2 Cultural Rights as a Tool of Protecting the Rights of Indigenous Peoples

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The aim of the current article is to analyse the cultural rights of indigenous peoples, and to examine the most relevant universal human rights documents recognizing these rights, and the related jurisprudence with special regard to the UN organs. As for the nature of cultural rights, the current article quests for the answer whether the international standards require the states to remain abstinent or quite the contrary: they require acting? Furthermore the article takes into account the possible obstacles which can hinder indigenous peoples enjoying their cultural rights. Last – but not least – it introduces the possibilities of indigenous peoples to protect their unique and precious knowledge, and to practice their rights over their intellectual property.

2.1 Introduction

Before discussing the cultural rights from a legal perspective it is worth mentioning what culture means to the academics of disciplines different than law. Based on the autoethnographic point of view, culture can be regarded either as a 'way in which a group of people solves problems and reconcile dilemmas' or as the 'collective programming of the mind.' Referring to this, *Caroline J. Picart* argues that nobody can emancipate themselves from their own cultural roots, there is no such thing as *omniscient perspective*. This does not mean the total absence of objectivity, rather the influence of cultural roots on the notion of objectivity, which makes intercultural negotiations hard. This is especially true for indigenous peoples, since their conception of culture differs fundamentally from those coming from the so called western world and who conquered and caused a tremendous amount of suffer to indigenous peoples.[1]

Throughout their history, indigenous peoples were not only coerced to suffer the loss of their self-determination, their lands, but the *defaming of their culture*. This is the so called *cultural violence*, which – among others – includes: (i) the misunderstanding and discrediting their history and mythology; (ii) the suppression of indigenous languages and

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1 C.J. Picart, 'Cross-Cultural Negotiations and International Intellectual Property Law: Attempts to Work Across Cultural Clashes between Indigenous Peoples and Majoritarian Cultures', *Southern California Interdisciplinary Law Journal*, Vol. 23, 2014, pp. 37-66, 40-42.

religions; (iii) the forcible removal of indigenous peoples from their families and the denial of their identity. Furthermore, (iv) the expropriation and the commercial use of indigenous cultural objects without permission from indigenous communities.[2] The latter one – the so called *cultural exploitation* –, is a serious problem due to several reasons: *firstly*, multinational firms expand their scope of activity to remote areas due to technical improvements; *secondly* the ever expanding tourism endangers indigenous peoples' culture by degrading it to consumer goods. *Last* – but not least –, the pharmaceutical industry shows special interest in the knowledge of indigenous peoples and they are not always willing to pay for it.[3]

It is worth to devote a few lines to the so called cultural violence and cultural exploitation. Cultural violence was justified by the so called *cultural hierarchy theory*, which states that indigenous societies, legal norms and culture, namely indigenous civilizations are inferior to the more developed conquering civilizations.[4] This distinction between the culture of the Western civilizations and that of the 'savages' also served as a justification for the *Doctrine of Discovery*,[5] which the colonizing powers utilized to justify their land acquisitions. Although both theories have been discredited[6] in the course of the 20th century, the legacy of the preceding is still alive up to now. *Rebecca Tsosie* argues that the debate about the name of the *Redskins* football team serves as an excellent example: many, if not most non-Indians fail to understand the significance of cultural identity to Indigenous peoples; as a result they don't understand the concept of *cultural harm*. Although several native leaders and tribal members protested against it, the owner of the team insists that the name actually honours the Indians.[7]

Cultural exploitation – according to *Walter R. Echo-Hawk* – can be interpreted as an organized theft of intangible indigenous property, a one-way transfer of this property from indigenous to non-indigenous population. Just like in the case of cultural harm, most non-indigenous fail to understand that indigenous peoples hold a form of property right to the aspects of their cultures, which includes the right to exclude others from the use of these items or symbols without a license. *Tsosie* believes that this arises from the artificial distinction between *art* and *artefacts*, where the latter designates the art of the indigenous people. Artefacts lack the elements, which inspire aesthetic appreciation and classify as a mere

2 R.J. Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy', *Canadian Journal of Law and Jurisprudence*, Vol. 6, 1993, pp. 249-285, p. 272.

3 E.I. Daes, 'Study on the protection of the cultural and intellectual property of indigenous peoples' (E/CN.4/Sub.2/1993/28), 28 July 1993, paras. 18-20.

4 M. Ahrén, 'Indigenous Peoples' Culture, Customs, and Traditions and Customary Law – The Saami People's Perspective', *Arizona Journal of International and Comparative Law*, Vol. 21, 2004, pp. 63-112, p. 64.

5 R. Tsosie, 'Just Governance Or Just War: Native Artists, Cultural Production, and the Challenge of Super-Diversity', *Cybaris: An Intellectual Property Law Review*, Vol. 6, No. 2, 2015, pp. 56-106, 62.

6 The Doctrine of Discovery was discredited by the ICJ in its advisory opinion on the *Western Sahara* case – ICJ, *Western Sahara*, advisory opinion of 16 October 1975.

7 Tsosie 2015, pp. 59-60.

utilization of design elements. Therefore indigenous artists are only entitled to restricted protection.[8]

The author believes that the above mentioned problems can be surmounted by the protection of cultural rights, which is obvious for many reasons. Probably the most important factor is that UN Organs approach the protection of indigenous peoples through the protection of cultural rights: having regard to the tight bonds between indigenous peoples and their ancestral lands, hindering them in their traditional activities – by land grabbing as an example – means the infringement of their cultural rights.[9]

The author also believes that the protection of cultural rights should be realized via regional mechanisms[10] instead of utilizing a 'one size fits all' approach, since the situations of the indigenous communities vary on a wide scale. Furthermore, the author agrees with the arguments of *Christoph B. Graber* that instead of a defensive strategy, indigenous people and international bodies aimed at protecting their rights should implement a more proactive approach, which includes the studying of whether international trade in indigenous cultural heritage could promote social and economic development.[11]

2.2 About Indigenous Cultural Rights in Details

2.2.1 *Universal Mechanisms Aimed to Protect the Rights and the Cultural Heritage of Indigenous Peoples*

Cultural rights in the international arena are mainly protected by the mechanisms of minority protection;[12] general human right mechanisms pay minimal attention to cultural rights.[13] According to the United Nations Human Rights Committee (hereafter: UNHRC), indigenous peoples assert a right to the protection guaranteed in Article 27 of the *Interna-*

8 Tsosie 2015, pp. 58-59, 85-88.

9 A. Xanthaki, *Indigenous Rights and United Nations Standards. Self-Determination, Culture and Land*, New York: Cambridge University Press, 2007, pp. 196-237.

