cultural and normative framework (within the limits of the recognised international legal standards).[93] This increasing international recognition has not left the I-ACtHR impassibly or imperturbably.

In fact, since the beginning, the Court has emphasised the importance of the indigenous peoples' customary law practices in the regulation of their right to communal property[94] and, hence, it has expressly recognised the centrality of *traditional* possession in its regulation. In this sense, the Court has stressed that

[92] Without entering at this stage into the legal requirements of the right to return, it is important to clarify that in the case of historical dispossession, besides what has been said by some scholars, it would be very difficult to talk –in strictly legal terms- of compensations. Instead, this situation would have to be framed within the positive measures that Member States have to take vis-à-vis the most vulnerable groups of the society. And, in the case of indigenous populations, States would have to take into account the cultural relevance that lands have in their life and –in that sense– grant them with new lands in order to make sustainable their *way of life* (e.g. according to Article 4 of the ILO Convention No. 169). For a contrary position, see S. J. ANAYA, Indigenous *Peoples in International Law*, cit., p. 144.

[93] See, Chapter IV, Section 4.

[94] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 151.

"...the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival..."[95]

The interpretation of the American Convention made by the Court in connection with the *'traditional'* possession goes hand in hand with the ILO regime that has been analysed above. In fact, keeping the centrality of the possession in the recognition of the right to communal property, as guaranteed within Article 21 of the American Convention[96], the Court has expressly stated that *"...traditional possession entitles indigenous people to demand official recognition and registration of property title."* Indeed, the recognition of the centrality of the customary practices in the case of indigenous communities, has permitted the Court to affirm –as a matter of principle– that *"...possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."*[97] In addition, the Court has clarified that *"[i]n order to obtain such title, the territory traditionally used and occupied by the members of* [indigenous and tribal communities] *must first be delimited and demarcated, in consultation with such people and other neighbouring peoples."*[98]

Moreover, from the reading of the Court jurisprudence, it would be possible to affirm that the Court followed the same understanding of traditional possession contained within the ILO regime. That is, the need for material and temporal *traditional* occupation or possession of the lands, in order to gain protection under the conventional recognition of the right to property (Article 21 of the Convention). In this sense, the Court has stressed –alongside its jurisprudence– that the material *relevancy* of the *traditional* presence or occupancy of these communities over the claimed lands and territories. Confirmation of this line of though can be found in the reading of *a contrario sensu* of the last quotation, but not only. In fact, a clear reception of this interpretation is held in the *Sawhoyamaxa Case* in which the Court

[95] See I-ACtHR, *the Case of Saramaka People v. Suriname*; Judgment on Preliminary Objections, merits, Reparations, and Costs, cit., para. 96.
[96] See –among others- I I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 151; see also, *Case of the Moiwana Community v. Suriname. Merits, Reparations and Costs*, cit., para. 131.
[97] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 151.
[98] See I-ACtHR, *the Case of Saramaka People v. Suriname*; Judgment on Preliminary Objections, merits, Reparations, and Costs, cit., para. 115.

has expressly recognised that *"traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title"*, and –hence– *"traditional possession entitles indigenous people to demand official recognition and registration of property title"*.[99]

Therefore, following these interpretative lines, we can even conclude that *as long as* these communities possess or occupy their territories and lands in a traditional way, they would be able to claim property rights over them. Of course, this traditional occupancy has to be *proven* in a courtroom in order to generate a successful claim, and the burden of proof would be assign –according to a general and basic principle of law– to the party making the allegations of facts on which the claim is based on, merely the members of the indigenous communities.[100] However, the question that remains unanswered here is precisely how to do it, *how to prove* the existence of the traditional possession or occupancy over the claimed territories in order to be granted with the conventional protection.

First of all, in order to establish the presence of traditional occupancy, what has to be demonstrated is the existence of *cultural practices* that would display the preservation over time of the *'unique'* or *'all-encompassing'* relationship that these communities have with their lands and territories.[101] These relevant cultural practises would be those that reflect the especial attachment that these people have with their lands and –consequently– stress the *differences* that these populations have with the larger parts of the society.[102] Of course, these practices may vary among the different communities because, it has been rightfully pointed out by the Court, the *"[s]aid relationship may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it..."*[103], and –in this sense– they have to be determined case by case. Among them, the Court has referred (without any pretention of exhaustiveness in its enumeration) to *"...the*

[99] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 128.
[100] See –among others- J. M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, 2003, p. 210 et seq.; L. HENNEBEL, *La convention Américaine des Droits de L'Homme. Mécanismes de Protection et Étendue des Droits et Libertés*, Bruxelles, 2007, p. 216 et seq.
[101] See our comments in connection with this topic, in Chapter IV, Section 2.2.4.
[102] See E.-I. A. DAES, *Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, cit., para. 14 et seq. From the same author, see also, E.-I. A. DAES, *Indigenous Peoples' Rights to Land and Natural Resources*, cit. *supra* note 59, p. 78-79.
[103] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131.

traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture."[104]

Moreover, we have to bear in mind that lands and traditions –in indigenous culture– are closely interlinked. Therefore, in order to determinate the presence of traditional possession or occupation in connection with specific territories, it would be necessary to take into account *"...their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values."*[105]

If relation with their lands is intrinsically cultural –as stated by the Court–, then the *demonstration* of the existence of traditional occupation upon them has to be *necessarily displayed* through the exhibition of cultural practices or expressions. It would be in the history of each community, in their cultural heritage[106], in which their *special* relationship with their lands can be traced back into immemorial times and, for this reason, especial attention would have to be given to their *oral traditions* as recorded within the memories of each community.[107] Is in this sense that Judges Cançado Trindade, Pacheco Gómez and Abreu Burelli affirmed that in the case of these populations *"...their link with the territory, even if not written, integrates their day-to-day life, and the right to communal property itself has a cultural dimension.*

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[104] *Ibid.* In this particular case, the Court took as proven the relationship through the demonstration within those lands of 'traditional hunting, fishing and gathering activities'.

[105] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 154.

[106] According to the *UN Special Rapporteur* Mrs. Daes, *"[t]he heritage or indigenous peoples has a collective character and is comprised of all objects, sites and knowledge including languages, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory of traditional natural use."* See, E-I- A. DAES, *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people*, UN Doc. E/CN.4/Sub.2/2000/26, United Nation, 2000, Annex I, para. 12.

[107] According to the *expert opinion* delivered by Rodolfo Stavenhagen Gruenbaum, former *UN Special Rapporteur,* anthropologist and sociologist, in the *Awas Tingni Case*, *"One must understand that the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked. [...] This linkage of humans with the territory is not necessarily written down, it is something lived on a daily basis."* See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 83(d).

In sum, the habitat forms an integral part of their culture, transmitted from generation to generation."[108]

The Court, taking into consideration the above mentioned reasons, has emphasised the importance of the *"historical memory"* of these communities, in which the possession of the traditional territories is *'indelibly recorded'* precisely because, in the process of sedentarisation, most of these communities *"...took on an identity of its own that is connected to a physically and culturally determinate geographic area."*[109]

Therefore, in order to prove the existence of traditional possession or occupancy in a given case, the involved indigenous population would have to make use of *expert witness* (e.g. anthropologist, sociologist, historians, etc.), or *witnesses* as such (e.g. those members of the community that are guardians or oral transmitters of their culture[110]). These witnesses would ideally be able to recall, from the ancestral memories of these populations, their traditional connection with the claimed and possessed territories.[111] In fact, for the Court, *"...such historical memory and particular identity must be especially considered in identifying the land to be transferred to them."*[112]

Notwithstanding, the testimony of witnesses –in order to support the property right claim– would have to be based on the present possession or occupation of the claimed territory or –at least– would have to be able to show the existence of a sufficient *present* connection with them (especially in the cases of relatively recent expulsions or displacements). In fact, if the testimony is based only on the

[108] *Ibid*, Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, para. 6.
[109] See *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 216.
[110] In the *Plan de Sanchez Masacre* it has been proved that the death of the women and elders, oral transmitters of the Maya-Achí culture, caused a cultural vacuum, precisely because it affected the reproduction and transmission of their culture. See I-ACtHR, *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, para. 49(12) and 87(b).
[111] Perhaps one of the most clear statements in this matter has been produced by Judge Cançado Trindade, when has emphasised that the *"...delimitation, demarcation, tilting and the return of their traditional territories [are] indeed essential. This is a matter of survival of the cultural identity of the N'djukas, so that they may conserve their memory, both personally and collectively. Only then will their fundamental right to life lato senso be rightfully protected, including their right to cultural identity.*" See *Case of the Moiwana Community v. Suriname. Interpretation of the Judgment of Merits, Reparations and Costs*, cit., Separate Opinion of Judge A.A. Cançado Trindade, para. 20.
[112] See I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay. Interpretation of the Judgment of Merits, Reparations and Costs*, cit., para. 23.

'remembrance of the greatest past', on the re-evocation of ancestral or pre-colonial possession of the claimed lands, it would only have to be considered as a *circumstantial or indirect evidence*[113] and therefore –by itself– it would be insufficient as *full* supportive evidence of the claim.[114]

In other words, the *ancient memories* and *immemorial traditions* are definitely important for the maintenance and development of indigenous people identity (as they are for any other cultural tradition), but not certainly enough for the recognition of a property right.[115] Land's claims must be based on more concrete *indicia*, on substantive elements, that is, physical and temporal evidence that would *presently* link those traditional memories with those specifically identified lands that are the object of the claim. Concrete *indicia*, such as *"...the traditional use or present, be it though spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing, etc."*[116]

Because what is at stake is the right over *'traditional'* lands, the activities that reflect their customs and traditions have to be *uninterruptedly* performed, since *'immemorial'* or *'historical'* times. Therefore, both historical records and concrete and physical evidences of possession or occupancy of the claimed traditional lands are required in order to be granted with the protection offered by Article 21 of the American Convention. In conclusion, as the Court plainly pointed out, *"...in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices –yet who lack real title to the property– mere possession of the land should suffice to obtain official recognition of their communal ownership."*[117]

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[113] Circumstantial evidence refers to indirect evidence that is not based on the personal knowledge or observations of a witness, as it could be considered –in this case- the recollection and transitions of the collective history of these groups. Present facts are able to be witnessed; history can only be transmitted. See in connection with the juridical estimation of this kind of proof, J. M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, cit., p. 212 et seq.

[114] As it has been said before, the right to property does not cover compensation for the great injustice suffered by these populations at the time of the colonisation or the formation of the current national states. See on this point, A. XANTHAKI, *op. cit*., p. 82. See also our consideration in connection with the conceptual implications of the temporal element, within the notions of *indigenousness*, in Chapter IV, Section 2.2.1., and 2.4.

[115] See Chapter IV, Section 2.2.5.

[116] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131.

[117] See I-ACtHR, *Case of the Moiwana Community v. Suriname. Merits, Reparations and Costs.* Judgment of February 8, 2006. Series C No. 145, para. 131.

However, it is not uncommon that the claims for the recognition of the communal property over traditional lands have had –as an object– not the legal recognition of a present or current possession. Instead, often happens that those claims pursue the restitution of those possessed territories from which indigenous population have been recently expelled or whose titles have been considered lost.[118] In these cases, the Court has recognised to the displaced communities –as a matter of principle– the *right to return* to their lands (and as well as a form of reparation)[119], beside the possibility for exceptional situations in which the relocation of these communities to other lands becomes unavoidable, because the existence of objective and fully-justifiable grounds for it.[120] In fact, for the Court *"...the member of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith."*[121]

In connection with the right to return to traditional territories and lands, and its exercise, different questions arise, in particular with regard to the legal and jurisprudential requirements regarded as indispensable for its realisation. But also with regard to its exercise *vis-à-vis* those third parties who currently and lawfully possess in good faith the very same traditional territories from which these communities have been removed; or even the time framework in which this right could be successfully upheld. Additionally, and perhaps even most importantly in connection with this study, it would important to inquire on the transversal role that the protection of *cultural diversity* plays in connection with all of these questions.

Within the following sections, I will try to answer these and other connected questions that the right to return impose to this enquiry.

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[118] For detailed examples of different situations in which indigenous communities find themselves deprived of their so-called *aboriginal title*, see E.-I. A. DAES, *Indigenous peoples and their relationship to land*. *Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, cit., p. 13 et seq.

[119] See I-ACtHR, *Case of the Moiwana Community v. Suriname*, *Interpretation of the Judgment of Merits, Reparations and Costs*, cit., Separate Opinion of Judge A.A. Cançado Trindade, para. 10.

[120] See Article 16(2), ILO Convention No. 169.

[121] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 128.

