COLLECTIVE LEGAL AUTONOMY CONCERNING TRADITIONAL ECOLOGICAL KNOWLEDGE:

THE RIGHTS OF INDIGENOUS PEOPLES AND THEIR LINKAGES TO BIODIVERSITY CONSERVATION IN COLOMBIA AND AUSTRALIA

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ABSTRACT

This thesis compares the legal status of biodiversity conservation and the recognition of the human rights of Indigenous peoples in Australia and Colombia. It argues that these two areas are legally protected interests that often collide. One interest cannot be sacrificed for the sake of the other and thus a Pareto optimal balance has to be reached. The aim of the research is to ascertain the most suitable model to achieve biodiversity conservation objectives in territories inhabited or otherwise used by Indigenous peoples.

For accomplishing this aim, the thesis critically assesses the models of fortress conservation and community-based conservation (CBC), grounded in the discipline of international environmental law. It argues that the first model, based on the premise of keeping people separate to pristine wildernesses, evolved towards the more inclusive second model, which is currently considered best practice. Australia currently implements CBC and has co-management agreements with Aboriginal and Torres Strait Islander peoples for protected areas. The thesis challenges both of these models on the basis that they do not optimise both interests, and proposes a third human rights–based model, called the collective legal autonomy concerning traditional ecological knowledge (TEK).

The collective legal autonomy concerning TEK is grounded in differentiated collective human rights entitled to Indigenous communities in their quality as *peoples*. By analysing the Colombian Constitution and the rulings of the Constitutional Court, along with case studies of Indigenous communities in the country, the thesis concludes that this human rights–based model achieves a Pareto optimal solution between the two legally protected interests of biodiversity conservation and the recognition of the rights of Indigenous peoples.

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Statement of Candidate

I certify that the work in this thesis, entitled *LEGAL AUTONOMY CONCERNING TRADITIONAL ECOLOGICAL KNOWLEDGE: The Rights of Indigenous Peoples and their Linkages to Biodiversity Conservation in Colombia and Australia*, has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

.....
Natalia Rodríguez Uribe
41372816

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT TITLES

ACHPR: African Commission on Human and Peoples' Rights
AIP: The International Labour Organisation's Andean Indian Program
ATSIC: Aboriginal and Torres Strait Islander Commission
ATSIHP: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), Australia
BP: Before the Present (used to refer to prehistoric events, the present is 1950)
CAR: *Corporación Autónoma Regional*
(Regional Autonomous Corporation, Spanish acronym)
CCAMLR: *Convention on the Conservation of Antarctic Marine Living Resources*
CBD: *Convention on the Protection of Biological Diversity*.
Short title: *Biodiversity Convention*
CCSBT: *Convention for the Conservation of Southern Bluefin Tuna.*
Short title: *Bluefin Tuna Convention*
CEACR: Committee of Experts on the Application of Conventions and Recommendations
(Same for the Spanish *Comisión de Expertos en Aplicación de Convenios y Recomendaciones*)
CITES: *Convention on International Trade in Endangered Species of Wild Fauna and Flora*
CMS: *Bonn Convention on the Conservation of Migratory Species of Wild Animals.*
Short title: *Convention on Migratory Species*
CNP: *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*.
Short title: *Convention on National Parks*
COP: Conference of the Parties
CRC: *Convention on the Rights of the Child.*
Short title: *Children's Convention*
CRIMA: *Consejo Regional Indígena Meso-Amazónico* (Association of Traditional Authorities of the Meso-Amazon Indigenous Regional Council, Spanish acronym)
CSICH: *Convention for the Safeguarding of the Intangible Cultural Heritage.*
Short title: *Intangible Cultural Heritage Convention*
CTBT: *Comprehensive Nuclear Test-Ban Treaty.*
EPBC Act: *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), Australia
ETI: *Entidades Territoriales Indígenas* (Indigenous Territorial Entities, Spanish acronym)
FAO: Food and Agriculture Organisation of the United Nations
GMOs: Genetically Modified Organisms
IAHEC: Inter-American Human Rights Court
ICCAT: *International Convention for the Conservation of Atlantic Tunas*
ICCPR: *International Covenant on Civil and Political Rights*
ICESCR: *International Covenant on Economic, Social and Cultural Rights*
IGAE: Intergovernmental Agreement on the Environment, Australia
ILM: International Legal Materials
ILO: International Labour Organisation
ILO 107: *International Labour Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.*
Short title: *Convention Concerning Indigenous and Tribal Populations*
ILO 169: *International Labour Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*.
Short title: *Indigenous and Tribal Peoples Convention*.
INDERENA: *Instituto Nacional de Recursos Naturales*
(National Institute of Natural Resources, Spanish acronym)
IWMI: The International Water Management Institute
IP: Intellectual Property

IPA:	Indigenous Protected Areas (Australia)
MDGs:	Millennium Development Goals
MEAs:	Multilateral Environmental Agreements
NEAFC:	*Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries.* Short title: *North-East Atlantic Fisheries Convention*
NSW:	New South Wales (Australia)
ONIC:	*Organización Nacional Indígena de Colombia* (National Indigenous Organisation of Colombia, Spanish acronym)
OUV:	Outstanding Universal Value (also OUV methodology)
PIC:	Prior Informed Consent
Ramsar:	*Convention on Wetlands of International Importance Especially as Waterfowl Habitat.* Short title: *Ramsar Convention on Wetlands*
RLICH:	Representative List of the Intangible Cultural Heritage of the Nation (Colombia)
SINAP:	*Sistema Nacional de Áreas Protegidas* (National Protected Areas System, Spanish acronym)
SPNN:	*Sistema de Parques Nacionales Naturales* (National Natural Parks System, Spanish acronym)
SOWIP:	*State of the World's Indigenous Peoples* (UN Report)
TEK:	Traditional Ecological Knowledge
IUCN:	International Union for the Conservation of Nature
UN:	United Nations
UNCCD:	*United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.* Short title: *Convention to Combat Desertification*
UNCED:	United Nations Conference on Environment and Development. Short title: the Rio Summit.
UNCHE:	United Nations Conference on the Human Environment. Short title: the Stockholm Conference
UNCTAD:	United Nations Conference on Trade and Development
UNDHR:	*Universal Declaration on Human Rights*
UNDP:	United Nations Development Programme
UNDRIP:	*United Nations Declaration on the Rights of Indigenous Peoples*
UNESCO:	United Nations Educational, Scientific and Cultural Organisation
UNPFII:	United Nations Permanent Forum on Indigenous Issues
UNTS:	United Nations Treaty Series
WHC:	*Convention Concerning the Protection of the World Cultural and Natural Heritage.* Short title: *World Heritage Convention*
WTO:	World Trade Organisation
WWF:	World Wide Fund for Nature International

TABLE OF CASES

Colombian Constitutional Court Judgements:

Note: In Colombia the Judgements of the Constitutional Court do not have names, only the indication of the type of judgement (T is for *tutela* actions, C for *actio popularis* of unconstitutionality, and SU for rulings that harmonise and unify previous jurisprudence), the number of the ruling (starting from 1 each year), and the year. Short names, in parentheses, have been created to identify these cases more easily.

Judgement T-092/1993 ('Villavicencio Landfill Case')
Judgement T-188/1993 ('Collective Right to Property Case')
Judgement T-231/1993 ('Cúcuta Sewer Case')
Judgement T-254/1993 ('Collective Actions Case')
Judgement T-257 of 1993 ('New Tribes of Colombia Evangelical Association Case')
Judgement T-380/1993 ('Collective Right to Life Case')
Judgement T-405/1993 ('DEA Radar Case')
Judgement T-471/1993 ('Garzón Landfill Case')
Judgement C-519/1994 ('Biodiversity Convention Approval Case')
Judgement T-254/1994 ('Exile and Confiscation Case')
Judgement T-422/1994 ('Aerial Crop-Spraying Case')
Judgement C-139/1996 ('Savage Management Act Case')
Judgement T-460/1996 ('Noise Pollution Case')
Judgement T-461/1996 ('Riohacha Sewer Case')
Judgement T-574/1996 ('Oil Spill and Fisheries Case')
Judgement SU-039/1997 ('U'wa Case')
Judgement T-523/1997 ('Customary Punishment Case')
Judgement SU-510/1998 ('United Pentecostal Church Case')
Judgement T-458/1998 ('Ricaurte Landfill Case')
Judgement T-652/1998 ('Urrá Dam Case')
Judgement C-595/1999 ('Social Function of Property Case')
Judgement C-431/2000 ('Environmental Licences Regime Case')
Judgement C-418/2002 ('Indigenous Mining Areas Case')
Judgement C-891/2002 ('Mining Code Case')
Judgement SU-383/2003 ('Illicit Crops Case')
Judgement T-382/2006 ('Injunction General Forestry Act')
Judgement C-030/2008 ('General Forestry Act Case')
Judgement C-461/2008 ('National Development Plan Case')
Judgement C-175/2009 ('Rural Development Statute Case')
Judgement C-615/2009 ('Wayuu Basic Plan Case')

Judgement T-903/2009 ('*Customary Due Process Case*')
Judgement T-769/2009 ('*Mandé Norte Case*')
Judgement T-601/2011 ('*Community Action Committees Case*')

Australian Case Law:

A v Hayden [No 2] (1984) 156 CLR 352
Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493 ('*ACF v the Commonwealth*')
Australian Conservation Foundation v Minister for Resources (1989) 76 LGRA 200
Booth v Bosworth [2001] FCA 1454 (17 October 2001)
Boyce v Paddington Borough Council [1903] 1 Ch 109
Commonwealth v Tasmania (1983) 158 CLR 1 ('*Tasmanian Dam Case*')
Coe v Commonwealth (1979) 24 ALR 118
Coe v Commonwealth (1993) 118 193
Cooper v Stuart (51) (1889) 14 App Cas)
Kartinyeri v The Commonwealth [1998] HCA 22
Koowarta v Bjelke-Petersen (1982) 153 CLR 168
Mabo v Queensland (1989) 166 CLR 186 ('*Mabo*')
Mabo v Queensland (No 2) (1992) 175 CLR 1 ('*Mabo No 2*')
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 ('*Yorta Yorta*')
Murphyores v Commonwealth (1976) 136 CLR 1 ('*Murphyores*')
Onus and Frankland v Alcoa of Australia Ltd (1981) 149 CLR 27 ('*Onus and Frankland v Alcoa*')
R *v Bonjon* [1841] (Unreported, NSWSC, Port Phillip District, Willis, April 1841)
Secretary of the Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218 ('*Marion's Case*')
Shaw v Wolff (1999) 163 ALR 205
Telstra Corporation Limited v Hornsby Shire Council (2006) 67 NSWLR 256 ('*Telstra v Hornsby*')
Tickner v Chapman (1995) 133 ALR 74
Western Australia v Ward (2000) 170 ALR 159 ('*Ward*')
Wik Peoples v Queensland (1996) 187 CLR 1 ('*Pastoral Leases Case*')

HUMAN RIGHTS TREATIES RATIFIED BY AUSTRALIA

Under s 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ***human rights*** means the rights and freedoms recognised or declared by the following international instruments:

International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*')

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*')

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*')

Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*')

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CDC*')

Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, [2008] ATS 12 (entered into force 3 May 2008)

INTRODUCTION

I. PROBLEM STATEMENT AND HYPOTHESIS

The aim of this investigation is to ascertain the most appropriate legal model to achieve biodiversity conservation in territories inhabited by Indigenous peoples. Over the last three decades, the legal doctrine has discussed the most suitable legal strategies to protect biodiversity. Biodiversity is an overarching concept that encompasses the immense variability of life on Earth, including the multiplicity of genes, species and ecosystems.[1] Biodiversity holds the key to healthy ecosystems, which are of paramount importance for human survival; hence, biodiversity should be, and indeed is, internationally and domestically, a legally protected interest.

The tropics comprise the most biodiverse regions[2] and harbour greater numbers of Indigenous peoples.[3] This is not a coincidence. The Indigenous peoples that have inhabited the tropics for thousands of years and survive today have adapted themselves to the particular environmental conditions of their lands.[4] As opposed to the common practice in Western cultures,[5] Indigenous peoples in general have not attempted to shape and tame the environment to suit their own needs. Rather, they have developed a

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1 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 243 (entered into force 29 December 1993) 194 ('*CBD*').

2 See generally, Edward O Wilson, *The Diversity of Life* (Penguin Books, 1992) ('*Diversity…*'); Russell A Mittermeier et al, 'Biodiversity Hotspots and Major Tropical Wilderness Areas: Approaches to Setting Conservation Priorities' (1998) 12(3) *Conservation Biology* 516; Sujata Arora and Vibha Ahuja, 'Biodiversity Conservation in Megadiverse Counties: A Profile' in Like-Minded Megadiverse Countries (ed), *Perspectives on Biodiversity* (Like-Minded Megadiverse Countries, 2005) 21.

3 Rakesh Maurya, Prason Gupta and C M Gupta, 'Biodiversity for Health' in Like-Minded Megadiverse Countries (ed), *Perspectives on Biodiversity* (Like-Minded Megadiverse Countries, 2005) 294. A table correlating endemic languages and biodiversity is available in Sophia Twarog and Promila Kapoor, *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions*, Geneva, United Nations Conference on Trade and Development (UNCTAD) Comm, UN Doc UNCTAD/DITC/TED/10 (2004) 72.

4 See generally, Tim (Timothy Fridtjof) Flannery, *The Future Eaters–An Ecological History of the Australasian Lands and People* (Reed New Holland, 1994) ('*Future Eaters*'); Jérémie Gilbert, 'Custodians of the Land: Indigenous Peoples, Human Rights and Cultural Integrity' in Michele Langfield, William Logan and Máiréad Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice* (Routledge, 2010).

5 See eg, Wilson, *Diversity…*, above n 2; Richard Leakey and Roger Lewin, *The Sixth Extinction–Patterns of Life and the Future of Humankind* (Doubleday, 1995); Paul R Ehrlich, 'The Scale of Human Enterprise and Biodiversity Loss' in John H Lawton and Robert McCredie May (eds), *Extinction Rates* (Oxford University Press, 1995) 214.

sustainable relationship with their environment honed for generations. This has included, in certain cases, altering the environment in a symbiotic pattern.[6]

International law[7] and domestic regulations in various countries, including Colombia[8] and Australia,[9] follow a rule of thumb: the most suitable legal model to conserve biodiversity is to ensure the protection of the maximum number of genetically diverse populations of the maximum amount of species in the greatest variety of ecosystems, kept as pristine as possible. However, this strategy interferes with other legitimate legal interests at stake, including the enjoyment of biodiverse areas for recreation, economic purposes and renewable natural resources; the human rights of Indigenous peoples over the areas in question; and mining.

Thus, legal strategies for biodiversity protection within Indigenous territories should take into account at least three main conflicting objectives: biodiversity protection for its own sake,[10] respect for the human rights of Indigenous communities living in highly biodiverse lands,[11] and the fair treatment of the interests that non-Indigenous people and

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[6] This is the argument of coevolution, which will be developed in Chapter III of this thesis. *Contra* overkill argument developed in section III of Chapter II. For symbiotic interactions with the environment, the case of fire-stick farming in Australia where Aboriginal peoples have altered the landscape for hundreds of years is a good example. However, this is a contentious issue, as Whitehead et al thoroughly discuss, because applying this knowledge in what the authors describe as a 'prescribed fashion' may have implementation issues, especially for non-Aboriginals. See, Peter J Whitehead et al, 'Customary Use of Fire by Indigenous Peoples in Northern Australia: Its Contemporary Role in Savannah Management' (2003) 12(4) *International Journal of Wildland Fire* 415.

[7] See especially, *CBD* art 8. See also, *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*, opened for signature 12 October 1940, 161 UNTS 193 (entered into force 1 May 1942) Preamble, arts II–IV ('*National Parks Convention*'); although it is restricted to the different wetland ecosystems, see also the approach of the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention*').

[8] In Colombia, art 19 of the *Natural Resources Code* delegates the mission of providing the research and technical support for creating a biodiversity inventory and assisting in the policies for its protection to the Alexander von Humboldt Institute. Thus, the National Biodiversity Policy was created *ad hoc* by this institute. See *Act 99 of 1993 Creating the Ministry of Environment, reorganising the Branches of the Public Sector in Charge of the Management and Conservation of the Environment and Renewable Natural Resources, Organising the National Environmental System, and Enforcing other Provisions* (Colombia) ('*Natural Resources Code*'); Ministry of Environment, National Department for Planning and Alexander Von Humboldt Institute, 'Política Nacional de Biodiversidad' (National Biodiversity Policy Alexander Von Humboldt Institute, 1997) <http://www.humboldt.org.co/download/polnal.pdf>.

[9] See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'); National Biodiversity Strategy Review Task Group, 'Australia's Biodiversity Conservation Strategy 2010–2030' (Policy Strategy, Natural Resource Management Ministerial Council, Australian Government, Department of Sustainability, Environment, Water, Population and Communities, 2010).

[10] See the works of Wilson supporting this thesis. Eg, Edward O Wilson, *The Future of Life* (Abacus, 2002) ('*Future…*'); *The Creation– An Appeal to Save Life on Earth* (W W Norton & Company, 2006) ('*Creation*'); *Diversity…*, above n 2.

[11] *International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1358 (entered into force 5 September 1991) Part II 'Land' arts 13–19 ('*ILO 169*'); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR,

the broader political community may hold in biodiverse areas.[12] Regarding the third objective, mining is among these interests. However, as an example of the inter-play between these objectives, the large-scale mining of non-renewable resources is likely to compromise the integrity of the ecosystem, and negatively affect the cultural identity of the Indigenous peoples occupying the area, as it will be discussed later in this introduction.

For a deeper level of analysis, this thesis will only consider the first two interests in its investigation, focussing on how to balance biodiversity protection and the human rights of Indigenous peoples. There are at least two possible competing strategies available for achieving this: the fortress conservation model and the community-based conservation approach.[13] Crucial aspects differentiate them, as explained below.

The fortress conservation model has its basis in scientific knowledge, rooted in ecology and biology precepts. It refers to enclosing large areas of land to keep them pristine and, in its strictest form, free from human habitation; hence the term 'fortress'. This model assumes thus that human intervention by Indigenous peoples was not essential for biodiversity protection in the first place. To achieve this rigorous level of protection, the State claims the property and management of the areas, and relies on the implementation of international and domestic conservation regulations. The model allows some restricted use of the areas, such as for ecotourism and scientific research. However, it acknowledges the destructive potential of mining, and thus strictly forbids the exploitation of renewable and non-renewable resources inside the relevant areas. This model, because of its restrictive nature, can be very effective for the protection of biodiversity inside the chosen areas. Due to the minimal human intervention in the areas,

61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 8.2(b) and 10 ('*UNDRIP*').

[12] For instance, see the Colombian Policy on biotechnology and sustainable use of biodiversity, adopted in the wake of the signing of the *Nagoya Protocol* to the *CBD*. República de Colombia Consejo Nacional de Política Económica y Social and Departamento de Planeación Nacional, 'Política para el Desarrollo Comercial de la Biotecnología a Partir del Uso Sostenible de la Biodiversidad' (Documento Conpes No 3697, Departamento Nacional de Planeación DNP-DDRS; Ministerio de Agricultura y Desarrollo Rural; Ministerio de Ambiente, Vivienda y Desarrollo Territorial, Ministerio de Protección Social; Ministerio de Relaciones Exteriores; Departamento Administrativo de Ciencia, Tecnología e Innovación - Colciencias, 14 June 2011).

[13] The IUCN has published the guidelines that follow best practice in conservation areas. These categories will be discussed more fully in the following chapters. See Nigel Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (IUCN Publications Services, 2008) 7–25.

limited to management activities and scientific research, ecosystem cycles can occur unhindered.[14]

The government is the key actor in this conservation strategy. The relevant authorities are in charge of the selection, management and maintenance of the protected area; input from relevant communities, Indigenous or otherwise, is usually minimal or non-existent. As such, in relation to the human rights of Indigenous peoples, this model is arguably the least desirable because it takes people out of the ecosystem. There is ample evidence showing that a great number of protected areas in the world were the homes of Indigenous peoples who have since been driven out for the sake of biodiversity conservation.[15] Considering that these peoples inhabited or used these protected areas for centuries, the 'pristineness' of the ecosystem can be questioned. It is thus paradoxical to promote a model based on excluding destructive people when the supposedly pristine ecosystems have been continually used or inhabited. Thus, although this model can arguably maximise the protection of biodiversity for its own sake, the neglect of Indigenous peoples' human rights speaks against it.

In contrast, community-based conservation is a more progressive approach that involves communities in the protection of biodiverse areas. As Berkes comments, the definition of Western and Wright from 1994 still holds: '[community-based conservation] includes natural resources or biodiversity by, for, and with the local community'.[16] The communities involved can be either Indigenous or non-Indigenous, provided they inhabit parts of the protected area or its adjacent zones. The model promotes the involvement of said communities in the management of the area as a livelihood opportunity, and the application of traditional management strategies, if any, is restricted to the specific terms of co-management agreements. The property of the area remains vested in the State, which issues policies with the participation of the community for devising tailored management strategies. Some traditional or low-impact uses of the area may be allowed, but large-scale mining is considered destructive and is thus prevented. Unlike fortress

[14] Chapter I explains why the ecosystem approach, applied also in fortress conservation, maximises the protection of the three components of biodiversity (genes, species populations and variety of ecosystems) by applying an ample protection to areas. The chapter also argues that legal instruments that seek only to protect endangered species are not effective without an ecosystem protection strategy.

[15] See Chapter II, which discusses how the fortress conservation model promoted social injustice by failing to consider the human factor in conservation.

[16] D Western and R M Wright (eds) *Natural Connections* (Island Press, 1994) 7, quoted in Fikret Berkes, 'Community-based Conservation in a Globalized World' (2007) 104(39) *Proceedings of the National Academy of Science* 15188.

conservation, community-based conservation also has a social aim: to protect the livelihoods of the communities linked to the protected area. As such, it is a more participatory and inclusive model, in which the input of the communities is no longer tokenistic.

At first glance, it would seem that this model sacrifices some of the interests of biodiversity *per se* for the sake of human interests. However, this is not necessarily the case. In successful instances of the application of this model, the outcomes for biodiversity can be maximised because the community appreciates the value of biodiversity protection and derives livelihood opportunities linked to its care. Thus, it becomes more effective to develop and maintain a sustainable relationship with the ecosystem than to destroy it altogether. For Indigenous peoples, this strategy is better than fortress conservation because it allows them to maintain their livelihoods and remain in the lands they have inhabited for generations. However, this model is not based on a human rights legal framework. Rather, it relies on biodiversity conservation policies, which may change with governments and which are based primarily on Western knowledge.[17] Indeed, in cases of conflict between the interests of the community and biodiversity protection, the solution will have the interests of biodiversity at the forefront. For example, in cases in which livelihoods and subsistence depend on the consumption of natural renewable resources, such as hunting and fishing activities, these may be restricted for the sake of species protection. Thus, these prerogatives of use have to be carefully negotiated in the drafting of management plans. Even if this denotes a certain degree of participation, if the involved community is an Indigenous group that has a special connection with the area, then the rights associated with cultural integrity might be lessened to suit the conservation agreement.[18]

In both of the models outlined above, the protection of biodiversity and the recognition of the human rights of Indigenous peoples collide. In fortress conservation,

[17] The term 'Western knowledge' is mostly used in this thesis as a counterpoint to 'traditional knowledge'. In this context, it is necessary to clarify that any reference to the 'West' follows a similar understanding based on the following premises. The colonialist endeavours of the great European empires, including Spain and Great Britain, starting in the fifteenth century, had the result of spreading similar understandings of the world in the conquered territories. The most relevant for this thesis was an understanding of development as a linear and unidirectional progression that constantly improves the lives of humans as they manage and tame nature. Under this conception, ways of living that deviate from the pattern are either doomed to fail, or are merely a stage to be overcome. As will be elaborated further in this dissertation, laws and policies inspired in this Western conception of development have had several shortcomings for the protection of the legally protected interests of biodiversity conservation for its own sake and the recognition of the human rights of Indigenous peoples.

[18] See Chapter III, in which the pros and cons of community-based conservation are discussed.

there is no input or participation from Indigenous peoples, while in community-based conservation, this participation is limited to specific agreements, usually based on Western conceptions of conservation.[19] This collision can be summarised as a premise: as protection of biodiversity becomes stricter, the recognition of the human rights of Indigenous peoples lessens. Thus, to guarantee the recognition of the human rights of Indigenous peoples that inhabit biodiverse areas, there have to be some limits to biodiversity conservation. This suggests the need for a third model that reaches an optimal balance between the protection of biodiversity and the recognition of the human rights of Indigenous peoples at an appropriate level. This model should follow a human rights–based approach to biodiversity conservation.

This thesis proposes such an alternative third model. The main claim is that the most appropriate legal model to achieve biodiversity conservation in territories inhabited or used by Indigenous peoples should be grounded in the recognition of the collective legal autonomy of Indigenous peoples to protect biodiversity, by means of their traditional ecological knowledge (TEK). This proposition implies the recognition of a *prima facie* priority of the human rights of Indigenous peoples over the scientific legal interest of biodiversity for its own sake. The use of the term *prima facie* priority, instead of understanding the rights of Indigenous peoples as trumps,[20] means that there is a burden of argumentation in favour of this interest. The intrinsic value of biodiversity is not automatically discarded because it is considered in this light to have a similar value as a legally protected interest. The *prima facie* priority is given as a tool to resolve the stalemate.[21] This theoretical approach allows this thesis to defend a model that optimises both interests rather than sacrificing one in the name of the other.[22]

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[19] The main view here would be the closed protection of pristine areas.

[20] Dworkin develops the idea of rights as trumps in several essays, especially 'Taking Rights Seriously'. A compilation of those essays with an appendix responding to the critiques to his arguments is available in Ronald Dworkin, *Taking Rights Seriously* (Duckworth, New Impresion with a Reply to Critics ed, 2005) (first pubished 1977).

[21] See the discussion of the application of the rules of balancing from Robert Alexy's *A Theory of Constitutional Rights* in Carlos Bernal Pulido, 'The Rationality of Balancing' (2006) 92(2) *Archiv fuer Rechts-und Sozialphilosphie* 195, especially heading 3) *The Burden of Argumentation*.

[22] The theoretical point of view is an application of Ross's theory of *prima facie* duties, developed in his book *The Right and the Good*. This theory admits the existence of conflicting duties that may have similar value if they have in common that they bring about as much good as possible. One of these *prima facie* duties is the duty of justice. This theoretical framework seems appropriate when it is linked to contemporary theories of environmental justice whereby a healthy environment brings well-being, especially to the sectors that suffer the most due to environmental damages and to the internationalisation of the rights of Indigenous peoples as a way to give visibility to centuries of injustice. Incidentally, bringing well-being to sectors suffering from environmental damages is one of the fundamental tenets of the principle of sustainable development. W D Ross, *The Right and*

The criteria for determining a human rights–based model that adequately balances the rights of Indigenous peoples with the objectives of biodiversity conservation are simple: for a Pareto optimal balance[23] between the two legally protected interests, the model should achieve the greater degree of biodiversity protection possible, without compromising the recognition and exercise of the human rights of Indigenous peoples. This model will be called collective legal autonomy concerning TEK. It embodies an ancestral understanding of the land, its cycles and the life that teems in them. It is not 'scientific' in the Western conception of the term,[24] as it also takes into account cultural and spiritual factors that are not material or visible, encapsulated in what is referred to throughout this thesis as 'TEK'. TEK is transmitted by oral tradition from one generation to the next and is deeply entrenched in the cosmovisions[25] of the Indigenous peoples in question. It operates inside territories inhabited or used by Indigenous peoples who derive their livelihoods from the natural resources present in them. The protection it provides to areas relies on the deep spiritual meaning the lands hold for these groups,

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The Good (Oxford University Press, 1930). See especially Chapter II 'What Makes Right Acts Right' (16–47) and Chapter V 'What Things are Good?' (134–141).

[23] For the purpose of this thesis, a Pareto optimal balance is reached when two interests are maximised to a point where one interest cannot be improved without negatively affecting the other.

[24] The meaning of the 'scientific Western conception of ecological cycles' is based on the parameters of hard sciences such as biology and ecology. This means that the values assigned to biodiversity are based on measurable tangibles, such as number of species present in a set location, rather than on intangibles, such as the cultural or spiritual values of the places. As Verschuuren accurately comments: '… conservation organizations are typically used to dealing with biological values. The ideological roots of the western conservation movement—starting some 150 years ago—are embedded in a deep respect and even reverence for nature and creation. However, scientifically expressed natural and biodiversity values have been prioritized over the cultural and spiritual values assigned to nature'. Bas Verschuuren, 'Arguments for Developing Biocultural Conservation Approaches for Sacred Natural Sites' in Bas Verschuuren et al (eds), *Sacred Natural Sites: Conserving Nature & Culture* (Earthscan, 2010) 62, 65. See also Robert Wild and Christopher McLeod (eds), *Sacred Natural Sites: Guidelines for Protected Area Managers* (IUCN, Gland & UNESCO, Paris, 2008) 19–20.

[25] This is a term of art used mainly in the social sciences to refer to the comprehensive understanding of the world, with its physical and spiritual dimensions, held by Indigenous peoples. In Australia, the preferred expression of Aboriginal and Torres Strait Islander peoples is the 'Dreamtime'. For consistency, the term 'cosmovision' or 'cosmovisions' is preferred throughout the thesis. Note that legal scholars and policy-makers, writing in English and Spanish, have embraced this term, and the Colombian Constitutional Court refers to it consistently in its judgements, as early as 1993. See, among others, Constitutional Court, *Judgement T-188/1993* ('*Collective Right to Property Case*'); *Judgement T-523/1997* ('*Customary Punishment Case*'); *Judgement T-903/2009* ('*Customary Due Process Case*'); *Judgement C-461/2008* ('*National Development Plan Case*'). See also, Marcus Colchester, 'Self-Determination or Environmental Determinism for Indigenous Peoples in Tropical Forest Conservation' (2000) 14(5) *Conservation Biology* 1365, 1366; Unidad Administrativa Especial del Sistema de Parques Nacionales Naturales, *Política de participación social en la conservación* (Parques Nacionales de Colombia–Ministerio del Medio Ambiente, 2001); Frank Semper, 'Los derechos de los pueblos indígenas de Colombia en la jurisprudencia de la Corte Constitucional' (2006) *Anuario de Derecho Constitucional Latinoamericano* 761; Lourdes Barragán Alvarado, *Pueblos Indígenas y Áreas Protegidas en América Latina–Fortalecimiento del Manejo Sostenible de los Recursos Naturales en las Áreas Protegidas de América Latina* (United Nations Food and Agriculture Organization-FAO, 2008).

and the protection of sacred sites is thus fiercely pursued.[26] Ideally, the property regime applied here is the collective ownership of the lands by the community.[27] With the Indigenous authorities in charge of the management of the territory, the decision to allow limited tourism or research, and the circumstances under which this is permitted, lies in their hands.[28] However, given that most domestic regimes state that underground resources belong to either the nation or the State, mining is allowed in these areas.[29]

The key difference between applying TEK within a community-based conservation framework and the collective legal autonomy concerning TEK is that the latter has as its goal the protection and recognition of the human rights of Indigenous peoples, such as self-determination. Even if community-based conservation strives to work collectively with local communities, it is still a framework designed to achieve biodiversity protection outcomes and does not necessarily guarantee the protection and promotion of the human rights of Indigenous peoples. The contemporary literature on the human rights of Indigenous peoples,[30] especially after the recent subscription to the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*),[31] insists on the implementation of

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[26] However, these territories may occupy only a small percentage of the country in question. This can be problematic from a conservation point of view, which favours the conservation of large areas. See Chapters I and II for a detailed discussion on protected areas.

[27] Editors, 'The Kimberley Declaration (Reaffirming the Kari Oca Declaration 1992)' (2002) 7(3) *Australian Indigenous Law Reporter* 68 <http://www.austlii.org/au/journals/AUIndigLawRpr/2002/50.html>; *UNDRIP*. *ILO 169* art 14.2 recognises the 'collective relationship' between Indigenous peoples and their lands. This relationship will be discussed further in Chapter IV.

[28] Recent policy documents and research are increasingly referring to the neologism 'Biocultural Diversity Conservation' to pinpoint those strategies that have both aims—biodiversity and cultural diversity—in mind. The sourcebook *Biocultural Diversity Conservation* presents an array of case studies that suggest that these kinds of strategies work. The literature on sacred sites also points towards the biodiversity protection values of these places, supported by field studies. This thesis uses these case studies to propose a human rights–based model founded on hard law rather than policies and guidelines, thus applying the literature rather than just reinforcing it. See Luisa Maffi and Ellen Woodley (eds), *Biocultural Diversity Conservation: A Global Sourcebook* (Earthscan, 2010); Bas Verschuuren et al (eds), *Sacred Natural Sites: Conserving Nature and Culture* (Earthscan, 2010); and Wild and McLeod, above n 23.

[29] *Colombian Constitution 1991* art 330. In Australia, the States have legislative jurisdiction on mining. See *Mining Act 1971* (SA); *Mining Act 1978* (WA); *Mining Act 1992* (NSW).

[30] See especially the academic works of the former and current Rapporteurs for the United Nations on the situation of human rights and fundamental freedoms for Indigenous peoples, Rodolfo Stavenhagen and S James Anaya. Several authors also highlight the role of Indigenous peoples in the protection of biodiversity, especially since this link was expressly recognised in the *CBD*, Preamble and arts 8(j) and 10(c). This subject is discussed in depth in Chapters II and III. See especially, Rodolfo Stavenhagen, 'Los derechos de los indígenas: algunos problemas conceptuales' (1992) XIII (43) *Nueva Antropología* 83; Rodolfo Stavenhagen, 'Los derechos de los pueblos indígenas: esperanzas, logros y reclamos' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 21; S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 141–148; S James Anaya, 'Los derechos de los pueblos indígenas' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 29.

[31] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*').

coherent frameworks in which the management of ecosystems and renewable natural resources are linked to the cultural and spiritual aspects of the territories.[32] Drawing from this, another important aspect that differentiates these approaches is that the collective legal autonomy concerning TEK recognises that Indigenous peoples have a different way to view nature. Rather than as an entity separate from humankind, nature is seen as numinous and inseparable from each of the peoples.

The notion of collective legal autonomy concerning TEK as the Pareto optimal model has its basis in a theoretical background that purposefully separates itself from the Western paradigm of progress. The collective legal autonomy concerning TEK capitalises on the cultural and spiritual approach that Indigenous peoples have towards nature by nurturing, respecting it and, most important of all, recognising it as a valid interpretation of nature and how to manage it. This recognition was absent from mandatory legislation, both domestic and international, until the late 1980s and early 1990s. At this time, the two seminal treaties that govern the issues of the human rights of Indigenous peoples and biodiversity conservation were enforced and both expressly recognised the link between Indigenous peoples and their lands.[33] Further chapters will contend that biodiversity loss and some of the failures of strategies to counteract this destruction have a common source. This common cause of failure stems from two deeply entrenched notions: first, a biased conception of nature as an entity separate from people, and second, a linear understanding of development, born in the Enlightenment:

> Enlightenment, understood in the widest sense as the advance of thought, has always aimed at liberating human beings from fear and installing them as masters. Yet the wholly enlightened earth is radiant with triumphant calamity.[34]

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[32] The inextricable link between Indigenous peoples and their territories is a constant theme in this thesis that will be further elaborated in the following Chapters, especially in Chapter IV. Two sourcebooks have been published recently reflecting on the efficiency, obstacles, challenges and success stories in the aftermath of the subscription of *UNDRIP*. See, Stephen Allen and Alexandra Xanthaki (eds), *Reflection on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011); Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012).

[33] For the relevant arts in the *CBD*, refer to above n 30. *ILO 169*, the only hard-law treaty creating obligations for the parties regarding the treatment of their Indigenous peoples, recognises this link especially in art 7 (the right to define development priorities) and Part II (Land Provisions). This binding treaty has been enforced in Colombia in several decisions of the Constitutional Court as will be seen in this thesis, especially in Chapter IV. Note that *ILO 169* replaced the *International Labour Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries,* opened for signature 26 June 1957, 328 UNTS 247 (entered into force 6 February 1959) ('*ILO 107*'). *ILO 107* is critiqued in Chapter III of this thesis.

[34] Max Horkheimer and Theodor W Adorno, 'The Concept of Enlightenment' in *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott trans, Stanford Univesity Press, 2002) 1.

Here, development is understood as the ability of human beings to shape and dominate nature, with the aim of reaching the final pinnacle of 'progress', even at the expense of the environment. Compared with the worldviews of several Indigenous peoples,[35] who hold a more harmonic and co-dependent relationship with their traditional territories, this pursuit of an ends regardless of the means is irresponsible.

Theodor Adorno and Max Horkheimer have commented on the shortcomings of this way of thinking, stating that 'what human beings seek to learn from nature is how to use it to dominate wholly both it and human beings. Nothing else counts. Ruthless toward itself, the Enlightenment has eradicated the last remnant of its own self-awareness.'[36] Noting that the blind drive towards progress has spawned unsustainable practices resulting in a paradoxical world of both immense and unprecedented wealth and enormous inequality,[37] Adorno and Horkheimer's writings will be used to support the argument for a model that gives the same weight to the human rights of Indigenous peoples and the protection of the intrinsic value of biodiversity.

Indeed, the fortress conservation model responded to the same conceptions of the environment under the Enlightenment. Given that wildernesses were becoming scarce, sacrificed in the name of industrialisation, the solution the same minds could devise was

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[35] As an example, this is the opinion signed at the 2008 IUCN World Conservation Congress, Barcelona, by the Custodians of Sacred Natural Sites and Territories, which includes representatives from Indigenous nations of six countries including Colombia and Australia: '... for many of us our whole territories are sacred and this includes our homes, communities, farms, footpaths, markets and meeting places and that these territories include layers of sacredness often with different purposes, including those that are material and functional to humans. ... They are an important part of the interrelationship between the people and the Earth. For many of us, we see Sacred Natural Sites and Territories as living beings. Even the rocks are alive, animated by our beliefs, and should not be disturbed ...' 'Annex I: A Statement of Custodians of Sacred Natural Sites and Territories' in Bas Verschuuren et al (eds), *Sacred Natural Sites: Conserving Nature & Culture* (Earthscan, 2010) 292.

[36] Ibid 2.

[37] Empirical evidence of this paradox is recorded in the 21 Human Development Reports prepared independently for the United Nations Development Programme (UNDP). For instance, the 2011 Report 'Sustainability and Equity: A Better Future for All' addresses the subject of distributive justice by stating that the intensification of inequality is due in no small measure to environmental degradation, which is linked, in turn, to unsustainable consumption patterns in developed countries. The reports are a good measure of the trends of human development, showing which gaps have narrowed and which have widened. One of the latter is, precisely, the inequality in the distribution of resources. In relation to Indigenous peoples, the *State of the World's Indigenous Peoples Report* emphasises that globalization of neo-liberal policies that open the way for mega corporations have a distinctly damaging effect on Indigenous peoples, dispossessing them and threatening their future generations. Mining policies and toxic waste are the principal culprits, showing a direct link between the inequality of these communities *vis-à-vis* the dominant culture and environmental problems. Department of Economic and Social Affairs, Division for Social Policy and Development and Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (December 2009) 16–18 ('SOWIP'). All of the UNDP reports are available for download at United Nations Development Programme (UNDP), *Human Development Reports* <hdr.undp.org/en/reports/>.

to separate nature further from humankind to protect pristine sites. Under the broad argument that progress after the Enlightenment has created not an age of reason but rather a return to barbarism,[38] the thesis will argue that a moderate view in which people acknowledge their affinity with nature can yield the most positive results for biodiversity protection. Under this view, humans are seen as participants in environmental processes rather than masters or mere managers, something that Indigenous cultures have arguably practiced for a long time. For this reason, the collective legal autonomy concerning TEK must be a human rights–based approach. The key is a shift in perspective. If the understanding and managing of the environment of Indigenous cultures is elevated to a full-fledged set of interlocked rights, respected and enforceable under the legal system, the protection of biodiverse ecosystems in their lands will be almost automatic. This would occur because, at least in these territories, the paradigm of Western progress and development would be replaced by the world vision of the Indigenous community that best knows its land, which in turn would be managed by affinity rather than mastery.

Seeing humans as participants is thus the key to the main claim this thesis defends: the way that some Indigenous groups in Australia and Colombia have developed and applied TEK inside their territories is an empirical example of ways of development that challenge the Western conception of progress. By applying their own customs, laws and traditions to manage their lands, Indigenous peoples have developed a relationship with nature that transcends the utilitarian understanding of land and resources of the West. This utilitarian understanding is intrinsically linked to the implementation of the fortress conservation model, which does not admit grey areas. If land belongs to those who work it, then it is not possible that entire communities will exist that do not seek to make the most of their land in terms of productivity. Hence, if wildernesses were to be protected, justified for instance by the need of solace,[39] then the only option was to remove people altogether.

Australia has restricted, and sometimes even denied, the customs and traditions of its Aboriginal and Torres Strait Islander peoples. Perhaps because of its history of nation construction, this country has experienced a slow and unsteady transition to a society

[38] This is the prevailing theme of several of the works by Adorno. See especially, Theodor W Adorno, 'Negative Dialectics and the Possibility of Philosophy' in Brian O'Connor (ed), *The Adorno Reader* (E B Ashton trans, Blackwell Publishers Ltd, 2000) 54–78; Horkheimer and Adorno, above n 34.

[39] Chapter II explains the theoretical justifications for fortress conservation in a utilitarian framework, commenting on the leading inspiration for defenders of protected areas from the end of the nineteenth century, such as Emerson and Thoreau.

more inclusive of its native peoples.[40] This thesis will show that, at most, there is evidence of the application of community-based management in the country, which fails to optimise the human rights of Indigenous peoples over their territories. This happens because community-based management strategies are not founded on a human rights–based framework; and absent those guarantees, there is no legal security that allows Aboriginal communities to apply their TEK fully.[41] In comparison, the thesis claims that Colombia has applied the collective legal autonomy concerning TEK model.[42] This can be seen first in the effective change introduced in the 1991 Constitution, which directly acknowledged that Colombia is a multicultural and pluriethnic country.[43] The country has also ratified the *Indigenous and Tribal Peoples Convention* (*ILO 169*) [44] and directly implemented its provisions thanks in no small measure to the jurisprudence of the Constitutional Court.[45] Finally, Indigenous peoples themselves have felt empowered to

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[40] For instance, only after the 1967 Referendum abolishing s 127 of the *Australian Constitution 1900* were Aboriginals counted as people of the Commonwealth. A further 25 years had to pass before the High Court invalidated the concept of *terra nullius* in *Mabo No. 2*, allowing the claim of lands via Native Title. The New South Wales Aboriginal Land Council, *The 1967 Referendum Factsheet* <http://www.alc.org.au/newsroom/fact-sheets/1967-referendum.aspx>; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo No 2*').

[41] Davis, for example, argues that a Constitutional amendment, based on the principles of democracy and respect of the rule of law, is the only viable legal alternative that will effectively redress past injustices. See generally, Megan Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6.

[42] For instance, there has been recent media attention given to the constitutional requirement of consultation to Indigenous peoples and other ethnic minorities (*Colombian Constitution 1991*, art 330, paragraph). The Constitutional Court has been adamant in protecting this right in its rulings. However, the media has voiced the opinion that this right hampers development projects and is tantamount to a veto power. The judgements of the Constitutional Court will be analysed in Chapter IV. For media articles criticising consultation processes see Alfredo Rangel Suárez, 'Consultas previas, costoso populismo' *Semana* (Bogotá), 16 February 2013 <http://www.semana.com//opinion/articulo/consultas-previas-costoso-populismo/333803-3>; María Isabel Rueda, 'De la consulta al chantaje' *Online*, *El Tiempo* (Bogotá), 16 February 2013 <http://www.eltiempo.com/opinion/columnistas/maraisabelrueda/ARTICULO-WEB-NEW_NOTA_INTERIOR-12600406.html>; 'Se destraban las consultas previas con las comunidades indígenas' *Política*, *El Tiempo* (Bogotá), 19 February 2013 <http://www.eltiempo.com/politica/ARTICULO-WEB-NEW_NOTA_INTERIOR-12605565.html>. *Contra* César A Rodríguez Garavito, 'Tres mitos sobre la consulta con indígenas y afros' *El Espectador* (Bogotá), 11 February 2013 <http://www.elespectador.com/opinion/columna-404279-tres-mitos-sobre-consulta-indigenas-y-afros>; César A Rodríguez Garavito, 'Más mitos sobre la consulta con indígenas y afros' *El Espectador* (Bogotá), 18 February 2013 <http://www.elespectador.com/opinion/columna-405619-mas-mitos-sobre-consulta-indigenas-y-afros?fb_action_ids=10151460212160673&fb_action_types=og.likes&fb_source=aggregation&fb_aggregation_id=246965925417366>.

[43] *Colombian Constitution 1991* art 7.

[44] *Act 21 of 1991 Approving the Convention Number 169 on Indigenous and Tribal Peoples in Independent Countries, adopted in the 76th General Conference of the International Labour Organization, Geneva, 1989* (Colombia).

[45] As at January 2013, this institution had issued more than 100 judgements that expressly apply this Convention. It has also determined that its provisions are part of the 'Constitutionality Block' and thus applied its provisions directly. This subject is discussed in Chapter IV.

organise and use the legal system to defend their rights, in many cases including for the effective protection of biodiversity inside their territories.[46]

Based on Colombia's experience, it will be shown that if the framework for guaranteeing the collective legal autonomy concerning TEK is strong and comprehensive, this maximises the human rights of Indigenous peoples and achieves the goal of efficient biodiversity protection. It is also argued that the legal strategy of fortress conservation, widely used especially in the National Parks schemes around the world,[47] has the basic flaw of conceiving nature as an independent entity, separate from people. This forced separation has thus promoted unfair schemes, such as the eviction of entire peoples from the areas in question.[48] This thesis contends that affinity towards nature, especially from Indigenous peoples, should illustrate legal strategies for biodiversity conservation policies in the lands they occupy or use. Affinity, translated as the inextricable spiritual and cultural link between Indigenous peoples and their land, absent in Western policies, can thus be used within a collective legal autonomy concerning TEK framework to optimise both biodiversity protection and the promotion of Indigenous peoples' human rights.

I.1 Challenges and Risks

This hypothesis presents three main challenges and risks. The first is whether the autonomy of Indigenous peoples can be subjected to limitations. After all, autonomy can imply the choosing of Western ways of living and the abandonment of TEK. It is

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46 The case studies presented in Chapter IV present empirical evidence of this claim.

47 Among many examples, see the National Park systems of the United States, Kenya and Tanzania. The first has more than 400 parks, the second 8% of its territory, and the third a quarter of its territory. The systems in Australia and Colombia are discussed in Chapter II. National Park Service–U S Department of the Interior, *About Us* <http://www.nps.gov/aboutus/index.htm>; Kenya Wildlife Service, *Parks and Reserves* <http://www.kws.org/parks/>; Tanzania National Parks, *The Tanzania Experience Brochure* <http://www.tanzaniaparks.com/newsletters/tanapa_brochure.pdf>.

48 Dowie presents a structured, although somewhat emotional, review of eviction for conservation cases from his perspective as a journalist. The works of Brockington, Igoe, Schmidth-Soltau and other authors at the forefront of the 'Parks vs Peoples' debate, discussed in greater detail in Chapter II, provide scholarly discussions on this subject. See, Dan Brockington, Jim Igoe and Kai Schmidt-Soltau, 'Conservation, Human Rights and Poverty Reduction' (2006) 20(1) *Conservation Biology* 250; Paige West, James Igoe and Dan Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2006) 35 *Annual Review of Anthropology* 251; Mark Dowie, *Conservation Refugees–The Hundred-Year Conflict between Global Conservation and Native Peoples* (The MIT Press, 2009); Kai Schmidt-Soltau, 'Is the Displacement of People from Parks only 'Purported', or is it Real?' (2009) 7(1) *Conservation & Society* 46.

possible that Indigenous communities will choose to use their territories for intensive agriculture, pastoralism or even large-scale mining, causing the inevitable decline of biodiversity. Secondly, and stemming from the possibility of Indigenous peoples choosing the Western way, the application of TEK might bring about a challenge to international obligations regarding biodiversity conservation. Recognising the collective legal autonomy concerning TEK as a valid conservation strategy may cause a decline in biodiversity, in turn making the country liable to default on its obligations, especially under the *Biological Diversity Convention*.[49] A third risk is that the treatment of Indigenous peoples *vis-à-vis* non-Indigenous populations will be perceived as unfair, given that the lands managed by the former can be extensive and the use of resources within restricted to its occupants. This is particularly noteworthy for communities that are poor or marginalised, but cannot claim to be an ethnic or cultural minority with the attached legal benefits this may imply.[50]

This thesis evaluates these risks and proposes that there can be valid limits to the collective legal autonomy concerning TEK. First, the exercise of autonomy cannot be used arbitrarily to sabotage projects, especially those of potential benefit for society. The example of the expansion of public participation and consultation provisions for ethnic minorities in Colombia, clearly stating that this does not constitute a veto power, illustrates a plausible method.[51] Secondly, the wanton destruction of biodiversity or ecosystems without valid justification has to be discouraged. This can be done by creating positive rather than negative incentives. For instance, micro financing, capacity building and a share in the country's resources are sound strategies. The key concept that separates the collective legal autonomy concerning TEK from community-based conservation strategies that, arguably, use these limits is that Indigenous peoples are effectively in charge of the territory in a holistic manner. This implies the exercise of the human rights of self-determination, participation and cultural integrity. Hence, the

[49] *CBD* art 8. See the critical assessment of art 8(j) in Chapter III.

[50] The Colombian case of the Mandé Norte project and how it affects communities that have no distinctive ethnic heritage illustrates this point. See, José Ubeimar Arango Arroyave, Nuri Yagarí and Adriana Arboleda Betancur, 'Megaproyectos mineros en territorios de comunidades negras e indígenas del bajo y medio Atrato. El proyecto minero Mandé Norte' in Juan Houghton (ed), *La Tierra contra la Muerte–Conflictos territoriales de los pueblos indígenas en Colombia* (Centro de Cooperación al Indígena CECOIN, Organización Indígena de Antioquia OIA, 2008) 367.

[51] See Rodríguez Garavito, above n 42, for an account of the consultation process in Colombia.

proposed model places the validation of the ways of life of Indigenous peoples at the forefront.

II. METHODOLOGY

The research questions and hypothesis developed in this thesis are the result of an extensive review of the literature on the subject of protected areas and the associated conflicts that can arise between different sectors that hold interests upon them. The questions addressed in the thesis have a different nature, complementing each other.

Question I: How can the collision between biodiversity protection and the recognition of the human rights of Indigenous peoples be resolved? This question has two components:

a) **Analytical:** to answer the question, it is necessary to provide the conceptual definition of biodiversity as a legally protected interest, explaining its contents and their place within the legal system. The same analysis applies for the human rights of Indigenous peoples, which have to be defined and their content delimited. How the law protects these rights bears careful scrutiny.

b) **Normative:** which of the two legally protected interests ought to prevail in an organised society, ruled by the principles of the Constitutions of Australia and Colombia?

Question II: Do either the fortress conservation or the community-based conservation models provide an adequate solution for this collision? This question requires an empirical approach because, once the point of optimal balance between biodiversity protection and the recognition of the human rights of Indigenous peoples is determined, then the empirically adequate strategy to reach it can be established.

To enrich the analysis, this thesis also has a comparative component between Australia and Colombia, comprising empirical and analytical elements. The aim of the comparison is, first, to identify the legal mechanisms implemented by each of the countries for biodiversity protection. Second, the human rights of Indigenous peoples in

each country will be ascertained. The thesis argues that Colombia and Australia have experienced a similar pattern in their history of ecosystem protection procedures, transitioning from fortress conservation schemes to community-based conservation policies. Earlier in the twentieth century, both used the fortress conservation model extensively and evicted or dispossessed Indigenous peoples in the process.[52] Two landmark events transformed the relationship: in Australia, the *Mabo* case refuted *terra nullius* in 1992,[53] and in Colombia, the new Constitution was passed in 1991. These legal breaking points promoted the shift, in both countries, towards a model more akin to community-based conservation.[54] This thesis argues that Australia is still in this stage, whereas Colombia has moved very quickly towards the collective legal autonomy concerning TEK model when Indigenous peoples are concerned.

Comparative analyses of contemporary environmental law regulations and their linkages with Indigenous groups are possible between different legal systems because they have been based on international law global initiatives, implemented during the last three decades.[55] Authors agree[56] that modern comparative methodologies call for more than the traditional, functional approach in which the researcher chooses a problem and analyses the equivalent legal tools used in different jurisdictions for solving it. Instead, the differences should also be considered, to enrich the comparative approach. Thus, the approach to the research follows the proposals of Danneman,[57] validated by Jansen,[58] that stress the importance of comparing differences so that a greater variety of alternatives can be discussed.

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52 See, Chapter II.

53 *Mabo No 2*.

54 See, Chapter III.

55 See, Nicholas A Robinson, 'Comparative Environmental Law Perspectives on Legal Regimes for Sustainable Development' (1998) 3 *Widener Law Symposium Journal* 247, 254. Note also that the Australian and Colombian policies regarding National Parks and other protected areas in the first decades of the twentieth century were also inspired by common sources, as will be seen in Chapter II.

56 For instance, Cotterrell purports that '[f]unctionalist approaches are seen as failing to recognize that purposes and tasks of law are inevitably defined using the terms of reference provided by particular cultures, and cannot be satisfactorily generalized or abstracted from these'. Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 709.

57 Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 383.

58 Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 305.

II.1. Why Colombia and Australia?

To follow a functional analysis methodology, enriched with the comparison of relevant differences, it is necessary to justify the choosing of Colombia and Australia as subjects of comparison. If the classical form of functional analysis had been chosen, this thesis would be replicating similar works in the academic arena.[59] Papers abound that compare the Australian regime with similar Common Law countries, both biodiverse and with the presence of Indigenous groups. Such is the case of New Zealand and Canada. The United States, even if its Constitution sets it apart from its former British colony counterparts, also offers a fertile ground for comparison.[60] Conversely, Colombia shares its Civil Law tradition with all former Spanish and Portuguese colonies of Latin America. All of these countries share a strong constitutionalist system that enshrines human rights in the Constitution in the form of fundamental rights as the top-most legal priority of the State. During the last three decades, these countries have developed in greater or lesser degree the recognition of the special differentiated rights of Indigenous peoples within their human rights framework. Again, these similarities have been extensively discussed in the existing literature.[61] Hence, to make an original contribution in the field of comparative analysis of biodiversity protection strategies as linked with the human rights of Indigenous peoples, the value of the differences is paramount.