10 The author also support regionalism in case of the definition on indigenous peoples. See: Gy. Marinkás, PhD Theses, 2016. Online available at: http://193.6.1.94:9080/JaDoX_Portlets/documents/document_23012_section_17556.pdf (31 May 2016).

11 C.B. Graber, Stimulating Trade and Development of Indigenous Cultural Heritage by Means of International Law: Issues of Legitimacy and Method. Universität Luzern, i-call working paper. No. 2012/01, p. 4.

12 UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135; Council of Europe, European Charter for Regional or Minority Languages, 4 November 1992, ETS 148; Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157.

13 R. Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women', *The George Washington International Law Review*, Vol. 34, 2002, pp. 483-513, at p. 488.

tional Covenant on Civil and Political Rights[14] (hereafter: ICCPR). *General Comment No. 23* of the UNHRC is worth mentioning regarding the above cited Article, in which the Committee stated that the cultural identity of indigenous peoples serves as a ground to extend the protection granted by Article 27 of the ICCPR in favour of them.[15] This interpretation is underpinned by the *concluding observations*[16] and the *case law*[17] of the UNHRC. As the Commission stated in the *Lovelace* case:

> The major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity.[18]

Article 15 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR) recognizes the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications.[19] This article has marginal relevance for indigenous peoples however, since their primary objective is the observance of their culture, not the participation in the cultural life of the majority or making a profit on this participation.[20] The *Committee on Economic, Social and Cultural Rights* (CESCR) observing this inadequacy, stated that the right to participate in cultural rights comprises the right to enjoy the benefits arising from works of art created by individuals or the community.[21] Furthermore the CESCR in its guides concerning the reporting duty of states, urges Member States to give full details of the cultural rights of indigenous peoples living in the respective states.[22] As a result of the Committee's efforts, the relevance of the ICESCR increased regarding the rights of indigenous peoples: the right to participate in cultural rights makes the protection

14 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171.

15 UNHRC, CCPR General Comment No. 23: Art. 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 3.2.

16 UNHRC *Concluding Observations on Thailand*, 8 July 2005. (UN Doc. CCPR/CO/84/THA), para. 24; UNHRC *Concluding Observation on Finland*, 2 December 2004. (UN Doc. CCPR/CO/82/FIN), para. 17; UNHRC *Concluding Observation on Suriname*, 4 May 2004. (UN Doc. CCPR/CO/80/SURI), para. 21.

17 UNHRC, *Sandra Lovelace v.Canada*, 30 July 1981. (CCPR/C/13/D/24/1977); UNHRC, *Lubicon Lake Band v. Canada*, 16 March 1990. (CCPR/C/38/D/167/1984); UNHRC, *Ilmari Länsman et al. v. Finland*, 26 October 1994. (CCPP/C/52/D/511/1992); UNHRC, *Jouni E. Länsman et al. v. Finland*, 30 October 1996. (CCPR/C/58/D/671/1995); UNHRC, *Jouni E. Länsman et al. v. Finland*, 17 March 2005. (CCPR/C/83/D/1023/2001).

18 UNHCR, *Sandra Lovelace v. Canada*, para. 9.9.

19 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3.

20 Xanthaki, p. 198.

21 CESCR, Report on the 7th Session (UN Doc. E/1993/22.), paras. 202-203.

22 Revised Guidelines regarding the Form and Contents of Reports to be submitted by State Parties under Art. 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/1991/1.

and support of indigenous rights possible based on the case law.[23] *Bolivia* is an excellent example for the above mentioned protecting mechanism: the CESCR expressed its concerns regarding the discrimination of indigenous peoples in the public school system and the non-recognition of the cultural rights of indigenous peoples as a distinct group.[24]

The *Committee on the Elimination of Racial Discrimination* (hereafter: CERD) – which was created to monitor the implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination*[25] – interpreted the underlying convention in a manner that enables the protection of indigenous peoples rights based on the text of the convention. Namely, the convention only contains a rather general wording stating the prohibition of discrimination in the enjoyment of religious and cultural rights or in participating education or cultural life.[26] Besides frequently referring to the rights of indigenous peoples in its concluding observations,[27] the Committee, in its General Comment No. 23, asked the Member States to 'Recognize and respect indigenous distinct culture, history, language and way of life as enrichment of the State's cultural identity and to promote its preservation.'[28]

Unlike the previous documents the *Convention on the Rights of the Child*[29] contains explicit disposals on the children of indigenous origin. The Convention (i) encourages the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous; (ii) [urges] the preparation of the child for responsible life in a free society, in the spirit of understanding peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (iii) [draws the attention of] those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, that a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language. Besides this, the *Committee on the Rights of the Child* (hereafter: CRC) also tried to widen the scope of the underlying Convention: the Committee addressed the problem of indigenous children who have been separated from their parents,[30] furthermore it drew the attention to the discrimination

23 P. Thornberry, *Indigenous Peoples and Human Rights*, Manchester: Manchester University Press, 2002, p. 197.

24 CESCR, Concluding Observations on Bolivia, 21 May 2001. (UN. Doc. E/C.12/1/Add.60), para. 14.

25 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, Vol. 660, p. 195.

26 Id., Art. 5.

27 CESCR, Concluding Observations on Argentina, 10 December 2004 (UN Doc. CERD/C/65/CO/1).

28 CERD, General Recommendation 23, Rights of indigenous peoples (51st session, 1997), UN Doc. A/52/18, Ann. V at 122 (1997), para. 4/a.

29 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, Arts. 17, 29, 30.

30 CRC, Concluding Observations on Australia, 13 September 2005. (CRC/C/15/Add.268.), paras. 31, 32.

against these children in the public education system.[31] Besides this, the CERD paid special attention to the problems of the children of *dalit* origin and the discrimination against them as a result of the *caste system*.[32]

In its publications, the *United Nations Educational Scientific and Cultural Organization* (hereafter: UNESCO) emphasized the importance of respecting other cultures. The 1966 *Declaration of Principles of International Cultural Co-operation*[33] emphasizes the following: 'Each culture has a dignity and value which must be respected and preserved.' The 1978 UNESCO *Declaration on Race and Racial Prejudice*[34] states the right of 'All individuals and groups […] to be different, to consider themselves as different and to be regarded as such.' The right to *cultural identity* was declared at the 1982 UNESCO *Cultural Policy World Conference*.[35] The 2001 UNESCO *Universal Declaration on Cultural Diversity*[36] defined cultural diversity as the heritage of humankind which deserves protection as such. The 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*[37] stated that cultural diversity can only be protected through a human rights approach. According to the Convention: "The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples." Furthermore, the document urges the states to create an environment which 'promotes preservation, safeguarding and enhancement of the diversity of cultural expressions.'