5. The right to return to traditional lands: The legal value of the cultural connection with traditional lands

First of all, if we scan the instruments that form part of the international human rights system or –in the words of the Court– *corpus juris*[122], we will find that the right to return is recognised in Article 16 the ILO Convention No. 169. In fact, it is incorporated as a complementary face of the *right to not be removed* from the lands which indigenous peoples *'occupy'*.[123] In effect, one of the basic principles of this Convention is that indigenous peoples shall not be removed from their lands. The core idea is the protection of the *'current'* or *'present'* possession of their lands and territories, as is possible to deduct from the present tense of the verb *'occupy'* used in the first paragraph of this article. Again, it is possible to identify the centrality that *traditional* possession or *occupancy* of lands and territories has on the structure of the ILO Convention, and consequently the outstanding protection that this emblematic instrument confers to the special and unique relationship that indigenous peoples have with their traditional lands.[124]

Nevertheless, it could happen that *exceptional* circumstances impose the need for the relocation of these people, such as –for example– the case of pastoralist and small island communities that would be severely affected by changes in the global

[122] See, I-ACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, cit., para. 120; and see, I-ACtHR, *The right to information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cit., para. 115

[123] Article 16 of the ILO Convention No. 169, reads as follow: *"(1). Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy. (2). Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned. (3). Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. (4). When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees. (5). Persons thus relocated shall be fully compensated for any resulting loss or injury."*

[124] The same principle can be found within the UN Declaration on the Rights of Indigenous Peoples, when establish in its Article 10 that *"[i]ndigenous 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, the option to return."*

climate.[125] The application of the general principle of non-removal in such cases would impose not only the consideration of the said displacements as exceptional but also *temporal*.[126] This means that as soon as the reasons that justify the relocation of these communities are no longer valid, they should have guaranteed the possibility to return to their lands, as is stated in Article 16(3) of the ILO Convention.[127]

Therefore, it would be possible to say that the right to return is complementary and functional (or has a complementary function) to the mentioned principle of non-removal. In other words, because indigenous peoples have recognised the right to their traditional lands (right to use and to property), they consequentially have the *right to stay and to not be removed* from them. However, if their removal and relocation became absolutely indispensable and justified in a pluralist and democratic society, then –immediately after the cease of those exceptional circumstances– they would have the right to return to their lands and territories, precisely because they already have the right to use and own them. In sum, the return to *their* lands and territories is grounded in the right to property or use, as guaranteed in Article 14 of the ILO Convention, which they already had over *'their'* traditional lands, merely over the lands that they traditionally *'occupy'*.[128] In this sense, as I argued before, the right to return cannot be claimed and exercised in connection with those territories which had been lost as result of processes of colonisation or formation of the modern national States. In fact, the right to return cannot be understood as a compensation for historical injustices suffered by these populations.[129]

Moreover, because the right to return is *complementary* to the right to property, its exercise would be possible *only* in connection with those lands and territories that indigenous populations *"occupied"* before their removal or relocation. Hence, it would be possible to conclude that what is really at stake and protected by the ILO Convention is the *'present'* or *'current'* traditional occupation/possession

[125] See ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, cit., p. 98.
[126] See, P. THORNBERRY, *op. cit.*, p. 357.
[127] Article 16(3) of the ILO Convention No. 169 states: *"Wherever possible, these peoples shall have the right to return to their traditional land, as soon as the grounds for relocation cease to exist."*
[128] As it has been said *supra*, according to Article 16(1) of the ILO Convention No. 169, indigenous peoples *"...shall not be removed from the lands which they occupy."*
[129] See, A. XANTHAKI, *op. cit*., p. 86.

(which is equivalent to a property title) and not the remembrance of historical immemorial occupancy or settlements that existed at the time of colonisation or formation of modern national states.[130]

However, *'present'* occupation cannot be considered –for obvious reasons– as an indispensable requirement for the exercise of the right to return in the case of the displacement of indigenous populations. Thus, we have to necessarily conclude that what is indeed required is to demonstrate the existence, *before the removal*, of an *effective traditional occupation*, use or possession of the claimed lands that *still* maintain connection with the present. This could be the case –for instance– of relative *recent* expulsions.[131]

Furthermore, Article 16(2) of the ILO Convention, after reaffirming the *exceptional character* of the removal of these populations from their traditional territories, has subordinated its relocation to new lands to their *'free and informed consent'*. In this sense, because of its importance within the scope of this work, and –even perhaps most importantly– due to its rising importance within the current international debates related to the consultation of indigenous populations before the implementation of measures that could potentially affect them, the following section will be entirely be dedicated to this topic.

5.1. The principle of consultation and its cultural implications

As I have already argued[132], the *principle of consultation* –with the concerned indigenous communities– means to actively seek their consent prior to any action that may affect them (directly or indirectly) and in this sense it has to be considered

[130] In this latter case, indigenous population would have the right to be the beneficiaries of positive action tending to their advancement in the society, to eliminate discrimination, promote tolerance and dissemination of their cultural understanding, and the continuing improvement of their economic and social conditions. These effective measures have been widely incorporated within both UN Declaration on the Right of Indigenous Peoples and the ILO Convention No. 169.

[131] In the same sense that the ILO Convention, the UN Declaration on the Right of Indigenous Peoples recognises the right to restitution (Article 27) of those lands and territories *"...traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."* The ground for the right to restitution (or return) is the same: the former possession or occupation of the traditional lands. See on this point, A. XANTHAKI, *op. cit*., p. 80 et seq.

[132] See, Chapter IV, Section 3.3.

as an obligation of *'means'* and not of *'results'*.[133] Within this normative framework, the ILO Convention imposes on the Member States the obligation to deploy all efforts in order to gain the *'free and informed consent'* of the involved communities, and this has to be done *'prior'* to their relocation, but not only. The obligation to consult, as an overarching principle that guides the entire relationship between Governments and indigenous communities[134], includes as well the phase of evaluation and decision making involving all decisions that can affect them. In this sense, it has to be considered as including those measures that would have –as a collateral effect– the displacement of these communities from their traditional lands (e.g. the construction of a dam, or other larger infrastructure projects, etc.).[135]

However, it could happen that, after all genuine efforts that have been deployed by the States in order to reach an agreement, the consent of the affected communities cannot be obtained. In this case, the legality of the relocation would depend –under the lights of the provision of the ILO Convention– on whether it has been taken after *'...following appropriate procedure established by national laws and regulations, including public inquires where appropriate...'*[136] This paragraph clarifies the *character* of the obligation to seek consent among the affected communities, which clearly is an obligation of *'means'*. In fact, what is truthfully at stake here is the *conduct*, *good faith* and the *will* of the States in following the

[133] See in this matter, S. J. ANAYA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya*, cit., in particular para. 46-49.

[134] According to *the ILO Guide*, *"[t]he obligation to consult indigenous peoples arises on a general level in connection with the application of all the provisions of the Convention. In particular, it is required that indigenous peoples are enabled to participate freely at all levels in the formulation, implementation and evaluation of measures and programmes that affect them directly."* See, ILO, *Indigenous & Tribal Peoples' Rights in Practice. A Guide to ILO convention No. 169*, cit., p. 61.

[135] The obligation of consultation in all phases of the process of relocation is grounded in the combined reading of both Article 16(2) and 6 of the ILO Convention No. 169. In fact, the tripartite Committee of the ILO Convention has stated that *"...the concept of prior consultation established in Article 6 should be understood in the context of the general policy expressed in Article 2, paragraph 1, and 2(b), of the Convention..."*, this means as one of the actions that governments have to take in order to protect the rights of indigenous peoples. See, *Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT)and the Colombian Medical Trade Union Association. Submitted:1999; Document No. (ilolex): 161999COL169B; para. 58.

[136] Cfr. Article 16(2) of the ILO Convention No. 169.

appropriate procedures with the genuine objective of achieving consent, independently of the result obtained.[137]

Therefore, when the relocation becomes unavoidable, because it pursues the realisation of a *general interest* that is fully justified in a pluralist democratic society, the ILO Convention does not recognise a *veto right* at the hands of the affected population.[138] Instead, it does stress the legality of the decision-making *procedures*, which means that the decision of relocation has to be taken following *appropriate procedures* established by national laws[139], but not only. In addition, it also enhances the possibilities of these communities to *effectively* participate in these procedures, through –for example– public inquires in which they would be able to, not only fully expose their own views, but as well to *politically* influence the outcome of the entire democratic process.

Finally, if the relocation is only temporal, *as soon as* the grounds for it cease to exist, the affected communities would have the right to return to their traditional lands, in full accordance with the exercise of their right to property, as has been said above. But, if the relocation develops into a permanent situation, then the affected population would have the right to be *fully* compensated, specially by means of receiving *'...lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development'.*[140]

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[137] As we already have said, *democracy* has to be considered essentially as a method to take common valid decisions and peacefully resolves disputes. See, Chapter II, Section 1 and 5; and Chapter IV, Section 3.3.

[138] See, Chapter IV, Section 3.3.

[139] According to the tripartite committee, *"...the appropriate procedure is that which creates favourable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained. That is to say, the expression "appropriate measures" should be understood with reference to the aim of the consultation, namely to achieve agreement or consent."* And concluded emphasizing that *"[i]t is not necessary, of course, for agreement or consent to be achieved."* See, *Report of the committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169),* made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR). Submitted: 2001; Document No. (ilolex): 162004MEX169A; para. 89.

[140] Cfr. Article 16(4) of the ILO Convention No. 169. A similar provision on compensation can be found at the UN Declaration on the Rights to Indigenous Peoples, when in its Article 28(2) establish that *"[u]nless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resource equal in quality, size and legal status or of monetary compensation or other appropriate redress."*

Furthermore, in the process of choosing these *alternative lands*, the States have to conduct faithful negotiations with these populations in order to reach an agreement concerning the quantity and quality of the lands; but in case of disagreement the final decision remains –nevertheless– on the hands of the States, through the establishment of the already mentioned *'appropriate procedures'*. But again, what is absolutely indispensable here –according to the *rationale* of the ILO Convention– is the truthful involvement of the affected communities in the decision-making process of all of those decisions that would affect them, in order to guarantee the protection of their cultural diversity and the preservation of their traditions and customs.[141] Moreover, this participation has to be granted in accordance with their own representative institutions in order to reach a prior, free and informed consent regarding the displacement and return to their lands, or –in the case of unavoidable final relocation– on the identification of alternatives lands. [142]

Ultimately, Article 16(5) recognises the right to be *'fully compensated for any resulting loss or injury'* as a consequence of the relocation process in both temporal and final displacement of the affected communities. The right to be compensated is –again– another consequence of the recognition of right to communal property over traditional lands, because what has to be compensated are the damages (material or immaterial) generated by the restriction on the enjoyment of the right to property as guaranteed by the ILO Convention No. 169 in its Article 14(1).

Moreover, the right to be compensated would cover *'any resulting loss or injury'* even when what is at stake is only a temporary deprivation on the enjoyment

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[141] According to the ILO tripartite committee, *"if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Conventions."* See, *Report of the committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169),* cit. *supra* note 139, para. 102.

[142] As in any case in which consultation with indigenous communities is involved, the ILO Convention imposes on Member States the obligation to conduct the negotiation in a cultural sensitive manner. This does not mean –of course– that the procedure has to be subjected to the procedures or decision-making and methodologies traditionally in force among the involved communities. The letter have the right to *internally* conduct their decision-making processes according to their own traditions and cultures; but they do not have the right to impose those cultural understandings on the general public sphere, and therefore to the public laws and regulations in force in the national State in which they live and are part of. Indigenous communities can have indeed the political aspiration to culturally influence the general public decision-making process. Again, as apples are not pears, cultural political aspirations are not rights. In connection with this issue, see our considerations in Chapter I, Section 4.2.

of this right. The compensation has to be *'fully'* in a sense that has to take into account the *all-encompassing* relationship that indigenous people have with their traditional lands and –hence– the compensation has to be integrative and cover both material and immaterial damages. Indeed, in case of definitive deprivation of their traditional lands, merely when the relocation is final and unavoidable, the compensation should focus on the provision of alternative lands, in agreement with the affected communities, but not only; all other damages connected with the suffered restriction have to be compensated, especially those connected with the spiritual aspect of the relations.[143]

6. The right to return as guarantee by Article 21 of the American Convention

The Inter-American Court took position in connection with the right to return for the first time in the *Case of Moiwana Community v. Suriname*[144], and developed its own jurisprudence in two subsequent cases regarding the State of Paraguay,

[143] According to the UN CERD Committee, in the exceptional cases in which the relocation of indigenous peoples is considered necessary, the compensation established in Article 16(2) of the ILO Convention No. 169, in order to be fair and equitable would have to provide *"...relocation sites equipped with basic utilities, such as drinking water, electricity, and washing and hygiene facilities, and with appropriate services, including schools, health-care centres and means of transportation."* Without any doubts, these are indispensable means for the advancement of indigenous people in the society, under equal condition *vis-à-vis* the majoritarian part of the society, but certainly not part of the compensation for restriction in the enjoyment of the right to communal property. I would rather advice to avoid confusion between positive actions, that States are obliged under Article 2 and 4 of the ILO Convention and Article 21of the UN Declaration on the Right of Indigenous Peoples, with the right to be compensated for the loss and injury generated for their relocation, as recognised in Article 16(5) of the ILO Convention or Article 28 of the UN Declaration. The contrary can only amount to unclarity and confusion in this highly controversial matter. In connection with the CERD Committee interpretation, see Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention. Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala*. 76th session, 19 May 2010 (CERD/C/GTM/CO/12-13).