For instance, both countries have cornerstone provisions embracing the rule of law as the foundation of their legal systems.[62] This means that the citizens of each country

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[59] See notes 60 and 61, below.

[60] McHugh is the author of the most comprehensive comparison between the laws of these four countries. Note, however, that the book was written in 2004, before the signing of *UNDRIP*. The author presents a complete history of the Common Law provisions that have governed the relationship between these states and their Indigenous peoples, starting with the colonial dispossession. P G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004).

[61] The works of Van Cott and Stavenhagen are good examples of this comparative approach. See eg, Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (University of Pittsburgh Press, 2000); Donna Lee Van Cott, 'Constitutional Reform in the Andes: Redefining Indigenous–State Relations' in Rachel Sieder (ed), *Multicuturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan, 2002) 45; Donna Lee Van Cott, 'Latin America's Indigenous Peoples' (2007) 18(4) *Journal of Democracy* 127; Rodolfo Stavenhagen, 'Los derechos de los indígenas: algunos problemas conceptuales', above n 28; Rodolfo Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate' in Rachel Sieder (ed), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan, 2002) 24; Rodolfo Stavenhagen, 'Los derechos de los pueblos indígenas: esperanzas, logros y reclamos', above n 30, 21.

[62] In the *Australian Constitution*, this can be seen in the precise separation of powers. The High Court has also reaffirmed the prevalence of the rule of law and the equality of people before the law in the precedents of *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *A v Hayden [No 2]* (1984) 156 CLR 352. The *Colombian*

expect that the government decisions that affect them should be based on widely publicised laws and be free from arbitrariness. Under this lens, Colombia has taken the view that minorities are especially vulnerable and hence enjoy legal protections based on a strong bill of human rights.[63] In addition, a wide array of provisions is devoted to the special protection of minorities and the guarantee of their effective participation at all levels of democracy.[64] In the case of Indigenous peoples, note that they have the collective right over their ancestral territories,[65] the right to governance autonomy, and the full recognition of their customary laws inside their territories,[66] among other differentiated provisions.[67] This is the fundamental difference that has allowed Colombia to develop the model proposed by this thesis; that is, collective legal autonomy concerning TEK.

In comparison, in Australia, there is no constitutional recognition of Indigenous peoples. The 1967 referendum removed the discriminatory mentions of the Aboriginals from the constitution, but did not change the text. The consequent expansion of the 'Race Power', which now allows the Commonwealth to make special laws for people of any race, has not resulted in an affirmative action provision. Scattered Federal and State legislation provides the framework for different Aboriginal affairs. However, absent the hierarchic power of human rights provisions, there is no certainty in how stable the law

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Constitution enshrines the rule of law in art 1, and the Constitutional Court has reiterated that as a fundamental principle, it is a mandatory reference and interpretation parameter for the Constitution and the law of the country. See, Constitutional Court, *Judgement T-380/1993* ('*Collective Right to Life Case*').

63 The bill of rights in the *Colombian Constitution 1991* is divided hierarchically into three parts: a) fundamental rights (arts 11–41); b) social, economic and cultural rights (arts 42–77); and c) collective and environmental rights (arts 78–82).

64 Some seminal judgements from the Constitutional Court explicitly acknowledge the link between Indigenous peoples and their environment. For instance, *Judgement SU-383/2003* links the grave damages caused to the environment used or inhabited by Indigenous peoples with the possibility of ethnocide. Given that the right not to be forcefully disappeared is a fundamental right (art 12), the Court concludes that damages that contribute to this forceful disappearance infringe a fundamental right. Hence, the collective right over the territory and co-dependency with the ecosystem of Indigenous groups is elevated here to the rank of fundamental right, liable to be protected by the injunction ('*tutela*') mechanism. This link between peoples and their land is also the basis of the expansion of the consultation and public participation right. This form of affirmative action, which guarantees the effective and adequate consultation of Indigenous peoples in decisions that may affect them, has been developed especially in the Constitutional Court, *Judgement SU-039/1997* ('*U'wa Case*'); *Judgement T-652/1998* ('*Urrá Dam Case*'); *Judgement C-418/2002* ('*Indigenous Mining Areas Case*'); *Judgement C-030/2008* ('*General Forestry Act Case*').

65 *Colombian Constitution 1991* art 229.

66 Ibid art 246.

67 Eg, recognition of their languages as official inside their territories and the promotion of bilingual education (ibid art 10).

can be.[68] As an alternative to land claims and recognition of traditional uses of lands such as hunting and fishing, there has been an increase in agreements for the co-management of National Parks with Aboriginal communities.[69]

Environmental protection differs as well. The Australian Constitution was drafted in 1900 and it does not vest the Federal Government with any specific power to regulate environmental matters. This is thus understood as a residual power of the States. After the *Murphyores* and *Tasmanian Dam* cases,[70] the Commonwealth used the trade and commerce, and international affairs powers,[71] respectively, to take a more prominent role.[72] Today, cooperative intergovernmental agreements are used for drafting environmental policy.[73] Conversely, the Colombian Constitution of 1991 elevated the environment and sustainable development to the rank of collective rights.[74] Additionally, it has more than 30 articles devoted to environmental protection.[75] The country has always had a central government and has created specialised entities for facilitating environmental management.

The justification for choosing Australia and Colombia as the case study jurisdictions lies in their similarities and differences. As regards their similarities, both are megadiverse countries, as expressed in the sheer quantity of unique species and ecosystems they

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[68] For instance, the provisions allowing the Native Title claims for ancestral territories, opened in *Mabo* and regulated in the *Native Title Act 1993* (Cth), have been watered down by case law, notably in the *Pastoral Leases Case* and *Yorta Yorta*. Further, the *Racial Discrimination Act*, which implements the *Racial Discrimination Convention*, has been suspended on various occasions, including in the 2007 Intervention in the Northern Territory. See, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*'); *Northern Territory National Emergency Response Act* 2007 (Cth) s 132; *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Pastoral Leases Case*'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD Race Discrimination Convention*'); *Racial Discrimination Act 1975* (Cth). For a review on the Referendum, see, The New South Wales Aboriginal Land Council, above n 38.

[69] In this respect, a resource from 1992 remains relevant to see the reasons behind the flourishing of co-management agreements and the applicable methodologies. See, Jim Birckhead, Terry de Lacy and Laurajane Smith (eds), *Aboriginal Involvement in Parks and Protected Areas* (Aboriginal Studies Press, 1992).

[70] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Murphyores v Commonwealth* (1976) 136 CLR 1 ('*Murphyores*').

[71] *Australian Constitution 1900* ss 51(i) and 51(xxix).

[72] Using the external affairs power, the Federal Parliament passed the implementation legislation for the main multilateral environmental treaties ratified by the country, including the *Biodiversity* and *Ramsar Conventions* in 1999. This Act is the point of reference for environmental management and procedures in Australia. See, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*').

[73] The intergovernmental agreement between Queensland, New South Wales, Victoria and South Australia to create a common policy for the management of the catchments of the Murray-Darling Basin is a good example.

[74] *Colombian Constitution 1991* arts 79 and 80.

[75] Eg, ibid art 8 (duty of the State and its citizens to protect the environment and natural resources), arts 63 and 72 (National Parks and heritage regime), arts 65 and 66 (protection of agriculture and promotion of sustainable livelihoods), and art 81 (express prohibition of manufacture or transit of nuclear or toxic materials and waste), among others.

sustain.[76] Second, both countries have a multiplicity of Indigenous peoples with unique identities, who have applied TEK for centuries.[77] Both countries also share a history of colonial rule by European empires, and in both the European method of agriculture was implemented disregarding the particularities of tropical ecosystems. However, it is the differences between the chosen jurisdictions that enrich this study. First, Australia is a dualist country and Colombia is monist. Second, Colombia is a constitutionalist country and has a strong bill of rights, whereas the Australian Constitution enshrines certain civil liberties but does not have a bill of rights. Thirdly, Australia is a Common Law system, while Colombia is a Civil Law one. In view of the strong empirical commonalities, these differences can be expected to enrich the analysis and the answers to the two research questions. By conducting a systematic analysis, it is also possible to answer a complementary question based on the premises outlined below.

The collective legal autonomy concerning TEK in Colombia responds to a constitutionalist tradition, to a strong bill of rights, and to the monist implementation of treaties that allow the immediate effectiveness to international environmental provisions and to the human rights of Indigenous peoples.[78] In Australia, fortress conservation and community-based conservation strategies respond to the dualist implementation of international law, and the interests of Indigenous peoples do not have a *prima facie* priority because of the lack of strong human rights provisions. Which of these two legal frameworks is more adequate for the optimal balance between the protection of biodiversity and the respect for the human rights of Indigenous peoples?

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[76] '[Australia is the] most megadiverse of developed countries—it has almost 10 per cent of the world's know species. It also has 10 per cent of the world's threatened species.' Australian Government, 'Australia's Fourth National Report to the United Nations Convention on Biological Diversity' (Report No 4, Australian Government, March 2009) 6. 'Currently, Colombia has more than 8000 species of vertebrates (fish, amphibians, reptiles, birds and mammals), which is equivalent to 13% of known and reported species in the world. Fish represent the most diverse taxonomic group with 4328 species (23% of the world's biodiversity), followed by birds with 1887 species (21%), 754 amphibians (12%), and 505 species of mammals (11%)'. Ministerio de Ambiente,Vivienda y Desarrollo Territorial, 'Cuarto informe nacional ante el Convenio sobre la Diversidad Biológica' (Reporte No 4, Ministerio de Ambiente, Vivienda y Desarrollo Territorial Colombia, August 2010) 12 (translated NRU).

[77] As an example of cultural diversity, the number of languages spoken in any given country is a good indicator. Currently in Colombia, Indigenous communities speak more than 60 languages and broadly 250 dialects. It is estimated that as many as 270 languages were spoken in Australia before settlement. See for Colombia, Yolanda Bodnar, 'Pueblos indígenas de Colombia: apuntes sobre la diversidad cultural y la información sociodemográfica disponible' in CELADE-CEPAL (ed), *Pueblos indígenas y afrodescendientes de América Latina y el Caribe: información sociodemográfica para políticas y programas* (CELADE-CEPAL, 2006) 231, 237; and for Australia see Wade Davis, *The Wayfinders–Why Ancient Wisdom Matters in the Modern Day* (House of Anansi Press, Inc., 2009) 152.

[78] As opposed to dualist systems, when Colombia ratifies an international agreement it has immediate mandatory effect in the domestic jurisdiction. *Colombian Constitution 1991* art 93.

If the analysis of Australian law and policy is restricted to the Commonwealth level of government following the functionalist approach, then only the centralised decisions taken at this level, mirroring the Colombian system, can be subjected to critique. In the area of biodiversity protection and Indigenous rights, the main provisions are the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). These acts are comparable to the two existing codes on natural resource management that exist in Colombia, and to the heritage lists. However, they are statutory provisions liable to be amended, and do not abide by higher hierarchical provisions such as a constitutional bill of rights. Conversely, in Colombia, there are specific laws for the protection of intangible heritage[79] that may be construed as *implicit* in Australia,[80] but which have no explicit provisions. Explicit provisions are one of the cornerstones for the collective legal autonomy concerning TEK. Additionally, in Colombia, *ILO 169* has a supralegal status.[81] As part of the constitutionality block,[82] it supersedes any national legislation in the country and serves as a mandatory parameter of interpretation of the Constitution itself.[83] Coupled with the constitutional status of the governance autonomy and self-determination of Indigenous

[79] 'The cultural heritage of the Nation encompasses all the tangible assets, the intangible elements, the products and representations of culture that are an expression of the Colombian nationality. The intangible elements comprise, but are not limited to, the Castilian language, the languages and dialects of the indigenous, black and creole communities, the tradition, the ancestral knowledge, the cultural landscape, and the customs and habits of peoples. The tangible movable and immovable assets comprise all of those that have a special interest for the nation because of their historical, artistic, scientific, aesthetic or symbolic characteristics, among others. Such interest can come from different fields like plastic art, architecture, urban planning, archaeology, linguistics, sound art, music, audio-visuals, films, testimonials, documents, literature, bibliographic references, museology, and anthropology'. *Act 397 of 1997 developing articles 70, 71, 72 and all the concordant articles of the Constitution and enforcing other rules regarding cultural heritage, promotion and incentives for culture, and creating the Ministry of Culture* (Colombia) art 4.

[80] Tehan critiques that tangible and intangible heritage values, related to the relationship Aboriginal peoples have with the land, may be implicit when Native Title has been established, but this recognition and protection is uncertain in any other situation. Taubman follows the same line, stating that the current legal framework is not sufficient to encompass the intangible values of territories, especially sacred sites. See generally, Maureen Tehan, 'Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-*Mabo* Era' (1998) 7(3) *Pacific Rim Law & Policy Journal* 765; Aliza Taubman, 'Protecting Aboriginal Sacred Sites: The Aftermath of the Hindmarsh Island Dispute' (2002) 19(2) *Environmental and Planning Law Journal* 140.

[81] *Colombian Constitution 1991* art 93: 'The international treaties and agreements ratified by the Congress that recognise human rights and prohibits their limitation in states of emergency prevail domestically. The rights and duties proclaimed in this Constitution will be interpreted in conformity with international human rights treaties ratified by Colombia'. Additionally, because it is a labour treaty ratified by the country, it is part of the national legal system as per art 94.

[82] 'The constitutionality block is composed of those norms and principles that, even though they do not appear expressly in the Constitution, are used as parameters in the exercise of constitutionality control of the legislation because they have been normatively integrated to the Constitution ... by its express mandate' (translated NRU). Mónica Arango Olaya, 'El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional colombiana' [2004] *Precedente* 79, 79.

[83] Ibid 80.

peoples, and the development of other fundamental rights in the doctrine of the Constitutional Court, the *prima facie* priority of the rights of Indigenous peoples has a solid legal foundation.

III. SCOPE

The protection of biodiversity is paramount not only because of its intrinsic value.[84] It is also instrumental for people because the safeguarding of healthy ecosystems guarantees the continuance of vital services, beneficial for humanity as a whole. Although this thesis focusses on the collision between the human rights of Indigenous peoples and biodiversity conservation, it is relevant to discuss briefly the interests at stake for broader society.

These interests can be divided into two sets. The first is the range of interests that involve conserving or using biodiversity. The second set contains those that entail its destruction or severe decimation. The latter is generally incompatible with biodiversity conservation legal models, and thus alternatives are proposed here. Note that sustainable exploitation of natural renewable resources can be placed in the first set only when certain parameters are met. Some activities claim to be sustainable when in fact they are as destructive as those that do not bother with the moniker. It is complicated to differentiate these because there is no standard measure. Thus, it ultimately depends on the domestic regulations enforced by each sovereign country. As a case in point, the current Colombian *Development Policy*[85] blankets itself in an aura of sustainability, while often overlooking environmental concerns in practice.[86]

[84] The defense of biodiversity for its own sake or intrinsic value is called the ecocentric approach. Ecocentrism is best understood under the light of the Deep Ecology Movement. See, Arne Naess and George Sessions, 'Platform Principles of the Deep Ecology Movement' in Alan Drengson and Yuichi Inoue (eds). *The Deep Ecology Movement: An Introductory Anthology* (North Atlantic Books, 1995) 49.

[85] Departamento de Planeación Nacional, 'Plan Nacional de Desarrollo 2010–2014: Prosperidad para todos' (Política pública Presidencia de la República de Colombia, 2010).

[86] See for example the critiques to the Colombian mining policies in the last decade, documented extensively by Fierro Morales. Julio Fierro Morales, *Políticas mineras en Colombia* (ILSA Instituto Latinoamericano para una Sociedad y un Derecho Alternativo - CCFD Terre Solidaire, 2012).

III.1. Interests that Promote Biodiversity Protection

Conserving biodiversity is beneficial for broader society in the following ways: first, healthy ecosystems guarantee vital services. These include production of freshwater, pollination, carbon sinks, photosynthesis, air purification and healthy soil for growing food, among others.[87] Second, healthy ecosystems can give people aesthetic pleasure and solace, even spiritual well-being. The first arguments advocating the creation of natural parks in the fortress conservation style included the passionate defence of places where people could marvel at the landscape and escape life in the cities.[88] The communion with nature experienced by visitors to these places was a very important part of this protection. Third, society stands to benefit from the resources derived from patentable matter. There are endless possibilities in the study of the properties of diverse plants and animals that can only come to fruition if said species exist and are available in the first place.[89] Fourth, natural places can be promoted for tourism, although this activity has to be carefully managed to reap the benefits without defeating the purpose of safeguarding fragile ecosystems. This is especially important for tangible heritage places because there are reciprocal obligations on the countries in which the site is located to provide access to visitors.[90] Fifth, protecting ecosystems helps to guarantee the continuity and sustainability of renewable natural resource use. There are legitimate activities that can guarantee the use and harvesting of resources in a sound fashion that do not entail the destruction of ecosystems. Even if there is an impact upon biodiversity, some low-scale forestry,

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[87] See, Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Biodiversity Synthesis* (World Resources Institute, 2005).

[88] This yearning was immortalised by Emerson in his essay *Nature*. Ralph Waldo Emerson, *Nature* (e-books@Adelaide, online ed, 1836). Refer to the discussion on the philosophical underpinnings of fortress conservation in Chapter II.

[89] The Australian Biodiversity Strategy, launched in 2010, implements these different interests and divides the services into four main groups: a) provisioning services (food, fibre and fuel, genetic resources, biochemicals and fresh water); b) cultural services (spiritual and religious values, knowledge system, education and inspiration, recreation and aesthetic values and sense of place); c) supporting services (primary production, provision of habitat, nutrient cycling, soil formation and retention, production of atmospheric oxygen and water cycling); and d) regulating services (invasion resistance, herbivory, pollination, seed dispersal, climate regulation, natural hazard protection, erosion regulation and water purification). Adapted from National Biodiversity Strategy Review Task Group, above n 9, 19.

[90] Chapter III provides a critique of the Outstanding Universal Value (OUV) methodology, in the framework of tangible heritage protection as inadequate for the safeguarding of cultural rights. See, Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention* (2011).

hunting and fishing activities can be conducted without bringing the nefarious consequences so often associated with human presence.

III.2. Interests that Promote Biodiversity Destruction

Many legitimate human interests do clash with biodiversity and may entail its destruction. The most deleterious are those that irreversibly alter ecosystems, destroy them or fragment them. Wilson identifies these threats to biodiversity and ecosystem health in the practical acronym HIPPO.[91] Here, each of the letters corresponds to a pervading human activity that can be responsible for the unintended decline of the diversity of species on Earth. ***H*** stands for habitat loss, including anthropogenic climate change. ***I*** means invasive species that displace native species, by predation, parasitism or competition. The first ***P*** is for pollution, and the second is for human overpopulation, which can also be the root cause for all other destructive activities. Finally, ***O*** stands for overharvesting of available resources of animal, vegetable or mineral origin. Since most of these problems cross state boundaries, they are regulated by multilateral environmental agreements (MEAs).[92]

These categories overarch specific menaces including mining and other large-scale development projects, extensive monocultures, changes in land use type, and polluting activities.[93] Note that most of these interests are deeply related to development endeavours, hence the rapid expansion in international law of the principles of sustainable development.[94] The problem of overpopulation is a very delicate issue that touches the sphere of basic human rights.[95] The deep ecology movement, for example,

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[91] Adapted from Wilson, *Creation*, above n 10, 75.

[92] See for example the regimes on climate change, pollution and ozone protection.

[93] All of these concerns are voiced by both the Australian and the Colombian governments in their last reports to the Secretariat of the *Biodiversity Convention* in 2010. See generally, Australian Government, above n 74; Ministerio de Ambiente, Vivienda y Desarrollo Territorial, above n 76.

[94] The thesis does not delve into sustainable development and its principles in any detail. Rather, it assumes that contemporary law and policy governing biodiversity protection strategies are underpinned by these principles. The author of this thesis has argued elsewhere that sustainable development principles have permeated international and domestic legislation at an increasing rate in the last two decades, giving credence to the theory that it is becoming a norm of *ius cogens*. See, Natalia Rodríguez Uribe, 'Dispute Resolution and "Environmental" Provisions in the WTO: Promising Developments for Environmental Matters' (2010) 3 *Anuario Colombiano de Derecho Internacional* 161.

[95] The soft language of Principle 8 of the *Rio Declaration* denotes this uncompromising stance: 'To achieve sustainable development and a higher quality of life for all peoples, States should reduce and eliminate

states clearly that '[t]he flourishing of human life and cultures is compatible with a substantial decrease of the human population. The flourishing of nonhuman life requires such a decrease'.[96] Such extreme solutions are liable to meet with strong opposition, and tend to be contrary to human rights.[97] A more elegant proposal is that, rather than curbing the world's population via leonine policies, women should be empowered to decide freely on their reproduction. Greater education opportunities for women do contribute to their delaying of maternity, which results in better outcomes for both the environment and the resulting children. Hence, in this scenario, which marries environmentalism with a liberal and progressive vision of human rights, reduced birth rates may lead to better conditions and more equalitarian societies.[98] Empirical evidence linking the empowerment of women with population decline and better quality of life exists for poor and rich countries alike. The top factors that promote such empowerment are the diminution of domestic violence and the promotion of gender equality, access to education and greater employment opportunities.[99]

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unsustainable patterns of production and consumption and promote appropriate demographic policies'. *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, UN Doc A/CONF.151/26 (vol 1) (13 June 1992).

[96] Naess and Sessions, above n 84, 49. The authors have expanded on this principle by stating that forceful policies like the ones implemented in China and, to some extent, India may indeed impinge on human rights, but they do not expand on the issue. Rather, they emphasise that not only developing countries should curb their populations, but that the overdeveloped and consumerist nations should be the first to do so. The reason for this is the extreme impact that overconsumption patterns have on the environment. Ibid 51–52.

[97] On the subject of overpopulation and the threat it presents to the environment and the survival of the species, refer to the works by Ehrlich, whose extreme positions in this respect were highly influential in the 1970s. His early work *The Population Bomb* (1971) and *The Population Explosion* (1991) still impact policy, even if the author in later work has moderated the most extreme positions, such as mass sterilisation and refusal of aid to poor countries. For instance, he revisited the issue in early 2013 in a comprehensive paper linking environmental global problems with overpopulation. See, Paul R Ehrlich and Anne H Ehrlich, 'Can a Collapse of Global Civilization be Avoided?' (2013) 280(20122845) *Proceedings of the Royal Society B*. See also, Paul Ehrlich, *The Population Bomb* (Buccaneer Books Inc, 1971); Paul R Ehrlich and Anne H Ehrlich, *The Population Explosion* (Simon & Schuster, 1991).

[98] Wilson, *Future…*, above n 10, 30–33.

[99] Chesnais comments that the trend of fertility rate decline in Europe is no longer attributable to only the most progressive countries such as Germany and Sweden. Traditional countries such as Italy and Ireland have followed, due to changing gender roles and a reduction in subsidies and other forms of government protection programmes for children. On the other end of the spectrum, case studies in African countries like Kenya and Tanzania show a drop in fertility linked directly to enfranchising women. Reher compares these trends and ventures that '[e]xtremely low fertility has been around for too long [100 years in Europe, 20 to 30 years in developing and least-developed countries] for it to portend anything other than major long-term social change'. See, Candice Bradley, 'Women's Empowerment and Fertility Decline in Western Kenya' in Susan Greenhalgh (ed), *Situating Fertility: Anthropology and Demographic Inquiry* (Cambridge University Press, 1995) 157; Jean-Claude Chesnais, 'Fertility, Family, and Social Policy in Contemporary Western Europe' (1996) 22(4) *Population and Development Review* 729, 730; Ulla Larsen and Marida Hollos, 'Women's Empowerment and Fertility Decline among the Pare of Kilimanjaro Region, Northern Tanzania' (2003) 53(6) *Social Science & Medicine* 1099; David S Reher, 'Towards Long-Term Population Decline: A Discussion of Relevant Issues' (2007) 23(2) *European Journal of Population/Revue Européenne de Démographie* 189, 194.

III.3. Grey Areas

There are grey zones in which the interests of society, or some groups within, can be seen as both promoting and hampering biodiversity protection. These groups include vegans and other ethical eaters, and agricultural conglomerates promoting monocultures for biofuels.[100] However, the best examples perhaps come from animal rights activists. At first glance, it would appear that this group supports the protection of biodiversity; after all, claiming that killing animals is wrong and should not be condoned is a fine ethical stance. However, when this view prevents the culling of out-of-control animal populations or the eradication of invasive species that are wreaking havoc on their new ecosystem, there is a problem.[101] Unfortunately, both procedures are deemed necessary for preserving the diversity of *species*, even at the expense of some individual animals or other species.[102]

This kind of activism, more nurtured by the heart than by the brain, may inadvertently become a catapult for endorsing the decimation of biodiversity or raising angry voices, not always informed, that could create media pressure over public officials that are doing their job. In the Australian case, Diamond criticises the United States for forbidding the importation of kangaroo meat because they are cute and furry creatures and 'because a congressman's wife heard that kangaroos are endangered … ironically the species actually harvested for meat are abundant pest animals in Australia. The Australian

[100] The issue of monocultures set specifically to supply rising demand of certain products has been linked both to the decline of biodiversity and to the disappearance of the subsistence economies of Indigenous peoples. A recent article in the Guardian linked the rising demand for quinoa by vegans in developed countries with its rising price for Bolivian peasants. Obviously, a vegan lifestyle is better for the environment than one full of protein, but European vegans should eat local produce and not drive third-world farmers to the cheapest junk food. Similarly, the planting of sugar cane and African palm for biofuels has been advocated to fight climate change, but has succeeded in threatening food security and producing biodiversity loss instead. The United Nations have identified the threat of biofuels and monocultures in the Department of Economic and Social Affairs, Division for Social Policy and Development and Secretariat of the Permanent Forum on Indigenous Issues, above n 35, 8, 116, 229–230. McShane et al present a case study of the rhetoric v reality of biofuels in Peru in Thomas O McShane et al, 'Hard Choices: Making Trade-offs Between Biodiversity Conservation and Human Well-Being' (2011) 144(3) *Biological Conservation* 966, 968. The original article in the Guardian, and the response by PETA on behalf of vegans stressing the deleterious effects of cattle for the world's climate and food security, are available at Joanna Blythman, 'Can Vegans Stomach the Unpalatable Truth About Quinoa?' *The Guardian* (London), 16 January 2013 <http://www.guardian.co.uk/commentisfree/2013/jan/16/vegans-stomach-unpalatable-truth-quinoa> and Mimi Bekhechi, 'Eating Quinoa May Harm Bolivian Farmers, but Eating Meat Harms Us All' *The Guardian* (London), 22 January 2013 <http://www.guardian.co.uk/commentisfree/2013/jan/22/quinoa-bolivian-farmers-meat-eaters-hunger>.

[101] Refer in Australia to the well-documented cases of the rabbit and cane toad invasions.

[102] See the next chapter for a conceptual break down of the components of biodiversity.

government strictly regulates their harvest and sets a quota'.[103] An even more colourful example of this stance of media and public misinformed outrage involved not a congressman's wife but a former minister. Here is the story of the killing of a wild hippopotamus that escaped from the recreational house of a once famous and now dead *mafioso*.

Pablo Escobar, the famous *capo* who terrorised Colombia during the 1980s, had a penchant for exotic animals, which he kept at his country estate in the Magdalena Valley. A colony of hippopotami survived him, and in 2007, two of them escaped the estate. The presence of these two hippopotami, unrecognised by some and labelled as 'monsters', in the wetlands of this rural region caused quite a commotion. The hippopotamus (*Hippopotamus amphibius*) is an exotic species that lacks predators in Colombia and threatens the local fauna and flora due to competing for food resources with smaller and weaker native species. The introduction of exotic species is a clear and identified threat to domestic biodiversity and the culling of such species is permitted by law.[104] After considering several alternatives, the authorities chose to cull the animals. Public opinion, including that of the former Minister for Environment, Housing and Territorial Development, harshly criticised the position of all of the people involved in this decision.[105] However, the decision was made with much more thought than the public cares to accept, especially as regards the costs. Even though *H. amphibius* is listed as vulnerable on the IUCN Red List,[106] it stands a better chance to be protected *in-situ* by the countries harbouring its original ecosystem. Any *ex-situ* conservation[107] plan, particularly in a country with one of the most biodiverse and threatened biota in the world and scare resources for environmental protection, would have been misguided.

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[103] Jared Diamond, *Collapse–How Societies Choose to Fail or Succeed* (Penguin Books, 2005) 391.

[104] The legislation, in force since 1978, states that whenever an introduced species threatens the native ecosystems, species or human population, its culling or 'control hunting' is lawful. *Executive Decree 1608 of 1978 Regulating the National Code of Renewable Natural Resources and Environmental Protection and the Act 23 of 1973 on Wild Fauna* (Colombia) pt IV arts 116–124.

[105] The media frenzy did not hesitate to use terms such as assassins, degenerates, ignorant and similar.

[106] The hippopotamus (*Hippopotamus amphibius*) has a vulnerable status and the populations of this species are declining. IUCN, *The IUCN Red List of Threatened Species-Version 2012 1* (4 September) <http://www.iucnredlist.org/search>.

[107] Art 9 of the *CBD* is clear in this respect: 'Each Party shall ... predominantly for the purpose of complementing *in-situ* measures: (a) adopt measures for the *ex-situ* conservation of components of biological diversity, preferably in the country of origin of such components...'

III.4. Caveat: the Conundrum of Mining and Property Regimes

The disruption caused by mining and differentiated property rights for underground resources is substantial for both biodiversity and Indigenous peoples. However, it can be justified under the parameter of the 'common good of society' because of the economic benefits brought by the commercial exploitation of non-renewable resources. In these cases, careful planning and the implementation of sustainable practices with less deleterious impacts should be pursued.[108]

Mining is a legitimate interest of countries, especially because non-renewable resources are an important part of their development capital. For newly independent and developing countries, the fight for sovereignty of these resources resulted in soft-law instruments linking them to the right of self-determination.[109] However, considering that, by definition, mining is an endeavour that ends when the resource is depleted, there is no justification whatsoever for performing this activity in a manner that entails the complete destruction of the above land. Large-scale mining is not the panacea for the economy that it claims to be and, in many cases, the benefits of the exploitation are not felt by the country that holds sovereignty over the resources.[110] Mining is not an activity likely to disappear in the near future. However, the legal frameworks governing it cannot ignore its impacts upon the environment and ethnic minorities. There is no elegant optimal solution here, but involving the affected communities in a careful consultation process,

[108] The best legal tool for this is the performance of environmental impact assessments (EIA). However, even when the legal frameworks are in place, the enforcement and honesty of the reports can be problematic. See for example the case of the dubious impact report in the development project of 'Puerto Brisa' on the Colombian Caribbean coast. Many sectors, including the Indigenous communities living in close proximity, have criticised the methodology, integrity and honesty of the report. See especially, Consejo Territorial de Cabildos de la Sierra Nevada de Santa Marta, 'Posición indígena de al Sierra Nevada de Santa Marta frente a los proyectos multipropósito Puerto Brisa en Dibulla, Represas en Besotes y Ranchería: Afectación a Nuestras Culturas' (Position Paper Asociación de Poblaciones de Montañas del Mundo, 1 October 2010) <http://www.mountainpeople.org/documents/posicionfrenteamegaproyectos.pdf>.

[109] Permanent sovereignty over natural resources and its link to self-determination and biodiversity conservation is discussed in Chapter II. Chapter IV explains how the collective legal autonomy concerning TEK necessitates a different legal framework that takes into account the rights of Indigenous peoples.

[110] See in Colombia the case of the Cerromatoso mine of iron and nickel. The mining company licensed to the site, BHP Billiton, has evaded the payment of royalties to the municipality for a long period and is now under investigation. Fierro Morales, above n 86, 112.

having clear rules for environmental impact assessment and conducting these activities with transparency present a reasonable compromise.[111]

The Western conceptions on private property have also been critical for biodiversity. Under the classic utilitarian private property regimes, the rights-holder has no obligation to protect biodiversity. Only in modern legal developments have obligations of this type been included as attached duties to the right to property.[112] However, not long ago in Colombia, there was an obligation for landowners to develop or exploit their property. It was considered that setting land aside solely for conservation of the ecosystem was not in the spirit of development and such territories could be seized by the State to be put to good use. In Australia, the story is not very different. The sectors of the bush that can be used for agriculture or pastoralism have been claimed by settlers and intensely irrigated, leading to soil salinisation.[113]

As Richardson comments,[114] without strong constitutional guarantees, governments may feel inclined to change otherwise protective laws towards the Indigenous communities' capacity to manage their resource. This 'watering down' of regulations can lead to land being used for purposes not sanctioned by the communities involved.[115] Australia is a case in point. In the late 1990s, the Howard government weakened[116] some of the statutory protections of the *Native Title Act 1993* (Cth). The amendments allow companies to use Aboriginal lands even against the wishes of the title-holders. This is because the amended Act only provides the right to consult or negotiate with the

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[111] A brief discussion on how best to account for the interests shared by the majority society in these matters is presented in Chapter I.

[112] Such is the case of the *Colombian Constitution 1991*. Art 58 guarantees private property but determines that property must fulfil a 'social function with implied obligations. As such, it has an inherent ecological function'. This article added the ecological function to the social function ascribed to property in the constitutional land reforms of 1936, *Legislative Act Number 1 of 1936 Amending the Constitution* (Colombia) art 10. Later, the Constitutional Court ruled that the definition of 'property' from the *Civil Code*, art 669, whereby the rights-holder might dispose of it 'arbitrarily', was unenforceable because this conceptual definition was archaic and no longer conformed to the principle of solidarity informing the new Constitution. See, Constitutional Court, *Judgement C-595/1999* ('*Social Function of Property Case*').

[113] Diamond presents a crude view of the causes of environmental degradation in Australia. See generally, Diamond, above n 103, ch 13, 369–416.

[114] Benjamin J Richardson, 'The Ties that Bind: Indigenous Peoples and Environmental Governance' in Peer Zumbansen, John W Cioffi and Lindsay Krauss (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 337, 357.

[115] Ibid.

[116] See *Native Title Amendment Act 1998* (Cth), especially subdivision P.

government and mining companies, instead of granting the traditional owners true bargaining power or even an obligation to reach a consensus.[117]

III.5. Excluded Topics

This thesis strives to understand the relationship between biodiversity protection, Indigenous peoples and their lands. This is a broad subject, so it is useful to state what this thesis *is not about*.

The issue of rights over intellectual property of natural resources, such as medicinal plants, has purposefully been excluded from the thesis. The *Agreement on Trade-Related Aspects of Intellectual Property-Rights* (*TRIPS*) will not be discussed, and nor will any of the other intellectual property regimes related to TEK, whether mainstream or *sui generis*.[118] The thesis omits this subject owing to its focus on the capacity of Indigenous peoples to manage entire ecosystems from the perspective of human rights rather than property rights. Moreover, it is questionable whether these regimes, which have a heavily individualistic focus, can truly ever fit the collective component that Indigenous peoples defend over their knowledge.[119] Other issues relate to the transmission of secret knowledge or shamanic rites of passage, neither of which can accurately be encompassed by sterile current practices. Hence, the particulars of the traditional knowledge over plants, medicines or other patentable matter will not be discussed.

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[117] Richardson, above n 114, at 357.

[118] For example, the relevant legal framework in Colombia for access to genetic resources is the *Decision No 391 of 2 July 1996, Common Regime on Access to Genetic Resources* (Comunidad Andina). The *Agreement on Trade-Related Aspects of Intellectual Property-Rights*, opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995) ('*TRIPS*') has encountered problems in its implementation.

[119] In this respect, several authors raise critiques of the using and misappropriation of art, songs and other cultural assets that the current intellectual property regime has not adequately addressed. See, among others, Russel Lawrence Barsh, 'How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property' (1999) 8(1) *International Journal of Cultural Property* 14; Joseph Githaiga, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge' (1998) 5(2) *Murdoch University Electronic Journal of Law* <https://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52nf.html#t1>; Robert K Paterson and Dennis S Karjala, 'Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples' (2004) 11 *Cardozo Journal of International & Comparative Law* 633; Thomas Cottier and Marion Panizzon, 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection' (2004) 7(2) *Journal of International Economic Law* 371; Víctor Toledo Llancaqueo, 'El nuevo régimen internacional de derechos de propiedad intelectual y los derechos de los pueblos indígenas' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 509; Terri Janke, *Writing up Indigenous Research: Autorship, Copyright and Indigenous Knowledge Systems* (Terri Janke & Company, 2009).

The study also excludes the commercial and potentially large-scale exploitation of biodiversity by-products for use industrially, such as pharmaceuticals.[120] The *Nagoya Protocol* to the *CBD*[121] deals with access and benefit-sharing mechanisms for Indigenous peoples, ethnic minorities and other local communities, and there are many examples in the literature on this subject.[122]

Finally, the thesis will not talk about the only other existing protocol to the *CBD*, the *Cartagena Protocol*.[123] This instrument deals with genetically modified organisms (GMOs) and other related subjects. Again, this issue does not relate to the management of entire ecosystems.[124] Moreover, it is doubtful that Indigenous peoples will engage in the creation of GMOs in the recent future, as many concerns about these organisms have been voiced by Indigenous peoples and organisations.[125]

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[120] For a complete discussion of the impacts of biodiversity loss linked to rainforest destruction on the pharmaceutical industry, refer to Erin B Newman, 'Earth's Vanishing Medicine Cabinet: Rain Forest Destruction and Its Impact on the Pharmaceutical Industry' (1994) 20(4) *American Journal of Law & Medicine* 479.

[121] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 2 February 2011 (not yet in force), UN Doc UNEP/CBD/Dec/X/2 (29 October 2010) ('*Nagoya Protocol*').

[122] Benefit-sharing and Indigenous intellectual property rights on the subject of biodiversity have been extensively discussed in the literature since the Rio Summit, and the Nagoya Protocol addresses some of the identified issues. See, for example, Darrell A Posey, 'Intellectual Property Rights and Just Compensation for Indigenous Knowledge' (1990) 6(4) *Anthropology Today* 13; Santiago Carrizosa et al (eds), *Accessing Biodiversity and Sharing the Benefits: Lessons from Implementing the Convention on Biological Diversity* (IUCN, 2004); Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan, 2004); Biswajit Dhar and R V Anuradha, 'Patent and IPR Regimes in Relation to Access and Benefit Sharing' in Like-Minded Megadiverse Countries (ed), *Perspectives on Biodiversity* (Like-Minded Megadiverse Countries, 2005) 98–112; P Pushpangadan and K Narayanan Nair, 'Access and Benefit Sharing of Genetic Resources and Associated Knowledge–Common Approaches and Some Examples from India' in Like-Minded Megadiverse Countries (ed), *Perspectives on Biodiversity* (Like-Minded Megadiverse Countries, 2005) 113.

[123] *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003) ('*Cartagena Protocol*').

[124] However, note that there is concern as to how genetically modified crops and seeds might intervene negatively in the livelihoods of Indigenous peoples. See eg, SOWIP, above n 37, 19–20; Alejandro Argumedo et al, 'Implementing Farmers' Rights under the FAO International Treaty on PGRFA: The need for a Broad Approach Based on Biocultural Heritage' (Report No G03077, IIED, 14–18 March 2011) <http://pubs.iied.org/G03077.html>.

[125] For a careful study on the intellectual property rights of Indigenous peoples, and proposals for Australia, see Terri Janke, *Our Culture: Our Future–Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel & Company, prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998).

IV. CHAPTER OVERVIEW

Aside from this introduction and the conclusion, this work is divided into four chapters. The first chapter is the conceptual background of the study. It contains detailed accounts of the two objectives that should be satisfied in biodiversity conservation strategies in the lands occupied or otherwise used by Indigenous peoples. It also discusses how the interests of society can find a compromise within this framework. It defines the different components of biodiversity to justify why laws and policies that protect entire ecosystems are the best legal practice, and it conceptualises the different human rights that should be recognised to Indigenous peoples, determining that they can be divided into five sets. These rights have to be considered whenever biodiversity protection is to be pursued in the lands that Indigenous peoples use or occupy. In regards to the interests of broader society, the chapter reflects on poverty alleviation issues, as well as the possibility that self-contained non ethnic–minority communities will be discriminated against in certain cases. The tensions between each of the objectives are then highlighted.

The three following chapters have common structural elements. That is, all of them have a theoretical and philosophical framework followed by an international law normative discussion on the relevant multilateral international treaties for the area. Next, there is a comparative section between Colombia and Australia and, finally, the advantages and objections to each of the models are discussed.

The model of fortress conservation is the subject of Chapter II. Drawing on a reflection of the pervasive myth of the separation of humans and nature, this chapter discerns the reasons behind conservation law and policy. The current biodiversity crisis thus sets the scene for the international law component. Here, the relevant treaties are discussed, analysing the principles and norms that have influenced the model. The comparative law part talks about the implementation of these three treaties in Colombia and Australia, stressing that both built a strong scheme of National Natural Parks and other protected areas that followed fortress conservation, especially in their early stages. Finally, the chapter discusses the objections and advantages to the model to highlight that, even though it maximises biodiversity protection, fortress conservation fails to satisfy the legal interests and rights of Indigenous peoples.

Having identified the problems of fortress conservation, Chapter III analyses the application of TEK under the community-based conservation model. Although it is more progressive because it considers the human factor to some degree, the chapter argues that it still does not encompass the plights of Indigenous peoples. The theoretical framework starts with an explanation of why the linear conception of progress promoted the dispossession of Indigenous peoples. It continues with an argument against using the 'noble savage' myth as a foundation for the use of TEK in community-based conservation. The international law normative discussion critiques the perspective of traditional knowledge in key treaties. The focus of this critique is on the paternalistic approaches to Indigenous peoples that have pursued either assimilation or enforced primitivism without considering the human rights angle. To complete this analysis, the soft-law guidelines that have complemented the approach to conservation in areas that Indigenous peoples occupy or use are reviewed. The following sections discuss community-based conservation in Australia and Colombia. Note that Australia has used this model more extensively, while it is argued that the model in Colombia is the collective legal autonomy concerning TEK. Nevertheless, in the case of Colombia, the chapter discusses the recognition of collective rights over the Pacific basin territories to the Afro-Colombian communities occupying them. This initiative began as a community-based conservation strategy, subsequently developed by the jurisprudence of the Constitutional Court, which has equated the ethnic rights of the communities of African descent to those recognised to Indigenous peoples. Finally, the chapter reviews the objections to and advantages of this model, emphasising that it is indeed desirable and adequate for communities that are not ethnic minorities because it involves them in conservation. However, the model still does not encompass the rights-based approach that this thesis claims is the optimal model.

Chapter IV defends the collective legal autonomy concerning TEK model. The starting point for this is the philosophical underpinning of the model: the shift from homogenising legal systems to the multiculturalist framework. Whereas the former suffocated cultural differences, seen as stages to be overcome, the latter embraces difference as a valuable part of the State identity. This chapter claims that the human rights of Indigenous peoples are entitled collectively. Since this is an assertion questioned by the literature, a section is included responding to the most common arguments that

question the theoretical validity of collective rights. The chapter then critically assesses the Colombian legal framework for the protection of the human rights of Indigenous peoples. It verifies that the developments of the Constitutional Court and the acceptance of multiculturalism by other institutions have empowered Indigenous peoples to use their TEK. Further, by extending the rights of participation, Indigenous peoples are now using the legal instruments of the country to defend their rights to protect their environment. This is proven with two case studies that show that Indigenous peoples are taking the initiative to protect biodiversity in their territories as an integral part of their collective rights, thus proving that this model is optimal because it maximises the legal interest of biodiversity protection in equal measure as it guarantees the recognition of the rights of Indigenous peoples. The lessons drawn from the Colombian experience are then discussed, with suggestions of possible avenues for change in Australia.

CHAPTER I

BIODIVERSITY AND INDIGENOUS PEOPLES' HUMAN RIGHTS: FRAMING THE DISCUSSION ON CONSERVATION

I. INTRODUCTION

What can be a clearer sign of human domination over nature than a model society in which all necessities are man-made? Think about it. Everything we, Western people, eat is the product of human intervention honed for generations. All our food comes from barely more than 25 domesticated plants and animals,[1] completely estranged from their wild forebears by centuries of artificial selection.[2] Our clothes are made of animal and plant fibres from species domesticated for millennia: cotton, wool, alpaca and linen, treated and woven to cover and warm us. To take it even further, the cheapest and most common clothing now comes from underground. Petroleum is not only destined to burn as a fuel, but reincarnates in plastics and polymers, some of which are spun as fibres and transformed into apparel. Manufacturing processes are now industrialised, as is agriculture and animal husbandry.[3]

How then can anyone doubt that humans have conquered nature? This is the result of the triumph of technology at the service of humankind, of the enlightened and reasonable person of science who 'knows things to the extent that he can make them. Their "in-itself" becomes "for him". In their transformation, the essence of things is

[1] 'Perhaps 30 000 species of plants have edible parts, and throughout history a total of 7000 kinds have been grown or collected as food but, of the latter, 20 species provide 90 percent of the world's food and just three—wheat, maize, and rice—supply more than half'. Edward O Wilson, *The Diversity of Life* (Penguin Books, 1992) 275–276 ('*Diversity...*').

[2] For a fascinating discussion on the domestication of food and pets, see Richard Dawkins, 'Cows, Dogs and Cabbages' in *The Greatest Show on Earth—The Evidence for Evolution* (Transworld Publishers, 2009) 19–42.

[3] 'The history of animal husbandry has been just as haphazard as that of agriculture. Like crop plants, the animals of the barnyard and range are mostly limited to those first domesticated by our Neolithic ancestors 10 000 years ago in the temperate zones of Europe and Asia. We have been stuck with a narrow range of ungulate mammals, horses, cattle, donkeys, camels, pigs, and goats, ill-suited for most habitats of the world and often spectacularly destructive of the natural environment'. Wilson, *Diversity...*, above n 1, 282.

revealed as always the same, a substrate of domination. This identity constitutes the unity of nature'.[4]

The dystopian and artificial societies that are usually reserved for science-fiction tales that invariably take place in 'the future' are here already. Everything comes from the supermarket, and the supermarket is the home of produce that may have at one point grown in some soil outside cities, but that in no case can claim to be 'natural'. Rather, this produce is the result of crops intensively intervened with since domestication; grown with the aid of fertilisers; protected from insects by pesticides; harvested with machines, both as simple as the oxen-driven plough and/or much more complex; packaged in plastic; and shipped over enormous distances.

We have effectively replaced the things that were formerly available in the wild, for innumerable generations in the case of careful stewardship, with synthetic surrogates creating the illusions that *living* nature can give us nothing anymore. Species that were not domesticated or that have already been consumed into extinction, and that cannot be hunted down, used for timber, skinned to wear as pelt, used as a pet, as a flower to decorate a home or garden, or to satisfy some other human fancy, become redundant. Indeed, the list of 'useful' species under these parameters is quite short, which 'enlightened' prefer. Development laws are based on the economic stimulation of mining sectors that feed cars, boats, planes and war machines; the expansion of arable lands is a distant second. In national budgets, as part of the inadequate contributions set aside for 'culture', paltry sums are allocated for conservation efforts.

So successful has this illusion of separation been in the satisfaction of necessities that typical Western have forgotten the role that a living and diverse biota plays in their daily lives. Hence, biodiversity and its usefulness become invisible concepts regarding which 'anything which does not conform to the standard of calculability and utility must be viewed with suspicion'.[5] Against this background, what happens to fungi that are not truffles or edible mushrooms? To the scores of insects that are not honey bees or silk moths? To the myriad of invertebrates that cannot be arranged in sets of five in the way of shrimp, with a sauce of choice and served at parties? What about the plants that

[4] Max Horkheimer and Theodor W Adorno, 'The Concept of Enlightenment' in *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott trans, Stanford Univesity Press, 2002) 6.

[5] Ibid 3.

cannot be used as timber, bear edible fruit or grace a garden? If appropriate conservation and management strategies are not implemented, the result may be the massive anthropogenic disappearance of species, dubbed by commentators as the 'Sixth Extinction'.[6] The empirical evidence of this mass extinction seems to affirm the bleak and discouraging prognosis of a self-destructing paradigm of progress as laid out in *The Concept of Enlightenment*.[7] However, not everything is lost. People of the Western persuasion have come to recognise the ill-conceived logic behind destroying and ravaging nature, especially in the face of scarcity situations that would not have arisen if natural resources had been managed appropriately. Perhaps the abovementioned domination and mastery was not real after all. Maybe industrialisation must relent until certainty over the availability of resources can be established. Further, it is possible that some green brings solace to people who need to escape the chaos of city life. As Biro accurately points out, the malaise and hopelessness that characterised the Frankfurt School, to which Horkheimer and Adorno belong, can be reread today with a glimmer of hope. Their writings can be reinterpreted with the benefit of hindsight to see that 'increased technological capacity does not necessarily lead to increased domination *and also* that rational social and ecological relations are indeed possible … the goal is "not the mastery of nature but of the relation between nature and man"'.[8]

Indeed, the 1960s, the decade in which the last edition of *Dialectics of Enlightenment* was published, brought great promise in environmental matters. During this decade, environmental law acquired its international dimension, owing largely to the identification of global problems such as pollution.[9] Where biodiversity is concerned, some of the first MEAs, such as the *Convention on International Trade in Endangered Species of Wild Fauna and*

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[6] A complete discussion on the 'Sixth Extinction', including references to the empirical data proving that it is occurring can be found in Chapter II.

[7] Horkheimer and Adorno, above n 4, 33–34.

[8] Andrew Biro, 'Introduction: The Paradoxes of Contemporary Environmental Crises and the Redemption of the Hopes of the Past' in Andrew Biro (ed), *Critical Ecologies–The Frankfurt School and Contemporary Environmental Crises* (University of Toronto Press, 2011) 3, 10. Quoting Walter Benjamin, *Reflections* (Peter Demetz ed, Edmund Jephcott trans, Schocken, 1978) (emphasis in the original).

[9] 'While "modern" environmental law has its immediate origins in nineteenth century legislation and antecedents in antiquity, the so-called 'modern era' of environmental law dates from the 1960s, when a liberal political climate in Western nations, coupled with changing economic conditions and improved scientific understanding of humanity's ecological impacts, created the conditions for heightened public awareness and willingness to speak out about environmental deterioration'. Benjamin J Richardson and Stepan Wood, 'Environmental Law for Sustainability' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2007) 1, 3.

Flora (*CITES*)[10] and the *Ramsar Convention*,[11] were negotiated, and ultimately signed in the early 1970s.[12] However, decades before the environmental movement, the fortress conservation model had already found its niche. It emphasised the separation between the *human* and the *natural* habitat, and fostered a notion of conservation as only possible without human presence.

Importantly, the philosophical and legal concepts that have nurtured this interpretation of nature and the role of people towards it are the product of centuries. In contrast, the conceptualisations of the diversity of life on earth and its interdependent link to humanity have roughly 40 years behind them. It is thus necessary to discuss these concepts. This chapter analyses the bases for identifying biodiversity conservation and the recognition of the human rights of Indigenous peoples as legal interests that ought to be protected. It defends the necessity of acknowledging that biodiversity and Indigenous cultures have an intrinsic value that should inform any legal strategy. The utilitarian drive of the West in the creation of law and policy in these areas has promoted a uniform approach that offers a linear understanding of where humanity should be headed. This narrow view trims diversity of every kind until every element complies with the mainstream drive of progress. This has to change.

According to Pound's conceptualisation, still valid today, there are three different kinds of legal interests, from the particular to the general. The first category comprises individual interests, which 'are claims or demands or desires involved immediately in the individual life and asserted in title of that life'. The second contains public interests, understood as 'claims or demands or desires involved in life in a politically organized society and asserted in title of that organization'. The third and last category comprises social interests, which are 'claims or demands or desires involved in social life in civilized society and asserted in title of that life'.[13] It is possible to argue that the protection of biodiversity and the recognition of the human rights of Indigenous peoples fit in the

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[10] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 14537 UNTS 993 (entered into force 1 July 1975) ('*CITES*').

[11] *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention*').

[12] This was also the first time that environmental principles were systematised in a Declaration, during the Stockholm summit. *Declaration of the United Nations Conference on the Human Environment*, 1972 UNYB 319, 11 ILM 1416, UN Doc A/CONF.48/14 (16 June 1972) ('*Stockholm Declaration*').

[13] Roscoe Pound, 'A Survey of Social Interests' (1943) LVII(1) *Harvard Law Review* 1, 1–2.

third category. To reach this conclusion, consider the malleability of social interests and their capacity to evolve and change over time, as well as their possibility of conflicting with one another, and the capacity of the law to strike a balance between them. After all, even '[o]bstinately held ideas of morality may in time come in conflict with ideas arising from changed social and economic conditions or newer religious and philosophical views'.[14] In this sense, the common social interest that captures the bare essence of what ought to be protected of biodiversity and cultural diversity is, precisely, their variety, both fragile and ever evolving. The next step would be to link one of the five main definitions of rights often found in the legal literature to this categorisation: 'an interest which one thinks should be recognised and secured by law'.[15] Once a legal interest is determined, it can be entitled with rights, as understood in the second conception used to 'designate the chief means which the law adopts in order to secure interests, namely, a recognition in persons, or a conferring upon persons, of certain capacities of influencing the actions of others'.[16]

The introduction to this thesis already referred to the legal interests that society has over biodiversity, and provided a conceptual differentiation between the interests that promote its protection and those that foster its destruction. Thus, this chapter will present an analysis on how these interests clash, arguing that biodiversity is the most fragile actor in this scenario because it has no means of standing for itself in a legal situation.[17] Nevertheless, thinking of the points of contact between biological and cultural diversity,[18] it is fair to argue that threatening one may mean threatening the other.

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[14] Ibid 26.

[15] Roscoe Pound, 'Legal Rights' (1915) 26(1) *International Journal of Ethics* 92, 93.

[16] Ibid. The other three conceptions of the term 'rights' are: (3) 'a capacity of creating, divesting, or altering "rights" in the second sense, and so of creating or altering duties' (ibid 95); (4) 'to signify a condition of legal immunity from liability for what otherwise would be a breach of duty' (ibid 98); and (5) as a noun 'used in a purely ethical sense of that which is just' (ibid 101).

[17] For the matter of legal standing, see the works of Stone. Christopher D Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450; Christopher D Stone, 'Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective' (1985–1986) 59(1) *Southern California Law Review* 1.

[18] If language diversity is taken as an indication of cultural diversity, the relationship between it and geographical areas of high biodiversity is undeniable: the tropical forest ecosystems harbour both. For instance, New Guinea harbours approximately 1000 languages and its biodiversity compares with that of Brazil. Colombia and Australia are also megadiverse on both counts. Jared Diamond, *The World until Yesterday–What can we learn from traditional societies?* (Allen Lane, 2013) 376–386. For distribution maps of languages and biodiversity indicators, such as number of endemic vertebrates, see Luisa Maffi and Ellen Woodley (eds), *Biocultural Diversity Conservation: A Global Sourcebook* (Earthscan, 2010), Plates 1–4.