However the 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* does not contain any *expressis verbis* reference to indigenous peoples, it helps to define the exact meaning of the rights set in Article 27 of the ICCPR. The 1992 declaration recognises the existence of collective rights, emphasizing the importance of the culture and customs of those belong to national minorities, furthermore the preservation of culture and customs. According to the Declaration:

> States shall take measures, where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.[38]

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31 CRC, Concluding Observations on Ecuador, 13 September 2005. (CRC/C/15/Add.262.), paras. 73, 74.

32 CRC, Concluding Observations on Nepal, 3 June 2005. (CRC/C/15/Add.261.), para. 36.

33 UNESCO Declaration of Principles of International Cultural Co-operation (Paris, 4 November 1966), Art. 1.

34 UNESCO Declaration on Race and Racial Prejudice (27 November 1978), Arts. 1, 5.

35 UNESCO Cultural Policy World Conference, Mexico City, from the 26 July to the 6 of August 1982.

36 UNESCO Universal Declaration on Cultural Diversity (Paris, 2 November 2001), Arts. 1, 7.

37 UENSCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (20 October 2005) Arts. 1, 3, 7, 8.

38 UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Arts. 1-5.

This process of learning about the different groups within society is mutual: minorities, too, should learn about the wider society. This model recognises that both the minority culture and the national culture are important to the individual; knowing both culture can lead to a state of 'unity in diversity', the mutual knowledge can induce mutual respect and tolerance between different groups. According to this *Alexandra Xanthaki* states that fundamentalist ideologies – which demand the observance of indigenous culture in their pure form – can lead to undesired consequences and therefore has to be dealt with reservations.[39]

2.2.2 To Do or Not to Do?

The question is whether the state is merely obliged to abstain from any interference of enjoying cultural rights or it has to pursue actions in order to fulfil its obligations? It does come up frequently, when the interpretation of Article 27th of the ICCPR is at stake. *Tomuschat*[40] and *Nowak*[41] say the above mentioned article clearly demands abstinence,[42] by using the phrase *'shall not be denied.'*[43] It follows from this approach that the state does not have any positive obligation, which would demand state action. Contrary to this, *Capotorti, Thornberry, Sohn, Ermacora* and *Cholewinski* argue that Article 27 demands an active attitude from states.[44] Thornberry points out that if state action was not required, the above mentioned article would be a mere repetition of the non-discrimination clause.[45] This argument is underpinned by the fact that the practical implementation of the article requires significant amount of – financial and human – resources.[46] This standpoint is shared by the UNHRC as well: according to its General Comment No. 23. on indigenous peoples, "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members […]"[47] Furthermore the Committee frequently asks Member States for information about the positive actions taken by them in order to protect

39 Xanthaki, p. 200.

40 C. Tomuschat, Protection of Minorities under Art. 27 of the International Covenant on Civil and Political Rights, in: R. Bernhardt et al. (Eds.): *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte: Festschrift für Hermann Mosler*. Heidelberg: Springer, 1983, pp. 949-979.

41 M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*. Arlington: N.P. Engel, 1993, p. 947.

42 A. Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law*. The Hague: Kluwer International, 1996, p. 128; R. Cholewinski, 'State Duty towards Ethnic Minorities: Positive or Negative?' *Human Rights Quarterly*, Vol. 10, 1988, pp. 344-371.

43 ICCPR, Art. 27.

44 Xanthaki, p. 202.

45 P. Thornberry, *International Law and the Rights of the Minorities*, Oxford: Clarendon Press, 1991, p. 181.

46 A. Capotorti, The report of the UN Special Rapporteur (UN Doc. E/CN4/Sub2./384/Add.1-7, Add.2.) para. 132.

47 UNHRC, General Comment 23, para. 6.2.

indigenous population. In 2003 the Committee greeted the positive measures taken by the *Philippines*, however urged further measures to be implemented.[48] The Committee asked *Guatemala* to adopt provisions in order to protect indigenous population and secure its practical realization.[49] Further examples are easy to be found in the case law of the Committee.[50]

The text of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities also strengthens the second interpretation. According to its first article:

> (1) States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
> (2) States shall adopt appropriate legislative and other measures to achieve those ends.[51]

Applying linguistic interpretation it is clear that states obligation to perform actions is not optional, but obligatory.[52] The second article almost repeats Article 27 of the ICCPR with a minor, but important difference: instead of using 'shall not be denied' it states that 'they have the right.'[53] The 1989, No. 169 Convention of the International Labour Organization (hereafter: ILO) on Indigenous and Tribal Peoples (hereafter: Convention No. 169) clearly demands the implementation of positive steps in order to protect indigenous rights. According to Article 4 Paragraph (1) of the Convention: 'Special measures shall be adopted […]'[54] The United Nations Declaration on the Rights of Indigenous Peoples[55] (hereafter:

48 UNHRC, Concluding Observation on the Philippines, 1 December 2003. (UN Doc. CCPR/CO/79/PHIL), para. 16.

49 UNHRC, Concluding Observations on the Philippines, 27 August 2001. (UN Doc. CCPR/CO/72/GTM), para. 29.

50 UNHRC, Concluding Observations on Venezuela, 26 April 2001. (UN Doc. CCPR/CO/72/VEN), para. 28; UNHRC, Annual Report 1991. (A/46/40/), paras. 488-489; UNHRC, Annual Report 1992. (A/47/40) para. 64.

51 UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art. 1.

52 Based on the fact that the article uses the expression 'shall'.

53 According to the second article: "Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination." – UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art. 2.

54 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169, Art. 4.

55 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples. Resolution adopted by the General Assembly, 2 October 2007, A/RES/61/295, Art. 8.

UNDRIP) provides likewise regarding the obligations of the state. According to Article 2, Paragraph (2a) of the document:

> States shall provide effective mechanisms for prevention of, and redress for: any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.[56]

Within the framework of the regional minority right mechanisms the requirement of positive measures are more prevailing than in the case law of universal human right mechanisms. According to Article 5 of the Framework Convention for the Protection of National Minorities adopted by the Council of Europe:

> The Parties undertake 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, namely their religion, language, traditions and cultural heritage.

Article 12 is even more straightforward:

> The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.[57]

2.2.3 The Barriers of the Effective Protection of Indigenous Cultural Rights in the International Law

Most international documents do not recognise and thus do not pay attention to the culture of indigenous peoples. On the contrary: these documents neglect the culture of the various groups, who live within the state and distinct from the majority of the population furthermore treat their cultural goods as state property. As a result, not only do these documents make the protection of indigenous peoples' rights harder, but in the meantime assist the state to dispose over the cultural heritage of indigenous peoples.