[144] As it has been said before, this case was about the massacres perpetrated on November 1986 by Suriname's military forces against members of the Moiwana villages, descendants of former slaves who had escaped into the jungle and established autonomous communities in the 17th Century, and consequential the destruction of the village and forced displacement of the survivors. See I-ACtHR, *Case of the Moiwana Community v. Suriname. Merits, Reparations and Costs*, cit., para. 86 et seq. For more information about this case, see –among others– C. MARTIN, *The Moiwana Village Case: A New Trend in approaching the Rights of Ethnic Groups in the Inter-American System*, *Leiden Journal of International Law*, 19, 2006, p. 491 et seq.; and L. HENNEBEL, *La Protection de l'"Intégrité Spirituelle" des Indigènes. Rèflexions sur l'arrêt de la Cour interaméricaine des droits de l'homme dans l'affaire Comunidad Moiwana c. Suriname du 15 juin 2005*, in *Rev. trim dr. h.*, 66, 2002, p. 253 et seq.

merely the cases of the indigenous communities of Yakye Axa[145] and Sawhoyamaxa.[146] In these cases, the Court dealt –basically– with indigenous communities that had been displaced from their traditional lands and territories. However, in the latter two cases, the displacements were not connected with internal armed conflicts or massacres perpetrated by state agents, as happened in the first case. Instead, these cases were related to the historical processes of gradual but progressive removal of indigenous communities from their traditional habitats, due to their "invasion" and occupation of these territories through a variety of processes, mostly by their destination to modern extensive/intensive agriculture exploitation.

In general terms, it would be possible to say that the interpretation of the American Convention made by the Court –in connection with the right to return– follows the already existing regulation of this right, specially within the framework of the ILO regime. Nonetheless, because the American Convention has not *literarily* incorporated this right among its articles, its effective inclusion –as integrative part of the right to property– was an *interpretative* operation made by the Court. In fact, in the case of the displaced communities, the recognition of their communitarian property –as protected under Article 21 of the Convention, interpreted under the light of the above mentioned provision of the ILO Convention No. 169[147]– would most likely include the recognition of their right to return to their traditional lands from which they had been removed. However, because the displacement intrinsically means that the possession over those traditional lands and territories has been lost (at least temporarily), the recognition of the right to return could *clash* –in certain cases– with third parties' possession that could have been consolidated over the time.

Hence, it would be important for the purpose of this study to analyse the implications of the recognition of the right to return, as an integrative part of the right to communal property, vis-à-vis third parties in possession of the claimed lands, or even with regard to those cases when the exercise of this right could be seen as incompatible with the general public interests of the society. In addition, it would be

[145] I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit.
[146] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit..
[147] For the legal justification of the interpretative use that the Inter-American Court has made of the provisions contained in the ILO Convention No. 169, see our considerations in Chapter V, Section 6.1.1.

also relevant to inquire on the role that the protection of the cultural diversity of these populations plays in the appraisal of these potential conflicts.

As it has been said before, what is essential for the recognition of the right to communal property is the *traditional possession* that indigenous people exercise over their territories and lands since immemorial times. Furthermore, it is this particular kind of possession that entitles them to additionally demand and obtain the official recognition and registration of the property title in order to have guarantees for non-violation in the future of their property rights (guarantee of non-repetition).[148] However, because in cases of displacements the affected communities have precisely lost possession of their traditional territories, then the Court has established an exception to this general rule, in order to deliver a real and concrete protection to them (principle of *effectiveness*).[149]

In fact, the regional tribunal has declared that *"...the member of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith."*[150] According to this jurisprudence, when communities have been displaced, they nevertheless would have conventionally guaranteed the exercise of their right to return to their lands, *as long as* their right to property *still* remains alive.

Additionally, their guaranteed return would be subjected –at least– to the potential concomitant existence of a more powerful reason (a prevalent conventionally protected interest) that would justify –in a pluralist and democratic society– the subordination of the right to return to the prevalence of *another* private or public interest. In other words, in case of a potential conflicting interest (public or private) with the indigenous' claim to return to their lands, the latter right could perhaps not prevail when the realisation of the former interest has become more

[148] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 151; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 127 & 128.
[149] In connection with the jurisprudential implication of the principle of effectiveness or *effet util*, see our considerations in Chapter V, Section 5. See also, among other authorities, I-ACtHR, *Case of the Constitutional Court v. Peru.* Competence. Judgment of September 24, 1999. Series C No. 55, para. 36.
[150] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 128.

pregnant in an open, pluralist and democratic society, due to its adjustment to the attainment of a legitimate collective interest.[151]

Therefore, even when traditional possession remains as the cornerstone for the regime of communal property, in cases of displacement it is not –for obvious reasons– an indispensable requirement for the official recognition of this right, as guaranteed in Article 21 of the American Convention. What the Court has established as a requirement for the recovery of the possession –and hence the enjoyment of the property rights– are two conditions: a) the *unwillingness* of members of the affected communities in connection with the displacement; and b) the inexistence of *good faith* in the third parties that are currently in possession of the lands.[152]

In connection with the first requirement, there is no need for extensive explanations. This is simply because if the members of the communities have *voluntarily* or *willingly* left the possession of their traditional lands (that is with the intention of abandoning them), it must be understood that they have renounced or *waived* their traditional possession and –consequently– their property rights over those territories. Beside the intrinsic clarity of the precedent situation, it is contextually important to highlight that the *willingness* or *unwillingness* of the members of these communities would have to be carefully verified by judicial authorities. This is especially because of the *vulnerable* position in which –in general– these communities live; but also –and perhaps most importantly in this specific context– because the potential *cultural* misunderstandings that could have been interfered in the interaction between these communities and external third parties, within the *cultural milieu* of the former. Nevertheless, it is important to bear

[151] This could be the case –for instance– when the displacement was generated by the construction of larger but essential societal infrastructures, such as dams, but not only. In connection with this topic, see our considerations in Chapter IV, Section 5. See also, among other authorities, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 145-146; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 136-138.

[152] The fact that the Court mentioned the *lawfulness* in the transference of the lands to the third parties has to be considered as included within the requirement of *good faith*, in a sense that cannot be a good faith if the lands have not been transferred in full respect to the legal procedures and regulations.

in mind that not all potential *cultural* misinterpretations would or could possibly have legal implications and relevance.[153]

In fact, as a guiding principle, the Court has stressed, when assessing cases in which indigenous communities are involved, the need to *"...take into account the specific characteristic that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity."*[154] Moreover, in cases in which the Article 21 is at stake, the Court has also added –as an specific application of this principle– that it would take into account *"...the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural and its transmission to future generations..."*.[155]

Therefore, under the interpretative light of this jurisprudence, in the assessment of the *willingness* or *unwillingness* of the dispossession or displacement of these communities, it would be important to also focus on their internal decision-making mechanisms and on the interrelated relevant cultural elements (e.g. language, tradition, legal cultural institutions and understandings, etc.). However, this kind of interpretation could possibly lead –if not correctly understood– to an inaccurate or misleading concern and understanding of its legal consequences. In this sense, it is important to remember that the peoples *concerned* are the only ones who can primarily decide upon their own priorities and in connection with their own development, as a societal cultural aggregation and as individuals, as the ILO Convention No. 169 chiefly established in its Article 7(1). And this –of course– is applicable to their relationship with their lands. However, that *self-decision-making* power can only be achieved if they fully understand the legal and social aspects of their actions, in particular vis-à-vis the majoritarian part of the society and the dominant legal system.[156]

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[153] As we saw in our previous chapters, culture is essentially a dialogical process, and hence, misunderstandings are and should be considered as a physiological cultural feature. In connection with this, see Chapter I, Section 2.2.; Chapter II, Section 2.2.; and Chapter III, Section 4.

[154] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 51.

[155] *Ibid*., para. 124.

[156] Article 7(1) of the ILO Convention No. 169 reads as follow: *'[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their live, beliefs, institutions and spiritual well-being and the lands that they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."*

In sum, *cultural sensitivity*, toward the relationship between these communities and their lands, is regarded as an essential condition for the assessment of the *willingness/unwillingness* of the displacement.[157]

If the answer to the presence of the first requirement (*unwilling* displacement) is positive[158], then the existence of the second requirement has to be assessed in order to grant recognition and protection of the right to return under the American Convention. As we already said, this additional requirement consists on the inexistence of *good faith* and *lawfulness* in connection with third parties that eventually could be founded in possession of the same claimed lands, at the time of their reclamation.

I would argue in these pages, that the above mentioned requirement constitutes an essential element in the configuration of the jurisprudence of the Court, because it opens the door for a balancing exercise between two rights (or legally relevant interests) that –in principle– deserves equal conventional protection (e.g. both private and communal rights to property), but not only. Its centrality is also based on the fact that indirectly introduces one of the most controversial discussions in connection the right to return, namely, the claims for the restitution vis-à-vis historical process of dispossession of lands, and the connected restitution and reparation claims for those past wrongdoings. In those cases, the most pregnant legal feature is connected with the problem of long-passed *statutes of limitations* or *laches*, that could reduce the strength and viability of any reclamation for the restitution of

[157] At this stage, it would be possible to ask whether this requirement of *cultural sensitivity* should be also applied to all other cultural manifestations in society. If the answer to this question is a positive one, then it would be rooted in the principle of equal valuative function that *all* cultural manifestation fulfil vis-à-vis all of those individuals who recognise themselves in them (See Chapter I, Section 4.2.). On the contrary, if this interpretative principle is *exclusively* applied to the case of indigenous communities, then it would be ontologically connected with the very notion of *indigenousness* (see Chapter IV, Section 2.2.3.), which also would hypothetically mean that indigenous culture and identity, because of their specific relations with their lands and philosophical world views, deserve a differential treatment, a treatment with *cultural sensitivity*. Indeed, if the latter would be the case, then it would be –perhaps– possible to say that this is nothing but an ulterior *essentialization* (see Chapter IV, Sections 2.4. and 4).

[158] If the answer would be negative, merely that these populations *willingly* left their territories, then these mean that the possession and –therefore– their right to communal property has been waived. The same conclusion could be drawn in the case of laches or consolidated status of limitations. On this topic, see –among other authors– D. SHELTON, *Reparations for Indigenous Peoples: The Present Value of Past Wrongs*, in F. LENZERINI (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, Oxford, 2008, p. 57 et seq.

territories that have been lost long time back in the past.[159] Furthermore, when we talk about status of limitation, its implications and interconnections with the overarching *principle of legal certainty* must not be disregarded.[160]

Coming back to the judicial requirements in connection with the right to return, the inexistence of the lawfulness and good faith on the possession of the questioned lands held by third parties would have to be proved –in principle– by the claimants in a given case. In fact, judicial cases have to follow one of the basic principles of procedural law that establishes the assignment of the *burden of proof* to the party making the allegations of the fact over which the claim is based. In the cases under review, this burden would be allocated on the side of the indigenous communities, whom plead their cases through the Inter-American judicial system.

Nevertheless, we have to bear in mind that international human rights courts always have greater latitude to evaluate the evidence on pertinent facts[161], in accordance with the principles of logic, and following the rules of *sound criticism*, based on experience. In fact, the I-ACtHR has concluded –in this sense– that, in receiving and weighing evidence, *"...particular attention must be paid to the circumstances of the specific case and to the limits imposed by respect for legal certainty and the procedural equality of the parties"*.[162] This means that –according

[159] See, in connection with the different problems raised by the reparation of the past wrongs, the excellent and very stimulating essay written by Aviam Soifer, in which it has been emphasised that *"[i]t may be expecting too mucht of judges and of a regular legal system to begin to make amends for drastic wrongs. It may also be asking too much of popularly-elected officials in other branches of government to attempt to afford justice to those who have suffered grievous wrongs in the past. Excessive focus on what ends are just tends to diminish attention to mundane, everyday needs"* See, A. SOIFER, *Redress, Progress and the Benchmark Problem*, in *Boston College Third World Law Journal*, 19, 1998, p. 525 et seq. See also, E. K. YAMAMOTO, *Race Apologies*, in *Journal of Gender, Race & Justice*, 1, p. 1997, p. 47 et seq.