It will become apparent that further attempts to sever the link between Indigenous peoples and their lands not only sacrifices cultural diversity,[19] but makes biodiversity lose a valuable ally in the conservation arena.

II. FIRST LEGAL INTEREST: BIODIVERSITY PROTECTION

Biodiversity, if possible to quantify in precise terms,[20] faces enormous pressures. This is no secret.[21] Hundreds of species disappear every year;[22] entire ecosystems are wiped out;[23] waterways are being polluted.[24] The adage of the delicate balance of nature is not an accurate prognosis; 'rather [it] is dynamic, often unpredictable, and perhaps even chaotic.[25] Nature is in constant change and the five severe extinction events that took

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[19] Since there is no readily coined umbrella term to refer to the multiplicity of Indigenous peoples on the planet that encapsulates the same sense of immense variety, this study resorts to the term 'cultural diversity' to refer to the variability of Indigenous peoples, their languages, customs, mores, traditions and everything that makes a single culture unique. To use the term specifically for this purpose can of course be problematic; after all, cultural diversity can refer for instance to the richness of cultural options within a city such as Paris, or to the multiplicity of media devoted to entertainment, such as movies, television and theatre. This thesis restricts the use of the term 'cultural diversity' specifically in relation to Indigenous peoples or other human minorities that identify themselves as having specific identities that separate them from the dominant society. Note that the right to self-determination and its enforcement not as a secession tool, but rather as the medium that allows peoples to define themselves is instrumental here.

[20] New species are being discovered all the time, especially in the megadiverse tropics. See the example of the recent discovery in a Suriname forest of 46 species new to science. Victoria Gill, *Suriname Team Find 46 New Species in Tropical Forests* (25 January 2012) BBC Nature News <http://www.bbc.co.uk/nature/16698776>.

[21] A comprehensive assessment of ecosystem loss due to anthropogenic factors can be found in, Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Biodiversity Synthesis* (World Resources Institute, 2005). The Australian government has acknowledged in its fourth country report to the *CBD* that biodiversity is in serious decline, due in great part to European settlement. Colombia's report also includes a comparative map with the change in use of ecosystems since the time of conquest. See, Australian Government, 'Australia's Fourth National Report to the United Nations Convention on Biological Diversity' (Report No 4, Australian Government, March 2009) 9; Ministerio de Ambiente, Vivienda y Desarrollo Territorial, 'Cuarto informe nacional ante el Convenio sobre la Diversidad Biológica' (Reporte No 4, Ministerio de Ambiente, Vivienda y Desarrollo Territorial Colombia, August 2010) 75.

[22] See especially, IUCN, *The IUCN Red List of Threatened Species* <http://www.iucnredlist.org/>; see also the comment on the 'sixth extinction' in heading III.1. of Chapter II.

[23] For example, only 5% of the ecosystems in the Colombian Caribbean region remained by the year 2000. Cristián Samper, 'Ecosistemas naturales, restauración ecológica e investigación' in Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2000) 27, 28.

[24] See generally, Rosalie Gardiner, 'Freshwater: A Global Crisis of Water Security and Basic Water Provision' in Felix Dodds and Toby Middleton (eds), *Earth Summit 2002: A New Deal* (Earthscan, Revised Edition ed, 2001) 289.

[25] Reed F Noss, 'Some Principles of Conservation Biology, as They Apply to Environmental Law' (1993) 69 *Chicago-Kent Law Review* 893, 893. See also, I Scoones, 'New Ecology and the Social Sciences: What Prospects for a Fruitful Engagement?' (1999) 28 *Annual Review of Anthropology* 479.

place thousands of years ago are a case in point.[26] As species compete constantly for resources and niches, some may fail to flourish, while others will prosper. However, never had one species single-handedly been responsible for so many ecological upheavals as *Homo sapiens*.[27] The damage this species has done has been extensively documented,[28] as Flannery states, '[u]ntil recently it was widely disputed whether humanity could have caused such changes. But the evidence is now overwhelming'.[29] Anthropogenic responsibility is a key factor in the extinction of species and in all interconnected environmental crises today. Global and local action are imperative because resources and the environment are 'not separate problems … they interact in two gigantic complex adaptive systems. The biosphere system and the human socio-economic system'.[30]

Before entering into the discussion of the different elements of biodiversity, it is necessary to reflect upon its moral value to human beings. After all, it is not easy to endorse the protection of an entity that is often so remote as to have no immediate meaning for the ordinary citizen. As will be seen in the following paragraphs, the lessening of biodiversity has a negative economic impact on humanity. There is an instrumental value to it because people rely on the proper functioning of ecosystems, their resources and their services to survive. As Techera comments: 'These elements of "nature" can never be controlled. The confidence in science, in the form of technology and biology, was misplaced as it failed to take into account the interdependence of

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[26] The next chapter explains what mass extinctions are and the role of humans in them.

[27] See especially the chapter 'The Planetary Killer' in Edward O Wilson, *The Future of Life* (Abacus, 2002) 79–102 ('*Future…*'). See also, S Kathleen Lyons, Felisa A Smith and James H Brown, 'Of Mice, Mastodons and Men: Human-Mediated Extinctions on Four Continents' (2004) 6 *Evolutionary Ecology Research* 339; Paul R Ehrlich, 'The Scale of Human Enterprise and Biodiversity Loss' in John H Lawton and Robert McCredie May (eds), *Extinction Rates* (Oxford University Press, 1995) 214.

[28] See eg, Richard Leakey and Roger Lewin, *The Sixth Extinction–Patterns of Life and the Future of Humankind* (Doubleday, 1995); Anthony D Barnosky et al, 'Has the Earth's Sixth Mass Extinction Already Arrived?' (2 March 2011) 471(7336) *Nature* 51; Rodolfo Dirzo and Peter H Raven, 'Global State of Biodiversity and Loss' (2003) 28 *Annual Review of Environmental Resources* 137; Thomas M Brooks et al, 'Habitat Loss and Extinction in the Hotspots of Biodiversity' (2002) 16(4) *Conservation Biology* 909.

[29] He then compares the case of humans as an 'introduced species' to a new environment, to the destruction that the introduction of the cane toad (*Bufo marinus*) has brought to Australian ecosystems. As destructive as these amphibians clearly are, it is more pertinent to place the blame on the people who wilfully introduced them in the first place. Tim (Timothy Fridtjof) Flannery, *Here on Earth–An Argument for Hope* (The Text Publishing Company, 2010) 75–76 ('*Here on Earth*').

[30] Paul R Ehrlich and Anne H Ehrlich, 'Can a Collapse of Global Civilization be Avoided?' (2013) 280(20122845) *Proceedings of the Royal Society B* 1, 1. Note that very similar wording was used in the minutes of the Colombian Constitutional Assembly in 1991 to justify the commitment of the new Constitution to environmental matters. This document is discussed briefly in the next chapter. Excerpts of it are quoted in Constitutional Court, *Judgement C-519/1994* ('*Biodiversity Convention Approval Case*').

species and natural cycles'.[31] Approaching the problem from the perspective of monetary value only can also bring problems alongside the benefits. For instance, monetary valuations often include a deconstruction of the ecosystem into its single components to detect protection priorities. This is problematic because '[t]he continued functioning of a healthy ecosystem is a complex process that represents more than the sum of its individual function of components; there is therefore a (hidden) value…'.[32] The moral value of biodiversity is, precisely, its intrinsic value, represented in the variability that is the product of evolutionary processes over millions of years. The value is not only instrumental. The next paragraphs show both the moral and the economic value of biodiversity, with the intention of persuading people of both the eco-centric and the anthropocentric persuasion about its benefits and wonders.

After this brief reflection on the different values of biodiversity and the threats it is currently facing, it is now pertinent to discuss its components. Biodiversity acts in a complex web in which every interconnected element plays a role. Following the definition of the *Convention on Biological Diversity* ('*CBD*'), three basic elements constitute biodiversity: genes, species and ecosystems.[33] Each of the three components has to be delineated to understand what has led to the favouring of the *in-situ* approach to ecosystem conservation over other management alternatives.[34]

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[31] Erika J Techera, *Marine Environmental Governance: From International Law to Local Practice* (Routledge, 2012) 15.

[32] Lawrence Jones-Walters and Ivo Mulder, 'Valuing Nature: The Economics of Biodiversity' (2009) 17 *Journal for Nature Conservation* 245, 246.

[33] 'For the purposes of this Convention: "Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'. *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 243 (entered into force 29 December 1993) art 2 ('*CBD*'). This is also the operative definition of the concept in Colombian and Australian legislation. See, Ministry of Environment, National Department for Planning and Alexander Von Humboldt Institute, 'Política Nacional de Biodiversidad' (National Biodiversity Policy Alexander Von Humboldt Institute, 1997) 1 <http://www.humboldt.org.co/download/polnal.pdf>; National Biodiversity Strategy Review Task Group, 'Australia's Biodiversity Conservation Strategy 2010–2030' (Policy Strategy, Natural Resource Management Ministerial Council, Australian Government, Department of Sustainability, Environment, Water, Population and Communities, 2010) 11.

[34] The models of fortress and community-based conservation are forms of in-situ conservation by means of protected areas. The most common system adopted in the world is National Parks, as will be thoroughly discussed in Chapter II.

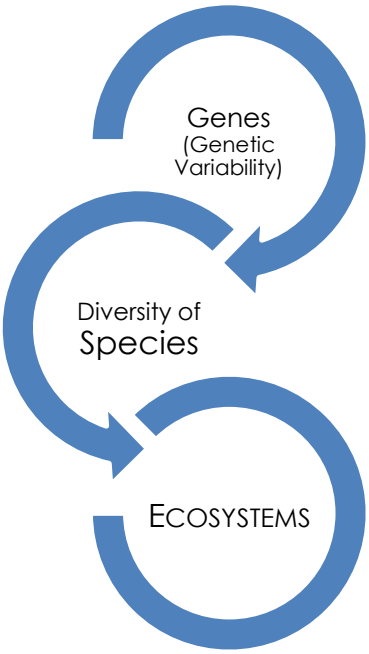

FIGURE 1: THREE COMPONENTS OF BIODIVERSITY, FROM MICRO TO MACRO

II.1. Genetic Variability

The first component of biodiversity, from micro to macro, is genetic variability. To understand its role, consider that each of the components of the biosphere can be vital to the whole in sometimes-unsuspected ways. Consider for example the fate of populations of species that have been reduced to a handful of individuals. The following paragraphs demonstrate that, for a species to survive and have a healthy existence, genetic variability is not an option but an imperative.

When genetic variability lessens, the chance for lethal or sub-lethal recessive genes to be expressed can be magnified to the point at which rare diseases such as Tay-Sachs syndrome or cystic fibrosis that affect human beings become common in the population, driving it ultimately to extinction.[35] Wilson explains that the evidently lethal genes are very rare. This is because the individuals that carry them usually die before they have a chance of mating; thus, they do not leave any offspring. However, many genes can be quite harmless, despite their dangerous potential, provided they are distributed at a low incidence in large populations. These genes are called 'sub-lethal' because of their

[35] Wilson, *Diversity...*, above n 1, 225.

recessive nature. A recessive gene only has the chance to express itself when two individuals that carry it reproduce. Thus, if one of the individuals of the couple is completely healthy, then even if the sub-lethal gene is passed to the offspring from the other parent, the child will still be healthy. The gene will then continue to pass silently until two individuals unlucky enough to both have it (an unlikely occurrence in large populations) mate and potentially produce an offspring in whom the gene is expressed.

This situation becomes more problematic when the number of individuals in the population decreases. The smaller the population is, the greater the chance that two individuals carrying recessive genes will reproduce, and the greater the chance of the gene manifesting in a destructive manner. Thus, without genetic drift, which is limited by a drop in numbers of individuals, otherwise 'silent' genes become increasingly common.[36] This is a well-documented phenomenon called *inbreeding depression*, which can usher in tragic consequences. [37]

II.1.1. Tragic Cases of Inbreeding Depression

The case of the Irish potato famine illustrates the devastation that *inbreeding depression* can cause. The food scarcity began in 1845, caused directly by the closed gene pool of the potatoes grown in Ireland. Fraser[38] recounts that Irish farmers had gradually replaced their formerly diverse crops with a single monoculture of Lumber potato. To put this in perspective, there are 4000 known species of potato in the world, most of them edible.[39] In Ireland, fields that had previously produced a wide array of vegetables and at least four kinds of potato now yielded only a tuber with a very limited gene pool. Given the functioning of potato cultivation, it is easy to understand how this happened. To grow

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[36] Ibid 223–225.

[37] Ibid. See also Yoshinari Tanaka, 'Theoretical Aspects of Extinction by Inbreeding Depression' (1998) 40(3) *Researches in Population Ecology* 279.

[38] Evan D G Fraser, 'Social Vulnerability and Ecological Fragility: Building Bridges between Social and Natural Sciences Using the Irish Potato Famine as a Case Study' (2003) 7(2) *Conservation Ecology* article 9.

[39] Compare Ireland with the interesting case of the 'Parque de la Papa' (Potato Park) in Peru. Six different Quechua and Aymara communities of the Andes highlands use their collectively entitled 8500 ha in a joint effort to protect 1200 species of potato and the diversity of the ecosystem. Their goal is to protect all 4000 species. See the case study in Jessica Campese, 'Rights-based Approaches to Conservation: An Overview of Concepts and Questions' in Jessica Campese et al (eds), *Rights-based Appproaches: Exploring Issues and Opportunities for Conservation* (CIFOR-IUCN, 2009) 1, 8.

potatoes, one may rely on a single plant and divide it into 'daughter' plants, which in turn can be divided repeatedly. In Ireland, research has established that all of the Lumber potato crops came from only four mother plants—a very limited gene pool. Of course, what this absence of variability meant was that all of the croplands were extremely vulnerable to plagues. Catastrophe did not take long to strike in the form of one single organism: *Phytophthora infestans*. This fungus can infect with blight disease most of the plants belonging to the Solanaceae family, such as tomatoes, eggplants, peppers and potatoes. The fungal outbreak ravaged Ireland. With the destruction of the potatoes came deaths among the human population that depended on them. Approximately three million Irish died as a result, and a further 25% of the population was forced to leave the island.[40]

It would be a mistake to think that *inbreeding depression* only affects people indirectly. Throughout history, human dynasties have shunned breeding with outsiders to keep bloodlines pure. However, in their quest for purity, these highbred families have repeatedly created perfect environments for 'silent' genes to manifest in force. Consider the example the Japanese imperial family over the last two centuries. The use of concubines as a means to overcome the nefarious effects of inbreeding became a standard practice. As related by Shillony, the rate of infant mortality in the imperial family was elevated due to factors such as inbreeding, the young age of mothers and the prohibition of doctors to touch the newborn royal babies. Eventually, the gene pool became so poor that legitimate children failed to survive or to produce healthy offspring with their related consorts. The dynasty survived into the twentieth century by resorting to the impregnation of concubines.[41]

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[40] Fraser, above n 38. See also, Stephen B Goodwin, Barak A Cohen and William E Fry, 'Panglobal Distribution of a Single Clonal Lineage of the Irish Potato Famine Fungus' (1994) 91 *Proceedings of the National Academy of Science* 11591.

[41] '...Thus, of the seventeen children of Emperor Kōkaku (r. 1780–1817), only one son survived infancy to become Emperor Ninkō (r. 1817–46). Of Emperor Ninkō's fifteen children, only one son survived to become Emperor Kōmei (r. 1846–67). Of Emperor Kōmei's six children, only one son survived to become Emperor Meiji, and of Emperor Meiji's fourteen children only one sickly son survived to become Emperor Taishō. The chief consorts of all the emperors in the nineteenth and early twentieth century were either barren or lost their children. As a result, all the emperors born at that time, from Ninkō to Taishō, were the sons of concubines'. Ben-Ami Shillony, 'The Japanese Imperial Institution: Crisis and Continuity' (Paper presented at the Symposium to Discuss Aspects of Japanese and British Royalty, Michio Morishima room at the Suntory and Toyota International Centres for Economics and Related Disciplines-STICERD, 23 February 2006).

Lucky for the Japanese imperial family, the responsibility for the survival of the entire human species did not rest on their shoulders. What would happen if that were the case? If the *depression* affected not only isolated populations but also the entire surviving stock of a single species, the net result would be the extinction of said species. This may well be the outcome for the Tasmanian devil (*Sarcophilus harrisii*),[42] a now endemic species of the island of Tasmania, from which it takes its vernacular name, whose numbers have plummeted. Various factors have contributed to this decline, such as habitat destruction and introduced organisms. Formerly found across most of the Australian mainland, the continental population of this mammal was driven to extinction by human hunting, competition from dingos (*Canis lupus dingo*), which were introduced at least 400 years ago, and finally European colonisation.[43] Without the healthy gene pool that the mainland populations could have provided, the remaining devils in Tasmania are now headed to extinction. In 1996, the lethal Devil Facial Tumour Disease (DFTD), transmitted by biting, started to spread rapidly.[44] Some authors speculate that saving the species is not feasible because there are not enough healthy individuals or enough genetic variability to overcome the disease.[45]

These cases prove that genetic variability is a vital component of biodiversity that has to be protected for the sake of species conservation. One of the biggest threats to this component of biodiversity is the isolation of populations due to, among others, habitat destruction or fragmentation. Loss or fragmentation of habitat is common in the anthropocentric world. Land clearing is an obvious example, but consider also that whenever a road is constructed, habitats are divided and populations are split, potentially restricting them from continuing to mix. Thus, the protection of entire, interconnected ecosystems, joined, for example, by means of corridors, helps to preserve the genetic variability of species.[46]

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42 Andy P Dobson, 'Sympathy for the Devil' (2007) 4(3) *EcoHealth* 241.

43 Clare E Hawkins et al, 'Emerging Disease and Population Decline of an Island Endemic, the Tasmanian Devil *Sarcophilus harrisii*' (2006) 131(2) *Biological Conservation* 307, 308.

44 Hawkins et al, ibid, reported the decline in the devils' numbers from 1996 to 2006. McCallum et al retook the study, and reported that by 2007 the number of individuals had declined even more. Hamish McCallum et al, 'Distribution and Impacts of Tasmanian Devil Facial Tumor Disease' (2007) 4(3) *EcoHealth* 318.

45 Hawkins et al, above n 43, 319.

46 Thomas van der Hammen, 'Consensos mundiales de restauración y enfoques de investigación y monitoreo' in Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2000) 41, 43.

Research[47] has also shown that variability in populations, maintained by keeping them healthy and genetically diverse, is paramount to ensure the resilience of ecosystems. Not only can the diminution of genetic variability contribute to the demise of species, it can also cause the decline of ecosystem services. For the human population, which relies on ecosystem services such as pollination, climate stabilisation, water supply and carbon sinks, protecting them is imperative. Luck, Daily and Ehrlich propose four key areas of population diversity that serve as indicators of biodiversity loss and that constitute focus areas of protection; these are richness, the size of each population, spatial distribution and differentiation. This approach does not propose to supplant the indicators of species loss, which will be discussed next, but rather to supplement them because not enough attention is currently given to this problem.

Having ascertained the importance of preserving genetic variability and population diversity, it is now possible to consider the second component of biodiversity; that is, species.

II.2. Diversity of Species

The second component of biodiversity, and perhaps the best known, is the diversity of species. Only minute changes in DNA are usually sufficient to spell the difference between two species with astounding results. Think for instance that our own DNA as members of the *Homo sapiens* species only differs from that of our closest relatives, the two species of chimpanzees *Pan troglodytes* and *Pan paniscus*, by 1.6 per cent.[48] So, why is it important to have a great number of species in any given ecosystem? Now that the vital importance of genetic variability for the survival of species has been ascertained, and after suggesting that the best way to protect it is through the conservation of entire, interconnected, ecosystems, it is time to discuss the role of species themselves. Species

[47] This paragraph is based on the paper by Luck, Daily and Ehrlich, who present a review of the evidence of the risks to ecosystem services of the decline of numbers and health of species populations and suggest that conservation efforts should never neglect them. Gary W Luck, Gretchen C Daily and Paul R Ehrlich, 'Population Diversity and Ecosystem Services' (2003) 18(7) *Trends in Ecology and Evolution* 331.

[48] To illustrate the close similarity, see that the 'principal hemoglobin [of humans], the oxygen-carrying protein that gives blood its red color, is identical in all of its 287 units with chimp haemoglobin'. Jared Diamond, *The Third Chimpanzee–The Evolution and Future of the Human Animal* (Harper Collins, 1992).

play a key role in the operation of ecosystems, and this section aims to prove that efforts that seek only to protect particular species are not sufficient to conserve biodiversity.

Species are much more than the value, either commercial or emotional, that humankind imbues them with. Organism diversity ensures the health and proper functioning of ecosystems. This is a key feature of biodiversity, the importance of which to people may be difficult to understand. A functional ecosystem provides a multitude of services that directly and indirectly benefit humanity. It is not easy, however, to pinpoint with any degree of accuracy exactly how each species acts, or what its precise role is in any given ecosystem. As Chapin III et al comment,[49] it is not the mere presence or absence of species that determines the well-being of ecosystems. Rather, the different relationships between organisms, such as mutualism, competition or even who eats or feeds from whom,[50] are responsible for modifying and affecting ecosystems directly and indirectly.

II.2.1. Diversity of Species and Healthy Ecosystems

Multiplicity of species thus creates an intricate web that starts with microscopic organisms such as plankton, algae and bacteria, includes insects, worms and spiders, and spreads to encompass great and majestic animals like the jaguar and the wolf. Interspersed in this complex system is the wide array of plants and fungi that, taken with all other species, provide a delicate equilibrium on which the overall operation of the ecosystem relies.[51]

For example, the megadiverse Neotropical rainforests, like the Amazon and the Colombian Chocó,[52] grow paradoxically on extremely poor soils. The presence of

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[49] F Stuart Chapin III et al, 'Consequences of Changing Biodiversity' (2000) 405 *Nature* 234, 237.

[50] The scientific term for this is 'trophic interactions', which can be summarised as predation, herbivory and parasitism.

[51] See Wilson, *Future...*, above n 27, 108–114. See also, Wilson, *Diversity...*, above n 1, 135–142.

[52] Chocó is the name of a Colombian province located on the Pacific coast and bordering Panama. It is also the patronymic for the bioregion comprising the Tumbes Chocó Magdalena hotspot (part of the wider Chocó–Darién–Western Ecuador and Tropical Andes hotspots). This region comprises different ecosystems and an immense variety of organisms. Since 2001, Conservation International, with the support of GEF, the World Bank and the Japanese government, has been fostering the application of the ecosystem approach in this region by means of ecological corridors. This corridor is not a strict fortress conservation area but rather a joint effort by various stakeholders. See, Ángela Andrade Pérez, 'El corredor de conservación Chocó Manabí y la aplicación del

animals, microorganisms and fungi turn vegetable and animal matter into a nutrient charged humus that allows trees and plants to grow and flourish.[53] Without the life teeming in this ecosystem, the nutrient-poor soil becomes quickly depleted. For this reason, such forests cleared for European-style agricultural purposes become barren after the first few crops.[54]

Australian soils share a similar vulnerability: the unusual geological stability of the continent, understood mainly as the absence of major volcanic activity, causes the country's soil to be almost devoid of nutrients, due to a lack of available material for its renewal.[55] Thus, the diversity of the Australian environment was only increased due to adaptations of organisms to the adverse conditions, in what Flannery proposes was a cooperative effort rather than a race between species.[56] This effort was honed for millennia, but was liable to be damaged by sudden disruptions. In both Australia and Colombia, people, especially colonial settlers, have brought such disruptions.[57]

It is an accepted rule among ecologists that 'the more species that inhabit an ecosystem, such as a forest or lake, the more productive and stable is the ecosystem'.[58] Biodiversity in fact guarantees that if one species declines in a particular habitat, the ecological niche formerly occupied by it will be covered by another species ready to take

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Enfoque Ecosistémico' in Ángela Andrade Pérez (ed), *Aplicación del Enfoque Ecosistémico en Latinoamérica* (CEM-UICN, 2007) 17.

[53] See Thomas K Rudel, 'Shrinking Tropical Forests, Human Agents of Change, and Conservation Policy' (2006) 20(6) *Conservation Biology* 1604.

[54] Manuel Rodríguez Becerra, 'Anotaciones para promover una reflexión subregional andina sobre el Desarrollo Sostenible' (Working Paper United Nations Environment Programme, Regional Office for Latin America and the Caribbean, UNEP Ad Hoc Group, June 2001) 29.

[55] Tim (Timothy Fridtjof) Flannery, *The Future Eaters–An Ecological History of the Australasian Lands and People* (Reed New Holland, 1994) 78–79 ('*Future Eaters*').

[56] Ibid 85.

[57] Salamanca summarises the available information for anthropogenic impacts in different Colombian ecosystems by region for 2001. The most severe are caused by ecosystem disruption for development projects, slash and burn for pastoralism and agriculture, mechanised agriculture, salinisation caused by the draining of wetlands, and pollution caused by chemicals and heavy metals used in the mining industry. Bibiana Salamanca, 'Deterioro de ecosistemas colombianos y necesidades regionales de investigación para adelantar tareas de restauración ecológica' in Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2001) 53–82, 70–77. Brooks et al report the losses of biodiversity in the hotspots linked to habitat loss. Western Australia and the two Colombian hotspots (Tropical Andes and Chocó–Darién–Western Ecuador) present similar patterns of extinction. Brooks et al also remark that the diversity in these hotspots is so huge that it is difficult to predict future extinctions, especially in little known taxa. This is another argument for fostering the ecosystem approach. See generally, Thomas M Brooks et al, above n 28.

[58] Wilson, *Future…*, above n 27, 108.

its place. This ensures that the overall equilibrium is not compromised.[59] However, if the ecosystem is attacked in a systematic pattern of unsustainable predation, the consequences can be catastrophic. The next paragraph will elaborate on the role of 'keystone' and 'engineer' species. These two terms refer to the key players in any given ecosystem, whose disappearance can cause the collapse of the system.

II.2.2. Keystone and Engineer Species

Although a species' disappearance sometimes does not appear to affect the general functioning of an ecosystem, especially the case when the habitat is diverse and the ecological niche can be re-filled, at other times the extinction in question can be devastating.[60] Flannery stresses the importance of key species in the extremely vulnerable Australian ecosystems. He warns that, because all of the organisms present in them play a role, having coevolved in a cooperative fashion, the extinction of any one species can cause the collapse of the system. Key groups of organisms are known as 'keystone' or 'engineer'[61] species, and have a major role in the operation of their ecosystems, to the extent that their individual demise can devastate the whole.[62]

The tragedy is that in many cases people do not realise the importance of the vanished species until it is too late. As an illustration, Wilson refers to the indiscriminate hunting for fur of the sea otter (*Enhydra lutris*) on the Californian coast. This aquatic mammal was a keystone species, whose dwindling drastically affected the functioning of the coastal ecosystem. The case eventually gathered strong public support, and conservationist groups were able to restore the sea otter population and save this habitat.

The existence of keystone species has also been scientifically tested in terrestrial and marine ecosystems. For example, marine ecologist John Paine oversaw the controlled removal of a sea star (*Pisaster sp.*) from areas off the Washington coast. The removal proved fatal, completely tipping the balance between predators and competing species. It

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59 See ibid 108–114.

60 Flannery, *Future Eaters*, above n 55, 82–85.

61 'Among the major players are the ecosystems engineers, which add new parts to the habitat and open the door to guilds of organisms specialized to use them'. Wilson, *Future...*, above n 27, 109–110.

62 For a full explanation of keystone species and their vital role in ecosystem productivity, see Wilson, *Diversity...*, above n 1, 153.

transpired that the sea star was the chief predator of one species of mussel (*Mytilus sp.*), which in turn competed for resources with other molluscs and bivalves. The disappearance of the sea star promoted the unchecked expansion of the mussel and the subsequent change of the entire marine habitat. Huge efforts were made by the local communities and the government to restore the balance.[63] What these two cases have in common is that people have acted upon them, to mitigate the impact of ecosystem destruction on the supply of ecosystem services. In the case of the Californian otter, the unbalancing of the ecosystem caused the multiplication of giant algae, which interfered with the traffic of motorboats; the algae and the absence of the otter also created adverse conditions for fish and shellfish nurseries, affecting the fishing industry. In the case of the sea star, the once bountiful ecosystem in which fishing thrived became barren, greatly affecting the fishing-dependent human population.

The existence of keystone and engineer species is a compelling argument to defend species conservation–driven treaties and domestic policies because, arguably, protecting these species would guarantee the optimal operation of ecosystems. However, this is not as easy as it sounds; years of careful field studies are needed to determine keystone species,[64] and during these years, entire habitats can be decimated. Additionally, including keystone species in international treaties can be a lengthy process. However, to achieve the objective of comprehensive biodiversity safeguards, habitat and ecosystem protection–driven international instruments have to be in place. This does not mean blind endorsement of fortress conservation; it is rather an acknowledgement of the soundness of protecting whole ecosystems instead of just individual species. As will be seen in the next section, the international legal framework for protecting genetic variability and diversity of species can be more efficient coupled with a habitat or ecosystem protection strategy.

[63] The complete story of the *Pisaster* sea star off the Washington coast can be found in David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007) 30.

[64] See generally, ibid Chapter 9.

II.3. Ecosystems

Conservation is no longer a stand-alone concept that further seeks to separate people from nature. Rather, acknowledging the human impact and searching for ways in which people and the environment are interrelated, and through which they nurture each other, should be at the forefront. Considering the interwoven relation of species and their habitats outlined above,[65] it should be logical to want to protect entire ecosystems and reach all of the goals of biodiversity conservation as soon as possible. But what exactly is an ecosystem? The *CBD* defines it as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'.[66] This definition is consistent with the discussion from the previous paragraphs on how species interact to keep their environment healthy, weaving a complex web. However, the literal interpretation of the definition would also encompass any human environment.

Think of a big city: it is indeed a dynamic complex that includes plant (eg, ornamental trees, grasses and flowering plants), animal (eg, humans, pigeons, rats, cockroaches and bees) and microorganism (eg, algae and bacteria) communities. Their non-living environment encompasses the roads, buildings, underground systems and air, which can be considered together as a functional unit. Thus, in the quest for ecosystem protection, this definition alone does not provide any justification for conservation other than to guarantee the maintenance of ecosystem functionality. This is precisely why there have been so many arguments in conservation circles. What is worth protecting? Only that which is useful to people? Those ecosystems richest in number of species? Perhaps the more beautiful ones? Only the ones that yield clear and visible services?

International and domestic environmental law has attempted to provide solutions to this question, but different schools of thought within conservationist circles make it hard for law and policy to satisfy all interests completely.[67] Additionally, note that this question

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[65] A habitat is 'the place or type of site where an organism or population naturally occurs'. *CBD* art 2 par 11.

[66] Ibid art 2 par 7.

[67] See for instance the clashes between anthropocentric and biocentric schools of thought. A good example is the 'Deep Ecology' and 'Social Ecology' movements, championed respectively by Naess and Sessions, and Bookchin. Refer to Arne Naess and George Sessions, 'Platform Principles of the Deep Ecology Movement' in Alan

only refers to human interests over ecosystems. None of the early treaties considered the intrinsic value of biodiversity, or recognised it as the marvellous result of millions of years of evolution, which is ultimately the most important moral value of biodiversity. The implementation of the *CBD* finally changed this stance by amplifying the scope of protection to the ambitious endeavour of protecting the variability of life on Earth, with all that it entails. The Preamble begins with the recognition of the 'intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components'. It then acknowledges its importance for evolution and maintaining the life systems of the biosphere and expresses concern that 'biodiversity is being significantly reduced by certain human activities'.[68] The treaty favours the *in-situ* approach to ecosystem conservation, which can be complemented by *ex-situ* strategies.[69] Hence, any law and policy design that has biodiversity at heart has to focus on the ecosystem approach.[70] Today, the move has also to consider ecosystem resilience and the capacity to overcome or withstand anthropogenic impacts.[71]

II.4. International Legal Framework

This section does not suggest that the international treaties and mechanisms in place to protect and identify endangered species are ineffectual.[72] Rather, it proposes that they are incomplete if they are not paired with ecosystem conservation strategies. The problem, and what many legal instruments neglect to acknowledge, is that the health and productivity of ecosystems rely on the interaction of a myriad of players, as shown in previous paragraphs. Hence, focussing only on the protection of pinpointed endangered

Drengson and Yuichi Inoue (eds), *The Deep Ecology Movement: An Introductury Anthology* (North Atlanic Books, 1995) 49; Murray Bookchin, 'What is Social Ecology?' in David Clowney and Patricia Mosto (eds), *Earthcare: An Anthology in Environmental Ethics* (Rowman & Littlefield Publishers, Inc., 2009) 285.

[68] Note that *in-situ* conservation within the fortress conservation model is discussed extensively in Chapter II.

[69] Some of the shortcomings of *ex-situ* conservation were mentioned in the Introduction of this thesis, in the case study of the hippopotami in Colombia.

[70] The ecosystem approach and its deep relation to fortress conservation is the subject of Chapter II.

[71] See, Germán I Andrade, '¿El fin de la frontera? Reflexiones desde el caso colombiano para una nueva construcción social de la naturaleza protegida' (2009) 32 *Revista de Estudios Sociales* 48.

[72] For example *CITES*, which has contributed significantly to a reduction in the illegal trade of endangered species.

species like the Tasmanian devil is not sufficient. These species would not have come to be in such a critical situation if the ecosystems of which they are a part had been better managed in the first place.

The decline in the number and availability of species was the first identified threat to biodiversity to be acknowledged in international instruments. It began with the need of humans to harvest, use and trade these so-called 'renewable' natural resources. As an anecdote, this is the reason behind the creation and fierce fortress-style protection of hunting preserves in feudal systems; it was clear that, if left unchecked, the hunting of big sources of protein such as deer would leave the lords without any quarry to pursue in their moments of leisure. The same principle was used for the creation of the first National Parks in Africa and India that adopted the fortress style. They were closed to the locals so that the British gentlemen that went on safari would have their game guaranteed. Indeed, the first seeds of fortress conservation, understood as the closing of an ecosystem, left in a pristine condition with only very limited use of its components, can be seen here. Of course, in later years, the exclusion of people would become even more marked, with any human presence in fragile ecosystems conceptualised as nothing more than a menace. The cause is what Shrumm and Campese call the '[o]verly simplistic approaches that perpetuate unfounded notions of *terra nullius* [that] neglect to acknowledge the millennia of human interaction with nature'.[73] Indeed, the possibility of beneficial outcomes for biodiversity derived from interactions with human communities was unthinkable in conservation circles until recent times.[74]

International legal manifestations of concern over the depletion of renewable natural resources, mainly fisheries and animals used for the manufacture of fur products, called for regional and global efforts. It became clear that some of these stocks could not belong to only one nation claiming sovereignty over them, and that migratory species ought to be specially managed. The joint concern eventually resulted in the treaties in

[73] Holly Shrumm and Jessica Campese, 'Editorial: Exploring the Right to Diversity in Conservation Law, Policy, and Practice' (2010) 17(Exploring the Right to Diversity in Conservation Law, Policy, and Practice) *Policy Matters* 10.

[74] Luisa Maffi, 'Why is a Biocultural Approach Relevant for Sustaining Life in Nature and Culture?' in Luisa Maffi and Ellen Woodley (eds), *Biocultural Diversity Conservation: A Global Sourcebook* (Earthscan, 2010) 13, 14, citing the following sources: J Terborgh, *Requiem for Nature* (Island Press, 1999); M E Soulé, 'Does Sustainable Development Help Nature?' (2000) (Winter) *Wild Earth* 57; S Schwartzman, A Moreira and D Nepstad, 'Rethinking Tropical Forest Conservation: Perils in Parks' (2000) 14(5) *Conservation Biology* 1370. See also, the whole edition of *Policy Matters* 17, above n 74.

place today. Early examples include the *Bering Sea Fur Seals Arbitration* between the United States and Britain in 1893,[75] and the enforcement of species conservation and management treaties. The *Whaling Convention*[76] is the most representative of these. It regulates the hunting, killing, trapping and other activities associated with whaling for commercial and research purposes. This was the first treaty to implement a complete moratorium of the killing for commercial purposes of *all* cetacean species in the world, which came into force in 1986.

Numerous marine commercial stocks have therewith been protected via regional and global agreements protecting single fish-stocks,[77] entire fisheries[78] or regulating the means for fishing.[79] Conventions such as *CITES* and the *Polar Bear Convention*[80] provide individual protection to other tradeable species not necessarily related to the food industry. Nevertheless, this pinpointed protection of species can never guarantee the protection of the diversity of life. They only protect what 'speaks' to people, either through the heart, like pandas, or through the stomach, like tuna fish. Non-furry animals, insects and microorganisms lack the charisma necessary to compete for protection, even when listed as endangered. Their one and only chance to thrive may be the blanket ecosystem approach.

Compared to the wide array of international and regional agreements seeking to protect endangered species, genetic diversity as a stand-alone concept only has one

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[75] Hunter, Salzman and Zaelke, above n 63, 762–763.

[76] *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 December 1948) ('*Whaling Convention*').

[77] Eg, *International Convention for the Conservation of Atlantic Tunas*, opened for signature 14 May 1966, 673 UNTS 63 (entered into force 21 March 1969) ('*ICCAT*'); *Convention for the Conservation of Salmon in the North Atlantic Ocean*, opened for signature 2 March 1982, 1338 UNTS 33 (entered into force 1 October 1983) ('*North Atlantic Salmon Convention*'); *Convention for the Conservation of Southern Bluefin Tuna*, opened for signature 10 May 1993, 1819 UNTS 360 (entered into force 20 May 1994) ('*CCSBT*').

[78] Eg, *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, opened for signature 11 February 1992, TIAS No 11465 (entered into force 16 February 1993); *Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries*, opened for signature 18 November 1980, 1285 UNTS 129 (entered into force 17 March 1982) ('*NEAFC Convention*'); *Convention on Fisheries Cooperation Among African States Bordering the Atlantic Ocean*, opened for signature 5 July 1991, 1912 UNTS 53 (entered into force 11 August 1995) ('*Dakar Convention*').

[79] Eg, *Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish*, opened for signature 5 April 1946, 231 UNTS 200 (entered into force 5 April 1953) ('*Meshes and Size Limit Convention*'); *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, opened for signature 24 November 1989, 1899 UNTS 3 (entered into force 17 May 1991) ('*South Pacific Driftnet Convention*').

[80] *Agreement on Conservation of Polar Bears*, opened for signature 15 November 1973, 27 UST 3918 (entered into force 26 May 1976) ('*Polar Bear Convention*').

specific international instrument. The *Cartagena Protocol on Biosafety*[81] regulates the use of biodiversity, especially in the wake of genetic modification by people.[82] In short, it deals with the potential of patenting biological matter, derivations and modifications, and its precise scope applies to the 'transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health'.[83] The agreement is a protocol to the *CBD*, which acknowledges the importance of genetic diversity in article 15. It is paradoxical that the protocol does not address the protection of vulnerable species or populations due to reduced genetic variability. On this point, the only way to prevent reductions in genetic variability may well be the conservation and correct management of ecosystems. This is also the first justification for *in-situ* conservation strategies.[84]

Regarding *in-situ* conservation strategies, the Australian domestic legislation has developed a listing system of endangered ecological communities. The *EPBC Act* takes the definition of biodiversity of the *CBD* to the letter and correctly identifies that some ecological communities should share the same listing protections as endangered species.[85] Recalling the case of the Tasmanian devil, some commentators[86] propose ways to address the issue in species in which spreading rates of pathogens have been identified, to prevent their extinction. However, this very costly process requires funding not readily available in developing countries.

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[81] *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003) ('*Cartagena Protocol*').

[82] This approach follows the precautionary principle, enshrined in Principle 15 of the Rio Declaration. See ibid art 1, and *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, UN Doc A/CONF.151/26 (vol 1) (13 June 1992) ('*Rio Declaration*').

[83] *Cartagena Protocol*, art 4.

[84] This view is embraced, among many other conservation biologists, by Wilson. Wilson, *Future…*, above n 27, 102.

[85] The categories of ecological communities for listing are: Critically endangered, endangered and vulnerable. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) art 182 and 183 ('*EPBC Act*'). Updated information related to the nomination, listing and current threats to ecological communities protected under the Act can be found at Department of Sustainability, Environment, Water, Population and Communities. Environment Australian Government-Department of Sustainability, Water, Population and Communities, *Threatened species & ecological communities* <http://www.environment.gov.au/biodiversity/threatened/index.html>.

[86] See for instance the recommendations by Hawkins et al, above n 43, and McCallum et al, above n 44, for saving the Tasmanian Devil, or the titanic vaccination and monitoring endeavour for vulnerable sick species that Smith, Acevedo-Whitehouse and Peterson propose. K F Smith, K Acevedo-Whitehouse and A B Peterson, 'The Role of Infectious Diseases in Biological Conservation' (2009) 12 *Animal Conservation* 1.

Overall, the three components of biodiversity act concomitantly. Legal instruments have addressed the threats to each, reacting to imminent menaces or damages. However, the importance of guaranteeing the overall health of ecosystems to maximise protection is clear. To achieve this, *in-situ* conservation in the form of protected areas is the most suitable approach.

The next part of this chapter talks about the interests and human rights of Indigenous peoples. Arguably, these groups can claim a relationship with the land different from the Western views that have dominated law and policy in biodiversity protection legal strategies. Their interests, however, may clash with these policies.

III. SECOND LEGAL INTEREST: THE HUMAN RIGHTS OF INDIGENOUS PEOPLES

This section discusses the second legally protected interest: the human rights of Indigenous peoples. First, this section argues that attempting to provide a one-size-fits-all definition for Indigenous peoples may be futile and, further, unnecessary if the human right to self-determination is recognised. It then establishes the international legal foundations of a human rights–based approach for Indigenous peoples, buttressed by five sets of interlocked rights.

Indigenous peoples are scattered across the planet in 90 developed and developing countries.[87] Between 5000 and 6000 groups have been preliminarily identified as fitting this category, comprising roughly 370 million individuals or 5% of the population of the world.[88] But how precisely can an indigenous, native or aboriginal group be defined? There are common factors that may shed some light on the quest for a definition. These include having cultural backgrounds that differentiate them from other groups, sharing similar experiences of discrimination, experiencing deeper spiritual links with their land,

[87] Department of Economic and Social Affairs, Division for Social Policy and Development and Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (December 2009) ('*SOWIP*').

[88] Sanjay K Nepal, 'Involving Indigenous Peoples in Protected Area Management: Comparative Perspectives from Nepal, Thailand, and China' (2002) 30(6) *Environmental Management* 748, 748.

and being more dependent on natural resources.[89] However, there has been disagreement in international organisations, treaties and domestic legislation when it comes to pinpointing a precise description.[90] The main claim of this section is that the right of Indigenous peoples to define who they are is the key. In view of this, three different approaches from the existing literature that provide definitions of the term 'Indigenous peoples' are discussed below, along with the problems identified for each of them. From this, a provisional definition is provided to serve as a platform to explain the rights that domestic systems ought to guarantee their Indigenous peoples. Stobbs accurately summarises the problem with law and policy in regards of Indigenous cultures:

> … we ought to respect and protect Indigenous peoples because we value them for what we perceive them as contributing (in either a political, economic or cultural sense), and not on the basis of any intrinsic value or on the basis of how such peoples value themselves and their communities.[91]

The similarities with the protection of biodiversity are striking: the design of legal strategies protecting these two interests is usually instrumental, appraising only what the interest can do for others, instead of placing their inherent value at the forefront. In the case of biodiversity, the protection of the maximum amount of variability is essential; with Indigenous cultures, the requisite factor is the promotion of self-determination. This is a non-negotiable component of any strategy seeking to balance the legal interest of protecting Indigenous peoples with other legal interests, as the following paragraphs will make apparent.

III.1. Attempting to Define Indigenous Peoples: a Futile Battle

Many commentators provide their own personal definition of what Indigenous peoples are, sometimes in an attempt to justify their arguments. For instance, anthropologist

[89] Benjamin J Richardson and Donna Craig, 'Indigenous Peoples, Law and the Environment' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2007) 195, 195.

[90] IUCN Inter-Commission Task Force on Indigenous Peoples, *Indigenous Peoples and Sustainability: Cases and Actions* (International Books, 1997) 27.

[91] Nigel Stobbs, 'What Can We Do You For? Naïve Conception of the Value of Indigenous Cultures and Communities' (2005) 6(10) *Indigenous Law Bulletin* 18, 18.

Rhoda Howard links the definition of dispossessed Indigenous groups, to rationalise why they would call for the protection of collective rights, as opposed to individual human rights, as a tool to regain their sense of dignity.[92]

Others, such as Richardson, avoid providing a definition altogether and proceed to identify Indigenous peoples as 'exemplars of environmentally sustainable living [whose] subsistence livelihoods [were] apparently kept in check by customary laws to ensure they lived by the laws of nature'. Various problems stem from this definition. The first is the vagueness of the expression 'laws of nature', which seems overly rhetorical. The second is the direct jump to the romantic view of the sustainable native. The author is not wrong, but he is avoiding the importance of self-determination and identification in his stance.

Other sectors of the legal literature prefer the term 'First Peoples' or 'First Nations' to identify the native inhabitants of a country prior to colonisation. These terms are the ones usually used by Indigenous peoples and nations to identify themselves, effectively applying their rights of self-determination and self-identification.[93] However, these terms may unduly imply that the legal claim that Indigenous groups have as rights-holders over their territores stems from the order of arrival. This interpretation can have unintended legal loopholes. What happens if these groups were not the first to arrive? What would happen if archaeological research found that they dispossessed the previous occupants and replaced them? Human history is rife with wars, which ideally imply the expansion of the victors' territory. Attaching legal rights only to 'first peoples', as in 'those who arrived first', can mean that such rights can potentially be stripped if this status is questioned. This is a worst-case scenario, but possible to argue. This thesis holds the view that the order of arrival is not what gives a group its valid claim over territory. Rather, the links developed with the land after continuous inhabitancy validate the claims.[94]

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[92] Rhoda E Howard, 'Dignity, Community, and Human Rights' in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives–A Quest for Consensus* (University of Pennsylvania Press, 1992) 81, 83–84.

[93] This is particularly the case of Canada's Indigenous peoples, who refer to themselves as First Nations, and are recognised as such in the legal treaties with the Crown. See the case of the Hul'qumi'num Treaty Group and their coastal management strategies, in Julia Gardner and Robert Morales, 'Shifting Currents: Seeking Convergence in the Pursuit of Conservation Arrangements that Respect First Nations' Rights on Canada's Pacific Coast' (2010) 17(Exploring the Right to Diversity in Conservation Law, Policy, and Practice) *Policy Matters* 215.

[94] See for instance the explanation of the relationship the Hul'qumi'num peoples have with the ocean and the adjacent coastlines. Ibid 216.

Note that these links to the land can also be developed by colonists, even after displacing the original inhabitants, these are the local communities often mentioned in the literature on nature conservation.[95] The difference between Indigenous peoples and local communities is that the latter does not enjoy differentiated rights associated with ethnic or national minority considerations, as those discussed in more detail in the following sections.

The first two examples have in common the neglect of the right to self-determination as an element that should be at the forefront. The third points to a risk of misinterpretation of a legitimate exercise of self-determination and self-identification. Indigenous peoples themselves have maintained that they should have the prerogative to define their identities through the application of this right. It would indeed be a conundrum of metaphysical proportions to have someone else defining for you something as personal as identity.[96] Nevertheless, as a starting point, the working definition by José R Martínez Cobo, in the report he prepared for the United Nations (UN) from the exhaustive ethnographic work he conducted between 1972 and 1986, can be useful. In this document, the author identified some common elements to Indigenous peoples around the world:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that develop on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral

[95] Several policy guidelines for biodiversity conservation and management often address the involvement of Indigenous peoples and local communities at the same level. The reason for this is that not only Indigenous peoples may have developed a deep link with their lands. The recent and increasingly mainstream use of the term 'biocultural diversity' to incorporate a broader range of views and wider interdisciplinary issues is a direct response. See, e.g. Alejandro Argumedo et al, 'Implementing Farmers' Rights under the FAO International Treaty on PGRFA: The need for a Broad Approach Based on Biocultural Heritage' (Report No G03077, IIED, 14-18 March 2011) < http://pubs.iied.org/G03077.html>; Grazia Borrini-Feyerabend, Ashish Kothari and Gonzalo Oviedo, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation–Guidance on Policy and Practice for Co-managed Protected Areas and Community Conserved Areas* (IUCN, 2004); Barbara Lausche, *Guidelines for Protected Areas Legislation* (IUCN, 2011); Maffi and Woodley, above n 18; Lea M Scherl and Stephen Edwards, 'Tourism, Indigenous and Local Communities and Protected Areas in Developing Nations' in Robyn Bushell and Paul F J Eagles (eds), *Tourism and Protected Areas, Benefits Beyond Boundaries* (CAB International/IUCN, 2007).

[96] 'All indigenous peoples have the right of self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious, and cultural development'. *Declaration of Principles of Indigenous Rights*, adopted by the Fourth General Assembly of the World Council of Indigenous Peoples, Panama September 1984, Reprinted in, UN Doc E/CN.4/1985/22 Annex 2 pple 1.

> 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.[97]

From this working definition, it is possible to determine five distinct sets of human rights that nurture and complement each other in an interlocking pattern:

1) self-determination and governance autonomy;
2) collective rights over territories and resources;
3) public participation and consultation spaces;
4) cultural integrity; and
5) non-discrimination.

If one of the sets is not at least partially represented in the legal system, the whole model may collapse. Indeed, the most desirable way to defend these would be to elevate them to the category of legally protected human rights. To justify this argument, it is necessary to explore the international instruments that govern the subject.

III.2. International Legal Foundations for a Human Rights-Based Approach to Indigenous Peoples

It may seem unusual to see the five sets of human rights identified in the previous paragraph as distinctively applicable to Indigenous peoples. After all, it may be argued that all of these are already part of the universal rights that shelter people as a whole. However, as distinct minorities, Indigenous peoples have expressed their inconformity with the one-size-fits-all blanket protection of other treaties.[98]

The first historical instance where a treaty regulated the treatment of Indigenous peoples as distinct communities was the *Convention Concerning Indigenous and Tribal*

[97] Quoted in Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples*, UN Doc PFFII/2004/WS 1/3 (19–21 January 2004) 2. Original report in Spanish: José R Martínez Cobo, *Estudio del problema de la discriminación contra las poblaciones indígenas, informe final que presenta el relator especial*, 36 sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983).

[98] One of the key objections is that human rights have been traditionally conceptualised as individual rather than collective. Chapter IV addresses the most common objections to the existence of collective rights.

Populations of 1957.[99] This agreement, commented in more detail in Chapter III, sought to help in the integration of Indigenous tribal and semi-tribal populations to the majority society of their countries. Although addressing the precarious labour situation of Indigenous peoples was a necessary step, the treaty did not recognise their entitlement to distinctive collective rights. Rather, this plight was heard in the International arena decades later, in the two seminal instruments that currently regulate the subject: the *Indigenous and Tribal Peoples Convention* (*ILO 169*) and the *Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'). These two instruments are set apart from any previous international effort to approach the relationships between Indigenous peoples and the State. First, the differently interpreted rights that ought to be recognised to Indigenous peoples in the signatory countries are clearly delimited. This is explained in detail in the following paragraphs. The provisions of the hard-law treaty do not replace other human rights treaties, nor are they incompatible with them. Rather, they expand their meaning for the cases of Indigenous peoples.

Note that *ILO 169* has not been widely ratified,[100] and hence the principles of *UNDRIP* serve to build a conceptual interpretation framework that could bypass this problem in non-signatory countries. After the initial reticence of Australia, New Zealand, Canada and the United States to sign *UNDRIP* in 2007, the Declaration counts now with the signature of all of the members of the General Assembly. Nevertheless, the statements by the representatives from these four governments have been unanimous in insisting that the Declaration does not bind them legally; rather, it is a moral, political and aspirational document. Thus, there is no academic agreement about the status of the

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[99] *International Labour Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 6 February 1959) ('*ILO 107*'). Note that ILO 157 was replaced by ILO 169 in 1989 and it is no longer open for accession. Nevertheless, the treaty remains in force for those parties that have not ratified ILO 169: Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Irak, Malawi, Pakistan, Panama, Syrian Arab Republic and Tunisia. See, International Labour Organization and NORMLEX, Ratification of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252:NO>.

[100] As of 31 January 2013, only 22 countries had ratified this instrument (Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemaqla, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Venezuela). The overwhelming majority of these countries are in Latin America. ILO and NORMLEX, *Ratifications of C169–Indigenous and Tribal Peoples Convention, 1989 (No. 169)* <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO>.

rights set in the Declaration in any given jurisdiction. In the case of *UNDRIP*, its status as a soft-law instrument makes it necessary for the signatory states to embrace it to the point of making it a customary obligation. As Allen comments, it is likely that the four countries that refused to sign it in 2007 will act consistently with their interpretation of the Declaration as a 'political aspirational instrument'.[101]

III.2.1. Human Rights to Self-Determination and Governance Autonomy

It is of the uppermost importance for Indigenous peoples to claim their own perception of their identity. Related to this claim is also the nurturing of autonomous culture and legal systems, in a framework not of homogenisation but of acknowledgement of their own diversity. In short, this refers to the claim to exercise their rights to self-determination and self-organisation, the initial stage and basing for complete governance autonomy. As an illustration to this point, the Kari-Oca Declaration, signed by Indigenous peoples' representatives to the United Nations Conference on Environment and Development (*UNCED* or the Rio Summit) in 1992, defined self-determination as 'the right to decide our own forms of government, to use our own laws, to raise and educate our children, to our own cultural identity without interference'. [102] Complementing this definition, the National Indigenous Organisation of Colombia (ONIC for its Spanish acronym) has stated: 'we will have autonomy only when we become the architects of our own history … Autonomy is also the possibility to build relationships and exchanges with others, based on respect, tolerance and peaceful coexistence'.[103] This second component of autonomy—the exchange with others—is the most notable link between this set of rights and the opening of participation spaces.

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[101] Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 225, 227–235.

[102] Kari-Oca Declaration, 1992. See, Editors, 'The Kimberley Declaration (Reaffirming the Kari Oca Declaration 1992)' (2002) 7(3) *Australian Indigenous Law Reporter* 68 <http://www.austlii.org/au/journals/AUIndigLawRpr/2002/50.html>.

[103] ONIC, 'Derechos territoriales de los pueblos indígenas. Obras–proyectos–explotación de recursos naturales consulta y concertación. Material Guía'. Unpublished draft prepared by Ana Cecilia Betancur, 1999, cited in Gloria Amparo Rodríguez, 'La autonomía y los conflictos ambientales en territorios indígenas' in Juan Houghton (ed), *La Tierra contra la Muerte. Conflictos territoriales de los pueblos indígenas en Colombia* (Centro de Cooperación al Indígena CECOIN, Organización Indígena de Antioquia OIA, 2008) 57, 59 (translation NRU).