The above mentioned phenomenon has two main reasons: *firstly*, according to the so called cultural hierarchy theory indigenous societies, legal norms and culture, namely indigenous civilizations are inferior to the more developed conquering civilizations.[58]

56 Id., Art. 8. Para. 2(a).
57 Council of Europe, Framework Convention for the Protection of National Minorities, Arts. 5, 12.
58 Ahrén, p. 64.

Although this theory has been discredited during the course of the 20th century its legacy still haunts. *Secondly*, it is presumable that – just like in the case of the self-determination[59] – states are afraid of guaranteeing more rights to the minority and indigenous groups because these are perceived as a threat to their hegemony. This is an unfounded fear however: the aim of indigenous peoples and the academics is not the elimination of different opinions, but the justification of other, different approaches. They believe that any perception of culture contributes to the protection of the common heritage, and thus has a reason for its existence. Besides the lack of recognition of indigenous peoples' claims in the basic documents, the main problem is that even if there are some kinds of guarantees for minorities, these provisions are irrelevant for indigenous peoples, since international law still prefers individual rights over collective rights.[60]

As a result of the above mentioned three causes, indigenous peoples have to face three main problems. The *first* one is the different understanding of culture: indigenous and non-indigenous peoples approach the idea of culture in a very different way. The *second* one is that international law treats cultural heritage as valuable goods which can be 'expressed in dollars and cents'.[61] This understanding of cultural heritage is unacceptable for indigenous peoples. The *third* one is that international law only recognises states as the subject of cultural rights; substate entities are excluded from this circle, resulting in the restricted nature of indigenous peoples' cultural autonomy.[62]

2.2.3.1 The Different Understanding of Culture

For indigenous peoples the relationship with culture is not merely a relationship with the physical aspects of the land, but is conceived of as a direct and personal kinship with each of the species of animals and plants that co-exist with people in the same territory. They do not consider it as commercial goods[63] – at least not in a sense like western people do –; their culture is a complex knowledge system with its own conceptions of epistemology, philosophy and scientific and logical validity.[64] These international documents, which were created in order to protect cultural rights, basically reflect the Euro-Atlantic civilization's perception of culture: cultural goods are the common heritage of humankind and they have a monetary value, thus they can be the subject of commercial transactions. Cultural rights are basically due to the state, which has the right to protect the cultural goods of nature; individuals are only entitled to access these goods, which comprise both the

59 ACHPR, Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, 30 May 2007.
60 Xanthaki, pp. 214, 227.
61 As *Roger Waters* sings in his song 'Perfect Sense'.
62 Xanthaki, p. 204.
63 Even if they intend to make a living from their art, most native artists face serious obstacles: they lack direct access to a significant portion of the market. – Tsosie 2015, p. 89.
64 E.I. Daes, 'UN Working Group on Indigenous Populations.' Preliminary Report of the Chairwomen (UN Doc. E/4/Sub.2/1994/31), paras. 8-10.

right for the revenue arising from the creation of cultural goods and the consumption of such goods.[65] As an artist of indigenous origin stated in front of the Australian Courts:

> Whilst I may own copyright under western law, as an artist, under Aboriginal law I must not use an image or story in such a way to undermine the rights of all the other *Yalgnu* [people].[66]

Considering the above mentioned, a new concept of culture is evolving, which takes the needs of indigenous peoples into account. According to this, culture is the

> […] sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups […] a coherent self-contained system of values, and symbols as well as a set of practices that a specific cultural group produces over the time and which provides individuals with the required signposts and meanings for behaviour and socials relationships in everyday life.[67]

In this broad sense, the right to culture covers all aspects of life: it incorporates protection for knowledge, belief, art, morals, law, customs and other capacities and habits.[68] This complex and comprehensive approach – as mentioned earlier – was neglected by international law until the 1980s of the last century with only a handful of exceptions. One of these is the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore,[69] which in its Article 'A' defines the folklore as follows:

> Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.[70]

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65 R. Stavenhagen, Cultural Rights: A Social Science Perspective, in: *Cultural Rights & Wrongs*, H. Niec (Ed.), Paris: UNESCO, 1998, pp. 1-20; Xanthaki, pp. 204-205.

66 Federal Court of Australia, *Milpurrurru v. Indfurn Pty Ltd. et al.*, 13 December 1994 (130 ALR 659), para. 87.

67 Stavenhagen, p. 5.

68 Thornberry, 1991, p. 188.

69 UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore (Paris, 15 November 1989).

70 Ibid., Art. 'A'.

The Preamble emphasizes that the specific nature and importance of folklore as an integral part of cultural heritage and living culture.[71] However – as Xanthaki[72] points out –, the document has indisputable merits by emphasizing the significant importance of protecting culture, by using the term folklore, it treats indigenous culture as a phenomenon of the past and freezes it in a given moment of time; whereas indigenous peoples often emphasizes that their culture is a living phenomenon and not a dead legacy of the long past.[73] Chapter VII of the *Creative Diversity*, the report of the World Commission on Culture and Development – another document adopted within the framework of the UNESCO – declares:

> Non-physical remains such as place names or local traditions are also part of the cultural heritage. Particularly significant are the interactions between these and nature: the collective human landscape. Only the preservation of these enables us to see indigenous cultures in a historical perspective. The cultural landscape forms a historical and cultural frame for many indigenous peoples.[74]

Human rights mechanisms also took efforts in order to get cultural rights recognised: UNHRC stated in its General Comment No. 23 that 'culture manifests itself in many forms.'[75] This statement was affirmed by the same Committee in the *Kitok* and *Lubicon Lake Band* cases.[76] The CERD stated likewise in its General Comment by calling the Parties upon to: "Recognize and respect indigenous distinct culture, history, language and way of life as enrichment of the State's cultural identity and to promote its preservation."[77]

2.2.3.2 The Conception of Cultural Proprietary Rights

As it has been stated in the previous point, indigenous peoples consider culture as the part of the community: "No person owns or holds as property living things. Our Mother Earth and our plant and animal relatives are respected sovereign living beings with rights of their own."[78] For them culture signifies the continuous relationship between human beings, animals, plants and places with which culture is connected. In this relationship, economic

71 Ibid., Preamble.
72 Xanthaki, p. 208.
73 UN Working Group, Report for the Vienna World Conference on Human Rights 18 June 1993. Preamble, para. 4.
74 The Report of the World Commission on Culture and Development, 'Creative Diversity' (CLT-96/WS-6), 1996.
75 UNHRC, General Comment 23, para. 7.
76 UNHRC, *Ivan Kitok v. Sweden*, 27 July 1988 (CCPR/C/33/D/197/1985); UNHRC, *Lubicon Lake Band v. Kanada.*
77 CERD, General Comment No. 23 on Indigenous Peoples (UN Doc. HRI/GEN/1/Rev.6 at 212), para. 4(a).
78 International Indian Treaty Council, Discussion Paper on Biological Diversity and Biological Ethics (30 August 1996), p. 5.