[160] One of the legal arguments advanced by the Court in support of the surrendering by the States of legal titles in connection with the indigenous traditional lands and territories, it was the need to ensure their legal certainty *vis-à-vis* to the entire community. In fact, the title will provide not only publicity but as well legal security to its holder. But this need for legal certainty is not unidirectional, in a sense that it only tends to guarantee the position of the indigenous communities and their possession but also could produce the same effect with regard to private owners who hold a title and effective possession of their land undisturbed since a considerable period of time. See, *a contrario sensu*, I-ACtHR, *the Case of Saramaka People v. Suriname*; Judgment on Preliminary Objections, merits, Reparations, and Costs, cit., para. 115.

[161] See I-ACtHR, *Case of Castillo-Páez v. Peru. Reparations and Costs.* Judgment of November 27, 1998. Series C No. 43, para. 38.

[162] See I-ACtHR, *Case of Yatama v. Nicaragua*, Judgment on Preliminary Objections, Merits, Reparations and Costs of June 23, 2005. Series C No. 127, para. 108; *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs.* Judgment of June 20, 2005. Series C No. 126, para. 45; *Case of Caesar v. Trinidad and Tobago. Merits, Reparations and Costs.* Judgment of March 11, 2005.

to the circumstance of the case and bearing in mind the vulnerable cultural-legal position in which most of these communities live– the allocation of the *burden of proof* could be changed and *reversed* if the defendants are situated in a better position to prove both elements, *viz* the *lawfulness* and *good faith* of the third parties' possession.[163]

Once established the existence of the above mentioned two requisites, plus – of course– the accreditation of the *traditional* possession or occupation of the claimed lands for immemorial time before their displacement, members of indigenous communities would be able to *successfully* exercise their conventionally recognised right to return and restitution in connection with those same territories. But solely *as long as* their special relationship with their lands still exists.[164] In other words, according to the axiological position assumed by the Court, it is precisely because of the existence of the *special relationship* that the displaced communities have (or claim to have), that the rights to return and restitution for these lands are recognised and protected under Article 21 of the American Convention.[165] Therefore, the maintenance of this *especial relationship* with the claimed lands is regarded –by the Court– as an *additional requirement* for a successful recognition of the right to return. As the Court clearly stated, *"[a]s long as said relationship exists, the right to claim lands is enforceable, otherwise, it will lapse."*[166]

Moreover, it is important to clarify that, in order to assess the existence of the mentioned *special relationship*, particular attention has to be paid to the presence of any external cause that could restrain or hinder these populations in the maintenance of their spiritual or material *traditional* contact with their lost lands. In fact, for the Court, in case of the existence of reasons beyond their control, *"...which actually hinder them from keeping us such relationship, such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances*

Series C No. 123, para. 42; *Case of the Serrano-Cruz Sisters v. El Salvador. Preliminary Objections.* Judgment of November 23, 2004. Series C No. 118, para. 33; and *Case of Lori Berenson-Mejía v. Peru. Merits, Reparations and Costs.* Judgment of November 25, 2004. Series C No. 119, para. 64.

[163] For instance, this would be the case if States would not have collaborated in good faith, through the incorporation into the procedures of those relevant documents and other evidence that are exclusively in its possession, such as property records. On this topic see, J. M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, cit., p. 210-211.

[164] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131.

[165] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 147.

[166] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131.

disappear." [167] This is nothing but absolutely logical. In fact, if indigenous communities have been prevented –after their dispossession– to return or to keep material/spiritual contact with their traditional lands, by *illegal* means, such as physical violence, intimidations or different kinds of threats or by the impossibility to access adequate judicial remedies, then this period cannot be counted as a voluntary waive of their claim.[168]

Notwithstanding, this last quotation could also be possibly read *contrario sensu*. That is, in a sense that if the members of the displaced communities did not continuously maintain their especial relationship with their traditional lands, in all of those cases in which they have not been prevented or hindered to do so by external factors, their right to claim back those lands *could lapse*. Moreover, this interpretative rule could even find application in those cases where the displacement has been effectuated against their will or consent. In other words, if after being dispossessed from their traditional lands the displaced communities have not kept alive their traditional connection with them, through immaterial/spiritual or material activities, or through the exercise of an available and adequate judicial remedy (when the traditional practices were hindered), they would face the *lapse* of their *right to return*.[169]

As a continuation, I will address this question, together with other possible restrictions recognised –by the Court– as applicable to the right to communal property, as constructed under the protective umbrella of Article 21 of the American Convention.

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[167] *Ibid.*, para. 132.

[168] This was the case of the N'djuka and other Maroons communities in Surinam which were forced to flee their villages after their destruction and the killings perpetrated by state agents, and they were prevented to return to their lands (for almost 18 years) by the permanent presence of the military forces in the zone in question. In this sense, in the *Moiwana Case*, the Court has emphasised the fact that *"...the ongoing impunity has a particularly severe impact upon the Moiwana villagers..."*, adding that *"...because of the ongoing impunity for the 1986 attack, they* [the members of the attacked villages] *suffer deep apprehension that they could once again confront hostilities if they were to return to their traditional lands"*. It is clear how structural and deeply rooted impunity has put the affected population into a permanent threat, and therefore it has prevented them to return to their traditional lands. See I-ACtHR, *Case of the Moiwana Community v. Suriname. Merits, Reparations and Costs*, cit., paras. 95 and 97, respectively.

[169] As we said above, the recognition of the right to communal property over traditional lands, has to be considered as part of those positive actions that States Parties of the Convention have to enact for the protection of indigenous communities allocated in a situation of *vulnerability*, and in particular for protection of their right to a dignified life.

6.1. Restriction to the Right to Return: the protection of the diversity and its boundaries

As it has been stressed in the precedent paragraphs, according to the jurisprudence of the Inter-American Court, the right to return –and hence the right to communal property in itself– can *lapse*, or can be subject to time-restrictions, conforming to the circumstances of the case.

In fact, the *contrario sensu* interpretation of the Court's finding in the *Sawhoyamaxa Case*[170] –as referred before– leads us to the preliminary conclusion that the right to reclamation for the restitution of the lost traditional lands could be considered *extinguished.* This would be particularly the case of those situations in which the existence of long-passed periods without performing any *traditional* activities would be confirmed; activities that would eventually have had –direct or indirect– effects of *keeping alive* the especial relationship that the involved indigenous populations used to have with the claimed territories. Thus, without the existence of those traditional activities that mirror traditional possession, the said rights would have to be considered *lapsed*. The same applies in those cases in which they have been *prevented* to do so, when it is proven that they *did not exercise any defence* or initiate any formal reclamation for the recovery of the said territories, when –of course– adequate and effective legal remedies were available to them.[171]

The above interpretation sounds very logical, not only because is based on *a contrario sensu* reading of the Court argumentation but –most importantly– because

[170] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131-132.

[171] We must always bear in mind that the legal remedies, in order to be available and effective, must be "adequate" for the protection of the fundamental rights that have been claimed as violated, that is, it has to be suitable to address the infringement of that specific right, and, in addition, they must be "effective" in a sense that would have the potential, the capability –according to the circumstances of the case- to produce the anticipated result, this means to restore the alleged violation through the delivery of justice. See –among others– J. M. PASQUALUCCI, *Preliminary objections before the Inter-American Court of Human Rights: Legitimate issues and illegitimate tactics*, in *Virginia Journal of International Law*, 40, 1999, p. 24. In connection with the Court jurisprudence, see among other authorities, I-ACtHR, *Case of Velásquez-Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 75; *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs.* Judgment February 6, 2001. Series C No. 74, para. 136; *Case of Cantoral-Benavides v. Peru. Merits.* Judgment of August 18, 2000. Series C No. 69, para. 164; *Case of Bulacio v. Argentina. Merits, Reparations and Costs.* Judgment of September 18, 2003. Series C No. 100, para. 127; and *Case of Durand and Ugarte v. Peru. Merits.* Judgment of August 16, 2000. Series C No. 68, para. 121.

it is aligned with the *principle of legal certainty*, in a sense that allows the *legal consolidation* of those factual situations that have existed unmodified since a very long time. However, it must be said that this interpretative reading is quite far reaching for being entirely representative of the Court's jurisprudence at this current stage. In fact, the Court never entered directly into the treatment of the question of *status of limitations*; its analysis focused only on the *material* (*viz.* cultural) connection with the claimed traditional lands but almost disregarding the *temporal* considerations of that connection.

Coming back to the reasoning of the Court, an accurate analysis of its jurisprudence has shown that *current possession* by the involved communities could not be considered –in certain specific cases– as an indispensable requirement for the existence of the right to restitution of the traditional lands.[172] In the case of displaced communities, this point of departure is nothing but absolutely logical –or even obvious– because, in their case, any restitution claim must be constructed –inherently speaking– over the *factual* situation of dispossession and displacement. Nevertheless, in cases of displacement, the restitution of the said lands would be subject to the *corroboration* of the presence of the *material* element, that is, the current existence of the mentioned *especial relationship* between the displaced communities and the traditional lands. As it has been said before, *as long as* the said *special relationship* with those lands *exists*, the right to claim and return to them would be enforceable.[173]

Notwithstanding, because the Court did not *expressly* consider, together with the presence of the above mentioned material element, the need of any special *temporal* requirements, it would be possible to hypothesise a situation in which, after many decades of the claimed lands being under peaceful non-indigenous possession and ownership, they –nevertheless– would have to be surrendered to the involved indigenous communities. This would be the case, precisely because those indigenous communities would have successfully managed to keep alive their *traditional ties* with the demanded territories. To put it bluntly, *as long as* those ties still exist; the right would be there. Hence, following these interpretative and argumentative lines, the material and factual determination of the current existence of those special

[172]See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 128.
[173] *Ibid.*, para. 131.

cultural ties should be regarded as a central question, especially because their proof would open the door for the *special* protection of the attached the said rights.

Within the following section we will attempt to build on this question, paying special attention to the *indicia* gave by the Inter-American Court in this matter, but not only. General principles of procedural law will be also applied.

6.1.1. Special relationship with traditional lands and its material demonstration

A first and perhaps less attentive reading of the jurisprudence of the Court, could lead us to believe that it would be enough for the displaced indigenous groups –in order to have a successful claim– to demonstrate the presence of a mere *spiritual* connection with their dispossessed traditional lands (*e.g.* presence of traditional graves, spiritual or religious ceremonial ties, etc.). Additionally, it could also persuade us to consider that, in order to prove the existence of those spiritual ties, it would be sufficient for the involved indigenous communities to use –as central evidence in a given case– the *transmitting memories* of their very same community.[174] Let me explain more in detail this first interpretative impression, which –as I will argue– would be quite inaccurate.

The reasoning incorporated in the precedent paragraph could be rationally deconstructed in the following manner. In the case of indigenous groups, lands are regarded as closely linked to their *oral* expressions and traditions, their customs and languages.[175] In addition to this, it has to be stressed that indigenous cultures, traditions, history and institutions are *transmitted orally* and not by the use of written words.[176] Therefore, taking into account both observations, the affirmation of the Court that *"[p]ossession of their traditional territory is indelibly recorded in their*

[174] In this sense, the Court has expressly stressed the fact that *"[s]uch historical memory and particular identity must be especially considered in identifying the land to be transferred to them"*; the reason for statement it has been given by the same tribunal has affirmed that *"...throughout its process of sedentarization, the Community "adopted a particular identity, associated with a physically and culturally determined geographical area.""* See I-ACtHR, *Case of the Yakye Axa Indigenous Community...*, cit. *supra* note 57, para. 23.

[175] See I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay. Interpretation of the Judgment of Merits, Reparations and Costs*, cit., para. 154.

[176] See, J. R. MARTÍNEZ COBO, *op. cit.*, para. 103.

historical memory"[177], could sound quite logical and in accordance with the above identified principle of *cultural sensitivity*.[178] Further in this line, it would be also relevant to rightfully consider the weight given by the court to the *cultural implication* of the traditional lands, and its relevance to the formation and maintenance of the indigenous' identity.[179] In fact, this latter consideration could fairly lead us to conclude that it would be even possible, for the *judicial recovery* of lost or dispossessed traditional lands (and enough from a legal/procedural perspective), to *solely* demonstrate that their *spiritual* significance and relevance is still impressed and engraved within the historical memories of the involved community.[180]

To put in another way, the Court has *almost* said that *as long as* the claimed territories are still marked or presented in the *ancestral memory* of the members of

[177] See I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 216.