These basic rights have been denied by national legislation around the world, in the fear that recognising them could compromise state sovereignty and promote secessions.[104] To understand this fear, a review of the history of the self-determination right in the post-war years is in order. The first international concerted effort to acknowledge the concept was contained in the *Charter of the United Nations*, being the basis for the respect of the member's sovereignty over their territories.[105] As the seminal human rights concept, it was then included in the twin article 1 of the *International Covenants* of 1966.[106] This article states that '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'.[107] The right is not limited to independent nations but specifies that it applies to '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*'.[108]

The rights to self-determination and self-government were considered the main mechanisms for the processes of independence and decolonisation of African and Asian countries in the 1960s.[109] The article followed the *UN Charter* in its recommendations to colonial powers 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions…'.[110] Even though the article and its application for non-colonial situations can be considered problematic because of the possibility of secessions,[111] this

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[104] Stobbs, above n 91, 19. Note that *ILO 107*, signed in 1957, does not have a specific or implicit mention to the right to self-determination.

[105] *Charter of the United Nations*, opened for signature 26 June 1945, TS 993 (entered into force 24 October 1945) ('*UN Charter*').

[106] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

[107] *ICCPR* and *ICESCR*, art 1.

[108] Ibid. See also the 'Declaration Regarding Non-Self-Governing Territories' Chapter XI, *UN Charter*, arts 73 and 74.

[109] See, Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857.

[110] *UN Charter* art 73(b).

[111] The fear of secession was directly addressed in *ILO 169* art 1.3, which explicitly states that '[t]he use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'. The implications can be clearly understood as the possibility of seceding from the parent state that could be supported by the other provisions of the treaty. *International Labour*

fear was proven groundless in consultation with Indigenous representatives regarding the *United Nations Declaration on Indigenous Rights*:

> Although Indigenous peoples themselves overwhelmingly rejected the assertion that secession would be sought by their communities, they claimed it was an important matter of principle that they not be dictated to ahead of time as of how they would exercise their autonomy under the declaration.[112]

To avoid becoming entangled in the *meaning* of the term *indigenous* or *tribal* peoples, *ILO 169* circumvents the drafting of a 'definitions' article, instead adopting the wording, 'this Convention applies to…'.[113] Hence, instead of defining what can be understood as Indigenous or tribal peoples, the article proceeds to enumerate a set of characteristics of each group. This careful choice of words allows for a generous margin of interpretation. Note that the Convention implicitly addresses the effects that assimilationist policies of the past may have had over the customs of these groups, by including the expressions 'wholly or partially' and 'some or all'. This prevents the denial of the rights enshrined in the treaty to communities that have been heavily affected by the majority society.[114] Contrast this with the definitions of *ILO 107*, which even included the term 'semi-tribal populations', characterising 'groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated to the national community'.[115] The problem of over-conceptualisation stems from the risk of never reaching an agreement that can encapsulate the immense diversity of Indigenous peoples in the world. However, this becomes an unnecessary exercise if self-identification mechanisms are put into

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Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, opened for signature 27 June 1989, 28 ILM 1358 (entered into force 5 September 1991) ('*ILO 169*').

[112] Stobbs, above n 91, 20.

[113] *ILO 169* art 1: 'This Convention applies to (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs and traditions or by special laws or regulations. (b) Peoples in independent countries who 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 colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'.

[114] If Australia had ratified this treaty and enforced it through clear statutory regulations, perhaps the reasoning in *Yorta Yorta*, whereby custom is deemed to be 'washed away' by the history of colonisation, could have been prevented. See, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*').

[115] *ILO 107*.

place.[116] For this reason, 'observers from indigenous organizations developed a common position that rejected the idea of a formal definition of indigenous peoples at the international level to be adopted by states'.[117]

Nevertheless, it is telling that the silence of *ILO 169* related to self-determination does not extend to self-identification as a guiding principle.[118] Further hints that point to the implicit recognition of self-determination in the treaty are found especially in article 7. More precisely, the right can be inferred from the wording of the instrument, especially where it enshrines the right of the peoples protected by the convention to freely determine their own development priorities.[119]

Seeing also the pre-eminence that multiculturalism and Indigenous inclusion has had in the last couple of decades, especially in Latin America, the fear of secession borders now on the pathological. Further, during the Constitutionalist revolution of the 1990s, when several countries in Latin America recognised this right explicitly, secessions of Indigenous minorities did not happen.[120] Indeed, the accommodation policies[121] that characterised these processes may be the reason that the minorities in question felt no need to secede. The Colombian case is the clearest example in the region of a successful and constantly improving accommodation policy, which will be made clearer when compared to the Australian legal approach.

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[116] Chapter III comments how in Australia these rights are partially fulfilled, but they are liable to be compromised by the three-part 'aboriginality' test devised in the *Tasmanian Dam Case*. *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

[117] *SOWIP*, above n 87, 5.

[118] 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'. *ILO 169* art 1.2.

[119] *ILO 169* art 7.

[120] For thorough analyses on the 'Constitutionalist wave' of the 1990s in Latin America, the move towards multiculturalism, and the embracing of the *ILO 169* principles in the Inter-American system, refer to the works of Rodríguez-Piñero. Luis Rodríguez-Piñero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 457; Luis Rodríguez-Piñero Royo, 'El sistema interamericano de derechos humanos y los pueblos indígenas' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 153.

[121] McGarry, O'Leary and Simeon argue that at least two different strategies have been used to fit multiculturalism within a state: integration and accommodation. The latter has been applied in Latin American countries including Colombia. 'Accommodation, minimally, requires the recognition of more than one ethnic, linguistic, national, or religious community in the State. It aims to secure the coexistence of different communities within the same state, though supporters of accommodation may support secession or partition if accommodation is impossible'. John McGarry, Brendan O'Leary and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) 41, 52.

The Declaration was finally adopted by the Sixty-First General Assembly Plenary of the United Nations, with 143 members voting in favour, 11 abstentions and four very notable votes against: Australia, Canada, New Zealand and the United States.[122] This Declaration is only a soft-law non-binding instrument, but it reflects an interesting deeper shift of perception in recent international law, from an assimilationist philosophy to a modern rights-based perspective. Such is the case in particular of the *ILO 107* and its revised instrument, *ILO 169*. Drafted three decades apart, the 169 Convention moved away from *ILO 107*, shifting from a patronising language characterised by judgemental statements to a respectful diversity approach.[123]

The language change, which reflects a fundamental shift in perspective that recognises self-determination and self-identification every step of the way, is evidenced in various articles of the Conventions. This is palpable in article 1, which defines to which persons and groups the Convention applies. For instance, the expression 'tribal and semi-tribal populations' present in *ILO 107* was replaced by 'tribal peoples' in the new instrument, thus acknowledging the plea of Indigenous peoples across the world to have their differences in culture and population groups recognised. In fact, the term 'semi-tribal populations' was removed altogether because *ILO 107* defined it as 'groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community'.[124] Since *ILO 169* seeks to recognise that cultural manifestations are not static in time, and that any Indigenous group has the right to evolve and experience changes across time, the new text shifts the entire focus by acknowledging that '[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.[125] Another important change in definitions was the suppression of the classification of Indigenous groups as part of archaic institutions, a manner of description that no doubt followed the assimilationist spirit of *ILO 107*. Instead, *ILO 169* recognises that although some traditional manifestations may have been lost over time,

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122 UN Department of Information, News and Media Division, *General Assembly Adopts Declaration on Rights of Indigenous Peoples* (13 September 2007) <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

123 See the discussion on assimilationist policies in Chapter III.

124 *ILO 169* art 1.2.

125 Ibid.

the group nevertheless retains 'some or all of their own social, economic, cultural and political institutions'.[126]

The recognition of self-determination has to be noted, as well as the suppression of the term 'semi-tribal', which had the implication of some hybrid between a 'true' Indigenous and a 'white' member of a community in the process of assimilation, which clearly fails to accept cultural dynamism. As Anaya notes, the norm is rooted in core values of freedom and equality … within the realm of human rights as opposed to sovereign rights'.[127] The human rights to self-determination and governance capacity are a key aspect of the collective legal autonomy concerning the application of TEK. Several authors and activists place the recognition of these rights as a fundamental step for achieving environmental justice.[128]

III.2.2. Collective Human Rights over Territories and Resources[129]

The main conflict that can arise between biodiversity conservation and the protection of the human rights of Indigenous peoples is the question of land tenure, use and ownership. Indeed, if the ecosystem approach proposed in the last section is to be applied, then there are potential hurdles in the matter of management of ancestral territories. Hence, having elucidated the appropriateness of this model in terms of maximising the protection of the three components of biodiversity, an analysis of the interests of Indigenous peoples logically follows. The aims of this section are to introduce the argument that a) Indigenous territories are better protected under a

[126] Ibid art 1.1(b).

[127] James S Anaya, 'A Contemporary Definition of the International Norm of Self-Determination' (1993) 131 *Transnational Law & Contemporary Problems* 131, 133.

[128] Chapter II discusses the 'Parks v Peoples' debate, in which sociologists and anthropologists present a fierce argument against the neo-colonial tints associated with protected areas. However, other threats are being identified in this same concern in what commentators call 'biocolonialism'. Di Chiro, for instance, denounces the homogenising drive of genetics research, and the potential of excluding the input of Indigenous peoples once again. She states that science today should work under the ethical lens of environmental justice. See, Giovanna Di Chiro, 'Indigenous Peoples and Biocolonialism: Defining the "Science of Environmental Justice" in the Century of the Gene' in Ronald Sandler and Phaedra C Pezzullo (eds), *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (Massachusetths Institute of Technology Press, 2007) 251.

[129] Parts of this section are based on the paper N Rodríguez-Uribe and D Rodríguez-Uribe, 'Emerging Indigenous Voices: Safeguarding Ingangible Heritage in Colombia and the Reaffirmation of Cultural Rights' in Rogério Amoêda, Sérgio Lira and Cristina Pinheiro (eds), *Heritage 2012–Proceeding of the 3rd International Conference on Heritage and Sustainable Development* (Green Lines Institute for Sustainable Develoment, 2012) vol 2, 1469, see especially 1471-1472.

collective property framework, and b) that if a collective right to land exists,[130] then it ought to be understood as an interdependence of rights of property and use of resources.[131]

The claim is thus that the rights over territories and resources of Indigenous peoples are better protected and recognised if there is a collective component to them. First, however, it is pertinent to review the international framework for these rights, beginning with the nature of the ownership of property as a fundamental human right. This discussion will inform why Australia has failed in its obligations under certain international treaties by its reluctance to acknowledge the customary relationships between Indigenous peoples and the environment.

The *UN Declaration on Human Rights* declares in article 17 that 'everyone has the right to own property alone as well as in association with others' and 'no one shall be arbitrarily deprived of his property'.[132] This right acquires a new dimension if the collective component is considered, as it may put the livelihoods of entire communities at risk.[133] Borrini-Feyerabend et al explain that the rights associated with land may vary from the perspective of different Indigenous communities. Nevertheless, all see their relationship with the land as a mixture of rights and responsibilities, especially towards nature.[134]

In this light, the classic description of property as a 'bundle of rights', capable of being separated, leased, bought and sold is inadequate. It fails to characterise appropriately the shared connection of the communities with their territories, which is particularly problematic in the Australian Native Title system.[135] Yáñez states that the

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130 Note that the notion of having collective human rights is problematic. For this reason, a section of this thesis is devoted specifically to a thorough discussion of this topic, including the uneasy relationship between collective and individual human rights. See Chapter IV.

131 See generally, Benjamin J Richardson, 'The Ties that Bind: Indigenous Peoples and Environmental Governance' in Peer Zumbansen, John W. Cioffi and Lindsay Krauss (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 337.

132 *Universal Declaration on Human Rights*, GA res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 17 ('*UNDHR*').

133 The Colombian Constitutional Court has linked the rights over collective territories and their destruction with the right to life of Indigenous groups, as will be discussed in Chapter IV.

134 Borrini-Feyerabend, Kothari and Oviedo above n 95, 74.

135 In Australia, Native Title has also been categorised as a *sui generis* bundle of rights. This is clear because the *Native Title Act 1993* (Cth) allows for the partial extinguishment of some claims without affecting others within the Native Title. See eg, s 23G(1)(b)(I). The High Court has also insisted on this partial extinguishment possibility, see especially *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Pastoral Leases Case*').

main difference between the Western conception of property and that of Indigenous peoples is the appropriation factor.[136] For the former, land and resources are there to be appropriated, used and tamed.[137] In contrast, for the latter, their lands have a double purpose. First, they are a gift deeply related to their cultural identity; a symbol of their 'relationship with the deities, the ancestors, or the founding heroes'.[138] Second, the land gives them their material and spiritual sustenance. It is this particular relationship that explains the development of TEK in virtually every Indigenous community, including the sustainable use of resources.[139] It also explains why these cultures have survived for centuries.[140] This is the key point of contact between biodiversity and the rights to land and resources that enables the optimisation of the two. It is also why some environmental NGOs and concerned individuals have found points of contact between the protection of the human rights of Indigenous peoples and biodiversity conservation.[141]

This holistic conception is incompatible with the notion of property as a 'bundle of rights', as prevailingly understood in the theory of law of the Anglo-American tradition, which is remarkably similar to that used by systems that follow the Roman-law tradition.[142] It is useful to draw upon the summary of Ostrom and Schlager of what the property 'bundle of rights' entails for each rights-holder. These authors divide the holders into the categories of owner, proprietor, claimant, authorised user and authorised entrant. The rights in turn are divided into access, withdrawal, management, exclusion and alienation. An owner thus has the fee simple and is entitled to all five rights, including

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136 Nancy Adriana Yáñez, 'Reconocimientos legislativos de los derechos ambientales indígenas en el derecho internacional' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 489, 492–493.

137 The prime theoretical background for this conception is the utilitarian school.

138 Yáñez, above n 136, 492 (translated by author).

139 Ibid.

140 See the parts of this thesis that explain why and how Australian and Colombian Indigenous peoples have survived in such seemingly harsh climates, especially heading IV.2. of Chapter II.

141 The word 'some' is not accidental. There is a bitter argument within conservation sectors about these points of contact. See the comments on the 'Parks v People' debate in the next Chapter, heading III.

142 Ostrom and Schlager comment that although both systems are similar, they differ in the Government's level of involvement. See, Elinor Ostrom and Edella Schlager, 'The Formation of Property Rights' in Susan Hanna, Carl Folke and Karl-Göran Mäler (eds), *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Island Press, 1996) 127, 139.

alienation. A proprietor is entitled to access, withdrawal, management and exclusion but cannot alienate or otherwise dispose of the land.[143]

Instead of being 'owners', Indigenous peoples in the collective rights scenario hold 'proprietor' rights. Far from hampering the individual right to property of each of the members of the community, they may benefit by having the common property as an intact territory. The fact that the land is inalienable and indivisible may guarantee not only the survival of the Indigenous community that owns it, but also the conservation and future use of resources. Indeed, one of the biggest threats to biodiversity is habitat fragmentation. Thus, keeping the territories of Indigenous peoples as collective areas that cannot be alienated by individual members may bring an overall benefit for the integrity of the ecosystem.[144]

Another interdependent right is the use of renewable natural resources. Indigenous peoples claim the right to harvest the resources within their territories.[145] This is one of the fundamental bases of their livelihoods and it is grounded on TEK. Broadly, these uses include hunting, gathering, minor-scale agriculture, fishing and other forms of aquaculture, and cultural or spiritual activities.[146] This last use is deeply related to the interdependent right of freedom of religion, which will be discussed as part of the sets of rights that guarantee cultural integrity.[147] These categories coincide with the different activities that Native Title–holders may claim if they are prohibited for other members of the public. They are separate activities, and the claimants have to prove their customary interests are legitimately linked to their Native Title for the prohibitions to be lifted.[148] The problem with this fragmentation of Native Title as a bundle of rights over territories

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143 Ibid 133.

144 See, for example, Etter et al's study of the consequences in biodiversity diminution in the Amazon jungle habitat in Caquetá province, fragmented because of poor planning policies, illegal settlements and the commercial deforestation that facilitated them. Andres Etter et al, 'Unplanned Land Clearing of Colombian Rainforests: Spreading Like Disease?' (2006) 77 *Landscape and Urban Planning* 240.

145 See in Australia, *Native Title Act 1993* (Cth) s 211.

146 For an early detailed study of ecological traditional knowledge in Indigenous cultures living in Amazonia and using these categories, see Darrell A Posey et al, 'Ethnoecology as Applied Anthropology in Amazonian Development' (1984) 43(2) *Human Organization* 95.

147 The Colombian Constitutional Court has made this link expressly in the case of the expulsion of the pastors of the Pentecostal United Church of Colombia from the Arhuaco territory. The Court deemed it necessary and justified to protect cultural integrity, commenting that the recruiting mission of these pastors threatened the ways of life, culture and cosmovisions of the Arhuaco people. Constitutional Court, *Judgement SU-510/1998* ('*United Pentecostal Church Case*').

148 *Native Title Act 1993* (Cth) S 211.

and resources is that it divides cultures into discrete components. Even if it is recognised collectively to entire communities, the effort of proving the legitimacy of each of the individual interests may lead to its dissolution by the defaulting of individual members. This is not an adequate response to the needs of Indigenous peoples.

The discrepancy between worldviews and the demands to accommodate different cosmovisions was enshrined in Part II of *ILO 169*, and defined in *UNDRIP* as the 'right to maintain and strengthen [Indigenous peoples'] distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands'.[149] This formal recognition acknowledges that the spiritual connection goes beyond the mere ownership or property rights commented on above. Sacred sites are many times considered as the point of origin of a particular community and have an important role to play in the afterlife. They are much more than just plots of soil to be used. This is one of the reasons that the legal instruments that relate to ownership of Indigenous territories, and that are signatories of *ILO 169*, usually define the property as a collective right held by the entire community, as opposed to any of its individual members, thus guaranteeing equal access and use.[150]

III.2.3. Human Rights to Public Participation and Consultation

ILO 169 is specific on the standard of participation of Indigenous peoples that should be pursued by signatory countries in the decisions that might affect them. Article 6 sets three specific tasks for governments to follow in the application of the convention: first, whenever there is a possibility of passing a legislative or administrative measure that may affect Indigenous or tribal peoples, they have to consult them through appropriate procedures.[151] Second, they have to create participatory spaces for these sectors of the population at all levels of decision-making, and provide input opportunities for them to take an active part in policies and programmes that may concern the peoples in question.[152] Third, they have to promote the full development of the institutions and

[149] *UNDRIP* art 25.
[150] This is the case of Colombia and is analysed in Chapter IV. See the *Colombian Constitution 1991* art 329.
[151] *ILO 169* art 6.1(a).
[152] Ibid art 6.1(b).

initiatives of Indigenous and tribal peoples, and provide economic support for this goal.[153] Additionally, it is a non-negotiable requirement for consultations to be carried out in 'good faith and in a form appropriate to the circumstances, with the objective of achieving agreement of consent to the proposed measures'.[154]

This is one of the most contentious human rights of Indigenous peoples. Indeed, the full application of this provision in any domestic regime may necessitate the creation of affirmative action measures. This creates another interesting point of comparison between Colombia and Australia: the former constitutionally changed the concept of democracy to define it as participatory, whereas the latter has kept faith to the model of representative democracy. Thus, Australia remains a faithful representative of the Westminster model or 'the concentration of political power in the hands of the majority', whereas Colombia follows a model that the literature calls consociational. That is, the will of the majority no longer validly subsumes minorities; instead, minorities are guaranteed participation spaces with true power.[155]

UNDRIP affirms the rights of participation in article 5, as a tool to 'maintain and strengthen their distinct political, legal, economic, social and cultural institutions'. Further, the provision clarifies that the peoples retain 'their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State'. Thus, the right is linked, first, to the right of self-governance discussed above and, second, to issues of justice regarding the fair treatment of Indigenous peoples within a society. Note that this article is holistic in its scope, further giving credence to the argument that interprets that these sets of rights complement rather than exclude each other.

The *Declaration* is also emphatic on the necessity of having Indigenous representatives 'chosen by themselves and according to their own procedures, as well as to maintain and

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153 Ibid art 6.1(c).

154 Ibid art 6.2.

155 For a concise analysis of the friction in the literature between the pure rule of majorities and consociational approaches, especially the long-standing academic debate between Arend Lijphart and Donald Horowitz, see Sujit Choudhry, 'Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) 3, 15–26. The author also notes that accommodation and integration theories go one step further, giving empirical elements to the debate and supplying a wider range of possible policies (ibid 26–31). The application of these different models in Australia and Colombia are further analysed in the following chapters. Moreover, the case studies show how this enhancement in participation mechanisms has allowed Colombia to have a framework that can be called the collective legal autonomy concerning TEK.

develop their own decision-making institutions'.[156] Here, participation has a dual nature; on one hand, it fosters the inclusion of Indigenous peoples at all levels of society, on the other, the peoples have the right to revitalise their own institutions. These provisions resonate with the rights to cultural integrity, highlighting the value of difference. Even though the participation rights evolved in Colombia before the signing of *UNDRIP*, the Court has incorporated its provisions in recent judgements. Given that in Colombia the right to participation is seminal for the protection of the land, resources and associated cosmovisions, and the jurisprudence has developed accordingly, no more will be said here.

III.2.4. Human Rights Linked with Cultural Integrity

The term *cultural integrity* is a holistic concept that refers to various aspects of any given culture. In this instance, the reference is focussed on the rights to cultural integrity of Indigenous peoples including consmovisions, knowledge of the land, oral histories, languages and spiritual practices. It is deeply linked to autonomy because it is the vehicle that allows for the dynamism and revitalisation of culture. Indeed, cultural integrity may be understood as an extension of individual self-determination, guaranteed in the *1996 Covenants*, to the guarantee for a whole group to freely develop and maintain their cultural identity.[157] From this definition, it is possible to identify three potential threats: 'ethnocide, the killing of cultures, linguicide, the killing of languages, and theocide, the deliberate killing of particular religious cultures'.[158] The *ICCPR* has a specific provision:

> *Article 27*: 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 practice their own religion, or to use their own language.

[156] *UNDRIP* art 18.

[157] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 131.

[158] McGarry, O'Leary and Simeon identify the rejection of these three threats as the main point of contact between the integrationist and accommodationist schools of multiculturalism in their opposition to assimilation policies. McGarry, O'Leary and Simeon, above n 121, 43.

Thus, the human rights of cultural integrity depend on religion, culture and language.[159] Francioni notes that there is no specific provision in the UN Charter linking culture to human rights and that 'cultural genocide' was a notion rejected by the General Assembly in 1948.[160] Thus, the *Genocide Convention* does not include this form of genocide in the definitions of the conduct.[161] Nevertheless, cultural integrity rights have been intensively developed in international law, and gain more relevance when Indigenous peoples are concerned. The milestone for the protection of these rights lies in the 1966 *Covenants*.

Continuing with the argument that the collective legal autonomy concerning TEK rests upon five pillars of rights, it would be remiss to omit that religion, culture, oral traditions and other intangible elements are inextricably linked to the rights over ancestral territories. Note that the separation between tangible and intangible elements becomes artificial in these instances. The claim for the legal system to acknowledge the inconvenience of this separation has been a constant and as yet unresolved problem in Australia. Conversely, it has become the reality in Colombia, as the case studies of this country will show.[162]

III.2.5. Human Right to Non-Discrimination

Despite being of paramount importance, the discussion of this right has been purposefully left until the end of this section. This is to highlight that countries today should have advanced their legal provisions in this respect to the point of them being seamless parameters of operation.[163] Sadly, this is not always the case. Even though racial

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[159] *ICCPR* art 18, *Freedom of Religion*, is deeply linked to this: '1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

[160] Francesco Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) 25 *Michigan Journal of International Law* 1209, 1212.

[161] Refer to the definitions in art 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 1021 UNTS 78 (entered into force 12 January 1951) ('*Genocide Convention*').

[162] The subjects of cultural integrity and identity are fully discussed in Chapters III and IV.

[163] The general prohibition of discrimination has its source in the *UNDHR*, art 2: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex,

discrimination should no longer be a factor for curtailing the rights and opportunities of certain sectors of the population, the reality is quite different. One of the key elements of non-discrimination towards any minority is to redress the injustices of the past. Indeed, the Preamble to *ILO 169* states that 'in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population … and their laws, values, customs and perspectives have often been eroded'. This is linked to the lingering assimilationist drive that prevailed when the treaty was drafted.[164] This section talks briefly about the relevant human rights provisions that inform non-discrimination.

The principal binding treaty dealing with this issue is the *Racial Discrimination Convention*.[165] It is based on the fundamental premise that 'any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice'.[166] The treaty is also adamant in its purpose: to condemn all forms of racial discrimination and eliminate them.[167] There are no grey areas, and the means for achieving these objectives are equally straightforward: the parties will not sponsor, defend or support it; shall take effective measures to review their policies and laws to remove all provisions that create or perpetuate racial discrimination; and will further prohibit these practices, instead encouraging integrationist multiracial organisations and movements. Additionally, there is a categorical rejection of all forms of Apartheid and the condemnation of all propaganda and organisation based on theories of racial superiority.

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language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'. This provision is reinforced by the equality provisions of arts 1 and 7.

[164] Part of the Preamble also states specifically that the new instrument seeks to remove the assimilationist orientation of *ILO 107*: 'Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards'.

[165] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

[166] Ibid Preamble.

[167] 'In this Convention, the term "racial discrimination" shall mean 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 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'. Ibid art 1.

These obligations of the parties are complemented by a list of rights that shall be guaranteed under the umbrella of non-racial discrimination. Listed in article 5, these rights are consistent with the rights enshrined in the *International Covenants of 1966*. For Indigenous peoples, non-discrimination is of paramount importance because, without it, their rights to self-determination and cultural integrity can be compromised.[168] However, non-discrimination guarantees can also be used against Indigenous peoples by sectors of the majority society claiming that these differentiated rights, in turn, create discriminatory practices based on the lack of full equality.

This section has canvassed the five sets of human rights that are currently recognised in international law. They are interlocked and contingent upon the recognition of the right to self-determination. Note that even if a country is not a party to *ILO 169*, these human rights are part of the main universal treaties, including the *Covenants* and *CERD*. Hence, observing their provisions is part of these international obligations.

IV. COLLISIONS

Having determined the two general legal interests to be optimised in conservation strategies within Indigenous territories, it is now pertinent to analyse the ways in which they collide. It is also convenient to canvass the collisions between the two legally protected interests and the majority society.

Alexy's law of collision is an appropriate theoretical tool to explain the limits of the two legally protected interests discussed in this thesis.[169] A collision occurs when 'two norms, when applied separately, lead to incompatible results, namely to two contradictory specific or concrete legal "ought"-judgments'.[170] There are different ways to solve collisions, depending on whether they are between rules or between principles.[171] On the one hand, 'rules can only be solved by either introducing an exception clause into one of

[168] In the discussion on the Australian situation of Indigenous peoples, the subject of non-discrimination will be addressed.
[169] Robert Alexy, 'On the Structure of Legal Principles' (2000) 13(3) *Ratio Juris* 294.
[170] Ibid 295.
[171] Ibid.

the two rules or declaring at least one of them invalid'.[172] Given that this thesis argues that the two legally protected interests of biodiversity protection and the recognition of the human rights of Indigenous peoples ought to reach a Pareto optimal solution in conservation legal models, treating them as rules is inadequate. Principles, on the other hand, are understood as 'norms commanding that something be realized to the highest degree that is actually and legally possible. Principles are therefore *optimization commands*. They can be fulfilled in different degrees'.[173] This definition is suitable for categorising the two legally protected interests at stake; they are both protected at the same level by international law, and they collide because their application leads to incompatible results. Hence the collision law for principles can be applied to legally protected interests.

The collision law for solving clashes between principles or, in this case, legally protected interests is contingent on a conditional priority: 'The conditions under which one principle takes priority over another constitute the operative facts of a rule giving legal effect to the principle deemed prior'.[174] In this scenario, 'the priority relations between the principles … are not absolute but only conditional or relative'.[175] This is none other than a *prima facie* priority. Recall that the introduction to this thesis stated that there is a *prima facie* priority where the burden of argumentation is in favour of the recognition of the rights of Indigenous peoples.

An example of when this *prima facie* priority can be challenged using the collision law would be if an Indigenous community that had fought for the recognition of collective ownership of their territory were then to decide to transfer these rights to a multinational company planning to undertake an open-cast mining operation. This kind of project is the worst-case scenario because it entails the utter destruction of the entire biome of the site. Were this situation to occur, the collision could be solved by favouring the conservation of biodiversity instead of the recognition of the right to collective ownership of Indigenous peoples. The conditional priority in this case would be that the recognition of the collective ownership over the territory cannot cause the complete

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172 Ibid.

173 Ibid (emphasis in the original).

174 Ibid 297.

175 Ibid. The technical version of this rule is: 'If principle P_1 takes priority over principle P_2 under conditions C: (P_1 **P** P_2) C, and if P_1 under conditions C implies legal effect *R*, then a rule is valid that comprises C as the operative facts and *R* as legal effect: C→*R*'.

destruction of the biome, which would negate the legally protected interest of biodiversity protection.

IV.1. Collisions between Biodiversity and the Interests of the Cultural Majority

Unlike interests that can be defended actively by the parties if the need arises, biodiversity has no autonomous standing in a court of law. With the exception of in Ecuador, which changed its Constitution in 2008 to state that the environment is indeed a rights-holder,[176] and the Whanganui River in New Zealand that was declared to be a legal entity with legal standing via a deed of settlement,[177] environmental protection depends on governments, concerned citizens and environmental organisations. The idea of granting standing to inanimate actors, notwithstanding them being life forms, is not new. In the 1970s, Stone's article, *Should Trees Have Standing?*, drew attention to this issue with its provocative title and resulting public stir. An obvious problem for this protection is the ways in which said concerned parties have access to the courts to plea for decisions that will protect the interests of the environment. In general, to obtain standing in a court of law, the plaintiff has to prove that they have an interest over the affected asset, prove a personal damage, or hold some other legal right allowing them to act. In this respect, Colombia can be considered a special case because of the various public participation mechanisms enshrined in the 1991 Constitution. These mechanisms allow citizens, even those with modest means, to approach the courts in public interest litigations. In Australia, the Commonwealth Government first took control of environmental policies in the country by the strict application of the foreign affairs power of the Constitution.[178] This drive then developed into a cooperative framework of governmental agreements

[176] *Constitution of Ecuador* 2008 art 77 states that Nature has the right to the respect of 'its existence and to its maintenance and regeneration of its vital cycles, its structures, its functions and its evolutionary processes, and every person, community, nationality or group has open standing to demand the effective fulfilment of this right'.

[177] Good comments the case of the Whanganui River and discusses how this approach revives Christopher Stone's proposals (see above n 17) for granting legal standing to non-human entities. See, Meg Good, 'The River as a Legal Person: Evaluating Nature Rights-Based Approaches to Environmental Protection in Australia' (2013) 1 *National Environmental Law Review* 34.

[178] See, *Tasmanian Dam Case*.

that allowed the States a voice in what had previously been considered one of the Commonwealth's residual powers.[179]

The environmental movement, has tended to view people and nature as separate entities, where the former often has a deleterious impact on the latter. The complete separation between people and nature, has defended the need to conserve biodiversity. Although there are very compelling accounts of how defending the interests of biodiversity ultimately benefit humans, the situation is not so straightforward when matters of dire necessity, such as feeding oneself, get in the way. This is the subject of the next section.

VII.1. Globalisation, Biodiversity Protection and Poverty Alleviation

Globalisation and trade liberalisation are the result of efforts made by the Western nations for more than 200 years. The opening of frontiers to increase commerce, through the lowering of tariffs and the reduction of *de facto* barriers, played a critical role, along with the exploitation of renewable and non-renewable natural resources.[180] One might think that this trend has brought prosperity to the world in general; assuming that more trade is directly proportional to more income. This cannot be further from the truth.[181]

Poverty indexes have increased during the last decades, enlarging the inequities between the rich and the poor. This situation applies to countries and individuals alike, with alarming results: Data gathered by the UN revealed that by the year 2002, 1.3 billion people, corresponding to almost one-fifth of the world population, were living on less than one dollar a day.[182] This is the extreme poverty index that, extrapolated to the sum of two buying capacity dollars a day per person, results in 3 billion people, half of the

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[179] The subject of standing in Colombia and Australia is developed in the comparative section of Chapter II.

[180] 'For the world the benefits of liberalization should exceed the cost. During 1995–2001 the results of the Uruguay Round of the GATT (General Agreement on Tariffs and 1hde) are expected to increase global income by an estimated $212–$510 billion-gains from greater efficiency and higher rates of return on capital, as well as from the expansion of trade'. United Nations Development Programme (UNDP), Human Development Report, 'Globalization—Poor Countries, Poor People' in *Human Development to Eradicate Poverty* (1997) 82.

[181] 'The overall gains obscure a more complex balance sheet of winner and losers. Projected losses are heavily outweighed by the gains, but those losses will be concentrated in a group of countries that can least afford them-and for some the cost will be significant. The least developed countries stand to lose up to $600 million a year, and Sub-Saharan Africa $1.2 billion'. Ibid.

[182] Niels Hermes and Robert Lensink, 'The Empirics of Microfinance: What Do We Know?' (2007) 117(February) *The Economic Journal* F1, F1.

world population, living in conditions of poverty.[183] On the other hand, and parallel to the increment of poverty around the world, another concern arises in the form of environmental degradation. This phenomenon goes hand-in-hand with poverty because '[t]he poor … have little chance to advance in a devastated environment. Conversely, the natural environments where most biodiversity hangs on cannot survive the press of land-hungry people with nowhere else to go'.[184] Increased poverty is not exclusive to developing and least-developed countries. Altay observes that '[p]overty is increasing around the world while the world appears to globalize',[185] and this can only contribute to the expanding gap between rich and poor in developed nations.[186] One of the factors that contribute to inequalities is the overexploitation of natural resources, in most cases to satisfy Western markets.[187]

The word *globalisation* includes in its very meaning ambitious endeavours of industrialisation and the rise of corporations, where every solution should be grand: dams, highways, massive communication systems, huge cities.[188] It is impersonal and obfuscates individual and local identities:

> [A] social identity embodies an individual's societal circumstances and a sense of locality … Social identities are unique expressions of both structural conditions that express change and continuity on the one hand, and the desire to preserve a minimum of stability and independence in an era of declining protectionism, multinational corporatism and dominant economic determinism, on the other.[189]

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[183] Leo de Haan, 'Globalization, Localization and Sustainable Livelihood' (2000) 40(3) *Sociologia Ruralis* 339, 342.

[184] Wilson, *Future…*, above n 27, 189.

[185] Asuman Altay, 'The Challenge for Global Women Poverty: Microfinance (or Microcredit) as a Solution for Women Poverty in Turkey' (Paper presented at the International Conference on Globalization and its Discontents, Cortland, 2007) 1.

[186] 'Globalization has its winners and its losers. With the expansion of trade and foreign investment, developing countries have seen the gaps among themselves widen. Meanwhile, in many industrial countries unemployment has soared to levels not seen since the 1930s, and income inequality to levels not recorded since the last century'. UNDP, above n 180, 82.

[187] Altay, above n 185, 1.

[188] '[T]he commonalities between the interests of states, [Transnational Corporations] TNCs, and international agencies make up collectively a governance mechanism working towards the same goal, which is continued globally organized capital accumulation or "development"'. Matthew Paterson, 'Interpreting Trends in Global Environmental Governance' (1999) 75(4) *International Affairs* 793, 797.

[189] Judith Cherni, 'Social-Local Identities' in Timothy O'Riordan (ed), *Globalism, Localism and Identity: Fresh Perspectives on the Transition to Sustainability* (Earthscan Publications, 2001) 61, 62.

It would be wise to revisit the very convenient poverty indicator based on wages. Low incomes are just an indicator, not a definition of all of the factors that poverty entails.[190] For instance, among the large range of indicators, the direst are the lack of access to clean water, at least marginally satisfactory forms of sanitation, and adequate food,[191] all of which are linked to environmental degradation. These problems are so far removed from the highest socio-economic levels of the Western World that they may be unimaginable. To illustrate this point, in some developed countries, a food shortage issue may mean not eating lamb-chops more than three times a month; in some developing countries, the problem is perceived as not being able to eat, at all.[192] The same is true for water and sanitation, which are highly dependent on infrastructure that is such an integral part of the developed world that people tend to take it for granted.[193] Nevertheless, in remote places, such infrastructure is likely absent, with the population instead relying on wells accessing a half-dry aquifer, and cesspits in place of sewerage systems. The asymmetries are so substantial they seem unfathomable. To put it bluntly: 'Poverty means that opportunities and choices most basic to human development are denied'.[194]

Accepting the premises presented by Wilson whereby '[t]he central problem of the new century … is how to raise the poor to a decent standard of living worldwide while preserving as much of the rest of life as possible',[195] and that '[b]oth the needy poor and vanishing biological diversity are concentrated in the developing countries',[196] then this interest in conservation strategies is impossible to ignore. The traditional perception of conservation as an activity *per se*, the goal of which is to impede 'development in order to

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190 'Concerns with identifying people affected by poverty and the desire to measure it have at times obscured the fact that poverty is too complex to be reduced to a single dimension of human life. It has become common for countries to establish an income-based or consumption-based poverty line. Although income focuses on an important dimension of poverty, it gives only a partial picture of the many ways human lives can be blighted'. United Nations Development Programme (UNDP), Human Development Report, 'Poverty in The Human Development Perspective: Concept and Measurement' in *Human Development to Eradicate Poverty* (1997) 16.

191 Wilson, *Future...*, above n 27, 189.

192 De Haan notes that '[s]ocial exclusion is a dynamic phenomenon. Just as in the Netherlands a schoolchild without a mobile phone hardly counts, and many municipal social service departments consider a television set and a subscription to a newspaper to be primary needs, in India a women (sic) is excluded from marriage when the level of a dowry is beyond the means of her family'. De Haan, above n 183, 343.

193 United Nations Development Programme (UNDP), Human Development Report, 'Resisting New Forces of Poverty in a Changing World' in *Human Development to Eradicate Poverty* (1997) 63.

194 UNDP, above n 190, 15.

195 Wilson, *Future...*, above n 27, 189.

196 Ibid.

limit negative impacts and *preserve* the natural environment'[197] misses the point. It fails both in the understanding of what conservation really means, as well as in the refusal to view development from a non-Western perspective.[198] A change of paradigm that addresses both problems from the angle of the communion between man and nature, as opposed to as a master/servant business-like relationship, may hold the key to these seemingly irreconcilable disciplines.[199] Nevertheless, it can be acknowledged that the tension between them is perhaps one of the reasons why donations to fund conservation efforts have been diverted towards a newly reinvigorated poverty reduction goal.[200]

On the (mis)conception of sustainable development on the other hand, Bosselmann accurately observes:

> Opposed to this philosophy of more-is-better lies the philosophy of different-not-more. It asks the question "sustainability of what?". The concern here is that sustainable development simply means to sustain the Western way of life at the expense of the poor and of future generations. To be sustained are not the economic, but the ecological conditions requiring substantial changes in economy and society. From this perspective the central issue is environmental sustainability and not development, making a concept of a sustainable society preferable, perhaps, to sustainable development.[201]

To harmonise conservation and poverty alleviation, the conception of sustainable development has to be reoriented. It ought to recognise that ecological protection can contribute to the achieving of sustainable livelihoods for the most dejected sector of the World's population, in a way that promotes equity for the people who depend on their natural environment.[202] This shift of perception among the development paradigm

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[197] Gonzalo Oviedo, Pascal van Griethuysen and Peter B Larsen (eds), *Poverty, Equity and Rights in Conservation* (IUCN, Gland, Switzerland; IUED, Geneva, Switzerland, 2006) 53.

[198] 'The concern here is that sustainability too readily denotes stasis and equilibrium whereas life is about change and growth. From this perspective development is the important dynamic element, making sustainable development a concept which ensures lasting economic growth and energy production or—in the words of the World Bank—simply a "development that lasts"'. Klaus Bosselmann, 'Ecological Justice and Law' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2007) 129, 153.

[199] This is the 'Parks v Peoples' debate, which will be addressed in the next chapter in terms of the advantages of and objections to the fortress conservation model.

[200] Matt Walpole and Lizzie Wilder, 'Disentangling the Links Between Conservation and Poverty Reduction in Practice' (2008) 42(4) *Oryx* 539, 539.

[201] Bosselmann, above n 198, 153.

[202] Although the 1997 Human Development Report already linked environmental degradation with poverty, the results from the latest published report based on 2011 data are discouraging. Even more data support that the countries with the greatest social inequalities are also experiencing increased environmental degradation, which in turn affects their populations in greater measure. See generally, United Nations Development Programme (UNDP), Human Development Report, *Sustainability and Equity: A Better Future for All* (2011).

'reflects a growing understanding within both natural and social sciences about the constitution and role of biodiversity and wider ecosystem services'.[203] Edwards and Onyx summarise it as the reconciliation of three imperatives, interconnected in such a way that the misuse or overuse of any of them may cause the collapse of the entire system:

> (i) the ecological imperative to live within global biophysical carrying capacity and maintain biodiversity; (ii) the social imperative to ensure the development of democratic systems of governance to effectively propagate and sustain the values that people wish to live by; and (iii) the economic imperative to ensure that basic needs are met worldwide.[204]

A panacea of sorts has attempted to settle many North–South debates in this context: the obligation that industrialised countries should lend their Southern counterparts aid. This help, known as official development assistance (hereinafter ODA) is designed to 'facilitate the transition to sustainable development'.[205] Commentators such as Sachs criticise the Northern compromise to provide ODA. He states that, although the rich world famously pledged that a target of 0.7 of the GNP would be devoted to ODA, the real share committed declined from 0.3 to 0.2 per cent during the 1990s.[206] Hunter et al summarise the situation as follows:

> The decline has been reversed to some extent in light of promises made to meet the Milennium Development Goals. In 2004, total ODA from the major OECD donor countries was just under $80 billion, up 5.9% from 2003. The 2004 numbers may also be misleading because one-third of the increase ($12.6 billion) was sent to Iraq and Afghanistan for post-war reconstruction. In any event, only a few countries (the Netherlands, Norway, Denmark, Sweden and Luxembourg) meet the UN target for ODA of 0.7% of GPP, a voluntary target frequently reaffirmed at UN Conferences. The United States provided a little under $20 billion in ODA in 2003, which is 0.17% of our GNP (the OECD as a whole gave 0.26% of its GNP).[207]

Sachs[208] and Hunter et al[209] draw attention to the fact that when aid is reduced, then greater attention must be paid to the type of projects that need funding and their correct

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203 Oviedo, Van Griethuysen and Larsen, above n 197, 53.

204 Mel Edwards and Jenny Onyx, 'Social Capital and Sustainability in a Community under Threat' (2007) 12(1) *Local Environment* 17, 18.

205 Hunter, Salzman and Zaelke, above n 63, 1551.

206 Jeffrey D Sachs, *The End of Poverty–Economic Possibilities for Our Time* (The Penguin Press, 2005) 213.

207 Hunter, Salzman and Zaelke, above n 63, 1552.

208 Sachs, above n 206, 227–228.

implementation. This can prevent, for example, the embezzlement of resources by corrupt officials; a difficult task when large sums of money enter the sovereign territory of other nations. To tackle this problem, Haas proposes a networked decentralised model of governance that would allow countries to cooperate in more 'holistic or comprehensive policies to address environmental externalities (a diplomatic term for ecological collapse) and to support sustainable development',[210] in which intertwined issues are addressed in a local fashion, accountable to the global goals.[211]

The cases of Australia and Colombia differ greatly in their development. Australia is a developed country, with a very strong economy, whereas Colombia is still a developing country. However, both have inequality issues, especially in vulnerable sectors of the population. In Australia, the disadvantages of the Aboriginal population compared to the rest of the country are palpable in terms of education, sanitation, mortality and access to work.[212] Aboriginals are also over-represented in jails.[213] In Colombia, the disadvantaged sectors are not confined to one ethnic group. One of the biggest poverty-stricken communities is that of the *campesinos*, who have been displaced by illegal groups and driven to the cities.[214] These groups are effectively dispossessed of their lands and when and if they return, their concern is productivity. Another similarity is that both countries have placed their hopes for overcoming these inequalities in the mining sector, which is also one of the most deleterious industries for the environment. Colombia and Australia

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209 Hunter, Salzman and Zaelke, above n 63, 1552.

210 Peter M Haas, 'Addressing the Global Governance Deficit' (2004) 4(4) *Global Environmental Politics* 1, 1.

211 See, ibid.

212 See, Australian Human Rights Commission, *Race Discrimination–Face the Facts 2005* <www.hreoc.gov.au/racial_discrimination/face_facts_05/atsi.html>.

213 In 1991, the Royal Commission into Aboriginal Deaths in Custody presented compelling evidence of the over-representation of Aboriginals in Australian jails and the tendency of the police to prosecute Aboriginal offenders and the Courts to sentence them. Commentators show that these trends have not varied substantially in the last couple of decades. Findlay, Odgers and Yeo argue that the determining factor is over-policing, while Cunneen provides a comprehensive analysis of the underlying causes, citing racism and economic disadvantage as the main contributing factors. See, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) 339–343; Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2005–2006) 17(3) *Current Issues in Criminal Justice* 329; Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4th ed, 2009).

214 Displacement can be even more damaging when racial discrimination factors are present. This is the case for instance for the black communities in Colombia. For a complete analysis on forced displacement and its incidence in Afro-Colombian populations see César A Rodríguez Garavito, Tatiana Alfonso Sierra and Isabel Cavelier Adarve, *El desplazamiento afro: tierra, violencia y derechos de las comunidades negras en Colombia* (Universidad de los Andes, Facultad de Derecho, CIJUS, Ediciones Uniandes, 2009).

are two of the most biodiverse countries in the world, a fact that must be considered in any strategy that may bring its destruction.

IV.2. Collisions: Indigenous Peoples' Human Rights and the Interests of the Majority within Conservation Debates

The first source of dispute between Indigenous peoples and the interests of the broader political community is the right to land. Indigenous peoples and other ethnic minorities have been awarded special territories under variations of the figure of 'reservations'. Although the ideal form of a reservation coincides with territories where Indigenous peoples hold traditional forms of occupation, in certain cases they have been either evicted from their lands or relocated to other places. The relocation can have happened immediately after colonisation or years later. Consequently, special treatment awarded to minorities regarding land may be felt to be unfair favouritism, affecting communities that do not have that ethnic component. At the other end of the spectrum, evicting Indigenous peoples from territories in the interests of biodiversity conservation is another form of violence.

In Colombia, for example, there was a debate in the wake of a Constitutional Court decision regarding whether *mestizo* minorities should have the same consultation rights as the Afro descendent and Indigenous inhabitants of *the same community*. In the injunction judgement T-769/2009, the Court recognised that the rights of the Indigenous peoples of the Embera community (eg, consultation, due process) had been violated by the concession of mining licences to multinational corporations.[215] Many factors were in play in the decision, and the ethnic minorities, not in small part due to the status of the *ILO 169* treaty, were the basis for granting the injunction. In the case of the municipality and mining district of Marmato in the Caldas province, the inhabitants are not mainly Afro-Colombian or Indigenous, but a cohesive community of mixed heritage. The community has practiced artisanal mining for generations, and its members have been ordered to cease and desist in their activities. The reasons adduced by the government were that the

[215] Constitutional Court, *Judgement T-769/2009* ('*Mandé Norte Case*').

small-scale mining activities of the people of Marmato generated pollution to rivers and underground aquifers. However, the solution was the granting of a mining licence for a megaproject called *Mandé Norte* to one of the biggest gold mining multinationals in the world. Large-scale mining, when left unchecked, is a source of pollution hundreds of times greater than that caused by artisanal mining. In this case, the community does not have the possibility to seek an injunction because they do not belong to the right ethnicity, despite their plight being similar in every other respect. This is only one example of the inequality that having special minority or ethnic rights can engender.

There is also an asymmetry in the land allocation to Indigenous groups. In Colombia, Indigenous and Afro-Colombian minorities constitute less than 4% of the population of the country. However, they have been entitled, through the collective right to land in the form of *resguardos*, to a land extension equivalent to roughly 30% of the country's territory.[216] The basis for this special status is the recognition of the collective right to ancestral territories, directly protected in the Constitution.[217] This subject is discussed in more detail in Chapter IV of this thesis. In a country in which poverty, unemployment and illiteracy are real and present problems, and where people are routinely displaced,[218] it seems unfair to have this asymmetry. In Australia, the first recognition of land rights of any sort to Aboriginals and Torres Strait Islanders was the *Aboriginal Land Rights Act 1976* (NT). Later, the landmark *Mabo* case[219] created the 'new' legal category of Native Title rights. Based on these and other developments, today Aboriginal and Torres Strait Islander peoples hold rights over 20% of the Australian land mass.[220]

Coming back to management of natural renewable resources, there is a double clash between TEK techniques and domestic regulations. The first is that the aforementioned activities may be incompatible with environmental protection regulations, especially those

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[216] Ministerio de Ambiente, Vivienda y Desarrollo Territorial, above n 21, 97.

[217] The collective right to land held by Indigenous peoples is enshrined in arts 63 and 320 of the *Colombian Constitution 1991*. The collective right to land held by communities of African descent is regulated by *Act 70 of 1993 Recognising the Occupation of Territories in the Pacific Basin by Black Communities* (Colombia). This Act recognised that communities that started as havens for escaped slaves, especially in the Colombian Pacific coastal region, had developed deep links to the lands they occupied and that status deserved to be especially protected.

[218] By 2008, Colombia had the second highest number of displaced people in the world because of an internal armed conflict; Sudan had the highest. Rodríguez Garavito, Alfonso Sierra and Cavelier Adarve, above n 214, 7.

[219] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo No 2*').

[220] Reconciliation Australia, *Q&A Factsheet–Aboriginal Land Rights* (December 2010) <www.reconciliation.org.au/home/resources/factsheets>.

that govern National Parks and other protected areas.[221] The second comes from the other end of the spectrum, in that the right to land is eroded by mining titles, prospecting concessions and timber licences;[222] a prevailing problem in both Australia and Colombia.

Apart from timber, which is a resource that grows *over* the land, the extraction of mineral non-renewable resources presents a legal conundrum. Both the Australian and the Colombian legal regimes consider that anything found below ground is the property of either the nation or the State. As such, the Crown and the Government are in the position to either mine the minerals themselves, or grant licences to domestic or foreign companies to do so. In Australia, Strelein suggests that the leases and joint management agreements of protected areas between Aboriginal peoples and the government were in part 'arranged to give mining companies access to mineral deposits'.[223] This is a bold statement that may reflect some activism on the part of the author. Nevertheless, social scientists may verify the accuracy of this statement.

Even if there are strong arguments supporting mining as a potential benefit for the majority, the division between ground and underground is artificial at best. Most mining operations end only when the resource in question is exhausted, leaving behind a barren pit where not even the most tenacious weeds attempt to grow. Coal mining and open sky gold extraction are classic examples of this. This is not a shallow criticism of mining. This is a simplified illustration of the legal issues being experienced in Australia and Colombia in regards to this activity. Besides the well-known environmental harms, Indigenous communities are affected by these activities in ways unsuspected by Western people. Think of the destruction of sacred sites, the draining of Mother Earth's blood, and the disruption of the spiritual world.[224] This all translates to raise the issue of the role of the

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[221] For a paper explaining why Aboriginal Australians struggle with the dominant 'white' legal concepts, see Michael Adams and Anthony English, '"Biodiversity is a Whitefella Word": Changing Relationships between Aborigines and the New South Wales National Parks and Wildlife Service' in Luke Taylor et al (eds), *The Power of Knowledge. The Resonance of Tradition* (Aboriginal Studies Press, 2005) 86–97.

[222] A landmark case of Indigenous peoples fighting a timber licence occurred in Nicaragua. See, *Mayagna (Sumo) Community of Awas Tingni v Nicaragua (Judgement)* (Inter-American Court of Human Rights, Case No Ser C, No 79, 31 August 2001).

[223] Lisa M Strelein and Jessica K Weir, 'Conservation and Human Rights in the Context of Native Title in Australia' in Jessica Campese et al (eds), *Rights-based Approaches: Exploring issues and opportunities for conservation* (CIFOR-IUCN, 2009) 123, 123.

[224] The three scenarios were present in the case of the U'wa in Colombia, who believe oil is the blood of Mother Earth and thus oppose its mining. See especially, Lilian Aponte Miranda, 'The U'wa and Occidental Petroleum: Searching for Corporate Accountability in Violations of Indigenous Land Rights' (2006–2007) 31(2,

collective legal autonomy concerning TEK of Indigenous peoples, which is not an easy question. However, certainly, mining and biodiversity conservation do not usually mix; hence, the absolute prohibition on mining extraction in the fortress conservation model, and in some measure in community-based conservation.

IV.3. Collisions between Biodiversity Conservation and the Human Rights of Indigenous Peoples

The greatest tension between the protection of biodiversity and the rights of Indigenous peoples has been, without a doubt, the eviction of entire human populations for the sake of biodiversity conservation via National Parks. The eviction for conservation scandal has gained momentum, especially after the Parks Congress in Durban, where representatives of numerous Indigenous peoples made an appearance to claim their ancestral rights to their lands.[225]

Another source of tension is the matter of exploitation of natural resources by Indigenous peoples. As can be seen especially in the Australian case, where there are specific hunting and fishing rights and quotas,[226] once new technologies are available, revamped hunting and fishing practices can damage otherwise well-managed ecosystems. An example of this is the dynamite fishing by Aboriginals and Torres Strait Islanders; the fishers in question have a fishing licence, but dynamite fishing is strictly forbidden. Thus, the rights to livelihood and subsistence of the Aboriginal population have to be balanced with the ecosystem protection regulations, which have identified dynamite fishing as

Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law) *American Indian Law Review* 651.

[225] A detailed account of this episode can be found in Mark Dowie, 'Fighting Back' in *Conservation Refugees–The Hundred-Year Conflict between Global Conservation and Native Peoples* (The MIT Press, 2009) 153–181.