considerations have no place.[79] Regrettably most international documents consider cultural goods as capital and property. The 1954 UNESCO Treaty on Convention for the Protection of Cultural Property in the Event of Armed Conflict defines cultural goods as follows: "movable or immovable property of great importance to the cultural heritage of every people"[80] The second protocol of the Convention interprets cultural rights in a similarly restrictive way.[81] Compared to the previous convention, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines cultural goods in a more detailed way. According to the convention cultural goods are: "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."[82] The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage[83] uses 'cultural heritage' instead of cultural property which fits more to indigenous concept of culture. Although the definition broadens the scope of protection granted by international law, it excludes some aspects if indigenous heritage. As a result if scientist found a skeleton, certain debate would arise whether human skeletons could be included in the products of archaeological excavations and discoveries. Furthermore, the convention protects outstanding objects with a great value, which is in sharp contrast with indigenous concept of cultural rights which consider every piece of cultural heritage worth being protected. An illustrative example is unauthorised filming of indigenous religious ceremonies and secret recordings of songs and rituals: the Convention protects photographs and film recordings that have some historical value, but it is arguable whether indigenous peoples have any protection against unauthorised filming and recordings.[84]

In 1993 Erica-Irene Daes, the UN special rapporteur on indigenous cultural and intellectual rights – former chairwoman of the UN Working Group – also drew attention to the more suitable nature of the term 'indigenous cultural heritage' compared to cultural goods. She defined the first one as follows:

> [Indigenous cultural heritage] is everything that belongs to the distinct identity of a people, and is therefore theirs to share, if they wish, with other peoples. It

79 Xanthaki, p. 209.

80 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), Art. 1.

81 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (The Hague, 26 March 1999).

82 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970).

83 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972).

84 E.I. Daes, Working Paper on the question of the ownership and control of the cultural property of indigenous peoples (UN Doc. E/CN.4/Sub.2/1991/34), paras. 5-8.

> includes all the things that international law regards as the creative production of human thought and craftsmanship, such as songs, stories and scientific artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally occurring species of plants and animals with which a people has long been connected.[85]

During the preparatory works of the UN Indigenous Declaration the drafters seriously considered using the phrase cultural heritage instead of cultural goods; as a result the document uses the first one, which fits better to indigenous concept of culture.[86] Despite a clear shift occurred in international law from the conception of cultural goods to the conception of cultural heritage, it only came very near to the surface: terminology has been changed, but the earlier problems of the practice remained the same.[87]

2.2.3.3 The State as the Subject of Cultural Rights

The third problem which has to be faced by indigenous peoples is that legally binding international documents consider the states and the individuals as the subject of cultural rights; substate entities are excluded from the circle of beneficiaries. This approach fitted well into international realities; however it has been surpassed by time, nationalities – and indigenous peoples – became *sui generis* subjects of international law.[88] The 1954 UNESCO Treaty on Convention for the Protection of Cultural Property in the Event of Armed Conflict grants the right to culture for every people.[89] Studying its *travaux préparatoires* however makes clear that the drafters regarded 'people' and 'state' as equal and interchangeable terms.[90] The 1966 Declaration of Principles of International Cultural Co-operation defines peoples and nations as the subject of cultural rights, according to its wording however; it refers to the whole population of a state, rather than a minority group.[91] The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines the subject quite foggily: albeit point 'a' of Article 4 refers to nationalities as the subjects of cultural rights, the protection of such rights is the task of the state.[92] The 1972 UNESCO Convention Concerning

85 Daes, Study 1993, para. 24.
86 UNDRIP, Art. 8.
87 Xanthaki, p. 211.
88 W. Kymlicka, Beyond the Indigenous/Minority Dichotomy, in: S. Allen & A. Xanthaki (Eds.): *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Oxford: Hart Publishing, 2011, pp. 183-208, p. 186.
89 1954 UNESCO Treaty on Convention for the Protection of Cultural Property in the Event of Armed Conflict.
90 R. Clements, 'Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law', *University of Toronto Faculty of Law Review*, Vol. 49, 1991, pp. 61-85.
91 UNESCO 1966 Declaration of Principles of International Cultural Co-operation, Preamble.
92 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Art. 4. point 'a', Art. 5.

the Protection of the World Cultural and Natural Heritage is similarly state centric, since most of its articles is addressed to the states.

Although the majority of the international documents which meant to protect cultural rights interpret the cultural rights of indigenous peoples rather restrictively, some documents are more open towards indigenous culture. They are not legally binding however, like the 1974 UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms which urges the states to 'promote, at various stages and in various types of education, study of different cultures, their reciprocal influences, their perspectives and ways of life, in order to encourage mutual appreciation of the differences between them.'[93] Still the article does not create a specific state obligation to promote the study of all cultures within the state: for example the education system of the state could include the study of many cultures around the world and ignore indigenous cultures at home.[94] Provisions of the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore reflect a basically multicultural orientation: relationship between state and culture is not necessary and determinant in the documents. According to Article 'B' of the document 'Folklore, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic, etc.) whose identity it expresses.' Article 'D' reads as follows:

> Preservation is concerned with protection of folk traditions and those who are the transmitters, having regard to the fact that each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media. Measures must be taken to guarantee the status of and economic support for folk traditions both in the communities which produce them beyond.[95]

In order to secure and provide these rights the recommendation clearly demands positive actions from states.

The state centred attitude – detailed above – not only makes the protection of indigenous cultural rights difficult – classified as defensive attitude by Graber – but the facilitation of more proactive solutions as well. Graber argues that despite they seem promising at the first sight, *preferential trade rules* for indigenous cultural goods and services cannot effectively stimulate the participation of indigenous peoples in the world trade. There are two main reasons for that: while the *first* one is rather theoretical, the *second* one is more

93 UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms (19 November 1974), Art. 17.

94 Xanthaki, p. 213.

95 1989 UNESCO Recommendation, Art. 'B' and 'D'

practical. The theoretical reason is that such preferences reflect a *neo-colonist* point of view, treating indigenous peoples as infants, which is undesirable for clear reasons.[96] The practical problem roots in the state centred attitude of international documents: since indigenous peoples are not recognised subjects of international law, the beneficiaries of the possible preferences would be those states which have indigenous populations and not the indigenous peoples themselves. The main problem[97] with this kind of allocation is the mere fact that – to say the least – interests of states and indigenous peoples rarely match.[98]

A possible solution could be the granting of cultural autonomy/sovereignty for indigenous peoples. The sovereignty may be defined – among other versions – as follows:

> the right to adopt or reject social and cultural innovations and make social changes that are culturally compatible with Native traditions and World views.[99]