[178] A very interesting work, in connection with the (hierarchical) distinction between oral and literate traditions, from the ethnographic perspective, is the work of James Clifford, who wrote a very vivid narrative in connection with the case of the Mashpee Wampanoag Tribal Council who sued a defendant class representing landowners in the town of Mashpee under the Indian Nonintercourse Act (25 U.S.C. s 177), in order to recover possession of tribal lands (Case of *Mashpee Tribe v. New Seabury Corp.,* 592 F. 2d 575. C.A.Mass., 1979. February 13, 1979). The case was dismissed on the grounds that the plaintiff was not a "tribe" at all relevant times. Bearing in mind the outcome of the case, Clifford said that *"[t]he Mashpee trial was a contest between oral and literate forms of knowledge. In the end the written archive had more value than the evidence of oral tradition, the memories of witnesses, and the intersubjetive practice of fieldwork."* In fact, because of the difficulties that oral tradition generated on the evaluation of the case and, in finally, on the allocation of the rights, the same author finished his thoughts by asking: *"In the courtroom how could one give value to an undocumented "tribal" life largely invisible (or unheard) in the surviving record?"* It seems that the I-ACtHR has answered this question in a rather holistic way. See, J. CLIFFORD, *The Predicament of Culture. Twentieth-Century Ethnography, Literature, and Art*, Cambridge/Massachusetts/London, 1988, p. 339 et seq.

[179] For a further reading in connection with the identity assessment of indigenous people's claims, see A. EISENBERG, *Reasons of Identity. A Normative Guide to the Political & Legal Assessment of Identity Claims*, Oxford, 2009, in particular Chapter 6, p. 119 et seq.

[180] In fact, in the *Sawhoyamaxa Case*, the Court has concluded that their right to restitution of the traditional lands *has not lapsed*, in spite of the fact that the members of the community have been dispossessed and their access to the claimed lands has been denied, because they were *still* able to carry out traditional activities in them and they still consider those lands as their own. But, if we look closely the relevant testimonies that have been used by the Court to ground its judgment, it would also be possible to conclude that the only connection that still *remain* alive with those lands is just the *spiritual* one. The Court stressed the impossibility for the members of this community to restore their traditional medical knowledge, to practise and teach their own language and transmit their costumes and practises, or to carry on proper burials, because of the lack of access to their traditional lands. Exemplificative of it is the testimony given by of one member of the community, which the Court quoted in its reasoning, who said *"[t]hose lands are the ones best enabling us to live, we are not claiming them just for the sake of it, but because they are the only ones still to hold traces of our grandparents"*. See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 133.

the said communities, and *as long as* their *cultural identity* as distinctive people is *still* intrinsically linked to those territories, they would have their right to property protected and recognised under the American Convention. Consequently, the involved communities would have the possibility to return to their traditional lands *even* if those same lands have been under the *undisturbed* possession by third parties, for a long period of time. In other words, a *preliminary* lecture of the Court's jurisprudence could possibly lead us to affirm that even when the alleged special relationships with *traditional lands* only lingers within the *ancestral memories* of the said communities, that would be enough to regard that said relationship still alive and –hence– sufficient to consider the right to return as not having lapsed. *So far, so good.*[181]

The latter interpretation, even when it could be understood as showing highest level of *cultural sensitivity*, is actually not pursuable because it would mean that the introduction of a sort of *'self-created proof'*, which would generate –with highest levels of provability– a complete *imbalance* between the two different interests at stake (e.g. individual property claim vis-à-vis the communal claim). In fact, the admission of this kind of evidence would also imply that the resolution of the controversy would be put almost entirely on the hands of one of the involved parties (the indigenous one). And this, would indeed be in deprivation of the non-indigenous counterpart's minimum defensive guaranties, especially according to the procedural *principle of equality of arms* or *principe du contradictoire.*[182] But also –

[181] As we saw above, the conceptual reduction of the notion of *"special relationship with traditional lands"* to the mere maintenance of spiritual ties, or even *memorial* ties, without any reference to specific material and identifiable element or *indicia* of concrete objective connection, is nothing but an ulterior *essentialization* of the very notion of *indigenousness*. In fact, the already mentioned *dogmatic equation* (indigenousness = relationship with traditional lands), would suffer a subsequent modification in a sense that it would be integrated as follows: indigenousness = *memories* of a special relationship with traditional lands. The *reductionism* is quite evident, and its practical implication too. It would be enough to say that almost every nation, every cultural societal identities have memories of past possessed territories. The question –of course– would be whether they would be able also to claim effective restitution of those territories based on their *traditional memories.* Of course, it would be possible to argue that the case of indigenous people is different in that the case of other ethno-cultural aggregations, and therefore only them would be able to seek this kind of judicial remedy. If the latter argument is correct, then we would arrive at the conclusion that some cultures are more *"unique"* than others, and for that reason, some cultures would be entitled to a differential treatment in order to match their cultural *uniqueness.* As we already explained in Chapter IV, Sections 2.2.4. and 2.4., this is nothing but an ulterior *essentialization.*

[182] The principle of equality of arms (*du contradictoire)* not only has its legal reception in the role of procedure of the Court, in its articles 35(e) and 57(1), but as well, and perhaps more importantly, in its own jurisprudence, when –for instance– it stated that *"[a]s regards of the weighing of evidence, the*

and even most importantly– by *confusing* the current existence of an enforceable right to the *remembrance* of its past existence (or its past enjoyment by their ancestors), would certainty hit the *principle of legal certainty* and –consequently– it would hardly match with what is required in a pluralist and democratic society. [183]

The line between present and past, between reality and memories (even collective ones), between right based claims and aspiration (or perhaps moral) based claims, cannot and must not be *exclusively* drawn *within* and *by* the *memories* of one of the involved parties in a legal procedure. What is required, as a minimum standard for the achievement of justice and respect of rule of law, is an *objective manifestation* of the alleged special connection with the claimed lands.

In other words, what it is required –as standard of proof– is a clear *embodiment* of the claimed special relationship with traditional lands in one or more *external* and *tangible manifestations*. In this sense, the objective externalisation or concrete manifestation –through external and objective elements– of the said collective *historical* memories, would presumably provide a vivid and current picture of the alleged *traditional* or *special* relationship with the claimed lands. To accept the contrary, would generate the subordination of the enjoyment of a conventionally protected right, that is, the right to property of the non-indigenous part, to the existence of a mere *remembrance* of the claimed *special relationship*, by the indigenous counterpart. Thus, the subordination would be to an special relationship that does not exist any longer; or –better– that exist *only* and *exclusively* in the memories of the involved communities. This, without decreasing –of course– the

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contradictory principle is applied, in order to respect the right of defense of the parties. Such principle is embodied in Article 44 of the rules of Procedure [according to 2003 version of it] *regarding the time of offering the evidence, in order for the parties to stand on an equal footing."* See, I-ACtHR, *Case of Baldeón-García v. Peru. Merits, Reparations and Costs.* Judgment of April 06, 2006. Series C No. 147, para. 60; and also *Case of Acevedo-Jaramillo et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 07, 2006. Series C No. 144, para. 183; *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs.* Judgment of February 01, 2006. Series C No. 141, para. 36; and *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of January 31, 2006. Series C No. 140, para. 61.

[183] See I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay. Interpretation of the Judgment of Merits, Reparations and Costs*, cit., para. 24. In connection with the practice of the ECtHR, it has said that *"[t]he Court's usual practice in its quest to assess the proportionality of an interference would normally begin by establishing a "legitimate aim", followed by an examination of the material facts at issue. It would then proceed to assess the presence and strength of the different values involved by engaging in a balancing exercise."* See, L. CARIOLOU, *The search for an equilibrium by the European Court of Human Rights*, in E. BREMS (ed.), *Conflicts Between Fundamental Rights*, Antwerp/Oxford/Portland, 2008, p. 261 et seq.; and See, J. CLIFFORD, *op. cit.*, p. 339 et seq.

societal importance of the above mentioned *supportive format* (oral transmission of information), which has been traditionally used by these populations for recording their account of history. But again, as apples are not pears, history and reality are not the same; and what the American Convention[184] protects are existing rights and not those that are lapsed back in history.[185]

As it has been mentioned above, *only* a preliminary interpretation of the Court's jurisprudence could possibly lead us to consider as still alive –and therefore *legally* relevant– the existence of the special relationships with traditional lands which *exclusively* linger upon the recorded ancestral memories of the said communities. I said *"only"* because if we carefully analyse this jurisprudence, it would be possible to find a potential different answer. In fact, we would find that it actually does indeed require the presence of *objective* and *tangible* elements from which deduct the *current* existence of the traditional connection with the claimed lands. Let me explain this better.

When the Court has referred and taken into account the *dual* nature of the said relationship with the traditional lands (*viz* spiritual and material), it has stressed the fact that the *"[s]aid relationship may be expressed in different ways, depending on the particular indigenous people involved."*[186] This affirmation does not provide great clarification in this matter, but if we connect it with the elucidative examples furnished by the Court, then we would be able to arrive to the conclusion introduced above, merely on the need of an objective current connection with the referred lands. In this sense, the examples provided by the regional tribunal have included *"...the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of*

[184] See Article 47(b) of the ACHR.

[185] Interpretation of a treaty's provision, like the American Convention, even when it is done in an *evolutive* manner (following the dynamics of the society), cannot be interpreted as allowing the creation of new rights through the judicial action. In fact, what is under evolutive or accommodative interpretation is an *existing right* (provision), and not a *political* claim (even when it can be considered based on a fair conception of justice). Judge Matscher clearly reaffirmed this principle when said *"...dans certains cas, la Cour a atteint les limites qui circonscrivent l'interprétation d'un traité international. Parfois, elle semble même les avoir dépassées, en s'aventurant dans un terrain qui n'est plus celui de l'interprétation d'un traité mais celui de la politique législative qui n'appartient pas à une cour de justice, mais qui est du domaine du législateur (ou, dans le cadre international, des Etats contractants)."* See, F. MATSCHER, *Les Contraintes de l'Interprétation Juridictionnelle. Les Méthodes d'Interprétation de la Convention Européenne*, in F. SUNDRE (ed.), *L'Interprétation de la Convention Européenne des Droits de l'Homme*, Bruxelles, 1998, p. 24-25.

[186] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131.

natural resources associated with their customs and any other element characterizing their culture."[187] As we can see, all these examples imply an externalisation of concrete current actions and material connections *vis-à-vis* the pretended traditional lands, even in the case of *"spiritual or ceremonial ties"*, they necessarily have to be linked to the lands through *"traditional use or presence"*[188], this means through an *objective channel*.

The same above mentioned examples have been referred –by the Court– in the most recent case of the *Xákmok Kásek* indigenous community, in which the Spanish version of the judgment made even more linguistically evident the need to the presence of a physically tangible element together with the spiritual one. The judgment clearly states that *"[a]lgunas formas de expresión de esta relación podrían incluir el uso o presencia tradicional, a través de lazos espirituales o ceremoniales…"*[189]

Therefore, the fact that the claimed lands could be still *"permanently marked in the "ancestral memory" of the members of the said community"*[190] is not and must not be considered in itself as sufficient for the recognition and successful exercise of the right to return to the lost or dispossessed traditional lands, as protected by Article 21 of the Convention. However, it could still be considered as an important *indicia* that would have –nevertheless– to be complemented by the demonstration of the existence of *concrete*, *material* and *current* connection with the said lands.[191]

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[187] *Ibid,* para. 131. In this particular case the Court took as proven the relationship through the demonstration within those lands of 'traditional hunting, fishing and gathering activities'.

[188] The use of a present tense by the Court is indicative of the contemporaneity of the connection.

[189] See, I-ACtHR, *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs.* Judgment of August 24, 2010. (Only in Spanish) Series C No. 214, para. 113.

[190] I-ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay. Interpretation of the Judgment of Merits, Reparations and Costs*, cit., Concurring Opinion of Judge A.A. Cançado Trindade, para. 1

[191] Moreover, it is important to bear in mind that the *indicia* mentioned by the Court could indicate not only the existence of right to property but as well the presence of the right to use, in accordance with the distinction established by Article 14(1) of the ILO Convention No. 169, which reads as follow: *'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.'* According to Prof. Thornberry, *"[t]he syntax may suggest that the greater rights* [right to communal property] *accrue only to lands 'exclusively' occupied by the peoples."* Nevertheless, he also précised that the right to property *"…does not explicitly demand that occupation must be exclusive…"* See, P. THORNBERRY, *op. cit.*, p. 355.

Moreover, we have to always bear in mind that the exercise of the right to return is in itself an *exceptional* situation, in a sense that is connected with a situation of dispossession or displacement from the claimed traditional lands. The *golden rule* with regard to the exercise of the right to communal property –as recognised within Article 21 ACHR– remains the *traditional possession*; this is the element that *"entitles indigenous people to demand official recognition and registration of property title"*[192], and –as a general principle– only admits very few exceptions. Hence, the exceptionality of the exercise of the right to property (through the exercise of the right of return, which is enshrined in it) when the claimants *are not* in possession of the pretended traditional lands, should naturally guide the interpreter toward a *restrictive* and cautions interpretation of the circumstances of the case. This restrained interpretation, would eventually lead to a conclusion of the existence (or not) of the said *especial relationship* and –therefore– to the current recognition (or not) of the claimed right to communal property.