[226] This subject was specifically addressed by the Australian Law Reform Commission. See, Australian Law Reform Commission, 'Aboriginal Hunting, Fishing and Gathering Rights: Current Australian Legislation' in *Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

having a destructive impact on vulnerable ecosystems, especially estuaries and other nurseries.[227]

In other cases, traditional practices are not well received by the international community, especially NGOs and environmentalist groups. Such is the case of the Inuit, who live in the Arctic regions and whose livelihood depends in great part on eating the meat of seals and using their pelts. The Canadian government allows a total annual catch of 10 000 seals for Indigenous peoples, whereas the allowance of commercial 'landings' has fluctuated between 200 000 and 400 000 between 1995 and 2012. The bashing of baby seals for their fur in its most inhumane expression was outlawed, and it is now illegal to slaughter pups from one to 11 days old. It should be noted that the Inuit never carried out this practice; rather, it was the white Newfoundlanders who skinned the white furred pups and threw their bodies away. Extreme groups such as Sea Shepherd decry the hunting of seals, with good reason. However, and despite Inuit spokespersons denying that their methods for hunting are inhumane and insisting that they only hunt adult seals, the environmental group still holds them responsible for their share of the hunt. Advocating for the protection of marine mammals, Sea Shepherd has condemned Indigenous groups, equating their justifications to those of Japanese whalers.[228]

Not every practice performed by Indigenous peoples within their environment can automatically be classified as benign. This Manichean and simplified division has done much more harm than good.[229] As Chapter III elaborates, the constant and compulsive impulse to include people in the appropriate category has, overall, been detrimental for the Indigenous peoples' rights movement. The simplification of Indigenous peoples as either primitive savages, that in their ways are charming, or peoples deemed to have shunned their culture because they do not wear the feathers and bone-pendants anymore

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[227] See the comments on the clash between Native title rights and the environment, especially in regards to fishing, in Anne Hewitt, 'Commercial Exploitation of Native Title Rights—A Possible Tool in the Quest for Substantive Equality for Indigenous Australians?' (2012) 32 *Adelaide Law Review* 227, 261.

[228] The question of Japanese whaling expeditions under the cloak of 'research purposes' condoned by art VIII(1) of the *Whaling Convention* makes the news on a regular basis, especially when activists from Green Peace or the Sea Shepherd are involved. For the clashes between Australia and Japan on this issue, given that Australia has declared part of its Exclusive Economic Zone around its portion of Antarctica as a marine nature reserve, see Natalie Klein, 'Whales and Tuna: The Past and Future of Litigation between Australia and Japan' (2008–2009) 21 *Georgetown International Environmental Law Review* 143.

[229] This argument will be fully discussed in Chapter III, which analyses the application of the Myth of the Noble Savage in the drafting of policies concerning Indigenous peoples. One of the arguments is that international law and domestic regulations, perhaps unintentionally, have promoted an enforced and romantic primitivism.

is almost schizophrenic. It is surprising that the common perception of Indigenous peoples today swings between those two extremes, without consideration as to what makes these cultures rich and unique. Just as city-dwelling people in Australia and Colombia do not normally sew their own clothes from the wool sheared earlier in the year from their sheep, several Indigenous nations of both countries prefer to buy their clothes in a store. To discriminate them sartorially thus seems far worse than just uninformed.

V. CONCLUSIONS

By revisiting the critique of the progress paradigm, it is possible to see that it is not only embodied in the artificial separation between people and nature. Perhaps this separation is only human awareness of the things around them; a random wonder of evolution that allows us to conceptualise our surroundings. However, it is precisely this variety, in all of the elements of the biosphere, and in all of the unique cultures that make humanity rich and interesting, that is worth protecting. This is indeed a moral duty, but one that also brings tangible benefits for society, either through the economic use and non-use values of biodiversity, or in the capacity to discover that not every society pursues the same goals.

This chapter has justified the moral relevance of legally protecting biodiversity and the rights of Indigenous peoples. It showed that the three components of biodiversity, genes, species and ecosystems, are deeply intertwined and that the most effective strategy to protect them is the ecosystem *in-situ* approach. In regards to the rights of Indigenous peoples and their cultural diversity, this chapter identified five sets, equally intertwined. These are the rights of self-determination; governance autonomy, over territories and resources; public participation and consultation spaces; cultural integrity; and non-discrimination. Biodiversity conservation and the rights of Indigenous peoples may seem to be in tension, but the affinity of Indigenous peoples with their environment creates positive points of contact between them. However, the majority society, especially when facing issues of resource scarcity, poverty and hunger, may disagree with land allocations

for these two legally protected interests. The identification of a linear conception of progress that accepts only one kind of development exacerbates this possibility.

Having seen all of the clashing interests that compete in the legal strategies for biodiversity protection, an interesting pattern emerges. This pattern is that the West embodies the rejection or mistrust of diversity of every kind. This includes the disregard of the ways of living of ethnic and cultural minorities, the sacrificing of biodiversity for the sake of economic interests, and the homogenisation of development projects and endeavours that follow a global model. Western progress validates only itself as the appropriate model to pursue. Given that both the Civil Law and Common Law systems developed under this way of thinking, it is logical to presume that the laws and regulations of those systems in turn evolved to reflect and develop the vision of progress. The case of property rights and planning laws is a perfect example. Land is now classified in terms of its potential use and productive value: as agricultural land or pastoral grounds, as a way to access water catchments, as a source of timber or as plots for developing human settlements. Wild ecosystems are set apart only as long as their value to people under this paradigm can be ascertained. For instance, fortress conservation, as will be seen in the next chapter, was born of the need of urban dwellers to find respite, to wander away for a little while and marvel at the beauty.

By shunning diversity, progress has effectively overshadowed these two morally relevant interests: the value of biodiversity in its own right and the rights of Indigenous peoples in their cultural diversity. The first is denied by simple lack of care and understanding; species are protected only when they represent or embody some human interest.[230] The second, the interests of Indigenous peoples such as their livelihoods, habitations and spiritual practices, are denied because they do not follow the expected linear model. They are thus interpreted as being in transition, yet to have grown and matured or, for a long time, seen as doomed to disappear or be assimilated. Progress thus takes diversity, both biological and cultural, and reduces it to only the validated expressions vouchsafed by the paradigm. They become homogenised. This is what has come to be known as globalisation: the gradual swallowing of all expressions of diversity that do not conform to the prevailing view.

[230] See Chapter III.

The next chapter explores the current legal concepts in the field of biodiversity protection, their origins and why international law and domestic legislation, including in Australia and Colombia, may face the pressing challenge of reviewing their conservation policies. Thus, the notion to defend is that the preservation of healthy terrestrial ecosystems is a sound goal and that legal strategies should follow this approach instead of focussing on protecting only single endangered species. Nevertheless, the logical caveat here is that the cultural diversity of peoples can also count as an endangered asset that should be considered in conservation legal strategies:

> Biodiversity also incorporates human cultural diversity, which can be affected by the same drivers as biodiversity, and which has impacts on the diversity of genes, other species, and ecosystems.[231]

[231] United Nations Environment Programme (UNEP), 'Global Environment Outlook' (Report No GEO-4, UNEP, 2007) 160, Box 5.1.

CHAPTER II

FORTRESS CONSERVATION: SEPARATING PEOPLE FROM NATURE

I. INTRODUCTION

Chapter I offered a conceptual framework of the components of biodiversity as a legally protected interest and the different human rights of Indigenous peoples that ought to be recognised within a legal system. It also presented some of the challenges of the protection of biological and cultural diversity. This chapter addresses the research question of whether the fortress conservation model provides an adequate solution for the collision between the legal interests of biodiversity protection and the recognition of the human rights of Indigenous peoples today.[1] To do this, both goals have to be maximised concomitantly. The term 'fortress conservation' has been chosen because of its prevalence in current literature on National Parks, discussed further ahead.[2]

This chapter claims that fortress conservation, in the guise of National Parks and other protected areas, can be an adequate strategy to protect biodiversity for three reasons.[3] First, it maximises the protection of endangered species and vulnerable populations, especially when it is applied in places with high rates of endemism (hotspots). In this way, it slows the anthropogenic event known as the sixth extinction.[4]

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[1] As the introduction of the thesis proposed, in countries such as Australia and Colombia that are both megadiverse and harbour multiple Indigenous nations, biodiversity conservation strategies have to reach a Pareto optimal solution.

[2] Several authors, most prominently Dan Brockington, use the name to denounce the often violent steps taken to either remove people from the lands or keep them out. In his book, *Fortress Conservation*, he attacks the creation and management of Mkomazi National Park in Tanzania, especially from the perspective of the itinerant pastoralists whose access to pastures inside the new reserves was denied. See generally, Dan Brockington, *Fortress Conservation–The Preservation of the Mkomazi Game Reserve, Tanzania* (Indiana University Press, 2002).

[3] **Caveat:** as noted in the introduction, this thesis does not address the subjects of intellectual property over the genetic components of biodiversity, access and benefit-sharing regimes, or genetically modified organisms. It focusses on the *in-situ* protection of biodiversity because of its intrinsic value and the guarantee of ecosystem services for generations to come.

[4] See sections IV.1. and IV.2. of this Chapter.

Second, it can maximise the flow of ecosystem services in especially vulnerable or fragile ecosystems. Third, it capitalises on earlier efforts of protection of wildlife and wildernesses, mostly in the form of National Parks. However, the strict application of the model overlooks the recognition of the human rights of Indigenous peoples and cannot achieve an appropriate balance between the two interests. Fortress conservation has a salient flaw: it promotes the complete separation between people and nature, seeing all human activities inside protected areas as potentially destructive. It will be shown that the focus on protected wilderness preserves based on this separation promotes unfair models, under which Indigenous peoples have been displaced from their territories.[5] This chapter does not fully agree with the focus of the recent critiques in the debate over protected areas, especially because they have centred on the experiences of African countries, in particular Kenya and Tanzania, which are in many respects not comparable to Colombia or Australia. However, the arguments are used to discuss the technical objections to fortress conservation.

The obligation to protect the two colliding interests at stake, namely biodiversity conservation and the recognition of the human rights of Indigenous peoples, are present in several environmental and human rights international treaties.[6] If a country finds itself in a situation of having ratified both sets, then a collision can occur. On the one hand, stringent conservation mechanisms should take place in any given protected area; potentially denying access and use to any and all people. In this scenario, Indigenous peoples who have ancestral claims over lands and resources may find themselves dispossessed by conservation policies. On the other hand, if vulnerable ecosystems such as wetlands are given without restriction to Indigenous peoples, the risk arises that these groups may mismanage the lands, cause the disruption of ecosystem services or prompt the extinction of species.[7]

The collision could be resolved by choosing one of the two options over the other. This is a compromise that cannot be made in countries that are at the same time

[5] For a journalistic account documenting the plight of displaced Indigenous peoples and local communities around the world (referred to as 'Conservation Refugees') since the creation of the first National Parks in the United States, refer to Mark Dowie, *Conservation Refugees–The Hundred-Year Conflict between Global Conservation and Native Peoples* (The MIT Press, 2009).

[6] Refer to Chapter I, which mapped the different sets of rights that ought to be recognised to Indigenous peoples under the international law human rights framework.

[7] Note that Colombia has ratified several human rights and environmental treaties, especially since the enactment of the 1991 Constitution. In contrast, Australia has been reluctant to subscribe human rights treaties that contain differentiated rights for Indigenous peoples.

biologically and culturally diverse and that have international obligations to protect both interests. This chapter claims that fortress conservation in its strictest form as the only option available is no longer considered best practice. It first reviews the evolution of international environmental law principles, verifying that they have purposefully deviated from this concept and more inclusive strategies.[8] This evolution can be divided into three distinct stages: the early environmentalist school of the beginning of the twentieth century; the listing system endorsed in *Ramsar* and the *World Heritage Convention* ('*WHC*'),[9] which highlights the international importance of certain areas within state borders; and the open-textured 'common concern of humankind' concept of the *Convention on Biological Diversity* ('*CBD*'), [10] which promotes a cooperative international model under the parameters of sustainable use of natural resources.

Moreover, this chapter will show that even though conservation efforts in the two countries of study initially followed the fortress conservation model, adopting National Parks systems, the post-Rio key developments in participation of the 1990s affected the direction of both countries. Australia has since engaged in co-management agreements between the government and Aboriginal peoples of protected areas, adopting community-based conservation strategies; whereas, Colombia has had legal developments that promote the collective legal autonomy concerning TEK. Thus, a comparative analysis shows a historical tempering of the fortress conservation model, albeit responding to different pressures. In Australia, the prominent role of the Commonwealth Government in conservation in the 1970s and 1980s, under the umbrella of the foreign affairs power of the Constitution, created tensions with the State governments. This tension, coupled with the conceptual framework of the *CBD*, prompted 'cooperative

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[8] The principle of sovereignty, which governs international relations, acquires an even more important dimension when related to natural resources. The *UN Charter* includes the principles of sovereignty and sovereign equality in article 2(1). Both are mentioned in the Preamble of the *Vienna Convention* and can be considered interpretation parameters. *Charter of the United Nations*, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945) ('*UN Charter*'); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*'). See also, *Declaration on Permanent Sovereignty over Natural Resources*, GA res 1803 (XVII), UN GAOR, Supp No 17, UN Doc A/5217 (14 December 1962); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance to the Charter of the United Nations*, GA Res 2625 (III), UN GAOR, Supp No 18 (24 October 1970) Annex.

[9] *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention*'); *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975) ('*WHC*').

[10] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 243 (entered into force 29 December 1993) ('*CBD*').

federalism' in environmental matters. Colombia's early environmental legislation followed a resource management approach, in which forests became especially protected not only for the industrial potential of timber, but as key to the provision of freshwater. The 1991 Constitution changed practically all of the legal institutions of the State, with environmental concerns and public participation at all levels of democracy as central issues.[11] These differences have ultimately influenced the choice of community-based management strategies in Australia, and the development of the collective legal autonomy concerning TEK in Colombia.[12]

II. THE MYTH OF THE PRISTINE LANDSCAPE: LEGAL EVOLUTION OF FORTRESS CONSERVATION

This section argues for three distinct stages influencing the evolution of the fortress conservation model, from the beginning of the twentieth century until the signing of the *CBD*. These phases have the common motif of the protected area, the core purpose of which has remained largely unchanged. However, the philosophic underpinnings of the model have seen a transition from the narrative of the 'pristine landscape' to increasingly inclusive frameworks that admit people as integral to their environment.

[11] *Colombian Constitution 1991*.

[12] Discussed in the following two chapters.

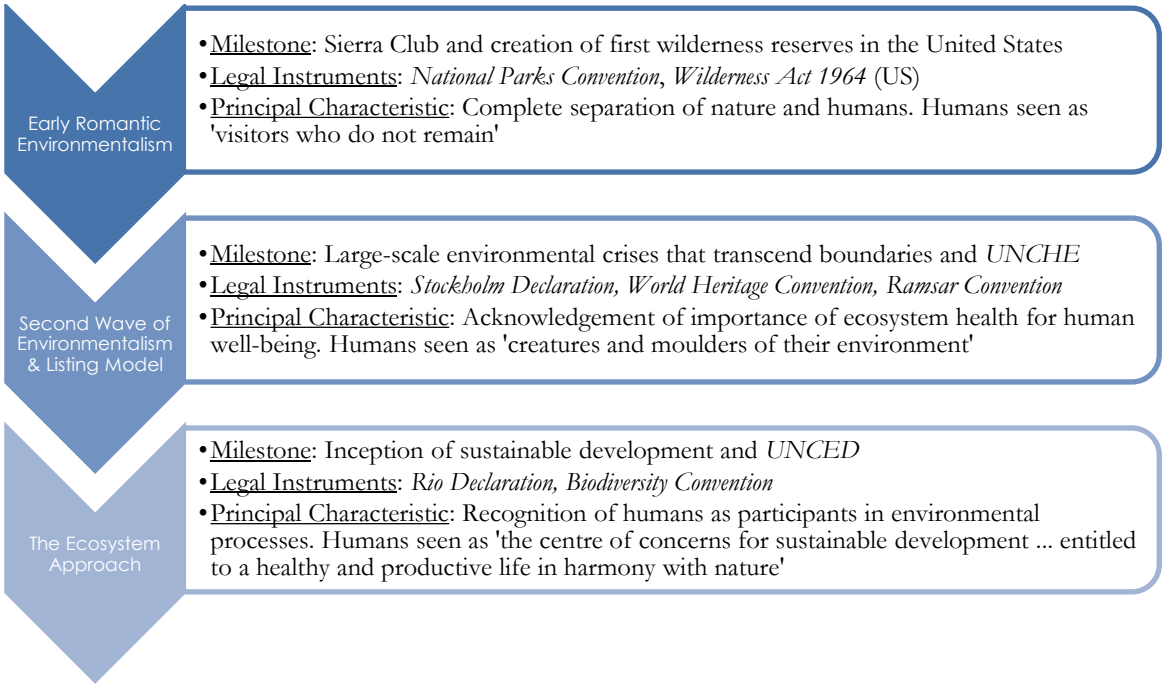

FIGURE 2: EVOLUTION OF FORTRESS CONSERVATION IN THREE STAGES

II.1. Early Romanticism and National Parks

The first milestone in the creation of protected areas for the sake of nature and wilderness conservation can be traced to John Muir, the Sierra Club and the early Romantic environmentalists in the United States.[13] Without disparaging their important works, and acknowledging their debt to conservation, a stark critique is in order. Muir's positions as a skilled lobbyist spawned the model of preservation of nature reserves as 'pristine' repositories.[14] Complemented with a religious discourse fond of comparing the forests of the United States with untouched gardens of Eden, the reverence of nature kept in a presumably virgin state was born.[15] This history of Yosemite National Park in the United States was the origin of the selective blindness in the creation of fortress style protected areas, which saw the landscapes but overlooked the people. This explains, in

[13] The Sierra Club is one of the oldest and most well established environmental NGOs. It has conducted very important initiatives to protect the environment, and John Muir had some insights that made him a visionary in many ways. However, this aspect of his work is well known among environmental lawyers, and it does not require further investigation here. Instead, his body of work is critiqued from the legal and philosophical standpoints.

[14] The Oxford Dictionary definition of the word 'pristine' is 'in its original condition; unspoiled'.

[15] Payne provides an account of John Muir's efforts as a conservation lobbyist, and compares his approach with two other influential nature writers: John Burroughs and Rachel Carson. Daniel G Payne, '"Talking Freely Around the Campfire": The Influence of Nature Writing on American Environmental Policy' (2010) 12(1) *Society & Natural Resources: An International Journal* 39, 42–44.

part, the exclusion of Indigenous peoples from nature conservation. Some old concepts linger.

The perceived disconnection between people and their surroundings that the last chapter discussed is arguably a misrepresentation of reality. As Godden and Peel accurately observe, the period of the Enlightenment marked the birth of anthropocentrism as a doctrine, creating the nature/human dualism critiqued here.[16] It is useful to draw on how Horkheimer and Adorno conceptualised this separation, which accurately represents the attitudes towards the environment that ultimately promoted fortress conservation as a countermeasure. The authors saw this as a malaise characterised by the feeling of non-identity that human beings experience towards Nature. There is an almost mystic quality about it that prevents us from fully grasping and comprehending it.[17] This baffling inability engenders fear of the unknown and an almost compulsive desire to control and master nature, perhaps to prove that humans are capable of fending for themselves by means of their own devising.[18] Once people, thanks to the developments in science, began to properly understand the causes of natural phenomena such as tides, storms and droughts, the fearful attitude turned into a domination drive. Nature thus became a set of discrete happenings and processes that, now being understood, could eventually be mastered, especially with the improvement of technology. The further science progresses, the less mystical the relationship with nature becomes. The drive towards industrialisation by means of taming nature came with repercussions. In Europe, where industrialisation was accelerating, foul pollution cases began to arise.[19] Moreover, the shift from life in the country to a crowded existence in

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[16] Lee Godden and Jacqueline Peel, *Environmental Law–Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 20–21.

[17] Max Horkheimer and Theodor W Adorno, 'The Concept of Enlightenment' in *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott trans, Stanford Univesity Press, 2002) 4–6.

[18] See generally, ibid. For an analysis of the subject of fear in the Frankfurt school and its relations to reason and nature, see Shane Gunster, 'Fear and the Unknown: Nature, Culture, and the Limits of Reason' in Andrew Biro (ed), *Critical Ecologies–The Frankfurt School and Contemporary Environmental Crises* (University of Toronto Press, 2011) 206, especially 214–217.

[19] Suffice it to recall that in the last decades of the nineteenth century, cities were not only pestilent because of the presence of regular businesses such as tanneries and abattoirs, but were also beginning to experience the first cases of serious air pollution. The phenomenon of the London Fog was a dense mist of greenish colour with the consistency of pea soup that would eventually prove lethal. For the history of the London Fog and its early association with pollution in the nineteenth century see, Peter Brimblecombe, *The Big Smoke: A History of Air Pollution in London since Medieval Times* (Routledge, 1987) Ch 6. For a recent paper reassessing the data of deaths in 1952 following the most serious London Fog event and linking more deaths to air pollution than to influenza or other pathogens, arguing that the effects of pollution linger and increase mortality in the years after an event, see Michelle L Bell and Devra Lee Davis, 'Reassessment of the Lethal London Fog of 1952: Novel Indicators of Acute

the cities, made the claustrophobic yearning for open spaces acute.[20] As Ralph Waldo Emerson would express in his influential essay *Nature*: 'to go into solitude, a man needs to retire as much from his chamber as from society'.[21] More than the fear of pollution, the narratives of Emerson and his disciple and friend Henry David Thoreau foreshadowed the eventual decline of the sublime American paradise landscapes that they vividly depicted. A fear *for* the fate of nature was thus expressed.

This was the romantic vision that inspired the creation of Yosemite National Park, the first park to be protected in the world.[22] In June 1864, Abraham Lincoln signed legislation that deeded the area 'for public use, resort and recreation … to be left inalienable for all time' under the management of the State of California.[23] None of the people involved had ever visited it. They were inspired by a set of evocative pictures that Carleton Watkins took in 1861, depicting a magnificent landscape devoid of human habitation.[24] The photographer arrived to Yosemite 10 years after the Mariposa battalion had started the violent relocation of the Ahwahneechee people,[25] and he avoided including any of the remainder in his pictures.[26] Indigenous peoples continued their activities in the valley and local farmers took their sheep to the meadows for pasture. Enter Muir and the Sierra Club. Starting in 1892, he proposed that the valley should be completely devoid of human habitation of any sort, under the idea that such 'pristine' places should become havens for visitors only. As a skilled lobbyist, he convinced Theodore Roosevelt to visit the area in 1903, and eventually to take national control of the Park. Muir appealed to Roosevelt's documented dislike for Indians to convince him

and Chronic Consequences of Acute Exposure to Air Pollution' (2001) 109(Supplement 3) *Environmental Health Perspectives* 389.

[20] Although this is not a scientific reference, the works of Émile Zola portraying the life in Paris of the Rougon-Macquart family, published in the last decades of the nineteenth century, do serve as an account of the environmental problems of the time. The author poignantly describes conditions of the city working class, and references some illnesses associated with industrialisation, such as respiratory problems. See especially the novels *L'Assomoir*, *Nana* and *Germinal*, all part of the global commons.

[21] Ralph Waldo Emerson, *Nature* (e-books@Adelaide, online ed, 1836). This essay is now part of the global commons.

[22] The second was the Royal National Park in Australia, declared in 1879, and then the Tongarivo in New Zealand in 1894. Dowie, above n 5, 11.

[23] *Yosemite Grant*, cited in ibid 5. This was also mentioned in Kevin Michel DeLuca and Anne Teresa Demo, 'Imaging Nature: Watkins, Yosemite, and the Birth of Environmentalism' (2000) 17(3) *Critical Studies in Media Communication* 241, 241–242.

[24] DeLuca and Demo, above n 23, 241–242.

[25] See Dowie, above n 5, 2–4.

[26] DeLuca and Demo, above n 23, 256.

to implement a 'White Only' policy for new parks, an initiative that succeeded in 1914.[27] Muir's rhetoric used the quasi-legal pastiche theory that would ultimately shape American wilderness area conservation policies: human beings are mere 'visitors'. Under this construction, he even dubbed the Native Americans of Yosemite as its 'first visitors' in complete disregard of existing evidence to the contrary. The valley of Yosemite was a carefully managed landscape where hundreds of peoples of the Miwok, Yokut, Paiute and Ahwahneechee nations tended rotational products, conducted controlled burning and sustained a steady population for generations.[28] In contemporary terms, the site would have better fit the concept of cultural landscape than a pristine wilderness, because it shows a perfect representation of the 'combined works of nature and man'.[29] This is no longer the case because the last vestiges of its original inhabitants, after six decades of abuse from the Park authorities, left in 1969, taking their landscape-tending traditional knowledge with them.[30]

The preservation of wildernesses in the fortress conservation style had a snowball effect that spanned the first decades of the twentieth century. One of the reasons for its success was that the blanket prohibition of hunt or capture inside the closed areas had the effect of restoring wildlife. The re-education of people and the creation of the first 'eco-tourists' had a positive effect that extended the aims of National Parks to include the conservation of natural systems for their own sake.[31] This reinforced the narrative that the best practice for conservation was to ban permanent human habitation, as was ultimately crystallised in a legal instrument. The lyric prose of the *Wilderness Act* illustrates this with historical inaccuracy:[32]

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[27] The non-Indian policy for national parks was first introduced by Samuel Bowles circa 1865. He believed that they should not be allowed in places of scenic beauty and that it was the duty of the State to relocate them to reservations for their own good. Dowie, above n 5, 6.

[28] Ibid 8. DeLuca and Demo note that the Ahwahneechee were either exterminated or relocated before Watkin's photographic expedition. This Indian nation had carefully tended the area for 3500 years. DeLuca and Demo, above n 23, 256.

[29] 'Cultural landscapes are cultural properties and represent the "combined works of nature and of man" designated in Article 1 of the [*World Heritage*] *Convention*. They are illustrative of the evolution of human society and settlement over time, over the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal'. Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention* (2012) s 47 ('*Operational Guidelines*').

[30] Dowie, above n 5, 7–11.

[31] Ibid 11–12.

[32] The active eviction and extermination of the Miwok, Yokut, Paiute and Ahwahneechee peoples serves as a painful reminder of this gaffe.

> A wilderness, in contrast with those areas where man and his works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.[33]

The same concept was the driving force behind the *Convention on National Parks*,[34] which bound most of the states in the Americas.[35] The treaty describes four types of protected areas: National parks,[36] national reserves,[37] nature monuments[38] and strict wilderness reserves.[39] Their regulations are the blueprint for fortress conservation as it is known today. This instrument has two distinct sets of obligations: the creation and maintenance of protected areas and the protection of migratory birds that 'may at any season cross any of the boundaries between American countries'.[40] The treaty has a peremptory language style that has not been replicated in protected area treaties since. It urges the Contracting Parties to 'explore *at once* the possibility' of establishing protected areas and, when this is not feasible, to pre-select eventual suitable areas to be transformed '*as early as possible*'. Once established, National Parks cannot have their boundaries altered, every portion of them should remain inalienable and the hunting, killing and capturing of wildlife without their bounds for commercial profit is strictly prohibited.[41] Additionally, the parties are to maintain the areas declared as strict wilderness reserves *inviolate*, 'except for authorized scientific investigations or government inspection'.[42] To guarantee their obligations, the contracting governments have to 'adopt, or to propose such adoption to their respective

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33 *Wilderness Act of 1964*, United States USC 16 §§ 1131–1136, § 2(c) (1988 & Supp IV 1992).

34 *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*, opened for signature 12 October 1940, 161 UNTS 193 (entered into force 1 May 1942) ('*National Parks Convention*').

35 Only three of the member countries of the Organization of American States (OAS) did not ratify the Convention: Bolivia, Cuba and Colombia.

36 'Areas established for the protection and preservation of superlative scenery, flora and fauna of national significance which the general public may enjoy and from which it may benefit when placed under public control'. *National Parks Convention* art I.1.

37 'Regions established for conservation and utilization of natural resources under government control, on which protection of animal and plant life will be afforded in so far as this may be consistent with the primary purpose of such reserves'. Ibid art I.2.

38 'Regions, objects, or living species of flora and fauna of aesthetic, historic or scientific interest to which strict protection is given. The purpose of nature monuments is the protection of a specific object, or a species of flora or fauna, by setting aside and area, an object, or a single species, as an inviolate nature monument, except for duly authorized scientific investigations or government Inspection'. Ibid art I.5.

39 'A region under public control characterized by primitive conditions of flora, fauna, transportation and habitation wherein there is no provision for the passage of motorized transportation and all commercial developments are excluded'. Ibid art I.4.

40 Ibid art I.5. Although the protection of endangered migratory birds is partially fulfilled by the creation of protected areas, the Annex expands this protection. See arts VII, VIII and the Annex.

41 Ibid art III. This requisite of inalienability has been adopted as one of the hallmarks of National Parks. For instance, the Colombian Constitution states that natural protected areas are guarded by a non-lapsable action, not subject to seizure and inalienable. *Colombian Constitution 1991* art 63.

42 *National Parks Convention* art IV.

law-making bodies suitable laws and regulations for the protection of flora and fauna' in their countries that are not included in National Parks.[43] This provision foreshadowed the developments that would characterise the coming era of environmentalism: a more comprehensive approach expanding outside the confines of wilderness protection. Although this treaty was confined to the Americas, and Colombia did not ratify it, its provisions informed the policies of several countries that adopted them *motu proprio*. In 1995, Rogers and Moore commented that the *National Parks Convention* had 'remained dormant and largely unimplemented since its inception, leading commentators to dismiss it as a "sleeping" or "paper" treaty'.[44] This may be accurate for the immediate sense, but the authors missed that the influence of the treaty went well beyond its implementation because it perpetrated an idea of best practice that has remained engrained.[45] However, this cannot be construed as an international customary practice. Rather, conservation by means of protected areas was a mostly domestic affair.[46]

The purported separation that created the false dichotomy between the human world and the natural world was a fabricated narrative. It was also ultimately responsible for a misguided notion of environmentalism that satisfied itself with the stringent protection of magnificent pockets of wild landscapes while the razing of the world around them continued unabated.[47] Indeed, environmental groups charged with the protection of wilderness 'relieved themselves of the responsibility of protecting non-pristine areas and

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43 Ibid art V.

44 Kathleen Rogers and James A Moore, 'Revitalising the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere: Might Awakening a Visionary but "Sleeping" Treaty Be the Key to Preserving Biodiversity and Threatened Natural Areas in the Americas?' (1995) 36 *Harvard International Law Journal* 465, 466.

45 Two other regional treaties followed the approach. The European countries adopted the *Bern Convention*, protecting wildlife habitats on that continent, and the Association of Southeast Asian Nations (ASEAN) subscribed a similar treaty in 1985, which requires the ratification of six of the 10 member countries to enter into force (art 33). Only Indonesia, the Philippines and Thailand ratified it in 1986, meaning that the treaty has had no effect in almost three decades. *Convention on the Conservation of European Wildlife and Natural Habitats*, opened for signature 19 September 1979, 1284 UNTS 209 (entered into force 1 June 1982) ('*Bern Convention*'); *ASEAN Agreement on the Conservation of Nature and Natural Resources*, opened for signature 9 July 1985, 15 EPL 2 (not yet in force).

46 As Birnie and Boyle comment, no customary law that could apply to the conservation of natural resources existed prior to the Rio Summit. Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford University Press, 2 ed, 2002) 561.

47 In the chapter of *Silent Spring* that gives the book its name, Rachel Carson denounces the death of the birds that used to herald the springtime because of the spraying of DDT. She transcribes the testimony of a concerned mother trying to explain to her children how that was possible given that 'Federal law protects the birds from killing or capture' (105). This example illustrates one of the flaws of the US environmental laws prior to the 1960s; that is, the lack of linked pollution prevention policies. Rachel Carson, 'And No Birds Sing' in *Silent Spring* (Haughton Miffin Company, 40th Anniversary ed, 2002) 103–127.

of critiquing the practices of industrialism that degraded the general environment'.[48] After all, their obligations to the environment were discharged when the federal declaration for a protected area was granted. Moreover, by adapting this single narrative, the environmentalists that influenced the first six decades of the twentieth century generally excluded the visions of Indigenous peoples from nature conservation.

II.2. The Listing Model: Engaging Nations in a Mutual Endeavour

International legislation has evolved to adopt more inclusive strategies that have progressively incorporated humans as participants in environmental processes, rather than regarding them as mere destroyers. This subtle but progressive shift of narrative is a step in the right direction for achieving a balance between the interests of Indigenous peoples and biodiversity conservation. The 1970s marked a new generation of environmentalism with more urgency voiced in the United Nations Conference for the Human Environment (UNCHE).[49] By this point, environmental issues, most notably pollution, had developed into crises that required joint global action.[50] In this light, people were portrayed as predators, with good reason. The focus of attention shifted from the romantic longing for beautiful natural spaces, ultimately fulfilled with the protection of small areas, to a bitter realisation that ecosystem services depended on biodiversity and that this was non-renewable and irreplaceable once lost. As Birnie and Boyle comment, 'if such a disaster occurs, modern technology cannot reproduce in laboratories the subtle differences between varieties that have evolved over millions of years, or their interactions with different ecosystems'.[51] Perhaps it was this acceptance of the dependence of humans on the environment that prompted a reflection over conservation policies fostering this artificial separation. This new environmentalist wave created the momentum for the first break from the paradigm of fortress conservation,

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[48] DeLuca and Demo, above n 23, 257.

[49] The event would close with the signing of the *Declaration of the United Nations Conference on the Human Environment*, 1972 UNYB 319, 11 ILM 1416, UN Doc A/CONF.48/14 (16 June 1972) ('*Stockholm Declaration*').

[50] 'This pollution is for the most part irrecoverable; the chain of evil it initiates not only in the world that must support life but in living tissues is for the most part irreversible. In this now universal contamination of the environment, chemicals are the sinister and little-recognized partners of radiation in changing the very nature of its life'. Carson, above n 47, 6.

[51] Birnie and Boyle, above n 46, 545.

because it saw the wildlife crisis as a global environmental issue requiring a more concerted effort at a solution than through scattered pockets of protected wilderness.

The language of the *Stockholm Declaration* deviated from the typical pattern of conceptualising people as a separate entity, proclaiming that 'Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and physical growth'.[52] However, science and technology gave him 'the power to transform his environment in countless ways and on an unprecedented scale'.[53] It concludes the proclamation by inviting people to change their careless behaviour and adopt 'more prudent care'. This stewardship role diverges from the utilitarian vision of land that led to the crisis in the first place, linking a healthy environment with the expectation of a decent standard of living.[54] The approach keeps a margin of separation between people and the environment, albeit changing the role of humans as having a responsibility towards it both for its sake and for that of future generations.[55] On the matter of wildlife protection, the *Declaration* refers to it as heritage and determines that man has the special responsibility to safeguard and wisely manage it, and thus it should be an important part of the planning of economic development policies.[56]

Except for when protected areas are shared by more than one country, they are under the jurisdiction of the State. Thus, to obligate the State to limit its sovereignty over portions of its territory is a sensitive topic. This is the case even at a domestic level. Australia, for example, has witnessed an internal struggle about the lack of constitutional powers related to environmental protection, as will be seen further in this chapter.[57] Perhaps the language of treaties that address the subject should be softened to prevent low ratification or lack of compliance, such as was the case for the *National Parks Treaty* discussed above.

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52 *Stockholm Declaration* Proclamation §1.

53 Ibid.

54 The document recognises that the 'goal of improving the human environment ... will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level'. Ibid Proclamations §§ 6 and 7.

55 The principle of intergenerational equity is present in the Proclamation (§6), and in principles 1, 2 and 19.

56 Ibid principle 4.

57 The disputes between State and Commonwealth governments peaked in the 1990s. Boer's analysis is a perfect example. See generally, Ben Boer, 'World Heritage Disputes in Australia' (1994) 7 *Journal of Environmental Law & Litigation* 247.

Arguably, the most delicate issue to address in treaties that seek to preserve areas is to engage the international community without bypassing state sovereignty. In international environmental law, there are areas where sovereignty is not so much the issue as is cooperation. After all, some of the problems affecting the environment do have an impact that transcends boundaries and may even be global. This is a strong incentive for states to cooperate, especially when the health and well-being of their inhabitants are at stake.[58] Prior to UNCHE, international environmental law had addressed the issue of sovereignty with an approach similar to the negotiations of agreements to free trade, where countries agreed to open their borders to certain products, restricted others and agreed on joint resource management.[59] In all of these cases, environmental goods and services were interpreted as discrete measurable units that could be managed individually, without acknowledging environmental processes. The urgency of environmental crises called for the drafting of instruments that would be likely to secure permanent engagement and subsequent compliance. The subject matters of *Ramsar* and the *WHC*, which protect vulnerable wetlands and the heritage of mankind, could only be achieved by means of protected areas. The rhetoric of both treaties is similar; certain sites, even if their sovereignty remains under the control of the nation in which they are located, have a significance that transcends state boundaries. Even if the legally protected interests of these treaties differ radically, both adopted a similar strategy with three common features: the listing of significant sites, an emergency 'in danger' mechanism,[60] and a pool of financial resources and capacity building for additional support to the parties.

[58] A clear example of success is the implementation of the Montreal Protocol which, applying the precautionary principle, has seen the complete banning of the production of the major substances that deplete the ozone layer. *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 26 ILM 1550 (entered into force 1 January 1989) ('*Montreal Protocol*').

[59] William R Moomaw, 'International Environmental Policy and the Softening of Sovereignty' (1997) 21(2) *The Fletcher Forum of World Affairs* 7, 8.

[60] In the *Ramsar Convention*, this special list is called the *Montreaux Record*. The *WHC* has the *List of World Heritage in Danger* or *In Danger List*.

II.2.1. Cooperation and Flexible Mechanisms in *Ramsar*

The original subject of the *Ramsar Convention* was the protection of waterfowl and other wetland-dependent migratory birds,[61] after concerned and influential international NGOs verified the rapid anthropogenic deterioration of wetlands, principally in Europe.[62] The correlation between habitat loss and the threat to species that in their migration know no boundaries became apparent, calling for an overarching habitat protection treaty.[63] Appealing to the international importance of wetlands, *Ramsar* managed to achieve a compromise from nations to use their listed sites wisely.[64] This represented a leap forward in the manner in which MEAs engage countries to cooperate and unite for habitat conservation. For the first time in a MEA, it was recognised internationally that ecosystems had values beyond the aesthetic component.[65] Indeed, the final scope of the convention was expanded to take the 'interdependence of man and his environment' into account.[66]

The treaty was originally designed as a network of sanctuaries for waterbirds in a manner that resembled the fortress conservation model, National Park pristineness requirement included. However, the final text re-focussed this preservationist scope by addressing ecosystems in terms of their services rather than only the resources found

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[61] *Ramsar Convention* Preamble: '...Recognising that waterfowl in their seasonal migrations may transcend frontiers and so should be the conservation of wetlands and their flora and fauna can be ensured by combining far-sighted national policies with co-ordinated international action'.

[62] The negotiation of the treaty started in 1962 during the MAR Conference, 'organized by Dr Luc Hoffmann, with the participation of the International Union for the Conservation of Nature and Natural Resources (now IUCN–The World Conservation Union), the International Waterfowl and Wetlands Research Bureau, IWRB (now Wetlands International), and the International Council for Bird Preservation, ICBP (now BirdLife International) and was held in Les Saintes Maries-de-la-Mer in the French Camargue, 12–16 November 1962'. Michael J Podolsky, 'U.S. Wetlands Policy, Legislation, and Case Law as Applied to the Wise Use Concept of the Ramsar Convention' (2001–2002) 52 *Case Western Reserve Law Review* 627, 628. See the details of the negotiation in Ramsar Convention Secretariat, *The Ramsar Convention Manual: A Guide to the Convention on Wetlands (Ramsar, Iran, 1971)* (6 ed, 2013) 24 ('*Ramsar Convention Manual*'). International technical meetings: St. Andrews, 1963; Noordwijk, 1966; Leningrad, 1968; Morges, 1968; Vienna, 1969; Moscow, 1969 and Espoo, 1970.

[63] This argument calls for countries to manage transient resources in a global way by ensuring the health and productivity of ecosystems because, for the purposes of the Convention, 'waterfowl are birds ecologically dependent on wetlands'. *Ramsar Convention* art 1.2.

[64] The 'wise use' provisions are similar to what is better known today as sustainable development principles. They are found in arts 2(6), 3 and 6 of the convention and are explained in the *Ramsar Convention Manual*, above n 62.

[65] See the wording of the selection criteria: 'Wetlands should be selected for the List on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology...' *Ramsar Convention* art 2.2.

[66] Ibid Preamble § 1.

within, explicitly noting that 'wetlands constitute a resource of great economic, cultural, scientific and recreational value, the loss of which is irreparable'.[67] The new emphasis of the convention introduced the possibility of having people in close interaction with key ecosystems. This acknowledgement of ecosystem services needed an additional component to make it attractive to countries: a non-intrusive way to engage potential signatories without altering sovereign rights. The convention peremptorily states that 'the inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated',[68] and it is very flexible in its listing obligations.

The *Ramsar Convention* welcomed the listing not only of 'artificial' wetlands, but also opened the door for ecological restoration initiatives. This defied the preservationist parameter of the fortress conservation model, which sought to protect only ecosystems deemed 'pristine'. The listing is also simple. Ratification or adherence to the treaty has attached the binding obligation of each member to list at least one wetland of international importance within its borders.[69] *Ramsar* lacks specific punitive provisions to guarantee the enforcement of the treaty and ensure compliance. Moreover, its language is soft and gives the impression of lacking binding obligations, preferring rather to exhort the parties to comply and giving them wide breadth for action. This can be seen as an obstacle to its correct implementation, because parties have no apparent reason to fear sanctions from the other signatories in case of default.[70] Podolsky is critical of this choice, seeing it practically as an invitation to disregard the convention's wise-use provisions, especially in the absence of a watchdog organisation to verify compliance.[71] However, this fear has not materialised. On the contrary, the agreement has achieved

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[67] Ibid Preamble § 3.

[68] Ibid art 2.3.

[69] Ibid art 2(1). Sites are selected based on their significance in terms of ecology, botany, zoology, limnology and/or hydrology, following a list of criteria defined by the seventh COP meeting (May 1997) and compiled in the *Strategic Framework and Guidelines for the Future Development of the List of Wetlands of International Importance of the Convention on Wetlands (Ramsar, Iran, 1971)*. See, *Ramsar Convention Manual*, above n 62, 57.

[70] Compare this regime with the *CITES* compliance methods. Given that *CITES* is a convention that deals with commerce of species, it logically puts forth trade sanctions in case of default, which can be detected by the monitoring scheme devised in the text of the treaty. For a detailed review of CITES' compliance, see Rosalind Reeve, 'Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime' (2006) 82(5) *International Affairs* 881; *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 14537 UNTS 993 (entered into force 1 July 1975) ('*CITES*').

[71] He then proposes that a possible solution could be 'achieved through regional agreements that do contain binding obligations of parties. While regional plans are certainly an integral part of the implementation process, the Ramsar Convention, by failing to bind the parties to obligations, puts its own ultimate success at risk'. Podolsky, above n 62, 371.

exponential success over the years, measured in the number of parties and number of hectares protected.[72] It is thus possible to argue that the success of the treaty is the departure from traditional methods, such as the trade sanctions from *CITES*.[73] *Ramsar* not only relies on the listing of sites of international importance, it also engages the contracting parties in the active protection of their wetlands by means of nature reserves. Article 4 addresses the commitments within a nation's borders in the manner of soft obligations, including the possibility to delete or restrict the boundaries of listed wetlands in cases of 'urgent national interest'.[74] It additionally offers the parties technical assistance, funding and capacity building, to help them implement domestic law and policy to meet the terms of the treaty.[75] The spirit of mutual collaboration is perhaps more evident in article 5, which instructs Contracting Parties to 'consult with each other about implementing obligations … especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared'.

Assistance is prioritised for sites included in the *Montreaux Record* of endangered wetlands,[76] 'where changes in ecological character have occurred, are occurring or are likely to occur'.[77] This specialised list has proven to be a fortunate mechanism for compliance, because the inclusion of a site aids the party at risk of defaulting to correct the damage or prevent it. This ensures the fulfilment of the object of the treaty: the protection of wetlands. If more traditional international law countermeasures such as retorsion, reprisal or retaliation were applied, this would defeat the purpose of environmental protection that the treaty espouses.

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[72] In 1992, there were 62 contracting states, protecting 500 sites; by 2006, the number had almost tripled, reaching 150 members and 1590 listed wetlands, covering 134 million hectares. As at April 2013, the Convention had 165 parties, 2118 designated sites on the List of Wetlands of International Importance, and a total surface area covered of 205 359 866 hectares, a rough increase of 70 million hectares in just six years. These data were adapted from David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007) 1170; current status updated continuously at The Ramsar Convention on Wetlands, *The Convention Today* <http://www.ramsar.org/>.

[73] See Reeve, above n 70.

[74] *Ramsar Convention* art 4.1.

[75] The issue of funding is always a problem in MEAs. Ramsar has a Small Grants Fund, established in 1990, and receives contributions from its members and from funding institutions such as the GEF and the World Bank. *Ramsar Convention Manual*, above n 62, 41–42. Interestingly, Ramsar is now engaged in a partnership with the private corporation Evian (part of the Danone Group), which has contributed 1.1 million dollars. See, Ramsar Convention Secretariat, *The Evian Initiative: An Introduction* (25 September 2008) Ramsar Secretariat Official Website <http://www.ramsar.org/evian_intro.htm>.

[76] See, *Ramsar Convention Manual*, above n 62, 59.

[77] The List of Wetlands of International Importance included in the Montreaux Record and the List of Ramsar Sites Removed from the Montreaux Record can be found at the Ramsar Convention on Wetlands, the Montreaux Record (08 September 2011) <http://www.ramsar.org/cda/en/ramsar-documents-montreux-montreux-record/main/ramsar/1-31-118%5E20972_4000_0__>.

TABLE 1: COLOMBIA IN THE RAMSAR CONVENTION LIST OF WETLANDS OF INTERNATIONAL IMPORTANCE

PROVINCE	NAME	YEAR
Chocó	Delta del Río Baudó	2004
Cundinamarca	Sistema Lacustre de Chingaza	2008
Magdalena	Sistema Delta Estuarino del Río Magdalena, Ciénaga Grande de Santa Marta	1998
Nariño	Laguna de la Cocha	2001
Risaralda	Complejo de Humedales de la Laguna del Otún	1998

Ramsar Convention on Wetlands Ratified by Colombia 18 October 1998
November 2012: Total sites: 5, Total Surface Area: 458.525 hectares

TABLE 2:
AUSTRALIAN TERRITORIES AND MARINE AREAS IN THE RAMSAR CONVENTION LIST OF WETLANDS OF INTERNATIONAL IMPORTANCE

TERRITORY	NAME	YEAR
Australian Capital Territory	Ginini Flats Subalpine Bog Complex	1996
Northern Territory	Cobourg Peninsula	1974
	Kakadu National Park	1980
Coral Sea Islands Territory	Coral Seas Reserves (Coringa-Herald and Lihou Reefs and Cays)	2002
	Elizabeth and Middleton Reefs Marine National Natural Reserve	2002
Christmas Island Territory	Hosnies Spring	1990
	The Dales	2002
Cocos (Keeling) Islands	Pulu Keeling National Park	1996
External Territory of Ashmore and Cartier Islands	Ashmore Reef National Natural Reserve	2002

Ramsar Convention on Wetlands Ratified by Australia 21 December 1975
Adapted from UNESCO World Heritage Lists

TABLE 3: AUSTRALIAN STATES IN THE RAMSAR CONVENTION LIST OF WETLANDS OF INTERNATIONAL IMPORTANCE

STATE	NAME	YEAR
New South Wales	Hunter Estuary Wetlands	1984
	Towra Point	1984
	Macquarie Marshes	1996
	Blue Lake	1996
	Great Pinaroo (Fort Grey Basin)	1996
	Little Llangothlin Lagoon	1996
	Gwydir Wetlands: Gingham and Lower Gwydir (Big Leather) Watercourses	1999
	Myall Lakes	1999
	Narran Lake Nature Reserve	1999
	Fivebough and Tuckerbil Swamps	2002
	NSW Central Murray State Forests	2003
	Paroo River Wetlands	2007
Queensland	Bowling Green Bay	1993
	Moreton Bay	1993
	Currawinya Lakes	1996
	Shoalwater and Corio Bays	1996
	Great Sandy Strait (including Great Sandy Strait, Tin Can Bay, and Tin Can Inlet)	1999
South Australia	Bool and Hacks Lagoon	1985
	The Coorong, Lake Alexandrina and Lake Albert	1985
	Coongie Lakes	1987
	Riverland	1987
	Banrock Station Wetland Complex	2002
Tasmania	Apsley Marshes	1982
	Cape Barren Island, east coast lagoons	1982
	Interlaken Lakeside Reserve	1982
	Jocks Lagoon	1982
	Lavinia Nature Reserve	1982
	Little Waterhouse Lake	1982
	Logan Lagoon	1982
	Lower Ringarooma River	1982
	Moulting Lagoon Nature Reserve	1982
	Pittwater Orielton Lagoon	1982
	Wet Tropics of Queensland	1988
	Shark Bay, Western Australia	1991
	Fraser Island	1992
	Australian Fossil Mammal Sites (Riversleigh/Naracoorte)	1994
	Heard and McDonald Islands	1997
	Macquarie Island	1997
	Greater Blue Mountains Area	2000
	Purnululu National Park	2003
	Ningaloo Coast	2011
Victoria	Barmah Forest	1982
	Corner Inlet	1982
	Gippsland Lakes	1982
	Gunbower Forest	1982
	Hattah-Kullyne Lakes	1982
	Kerrang Wetlands	1982
	Lake Albacutya	1982
	Port Phillip Bay and Bellarine Peninsula	1982
	Western District Vales	1982
	Edithvale-Seaford Wetlands	2001
	Western Port Bay	1982

Western Australia	Eighty-Mile Beach	1990
	Forrestdale and Thomsons Lake	1990
	Lake Warden System	1990
	Lakes Argyle and Kununurra	1990
	Ord River floodplain	1990
	Peel-Yargorup System	1990
	Roebuck Bay	1990
	Toolibin Lake	1990
	Vasse-Wonnerup system	1990
	Becher Point Wetlands	2001
	Lake Gore	2001
	Muir-Bayenup System	2001

Ramsar Convention on Wetlands Ratified by Australia 21 December 1975
November 2012: Total Sites: 64, Total Surface Area: 8.118.485 hectares
Adapted from Ramsar Lists

II.2.2. Engaging the Communities in Heritage Preservation

In the case of the *WHC*, it was perhaps easier to persuade countries of the 'international importance' of heritage than the appeal of protecting waterbirds. The urgency of the protection and conservation of heritage, in the form of cultural and natural sites, was clear after the ravages the two world wars caused to monuments that could never be replaced.[78] In the 1970s, the term *heritage* 'acquired its present more specialized usage as the name we give to those valuable features of our environment which we seek to conserve from the ravages of development and decay'.[79] It is associated with a valuable piece of a past long gone, whose legacy remains as a testimony of either genius, mores or even ways of making a living.[80] Heritage, thus understood as the value of the past, can be 'defined largely in terms of what we value or repudiate in the present or fear in the future'.[81] The impulse to protect it arises then as a reaction to the rapid growth towards industrialisation and the ensuing uniformity spawned by mass-production. It is a compensation of sorts for what humanity has destroyed, and this sorrow is reflected in the clinging to 'remaining familiar vestiges'.[82] A dichotomy arises between things that can

[78] Hunter, Salzman and Zaelke, above n 72, 1161.
[79] G A Davison, 'The Meaning of Heritage' in G A Davison and C A McConville (eds), *Heritage Handbook* (Allen and Unwin, 1991) 1, 1.
[80] See, David Lowenthal, 'Heritage and its Interpreters' (1986) 5(2) *Heritage Australia* 42, 42.
[81] Davison, above n 79, 4.
[82] Lowenthal, 'Heritage and its Interpreters', above n 80, 43.

or must be preserved, and things that can be created. In the backdrop lies the respect of things crafted by our forefathers with less technology and considerably more talent.[83]

The previous definitions refer to the worth of *cultural* heritage echoed in *created* things, for which international support is more forthcoming. It is thus more remarkable that the *WHC* accomplished the inclusion of natural heritage as an asset equally worthy of protection. This legacy from the early environmentalists of the twentieth century must be acknowledged, despite the criticisms to the movement raised earlier. Although natural heritage shares similarities to cultural heritage, being fragile and irreplaceable if destroyed, the *past* aspect of it is not as evident.[84] Ecosystems and natural landscapes, no matter how stunning, live in the present and do not tell us anything about *people*. As Lowenthal accurately observes, '[b]efore nature and antiquity could be treasured, they had first to be recognized as realms apart from the everyday present'.[85] The careful construction of the 'pristineness' narrative and the evolution of National Parks as sanctuaries for wildlife were seminal for the validation of natural sites as subjects of heritage protection. Their value stems, precisely, from their magnificence independence from human intervention, which is why the category of 'cultural landscapes' was not included in the *Operational Guidelines* until 1992.[86]

The Preamble recognises the importance of the preservation and protection of cultural and natural heritage. It further stresses that threats are not only derived from a process of normal decay, they also have exogenous causes, like the 'changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction'.[87] The instrument identifies that the loss of heritage not only affects the nation in which it was located, but impoverishes *every nation of the world*. Further, it acknowledges the need of foreign help to protect what is left and worth saving.[88] Extrapolated to biodiversity, the *WHC* can be used to preserve ecosystems[89] if they fulfil the criteria for listing.[90] Appealing thus to the interest of

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83 Davison, above n 79, 5.

84 See Lowenthal, 'Heritage and its Interpreters', above n 80, 43.

85 David Lowenthal, 'Natural and Cultural Heritage' (2005) 11(1) *International Journal of Heritage Studies* 81, 82.

86 Refer to the definition of 'Cultural Landscapes' in *Operational Guidelines*, above n 29.

87 *WHC* Preamble.

88 Ibid.

89 Article 2 of the *WHC* identifies three specific cases in which a site can be considered natural heritage if there is an Outstanding Universal Value (OUV): natural features of aesthetic value, geological and physiological formations that are the habitat of threatened species of flora and fauna of scientific or conservation value, and natural sites of scientific, conservation or natural beauty value.

humanity over the protected piece of heritage, the treaty tones down the extent of the sovereign power of the State.[91]

Further, the instrument states that 'the inclusion of the property in the World Heritage List requires the consent of the State concerned'.[92] This raises the question of whether the parties that have already listed an item preserve the authority to destroy it or alter it afterwards in times of peace: a move that has been condemned by the international community.[93] The *WHC* has proved its success in terms of protection of cultural and natural heritage, despite lacking enforceability and relying on the good faith of the parties for implementation of the regulations.[94] To understand this success, the link with fortress conservation strategies is critical. This treaty seeks to preserve the vanishing treasures of the past, and the best way to do this is to enforce the strictest standards of preservation.