The claim for cultural autonomy[100] basically originates from the rights to guidance, participation and consultation related to cultural rights. The UNHRC – whenever the interpretation of Article 27 of the ICCPR came into scope – stated that indigenous peoples must be involved into any decision which concerns them. At the same time, the Commission greeted every transfer of authority in this regard.[101] However, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities does not contain an expressis verbis provision on cultural autonomy: Paragraph (3) of Article 2 only recognises the right of minorities to participate in decision making which affects them. Furthermore, according to Article 5, 'National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.'[102] The latter one can be read as a provision, which creates state obligation to consider the interest of indigenous peoples.[103] Erica-Irene Daes, the former chairperson of the UN Working Group on Indigenous Populations, says that the establishment of community based cultural institutions is conform with the rules of international

96 See Ahren's article on cultural hierarchy!

97 Another problem worth to be mentioned is that backward indigenous communities not only exist in the third world countries, but in the first world countries as well. Taking into account that the true beneficiaries are the state governments, there are hardly any countries that would like to support rich countries like the USA or New-Zealand. – Graber, p. 26.

98 Graber, pp. 23-27.

99 R. Tsosie, Introduction: Symposium on Cultural Sovereignty. *Arizona State Law Journal*, Vol. 34, No. 1 (Spring 2002), pp. 1-14, p. 8.

100 For which most indigenous communities don't even have a word. They took it as a matter of course, before conquerors deprived them from it. – Tsosie 2002, p. 4.

101 UNHRC, Annual Report for the UNGA, 21 September, 1994 (A/49/40), paras. 89, 182.

102 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art. 5.

103 Spiliopoulou Åkermark, p. 184.

law, which protect – or regulate – the cultural heritage of the given group. The United States and Panama already regulates this question likewise.[104] The Copenhagen Document expressis verbis refers to the possibility of creating a proper local and autonomous administration for the handling of indigenous issues, which includes cultural rights as well.[105] Graber argues, however, that the only possible solution for the above mentioned practical problem is the recognition of indigenous peoples as sui generis subjects of international law; he believes that FPIC and other above mentioned examples are insufficient in itself.[106]

2.2.4 Intellectual Property Rights of Indigenous Peoples

The traditional knowledge which appears as a part of indigenous culture represents true value, as indigenous people say: 'When an elder dies, a library burns.'[107] Arising from the above mentioned, the preservation of indigenous peoples' intellectual property rights, their common heritage is worth particular attention. The area of intellectual property rights is regulated by the 1992 Convention on Biological Diversity[108] (hereafter CBD) and the Agreement on Trade-Related Aspects of Intellectual Property Rights[109] (hereafter: TRIPS). While the latter – just like other WTO agreements[110] – does not contain any indigenous related provisions, the CBD has explicit reference to them.

The Conference of the Parties, created under the provisions of Article 24 of the CBD, defines traditional knowledge as follows:

> [Traditional knowledge includes:] innovations and practices of indigenous and local communities around the world. Developed from experience, gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be

104 In the United States, where indigenous peoples already exercise a large degree of local autonomy, a number of Indian tribes have enacted laws for regulating archaeological or cultural research. The *Navajo Nation*, the largest indigenous people in the United States, has adopted laws to punish Navajos and physically remove non-Navajos who engage in unauthorized research or trade in cultural property. Regulations adapted by Indian tribes have the force of laws under the United States legal system. Similarly, the *Kuna people* in *Panama*, who enjoy a degree of local autonomy under national law, which require scientists visiting their 60,000 hectare *Kuna Yala* forest reserve to cooperate with Kuna authorities, which includes paying fees and sharing the results of their researches. – Daes, Study 1993, paras. 107-108.

105 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, Art. 35.

106 Graber, p. 28.

107 Alaska Native Science Commission, What is Traditional Knowledge? – Online available at: www.native-science.org/issues/tk.htm (31 January 2016).

108 Convention on Biological Diversity (Rio de Janeiro, 5 June 1992).

109 Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), Ann. 1C.

110 Graber, p. 18.

> collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry.[111]

Traditional knowledge is not based strictly on the observations of the past; by means of globalization several new external stimulus reaches indigenous peoples. As a result, their knowledge is increasing and changing, which is not condemned by indigenous peoples at all; they are greeting the new knowledge as well.[112]

The Preamble of the CBD emphasizes the importance of sustainable development and the role of indigenous peoples in its realization:

> Affirming that the conservation of biological diversity is a common concern of humankind […] Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.[113]

Furthermore the Convention puts down in writing and grants several important rights like the principle of 'fair and equitable sharing of the benefits arising out of the utilization of genetic resources and prior [and] informed consent.'[114]

The Convention served as a basis for several international standards: the Conference of the Parties established a broad mandated working group on the interpretation of Article 8 Paragraph (J) of the CBD. The so called Bonn Guidelines[115] – in which the working group analyses not only Article 8, but Article 15 – is the results of the working group's efforts. The scope of the guidelines is rather broad: it covers various topics from technology transfer to the eradication of poverty. The other guideline meant to interpret Article 8 Paragraph (J) of the CBD is the Akwe: Kon[116] voluntary guidelines. This document aims

111 CBD Background Material, What is traditional knowledge? – Online available at: https://www.cbd.int/tk/material.shtml (31 January 2016).

112 M. Fitzmaurice, 'The Dilemma of Traditional Knowledge: Indigenous Peoples and Traditional Knowledge', 10 *International Community Law Review*, 2008. p. 255-278, pp. 256-257.

113 CBD, Art. 1.

114 Id. Art. 15. (5) (7).

115 CBD Conference of the Parties, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002.

116 Akwe: Kon is a term Mohawk origin, meaning 'all of us' or according to another translation 'everything is in Creation.' – Fitzmaurice, p. 268; Cornell University, American Indian Program. – Online available at: https://aip.cornell.edu/akwekon (31 January 2016).

to facilitate the effective participation of indigenous peoples in the preparation works and decision making of any project which would affect them. This participation includes the consideration of any aspects and traditional knowledges which is important for indigenous peoples.[117] However the guidelines are not legally binding, the fact that they have been adopted unanimously by the states creates the just claim that states should act based on the guidelines.[118]

Regarding indigenous intellectual property rights, the existence of its communal form – which fits indigenous world concept better –, is still heavily debated. *Enninya S. Nwauche* argues that a combination of recent constitutional provisions in regions such as Latin America and Africa, as well as international treaty provisions, support the assertion of the existence of *communal intellectual property* rights.[119] – Even the above mentioned author notes that numerous counter-arguments could be called upon against this approach. – In order to fortify his argument Nwauche cites *General Comment No. 17* of the UNCESCR, according to which: "Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities."[120] According to the author of the current article, Nwauche has gone too far, since the following sentence of the above mentioned general comment reads as follows:

> Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity…[121]

This can hardly be regarded as a clear and unambiguous recognition of this right. Likewise, when Nwauche argues that the constitutions of certain Latin American and African states and provisions of a few international documents[122] can be read as the recognition of communal intellectual property rights,[123] it is some wishful thinking rather than an inter-

117 Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (2004), paras. 8, 20.