But (there is always a "but"), an attentive and knowledgeable reader would certainly introduce a very strong criticism on what has been said before. His or her objection would most likely consist on the fact that this interpretative construction does not provide a reasonable answer to those cases in which the involved populations were prevented –or banned– in their tentative plea to keep material and objective *traditional* contact with their ancestral lands and territories. Especially after being displaced or unwillingly removed from them by the use of different means (e.g. use of force, lack or structural legal deficits in the recognition of the communal property, inexistence of adequate and effective remedies, etc.). This observation would be perfectly valid. However, as I said before, the objective requirement of *traditional current possession*, as a ruling principle, accepts some few exceptions. And, as you can imagine, this is one of them. In fact, the Court has considered this issue, when it has concluded that *"...restitution rights shall be deemed to survive until said hindrances disappear."*[193]

[192] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 128; in the same vein, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 151;
[193] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 132.

In other words, the indigenous people's *special* relation with their lands not only has to be *present* but also *possible*. This means that the involved communities should not have been averted –for reasons beyond their control– from the realisation or accomplishment of those *cultural* activities that reflect –and prove– the permanence, *current* existence and continuity of their *traditional relationship* with the claimed lands.[194]

The latter affirmation of the Court leads us to two different observations. First, a *contrario sensu* reading of it could allow us to affirm that after the disappearance of those impediments, after the banishment of those hindrances, the right to return and –consequently– their right to traditional communal property would *lapse*. This would be the case, if the members of the involved community did not *re-establish* their *special relationship* with the claimed lands, and did not display those traditional activities that are able to mirror the *cultural distinguishability* of the said relationship. Why? Simply because, as any other *non-absolute* right[195], the right to property could be *restricted* or even considered –for instance– as *lapsed* when entered in collision with the protection or attainment of legitimate objectives or even foundational higher values in a democratic society, such as the principles of *legal certainty* and *rule of law*.[196]

In fact, is in the protection of the above mentioned principles, that the legal introduction of *prescriptions* or *status of limitations* could be recognised as a legitimate and necessary interference to the conventional protection of the right return and recovery of the dispossessed traditional lands. Therefore, taking into consideration these potential limitations, in those cases where it would not be possible to identify external signals or manifestations of *effective exercise* of traditional possession, that situation could be taken as a logical and concrete evidence of the *lack of exercise* of the right to property (when –of course– that exercise was possible). In addition, if the said external absence is maintained during a relevant period of time, then it would be possible to conclude that the involved indigenous communities –who used to have an special connection with those lands–

[194] See I-ACtHR, *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, cit., para. 113.
[195] See Article 21(2) of the ACHR.
[196] See, I-ACtHR, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., p. 144-145.

have *waived* or *lost* their interest in the conservation of the referred traditional possession and communal property.

Furthermore, beside the application of the general principle of equality and non-discrimination in the enjoyment of the conventional rights[197], the *reasoning* behind the protection of the traditional communal property lies –as we saw– on the protection of the *essential* and *constitutive* connection that traditional lands have with indigenous cultural identity and *cultural distinctiveness*. Therefore, when the involved communities *voluntarily waive* their *special* connection with the said lands, it logically and inevitably means that *that* connection is in itself not essential any longer.[198] In fact, the Court has rightfully recognised the *perishability* of the said special relationship, when it has bluntly affirmed that *"[s]i esta relación hubiera dejado de existir, también se extinguiría ese derecho* [de propiedad]*."*[199] Thus, in the case of voluntary (explicit or implicit) waive of the said *special* connection with traditional lands, the right to return and –consequently– the right to communal property have to be considered definitely *lost*.

The second observation that could be drawn, from the jurisprudence of the Court under analysis[200], consists of the fact that –again– the regional tribunal kept silence in connection with what would have happen if those hindrances, those material (factual or legal) impediments would have remained in place for a *very long period of time*, perhaps for several decades or even centuries.[201] Forced displacements, unjust or even illegal deprivation of lands (according to national or even international law existing at the time of the events), lack of redress, or insufficiency or inadequate and ineffective legal remedies, could be the broad picture

[197] See Article 1(1) and 24 fo the ACHR.

[198] As the reader can imagine, the latter affirmation is constructed within the process of understanding of the jurisprudential regulation of the involved rights. Hence, for our own understanding in connection with the *essential* constitutive character of the *special relationship* with traditional lands with regard to indigenous identity and culture, see our considerations in Chapter IV, Section 2.2.4. and 2.4.

[199] In the author's own translation: "If this relation would no longer exist, it would extinguish that right also." See I-ACtHR, *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, cit., para. 112; see also, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131.

[200] In connection with this topics, Chapter V, Section 2.

[201] This, for instance, could be the case of Mapuche population in Chile and Argentina, which in very high percentage lives as an urban population, since a very long time (in some cases even from more than 100 years), which –according to certain field studies- *"[v]ery often they have lost awareness of their identity, as it has been undermined – some would say systematically – by state-imposed education, religion and the media..."* See, L. RAY, *op. cit.*, p. 20-21.

that represent most cases that we have to deal with, when we analyse the fate of many indigenous communities in Latin America.[202] All of these actions can be considered indeed as historical injustices and moral wrongdoings (according to the contemporaneous moral standards[203] and –perhaps– to those existing at the time of their actualisation[204]), but –unfortunately– it cannot be considered as a *valid legal justification* for the protection of a specific *currently* recognised right before an international tribunal. Seeking redress for historical injustices, and to have the right to a judicial reparation or redress, is not –and must not be– the same.[205]

Therefore, even in those cases in which the dispossessed communities have been prevented since a very long time to re-establish their traditional contact with what used to be their ancestral lands, the pursuing of a *general interest* in a democratic society and –hence– the application of both, the principle of legal certainty and the rule of law, would require us to consider the claimed right to communal property as *lapsed*. The *remembrance* of the claimed possession –which does not exist any longer–[206] could still be indeed vivid within the *traditional memories* and –therefore– could still have an important role in the formation of the communal identity of the members of the involved communities. In fact, it could perhaps be an immaterial pivotal element for the maintenance of their internal

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[202] See, R. STAVENHAGEN, *Indigenous Peoples in Comparative Perspective - Problems and Policies*, cit., p. 2 et seq.

[203] For a current perception of historical wrongdoings, see –for instance– the *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc. A/CONF.189/12, 2001, p. 12, para. 14.

[204] See e.g. F. B. DE LAS CASAS, *Brevisima Relación de la Destruicion de las Indias*, Sevilla, 1552.

[205] Professor Brooks, meanwhile addressing the question of reparation claims for slavery, which is –of course- highly controversial, has said that *"not all responses to an atrocity are reparations. Some are intended to be remorseful; others are intended to simply make the matter go away, to get over the hump, as it were. Thus, a clear distinction is made between "reparations" and "settlements". The latter, unlike the former, refers to an unremorseful, unapologetic perpetrator response to an atrocity."* See, R. L. BROOKS, *Getting reparations for slavery right - A response to Posner and Vermeule*, in *Notre Dame Law Review*, 80, 2004, p. 259. In addition, see our considerations in Chapter V, Sections 2.2.2., 2.2.5. and 2.4.

[206] In this sense, Professor Savigny has said, in connection with the causes that generate the loss of the possession, that *"[l]a primera condición de la continuación de la posesión, consiste en una relación física con la cosa poseída, por la cual nos es posible ejercer sobre ella nuestra influencia. No es necesario que esta influencia sea inmediata, actual, […] basta con que esta relación de poder sea de tal naturaleza, que se halle en estado de producirse conforme a la voluntad, y de ese modo la posesión no se pierde sino cuando la influencia de nuestra voluntad ha venido a ser enteramente imposible."* It is clear that in this case the relationship with the claimed traditional lands became impossible and hence extinguished. See, F. C. v. SAVIGNY, *Tratado de la Posesión. Según los Principios de Derecho Romano*, Madrid, 1845, p. 176 et seq.

societal cohesion.[207] However, because the presence of other essential principles which lie down at the very base of the democratic construction in any given society, the protection of cultural diversity and potential *distinguishable* identities, and –consequently– those potential differential cultural understandings of property, *find their limit*s.

7. Conclusion

We started this chapter with the analysis of a new element that has been jurisprudentially incorporated into the multifaceted conceptual notion involved within the so-called *"special relationship with traditional lands."* That is, the possibility to enjoy a *life in dignity*, or a *dignified life*, which is enshrined –according to the Court– within the scope of protection of Article 4(1) ACHR, interpreted in a broad sense (*lato sensu*).

In fact, the Inter-American Court has identified within the scope of protection of the conventionally protected right to life, and therefore, as part of the obligation assumed by the States Parties, the prohibition of its arbitrary deprivation (negative obligation), but not only. It has also identified within that scope, the generation of those necessary conditions that would allow or make it possible to have access to a *decent life*. That is, a life which respects those minimum conditions that would protect the dignity of each human being. [208]

However, it is important to bear in mind that the notion of a *dignified life* has to be necessarily considered in context. Therefore, in the case of indigenous populations, the *positive measures* that States have the obligation to implement (Article 1(1) ACHR), have to necessarily take into consideration their regarded cultural *distinctiveness* and –most in particular– the protection of their *special relationship* with their traditional lands. In fact, because the said special relationship is regarded –by the Court– as a constitutive and essential part of the indigenous people's *identity*, the recognition of the right to communal property over traditional lands has to be considered as part of those positive actions that States Parties of the

[207] See, L. RAY, *op. cit.*, p. 20 et seq.
[208] See I-ACtHR, *Case of Juan Humberto Sánchez v. Honduras*, cit. para. 110.

Convention have to enact for the protection of indigenous communities. Indeed, the recognition of the right to communal property is regarded as a necessary instrumental *vehicle* to make possible culturally tailored *dignified lives*.[209] In this sense, special attention has to be paid in connection with those members of indigenous communities living in a factual situation of *vulnerability*.[210]

Therefore, according to the jurisprudence of the Court, in the specific case of indigenous communities, the lack of recognition of the right to property to their traditional lands, would amount not only to a violation of Article 21 of the American Convention. In addition, it would also imply an infringement of the right to life as protected by Article 4(1), when read in accordance with the dispositions contained within Article 1(1) and 2 of the same instrument (Obligation to Respect and Protect).[211]

Moreover, in the view of the regional tribunal, States' obligations include –as positive actions– the necessary processes for the identification, demarcation and titling of those traditional lands, for the *effective* benefit of the involved communities (principle of effectiveness).[212] In order to perform these obligations, due attention has to be paid to the traditional possession of the affected lands, which should also be regarded as a sufficient official recognition of the right to property and its due official registration.[213]

Furthermore, in those cases where indigenous communities were displaced from their traditional lands, and therefore temporarily dispossessed, their *right to return* to the claimed traditional lands is also recognised as protected by Article 21 ACHR. However, the possibility to return is not absolute. It would be maintained, *as long as* the members of the involved communities would be able to conserve alive the regarded *special* and *'unique'* relationship with their traditional lands. When that

[209] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., Separate Opinion by Judge Cançado Trindade, para. 30.
[210] See, I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 170.; see also, *The Case of the Pueblo Bello Massacre v. Colombia*, cit., para. 111-112
[211] See, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., para. 168.
[212] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, cit., para. 120.; see also, *Case of the Yakye Axa Indigenous Community v. Paraguay. Interpretation of the Judgment of Merits, Reparations and Costs*, cit., para. 23
[213] See I-ACtHR, *The Case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, cit., para. 151.

relationship *ceases*, their right to communal property *ceases* too; and –as a consequence of that extinction– the possibility to return would *lapse* too.[214]

Nevertheless, in those cases in which this relationship has been hindered by acts of violence or threats, the right to return to those traditional lands (as a component of the right to property) *'shall be deemed to survive until said hindrances disappear'.*[215] Accordingly, after the disappearance of those impediments, it could happen that the possession or traditional use of the lands is not *re-established*, or even that those impeditive grounds remain for a very long time without being *legally challenged*. Then, in those cases, after the passing of a certain period of time (for example the period 90 years established in the case of the prescription from time immemorial[216] –or even less– according to the different national regulations)[217], the right to return and –consequently– the right to communal property has to be considered definitely *lost*.

This interpretation could be seen as in line with the substantial provisions of the ILO Convention no. 169, in which the recognition of right to return is always connected with an *unwilling* loss of the former possession of the claimed traditional lands (temporal connection), but not only. It could be considered as fundamentally in line with the regulation of the right to property as protected by the American Convention, in which the latter right is recognised as a *non-absolute* right and –hence– potentially subordinated in its exercise and enjoyment to –for instance– the general interest of the society.[218] This could be indeed the case of the protection and enforcement of foundational principles of modern democracies, such as the principles of *legal certainty* and *rule of law*.[219]

The interest of the broader society, organised in a pluralist and democratic form, operates –in this particular case– as a limit for a further protection of the cultural diversity or cultural *distinguishability* of a given ethno-cultural entity.