For an item to be placed on the World Heritage List, it has to be nominated by a State Party to the Convention and be in its territory. The State Party also has to consent to its eventual inclusion.[95] There is no external imposition for the inclusion of sites. However, any party can approach another signatory to request their 'help in the identification, protection, conservation and presentation' of its listed heritage, denoting the commitment to cooperation.[96] Another important factor is that the scope of protection of natural heritage refers always to 'clearly delimited' areas, which can be small enough for a country not to feel its sovereignty over natural resources is being compromised. After the nomination, the site is evaluated by the advisory bodies, which

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90 See *Operational Guidelines*, above n 29.

91 *WHC* art 6(1): 'Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage ... is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate'.

92 Ibid art 11(3).

93 See the case of the Bamiyan Buddhas. Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14(4) *European Journal of International Law* 619. The destruction of heritage during times of war has been thoroughly regulated, criminalised and prosecuted. See in this respect Francioni's comment on the evolution of criminal liability in respect to property. The author reviews relevant provisions of the 1954 *Hague Convention*, the 1977 first additional Protocol to the Geneva Conventions of 1949, and the inclusion and scope of criminal responsibility in the International Criminal Tribunal for Yugoslavia, among other. Francesco Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) 25 *Michigan Journal of International Law* 1209, 1215. *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 15 May 1954, 249 UNTS 240 (entered into force 7 August 1956) ('*Hague Convention on Cultural Property*').

94 The language of the World Heritage Convention is very soft, prompting parties to do their best to protect heritage, as opposed to forcing them to do so.

95 *WHC* art 11.3.

96 Ibid art 6.2.

then submit a report for the World Heritage Committee,[97] which is in charge of deciding its inscription on the List in accordance to the *Operational Guidelines*.[98]

In a similar way to *Ramsar*, the *WHC* provides a mechanism called the *In Danger List*, which identifies the properties already on the *World Heritage List* that require special protection.[99] The mechanism in article 11(4) allows the World Heritage Committee to include properties 'threatened by serious and specific dangers' for the conservation of which 'major operations are necessary' and 'assistance has been requested'. Exceptionally, the Committee can act immediately in case of 'urgent need'. This power to act unilaterally is not a threat to state sovereignty because countries are understood to have relinquished the power over the items they agreed to include on the *World Heritage List* in the first place.

TABLE 4: AUSTRALIA IN THE UNESCO TANGIBLE HERITAGE LIST

HERITAGE TYPE	NAME	YEAR
Natural Heritage	Great Barrier Reef	1981
	Lord Howe Island Group	1982
	Gondwana Rainforests of Australia	1986
	Wet Tropics of Queensland	1988
	Shark Bay, Western Australia	1991
	Fraser Island	1992
	Australian Fossil Mammal Sites (Riversleigh/Naracoorte)	1994
	Heard and McDonald Islands	1997
	Macquarie Island	1997
	Greater Blue Mountains Area	2000
	Purnululu National Park	2003
	Ningaloo Coast	2011
Cultural Heritage	Royal Exhibition Building and Carlton Gardens	2004
	Sydney Opera House	2007
	Australian Convict Sites	2010
Mixed Heritage	Kakadu National Park	1981
	Willandra Lakes Region	1981
	Tasmanian Wilderness	1982
	Uluru-Kata Tjuta National Park	1987

World Heritage Convention Ratified by Australia 22 August 1974
Adapted from UNESCO World Heritage Lists

[97] This is an Intergovernmental Committee established within UNESCO in ibid art 8.1 , 'composed of 15 States Parties to the Convention, elected by States Parties to the Convention meeting in general assembly during the ordinary session of the General Conference of [UNESCO]'. The number was increased to 21 when the treaty entered into force for 40 states.

[98] The listing abides by the OUV methodology, which is critiqued in relation to Indigenous peoples in Chapter III. The *Operational Guidelines*, above n 29, state that a property nominated for inclusion on the list has to firstly pass three tests: 1) it has to fit one or more of the criteria outlined in the guide, for example represent a unique artistic achievement or be an outstanding example of a type of architecture; 2) it has to pass the test of authenticity 'in design, material, workmanship or setting and in the case of cultural landscapes their distinctive character and components'; and 3) the country in which it is situated has to be able to provide an adequate legal or traditional mechanism for its protection.

[99] By May 2013, the List had 38 properties. UNESCO, *List of World Heritage in Danger* <http://whc.unesco.org/en/danger/>.

Maintaining the concept of separation between people and nature in the differentiated categories of cultural and natural heritage of the *WHC* served a transitional purpose. That is, it enabled the conservation of habitats as a matter of international importance, away from the purely domestic sphere of National Parks. This model does not entirely include Indigenous peoples in conservation endeavours.[100] Nevertheless, *Ramsar* and the *WHC*, with an approach akin to fortress conservation, represented a move towards the inclusive system that would reunite people and nature as part of the same ecosystem after the Rio Summit.[101] This reunification is more akin to the interpretation of the environment shared by several Indigenous peoples that fosters the reciprocity between people and their lands.[102] An example of this evolution can be seen in the results of the sixth Conference of the Parties of the *Ramsar Convention* held in Brisbane, Australia, in 1996. One of the recommendations was for the Contracting Parties 'to make specific efforts to encourage active and informed participation of local and indigenous people at Ramsar listed sites and other wetlands and their catchments, and their direct involvement, through appropriate mechanisms, in wetland management.'[103] This resulted in the creation of the soft-law guidelines contained in the Resolution VII.8 issued in the seventh Conference of the Parties, held in San José de Costa Rica in 1999 whose theme was the vital link between people and wetlands.[104]

While the post-Stockholm 1970s saw a proliferation of so-called 'first generation environmental treaties' devoted to conventional issues of pollution and nature conservation,[105] the 1980s gave way to the 'second generation' of agreements. Here,

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[100] See further critiques in the next chapter on the *WHC* and the issues with the voluntary *Ramsar* guidelines for including Indigenous peoples.

[101] United Nations Conference for Environment and Development (UNCED).

[102] Refer to the case studies from the Colombian Amazon in Chapter IV, where the cosmovisions have converged with biodiversity protection by means of traditional ecological knowledge.

[103] 6th Meeting of the Conference of the Parties to the Convention on Wetlands (Ramsar, Iran, 1971), Brisbane, Australia (1996), Recommendation 6.3: *Participation in Management*.

[104] 7th Meeting of the Conference of the Parties to the Convention on Wetlands (Ramsar, Iran, 1971), San José, Costa Rica (1999), Resolution VII.8: *Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands*.

[105] In the 1960s and 1970s, it became apparent that some environmental issues transcended borders and called for a global effort. Before that, international agreements on these matters were usually very resource or problem specific. Such was the case of the early conservation treaties mentioned in the last chapter, or the trade of heritage items. This trend continued in the 1980s and 1990s, with a focus on solving pressing matters such as the management of pollution, waste and toxic materials, or the destruction of the ozone layer. See eg the following MEAs: *International Convention for the Prevention of Pollution from Ships*, opened for signature 2 November 1973, 1340 UNTS 184 (entered into force 2 October 1983) ('MARPOL 73/78'); *Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983)

environmental problems were finally recognised as much more complex global issues that merited more sophisticated treaty frameworks.[106] The *Biodiversity Convention* embodies that response in the area of wildlife protection, as will be seen next.

II.3. Common Concern and the Ecosystem Approach

The *Rio Declaration*[107] would arguably end the human nature dichotomy by '[r]ecognizing the integral and interdependent nature of the Earth, our home'[108] and stating as first principle that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.[109] At first glance, the shift towards human participation can be construed as a step back in environmental policy: from a focus on wildlife, landscapes and pristine wildernesses, to a paradigm centred on humans. Moreover, the phrase 'in harmony with nature' remains suggestive of the separation theme. However, this was not the case. The *Rio Declaration* presented the opportunity to open legal instruments to other possibilities beyond protecting biodiversity and ecosystems through isolation and exclusion. The fostering of participatory bottom-up practices in the drafting of environmental protection policies was also a step forward in engaging, rather than alienating, communities in conservation efforts. If biodiversity conservation is to succeed, engaging as many developing countries as possible is paramount.[110] Although the *Stockholm Declaration* mentioned the differentiated needs and capacity of these countries on the environmental front,[111] the breakthrough in the *Rio Declaration* was the delineation of the principles of sustainable development. This initiative succeeded in engaging these jurisdictions, as can be verified

('*LTRAP*'); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 1673 UNTS 126 (entered into force 5 May 1992) ('*Basel Convention*'); *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, opened for signature 10 September 1998, 2244 UNTS 337 (entered into force 24 February 2004) ('*Rotterdam Convention*'); *Stockholm Convention on Persistent Organic Pollutants*, opened for signature 22 May 2001, 2256 UNTS 119 (entered into force 17 May 2004) ('*Stockholm Convention*').

[106] Hunter, Salzman and Zaelke, above n 72, 173–174.

[107] *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, UN Doc A/CONF.151/26 (vol 1) (13 June 1992) ('*Rio Declaration*').

[108] Ibid Preamble.

[109] Ibid Principle 1.

[110] This responds to a purely arithmetical reason: there is a directly proportional ratio between diversity expressed in the number of species and the closeness to the Equator. A quick socio-geographical reflection will quickly deduce that all of the countries in the tropical belt are part of the geopolitical 'South', ie developing and least-developed countries.

[111] *Stockholm Declaration* Proclamations §§4 and 7, and Principles 9, 10, 11 12, 20 and 23.

in the case of Latin America, where several countries enshrined both sustainable development and the collective right to a healthy environment in their Constitutions.[112] The *CBD*, negotiated at this Conference, has contributed to reconceptualising the relationship people have with the environment.

The *CBD* reconciles people and the environment as interdependent entities, reinterpreting the strict and narrow vision of fortress conservation. Its relevance is not only measured by the breadth of its scope, but also by the wide commitment to its mandates, as evidenced in the number of ratifications it has gained.[113] Two legal developments made this possible: the respectful attitude towards sovereignty over biodiversity and its resources; and the 'ecosystem approach', which understands ecosystems as life-supporting entities of which humans are an integral part.[114] The promotion of the sustainable use of resources and integral management strategies that complement the *in-situ* conservation provisions of article 8 challenge the mere closing of relevant ecosystems of the 'visitor only' approach.[115]

The *CBD* pursues three objectives: *in-situ* conservation, the sustainable use of natural resources, and the sharing of the benefits of biodiversity products.[116] It was argued early in the negotiations that the relinquishing of sovereignty would be a desirable step to

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[112] The discussion of having the enjoyment of a healthy environment as a human right, linked to the right to pursue a decent standard of living, has been around since the 1970s, especially after UNCHE, 1972. It is enshrined in Principle 1 of the *Rio Declaration*, stating that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'. The wave of constitutional developments in Latin America during the 1990s consistently introduced provisions related to the protection of a healthy environment as a collective right of all citizens. See eg, the constitutions of Argentina (art 41), the Plurinational State of Bolivia (art 33), Chile (art 19), Colombia (art 79), Costa Rica (art 50), Ecuador (art 14), El Salvador (art 113), Honduras (art 145), Nicaragua (art 60), Paraguay (art 7), Uruguay (art 47) and the Bolivarian Republic of Venezuela (art 127).

[113] The *CBD* was signed by 168 countries during the Rio Summit; by 2013, it has 193 parties. Convention on Biological Diversity Secretariat, *List of Parties* <http://www.cbd.int/convention/parties/list/>. The United States is the only party that signed the Convention but refused to ratify it afterwards, because of disagreements with the treaty's provisions regarding the use and possible patenting of genetic resources. On these concerns refer to Melissa Chandler, 'The Biodiversity Convention: Selected Issues of Interest to the International Lawyer' (1993) 4 *Colorado Journal of International Environmental Law and Policy* 141, 161–168.

[114] The fifth Conference of the Parties further conceptualised the ecosystem approach in decision V.6, which implemented a set of 12 principles to help the parties in the design of policies and plans of action. Convention on Biological Diversity Secretariat, *Conference of the Parties (COP)–Documents and Decisions* <http://www.cbd.int/cop>.

[115] Although during the 1970s the first seeds for an integral approach to ecosystems were seen, especially in the wise-use provision of *Ramsar*, the principles calling for an inclusive approach to management were not yet articulated.

[116] Note that the first two do not warrant further explanation in art 1 of the *CBD*, whereas the third one takes most of it: 'The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including the appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and the technologies, and by appropriate funding'.

protect biodiversity.[117] It was suggested, for instance, that Brazil should resign its sovereignty over the Amazon jungle, which would become *res communis humanitatis* as 'the lung of the world'.[118] This would create a paradoxical situation of two incompatible and mutually exclusive subjects: the permanent sovereignty over natural resources and what could only result in a common heritage obligation.[119] The possibility of having plants and their diversity as part of the common heritage of humankind was fiercely rejected by developing countries. No international precedent existed for this construction; on the contrary, the sovereignty over plant resources had been ascertained in several international instances.[120]

Ultimately, the text of the convention opted for a compromise: the qualification of biodiversity and its conservation as 'a *common concern* of humankind'[121] that would not impinge upon sovereignty.[122] Speth and Haas note that this weaker concept has gained wide currency because of the increased awareness and scientific consensus about the interdependence of humanity, ecosystems and people. 'Unlike the common heritage concept, common concern does not imply specific legal obligations, but it does signal the openness of the international community to regulate resources that would otherwise be strictly within the control of sovereign nations'.[123] The counterpart to this optimism is that its remains 'underdeveloped and fuzzy'.[124] This should not be interpreted as an issue.

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[117] Ikechi Mgbeoji, 'Beyond Rhetoric: State Sovereignty, Common Concern, and the Inapplicability of the Common Heritage Concept to Plant Genetic Resources' (2003) 16(4) *Leiden Journal of International Law* 821, 825–827.

[118] Ibid 835.

[119] The only international treaties that consign the term 'common heritage of mankind' in the narrow meaning of inalienable resources belonging to humanity as a whole refer to non-living resources. The *Moon Treaty* and *UNCLOS* state that the mineral resources of the moon and the seabed cannot be appropriated by any one nation. Note that the former has only been ratified by seven countries, and the United States, one of the few countries with the economic and technical capacity to exploit and mine the seabed, has refused to ratify the latter. See, Mgbeoji, above n 115, 826, 835. *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 21 (entered into force 11 July 1984) ('*Moon Treaty*'); *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

[120] Mgbeoji, above n 117, 829–835.

[121] *CBD* Preamble.

[122] Ibid art 3: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. This is an exact reproduction of Principle 2 of the *Rio Declaration*.

[123] James Gustave Speth and Peter M Haas, *Global Environmental Governance: Foundations of Contemporary Environmental Studies* (Island Press, 2006) 7.

[124] Mgbeoji, above n 117, 837.

Rather than taking the negative side, this underdevelopment gives an opportunity for countries to incorporate it and reinterpret it within their national jurisdictions.

The *CBD* follows a similar technique to *Ramsar* and the *WHC* in the identification processes of relevant assets as a vital step to fulfil the objectives of the provisions of *ex-situ* and *in-situ* conservation and sustainable use.[125] As those treaties encouraged an internal listing system of important wetlands and national heritage sites, the *CBD* exhorts the parties to 'as far as possible and appropriate … identify components of biological diversity important for its conservation and sustainable use'.[126] Parties are also exhorted to conduct monitoring activities to continually assess the health of their ecosystems and identify potential risks, prioritising the ecosystems that require urgent conservation measures.[127] This duty is consistent with the developments of international law since the 1970s, which gave more importance to preventative measures based on the possibility of environmental issues in one country extending to others.[128]

Note that the *in-situ* provisions for protected areas are only one of the aims of the biodiversity convention.[129] In this respect, this instrument differs radically from *Ramsar* and the *WHC*, which maintain the preservationist aim, focussing on the listing and maintenance of protected areas mostly in an independent fashion, seeing them as isolated entities. The *CBD*, on the other hand, strives for adaptive management techniques, which challenge the fortress conservation paradigm to its core. Adaptive management recognises that the ecological conditions of ecosystems are susceptible to change because of different factors, such as climate change. Thus, a protected area considered 'pristine' by previous standards might begin to degrade, affecting the provision of essential ecosystem services in the process. Active management of the area from a perspective that

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125 Respectively, arts 8, 9 and 10 of the *CBD*.

126 Ibid art 7(a).

127 Ibid art 7. The parameters to guide these activities are succinctly presented in Annex I: 'Identification and Monitoring: 1) Ecosystems and habitats: containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes; 2) Species and communities which are: threatened; wild relatives of domesticated or cultivated species; of medicinal, agricultural or other economic value; or social, scientific or cultural importance; or importance for research into the conservation and sustainable use of biological diversity, such as indicator species; and 3) Described genomes and genes of social, scientific or economic importance'.

128 The no harm principle is present both in the *Stockholm* and *Rio* declarations, in principles 21 and 2 respectively, and was perhaps the seminal norm that gave rise to global action in environmental matters. It has made its way into several multilateral and bilateral treaties and it can be considered a customary obligation. See eg, Donald R Rothwell and Ben Boer, 'From the Franklin to Berlin: The Internationalisation of Australian Environmental Law and Policy' (1995) 17 *Sydney Law Review* 242, 250–251.

129 *CBD* art 8.

adapts to different pressures becomes relevant. For it to work, the ecosystem approach is paramount. In conventional conservation efforts, the only concessions to sustainable use were driven by concerns of guaranteeing the supply of a certain good or service.[130] The ecosystem approach necessitates a broader scope that considers the interaction of all of the elements, including processes, services, uses and the optimisation of their benefits. This explains the inclusion of the sustainable use provisions of Article 10, which ask the parties to implement five different institutional measures, as explained below.

First, each party shall 'integrate consideration of the conservation and sustainable use … into national decision-making'.[131] This obligation calls for the creation of domestic legislation that elevates protection to every level of decision-making. Accordingly, the second element is to 'adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity'.[132] Note the difference with the preservationist style of conservation, which did not tolerate any disruption of the protected asset. The third is to 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'.[133] This provision is directly related to article 8(j), which exhorts the parties to, subject to their national legislation, 'respect, preserve and maintain knowledge, innovations and practices of Indigenous peoples'.[134] The fourth asks contracting parties to 'support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced'.[135] This is perhaps the provision that best encapsulates the rejection of fortress conservation because it calls for the action of people already living in the area, rather than those 'visitors who do not remain' to engage in the restoration of ecosystems. Obviously,

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[130] This is the case of fisheries and other animal stocks. See the *Behring Fur Seal Arbitration*, the provisions of maximum sustainable yields in *UNCLOS*, and the *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 December 1948) ('*Whaling Convention*').

[131] *CBD* art 10(a).

[132] Ibid art 10(b).

[133] Ibid art 10(c).

[134] The next chapter critiques certain aspects of arts 8(j) and 10(c) under the lens of the human rights of Indigenous peoples, contrasting them with the obligations of the International Labour Organisation Conventions on the subject (107 and 169) and with the *Declaration of the Rights of Indigenous Peoples*. *International Labour Organization Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 6 February 1959) ('*ILO 107*'); *International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1358 (entered into force 5 September 1991) ('*ILO 169*'); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*').

[135] *CBD* art 10(d).

this does not correspond with the narrative construction of pristine areas because it admits that these areas can be regenerated and that anybody can help in that process. The final measure encourages cooperation between the public authorities and the private sector.[136] Notice the deviation from the drive that promoted National Parks in the early twentieth century, which called for a complete centralisation of protection, entrusting the government with the role of keeping people in check. In this new approach, decisions should no longer be the sole prerogative of the authorities in a top-down fashion;[137] bottom-up processes and management are encouraged.

Inclusive models that take society, people and culture into account allow for long-term strategies. Lack of engagement can cause the neglect of the area, turning it into a 'paper park'. The implementation of the ecosystem approach, securing local participation in the management of protected areas can be a solution to this perceived problem.[138] If the ecosystem approach were implemented, then the collision between human rights law and biodiversity conservation should be avoided. However, the language of the biodiversity convention and the soft nature of its obligations mean that no reprisal or any other international measures are triggered by defaulting. This gives countries too wide a breadth of interpretation. Thus, although the soft language is a positive aspect of the treaty because it prompted disparate countries to ratify it, the treaty's lack of stringent compliance provisions means that the ecosystem approach has not been embraced to the extent that it should have been.[139] This explains why countries continue to choose the less demanding fortress conservation techniques, which are familiar, well known and have been applied for several decades. Seeing these shortcomings, human rights' frameworks and provisions can be seen in a new light. Instead of hampering and preventing the conservation aims of the *CBD*, they can enhance it by providing an additional binding framework that can be used for enforcing the ecosystem approach. This is especially the case in the collective legal autonomy of TEK in Colombia.

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[136] Ibid art 10(e).

[137] This participatory requirement, extending to access to legal action and redress, is one of the key elements that have enabled the collective legal autonomy concerning TEK in Colombia. Conversely, even though Australian policy is now more open in the inclusion of Aboriginal peoples and Torres Strait Islanders in protected areas decision-making, a bottom-up approach is yet incipient. This will be evidenced in the next two chapters.

[138] This community-based conservation scheme has been applied in Australia and is the subject of the next chapter.

[139] See in this respect the developments in the decisions of the Conference of the Parties in 2004 (COP 7, Kuala Lumpur) and 2008 (COP 9, Bonn). Convention on Biological Diversity Secretariat, *Conference of the Parties (COP)–Documents and Decisions* <http://www.cbd.int/cop>.

A word of caution is in order here, anticipating the objection whereby this kind of inclusive framework can result in the decimation of conservation. The case of the Aché settlement of Chupa Pou in eastern Paraguay, whose lands are part of the biosphere reservation of the Mbaracayú forest, illustrates this scenario and, as Dowie comments, is 'a favourite example cited by defenders of exclusionary conservation'.[140] In this instance, one version claims that the Chupa Pou appeared as a role model community that had practiced a sound form of environmental stewardship for a long time. However, once their ancestral lands were formally entitled, they proceeded to sell the old-growth hardwood trees in a predatory pattern.[141] This case is made particularly interesting for the purposes of this study because two conflicting accounts of the case exist.

The first is told from the perspective of the application of the ecosystem approach in the Mbaracayú reserve. The authors argue that the entitlement of the Chupa Pou land as part of a broader ecosystem connection strategy was a success of collaboration between Indigenous peoples, private actors and the government.[142] However, a paper written 10 years earlier claimed that the creation of the biosphere reserve had several irregularities that widened the gap between Indigenous peoples and other sectors of the majority society. The first issue was that the law that created the reserve mentioned the ancestral claims of the Aché, but omitted the other peoples who also used the area, the Ava Guaraní. Second, the deed of the biosphere reserve restricted the hunting and gathering rights of the peoples of the area who were wholly or partly nomadic, and who thus depended on these practices for their sustenance. Third, the deeding of the private conservation component of the reserve was an attempt to mask the asymmetry in land possession of the country.[143]

Seeing these accounts collectively, one can draw the following conclusions: first, there are obvious benefits to biodiversity in the parts of the wider Mbaracayú reserve that have been protected via the closed fortress approach. However, the restriction of hunting and gathering rights drove the members of the Chupa Pou settlement to resort to selling

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140 Dowie, above n 5, 111.

141 Ibid.

142 See generally, Danilo A Salas Dueñas and Edgar García, 'Estrategia de conectividad de la reserva de biosfera del bosque Mbaracayú y el Enfoque Ecosistémico' in Ángela Andrade Pérez (ed), *Aplicación del Enfoque Ecosistémico en Latinoamérica* (CEM-UICN, 2007) 48.

143 See generally, Mirta Pereyra, 'Paraguay: el Caso Mbaracayú' in Andrew Gray, Marcus Colchester and Alejandro Parellada (eds), *Derechos indígenas y conservación de la naturaleza: asuntos relativos a la gestión* (Mario di Lucci trans, Grupo Internacional de Trabajo sobre Asuntos Indígenas (IWGIA), El Programa para los Pueblos de los Bosques (FPP), Asociación Interétnica de Desarrollo de la Selva Peruana, 1998).

high quality wood. The problem here was that the legal framework for the entitlement of ancestral land and the biosphere reserve did not balance the competing interests at stake, hence the negative results.

II.3.1. IUCN Categories for Protected Areas

Seeing the difficulties in the implementation of the ecosystem approach, and the reluctance of decision-makers to abandon the fortress model altogether, the International Union for the Conservation of Nature (IUCN) developed a set of categories for protected areas (see Table 1).

TABLE 5: IUCN PROTECTED AREA MANAGEMENT CATEGORIES

CATEGORY AND NAME	CHARACTERISTICS
I-a Strict Nature Reserve	Strictly protected areas. Set aside to protect biodiversity and possible geological /geomorphological features. Human visitation, use and impacts strictly controlled and limited to ensure protection of conservation values. They can serve as indispensable reference areas for scientific research and monitoring.
I-b Wilderness Area	Protected usually large unmodified or slightly modified areas, retaining their natural character and influence. No permanent or significant habitation. Protected and managed to preserve their natural condition.
II National Parks	Large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area. Also provide a foundation for environmentally and culturally compatible educational, spiritual, scientific, recreational and visitor opportunities.
III Natural Monument or Feature	Areas set aside to protect a specific natural monument, which can be a landform, sea mount, submarine cavern, geological feature, such as a cave or even a living feature such as an ancient grove. Generally quite small and often have high visitor value.
IV Habitat/Species Management Area	They aim to protect particular species or habitats and management reflects this priority. Many of these protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats, but this is not a Category IV requirement.
V Protected Landscape/Seascape	A protected area where the interaction of people and nature over time has produced a distinct character with significant ecological, biological, cultural and scenic value. Safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values.
VI Protected Area with Sustainable Use of Natural Resources	They conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under sustainable natural resource management. Low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of these areas.

Adapted from Dudley (2008).[144]

[144] Nigel Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (IUCN Publications Services, 2008) 13–22.

The widening of the scope of protection and the increased inclusion of people in different aspects of conservation and sustainable use complements the purely preservationist drive and allows for the implementation of lesser strict models.[145] It should be noted that calling an area a 'National Park' does not necessarily mean that its management is consistent with Category II. It may be, as is the case of some protected UNESCO heritage areas, Category Ia. Australia has incorporated this categorisation into its national legislation. Regulation 10.03H of the *Environment Protection and Biodiversity Conservation Regulations*[146] refers specifically to the categories cited above. Schedule 8 details the principles for each, and these principles are faithfully represented in Table 1. These regulations serve as a point of reference for definitions not readily available in the *Environmental Protection and Biodiversity Conservation Act* (*EPBC Act*).[147]

This part has shown the three stages of the application of fortress conservation and its philosophical underpinnings. It is positive to note that the system has evolved from a purist focus on the pristineness and spectacular scenery of wilderness areas to a more holistic approach that acknowledges people. For areas that are not used or inhabited by Indigenous peoples, the contemporary vision of the model seems satisfactory. However, this legal approach was founded not only on a skewed conception of separation between nature and the environment, but also on a discriminatory stance towards Indigenous peoples. It is problematic that the foundations of the legal model include the purposeful exclusion of already disenfranchised groups. More problematic still is that these engrained conceptions can be interpreted to contribute today to the further marginalisation of vulnerable communities, as will be seen in the next section.

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[145] For an analysis of the economic considerations behind the evolution of this new paradigm of conservation and the critique to *preservationist* approaches, especially in poor countries, see Pascal van Griethuysen, 'A Critical Evolutionary Economic Perspective of Socially Responsible Conservation' in Gonzalo Oviedo, Pascal van Griethuysen and Peter B Larsen (eds), *Poverty, Equity and Rights in Conservation* (IUCN, Gland; IUED, Geneva, Switzerland, 2006) 7.

[146] *Environment Protection and Biodiversity Regulations 2000* (Cth).

[147] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*').

III. DRAWBACKS OF FORTRESS CONSERVATION, ADVANTAGES OF AN INCLUSIVE ECOSYSTEM APPROACH

This section reviews the fierce objections to the model of fortress conservation, mostly from the social justice perspective, crystallised in the Durban Congress on National Parks of 2003.[148] Several sectors, including representatives of Indigenous peoples, have denounced the problems with the model. This has come to be known in the literature as the 'Parks v People' debate. The crux of the dispute does not revolve around a critique of protected areas *per se*. Indeed, as repositories of biomes that guarantee vital ecosystem services, the system cannot be dismantled. The objections to the model derive from its implementation in the fortress fashion, following the vision of humans as the elusive 'visitors who does not remain'. The eviction of human communities for the creation of protected areas can be a source of social injustice. If the communities in question are already marginalised, as is the norm rather than the exception for Indigenous peoples around the world, the problem reaches human rights dimensions.

Contrasting these objections with the advantages of protected areas will show that fortress conservation, despite maximising the defence of the legally protected interest of biodiversity protection for its own sake, does not adequately encompass the rights and interests of Indigenous peoples. This will validate the claim that fortress conservation in its strictest form endorsed by the early environmentalists is an irrational model to follow today. This will also serve as the basis for the discussion in the next chapter of the community-conservation model.

The introduction to this thesis explained that the community holds an important interest in the ecosystem services that biodiversity provides.[149] The strict conservation of ecosystems does comply with the safeguarding of certain services such as carbon sinks or freshwater supply; however, another service it ensures is the opportunity for the enjoyment of biodiverse spaces. This was the main goal of Thoreau, Emerson, Borroughs and Muir. Yet this legal interest of leisure also has a social objection: the

[148] The Durban Congress is the short name of the Fifth IUCN World Parks Congress. It was held in Durban, South Africa, in 2003.

[149] Remember that these interests hold some protection of biodiversity at their core, in contrast to those that destroy biodiversity to pursue other legitimate interests, such as mining.

turning of National Parks into refuges for only the few people that have the resources to visit; or, as DeLuca and Demo describe it, a getaway for the elite.[150] This is not the only dimension to the problem.[151] The root causes for the evictions of the Tikuna and Embera Katío peoples from the Amacayacu National Park and the UNESCO World Heritage site of Los Katíos in Colombia[152] followed the idea that the only valid model for the creation of protected areas was to obey the mantra 'do not touch, do not use, do not intervene'.[153] In Africa, adherence to this mantra has seen entire human communities evicted from the lands they have inhabited for generations. This begs the question of what is the precise meaning of the term 'pristine'. If it is 'in its original condition, unspoiled' then can any area be considered as such? Consider that many people have already made use of and tended the areas to be protected, such as in the case of the inhabitants of Yosemite Valley. Thus, a better approach would be to encourage and foster the maintenance and revitalisation of the traditional knowledge that allowed these areas to remain biodiverse, rather than to evict the holders of that knowledge from the area. The social justice-oriented objections also serve as a warning for the model used in Australia, which includes Aboriginal peoples more as an afterthought for conservation than as holders of legally protected interests and rights.[154]

III.1. Combating the Sixth Extinction

The myth of the separation of people and nature that has informed the development model of the industrialised era is directly responsible for the decline of biodiversity seen today.[155] There are two main counterarguments to this claim. First, the extinctions of live organisms are not caused exclusively by human activities. After all, one of the tenets of

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150 DeLuca and Demo, above n 23, 256.

151 For a conscientious critique of the various sectors of environmentalism, especially in developed countries, and of the relation of the narratives of nation and identity construction with natural imagery, refer to Yrjö Haila, 'Genealogy of Nature Conservation: A Political Perspective' (2012) 1 *Nature Conservation* 27.

152 The early evictions of the Amacayacu National Parks are discussed in the comparative analysis, later in this chapter. For references of the displacement in Los Katíos and other protected areas in Latin America refer to Lourdes Barragán Alvarado, *Pueblos Indígenas y Áreas Protegidas en América Latina–Fortalecimiento del Manejo Sostenible de los Recursos Naturales en las Áreas Protegidas de América Latina* (United Nations Food and Agriculture Organization-FAO, 2008) 22–24.

153 For Australia, the situation of co-managed National Parks will be discussed in the following chapter.

154 See Chapter III.

155 For a succinct explanation of the main causes of the loss of biodiversity involving human activities, see Hunter, Salzman and Zaelke, above n 72, 1012–1014.

evolutionary theory is the disappearance of certain species and the thriving of new ones.[156] Moreover, mass extinction events have occurred throughout the history of the Earth—five to be exact.[157] The second counterargument is that the human activity of just the last 200 years cannot be held solely responsible for the current mass extinction event. There is evidence of extinctions linked to human groups since prehistoric times.[158] This section addresses these arguments and defends that the Sixth Extinction is actually the most compelling argument for declaring new protected areas and maintaining the existing ones.

Leakey and Lewin,[159] Diamond,[160] Wilson[161] and Flannery[162] agree: whenever people first settle a 'virgin' land, the consequences for the environment can be catastrophic. The effect is akin to that of an invasive species in a new ecosystem. The cases of introduced species and their devastating power are well documented.[163] Hence, the underlying theme seems to be the human obsession for finding new places to colonise. In that respect, humans are only outdone by ants, which have a presence on all continents, including Antarctica. Thus, admitting that some Indigenous peoples were indeed the first to colonise an empty land devoid of previous human habitation, they are not the exception to this rule. Initial successful human settlements were directly responsible for the annihilation of numerous species, such as the giant megafauna. The Maori occupation of New Zealand, starting approximately 1500 years BP, led to the extinction of the 12 species of flightless moas whose last individuals died 600 years ago.[164] The giant lemurs

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156 The best source to consult here is the father of evolution theory himself, Charles Darwin. Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (Part of the Global Commons, 1859) ('*On the Origin of Species*'). See the section entitled 'On Extinction', part of Chapter X 'On the Geological Succession of Organic Beings'.

157 These events took place in the geological periods of the Ordovician, the Devonian, the Permian, the Triassic and the Cretaceous. The last one, in which the dinosaurs met their end, is the best known. Anthony D Barnosky et al, 'Has the Earth's Sixth Mass Extinction Already Arrived?' (2011) 471(7336) *Nature* 51, 51.

158 See the sources further in this section, especially below n 159, 160, 161 and 162.

159 Richard Leakey and Roger Lewin, *The Sixth Extinction–Patterns of Life and the Future of Humankind* (Doubleday, 1995).

160 Jared Diamond, *The Third Chimpanzee–The Evolution and Future of the Human Animal* (Harper Collins, 1992); see also, Jared Diamond, *Guns, Germs and Steel–A Short History of Everybody for the Last 13,000 Years* (Vintage Random House, 1998).

161 Edward O Wilson, *The Future of Life* (Abacus, 2002) ('*Future...*').

162 Tim (Timothy Fridtjof) Flannery, *The Future Eaters–An Ecological History of the Australasian Lands and People* (Reed New Holland, 1994) ('*Future Eaters*').

163 Australia is a perfect example to show the destructive capacity of introduced species, with the spread of the rabbit and cane toad, explained later in this chapter. The case of the land snail in Hawaii is another clear example. See, Wilson, *Future...*, above n 161, 44–50.

164 See Flannery, *Future Eaters*, above n 162, Chapter 18 'There Ain't No More Moa in Old Aotearoa' 195–198.

of Madagascar met the same fate, as did the European woolly mammoth and most of the bison of North America and Europe.[165]

An example of the wholesale destruction that people can bring to the environment is seen in the story of the Rapanui (also Rapa Nui), the only inhabitants of Easter Island before its annexation to Chile. In a typical overexploitation pattern, the Rapanui single-handedly wiped out the entire ecosystem, including part of the coastal resources. They chopped down the trees for use in erecting the magnificent stone statues that grace the island. With the trees went the birds, and the possibility of building rafts. With the birds went eggs and other sources of food. Without food and without means of escaping their remote island in the Pacific Ocean, the Rapanui came close to extinction. The diseases brought by the first European contact provided the *coup de grâce*, bringing acculturation to the survivors. Today, the statues remain as testimony to a relationship with the land and sea that went horribly wrong.[166]

This is the overkill hypothesis, which contends that the extinctions of megafauna were not due to environmental and climatic factors, but rather the consequence of extermination at the hands of people over relatively short periods. Australia is not the exception. The giant wombats, kangaroos, marsupial lions and a carnivorous duck that lived on the continent before the arrival of its first inhabitants between 60 000 and 40 000 years ago remain only in the fossil record.[167] However, a recent assessment of the available evidence contends that humans may not have played a determinant role in their extinction. Rather, the culprit may have been climate change.[168] As for South America, the extinction of the giant tree sloth and the mastodon on the late Pleistocene (15 000–12 000 BP), coincide with traces of early human habitation.[169] Lyons, Smith and Brown compared the fossil record of mammals on four continents, North America, South

[165] As a grim anecdote, one of the last living European bison was recently slain by the King of Spain who enjoys hunting endangered species.

[166] The story of the Rapanui of Easter Island is recounted by various authors. Refer especially to Diamond, *Guns, Germs and Steel*, above n 160, 41–46. See also, Flannery, *Future Eaters*, above n 162.

[167] Wilson, *Future...*, above n 161, 91–92. Flannery, *Future Eaters*, above n 162, 190–194.

[168] Stephen Wroe et al, 'Climate Change Frames Debate over the Extinction of Megafauna in Sahul (Pleistocene Australia-New Guinea)' (2013)(Early edition) *Proceedings of the National Academy of Sciences of the United States of America* 1.

[169] Lyons, Smith and Brown, present compelling evidence for the overkill hypothesis comparing archaeological evidence from Africa, Australia and the Americas. S Kathleen Lyons, Felisa A Smith and James H Brown, 'Of Mice, Mastodons and Men: Human-Mediated Extinctions on Four Continents' (2004) 6 *Evolutionary Ecology Research* 339, 339. For Australia, cfr, Wroe et al, above n 168.

America, Australia and Africa, in the late Pleistocene,[170] to verify whether their systematic extinction was correlated with first human arrival. They note that in Australia and the Americas, the patterns of extinction were strikingly similar, corresponding to the selective hunting of large prey by the newly arrived people. The extinctions were thus anthropogenic, prompting the dismissal of the alternative hypothesis that the extinction could have been caused by changes in climate.[171] In the African case, the authors comment that a similar 'pulse' between early species of the genus *Homo* and the continent's megafauna occurred in the early- to mid-Pleistocene. As *Homo erectus* developed a more complex society, the species also caused the extinction of 10 out of 12 elephant-like animals.[172]

Overkill has not been limited to the megafauna. If the trend is taken to the present, humans can be seen to have repeatedly, and in an ongoing manner, altered their environment.[173] As the next chapter contends, after the initial overkill, human societies either learned to manage their environments or perished in the process.[174] The new waves of colonisation of the last few centuries have caused ecological upheavals much more serious than the killing of large prey. They have altered the functioning of ecosystems, by introducing invasive species and devoting large areas for the grazing of introduced livestock.[175] The result has been the pollution of air, land and water, climate change and overexploitation of resources to satisfy an ever-growing population.[176] There should be no doubt that this is a 'mass extinction' event. None of the other five mass extinctions were caused by one species alone. In some of these extinction events, the

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[170] Lyons, Smith and Brown note that the extinction event involving megafauna had a different timeframe in Australia. Whereas in the Americas the extinctions happened between 15 000 and 12 000 years ago, in Australia the fossil record shows that if happened roughly 46 000 years ago. These extinction periods both correspond to the arrival of the first humans to these continents. Above n 169, 349–354. Wroe et al, above n 168, place the time of the extinction in Sahul in the same timeframe, but note that the arrival of humans took place against a backdrop of severe climate change. The authors state that the presumption of a synchronous arrival of humans and the extinction of megafauna is inaccurate and that the evidence does not support a cause–effect correlation.

[171] Lyons, Smith and Brown, above n 169, 354.

[172] Ibid 353.

[173] In this regard, the *IUCN Red List of Threatened Species* is a valuable resource. It contains comprehensive and reliable information on the status of known species classified under seven degrees of vulnerability: *Least Concern*, *Near Threatened*, *Vulnerable*, *Endangered*, *Critically Endangered*, *Extinct in the Wild* and *Extinct*. Note however that the data are constantly updated and the list can thus be incomplete at any one time. IUCN, *The IUCN Red List of Threatened Species* <http://www.iucnredlist.org/>.

[174] See also Chapter I in respect to the threats of the different elements of biodiversity.

[175] This has been the case for the mammals in Australia in the last 300 years, since the time of European colonisation. Note that these extinctions do not coincide with climate change patterns that could have altered the vegetation, leading to the demise of mammals. See analysis in Lyons, Smith and Brown, above n 169, 349–351.

[176] Refer to section II.1. of the Introduction to this thesis.

natural factors contributing to them meant that the process of extinction was one of centuries of steady species decline. [177]

In fact, the late Pleistocene extermination, in which the above overkill scenario took place, was a relatively minor event when compared to the mass destruction of biodiversity of the last 200 years. Entire ecosystems have been, and are still being, wiped out in the name of development, taking with them species that may not yet have been properly classified or named,[178] all to satisfy the needs of an ever-growing human population.[179] A special mention has to be made of the tropical rainforest and montane forest ecosystems, recognised by scientists as the Earth's habitats that can harbour most biodiversity per square metre. The majority of the 25 recognised biodiversity hotspots, defined as places where more than 1500 species of vascular plants occur, are located in the tropics and include these two abovementioned ecosystems. Two of these hotspots are partly located in Colombia: the Tropical Andes (Venezuela, Colombia, Ecuador, Peru and Bolivia) and the Chocó-Darién-Western Ecuador (Panama, Colombia and Ecuador), one is located in Western Australia.[180]

The Sixth Extinction is real, and the consequences for people could be catastrophic because of the loss of ecosystem services, which commentators have calculated 'at 33 trillion US per year, and may total as much as 4.5 times the value of the Gross World Product'.[181] In a world without pollination, agricultural security would be compromised, as in the case of the Irish potato famine. A world without coastal mangrove wetlands and other vegetation buffer zones is more vulnerable to natural disasters, as empirically

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[177] Mass Extinction: A mass extinction event is when the earth loses more than three-quarters of its living species in a short geological time. Five have occurred in the last 540 million years: 1) the Ordovician event, ~443 million years BP; 2) The Devonian event, ~359 million years BP; 3) The Permian event, ~251 million years BP; 4) The Triassic event, ~200 million years BP; 5) The Cretaceous event, ~65 million years BP. The causes range from global cooling, volcanic activity and the asteroid impact in the Yucatán. To give the reader an idea of the time scale, the effects of said asteroid lasted for 2.5 million years which culminated in the extinction of 76% of species, including most dinosaurs. Adapted from Barnosky et al, above n 157.

[178] Wilson dubbed this as 'Centinelian Extinctions', after the study of the disappearance of the Centinela Forest in Ecuador, a massively diverse ecosystem that had a high rate of species endemism, all of which were lost as a result of clearing. See, Wilson, Edward O, *The Diversity of Life* (Penguin Books, 1992) ('*Diversity...*').

[179] See Paul R Ehrlich, 'The Scale of Human Enterprise and Biodiversity Loss' in John H Lawton and Robert McCredie May (eds), *Extinction Rates* (Oxford University Press, 1995) 214, 215.

[180] See generally, Thomas M Brooks et al, 'Habitat Loss and Extinction in the Hotspots of Biodiversity' (2002) 16(4) *Conservation Biology* 909.

[181] Jonathan M Hoekstra et al, 'Confronting a Biome Crisis: Global Disparities of Habitat Loss and Protection' (2005) 8 *Ecology Letters* 23, 24, citing R Constanza et al, 'The Value of the World's Ecosystem Services and Natural Capital' (1997) 387 *Nature* 253; and R Boumans et al, 'Modeling the Dynamics of the Integrated Earth System and the Value of Ecosystem Services Using the GUMBO Model (2003) 41 *Ecological Economics* 529.

proven by the Southeast Asia tsunami of 2004.[182] Moreover, it is impossible to survive without freshwater or clean air. All of these services are declining along with biodiversity, which means that protected areas, some of which are currently under strict standards of conservation protection, have to be maintained and expanded.[183]

III.2. Disagreements over the Protection of Hotspots

The *CBD* seeks not only to protect vulnerable ecosystems, but also to ensure that the habitats protected are diverse.[184] Conservation biologists have acknowledged this perspective, as well as taking it a step further, by calculating which regions harbour the most biodiversity.[185] These regions have been dubbed 'hotspots'; that is, megadiverse places teeming with life and harbouring more than 70% of all species currently identified, described and named in the world.[186] Less than 20 countries can be considered megadiverse, with most of these being developing countries, including Colombia, plus only three developed countries: Australia, New Zealand and the United States.[187]

Arguably, being labelled as a megadiverse country would imply that country's obligation to conserve the greater amount of its habitats, to ensure the survival of the

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[182] 'Research has shown mangroves are able to absorb between 70–90% of the energy from a normal wave. A study by the World Conservation Union of two villages in Sri Lanka that were hit by the devastating tsunami in 2004, for example, found a death toll of two people in the village with a dense mangrove and scrub forest, compared to 6,000 deaths in the village that had cleared its coastal vegetation'. Hunter, Salzman and Zaelke, above n 72, 1169. Chan et al comment that disaster-mitigation ecosystem services are intangible until a disaster actually happens. For this reason, they are difficult to reconcile with activities that yield private profits, such as the conversion of mangroves to shrimp pools. Kai M A Chan et al, 'When Agendas Collide: Human Welfare and Biological Conservation' (2007) 21(1) *Conservation Biology* 59, 62.

[183] See especially, Bastian Bertzky et al, *Protected Planet Report 2012: Tracking Progress Towards Global Targets for Protected Areas* (IUCN and UNEP-WCMC, 2012). See also, Paul R Ehrlich and Anne H Ehrlich, 'Can a Collapse of Global Civilization be Avoided?' (2013) 280(20122845) *Proceedings of the Royal Society B* 1.

[184] See *CBD* art 7 and Annex I, mentioned earlier in this chapter. As an example of ecosystem variability, think of rainforests, wetlands, tundra, taiga, dry forests, estuaries and marine ecosystems.

[185] Including Norman Myers, Russell and Christina Mittermeir, and Edward O Wilson. See among others, Russell A Mittermeier et al, 'Biodiversity Hotspots and Major Tropical Wilderness Areas: Approaches to Setting Conservation Priorities' (1998) 12(3) *Conservation Biology* 516; Thomas M Brooks et al, above n 180, 909; Wilson, *Diversity*..., above n 178, 247–260.

[186] Uppeandra Dhar, 'Global Biodiversity and Megadiverse Countries: An Analysis for Common Approach' in Like-Minded Megadiverse Countries (ed), *Perspectives on Biodiversity* (Like-Minded Megadiverse Countries, 2005) 1–20, 6.

[187] In 2002, 12 megadiverse developing countries, holding roughly 70% of the world's biodiversity, pledged the protection and sustainable use of these resources as a priority, but acknowledged the technical and financial difficulties of doing so. The resulting plan of action is consigned in the *Cancun Declaration of Like-Minded Megadiversity Countries*, UNEP, Conference of the Parties to the Convention on Biological Diversity 6th mtg, UN Doc UNEP/CBD/COP/6/INF/33 (21 March 2002) ('*Cancun Declaration*').

maximum number of species. If the ecosystems are fragile, perhaps a form of fortress conservation is in order. However, as most of the megadiverse countries are in a developing stage, and given that biodiversity has been conceptualised as a 'common concern of humankind', then the mechanisms to encourage its protection should also include a funding component from developed nations.[188]

III.3. The Human Community Side of the Debate: Opposing Fortress Conservation

Berkes notes that states have used different models for biodiversity conservation. The most important is the system of National Parks and protected areas, followed by the privatisation of wilderness areas to keep them pristine and community-based management including the participation of Indigenous and tribal peoples. [189] Sunderland et al comment that the protected areas system was inherited from a 'colonial approach' to conservation, where it was often the case that entire communities were forcibly displaced to establish conservation sanctuaries, a visibly unsustainable practice, especially in poverty-stricken countries.[190]

The hotspots approach arose as a means to inform biodiversity conservation strategies, a much-needed update to the National Parks model. It seeks to determine and establish protected areas that will maximise the number of species protected. The resulting findings conclude that the nearer to the Equator an ecosystem is located, the greater number of species will be found within. If factors that promote speciation such as geographical unevenness are present, even more species will populate the resulting

[188] See *CBD* art 20, 'Financial Resources'. There are different financial obligations for Contracting Parties depending on whether they are developed or developing countries. This is consistent with the principle of common but differentiated responsibility, first mentioned in the *Stockholm Declaration* and then as one of the key elements of sustainable development as part of the *Rio Declaration*, Principle 7: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

[189] Fikret Berkes, 'Community-Based Conservation in a Globalized World' (2007) 104(39) *Proceedings of the National Academy of Science* 15188, 15188.

[190] Terry Sunderland, Christiane Ehringhaus and Bruce Campbell, 'Conservation and Development in Tropical Forest Landscapes: A Time to Face the Trade-offs?' (2008) 34(4) *Environmental Conservation* 276.

ecosystems.[191] However, this tactic has to consider that the territories that occupy the tropical belt, and hence those that harbour most of the world's hotspots, are categorised as either developing or least-developed countries. These different policies have spawned disagreements among commentators regarding the best way to tackle the problem, with suggested approaches ranging from purely anthropocentric to deeply eco-centric,[192] with sustainable development somewhere in between.[193] This raises the objection of the right to develop to a reasonable standard of living, discussed in Chapter I. [194] For environmental justice to be achieved in these cases, developed countries have to assume the responsibility of the damages they caused in the past. An elegant way to do this is to provide substantial assistance to developing countries for the protection of ecosystems, capacity building and technology transfers, which could make conservation efforts more attractive to these megadiverse nations from an economic point of view.

Aside from the general obstacle to development objection, a further condemnation of protected areas arises from their being considered as 'engines of socio-economic marginalisation'.[195] They can place an unfair burden upon communities that become tied to, for example, tourism possibilities that may never materialise. Brockington and Schmidt-Soltau express that they can also be harmful or inconvenient to local groups, as sometimes the cost of protection is greater than the benefit it ultimately entails.[196] Studies undertaken by Brockington and Igoe also show that there have been abuses on the part

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[191] See generally, Mittermeier et al, above n 185; Brooks et al, above n 180.

[192] Wilson for instance states that there are three levels of altruism towards the rights of other non-*Homo sapiens* species: 'The first is anthropocentrism: nothing matters except that which affects humanity. Then pathocentrism: intrinsic rights should be extended to chimpanzees, dogs, and other intelligent animals for whom we can legitimately feel empathy. And finally biocentrism: all kinds of organisms have an intrinsic right at least to exist. The three levels are not as exclusive as they first seem. In real life they often coincide, and when in life-or-death conflict they can be ordered in priority as follows: first humanity, next intelligent animals, then other forms of life'. Wilson, *Future...*, above n 161, 133.

[193] Klaus Bosselmann, 'Ecological Justice and Law' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2007) 129, 151.

[194] Recall that the date set for achieving the eight Millennium Development Goals, 2015, is less than two years away. The 189 countries that supported the initiative pledged to 1) eradicate extreme poverty and hunger; 2) achieve universal primary education; 3) promote gender equality and empowerment of women; 4) reduce child mortality; 5) improve maternal health; 6) combat HIV/AIDS, malaria and other diseases; 7) ensure environmental sustainability; and 8) develop a global partnership of development by 2015. The last Report from 2012 highlights that the number of people without access to improved sources of water has halved, and that the target for reducing poverty for 2012 was met, resulting in a fall in extreme poverty in every region. See the United Nations, *The Millennium Development Goals Report 2012* <http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2012/English2012.pdf>.

[195] Matt Walpole and Lizzie Wilder, 'Disentangling the Links Between Conservation and Poverty Reduction in Practice' (2008) 42(4) *Oryx* 539, 539.

[196] See, Dan Brockington and Kai Schmidt-Soltau, 'The Social and Environmental Impacts of Wilderness and Development' (2004) 38(2) *Oryx* 140.

of governmental and non-governmental conservation agencies towards locals. The authors express their disagreement with the manner in which important conservation NGOs such as the Nature Conservancy and the Wildlife Conservation Society foster the creation of protected areas, including through the deliberate eviction of peoples, especially in Gabon. Similarly, Conservation International's biodiversity hotspots approach has facilitated the almost indiscriminate creation of new ones in Latin America.[197] West et al attack the IUCN's flagship programme to create a universal system to categorise protected areas[198] to assign funding priority, arguing that this scheme further separates nature and culture instead of reconciling them.[199] This is of course one of the main counterarguments that the model of the collective legal autonomy concerning TEK seeks to address.[200]

Developing the same theme but moving from the purely eviction-focussed perspective, Adams et al warn that conservation efforts that only aim at preserving ecosystems in a pristine state can compromise the livelihoods of entire communities. These human groups may be forced to stop the exploitation of natural resources in the assigned areas. This conclusion was based on the identification of four factors that define the tension between conservation and poverty alleviation; namely: a) the separation of conservation and poverty into two policy realms, b) the consideration that poverty is a critical constraint on conservation, c) the inadmissibility of conservation compromising poverty reduction, and d) the fact that poverty reduction depends on living resource conservation.[201] Chan et al also identify this tension,[202] and West and Brockington develop it by stating that a persistent issue 'with regard to the social effects of protected areas is that social and natural scientists do not have sustained conversations about why deep social effects matter … before projects are implemented'.[203] These four factors are indeed crucial for building holistic biodiversity conservation policies beyond the out-dated fortress conservation model. Australia has linked conservation to the creation of

[197] Dan Brockington and Jim Igoe, 'Eviction for Conservation: A Global Overview' (2006) 4(3) *Conservation & Society* 424, 444.

[198] For the explanation of these categories, see Table 1 earlier in this chapter.

[199] Paige West, James Igoe and Dan Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2006) 35 *Annual Review of Anthropology* 251, 256.

[200] The case studies from Colombia presented in Chapter IV prove the effectiveness of this model for Indigenous communities from the Amazon.

[201] William M Adams et al, 'Biodiversity Conservation and the Eradication of Poverty' (2004) 306 *Science* 1146.

[202] Chan et al, above n 182.

[203] Paige West and Dan Brockington, 'Anthropological Perspective on Some Unexpected Consequences of Protected Areas' (2006) 20(3) *Conservation Biology* 609, 614.

jobs, building it into the country's long-term strategy.[204] In Colombia, one of the keys to success of the collective legal autonomy concerning TEK is the budgetary constitutional provisions for Indigenous Territorial Entities (ETIs for its Spanish Acronym).[205]

Interestingly, a point raised in the aforementioned papers was the perceived differentiated treatment Indigenous peoples received from NGOs and policy makers, who tend to favour these communities over other human groups. The commentators conclude that such a situation should not be endorsed because it can generate unfair treatments of 'lesser' stakeholders, such as small-scale farmers. Brockington et al revisited this view and denounced the unfairness of international conservation lobby efforts, warning that:

> conservationists need to be wary of an exclusive focus on indigenous peoples. We thoroughly support policies that advance indigenous peoples' rights and needs … Conservationists, however, must not allow their concern for indigenous rights to obscure the experiences for nonindigenous peoples, which can be just as serious.[206]

This is where the conservation side of the debate is neglected when it should be complementing the debate in a constructive manner. Given that the mentioned authors overtly disqualify the need to protect hotspots and put the immediate interests of people before conservation in almost every case, conservation efforts become treated as an evil conspiracy of sorts:

> The unpopularity of protected areas has come as an unwelcome shock for many conservationists. For years conservation has enjoyed the moral high ground. It was saving the planet, rescuing species from extinction, and taking a stand against the rapacious consumption of resources by one virulent species. This image of 'global good guys' is not only an important part of conservationists' own self-perceptions, it is also essential to the image of large conservation organizations in their fund-raising appeals. Now these same organisations find themselves engaged in publicity battles, the negative consequences of which could be particularly damaging to their institutional well-being.[207]

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[204] See Chapter III's comment on the 2010–2030 Biodiversity Conservation Strategy. National Biodiversity Strategy Review Task Group, 'Australia's Biodiversity Conservation Strategy 2010–2030' (Policy Strategy, Natural Resource Management Ministerial Council, Australian Government, Department of Sustainability, Environment, Water, Population and Communities, 2010).