118 Fitzmaurice, p. 268.

119 E. S. Nwauche, 'The Emerging Right to Communal Intellectual Property', *Marquette Intellectual Property Law Review*, Vol. 19, 2015, p. 221-244.

120 UNCESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), 12 January 2006 (E/C.12/GC/17), para. 1.

121 Ibid., para. 1.

122 UNDRIP, Art. 31 Para. (1) reads as follows: 'They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'

123 Nwauche, pp. 229-230.

pretation of a wide-spread state practice.[124] Nevertheless, the author does not challenge the importance of a shift towards the recognition of communal intellectual property rights and Nwauche's arguments regarding the necessity of finding proper balance between communal rights and communal property.

One of the greatest beneficiaries of traditional knowledges is the pharmaceutical industry, which does not always intend to pay for the utilization of this knowledge and act in a manner which is called 'biopiracy' instead 'bioprospecting.' Bioprospectors utilize biological resources as the basis for extracting, isolating, and purifying patentable genetic products. Conversely, biopirates obtain and utilize genetic resources without compensating the traditional owners for that knowledge or seeking their consent for the use.[125] It is worth mentioning that according to some of the scholars the two terms mean the same, calling the phenomenon as bioprospecting just a way of describing the act of biopiracy in a less inflammatory manner by using a word with less negative connotations.[126] Nevertheless, biopiracy is quite a wide-spread phenomenon as the following cases will show it.

The so called *Ayahuasca Patent* case started in 1981, when Loren Miller, director of California-based International Plant Medicine Corporation (hereafter: PMC), took a sample of the *ayahuasca* plant back to the United States, which he patented with the U.S. Patent and Trademark Office (hereafter: USPTO). In 1986, he obtained exclusive rights to sell and breed the plant for 17 years. After 13 years of litigation between the PMC and the concerned indigenous tribes, the USPTO annulled the PMC's patent, the relief of the indigenous community did not last long however; in 2001 the PTO reversed its earlier decision and granted the patent for the remaining two years. Ironically, after all his legal efforts, Miller was left with a patent that was virtually valueless.[127] Other instances of biopirating include: the patent case of *Eli Lilly*, a US based pharmaceutical company, which patented its cancer fighting medications from the *periwinkle* plant in Madagascar, the *Robert Larson's* patent case and the *Larry Proctor* case. The Robert Larson Co. is a US seated timber exporter, which obtained a patent in 1985 to import the Indian neem tree to the US in order to produce its pesticide called *Margosan-O*. Three years later, in 1988, the Robert Larson Co. sold the patent to *W.R. Grace*, presently called *Certis*. The latter lost the European patent, when the European Patent Office found out that the utilization of

124 D. Kugelmann, The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity, in: A. von Bogdanndy & R.Wolfrum (Eds.), *Max Planck Yearbook of United Nations Law*, Vol. 11, 2007, pp. 233-263.

125 K.A. Kelter, 'Pirate Patents: Arguing for Improved Biopiracy Prevention and Protection of Indigenous Rights Through a New Legislative Model', *Suffolk University Law Review*, Vol. 47, 2014, pp. 373-396, p. 379.

126 M. B. Snell & U. Reader, 'Bioprospecting or Biopiracy? The hunt for genetic riches in the developing world', *Utne*, 1996 March-April. Online available at: www.utne.com/science-and-technology/bioprospecting-or-biopiracy-debate-introduction.aspx (4 February 2016).

127 See; *Steve Beyer's* Blog on Ayahuasca and the Amazon – Online available at: www.singingtotheplants.com/2008/01/ayahuasca-patent-case/ (3 February 2016).

the neem tree was not a novelty in India; on the contrary it has been known from time immemorial.[128] The *Enola Bean* case of the Larry Proctor Company was probably the most revolting one among the above mentioned cases. In 1994 Proctor, the owner of the company, purchased a package of yellow beans in Mexico and planted them on his farm. Two years later, he filed for an exclusive monopoly patent in the United States, which was granted in 1999 for 20 years. He immediately brought legal suits against two Mexican companies that were exporting the bean to the United States as well as 16 companies and farmers of Colorado, alleging that they were violating his rights. Even if Mexican farmers won the litigations, Proctor successfully enforced its patent rights during the legal battles, causing irreparable damages to the Mexican farmers and companies.[129]

One of the recent cases, the *Hoodia* case[130] also started with the registration of a patent. The Council for Scientific and Industrial Research (CSIR) – an institute related to the South-African government – asked and obtained international patent rights for the utilization and trade of hoodia without consulting the San Tribe or making any promise on benefit sharing. The *hoodia* plant,[131] the subject of the patent, is known and used by the African San Tribe as an appetite *suppressant* during their longer trips from time immemorial. Subsequently the CSIR sold the patent to the Phytopharm. The tribe, which only learned about the wide-scope commercial utilization of their traditional knowledge after the patent was granted, picked up the glove: they successfully coerced the firm to engage into negotiations with the tribe. As a result, the parties signed one of the first benefit-sharing agreements between a multinational enterprise and an indigenous tribe.[132] Opposing the previous cases, during the ICBG project in Suriname,[133] the Maroon Tribe played an active role from the very beginning: the tribe shared its valuable knowledge with the professionals of the ICBG, who started scientific researches based on that information.

128 J.M. Finger & P. Schuler (Eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*, Oxford University Press, Oxford, 2004, p. 162; Neem Foundation, The Patent on Neem – Online available at: www.neemfoundation.org/about-neem/patent-on-neem/ (3 February 2016).

129 For more information please visit the blog of the International Center for Tropical Agriculture, which represented the Mexican litigants in front of the USPTO – Online available at: www.ciat-news.cgiar.org/2009/07/22/new-legal-decision-against-enola-bean/ (3 February 2016).

130 R. Wynberg, 'Rhetoric, Realism and Benefit Sharing: Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant', *The Journal of World Intellectual Property*, Vol. 7, 2004, pp. 851-876.

131 Since 2004 the plant is listed in App. II of the 1973 Convention on International Trade in Endangered Species (Washington, 3 March 1973.). The appendix contains a list of species threatened by extinction.

132 V.M. Tellez, Recognising the traditional knowledge of the San people: The Hoodia case of benefit-sharing, p. 1. Online available: www.ipngos.org/NGO%20Briefings/Hoodia%20case%20of%20benefit%20sharing.pdf (18 January 2014.).