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[214] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 131.
[215] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* cit., para. 132.
[216] See ECtHR, *Handölsdalen Sami Village and Others vs. Sweden*, Decision as to the Admissibility of February 17, 2009 (Application no. 39013/04).
[217] The regulation of this time limit indeed falls into the national legislative jurisdiction of each Member State of the American Convention.
[218] Article 21(1) American Convention.
[219] See, I-ACtHR, I-ACtHR, *Case of Yakye Axa Indigenous Community v. Paraguay*; Judgment on Merits, Reparations and Costs, cit., p. 144-145.

Last but not least, allow me to analyse the above consideration from a different angle, merely from the perspective of the theoretical framework that we have developed within the first part of this study. In fact, if we come back to the notion of *special relationship with traditional lands*, from a conceptual point of view we have already said that intrinsically enshrines a sort of *essentialization* of indigenous people's identity. In other words, indigenous identity is conceptually reduced to the existence of a single objective element, a sort of *dogmatic equation* in which *indigenousness* is equalised to the factual circumstances of the said relationship.[220] In addition, we have also concluded that, under the understanding of the Court, this equation has gained a sort of multifaceted conceptual notion that has been characterized as a *"fivefold circular relationship"*, integrated by the interrelated and interdependent notions of: *traditional lands → culture → identity → right to dignified life → right to communal property over traditional lands.*[221]

However, if we add to the said multidimensional notion the new elements that we have incorporated in this chapter (beside the right to dignified life that has already been introduced), it would be possible to consider the above mentioned conventional need for the adoption of positive actions –as it has been interpreted by the Court– as a new integrative element of this conceptual chain. Therefore, instead of a *fivefold* multifaceted conceptual notion we would have a *sixfold circular relationship*, composed as follows: *traditional lands → culture → identity → right to dignified life → positive actions → right to communal property over traditional lands*. Within the latter right, we have to consider included the right to return (which is one of its components), especially in those cases of forced displacement.

Moreover, if we precisely focus on the specific situation of the indigenous displaced populations, which –in most cases– are indeed in a situation of *vulnerability*, it would be quite logical to conclude that the most adequate positive action –in order to revert their factual situation– would be the recognition of the right to property over their traditional lands and their consequential restitution. However, if we take into consideration that this specific positive action is based –according to the understanding of the Court– on the existence of the above mentioned *special*

[220] For more detailed explanations in connection with this *dogmatic equation*, see Chapter IV, Sections 2.2.4., 2.4. and 4; and Chapter V, Section 2 and 7.
[221] See our conclusion in Chapter V, Section 7.

relationship with those traditional lands from which they have been displaced, we would have to necessarily conclude that the inexistence or loss of the latter would unavoidably affect the legitimacy of the former. Nonetheless, as it has also been stated above, there are exceptions to this general conclusion.

Finally, if we consider that the said *special relationship* is regarded as *the* essential component of the notion of *indigenousness,* and therefore indispensable for the configuration of indigenous cultural identity[222], then the consequence of the loss of that special relationship would inevitably generate the *deprivation* of the said identity. Thus, in those cases in which the displaced populations would not have the possibility to return to the lands from which they were displaced, what would be at stake would be their impossibility to retain their own identity, as indigenous people, at least from a conceptual point of view.

The above way of thinking could be logical but not practical (or even accurate). Cultural identities are dialogical, dynamic and changeable.[223] They cannot possibly be reduced to the existence of one single element, namely, the said *special relationship* with traditional lands. As a very last remark, perhaps it would be even possible to say that, in this case, it seems that more notions remain tied but also trapped together in what we have called the *'essentialist trap'*.

[222] See, Chapter IV, Section 2.2.3.
[223] See, Chapter III, Section 4.

CONCLUSIONS

The present work has examined the question of cultural diversity and cultural identity, and the claim of ethno-cultural entities or groups for the recognition of their distinguishable cultural identity, through the allocation of a differential set of rights, able to reflect and mirror their cultural diversity. In addition, special attention has been given to the specific claims of indigenous people and –in particular– in connection with their claims for the acknowledgement and recognition of the special (cultural) relationship with their traditional lands.

Hence, this study has addressed the above mentioned topics from two different angles. First, from a theoretical perspective, this study has been conducted through the examination of the logical argumentative construction of those central notions contained within the socio-political, axiological and legal discourses related to this topic. Secondly, our analysis shifted toward the concrete situation of indigenous people and the jurisprudence of the Inter-American System in connection with their claims for the recognition of their rights over their regarded traditional lands. This second part has been thought as a concrete case study in order to assess how the theoretical framework –developed within the first part– works in practice.

Coming back to the first part, in Chapter (I) we analysed the *multiculturalist* proposal as a potential answer for the above mentioned claims, which basically means the equal recognition of the different ethno-cultural entities or groups present in a given society. According to our analysis, the multiculturalist's plea has to be regarded as both axiologically and ontologically incorrect.

Axiologically incorrect, because multiculturalist proposals lead to an axiological paradigm that could be summarised as *'equal in differences'*, which is not the same as *'different but equal'*. The former stresses the equal acknowledgement of our cultural differences –what we do not have culturally in common– through recognition of a different culturally tailored set of rights that would lead to the existence of different legal status based on group membership. On the contrary, the latter stresses our commonality, what make us equal beside our potential cultural differences or alliances. In short, this means that the centre of multiculturalist

axiological protective system is not based any longer on Article 1 of Universal Declaration of Human Rights, which is human dignity, but on the dignity of each ethno-cultural entity or group.

Secondly, this proposal has to be considered as ontologically incorrect because it is based on a fallacy, namely, the ontological *equal value of cultures*. The latter has to be considered as a dogmatic assumption, due to the fact that cultures cannot be ontologically compared. The reason is the lack of external parameter. Their value is *culturally* attributed, and therefore axiologically relative. However, all cultures perform an *equal valuable function* in the society, regardless of their attributed moral value. Every individual finds in his or her own culture an equal *functional* system of values and the necessary understandings of life.

Last but not least, this study has shown that the fact that cultures have equal functional value does not mean that they would have *equal societal success*. In providing their societal function, some cultures could be more successful than others, and therefore they would receive more substantial support in the society. Cultures are ontologically changeable and dynamic, they change across time and space; their perpetuity is not guaranteed. Hence, the existence of *cultural majorities* is nothing but a manifestation of their own *cultural success*.

However, in open, pluralist and democratic societies, members of cultural minorities are not unprotected. As individuals, their right to freely enjoy their own culture –in community with the other members of their group– is indeed guaranteed (e.g. Article 27 ICCPR). As a societal aggregation, as a differential ethno-cultural group, this study has concluded that what is guaranteed is their possibility to openly engage in dialogical process of avocation, seeking cultural support for their differential views and understandings. Nevertheless, these *political/cultural aspirations* are not enforceable as rights; their *cultural/institutional success* is subordinate to what has been called *"the democratic game"*. In this study (Chapter II), the latter has been defined as a dialogical process that permits the possibility to methodologically channel all political aspirations and cultural understandings and views into a common societal decision-making process. Yet, it has also been found that this *game* does not guarantee any socio-political and cultural success.

In addition, this study has highlighted the fact that common societal cultural institutions (including the legal systems) are constructed through societal consensual agreements among all its members, including –of course– minority members. However, in democratic societies, consensus is essentially a result of an inclusive dialogical and procedural mechanism, which does not guarantee culturally tailored substantial outcomes, only participation. Indeed, minority members can make full use of the democratic dialogical procedures, advocating for the *goodness* of their differential cultural understandings in order to gain broader support in society, and perhaps even to culturally reconstruct (or deconstruct) common societal institutions. But, because in a democracy, numbers count, their political aspirations are not guaranteed.

Nevertheless, because democracy and human rights are interdependent and mutually reinforced concepts, the latter operates as an ultimate limit of the –most likely– majoritarian outcome of the said *democratic game*. In fact, when members of ethno-cultural minorities are *completely marginalised* from the dialogical decision-making process, this study concluded that international human rights standards would grant them with the possibility to exceptionally exercise the so-called right to *internal self-determination*, not just as members of societal minorities, but as "peoples" (common Article 1 of the ICCPR and ICESCR). This means that they would have the possibility to seek and to rightfully claim –within the boundaries of national States– the recognition of political autonomy and self-government in accordance with their own cultural understandings and traditions.

Moreover, in case of threat to the very physical existence of the members of an ethno-cultural minority, just because of their membership in a group (such as the case of genocide), then it would be even possible for that specific societal entity to claim the full exercise of the *right of self-determination*. Therefore, they would be able to rightfully exercise a *remedial secession*, under the light of Article 1(2) of the UN Charter. Notwithstanding, both cases have to be regarded –as we have also concluded– as remedial arrangement for exceptional circumstances in which democratic societies do not function, and not as recognition of *multiculturalist* proposals for culturally divided societies.

As we can see, in an open, pluralist democratic society, the individual freedom to enjoy culture –in association with others– is fully protected, but not only. What is protected too is their cultural freedom, the possibility to engage in cultural creative activities, to freely express themselves. In fact, as we concluded in Chapter (3), without having the possibility to culturally express themselves, humans would become just mere instruments or tools subjected to the *will* of others. Therefore, our unavoidable conclusion was that *cultural freedom* is inseparable from respect for *human dignity*. This conclusion is quite different from the UNESCO's views on this matter. For the said organisation, what is inseparable from the respect of human dignity is *cultural diversity.*[1]

According to our views, the UNESCO's understanding is based on the confusion between these two ontologically different notions. However, they are indeed interconnected. In effect, a diversity of cultural expressions could provide an enriched environment for a better development of individual cultural identities, but the cultural product (culture) –which is changeable and dynamic– cannot be confused with the dignity of its producer (the individual), which is not. Culture, as concluded, is (or should be) functional to the individual, not the opposite.

In this sense, this work has also highlighted what has been characterised as UNESCO's multiculturalist approach toward culture and cultural identity. In fact –for this organisation– cultures would have values on their own that have to be protected and respected, regardless of their instrumental function vis-à-vis the individuals. And because individuals are those that have to respect that acquired dignity, it seems that –under this understanding– individuals have become functional to culture and cultural entities, instead of the opposite.[2] In short, this could be seen as a sort of *subordination* of the cultural producer to his or her own cultural product.

However, if we incorporate into this general understanding of culture and cultural diversity, the human rights based component, it would be possible to axiologically evaluate the functional content of cultures. In fact, international human rights standards –as we have concluded– operate as an external *cultural comparator*,

[1] See, Article 4, UNESCO *Universal Declaration on Cultural Diversity*.
[2] See, UNESCO *Declaration of Principles of International Cultural Co-operation*, of 4 November 1996, Article I(2)

but not only. As an external valuative (moral) parameter, it also operates as a *cultural restrictor* too.

The above conclusion is based on the fact that –as common standards– human rights norms have received broad and universal consensus from international community; even when not always fully respected, its norms are regarded as such, namely, as a common moral parameter or yardstick of the humanity. Moral principles and values are consensual and international human rights standards are the most accepted ones. For this reason, the respect for pluralism and the different cultural manifestations does not mean that it is extended to those practices that are harmful or disrespectful of international human rights law and standards; the former find their limits in the latter.

In addition, the analysis –in Chapter III– of the notions of cultural diversity and cultural identity has also shown that these concepts are not ontologically connected with the potential political aspirations of minoritarian ethno-cultural entities or groups, claiming for more institutional visibility and structural societal participation, but not only. They also claim to be granted –due to their cultural distinctiveness– with a differential set of rights. These are political battles, which have to be fought within and under the rules of the so-called *'democratic-game'*.

Notwithstanding, according to our conclusion in Chapter IV, it seems that international community has recognised one clear exception in connection with granting specific and differentiated set of rights based on ethno-cultural grounds. In fact, with the adoption of the UN Declaration on the Rights of Indigenous Peoples (2007), it seems that these populations have received concrete international support for the recognition of their *cultural distinctiveness*, as distinguishable societal entity, as different peoples, with right to a differential and exclusive set of culturally constructed rights. In this sense, the adoption of the said instrument –by the UN General Assembly– can be regarded as a successful political achievement toward the construction of multiculturalist societies, based on differentiated, exclusive, and culturally constructed set of rights based on group ethno-cultural affiliations.

The argumentative justification of this differential and exclusive legal treatment has been identified as the need for protection of their cultural distinctiveness, or what has been called their essential *'indigenousness'*. Therefore,

the critical analysis –in Chapter IV– is concentrated on the ontological implications of this notion, on its axiological legitimation as a societal concept that enshrines and reflects the unique and distinguishable societal nature of indigenous people, which would justify its differential (and exclusive) normative treatment. The enquiry showed that the claim of cultural "uniqueness" has no ontological foundation, in a sense that indigenous culture is "as unique" as all the other cultural manifestations. All cultures have *equal functional value*, indigenous or non-indigenous cultures alike. Hence, ontologically speaking, there are no cultures more "unique" than others.