[205] Art 286 of the *Colombian Constitution 1991* states that the Indigenous territories are territorial entities that, according to art 287(4), have part of the national budget assigned to them. This territorial regime is discussed thoroughly in Chapter IV.

[206] Dan Brockington, Jim Igoe and Kai Schmidt-Soltau, 'Conservation, Human Rights and Poverty Reduction' (2006) 20(1) *Conservation Biology* 250, 251.

[207] Brockington and Igoe, above n 197, 425.

This is an exaggeration. This is no longer the age of Muir and his peers. To blindly attack these NGOs neglects their achievements. Arguably, the interpretation that Indigenous peoples are preferentially treated is also skewed. Dispossessing them to create a protected area can be construed as a new form of colonialism, with long-lasting consequences, as the Amacayacu case discussed below will show.208 Even in some forms of community-based conservation, as will be elaborated in the next chapter, the relationship of the State vis-à-vis its Indigenous peoples can devolve into an uneasy cheap labour situation that reduces the cost of park management.

This debate has also revolved around the model of National Parks as forms of fortress conservation, which has its international legal basis in the *in-situ* conservation provisions of the *CBD*.[209] However, the same criticism can apply to Ramsar zones. Both Australia and Colombia have listed fragile and well-preserved ecosystems under this convention, with the wise use given to them being directed towards preserving the water resource rather than giving other uses to these ecosystems. While it is clear that the specificity of the types of ecosystem that can be protected under the *Ramsar Convention* prevents other uses, even the conference of the Parties of this treaty has issued guidelines for the involvement of Indigenous peoples and local communities.[210] In the case of the *WHC*, it is debatable whether the protection of mixed sites with cultural and natural heritage values contributes to the protection of the human rights of Indigenous peoples. As the next chapter elaborates, the outstanding universal value (OUV) methodology of the *WHC* is not participatory, and the listing of sites may not accurately reflect the values conferred to the sites by the groups that do have a link with the land.

It is now pertinent to present the arguments in favour of a strong conservationist policy. Aside from the anthropogenic extinction argument, the necessity to curb the predatory appetites of people in regards of ecosystems cannot be readily dismissed, if only as a token of good faith towards future generations of human beings.

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208 See the comparative analysis further in this chapter.

209 *CBD* art 8.

210 See eg, Recommendation 6.3 COP 6, Brisbane 'Involving local and indigenous people in the management of Ramsar wetlands'.

III.4. The Conservationist Side of the Debate: Advantages of Ecosystem Protection and Fortress Conservation

The principal advantages of fortress conservation arise from keeping people out of the area in question. This is not only true for areas where the objective is to keep the ecosystem pristine. For strategies involving ecological restoration of damaged or intervened ecosystems, it is considered best practice to close the area completely and manage it externally to ensure the repopulation of the area with native species of plants, animals and fungi.[211]

As suggested before, nature conservation efforts tend to be based on the creation of protected areas for the safekeeping of relatively large extensions of land in a pristine condition, as a treasure-chest of ecological bounties. However, the approach entails ecological complications: if only designated areas are left untouched, and thus isolated from the interconnected ecosystems, the price for biodiversity could be a drastic reduction of the variety of species. The cause for this is ecosystem fragmentation.[212] To avoid it, the best strategies are the creation of buffer zones and corridors that connect protected areas: two fundamental tenets of conservation biology.[213] As the *Protected Planet Report* notes, to maintain the health of protected areas and vulnerable ecosystems, active 'connectivity conservation and management' is needed, and has to be based on the ecosystem approach.[214] Nevertheless, the fortress conservation model has been justified as an effort to guard entire groups of species for their intrinsic value, regardless of their status on endangered lists and similar efforts.

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[211] See for instance the recommendations set forth by Van der Hammen in the case of the Colombian Andean cloud forests, especially near heavily populated cities. Thomas van der Hammen, 'Consensos mundiales de restauración y enfoques de investigación y monitoreo' in Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2000) 41, 47–48.

[212] The literature on the subject of habitat fragmentation is abundant. Fahrig provides a review of this literature, critiquing some of its most established concepts and proposing new avenues for study. Lenore Fahrig, 'Effects of Habitat Fragmentation on Biodiversity' (2003) 34 *Annual Review of Ecology, Evolution, and Systematics* 487. For the role of habitat fragmentation in the disruption of ecosystem services, see Richard S Ostfeld and Kathleen LoGiudice, 'Community Disassembly, Biodiversity Loss, and the Erosion of an Ecosystem Service' (2003) 84(6) *Ecology* 1421.

[213] See Reed F Noss, 'Some Principles of Conservation Biology, as They Apply to Environmental Law' (1993) 69 *Chicago-Kent Law Review* 893, 900–904.

[214] The Report compiles the data to 2012, and summarises best practice in connectivity conservation management. Note that the report deviates from the strict application of fortress conservation by highlighting, as Noss (ibid) did in 1993, that humans are now a key part of the ecosystem; hence the need for active rather than passive management strategies. Bertzky et al, above n 183, 43–47.

On the other side of the discussion about how protected areas can engender poverty and marginalisation, commentators such as Redford et al try to balance the equation between man and nature. The authors argue that the impact on poverty of the protection of wilderness areas is minimal if one takes into account that pristine sites are usually isolated and do not harbour numerous populations. This factor can cause miscalculations on the number of people effectively displaced or negatively affected by conservation efforts.[215] Sanderson and Redford even suggested that sometimes 'poverty-alleviation has largely subsumed and supplanted biodiversity conservation', a view also voiced in the 2003 World Parks Congress in Durban.[216] This position was later softened by the authors in a new paper in which they clarified that 'their lament is not that poverty should be ignored; it is that protected areas are on the defensive, described as obstacles to poverty alleviation'.[217] This argument cannot be readily dismissed. As argued in Chapter I, environmental degradation and poverty alleviation feed into each other and can become trapped in a vicious circle. To sacrifice either of the interests completely for the sake of the other is not an optimal solution. These are interdependent problems and to divide them would be yet another resurfacing of the myth that people and nature are separate.

The discussion at this point is far from settled, and it has deteriorated such that the commentators on either side seem to be producing new papers only to justify their previous work and to defend their points of view without reviewing or producing new data.[218] As Sunderland et al noted, this compromises the overall credibility of the published results, which are increasingly anecdotal and polemic from both sides.[219] After analysing the most representative literature on the subject, the authors advocate for an end to this polarised debate. They propose that there is an urgent need to reach a common ground, and identify that more research from a multidisciplinary perspective is required. Chicchón[220] and Springer[221] join this claim for more research. The latter also

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[215] Kent H Redford et al, 'What is the Role for Conservation Organizations in Poverty Alleviation in the World's Wild Places?' (2008) 42(4) *Oryx* 516.

[216] Linda Krueger, 'Protected Areas and Human Displacement: Improving the Interface between Policy and Practice' (2009) 7(1) *Conservation & Society* 21.

[217] Steven E Sanderson and Kent H Redford, 'The Defence of Conservation is not an Attack on the Poor' (2004) 38(2) *Oryx* 146, 146.

[218] To illustrate this point from the 'poverty side' see Kai Schmidt-Soltau, 'Is the Displacement of People from Parks only 'Purported', or is it Real?' (2009) 7(1) *Conservation & Society* 46, who quotes from Gandhi to justify his stance (54).

[219] Sunderland, Ehringhaus and Campbell, above n 190.

[220] Avecita Chicchón, 'Working with Indigenous Peoples to Conserve Nature: Examples from Latin America' (2009) 7(1) *Conservation & Society* 15.

notes the importance of harmonising international and domestic legal frameworks, especially those concerning human rights and environmental regimes, to implement best practices.[222] This thesis is in part a response to this gap.

These positions are deeply related to the human rights–based approach to biodiversity conservation. To address conservation with the difficult concept of the intrinsic right of species to exist on Earth as sole shield and argument may not yield positive results. Hunter et al point out that one of the most important controversies surrounding the conservation of wildlife is that people need to exploit their surrounding resources. Thus, to strike a balance between conservation and exploitation can be a difficult task.[223] It would seem that alleviating poverty and conserving ecosystems are incompatible goals in themselves, and thus Bosselmann proposes that they are best analysed under the lens of environmental ethics and justice,[224] a view consistent with Springer's position.[225] In the case of Indigenous peoples, the social justice issue meets the historical debt of the dominant societies, a debt comparable to the liability that developed countries have in respect to the environmental damage of the late nineteenth and first two-thirds of the twentieth centuries. The debt to Indigenous peoples increases each time they are removed from their ancestral lands.[226]

Even if the academic debate has deteriorated, as shown above, the core issue continues to be that the model of fortress conservation has foundational deficiencies that have to be addressed in a radical fashion. The separation theme was an inappropriate conceptualisation that affects communities that do not follow the Western traditions more deeply. The cases of Colombia and Australia, given in the next section, illustrate these issues. Both countries made an early commitment to the preservationist paradigm of National Parks and reserves, with no consideration of the input or needs of their Indigenous peoples. These early developments in wildlife conservation law and policy have determined the present-day models for including Indigenous peoples in conservation, which in Australia, follow the precepts of environmental law; and in Colombia, are marked by human rights law.

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[221] Jenny Springer, 'Addressing the Social Impacts of Conservation: Lessons from Experience and Future Directions' (2009) 7(1) *Conservation & Society* 26.

[222] Ibid

[223] Hunter, Salzman and Zaelke, above n 72, 1014.

[224] Bosselmann, above n 193, 152.

[225] Springer, above n 221, 26.

[226] See Chapters III and IV.

IV. FORTRESS CONSERVATION IN COLOMBIA AND AUSTRALIA

IV.1. Methodology

This part observes Dannemann's methodology, which deviates from the purely functionalist approach to comparative law and proposes to widen the scope of comparison.[227] The justification for the choice of methodology and the main similarities and differences of the jurisdictions of study were discussed in the introduction to this thesis. The purpose of its use is to evaluate the similarities and differences between Colombia and Australia, with the aim not only of understanding how these systems comply with colliding international obligations, but also of proposing avenues for law reform. This method has three main components with relevant subdivisions. The first is the selection of the subject of comparison, the sources and the legal systems. The second consists of a description of the legal institutions and rules, the legal context and the non-legal context. The last element is an analysis of the findings, explaining their differences and similarities.[228]

The reasons for the selection of the subject of comparison and legal systems were discussed in the introduction to this thesis. The conceptual analysis of the collisions between the two legal interests, namely the recognition of Indigenous peoples' human rights and biodiversity conservation, was covered in Chapter I. This satisfies the first component of the methodology. The previous sections of this chapter already provided a critical analysis of the international legal and non-legal contexts that are part of the second component. They canvassed the origin and philosophical foundations of the model of fortress conservation, complemented with its evolution in international environmental law and the current status of the debate over protected areas. Aside from the primary legal documents, the sources chosen for this part contained academic papers from different disciplines, enriching the analysis with a perspective on the social and ecological issues of fortress conservation.

[227] Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, 2006) 383.
[228] Ibid 406–418.

This section occupies itself with the second and third components of the methodology. It starts by narrowing down the similar non-legal contexts of the two compared countries, where the pressures to their natural environments were exacerbated by colonial settlement. The ratification of the analysed multilateral treaties played a vital role for shaping the developments in the legal context, which built upon the pre-existing strong National Park networks in both countries. It then describes, analyses and compares the legal institutions of Colombia and Australia that are relevant for the implementation of these treaties. The focus of the comparison is on constitutional developments in both countries, because they contain the key differences that gave birth to the conservation strategies that also involve Indigenous peoples. Thus, the main sources used are the constitutions and selected case law that enshrine the principles that govern environmental protection, complemented by the input of scholarly papers.

IV.2. Root Causes of Environmental Degradation

To understand the vulnerability of the ecosystems of Australia and Colombia, and the consequent necessity of biodiversity conservation strategies, some context is needed. These two countries inherited more than their legal systems from their former colonial empires; their lands were also altered to follow the model of agriculture perfected in the Fertile Crescent roughly 9500 years ago.[229] Thus, the descendants of these first pioneering farmers have continued to modify their environment. There are several problems associated with this model of working the land, starting with the fact that it was developed for use in the temperate or sub-temperate regions, which follow seasonal weather patterns unlike those of the territories to which the methods were transposed.

The Europeans who colonised the Americas and Australia believed that the Eurocentric model of agriculture was the best method to maximise the use of the land. This included bringing already domesticated species into the new ecosystems. To adopt this form of agriculture, it is necessary to divide the land into discrete units. Planning laws

[229] Note that this is only the farming techniques for Europe and the Middle East. Other societies have perfected agriculture as well, including the Indigenous peoples of the Andes and the nations of Papua New Guinea. In total, five regions can be said to have developed agriculture independently from each other: the Fertile Crescent, East Asia, South America, North America and New Guinea. Tim (Timothy Fridtjof) Flannery, *Here on Earth–An Argument for Hope* (The Text Publishing Company, 2010) 137 ('*Here on Earth*').

and property regimes are the key legal instruments that complement and regulate the model. The challenges of tropical ecology were not even considered in the equation; after all, what had worked so well in the motherland was bound to work in the new domains.

The lusciousness of the landscape and its apparent fertility mesmerised the Spanish in the Neotropics[230] and the British in Australia.[231] They interpreted wrongly that the overabundance of plants that sprouted not only from the ground, but also on trunks, branches and even leafs, was a sign of fertile lands that would be continually productive. This was the reason, in Colombia, to implement slash and burn agriculture, which remains today as one of the main causes of biodiversity loss.[232] However, these tropical ecosystems were not what they seemed.[233] Their health and productivity depends on their own recycled nutrients, rather than on the soils, which are often poor. Van der Hammen and Rodríguez compare the typical approach of the Colombian dominant society towards the forest with that of the peoples of the country's Amazon.[234] The difference is that the former conceive the forest as a space to be transformed, colonised and turned into agricultural areas or a repository of extractive materials such as timber. In contrast, the latter oppose this utilitarian perspective by seeing the forest as a friend and ally instead of an enemy to be tamed.[235]

The transplanting of foreign farming models and species had a negative impact upon biodiversity conservation and the recognition of the rights of Indigenous peoples in Australia and Colombia. First, there was a strong deleterious impact on tropical and subtropical ecosystems, especially forests. In Australia, the tropical forests of Queensland

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230 Ibid 147–148.

231 Jared Diamond, *Collapse–How Societies Choose to Fail or Succeed* (Penguin Books, 2005) 382–383.

232 Ministry of Environment, National Department for Planning and Alexander Von Humboldt Institute, 'Política Nacional de Biodiversidad' (National Biodiversity Policy Alexander Von Humboldt Institute, 1997) <http://www.humboldt.org.co/download/polnal.pdf>.

233 Rodríguez Becerra commented in 2001 that approximately 25% of the world's biodiversity is in the Andean subregion (Ecuador, Peru, Colombia, Venezuela and Bolivia). However, instead of capitalising on its potential for sustainable development, these countries have pioneer settlers that seek to 'gain lands' from the forests. One of their strategies is to slash and burn the existing forests or savannahs for pastoral agriculture. Manuel Rodríguez Becerra, 'Anotaciones para promover una reflexión subregional andina sobre el Desarrollo Sostenible' (Working Paper United Nations Environment Programme, Regional Office for Latin America and the Caribbean, UNEP Ad Hoc Group, June 2001).

234 The southernmost region of Colombia, comprising the provinces of Putumayo, lower Caquetá, Vaupés, Guaviare, Guainía and Amazonas, is part of the Amazon jungle.

235 María Clara van der Hammen and Carlos Alberto Rodríguez, 'Restauración ecológica permanente: Lecciones del manejo del bosque amazónico por comunidades indígenas del medio y bajo Río Caquetá' in Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2000) 259, 269.

and the Northern Territory,[236] the rainforests of Western Australia and Tasmania, and the bushlands in all of the other states were badly affected.[237] In Colombia, the Amazon jungle, the montane and cloud forests of the Andes, and the Chocó-Pacific rainforest have been significantly reduced in size.[238] The loss of biodiversity and ecosystems has a more severe impact in the tropics than in temperate zones, especially through erosion, which is prevented by ecosystems. Once the vegetation layer is stripped, the land becomes susceptible to erosion and desertification. This affects people directly because agriculture is impossible in sterile soils, and the lack of vegetation also makes the land unstable and more at risk from natural disasters like landslides and floods. Loss of ecosystems may also entail the decimation of biodiversity due to the number of endemic species that may inhabit relatively small areas. Colombia and Australia both rank in the world's top 10 for endemism rate. Once the unique circumstances and habitats that allowed these species to flourish are changed, it is likely that the species they harbour will vanish. Aggressive slash and burn agriculture, for example, leaves no room for regeneration or restoration.[239] Moreover, forests are not the only vast repositories of biodiversity. Other ecosystems also play key roles in human well-being with their various services, such as coastal protection and freshwater supply.

In Australia, the Great Barrier Reef protects the Northeastern coast. Incidentally, it is the largest living organism on Earth and no other marine ecosystem comes near to its biodiversity. Coral reefs are considered some of the most productive ecosystems in terms

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236 See the accounts of Boer on the disputes between, for example, the State of Queensland and the Commonwealth Government regarding the listing of the World Heritage Area of the Wet Tropical Rainforests of North Eastern Australia during the 1980s. Boer, above n 57, 272–275.

237 Australia's fourth National Report to the *CBD* links the loss of 'about 90 per cent of the native vegetation in the eastern temperate zone' to economic and development processes. These include habitation transport, industry and crops. Additionally, '50 per cent of rainforests have been cleared and the proportion of Australia covered by forest or woodland has been reduced by more than one-third'. Australian Government, 'Australia's Fourth National Report to the United Nations Convention on Biological Diversity' (Report No 4, Australian Government, March 2009).

238 Ortega-P et al cite the main causes for deforestation of the Andean highlands in Colombia as clearing for agriculture and forest fires, and for the Pacific and Amazon rainforests, the extraction of valuable slow-growth timber. Sergio Camilo Ortega-P et al (eds), *Deforestación evitada. Una guía REDD + Colombia* (Ministerio de Ambiente, Vivienda y Desarrollo Territorial, Conservación Internacional Colombia, Fondo Mundial para la Naturaleza (WWF), The Nature Conservancy, Corporación Ecoversa, Fundación Natura, Agencia de Cooperación Americana–USAID, 2010) 3.

239 Andrade provides an analysis of the likelihood of ecosystem restoration and resilience depending on the magnitude of human impact (110–111) and compares it with natural processes or 'forests dynamics' (114–115) to highlight that humans can no longer be excluded from consideration in biodiversity conservation strategies. See Germán I Andrade, 'Selvas sin ley. Conflicto, drogas y globalización de la deforestación en Colombia' in Martha Cárdenas and Manuel Rodríguez Becerra (eds), *Guerra, sociedad y medio ambiente* (Friedrich-Ebert-Stiftung en Colombia (Fescol), Tropenbos, Fundación Alejandro Ángel Escobar, Ecofondo, Internacional Colombia GTZ, 2004) 107.

of the quantity of goods and services they provide. They are a source of seafood, recreation and aesthetic pleasure, act as carbon sinks and fix nitrogen in nutrient-poor environments, thereby actively contributing to the sustenance of aquatic life. They are also extremely fragile, being vulnerable to human activities not only at sea but on the land, such as deforestation and pollution.[240] Currently, the entire reef is carefully managed and zoned as one of Australia's flagship National Parks. Colombia has a high mountain ecosystem exclusive to the tropical Andes called the *páramo*. This ecosystem guarantees the supply of water to several mountain cities in the country, including the capital.[241] Their destruction for expanding arable lands, especially for growing potatoes, adversely affects the Colombia people directly. As the *páramo* shrinks, water shortages start and make land less productive, which in turn prompts more clearing of land. Eventually, the lack of vegetation erodes the soil, increasing the likelihood of landslides, which can wash away crops. The processes and services of these ecosystems cannot be replicated or entirely replaced through technology.[242]

The second impact is that the introduction of agricultural practices and the associated legal regimes in Australia and Colombia largely ignored the practices and customs of the Indigenous inhabitants of these countries.[243] The Spanish and British settlers had a univocal plan for their colonies, to implant as much of their homeland systems as possible. The food production front largely ignored the animals and plants that Indigenous peoples consumed, except in the cases in which these could be produced in bulk or had commercial potential. Unlike Australia, Spanish-colonised America had several agricultural societies whose methods were adapted to different weather patterns.

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[240] Fredrik Moberg and Carl Folke, 'Ecological Goods and Services of Coral Reef Ecosystems' (1999) 29 *Ecological Economics* 215, 219–223.

[241] For detailed analysis of the functioning, importance and risks of the *páramo* ecosystem in Colombia, see the works of Hofstede, among others, Robert Hofstede, 'El Proyecto Páramo Andino: un ejemplo de aplicación del Enfoque Ecosistémico a nivel de paisaje regional' in Ángela Andrade Pérez (ed), *Aplicación del Enfoque Ecosistémico en Latinoamérica* (CEM-UICN, 2007) 37; Robert G M Hofstede, 'The Effects of Grazing and Burning on Soil and Plant Nutrient Concentrations in Colombian Páramo Grasslands' (1995) 173 *Plant and Soil* 111; Robert G M Hofstede, M Ximena Mondragón Castillo and Constanza M Rocha Osorio, 'Biomass of Grazed, Burned, and Undisturbed Páramo Grasslands, Colombia. I. Aboveground Vegetation' (1995) 27(1) *Arctic and Alpine Research* 1.

[242] The water problem is pressing in expanding human populations. The use of technology to replace ecosystem services is self-defeating. See for instance the disproportionate investment ($4 million just for the studies) in the Sydney desalination plant for use in times of drought, approved under the special provisions for 'critical infrastructure' in the *Environmental Planning and Assessment Act 1979* (NSW) ('*EPA Act*'). The community preferred this plant to the option of recycling and purifying sewer water as is done in the countries of the European Union. Rosemary Lyster et al, *Environmental & Planning Law in New South Wales* (The Federation Press, 2007) 274–275.

[243] For an analysis of how customary laws were systematically supplanted in European colonies and the theoretical foundations justifying this stance, refer to Erika J Techera, *Marine Environmental Governance: From International Law to Local Practice* (Routledge, 2012) 129–133.

This explains the keen and practically immediate adoption of cocoa, potatoes and maize, among others capable of being grown in seasonal monocultures.[244] Thus, Indigenous peoples' knowledge of the land itself was supplanted by the knowledge of the settlers, applicable to entirely different climates and ecosystems from those of Australia and Colombia. The damage done by this policy in the form of destruction and decline of vital ecosystem services and the traditional knowledge that understood their functioning and management should serve as a lesson of 'what not to do' in land planning and environmental policies. This is the reason that culture revitalisation mechanisms are a vital part of the collective legal autonomy concerning TEK proposed in this thesis.

The history of environmental degradation and loss of biodiversity continued relatively unchecked for a long time. The next sections analyse the early implementation of fortress conservation–like strategies in Colombia and Australia, evident in the adoption of National Park systems. Both countries responded to two pressures; first, they sought to curtail the decline of environmental goods and services like timber. Second, they were influenced by the two waves of environmentalism of the early twentieth century and the 1960s and 1970s environmentalists. The legal strategies followed similar patterns but diverged markedly during the 1990s; although both would embrace the sustainable development model from Rio, the key difference is the adoption of a participatory democracy model of the State in Colombia, under a strong human rights framework.[245] Australia did not experience the same kind of radical change. Nevertheless, treaties in the areas of environmental law and human rights international obligations had a marked influence in Australian domestic law, especially because both areas were traditionally regarded as part of the States' competence.[246] Environmental law eventually became a much more collaborative affair, with the Commonwealth and the seven state governments reaching a common ground.

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[244] Mgbeoji comments that the introduction of maize and potatoes into the European diet, which Colombus brought back from his first and second trips, resulted in a population increase on the continent because of these crops' higher yields. Mgbeoji, above n 117, 824.

[245] *Colombian Constitution 1991* art 1.

[246] Brian R Opeskin and Donald R Rothwell, 'The Impact of Treaties on Australian Federalism' (1995) 27 *Case Western Reserve Law Review* 1, 10.

IV.3. Colombia: An Ecological Constitution for a Megadiverse Country

Colombia's environmental law has evolved rapidly since the enforcement of the new Constitution. This is not surprising. The Constituent Assembly of 1991 committed to the creation of a truly ecological instrument, which has prompted changes in several areas, including environmental impact assessment processes and environmental licences as a requisite before undertaking infrastructure developments.[247] To understand the current environmental provisions, and where National Parks and other protected areas stand in the legal system, it is relevant to refer to the early natural resource management strategies in place.

Colombia declared its independence from the Kingdom of Spain on 10 July 1810, but remained a Spanish colony until 7 August 1819. Although the first national Constitution, inspired by its American counterpart, was enforced in 1821 in San José de Cúcuta, discussions and disagreements among the independence leaders about the convenience of a federal state brought instability for the next six decades.[248] A central government ruled by Civil Law was declared at last in 1886 with the enforcement of a new Constitution and of the Civil Code the next year.[249] The 1886 Constitution remained in force until 1991, with important amendments implemented in 1903, 1910, 1936, 1945 and 1968. Under this constitutional framework, the approval law of any given treaty was not directly enforceable as it is today. Colombia adopted a pure dualist approach to international law, akin to the interpretation still preferred in Australia and other Common Law countries.[250] Under this system, decisions taken in the international arena subscribed by the State could only have force after the passing of tailored law and policy. The reason for this was that the decision-making processes in these forums were considered vastly

[247] Environmental assessment procedures were first implemented in the *Executive Decree 2811 of 1974 Enacting the Code of National Renewable Resources and Environmental Protection* (Colombia).

[248] Marco Palacios and Frank Safford, *Colombia: País fragmentado, sociedad dividida–Su historia* (Editorial Norma, 2002) 235–270.

[249] The *Civil Code* is still in force, although it has had several amendments over the years.

[250] The implications of the dualist and monist implementations of international human rights law for Indigenous peoples in Colombia and Australia are discussed in the next two chapters.

different to those made in domestic law, especially in their normative production, subjects and sanctions.[251]

IV.3.1. Pre-1991 Environmental Law and Policy

The Colombian legislation on environmental matters is traced to the Colonial Period, with legal institutions such as the *Mercedes Reales de las Aguas* (Royal Permits over Water) and *Permisos de Caza* (special hunting licenses) granted by the Spanish Crown. The latter allowed the killing of certain animals for sport, akin to the hunting enjoyed by the European aristocracy.[252] After independence, the *Civil Code* implemented the ownership regime over water, forests, hunting and fishing. During the twentieth century, the legislation had a clearly resource-oriented development. Thus, water and forestry, which depend upon each other for their productivity, saw the implementation of numerous regulations.[253] The first protected areas in the country were utilitarian. Areas were protected based on their strategic importance for water security and the long-term exploitation of certain timber species.[254] Even so, in 1948, the *Serranía de la Macarena* was deeded as a national reservation for the study of natural sciences and in 1968 the first National Park, *Cueva de los Guácharos*, was declared.[255]

In 1973, Colombia not only signed the *Stockholm Declaration*, it also acted upon its principles. The use of natural renewable resources in a manner compatible with the value of the environment as part of the nation's heritage was systematically codified. The

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[251] In the *Wayuu Basic Plan Case*, the Constitutional Court refers to the express reversion of the dualist model in favour of monism and the commitment of the country to the supremacy of international human rights obligations. Constitutional Court, *Judgement C-615/2009* ('*Wayuu Basic Plan Case*').

[252] For a complete account on the history of Colombia's environmental law prior to 1991, see Imelda Gutiérrez, 'La legislación ambiental preexistente frente al nuevo marco constitucional' (Paper presented at the Curso Legislación Ambiental, Proyecto de Capacitación para profesionales del sector ambiental, Ministerio del Medio Ambiente - ICFES - Programa Ambiental - Crédito BID, Villa de Leyva Boyacá, 9–13 June 1996).

[253] For example, *Act 119 of 1919* regulated the logging of wood chips in the three mountain ridges and specified that the persons licensed by means of public contracts to exploit the public forests had the obligation to reforest the lands used to guarantee their future exploitation. Similarly, *Act 200 of 1936* introduced heavy fines for illegal logging, especially near watercourses, and *Act 202 of 1938* further regulated that reforestation had to be done with the same kind of trees as those logged for commercial exploitation. See Gutiérrez, above n 252.

[254] *Executive Decree 2278 of 1957* divided forests into four types: a) Protected Forests, b) Public Forests, c) General Interest Forests and d) Private Property Forests. Arts 4 and 5 determine the qualities of strategic importance for water and timber. *Act 2 of 1959* further regulated protected forests. *Act 2 of 1959 Enforcing Provisions on the Nation's Forestry Economy and the Conservation of Natural Renewable Resources* (Colombia); *Executive Decree 2278 of 1953 Enforcing Regulations on Forestry Matters* (Colombia).

[255] For the location of these parks see Table 6 below, 'The Protected Area System in Colombia by Eco-Region'.

President was granted extraordinary faculties to that effect and thus was the *Natural Renewable Resources and Environmental Protection Code* enacted in 1975.[256] This code was the pioneer instrument to deviate from the notion of separation from nature by linking extensive pollution and other sources of contamination of air, land and water to health and well-being problems in the Colombian population. This instrument also unified the legislation of protected areas, which was scattered between forestry regulation and deeded areas.[257]

It is possible to argue that in Colombia the 1991 change of paradigm that made cultural diversity a foundational principle of the State also had a direct impact on the preferred biodiversity conservation models. Prior to 1991, the preferred approach was a top-down designation of protected areas, where the value and knowledge systems of the majority society prevailed in cases of conflict with Indigenous peoples living inside or using the areas. This situation has changed drastically. Like the flipping of a coin, Colombia passed from a completely top-down process, where, as expressed by a leader of the San Martín de Amacayacu community, 'they took advantage of our lack of knowledge of what a Natural Park was, we thought they were referring to a playground, with swings'.[258] This summarises the 'consultation process' before the creation of one of the most iconic National Parks in the country, the Amacayacu, in 1975. The park overlaps part of the ancestral territory of the Tikuna, including the town of San Martín, originally a well-meaning evangelisation endeavour that brought together the Tikuna families living in great extents of jungle into a handy congregation. This had the unintended effect of population growth and a related scarcity of resources, and eased the way for the government to claim the territory for the creation of Amacayacu National Park. Even though today the Tikuna community are regaining spaces of participation and reinvigorating their TEK—now much more appreciated and understood—the process took decades.[259]

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[256] *Executive Decree 1608 of 1978 Regulating the National Code of Renewable Natural Resources and Environmental Protection and the Act 23 of 1973 on Wild Fauna* (Colombia).

[257] Art 327 of this Decree defines the protected area system as 'the compound of areas with exceptional values for the national heritage. Due to their benefit for the inhabitants of the nation and to their natural, cultural or historical characteristics are reserved and declared as comprised in any of the categories defined in this instrument'.

[258] José Gregorio Vásquez and Gerard Verschoor, *En defensa de lo propio: Hacia el perfeccionamiento de las relaciones entre el mundo tikuna y el mundo occidental* (Tropenbos Internacional Colombia, 2011) 6 (translated NRU).

[259] See, Ramiro Feijoo Martínez, 'Gerstión de Parques Nacionales en Colombia, asuntos indígenas y el Parque Nacional Amacayacu' [1994] *ERIA* 49.

IV.3.2. Constitutional Framework

The current interpretative framework of environmental protection in Colombia can no longer be understood under the concept of separation. Rather, the Constitution and doctrine of the Constitutional Court point now to a state in which people and the environment are interdependent entities. For this, the focus on 'common concern' of humanity has been the key to open an environmental policy that deviates from the pure conservationist focus of the past.[260]

The 1991 Constitution provided the necessary framework for the modernisation of Colombian environmental law and policy, which had previously been scattered and unsystematic. The new Constitution opted for the monism model. The choice responded to the new focus of the nation towards multiculturalism, diversity and inclusion. These values are protected by the commitment to human rights by two main mechanisms. The first is the bill of rights, divided into three groups, along with special actions to access the courts and seek injunctions.[261] The second is the direct application of human rights provisions of treaties ratified by the country. Article 93 of the Constitution declares that '[t]he international treaties and agreements ratified by the Congress, which recognise human rights and forbid their limitation during States of Emergency prevail over the legal system'. The same provision further stresses that '[t]he rights and duties recognised in this Constitution will be interpreted according with the international human rights treaties ratified by Colombia'. The Constitutional Court has developed the interpretation of this article in its judgements, explaining that these human rights provisions have a supranational quality as part of the 'constitutionality block'.[262] The system implemented

[260] The Constitutional Court has stated in different instances that the protection of the environment is a global endeavour that requires the cooperation of each state (*Biodiversity Convention Approval Case*) and that this is one of the objectives pursued by the Modern State (*Collective Actions Case*). See, Constitutional Court, *Judgement T-254/1993* ('*Collective Actions Case*'); Constitutional Court, *Judgement C-519/1994* ('*Biodiversity Convention Approval Case*').

[261] The three groups are fundamental rights, social and economic rights, and collective rights.

[262] For a complete analysis of the doctrine of the Constitutional Court on the subject of the Constitutionality Block, since its inception in early rulings to the first use of the term in 1995 and its status today, refer to Mónica Arango Olaya, 'El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional colombiana' [2004] *Precedente* 79.

the hierarchical structure of the sources of law first proposed by Merkl,[263] better known for Kelsen's explanation in the first edition of *Pure Theory of Law*.[264]

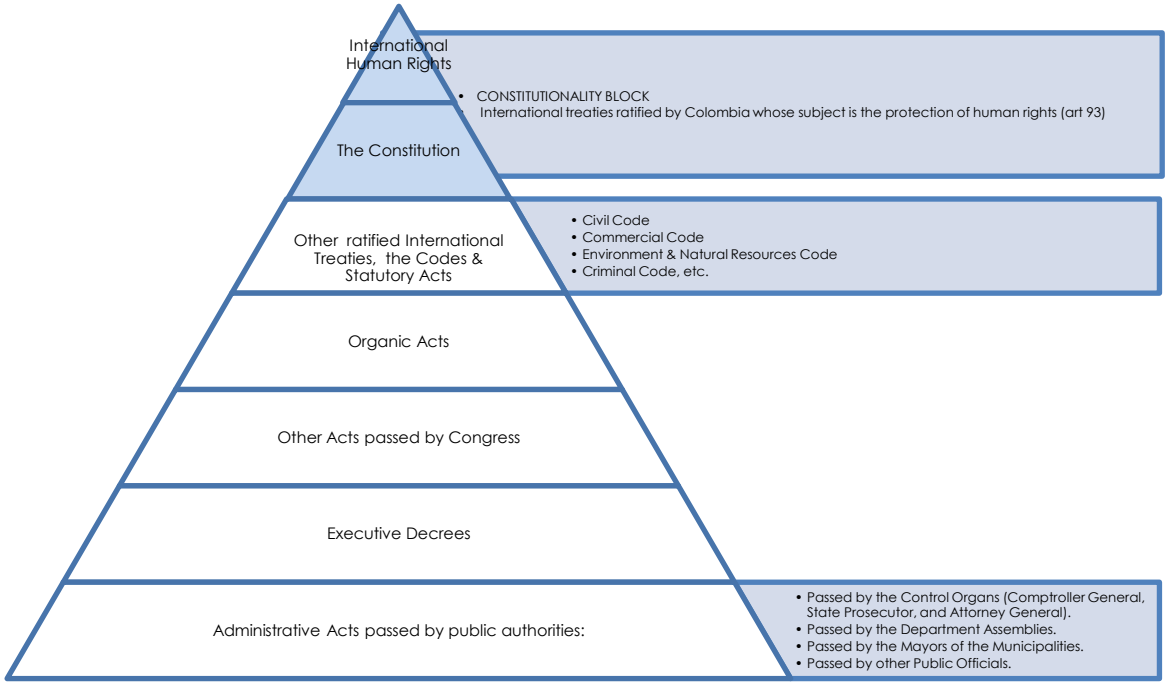

FIGURE 3: PYRAMIDAL HIERARCHY IN THE COLOMBIAN LEGAL SYSTEM

The National Constituent Assembly of 1991 acknowledged its responsibility for environmental protection, especially as the second most biodiverse country on Earth. It noted that the world is moving towards a serious environmental crisis that requires global action, grounded on the principles of sustainable development. In this context, environmental matters should permeate every aspect of the Constitution, 'not as an appendix or as a handful of good intentions whose content is ultimately ignored … the environmental crisis is in equal parts a crisis of civilization that calls for a restructuring of human relations'.[265] As the Constitutional Court noted in the automatic revision of the approval act of the *CBD*,[266] Colombia enforced a truly ecological Constitution. It should

[263] Originally published as an essay in a compiled German volume, translated as *Society, State and Law*. Adolf Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaus' in Alfred Verdross (ed), *Gesellschaft, Staat und Recht* (Julius Springer, 1931).

[264] Hans Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie Listschewski Paulson and Stanley L Paulson trans, Clarendon Press, Oxford, 1992).

[265] Asamblea Nacional Constituyente, 'Informe-ponencia medio ambiente y recursos naturales' (*Gaceta Constitucional No 46*, 15 de abril de 1991), quoted in Constitutional Court, *Biodiversity Convention Approval Case* (translated NRU).

[266] *Act 162 of 1994 Approving the 'Convention on Biological Diversity', Rio de Janeiro 5 June 1992* (Colombia).

not be construed as a mere statement of general principles, but as an effective legal instrument to enjoy, as far as possible, a healthy environment.[267]

There are more than 40 articles dedicated to the protection and management of cultural and natural resources to be interpreted concomitantly, instead of as a set of separate principles.[268] For this it is useful to organise it in terms of rights and duties of citizens. First and foremost, the instrument abandons the notion of the environment as an entity independent from people; hence, article 79 guarantees the collective right to a healthy environment. To achieve this, it vests in the State the duty of safeguarding its diversity and integrity by means of securing areas of special ecological importance and promoting education. The two values of what can be interpreted as a healthy environment according to the ecology of ecosystems are present here. The first is the diversity character, which implies the variability of the three components of biodiversity as discussed in Chapter I. The second is the integrity factor, which entails the safeguarding of ecological processes to guarantee the provision of services for current and future generations. It also promotes public participation of citizens in environmental matters, following the *Rio Declaration* and *Agenda 21*.[269] Article 80 complements it by ordering the State to take charge of planning the management and use of natural resources in harmony with the principles of sustainable development. The most relevant provisions in the matter of biodiversity protection are article 63, which states that protected areas (including National Parks), collective territories of ethnic minorities, and archaeological heritage law are guarded by a non-lapsable action, not subject to seizure and inalienable. For this purpose, article 72 ensures that the cultural heritage of the nation and all others that mould Colombia's national identity falls under the direct protection of the State. Agriculture and the promotion of sustainable livelihoods based on the sound management of fisheries, and livestock, forestry and agricultural industries are protected in articles 64 and 65.

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[267] *Biodiversity Convention Approval Case*.

[268] For example, the specific duties of the State and its different agencies and authorities can be found in the Preamble and arts 8, 49, 58, 63, 67, 79, 80, 81, 82, 215, 226, 268(7), 277(4), 282, 289, 300(2), 310, 313(9), 317, 330, 331, 333, 334, 339, 340 and 366.

[269] *Agenda 21: Programme of Action for Sustainable Development*, UN Conference on Environment and Development, 46th sess, Agenda Item 21, UN Doc A/Conf.151/26 (13 June 1992) ('*Agenda 21*').

IV.3.3. Actions and Standing

There was the potential that these goals would stay on paper, as dead-letter law. Indeed, the challenge for new constitutionalism, as has been seen in other Latin American countries, is the appropriation of these rights by the population, to put them into action. After all, a constitutional human rights provision is moot without the mechanisms to protect and enforce it.[270] The institutional crisis that led to the replacement of the Constitution in its entirety left no place for half measures: a complete upheaval of the system was necessary.[271] Hence, the organisation of the Republic was redefined in article 1, declaring that 'Colombia is a Social Democratic State subject of the rule of law, organized in the form of a unitary, decentralised republic, with autonomy of its territorial entities'. This implied a weakening of the central government, giving more scope of action to territorial entities, which now have autonomous governments. This includes the lands entitled to Indigenous peoples in the form of *resguardos*,[272] and the delegation of the managing and monitoring of certain environmental activities to regional entities. The article also states that the founding principles of the country are 'the respect of human dignity, the solidarity of its citizens and the prevalence of the common interest'.[273] These principles have been paramount in the development of inclusive models of environmental protection that integrate human beings with decision-making processes. However, to fulfil these principles' potential, it was paramount to guarantee effective access to the court. In other words, this is a matter of *locus standi*.

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[270] Take the case of Bolivia and Ecuador. They enforced new Constitutions in 1994 and 1998 respectively, with extensive bills of rights and participatory provisions. However, they were both repealed and replaced in 2008 and 2009. Given that the bills of rights in both countries were drastically expanded, it is easy to deduce that the participatory access to justice that they were supposed to guarantee was not working. See the critiques to these early constitutional reforms in Donna Lee Van Cott, 'Constitutional Reform in the Andes: Redefining Indigenous-State Relations' in Rachel Sieder (ed), *Multicuturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan, 2002) 45, 52–58 (Bolivia) and 58–67 (Ecuador).

[271] Lemaitre recounts the zeitgeist that nurtured the constitutional reform process and the melting pot of fortuitous circumstances that contributed to its creation, bringing together actors as disparate as Indigenous peoples' movements, demobilised guerrillas, journalists, agricultural workers and a strong and committed student movement. Julieta Lemaitre, 'Legal Fetishism: Law, Violence, and Social Movements in Colombia' (2008) 77(1) *Revista Jurídica Universidad de Puerto Rico* 331, 339–343.

[272] The process of land adjudication to Indigenous peoples and the implications of governance autonomy are discussed at length in Chapter IV.

[273] *Colombian Constitution 1991* art 1.

Usually, to have standing in a court of law a person must prove that a concrete harm was done to them or one of their interests, which entitles them to seek remedies, injunctions or both. Moreover, the access to courts in these matters typically requires the intervention of a lawyer or barrister. As will be seen in the discussion on Australia in the following pages, this was the prevailing interpretation until the careful and restrained expansion of standing provisions in cases related to the environment.[274] The legal interests of the recognition of the human rights of Indigenous peoples and the conservation of biodiversity are not adequately protected with this kind of standing provision, which makes it impossible to act in a pre-emptive manner.

In Colombia, the creation of an independent Constitutional Court was one of the main institutional changes implemented by the Constitution of 1991.[275] Previously, as is still the case in Australia where the High Court has original jurisdiction over constitutional matters, the Supreme Court had a constitutional division. The newly created tribunal took over the responsibility of the decisions related to the Constitution, the automatic prerogatives of judicial revision of constitutional amendments and approval acts of international treaties and the review of certain *tutela* actions. The closest translation of *tutela* would be an injunction. This is the capacity of *all* Colombian citizens to go before any judge to ask for a writ of mandamus in the event that one or more of their fundamental rights[276] has been or is likely to be irremediably denied or violated by public or private actors, where no other means of judicial defence are available.[277] The *actio popularis* of unconstitutionality (*acción de inconstitucionalidad*) also has open standing provisions: any citizen can challenge any acts from the congress that they consider to be contrary to any article of the Constitution 'either because of their material contents or

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[274] Refer especially to the relaxed standing provisions to access the Land and Environment Court in NSW.

[275] Art 241 states that '[t]he protection of the integrity and supremacy of the Constitution is the duty of the Constitutional Court, in strict compliance with the precise terms of this article'. The functions are delimited in 11 points.

[276] The fundamental rights, first part of the constitutional bill of rights, are comprised in arts 11 to 40 of the *Constitution*. They are deemed rights of 'immediate application' in art 85. Note however that the Constitutional Court has consistently taken down the boundaries between 'fundamental rights' and 'social, economic and cultural rights'. The result is that the *tutela* action is now used to seek injunctions to prevent the violation of the Constitution's entire bill of rights.

[277] The *tutela* action is introduced in art 86 of the 1991 *Constitution*, and its regulation is expanded in *Executive Decree 2591 of 1991 Regulating the 'tutela' action enshrined in article 86 of the Constitution* (Colombia). As early as 1993, the Court suggested that this action could be used for the protection of collective rights to prevent an irremediable damage connected to fundamental rights. The only additional requisite for standing in these cases is that the actor has to belong to the community that could be directly affected. Constitutional Court, *Collective Actions Case*.

because of procedural errors'.[278] These two actions do not require a lawyer to access the Court, thus providing the public with real open standing that is not subordinated to needing access to higher than average income. Additionally, there are two actions available for the protection of collective rights: class actions and public interest actions.[279]

The Court's rulings are divided into three main types. 1) The *tutela* rulings, preceded by the letter T, which review injunctions in extraordinary cases. Note that this is not tantamount to a special leave to appeal. *Tutela* injunctions can be sought before every single judge in the country, no matter their rank or speciality. This special faculty, whereby all judges are Constitutional judges by default, was designed to guarantee easy access to any person whose rights were at peril of being violated. *Tutelas* can be appealed to the hierarchical superior of the first deciding judge. All *tutela* appellate rulings are automatically sent to the Constitutional Court, which then chooses the cases for extraordinary review. 2) The *actio popularis* rulings, preceded by the letter C; and 3) the *Sentencias de Unificación*, preceded by the acronym SU, whose purpose is to unify the precedent on related subjects that have been decided disparately in *tutela* revisions. Note that even though Colombia is a Civil Law country not bound by judicial precedent, it has been accepted that the rulings of the Constitutional Court are unique and do create a precedent of sorts, more akin to Common Law cases.[280]

The 'ecological constitution' theme has been addressed in several rulings of the Constitutional Court, deciding on unconstitutionality and *tutela* actions.[281] In all of these the prevailing understanding is that:

> …the environment is a principle and an objective upon which the *estado social de derecho* (social and democratic state, subject to the rule of law) is structured. The ecological

[278] *Colombian Constitution 1991* art 242(1): 'Any citizen can exercise the public actions from the previous article [see especially 241(4)], and present *amici curiae* in favour or against the norms subject to judicial review in actions promoted by others, as well as in review processes started without a public action'. Constitutional Court, *Collective Actions Case* (translated NRU).

[279] These actions are introduced in art 88 of the *Constitution* and regulated by *Act 472 of 1998 Developing article 88 of the Constitution in relation to the exercise of public interest and class actions and enforcing other provisions* (Colombia). Class actions (*acciones de grupo*) are specifically designed to seek remedies for damages inflicted on a group of people, and they are thus exercised as a group. Public interest actions can be initiated by just one person on behalf of the public interest affected by the impingement of a right.

[280] The Constitutional precedent has become binding in Colombia, especially in cases in which no statutory laws exist to regulate the subjects. Examples of this include the recognition of civil unions of persons of the same sex (*Judgment C-029/2009*) or the decriminalisation of abortion in three specific circumstances (*Judgment C-355/2006*).

[281] For *actio popularis* decisions, refer especially to the *Biodiversity Convention Approval Case* and Constitutional Court, Judgement C-431/2000 ('*Environmental Licences Regime Case*').

> constitution comprises the group of provisions and principles that regulate the interactions of communities with nature and that, in great measure, foster its conservation and protection'.[282]

Having environmental considerations underpinning the construction of the social democratic state further expands the precedent developed by the Court in several *tutela* rulings connecting the right to a healthy environment to the fundamental right to life.[283] This is related to the connectivity doctrine, which states that the serious infringement of certain economic and social rights may impinge upon the fundamental rights to which they are connected.[284] This doctrine evolved especially in relation to the right to health, for people seeking access to certain medicines and surgical procedures not covered by the State's national health plan.[285]

In the 1990s, the connection between pollution and human health was conceptualised under the human rights constitutional framework. The Court has recognised the validity of injunctions in several rulings, usually from affected individuals against local authorities intending to carry a development activity that may cause an irreparable damage to the environment *impacting* the health of human groups and consequently their right to life. The cases involving the poor maintenance of landfills and sewers were among the first to be granted injunctions, where the Court explicitly acknowledged the link between the collective right to a healthy environment, the right to health and the risk to the right to life.[286] However, the Court has clarified that the plaintiff has to prove at least summarily that there is damage to health and that this damage is linked causally to the actions of the defendant.[287] The plaintiffs can seek an

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[282] *Environmental Licences Regime Case* (translated by the author).

[283] The Court has developed different connexions between the right to a healthy environment and the rights of Indigenous peoples. This doctrine is discussed in Chapter IV.

[284] *Executive Decree 2591 of 1991 Regulating the 'tutela' action enshrined in article 86 of the Constitution* (Colombia).

[285] Colombia, like Australia, has a universal healthcare subsidy scheme. Equivalent to the Medicare system, the Colombian scheme is called *Plan Obligatorio de Salud-POS* and it includes a list of approved procedures and medicines eligible for rebates.

[286] See, Constitutional Court, *Judgement T-471/1993* ('*Garzón Landfill Case*'); Constitutional Court, *Judgement T-461/1996* ('*Riohacha Sewer Case*'); Constitutional Court, *Judgement T-458/1998* ('*Ricaurte Landfill Case*'); Constitutional Court, *Judgement T-231/1993* ('*Cúcuta Sewer Case*'); Constitutional Court, *Judgement T-092/1993* ('*Villavicencio Landfill Case*').

[287] The lack of a causal link gave the Court the chance to comment on the application (or misapplication) of the precautionary principle. In a case involving crop-spraying and another related to sewer management, the Court held that the negative perception of the community in relation to an activity is not enough to seek an injunction. This is a similar understanding of this principle as that of the Land and Environment Court of NSW in *Telstra Corporation Limited v Hornsby Shire Council* (2006) 67 NSWLR 256 ('*Telstra v Hornsby*'). See in Colombia, the *Riohacha Sewer Case* and Constitutional Court, *Judgement T-422/1994* ('*Aerial Crop-Spraying Case*').

injunction not only against the State but also against private actors whose actions impinge upon this collective right.[288]

The result of the open standing provisions has indeed been an opening of the floodgates. However, contrary to the lingering fear in Common Law jurisdictions that this would have an undesirable effect, it has resulted in a form of direct participation. The key for the *actio popularis* is that there is no direct economic interest involved for the plaintiff. In consequence, the Court has no obligation to decide upon damages. The *tutela* rulings, being linked to fundamental human rights, have strengthened the vision that the environment is not an abstract and separate entity, but instead that it is inextricably linked to human well-being. The exercise of these actions, especially the *actio popularis*, thus has three beneficial effects. The first one is the empowerment of common citizens, which has been, as will be seen in the case of Indigenous peoples in further chapters, a key factor for the recognition of their rights and the link with the environment and biodiversity. Second, the action can serve for accountability purposes, curtailing the effects that poorly drafted laws may have. Third, having a significant number of cases per year allows the Court to develop the parameters for constitutional interpretation, making it stronger and allowing for consistency in the legal system. The inconsistency of rulings is perhaps one of the most serious problems in Civil Law systems that do not abide by precedent. It is satisfactory to verify that the nurturing of the constitutional precedent and its mandatory character are fortunate examples of a legal transplant from Common Law systems.

[288] See for example the case against the national oil corporation Ecopetrol for the damaging of the coastal ecosystem of Salahonda on the Pacific Coast, which threatened the survival of an entire village dependent on fishing. All of the inhabitants proved the damage and causal link individually. In another case, the Court held that it was valid to seek an injunction against a private actor conducting a legitimate activity (the making of furniture), ordering the defendant to reduce the noise. Note that the Court contended that it was inadmissible for citizens to remain defenceless in the face of noise pollution and other abuses to the environment, making the *tutela* an ideal mechanism. Constitutional Court, *Judgement T-574/1996* ('*Oil Spill and Fisheries Case*'); Constitutional Court, *Judgement T-460/1996* ('*Noise Pollution Case*').