133 The main object of the project was the elaboration of new active substances by mixing the traditional knowledge of indigenous peoples and modern technologies. For further information visit the homepage of the ICBG: http://icbg.ucdavis.edu/front-page (31 January 2016).

This cooperation could serve as an excellent example for further projects of the years to come,[134] even if this project received criticism as well.[135]

What is the reason for the insufficient protection? Why is international law incapable to protect indigenous intellectual property? This question has been partially answered in the previous chapter by analysing the different approaches to culture. This different approach is reflected in some specific regulation: according to Article 27 of the TRIPS, patent protection can be granted only if invention and ideas are 'new', 'nonobvious' and 'useful'. This is radically opposed to the approach of indigenous peoples, who consider their traditional knowledge collectively traditional, intuitively obvious. Regarding the usefulness there is a match, but only at the first look, however. While western people only consider something useful if it can produce money, indigenous people consider self-contained knowledges valuable as well. In addition, patent protection has a requirement called 'enablement', which means one must be able to describe the invention so clearly that potentially, anyone wishing to replicate or exploit that knowledge once patent protection has lapsed, can do so. The latter requirement is also hard to fulfil if a certain group has only unwritten culture, which is common characteristics of indigenous peoples. Summarizing the statements of the TRIPS, it assumes that protecting the investor's right to sole exploitation is the best means to promote the utilitarian goal of continued innovation. This approach is wrong for two reasons: *firstly*, it is the hotbed for abuse of rights, as it has been demonstrated by the above mentioned cases. *Secondly*, some indigenous peoples' innovations are communally derived or otherwise anonymous, which makes them difficult to protect under TRIPS; nonetheless, they are in a need of protection from external exploitation. Furthermore these cultures may place more normative weight on sustainability rather than innovation and, thus, the western rationale behind the right to sole exploitation may be irrelevant.[136] Therefore effective protection requires stepping out of the western intellectual property paradigm under the guidance of these indigenous groups and understanding completely different value and ownership system that does not automatically land itself to western cultures.[137]

134 Fitzmaurice, p. 271.

135 B. Berlin & E.A. Berlin, 'Community Autonomy and the Maya ICBG Project in Chiapas, Mexico: How a Bioprospecting Project that Should Have Succeeded Failed', 63 *Human Organization*, 2004, pp. 472-486.

136 C.J. Picart & M. Fox, 'Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I', *International Community Law Review*, Vol. 15, 2013, pp. 319-340, pp. 333-334, 338.

137 D.L. Fernando, 'Intellectual Property and the Protection of Indigenous Culture in the United States and New Zealand: An Effective Solution for Indigenous Communities', *Cardozo Public Law, Policy and Ethics Journal*, Vol. 12, 2013, pp. 149-182, p. 181.

2.3 Conclusions

The protection of indigenous cultural rights – despite the developments of the last few decades – still leaves a lot to be desired, which has many causes. *Firstly*, the majority still has its aversion towards indigenous society and culture. *Secondly*, most international documents – both those aiming at the protection of cultural heritage and intellectual property rights – do not pay enough attention to the characteristics of the culture and traditional knowledge of indigenous peoples and their needs, since international law generally prefer individual rights. This individualist approach is unsuitable for the protection of indigenous rights, however. Beside the individualist approach, these documents not only make the protection of indigenous property more difficult, but facilitate the treating of cultural heritage as state property.

Presumably, the reluctance of states to grant wider rights originates in the fear of losing hegemony in this field. This fear is unreasonable as it was stated earlier. Furthermore, it is important to overcome these aversions for another reason: according to the case law of international human rights mechanism and the opinion of the majority of the academics, states have an obligation to implement state actions in order to facilitate cultural rights, otherwise these rights would be pre-empted and cultural rights would only repeat the prohibition of discrimination. According to the author, this approach fits the needs of indigenous peoples better by providing a more suitable protection: indigenous peoples usually live on the margin of society, thus cannot represent their interest in a vigorous manner.

The importance of protecting the traditional knowledges of indigenous peoples has only been recognised in the recent past. This recognition was induced by the realization that their knowledge can contribute to sustainable development and represents significant value for medical science. The protection of this knowledge is being still in its infancy, however; in the absence of suitable substantial norms, which would take the characteristics of indigenous peoples into account, it is hard to protect the traditional knowledge of indigenous peoples. Thus the fair attitude of the ICBG can be regarded as exceptional; experiences show that in the absence of suitable regulation multinational companies are likely to neglect the needs of indigenous peoples. According to this, the writer firmly believes that guidelines should be elaborated in order to direct multinational corporations towards collaboration with indigenous peoples, which includes obtaining their free prior and informed consent, providing a reasonable share from the benefits and making preliminary studies on the effects of the project. These requirements – or at least parts of them – can be found and generally accepted in the practice[138] of regional human rights mecha-

138 See; Gy. Marinkás, 'The Protection of Indigenous Peoples' Rights in the Jurisprudence of the Inter-American System: A Comparative Analysis', in: Conferinta Studenteasca Anuală 'Nicolae Titulescu' (ISSN-L 2246-

nisms,[139] and can be considered as an evolutive development of the already existing substantial norms. Thus the protection of indigenous peoples' cultural rights can be enhanced in two different ways: on the one hand by the revolutionary, evolutive development of the already existing substantial norms as the regional human rights mechanism enhance the protection within their frameworks; on the other hand by adopting new international standards which take the needs of indigenous peoples into account. The author believes that the best solution is to codify the achievements of the regional human rights mechanisms into regional documents, since these mechanisms could elaborate a more adequate regulation taking the needs of the indigenous peoples of the given region/continent into account.

The author suggests that the above mentioned possible codifications should pay special attention to the cultural autonomy of indigenous peoples as one of the most important barriers of enforcing indigenous interests and rights is the lack of autonomy. Surpassing state centred regulation – which treats indigenous arts and artefacts as state property – and the recognition of indigenous peoples as the trustee of their own cultural heritage even on the international stage is of paramount importance.

At the moment, these suggestions are only wishful thinking, however.

9214), Bucharest, 2014, pp. 423-429; Gy. Marinkás, 'The Mayagna (Sumo) Awas Tingni vs Nicaragua Case, in other words the Precedent Shaping Role of the Inter-American Court Regarding Indigenous Rights', in: I. Stipta (ed.): Doktoranduszok Fóruma, Miskolc: Miskolci Egyetemi Kiadó, 2012, pp. 129-133.

139 IACtHR, Saramaka People *v*. Suriname, 28 November 2007 Series C No. 172. para. 129; ACtHPR, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs Kenya, 25 November 2009 (Case No. 276/2003), paras. 20, 74.