Moreover, this study showed that the so-called *special relationship with traditional lands* element, as the essential factor demonstrative of their cultural distinctiveness, within socio-political and legal discourses, involves in reality a *dogmatic essentialization* of indigenous people's cultural identity. In fact, the equation *indigenousness=special relationship with traditional lands*, seems to be based on the dogmatic assumption of the unchangeable, timeless and even culturally uncontaminated character of indigenous cultures. This is not only opposed to the very idea of culture, which is essentially dynamic and dialogical, but also –and even most importantly– deprives of indigenous identity those large majorities of self-identified indigenous people living in urban areas for generations. In fact, under this dogmatic *essentialization* of indigenous cultural identity, they would not be able to identify themselves as such any longer.

In addition to what has been said above, the other factor regarded as essential, for the construction of their distinguishable cultural identity, has also been retained as ontologically problematic. This is nothing but the objective criterion of *'being first in time'*. In this case, given ontological relevance to the *mere* fact of being descendant of those first inhabitants that populated the current national territory of a given State, at the time of colonisation, invasion or otherwise *unjust* dispossession of their traditional lands, could –most likely– pave the way for biological and –hence– racially related connotations.

For these reasons, without having clear objective justifications, it has been concluded that the claim of substantial *cultural distinctiveness*, is exclusively sustained by the subjective element of this notion, namely, their *self-identification*

and *self-understanding* as being culturally different. In other words, indigenous people's culture should be regarded as *"more unique"* and different from other cultures, just because indigenous people's *self-perception* of uniqueness.

This study also pointed out, that self-perception of uniqueness and differentness –in cultural terms– is common to all cultural manifestations, precisely because all of them are "unique". In addition, it has been shown that individual enjoyment of cultural self-identifications is fully protected in international human rights law, but that is not the case of group self-perception. In short, granting indigenous groups (or any other ethno-cultural group) specific and exclusive rights based on their self-identification as being ontologically different from the rest of the society, has been considered as axiologically connected with the *multiculturalist* path for the segmentation of human society in equal societal ethno-cultural entities or groups.

However, because the said division would be based mainly on criterion of *descendancy*, it could potentially lead to a rebirth of societies based just on the criteria of ethnicity and race. Additionally, the rational and critical assessment of the proposal for the construction of divided and segmented societies would have –as a consequence– nothing but the allocation of humans in *distinguishable unequal positions*, according to their ethno-cultural appurtenances, that is, according to their *cultural distinctiveness*.

In effect, at the end of this first conceptual part, this study has shown that the true question at stake is how human rights are ontologically considered. Either as equal minimum standards for all, based on our equal dignity and hence regardless of potential different ethno-cultural affiliations; or as equal rights for equal groups, culturally distinguishable and composed of individuals who would enjoy a differential set of rights and legal status, based on their ethno-cultural membership. The former interpretation ideally leads to a society of culturally diverse but equal humans; the latter, toward a society of equally diverse humans (in cultural terms), but not necessarily equals (in rights and dignity). *Diversity in equality or equality in diversity*, this is the question.

In order to provide a practical answer to this axiological question, this study undertook the analysis of the jurisprudence of the Inter-American Court of Human

Rights (I-ACtHR) in connection with indigenous people's land claims (Chapters V and VI). The reason for this methodological choice can be found in the very same jurisprudence. This regional tribunal has –in fact– provided answers to the central element of indigenous people's *cultural distinctiveness*, namely, their *special relationship* with their traditional lands, but not only. Most importantly, it has done so from a perspective of a regional instrument that recognises equal human rights for all individuals, regardless their ethno-cultural affiliations, that is the American Convention on Human Rights (ACHR).

After reviewing –in Chapter V– the methods of legal interpretation applied by the regional tribunal in its case law and –in particular– in those connected with indigenous people's cases, this study has shown that the Inter-American Court has applied an innovative and integrative method of legal interpretation. In fact, through a dynamic, systemic, evolutive, non-restrictive and effective interpretation of the regional and universal human rights instruments (as integrative part of the *corpus juris* of international human rights law)[3], this Court has introduced specific indigenous people's rights into the text of the American Convention.

In particular, under the interpretative light of the said *corpus juris* has re-elaborated the content of Article 21 of the American Convention, in a sense as to extend its scope of protection beyond the borders of a *mere* right to property; even far away from the *mere* recognition of the right of indigenous people to communal property over traditional lands. Indeed, the Court has extended the scope of the protection of this article to the protection of indigenous people's *cultural identity*.

This study has concluded that the reasoning applied by the Court started –in fact–with the acknowledgement of the *special relationship* that the involved indigenous communities have with their traditional lands. But the Court also understood the said *special relationship* as the *essential* and determinative factor of the *distinguishable* cultural identity of those communities. For this reason, the I-ACtHR has arrived at the conclusion that without the enjoyment of this special connection, their indigenous identity –as *distinguishable* peoples– would be at stake. In effect, for the Court, without the recognition and protection of the said relationship, indigenous people's possibility to enjoy a *life in dignity* –a *dignified*

[3] See, I-ACtHR, *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion AC-18/03 of September 17, 2003. Series A No. 18, para. 120.

life–, according to their own cultural traditions, would be potentially violated. For this reason, the scope of protection of Article 21 ACHR was extended –by means of its systemic, evolutive and non-restrictive interpretation– far beyond the right to property, to the point of confusing its own limits with those of the right to life, as protected by Article 4(1) ACHR, but not only.

In addition, and as a consequence of the above mentioned equation (special relationship with traditional lands = life in dignity), the I-ACtHR has interpreted –according to the results of our inquiry in Chapter VI– that the recognition of the right to communal property over traditional lands has to be considered as part of those *positive actions* that States Parties of the American Convention have to enact for the protection of indigenous communities (Article 1(1) and 2 ACHR, obligations to respect and protect). Consequentially, the recognition of the right to communal property is regarded as a necessary instrumental *vehicle* for making possible –culturally tailored– *dignified lives*.[4]

The enquiry has also shown that these positive measures should include the necessary processes for the identification, demarcation and titling of those traditional lands, in order to guarantee the effective benefit for the involved communities. In addition, the official recognition of the said right requires special regard to be given to the objective and demonstrable existence of *traditional possession*. In other words, the latter element cannot be judicially ascertained by the *sole* and *exclusive* demonstration that, the claimed traditional lands still have *spiritual* significance and relevance within the *historical memories* or *oral records* of the claimant communities. Neither historical reminiscences of past traditional possession nor historical processes of land's dispossession are included within the scope of protection of Article 21 ACHR. What is included under the protection of the American Convention are existing rights, which have to be *objectively* demonstrable, and not socio-political revindications for those "rights" regarded as *lapsed* back in history. This is, of course, without prejudice of the moral/political legitimation of claims for redress in connection with historical wrongdoings.

[4] See I-ACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, Separate Opinion by Judge Cançado Trindade, para. 30.

However, our study has identified one exception to the golden principle of the traditional *current* possession of the lands, namely, those cases where indigenous communities were recently displaced from their traditional lands, and –therefore– temporarily dispossessed. In these cases, their right to return to the claimed traditional lands is also recognised as protected by Article 21 ACHR. Nevertheless, this enquiry also showed that the possibility to return is not absolute. In fact, our analysis of the jurisprudence of the Court has demonstrated that the right to return is preserved, *as long as* the members of the involved communities would be able to conserve alive the regarded *special relationship* with their traditional lands. When that relationship *ceases*, their right to communal property *ceases too*; and –as a consequence of that extinction– the possibility to return would *lapse too*.

I concluded that the extinction of the right to return, and therefore the right to property over traditional lands, has to be regarded as a direct consequence of the legal nature of Article 21 ACHR. In fact, in the latter Article, the right to property (including the right to communal property) is recognised as a *non-absolute* right and –hence– potentially subordinated in its exercise and enjoyment to –for instance– the general common interest of the society. And this could indeed be the case of the protection and enforcement of foundational principles of modern democracies, such as the principles of *legal certainty* and *rule of law.*

Finally, from the critical appraisal of the jurisprudence of the Court, under the light of the theoretical framework developed within the first part of this study, it has been concluded that the interpretative action of the Court enshrines a specific understanding of the ontological role played by the notion of *special relationship with traditional lands*.

In fact –for the Court– the above mentioned notion is regarded as the *pivotal element* over which it has constructed a multifaceted ontological understanding that has been characterised by the author as a *'sixfold circular relationship'*. This axiologically constructed notion enshrines different conceptual elements, tied together by the presence of the mentioned notion of "*special relationship with traditional lands*". Its composition can be described as the following: *traditional lands → culture → identity → right to dignified life → positive actions → right to communal property over traditional lands.*

Indeed, our critical analysis of the jurisprudence of the Court has shown that the said *special relationship with traditional* lands is interpreted as essential for the *culture* of indigenous people, and –in that sense– also for the maintenance of their *distinguishable cultural identity* as a differential societal aggregation; that is their *indigenousness.* Additionally, the enjoyment of their cultural identity is regarded as essential in order to have the possibility to enjoy a life in dignity, which is interpreted as a life with the possibility to be conducted in accordance with their cultural traditions and understandings (right to life in *lato sensu*).

Thus, our enquiry has arrived at the conclusion that –for the regional tribunal– in order to protect and ensure the indigenous people's enjoyment of their life *in dignity*, it has been regarded as indispensable the protection of their *special relationship with their traditional lands* by means of the adoption of *positive measures* by States Parties of the American Convention. In this sense, positive actions would include indeed the recognition of the right to property over the claimed traditional lands. Additionally, they would also encompass their identification, demarcation and titling, and the recognition of the right to return to those lands, in cases of forced displacement of communities, *as long as* they still maintain a *current* and *objectively demonstrable* special relationship with the regarded lands (Article 1(1), 2, 4 and 21 ACHR, jointly read). For this reason, we have concluded that this *sixfold* relationship has to be seen as having a *circular* conceptual configuration, but not only.

In effect, this study has also shown that the Court has incorporated into its jurisprudence a conceptual equation which is regarded by the author as a *dogmatic essentialization* of indigenous identity, by means of its reduction to the existence of a single element. In fact, the equation, *indigenousness = special relationship with traditional lands = dignified life*, has –as an epistemological consequence– the deprivation of their self-identified *indigenousness* of those large indigenous majorities living in urban areas for generations, who have continuously asserted their self-perceived indigenous identity. Moreover, from an ontological point of view, it has to be regarded as based on an ulterior or additional *essentialization*, which is nothing but the *assumption* of the unchangeable, timeless and even culturally uncontaminated character of indigenous cultures.

However, because cultural identities have to be regarded as dialogical, dynamic and changeable –as this study has also shown–[5], indigenous identity cannot possibly be reduced to the existence of one single element, namely the said *special relationship with traditional lands*. In this sense, this *conceptual reductionism* has been regarded –from an ontological point of view– as a sort of an *essentialist trap*; or –from the perspective of the socio-political theories– as an axiological *multiculturalist trap.*[6] The latter could be described as the segmentation of the *common* society into culturally distinguishable societal aggregations or groups (according to their *essentialzed* main ethno-cultural features), in which human members would enjoy equally distinguishable but –at the very end– *unequal* rights. In other words, what is *trapped* in it is our axiological golden rule enshrined in Article 1 of the Universal Declaration of Human Rights, that is, that *"[a]ll human beings are born free and equal in dignity and rights."*

Last but not least, allow me to say that the jurisprudence of the Inter-American Court regarding indigenous people's land claims, has shown that legal culturally tailored answers could be found without the need to pursue the multiculturalist construction of segmented societies across the lines of ethno-cultural differences. Indeed, this enquiry has shown that the harmonious and respectful coexistence of all individuals in the society could also be achieved under the guarantee of universally designed human rights instruments like the American Convention on Human Rights. The future challenge for the regional tribunal could be, perhaps, to be equally able to deliver concrete answers for specific situations where human rights are at stake, *without being trapped* in ontological or axiological *essentializations*.

This is what I believe is the best way to accommodate cultural differences in the society, that is, through the reinforcement of what all of us have in common as members of the very same human family, namely, our ontologically common dignity as humans. In other words, through making the enjoyment of fundamental human rights and freedoms available for all, without discrimination and distinctions of any kind, and not through the deconstruction of our *common* societal structures, institutions and organisations, in culturally divided and exclusive entities,

[5] See, Chapter III, Section 4.
[6] See, Chapter I, Section 4.2.

constructed upon what circumstantially (time and space) or contextually (dialogical exchange) make us different. That is, our cultural preferences or ethno-cultural chosen identities.

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