TABLE 6: THE PROTECTED AREA SYSTEM (SINAP) IN COLOMBIA BY ECO-REGION

ECO-REGION	NAME	PROVINCE
Amazon Region	Amacayacu (National Natural Park)	Amazonas
	Cahuinarí (National Natural Park)	Amazonas
	Río Puré (National Natural Park)	Amazonas
	Serranía de Chiribiquete (PNN)	Caquetá-Guaviare
	Serranía de los Picachos (PNN)	Caquetá-Meta
	Alto Fragua Indi Wasi (PNN)	Caquetá
	Puinawai (National Natural Reserve)	Guainía
	Guaviare (RNN)	Guaviare
	La Paya (National Natural Park)	Putumayo
	Plantas Medicinales Orito Ingi-Ande (Flora Sanctuary)	Putumayo
	Farallones de Cali (PNN)	Valle del Cauca
	Las Hermosas (PNN)	Valle del Cauca-
Tolima		
	Yaigojé Apaporis (National Natural Park)	Vaupés
Andean Region	Las Orquídeas	Antioquia
	El Cocuy (PNN)	Boyacá
	Iguaque (SFF)	Boyacá
	Pisba (PNN)	Boyacá
	Guanentá-Alto Río Fonce (SFF)	Boyacá-Santander
	Selva de Florencia (PNN)	Caldas
	Los Nevados (PNN)	Caldas-Risaralda-Quindío-Tolima
	Chingaza (National Natural Park)	Cundinamarca
	Sumapaz (National Natural Park)	Cundinamarca
	Nevado del Huila (PNN)	Huila
	Cueva de los Guácharos	Huila-Caquetá
	Galeras (Flora and Fauna Sanctuary)	Nariño
	Isla de la Corota (SFF)	Nariño
	Catatumbo-Barí (PNN)	Norte de Santander
	Los Estoraques (Unique Natural Area)	Norte de Santander
	Tamá (Binational Natural Park-Venezuela)	Norte de Santander
	Serranía de los Yariguíes (PNN)	Santander
	Paramillo (PNN)	Sucre
	Complejo Volcánico Doña Juana-Cascabel (PNN)	Cauca-Nariño
	Munchique (PNN)	Cauca
	Serranía de los Churumbelos Auka-Wasi (PNN)	Caquetá-Cauca-Huila-Putumayo
	Puracé (PNN)	Cauca
	Tatamá (PNN)	Chocó-Risaralda-Valle
	Otún Quimbaya (SFF)	Risaralda
Eastern Savannah	El Tuparro (PNN)	Vichada
	Sierra de la Macarena (PNN)	Meta
	Tinigua (PNN)	Meta

Caribbean Region	Old Providence McBean Lagoon (PNN)	San Andrés
	Corales del Rosario y San Bernardo (Subaquatic park)	
	Los Colorados (SFF)	Bolívar
	Los Flamencos (SFF)	Guajira
	Macuira (PNN)	Guajira
	El Corchal "El Mono Hernández" (SFF)	Sucre
	Ciénaga Grande de Santa Marta (SFF)	Magdalena
	Isla de Salamanca (VP)	Magdalena
	Sierra Nevada de Santa Marta	Magdalena
	Tayrona (PNN)	Magdalena
	Flamencos (SFF)	Guajira
	Macuira (PNN)	Guajira
Pacific Region	Los Katíos (PNN)	Chocó
	Utría	Chocó
	Sanquianga (PNN)	Nariño
	Gorgona	Valle del Cauca
	Uramba Bahía Málaga (National Natural Park)	Valle del Cauca
	Malpelo (Santuario de Flora y Fauna)	

Adapted from the Parques Nacionales Naturales de Colombia website <www.pasquesnacionales.gov.co>

IV.4. Australia: Federalism and Environmental Law

The structure of the State in Australia and the creation and applicability of law and policy in different parts of the country differ radically from the Colombian example. There is a hierarchical structure within the Commonwealth, but it does not follow the strict pyramidal scheme described above. Whereas in Colombia international treaties are at the top of the pyramid after the adoption of the monist model, Australia is committed to dualism. This means that international treaties entered into by the country do not become binding until relevant legislation on the matter is enforced internally. As Opeskin and Rothwell comment, there are three main ways this can happen. First, certain treaties have clear straightforward obligations that are 'suitable for immediate incorporation'. In these cases, the legislation is simply declared that the treaty has force of law in Australia. Second, the Parliament may rewrite the obligations in an internal statute, expanding the legal regimes to include a set of complementary rights and remedies. In these cases, involving human rights treaties especially, the agreement being implemented serves as an

interpretative parameter to the statute. Third, some legislation may be enacted without mentioning the underlying treaty with which it seeks to comply.[289]

This policy has had an inversely proportional effect on the two legally protected interests discussed in this thesis. On the one hand, the country has been reluctant to ratify international human rights treaties that create differentiated rights for Indigenous peoples.[290] On the other, it has entered into a plethora of multilateral, regional and bilateral environmental agreements from the mid-1960s onwards.[291] It has also played a key role in regional and multilateral negotiations, especially in marine-related agreements.[292] The immediate effect of this relation is that environmental law in the country has evolved, specialised and refined different topics within the discipline, which has resulted in a wider participation frame of cooperative federalism. Conversely, the issue of human rights concerning Aboriginal and Torres Strait Islander peoples has stagnated.[293]

IV.4.1. The Australian Constitution

The Australian Constitution was drafted in 1900. Obviously, at that time the problems caused by environmental degradation would only become apparent several decades later. The country follows a three-tiered structure of government whereby each of the three levels exercises distinct prerogatives. The first tier is the Commonwealth or federal

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[289] Opeskin and Rothwell, above n 246, 9–10.

[290] Aside from the specialised treaties from the International Labour Organisation, *ILO 107* and *ILO 169*, the country has not become a party to the *Convention on Intangible Heritage* or the *Convention on Cultural Expressions* (Colombia is not a party to this treaty either). Australia also refused to subscribe *UNDRIP* at first, and only agreed to do so after a careful disclaimer on how Australia interprets the instrument. This is the subject of the next chapter. *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) ('*CSICH*'); *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, opened for signature 20 October 2005, CLT 2005/CONVENTION DIVERSITE-CULT REV 2 (entered into force 18 March 2007).

[291] According to the DFAT database for environment and resources or treaties in force by March 2013, Australia is a party to 40 bilateral agreements and 56 multilateral treaties, some of them regional in scope, such as the *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 26 June 1961). Three of these treaties deal directly with the protection of biodiversity: *CITES*, the *CBD* and the *CMS* (including the 2012 amendments to Appendices I and II). *Bonn Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 19 ILM 15 (1980) (entered into force 1 November 1983) ('*CMS*'). Refer to Department of Foreign Affairs and Trade Australian Government, *Australian Treaties Database* <http://www.dfat.gov.au/treaties/>.

[292] See the analysis on Australian initiatives in the international environmental sphere in Rothwell and Boer, above n 128, 255–258.

[293] See the discussion on the status of the five sets of distinctive rights that ought to be recognised to Indigenous peoples in Australia in the next chapter. They are met only partially.

government, which derives its powers from specific constitutional provisions. The only truly exclusive powers of the Commonwealth are over places and public services, customs and excise duties, and the territories under the Commonwealth, contained respectively in sections 52, 90 and 122.[294] Even if the Australian Capital Territory and the Northern Territory have self-government agreements,[295] they can be curtailed by the Federal Government, as seen recently in the Northern Territory intervention.[296] Section 51, which lists the matters upon which the Federal Parliament can legislate, is more open-textured. This means that there are no powers 'reserved' to the States, the second tier. Rather, they have residual powers over any matter not listed in this section.[297] The third tier is the local governments, which are empowered directly by their State Parliament through discretionary acts. This third tier does not have sovereign powers.

Section 51 is silent on the subject of environmental laws and regulations. This meant that for many years, the environmental policies of the country were scattered, piecemeal and varied greatly from one State to another. However, environmental crises such as prolonged droughts, the salinisation of formerly fertile grounds and the extinction of key species called for a different, collaborative approach.[298] In fact, it became evident that the

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[294] *Australian Constitution 1900* S 52: 'The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) the seat of government of the Commonwealth for public purposes; (ii) matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth; (iii) other matters declared by this Constitution to be within the exclusive power of the Parliament'. S 90: 'On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and excise, and to grant bounties on the production or export of goods, shall become exclusive…' S 122: 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of Parliament to the extent of the terms which it thinks fit'.

[295] *Australian Capital Territory (Self-Government) Act 1988* (Cth); *Northern Territory (Self-Government) Act 1987* (Cth). Additionally, Norfolk Island has limited autonomous powers through the Legislative Assembly under the *Norfolk Island Act 1979* (Cth).

[296] *Northern Territory National Emergency Response Act 2007* (Cth). A case in which the power of the Commonwealth over territory decisions was more strongly ascertained was the repealing of the act that legalised euthanasia in the Northern Territory. The Federal Parliament in this instance amended the parliamentary powers granted to the NT, ACT and Norfolk Island governments to exclude euthanasia. *Rights of the Terminally Ill Act 1995* (NT); *Euthanasia Laws Act 1997* (Cth).

[297] James Crawford, 'The Constitution and the Environment' (1991) 13(1) *Sydney Law Review* 11, 14.

[298] The human depredation of the flora and fauna of the country by the British settlers and their descendants brought wholesale destruction to the ecosystems of the country. This combined with poor choices in regards to pesticides and hunting game—eg, the introduction of the South American cane toad (*Bufo marinus* or *Rhinella marinus*) and the European rabbit (*Oryctolagus cuniculus*)—to create a history of severe environmental neglect in biodiversity matters. The Department of Primary Industries in Victoria publishes conscientious information on its website about these pests and the methods of eliminating them. See, Government of Victoria - Department of Primary Industries, *A-Z of Pest Animals: Cane Toad* (31 January 2013) <http://www.dpi.vic.gov.au/agriculture/pests-diseases-and-weeds/pest-animals/a-z-of-pest-animals/cane-toad>;

environmental decisions taken in one State could be harmful to others.[299] The borders between most of the States and territories are imaginary lines and neither pollutant agents nor invasive species respect them. The drive towards industrialisation and accelerated development promoted by State governments[300] had the country in the late 1960s and early 1970s spiralling towards environmental collapse. The impotence of the Commonwealth Government prompted active engagement in international environmental law as a gateway to influence environmental policy.

IV.4.2. International Influences on Domestic Environmental Law

Australian environmental law in general and biodiversity protection law in particular have evolved on par with the interpretations of the broadness of the powers of the Commonwealth *vis-à-vis* the autonomy of the States. The tension has transcended internal matters and taken a turn for what several commentators call the 'internationalisation of environmental law'.[301]

It is thus not a source of surprise that the most important judicial developments have taken place in disputes related to protected areas declared under the *WHC*[302] and involving the damming of rivers.[303] The driver for change, and now one of the most

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Government of Victoria - Department of Primary Industries, *Rabbits and Their Impact* (17 January 2011) <http://www.dpi.vic.gov.au/agriculture/pests-diseases-and-weeds/pest-animals/lc0298-rabbits-and-their-impact>.

[299] The instance that better illustrates this is the abuse of the water catchments in the Murray-Darling basin. After intensive use of the freshwater upstream for agricultural irrigation, especially in Queensland, the downstream state of South Australia was left with a scarcity of this resource. The states agreed to transfer power to the Commonwealth Government to enact legislation to deal with the matter. See, Lyster et al, above n 242, 242–279.

[300] See Mercer's comments in relation to the justification of the proposal for dams in Tasmania, compared to other parts of the world like Newfoundland, Norway and Scotland, which he states are 'classic examples of a Western, industrialized "peripheral" region'. In this context, said regions sought in the mid-1970s and early 1980s to equate their economic capacity with that of their country. David Mercer, 'Australia's Constitution, Federalism and the "Tasmanian Dam Case"' (1985) 4(2) *Political Geography Quarterly* 91, 100–101.

[301] See especially, Rothwell and Boer, above n 128; Opeskin and Rothwell, above n 246; Godden and Peel, above n 16, 43–44.

[302] The *WHC* has special provisions in art 34 applied to states that have a 'federal or non-unitary constitutional system', to bypass any hurdle between state governments within one of the parties. Part (a) states that if the central government has the legislative power to implement the obligation then its powers are the same as those of the non-federal State Parties. If the jurisdiction falls on individual constituent states, then 'the federal government shall inform the competent authorities of such States ... of the said provisions, with its recommendation for their adoption'.

[303] Note that damming can also affect Ramsar zones. Jacqueline Peel and Lee Godden, 'Australian Environmental Management: A 'Dams' Story' (2005) 28(3) *UNSW Law Journal* 668, 692–93.

important cases for constitutional interpretation, is the *Tasmania Dam Case*.[304] In 1975, fresh from being one of the pioneer nations to subscribe to both *Ramsar* and the *WHC*, the government implemented four pieces of legislation to implement it; namely, the *Environmental Protection (Impact of Proposals) Act*, the *Australian Heritage Commission Act*, the *National Parks and Wildlife Conservation Act* and the *Great Barrier Reef Marine Park Act*. These acts had the characteristic of having a centralising tint, in which the Commonwealth took over certain prerogatives that had been traditionally seen as the realm of the States. The first case that discussed this constitutional issue finding the broad use of these powers to intervene within a State was *Murphyores*.[305] In this instance, the federal government used the *Environmental Protection (Impact of Proposals) Act*, invoking a combination of different powers of section 51 of the Constitution to advance what can be called an environmental agenda.[306]

The area of the lower Gordon and Franklin rivers, where the Tasmanian government planned to build a hydroelectric project, was listed under the *WHC* in 1982, which placed the obligation of safeguarding its integrity upon the Australian government. The proposal for the project thus generated outrage in all Australian States. The influence and pressure of the concerned public about the impending destruction of the world heritage area of the Gordon River by the proposed dam prompted the Hawke government to act to enforce the legislation, ultimately resulting in the *Tasmanian Dam Case*.[307] The *World Heritage Properties Conservation Act*[308] was by then the only law enforced in the world to guard heritage in a domestic context by ensuring the implementation of the *WHC*.[309] The Court held that the extent of the external affairs power was not only limited to matters that took place outside the borders of Australia, and that the government could implement legislation expanding its scope if the treaty was entered into in good faith.[310] In the aftermath of this case, several constitutional issues were raised in the High Court

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[304] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'). The implications for Aboriginals and Torres Strait Islanders will be discussed elsewhere in this thesis.

[305] *Murphyores v Commonwealth* (1976) 136 CLR 1 ('*Murphyores*').

[306] The most relevant powers here are 51(i) trade and commerce with other countries and among States; 51(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth; and 51(xxix) external affairs.

[307] For a detailed comment on environmental activism and the public pressure on the Hawke Government to stop the proposed dam in a world heritage area, refer to Mercer, above n 300, 96–99, and to Boer, above n 57, 260–262.

[308] *World Heritage Properties Conservation Act 1983* (Cth).

[309] Boer, above n 57, 260.

[310] The previous doctrine was decided in *R v Burges; Ex parte Henry* (1936) 55 CLR 608.

related to heritage protection, making the country one of the only jurisdictions to have interpreted the *WHC* so extensively.[311] By 1994, most of the States had adopted their own heritage jurisdiction and had determined the protected sites in a non-cooperative fashion that seemed to contravene the mandates of the *WHC*.[312] This generated the controversies of *Richardson v Forestry Commission* and *Queensland v The Commonwealth of Australia*, in which the Court upheld that the Constitution allowed the federal government to act proactively to protect international obligations, even if this meant interfering with State prerogatives over land.[313]

As Crawford remarked in relation to the chain of decisions that followed the *Tasmanian Dam Case*, the Constitution has a 'formidable list of federal powers … which, given certain principles of interpretation, was likely to confer substantial federal authority with respect to environmental management'.[314] Perhaps before the prominence of environmental activism, which began in the 1960s and had strong support in Australia, there was simply no real need to use these powers. Hence, the conclusion of certain commentators in the 1970s that deemed these matters purely residual powers under the principal control of the States.[315]

The period that followed saw an accelerated involvement from Australia in international environmental agreements, and the uneasy relation between the federal and state governments. If the disputes between State governments and the Commonwealth had continued during the 1990s, environmental legislation would have continued to be a contentious and piecemeal effort in which both the environment and the welfare of Australians were compromised. The treaty-signing trend and underlying centralised policy of the Commonwealth peaked in the early 1990s after the Commonwealth Government agreed in the Intergovernmental Agreement on the Environment (IGAE) to consult with the States in all of the steps of treaty making on these matters.[316] The era of cooperative federalism in which concerted decisions in environmental matters were sought was born, and this continues to be the method applied today.

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311 Boer, above n 57, 249.
312 Ibid 255–256.
313 See the analysis of these disputes in ibid 265–275.
314 Crawford, above n 297, 13.
315 Ibid 12, citing several sources, especially M Crommelin, 'Resources Law and Public Policy' (1983) 15 *UWALR* 1.
316 Rothwell and Boer, above n 128, 243–244.

IV.4.3. The EPBC Act and Expansion of Locus Standi

Perhaps this vision of a centralised policy coincided with the new interpretations of the environment fostered in the *Stockholm Declaration*; that is, not as an alien entity but as a system that includes people. This perspective would logically lead to the current underlying principle of Australian environmental law and resource management strategies: an integrated approach to conservation and development.[317] As a response, the cooperative approach to environmental law and policy, still in place today, was formally born with the signing of the IGAE, and renewed with the Council of Australian Governments (CoAG) agreement, with the goal of delivering 'more effective measures to protect the environment' and avoid a duplication of efforts.[318] This, in turn, gave birth to the trigger system of the *Environment Protection and Biodiversity Conservation Act* ('*EPBC Act*'), discussed next.[319]

The principle of sustainable development, which in Colombia is a constitutional provision, has been introduced in Australia by means of statute. The *EPBC ACT* defines five principles of *ecologically* sustainable development, which are in tune with the application of the ecosystem approach of the *CBD* mentioned earlier in this chapter. Note that the inclusion of the highlighted term denotes the commitment of the country to the environmentalist side of the principle. After the frictions between the State and Commonwealth governments of the 1980s, this is a provision that can be interpreted as a warning against acts threatening ecological processes. Indeed, different working groups have been appointed by the Commonwealth and tasked with the development of these principles after the disputes discussed above, as a working part of the *National Strategy for Ecologically Sustainable Development*.[320] The first principle explicitly sponsors the effective integration of 'both long-term and short-term economic, environmental, social and equitable considerations' in decision-making processes.[321] The second is the endorsement

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[317] 'There should be an integrated approach to conservation (including all environmental and ecological considerations) and development by taking both conservation (including all environmental and ecological considerations) and development aspects into account at an early stage'. *National Strategy for Ecologically Sustainable Development*.

[318] Peel and Godden, above n 303, 676–677.

[319] *1999* (Cth), s 3A.

[320] Peel and Godden, above n 301, 677.

[321] *EPBC Act*, s 3A(a).

of the precautionary principle.[322] The third is the principle of inter-generational equity.[323] The fourth principle warrants the inclusion of the qualifying term 'ecologically' in front of sustainable development by stating that 'the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making'.[324] The importance of this provision reflects directly on the capacity of persons and organisations to act on behalf of the environment under the *EPBC Act*. Finally, the act states that 'improved valuation, pricing and incentive mechanisms should be promoted'.

The results of the negotiation for the frameworks of cooperative federalism can be seen in the curtailment of Commonwealth power on the scope of the *EPBC Act*. The resulting provisions are a system of 'triggers' that activate the power of the Commonwealth to issue approvals after assessing development proposals that will have or are likely to have a significant impact on 'matters of national environmental significance'. Every other decision over environmental management and development thus remains in the power of the States. The matters of national environmental importance are restricted to only eight areas, consistent with the international treaties that the *EPBC Act* implements.[325] These matter are: heritage properties declared under the *WHC*,[326] national heritage places,[327] wetlands of international importance included in the *Ramsar* list,[328] nationally listed threatened species and ecological communities in compliance with *CITES* and the *CBD*,[329] nationally listed migratory species complying with *Ramsar* and the *CMS*,[330] nuclear actions under the provisions of the *Comprehensive Nuclear Test-Ban Treaty*,[331] the Commonwealth marine environment[332] and the Great Barrier Reef National Park.[333]

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322 'If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'. Ibid s 3A(b).

323 'The principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations'. Ibid s 3A(c).

324 Ibid s 3A(d).

325 The Acts that regulated the *Ramsar Convention* and the *WHC* were replaced by the *EPBC Act*.

326 *EPBC Act* s 12.

327 Ibid s 15B.

328 Ibid s 16.

329 Ibid s 18.

330 Ibid s 20.

331 Ibid s 21.

332 Ibid s 23. The care and management of the marine environment is a compilation of several international obligations subscribed by Australia. A table of the treaties currently in force and ratified by Australia that fall within the scope of the *EPBC Act* is available at Appendix 4 of the independent review of the Act of 2009, in compliance with s 522A. Allan Hawke (ed), *The Australian Environment Act–Report of the Independent Review of the*

Australian access to justice in environmental matters is not the participatory affair of litigation activism that Colombia created in 1991. This is not to say that the environmental movement has not played a significant role in the legal system and that the aforementioned 'internationalisation' did not have a positive effect. Indeed, the voicing of public environmental concerns, usually by NGOs, through public interest litigation have prompted the opening of standing provisions. Nevertheless, the case law history of legal standing for the protection of biodiversity has been met with reluctance by the High Court. There is a fear of enabling the opening of the 'litigation floodgates', hampering the development and decision-making capacity of government officials.[334]

Locus standi for public matters in Australia is based on the Common Law principles formulated in *Boyce v Paddington Borough Council*.[335] A plaintiff can sue only in two cases. First, 'where the interference with a public right is such as that some private right of his is at the same time interfered with'.[336] Second, 'where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right'.[337] In environmental matters, the first landmark case to address standing requirements was *AFC v the Commonwealth*,[338] where the Australia Conservation Foundation attempted to hold the Ministers accountable for approving the building of a hotel complex near Rockhampton. The plaintiff claimed that they did not take into account the relevant legislation of the time.[339] The Court interpreted the second element of *Boyce* as the instance in which a person has a 'special interest in the subject matter of the action'[340] and determined that this did not apply to *AFC*, even in their quality as a conservation agency. A year later, an Aboriginal group attempted collectively

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Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth of Australia, Australian Government Department of the Environment, Water, Heritage and the Arts, 2009).

[333] *EPBC Act* s 24B. The management of the Park was formerly regulated by the *Great Barrier Reef Marine Park Act 1975* (Cth).

[334] NSW has been a pioneer in the opening of standing provisions. S 123 of the *Environmental Planning and Assessment Act 1979* (NSW) gives open standing to any person to bring proceedings to the Land and Environment Court for an order to 'remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach'. Further, the person can bring proceedings on his or her own behalf or on behalf of others. Similar open standing provisions are available in ss 252 and 253 of the *Protection of the Environment Operations Act 1997* (NSW).

[335] Note that in these cases individual plaintiffs can bring proceedings, without joining the Attorney General, the plaintiff that acts on behalf of the public interest. *Boyce v Paddington Borough Council* [1903] 1 Ch 109 ('*Boyce*').

[336] *Boyce*, 114 (Buckley J).

[337] Ibid.

[338] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 ('*ACF v the Commonwealth*').

[339] *Environment Protection (Impact of Proposals) Act 1975* (Cth).

[340] *ACF v the Commonwealth* (Gibbs CJ).

to have some relics that were arguably part of their heritage protected in *Onus v Alcoa*.[341] They claimed that the *Aboriginal Relics Preservation Act 1972* (Vic), which had special provisions in case of damage of relics in s 21, was not being applied. The Court in this instance did not consider that the cultural link between the plaintiffs and the relics was enough to be considered 'special interest' because s 51 applied to all members of the public, and thus deemed that they had no standing.[342]

The problem of defining the extent and definition of public interest, and the associated fear of abuse of litigation, were considered in subsequent cases and standing provisions were expanded to include environmental groups, following a test of five factors:

> 1- A group's special relationship to the environment at issue;
> 2- Its status as 'peak' environmental organisation or as a body pre-eminently concerned with the environmental matter at hand;
> 3- Government recognition of the group in some way, such as through the provision of financial support, or commissioning to conduct government-funded projects;
> 4- Extensive involvement of the group with the issue concerned, for instance, by making submissions to government bodies; and
> 5- The increasing importance placed by the public on environmental protection, along with the growing recognition of the need for NGOs to be able to act in the public interest. [343]

The *EPBC Act* implemented these principles and incorporated them in its 'interested person' or 'interest organisation' provisions,[344] whereby the entity or person that shows

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[341] *Onus and Frankland v Alcoa of Australia Ltd* (1981) 149 CLR 27 ('*Onus and Frankland v Alcoa*').

[342] This decision can be construed as contrary to the right to cultural integrity.

[343] Godden and Peel, above n 16, 105–106, citing *North Coast Environment Council v Minister for Resources* (1994) 85 LGERA 270 and *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200.

[344] *EPBC Act* s 475: '...**Meaning of interested person –individuals:** (6) For the purposes of an application for an injunction relating to conduct or proposed conduct, an individual is an ***interested person*** if the individual is an Australian citizen or ordinarily resident in Australia or an external Territory, and:
(a) the individual's interests have been, are or would be affected by the conduct or proposed conduct; or
(b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before: (i) the conduct; or (ii) in the case of proposed conduct–making the application for the injunction.
Meaning of interested person—organisations: (7) For the purposes of an application for an injunction relating to conduct or proposed conduct, an organisation (whether incorporated or not) is an *interested person* if it is incorporated (or was otherwise established) in Australia or an external Territory and one or more of the following conditions are met:
(a) the organisation's interests have been, are or would be affected by the conduct or proposed conduct;
(b) if the application relates to conduct–at any time during the 2 years immediately before the conduct: (i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment;

this special interest can apply to courts for an injunction when the Act has been breached. Obviously, this is far from the sort of open standing provisions of other jurisdictions, even in the Common Law.[345] Nevertheless, given the history of reluctance for relaxing the standing requirements in Australia as mentioned above, the expansion in the *EPBC Act* is significant. In 2000, just one year after the injunction provisions were expanded, an interested person, Dr Booth, was successfully granted an injunction under the Act to prevent the electrocution of several individuals of the endangered spectacled flying fox (*Pteropus conspicillatus*).[346]

However, the rhetoric outlined above is still present in Australian law, leaving environmental decisions as a mostly top-down affair. Even if the *EPBC Act* expanded the standing provisions, some problems remain. This lack of non-*ad hoc* participatory mechanisms can subordinate key decisions to political, and often high profile, strategies to stay in office. This is where the difference between Australia's model of representative democracy and the participatory system implemented in Colombia two decades ago is more deeply felt. Australian citizens may not necessarily need to elicit a radical change. However, the environmental drive of the country can be capitalised on to enforce policies that bring citizen participation to the forefront, including through standing provisions.

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and (ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment; (c) if the application relates to proposed conduct--at any time during the 2 years immediately before the making of the application: (i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and (ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment'.

[345] See the open standing provisions of the *EPA Act* and the *Protection of the Environment Operations Act* mentioned above. As an example for other jurisdictions, California has a universal standing provision in §17200 of the *Business and Professions Code*, in which any person can go to court whenever they have reason to believe that a person or corporation has engaged in unfair competition, inclusive of 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter I [of this code]'. The plaintiff does not have to prove actual or potential damage by the conduct to sue. The provision has been seen as a 'licence to do good', having been used to further environmental and human rights causes in instances of false or misleading advertising. Such was the case of a citizen that sued Nike's CEO for denying the company's use of sweatshops, and another that sued Honda for exaggerating the supposed environmental benefits of their hybrid car models. See the cases of *Nike v Kasky* and *Gaetano Paduano v American Honda Motor Company Inc.*

[346] *Booth v Bosworth* [2001] FCA 1454 (17 October 2001).

IV.5. Outcomes of the Comparison

It is undeniable that protected areas are needed for the protection of biodiversity.[347] If the notion of conservation had not arisen and been fiercely defended during the twentieth century, it is probable that environmental crises owing to biodiversity decline would be at a stage of irreparability difficult to imagine. Moreover, the creation of awareness, education and engagement in nature conservation promises the slowing of the current anthropogenic mass extinctions. However, the model of fortress conservation employing the complete separation of people from their environment is not desirable. This raises the issue of lack of participatory processes and methodologies and suggests that the top-down approach that pervades environmental law and policy design should be reconsidered.[348]

From the purely legal perspective, this public participation component finds a notable expression in the possibility of accessing courts to seek benefits to the environment that do not entail an economic factor. Thus, standing provisions constitute an interesting juxtaposition. Even if the pressures and early history of environmental law in both countries had common elements, the move towards public participation and open standing in Colombia would create a snowball effect in litigation that will be better appreciated when the collective legal autonomy concerning TEK model is discussed in Chapter IV. In Australia, however, the balancing of wills between the Commonwealth and State governments, coupled with the historic reluctance to expand the access to courts in the form of standing provisions, has confined decision-making to the higher spheres of power. It could be said that the Colombian experience of open standing could never be replicated in a Common Law system because of the matter of judicial precedent. However, note that Colombia transplanted its precedent model to the rulings of the Constitutional Court, thus guaranteeing the unity in interpretation of the mandates of the

[347] For this reason, Aichi Target 11 of the *CBD* calls for an increase of protected areas to 17% of the terrestrial area in each signatory country, and why the *Protected Planet Report* stresses the importance of this target. Colombia has reported that, by the end of 2012, 12% of its territory was already declared as protected area, either public or private, and the government had entered into an alliance with private investors and NGOs, called *Naturalmente Colombia*, to meet the target. Bertzky et al, above n 183; Convention on Biological Diversity Secretariat, *Aichi Biodiversity Targets* <http://www.cbd.int/sp/targets>; Editorial, 'La hora de la biodiversidad' *El Tiempo* (Bogotá), 03 May 2013 <http://www.eltiempo.com/opinion/editoriales/la-hora-de-la-biodiversidad-editorial-el-tiempo_12777812-4>.

[348] Techera, above n 243, 97.

1991 instrument. Broadening the access to courts is complemented by other changes such as the transition from a purely representative democracy, the model followed in Australia, to participatory democracy.[349] Nevertheless, even without such radical upheavals, Australia can take note of the positive aspects of making its judiciary more accessible.

Comparing the legal perspectives of Australia and Colombia has enriched this debate. First, as the tables illustrate, both have a strong National Parks system. Although in Australia's federal government the States have the residual power to create, manage and sometimes transform the protected areas, the network of parks administered by the Commonwealth has similar legislation to the States.[350] In Colombia, the central government, through the National Natural Parks System (*Sistema Nacional de Parques Nacionales*—SPNN) and the National Protected Areas System (*Sistema Nacional de Áreas Protegidas*—SINAP) manages this type of protected area. The *Ramsar* sites are the domain of the Ministry of Environment under SINAP, and the Heritage Sites are managed by the Ministry of Culture.

One of the main differences between these two countries in terms of protected areas, drawing attention to international obligations, is in the number of UNESCO World Heritage Areas and *Ramsar* zones in the two countries. Colombia, a monist country in which ratified international treaties are at the top of the legal hierarchy,[351] ratified these treaties a long time ago, yet the number of *WHC* and *Ramsar* areas is low. In contrast, Australia, a dualist country with a very different view on the role played by international treaties within the territory, has a substantial number of listed natural protected areas under these treaties. It could be speculated that the tourism factor in Australia has boosted the declaration of these protected areas. However, as seen in this chapter, it also reflects an initial drive by the Commonwealth for centralised control over environmental law and policy in response to public pressure voicing concern for vulnerable assets. This position was later tempered through the negotiated framework of cooperative federalism

[349] Discussed in the following chapters.

[350] The Commonwealth can declare reserves in the territories, even in those that have some degree of self-administrative powers. Jurisdiction: Ashmore and Cartier Islands, Australian Antarctic Territory, Australian Capital Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Heard Island and McDonald Islands, Jervis Bay Territory, Norfolk Island and Northern Territory. The Commonwealth is also in charge of managing Aboriginal lands.

[351] Recall that, as discussed above, those treaties that enshrine human rights obligations hold a supralegal status and may supersede even the Constitution.

in environmental matters. Colombia, because of its history of violence, has squandered its ecotourism potential in the past, and now seems to be pursuing the luxury tourism that has been the source of criticism in African countries, especially since the Durban Congress.[352] Despite this, the enforcement of the 'ecological constitution' in 1991, along with the expansion of public participation mechanisms and access to the courts has brought a progressive attitude towards environmental matters. Thus, in both countries, while their legal instruments and public policies have evolved to reflect a more progressive understanding of the role of humans as participants in the environment, the myth of 'pristine' spaces continues to be influential.

It is apparent in both countries that protected areas have brought important benefits to the value of biodiversity *per se*. In Colombia, vulnerable ecosystems that guarantee vital services such as water are now awarded special protection, ecological restoration strategies using the fortress model have been put in place and some key areas have been completely closed.[353] The National Parks system, put in place more than 20 years prior to the ratification of the *CBD*, has contributed to the protection of biodiversity in both Colombia and Australia, especially from the damages caused by illegal settlers, farmers and the unsustainable practices of industrialisation. Australia is an exemplary case of the organisation, creation and management of protected areas at both the State and Commonwealth levels. However, regardless of how well a model is executed, if the model is flawed because its foundations perpetuated the exclusion of human groups, this flaw cannot be circumvented.

Drawing from the experiences of both countries, it can be inferred that applying fortress conservation in its prescribed manner does not solve the collision between the two legally protected interests. Indeed, this application does not acknowledge the legitimacy of recognising the human rights of Indigenous peoples. Let this be the opportunity to anticipate that the more inclusive model of community-based conservation and the application of article 8(j) of the *CBD* allows for the interest to be

[352] The Durban Congress is the short name of the Fifth IUCN World Parks Congress. It was held in Durban, South Africa, in 2003.

[353] The most notable example of vetoed ecosystems is the *páramos* because of their water supply service. For case studies of reforestation and ecological restoration refer to Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2000).

acknowledged and included. However, as the next Chapter will show, this also falls short of the radical solution needed to attain Pareto optimal balance.

V. CONCLUSIONS

The current model of protected areas, inspired by the fortress conservation strategies of the early twentieth century, has undeniable advantages. Of most relevance is the fact that protected areas help to preserve the continuous and healthy flow of ecosystem services, and the protection of endemic species and vulnerable populations. However, the fatal flaw of the model is that, nurtured by the idea of separation between people and nature, it is complacent, focussing only on small, isolated areas of spectacular beauty, to be enjoyed, but not inhabited.[354] In the second wave of environmentalism begun in the 1960s,[355] environmental issues were showcased as a global rather than local issue, but the protected area treaties of this time, *Ramsar* and the *WHC*, continued to be influenced by the notion of separation, exacerbated by the identification of people as the principal threat to the environment. The transition to the *CBD* had the positive quality of disrupting the separation motif and including humans as part of the ecosystem. Nevertheless, even if the ecosystem approach is supposed to be the norm, if not since the inception of the *CBD* then definitely since the Fifth COP in 2000,[356] the heavily engrained ideas of protected areas that follow the fortress pattern remain.[357] Indeed, the Ninth COP in 2009 noted in Decision IX/7 that 'global assessments suggest that the ecosystem approach is not being applied systematically to reduce the rate of biodiversity

[354] Additionally, having small areas protected without buffer zones and interconnected corridors that guarantee the transit of species populations can also be detrimental to biodiversity. Refer to the analysis of the different components of biodiversity in Chapter I.

[355] The plight of this era was voiced in UNCHE and consigned in the *Stockholm Declaration*.

[356] Decision V/6. In 2007, COP 7 Decision VII/11 noted the positive response to the ecosystem approach and that several parties had embraced its implementation. This endorsement called for more resources to develop and implement the approach, denoting it as steadily becoming the trend to follow.

[357] This was one of the identified challenges in the implementation of the ecosystem approach in Latin America. In a conference organised in Colombia in 2007 to evaluate the effective application of the ecosystem approach in the region, delegates from several countries agreed on the assessment that governments consider it easier to adopt comprehensive models of conservation more akin to the fortress paradigm. This is where participatory legal models such as the Colombian Constitution play a seminal role. See the documents, especially the conclusions comparing different experiences in Latin America, in Ángela Andrade Pérez (ed), *Aplicación del Enfoque Ecosistémico en Latinoamérica* (CEM-UICN, 2007).

loss'. One of the problems is the lack of cross-sectoral normative frameworks, which makes the application of the model difficult on a large scale, regardless of the wealth of empirical evidence of its success in local communities.[358]

This explains why the model has been the subject of a heated debate in recent years, criticised for not taking into consideration that entire human communities have been displaced to satisfy the goal of biodiversity protection. These patterns of disempowerment and exclusion echo the evictions that took place in the United States during the birth of the model. The dissenting critiques from various disciplines have been aimed at the protected areas model in general, and are mostly limited to the experiences in African countries where particular injustices took place;[359] however, the core of the critique relating to human rights and environmental justice cannot be lightly dismissed. Yet conservation biologists continue to defend the current approach to protected areas, especially under the argument that the hotspots of biodiversity, usually located in tropical regions, have to be preserved.

Despite the favourable outcomes for conservation discussed in the comparison between Australia and Colombia, it can be concluded, applying Alexy's collision law,[360] that this model does not solve the collision between biodiversity protection and the recognition of the human rights of Indigenous peoples. It did not even address the second interests, thus nullifying it. The model can promote the protection and regeneration of ecosystems, thus boosting biodiversity, but the strict non-use policy is especially adverse for the interests of Indigenous peoples.[361] Of course, prior to the 1990s, the time-span covered in this chapter, Indigenous peoples were not typically consulted in regards of protected areas at all.

The next chapter discusses the policies towards Indigenous peoples at the international and domestic levels and the rise of community-based conservation as an alternative to the preservationist drive of fortress conservation. This model responds

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358 All of the documents and decisions of the Conference of the Parties of the *CBD* are available online and are updated regularly. See Convention on Biological Diversity Secretariat, *Conference of the Parties (COP)–Documents and Decisions* <http://www.cbd.int/cop>.

359 The case presented in the book *Fortress Conservation* in Tanzania is a poignant example. See, Brockington, above n 2.

360 Robert Alexy, 'On the Structure of Legal Principles' (2000) 13(3) *Ratio Juris* 294, 295–297. See the comment on the application of the collision law in Chapter I, heading IV.

361 The brief case study of the creation of the Amacayacu National Park in Colombia showed that, instead of exalting traditional ecological knowledge and helping the community, the creation of the Park had a deleterious impact.

directly to the ecosystem approach provisions of the *CBD* expanded in the COP decisions, and seeks a model for the management of ecosystems with the direct participation of the people that surround or live in them.

CHAPTER III

COMMUNITY-BASED CONSERVATION: ISSUES WITH THE RECOGNITION OF INDIGENOUS PEOPLES

I. INTRODUCTION

The last chapter discussed the origins and status of fortress conservation and compared the legal systems of Colombia and Australia, concluding that applying fortress conservation neglects the recognition of the human rights of Indigenous peoples. It showed that the ecosystem approach derived from the *Biodiversity Convention* ('*CBD*') was the final step to challenge the theoretical separation between people and nature in conservation strategies.[1] Under this framework, it was argued that human activities that have occurred inside 'pristine' areas are now seen in a different light, and not judged *a priori* as deleterious to the environment. New conservation strategies that present a valid alternative to fortress conservation are referred to in this chapter with the umbrella term of 'community-based conservation' (hereto CBC). This is the current state of the art in conservation strategies because it follows the ecosystem approach discussed in the previous chapter. CBC, due to what the literature has dubbed the 'New Paradigm for Conservation',[2] has been developed greatly, especially in the early 2000 in the wake of the National Parks Congress in Durban.[3] As it stands today, CBC could be considered an expansion of the protected areas model, tempering fortress conservation but still firmly rooted in the discipline of environmental law. This moderate version sees the State sharing power with other stakeholders and implementing alternative policies such as co-

[1] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 243 (entered into force 29 December 1993) ('*CBD*'). See the comments related to the fine-tuning of the ecosystem approach by the Conference of the Parties of the *CBD* in the previous chapter.

[2] For a detailed timeline analysing the milestones for the development of this New Paradigm in the history of National Parks refer to Adrian Phillips, 'Turning Ideas on Their Head: the New Paradigm for Protected Areas' (2003) 20(2) *The George Wright Forum* 8. The author also published a concise article on the subject in the book launched at the Durban Congress by IUCN: Adrian Phillips, 'The New Paradigm for Protected Areas' in Hanna Jaireth and Dermont Smyth (eds), *Innovative Governance, Indigenous people, Local Communities and Protected Areas* (Ane Books, 2003).

[3] See the discussion of these arguments in Section IV of Chapter II.

management agreements. Thus, it is considered best practice and promoted by international organisations.[4] Co-management agreements between Indigenous peoples and their home State are an often applied legal strategy.

CBC is not a model exclusively tailored for Indigenous peoples; it is one of the vessels for enabling the inclusion of interested parties in conservation, thus broadening the stakeholder base. This approach seeks to engage as many and as varied communities as possible in the endeavour of sustainable biodiversity management.[5] It should not engage in discrimination, positive or otherwise, between human groups. This is one of the crucial factors that differentiate it from the collective legal autonomy concerning TEK. The latter is based on a differentiated approach towards Indigenous peoples that, consequently, has a more limited scope than CBC. As shown in this chapter, Australia has followed a managerial rather than rights-based policy framework in regards to its Indigenous peoples. This means that biodiversity conservation endeavours in what can be considered their ancestral territories have neglected to include guarantees for cultural rights.

This chapter addresses the research question of whether the CBC model, especially in the form of co-management agreements, provides an adequate solution for the collision between the legal interests of biodiversity protection and the recognition of the human rights of Indigenous peoples. The basis for addressing the question is to verify the extent of autonomy that Indigenous peoples can have for the application of their TEK in this scenario. For this, the chapter starts with a discussion of coevolution between Indigenous peoples and their lands, which will lead to an operational definition

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[4] The publications of IUCN on the subject illustrate this claim and are an excellent resource for policy makers. They are the product of years of field studies and practical implementation of CBC with local communities. Refer especially to the comprehensive work compiled by Grazia Borrini-Feyerabend et al, *Sharing Power: A Global Guide to Collaborative Management of Natural Resources* (Earthscan, 2007); see also, Grazia Borrini-Feyerabend, Ashish Kothari and Gonzalo Oviedo, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation–Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas* (IUCN, 2004). On the subject of food security and the intangible heritage of farmers as local communities, refer to Alejandro Argumedo et al, 'Implementing Farmers' Rights under the FAO International Treaty on PGRFA: The need for a Broad Approach Based on Biocultural Heritage' (Report No G03077, IIED, 14–18 March 2011) <http://pubs.iied.org/G03077.html>.

[5] As Kothari et al note, the trend of CBC has permeated international and local policies that engage Indigenous peoples and local communities. One of the drivers of this step forward has been the recognition that several forms of governance can apply to protected areas, which the authors call 'conservation *with* and *by* communities'. Ashish Kothari et al, 'Local Voices in Global Discussions: How Far Have International Conservation Policy and Practice Integrated Indigenous Peoples and Local Communities?' (Paper presented at the Symposium on 'Sustaining Cultural and Biological Diversity in a Rapidly Changing World: Lessons for Global Policy', American Museum of Natural History, 2–5 April 2008) 2–3.

of TEK. This is followed by a brief comment on the critiques of co-management strategies and an assessment of whether the *World Heritage Convention*, as an instrument that values sites of both cultural and natural significance, is a sufficient framework.

In the second section, although Colombia will be referred to in certain instances, the answer to the research question will be based on the Australian case, where the CBC model has been endorsed as a means to create opportunities for Indigenous peoples.[6] The section will thus confront the status of the five sets of human rights of Indigenous peoples explained in Chapter I with the model of CBC in Australia. The human rights in question are: 1) self-determination and rights to governance autonomy, 2) rights over territories and resources, 3) public participation and consultation, 4) cultural integrity, and 5) non-discrimination. The main claim of this chapter is that, even if the introduction of agreements that involve Indigenous peoples in conservation is a welcome development, they are utterly insufficient to redress the lack of recognition and disenfranchisement to which Aboriginal and Torres Strait Islander peoples were subjected. This thesis defends the collective legal autonomy concerning TEK because it can prove with the Colombian example that a human rights–based model adequately caters, and even enhances, biodiversity protection policies.

This chapter reviews the philosophical underpinnings of the main three historical perspectives that have dominated the international approach to Indigenous peoples. They will be referred to in this chapter as dispossession, assimilation and fossilisation. All of these perspectives have been influenced by the myth of the noble savage in greater or lesser measure, and the legal regimes of Colombia and Australia are based on this international framework.[7]

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[6] See for example the *Indigenous Australians Caring for Our Country* programme, which funds different projects related to natural resources management. These include Indigenous Protected Areas (IPA), the Working for Country ranger programme and the Carbon Farming Fund. Department of Sustainability Australian Government, Environment, Water, Population and Communities, *Indigenous Australians Caring for Country* <http://www.environment.gov.au/indigenous/index.html>.

[7] **Caveat:** Even though it is tempting to dwell on the intricacies of the Native Title jurisprudence of the last two decades, it falls outside the scope of this thesis. For a comprehensive work, in which analysis of Australian community-based conservation policies, and their insufficiency to serve as surrogates of a human rights framework, is linked to Native Title cases see *Compromised Jurisprudence* by Lisa Strelein. Note though that the focus of her book is not solely on land tenure. Lisa Strelein, *Compromised Jurisprudence–Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009).

II. TRADITIONAL KNOWLEDGE AND CO-MANAGEMENT IN COMMUNITY-BASED CONSERVATION

Despite even the most driven efforts to eradicate, assimilate, integrate, ignore or further marginalise and dispossess Indigenous peoples in former European colonies, some of them survived.[8] They are still alive as peoples. Not as individuals, or as mere 'populations',[9] but as entire societies with their cosmovisions, mores, laws and practices still present.[10] Akin to biodiversity, Indigenous peoples risk extinction, often hand-in-hand with the systematic elimination of the natural resources that supported them.[11] Even today, threats to entire peoples are a painful reminder of the colonial past.[12] Every 14 days a language dies.[13] Perhaps the application of TEK can be seen here as one of the contributing factors of the resilience of Indigenous peoples to adversity.

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[8] Davis tells the story of the Penan, one of the last nomadic peoples of Southeast Asia, who dwelled in the forests of Malaysia. The timber exploitation ruthlessly encouraged by the government threatened their extinction. Although they fought, even taking their plight to the United Nations, the pull towards 'progress' of the official government was unrelenting. The author reports that in just one generation (late 1980s–late 2000s), the Penan were assimilated in the most brutal form, being forced from their lands to work in undignified jobs and live in shanties. By 1998, only 100 families remained in the forest. By 2009, the last family settled. Wade Davis, *The Wayfinders–Why Ancient Wisdom Matters in the Modern Day* (House of Anansi Press, Inc., 2009) 171–179.

[9] The replacement of the term 'populations' by 'peoples' was one of the most crucial changes from *ILO 107* to *ILO 169*. See the discussion in Chapter I, Section III.2.1. *International Labour Organization Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 6 February 1959) ('*ILO 107*'); *International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1358 (entered into force 5 September 1991) art 13 ('*ILO 169*').

[10] Siegfried Wiessner, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations Audiovisual Library of International Law <http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295_e.pdf> 1.

[11] Such is the story of the Kiowa and the North American buffalo of the plains. An explicit policy, endorsed by Theodore Roosevelt himself, ordered the extermination of the buffalo and the plains peoples. After the very efficient slaughter of the bison and most of the Kiowa peoples, new policies outlawed cultural practices such as the Sun Dance. Demoralised and demolished in every sense, the last individuals of the Kiowa died of measles in 1892. Davis, above n 8, 169.

[12] Recently, the Awá peoples in the Brazilian Amazon have been declared the most endangered in the world. Facing annihilation by loss of habitat, the 355 individuals that remain will be gone by next decade unless urgent action is taken. The parallels with endangered species are undeniable. Survival International, *Brazil Ignores Deadline to Save Earth's Most Threatened Tribe* (18 April 2013) <http://www.survivalinternational.org/news/9110>.

[13] The Enduring Voices Project provides an interactive resource that maps the 'Language Hotspots' and their degree of threat. The Northern part of Australia is listed as severely threatened, whereas the two hotspots overlapping Colombia are listed as severely and highly threatened. See, Enduring Voices Project, *Disappearing Languages: Documenting the Planet's Endangered Languages,* National Geographic <http://travel.nationalgeographic.com.au/travel/enduring-voices/>.

Indigenous peoples today share a common characteristic: the identification of the deep link between land and people.[14] There is no room for separation between people and nature. They nurture each other, grow with each other or even destroy each other, but their fates are intertwined.

In anticipation of the counterargument, it should be stated that the above statement about TEK is not a reference to the noble savage trope. It is rather what Diamond and Flannery have called 'coevolution': the trial and error process of developing sound livelihood practices that endure over time. Coevolution relates to the development of TEK over the ages, and is transmitted through oral tradition. The term, even if it has a scientific connotation that may seem like an attempt to conceptualise the 'other' in a Western fashion, serves another purpose here.[15] It is used to show that TEK has been misconstrued in the legal arena because the international and domestic instruments have operated under stereotypes that invariable saw Indigenous peoples as first an obstacle to modernity, and then as the embodiment of a primitive and irrecoverable Eden.[16] This section discusses the implementation of CBC as an evolution of fortress conservation that follows the ecosystem approach. CBC has been devised as a more inclusive model. In the case of the inclusion of local communities, the literature regards it as best practice because it engages their members and provides livelihood opportunities that secure, in turn, benefits for biodiversity conservation.

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[14] This may seem like a generalisation, but as a common voice, Indigenous peoples represented in several international forums, such as the UN Permanent Table, have defended this link. Chapter IV elaborates on this claim and its collective component.

[15] The recognition of otherness is a term of art used in the literature, especially in the Spanish term *alteridad*. It is usually associated with the rise of multiculturalism and Indigenous identities, and it often goes hand-in-hand with cultural rights, including safeguarding intangible heritage. See, among others, Luis Carlos Castillo and Heriberto Cairo Carou, 'Reinvención de la identidad étnica, nuevas territorialidades y redes globales: el Estado multiétnico y pluricultural en Colombia y Ecuador' (2002) 3 *Revista Sociedad y Economía* 55; Roberto Pineda Camacho, 'La Constitución de 1991 y la perspectiva del multiculturalismo en Colombia' (1997) 7(14) *Alteridades* 107; Victoria Quintero Morón, 'El patrimonio intangible como instrumento para la diversidad cultural ¿una alternativa posible?' in Gema Carrera Díaz and Gunther Dietz (eds), *Patrimonio inmaterial y gestión de la diversidad* (Instituto Andaluz de Patrimonio Histórico, Junta de Andalucía, 2005) 69; Joanne Rappaport and Robert V H Dover, 'The Construction of Difference by Native Legislators: Assessing the Impact of the Colombian Constitution of 1991' (1996) 1(2) *Journal of Latin American Anthropology* 22. The conceptualisation of the 'other' in the case of Indigenous peoples under variations of the Noble Savage trope is critically analysed in Part IV of this Chapter.

[16] Chris Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993' (1994) 16 *Human Rights Quarterly* 1, 7–8.

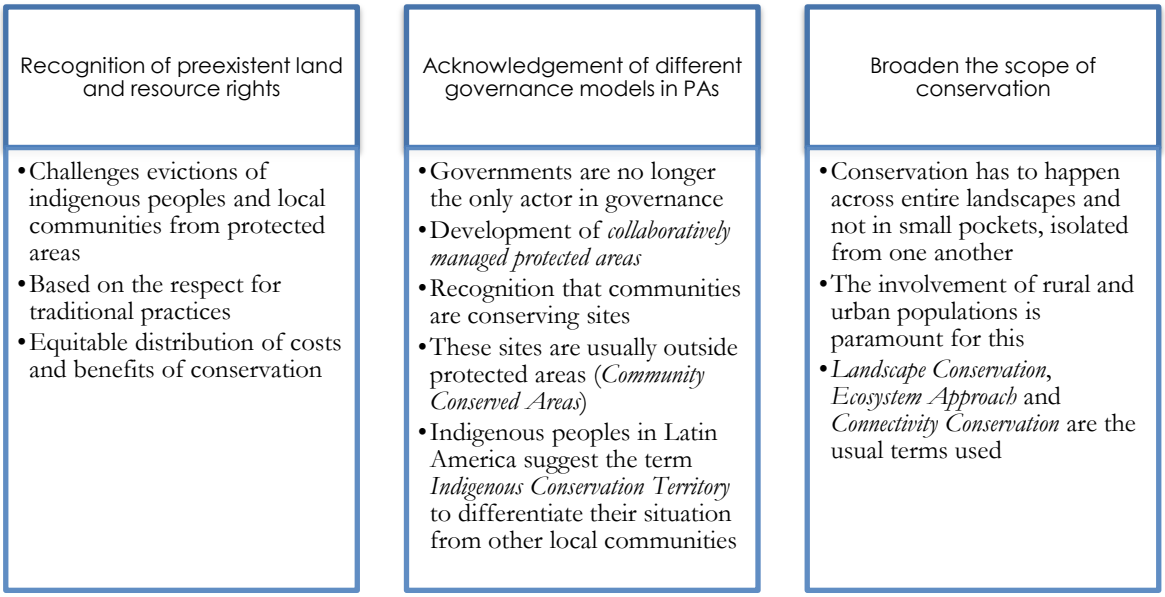

FIGURE 4: COMMUNITY-BASED CONSERVATION AS BEST PRACTICE[17]

II.1. Coevolution

Some authors contend, and the evidence is very persuasive, that the longer a human society coexists with its environment, the more likely it is to reach a point at which people and their environments have a healthy, and even mutually beneficial, relationship. This harmonisation has its origin in the intimate knowledge of the land that only a prolonged contact can give. In other words, 'the land begins to shape the people'.[18] This explains why the megafauna in Africa, the continent where *Homo sapiens* were born as a species, are still very diverse.[19] The evidence does not end there. On other continents it would appear that, following the inevitable initial overkill,[20] people experienced a 'long and hard period of conciliation' resulting in an equilibrium of sorts.[21] The Australian and Neotropical Indigenous peoples understood the particular ecology of their regions and adopted management strategies that included ecosystem-appropriate agriculture.[22]

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17 Adopted from Kothari et al, above n 5, 2–3. The trends above reflect the evolution of protected areas and the conservation discourse by 2008, especially after the IUCN Fifth World Park Congress in Durban in 2003, and the Seventh Conference of the Parties of the *CBD* (CBD COP 7) in Kuala Lumpur in 2004.

18 Tim (Timothy Fridtjof) Flannery, *The Future Eaters–An Ecological History of the Australasian Lands and People* (Reed New Holland, 1994) 263 ('*Future Eaters*').

19 Edward O Wilson, *The Future of Life* (Abacus, 2002) 79–102 ('*Future…*').

20 The overkill hypothesis and the Sixth Extinction are discussed in Chapter II of this thesis.

21 Flannery, *Future Eaters*, above n 18, 145.

22 See for example the case of the 'chagras' system implemented by the peoples of the Amazon, discussed briefly in this chapter. Refer to María Clara van der Hammen and Carlos Alberto Rodríguez, 'Restauración ecológica

There is evidence of continuous human occupation in Australia and the Neotropics, including Colombia, for more than 15 000 years BP. The fact that so much biodiversity has survived these long periods may be an indication that the presence of people *per se* is not bad for biodiversity. It may mean instead that the use given to these lands after the colonisation process, and continued by the current legal systems, has been the real problem. This shows that the destruction of biodiversity is primarily linked to the colonisation model in general and to Eurocentric agricultural techniques specifically. Another culprit can be found in the legal principles that stem from the utilitarian conceptions of property. In combination with a reluctance to change existing structured and tried legal systems, like the Civil and Common Law codes, and the reasons for the extinction rates witnessed today can be understood.[23]

The fact bears repeating that the first human occupation of Australia occurred between 60 000 and 40 000 years BP, making the continent the home of one of the oldest human societies on Earth. The Indigenous hunter-gatherer cultures survived owing to their keen knowledge of the land, water and resources available to them, and their possible scarcity, especially in desert conditions where they were less populous. Thus, their existence depended on ecological cycles, and a harmonious coexistence with other species was a matter of survival.[24] Note that recent research has re-evaluated the existing data on the early Australian extinctions that attributed them to the impact of human arrival. The conclusion of this new research is that the disappearance of the megafauna is more consistent with a climate change event.[25]

Regarding the relationship that the Indigenous people formed with the land, Flannery proposes that, after the initial megafauna extinction, Indigenous Australians took over the role of the extinct megafauna by fulfilling their ecological function in the ecosystem.[26] Firestick farming, the technique of burning precise plots of soil in a controlled fashion, was instrumental to the maintenance of the biodiversity of the desert

permanente: Lecciones del manejo del bosque amazónico por comunidades indígenas del medio y bajo Río Caquetá' in Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2000) 259.

[23] Refer to Chapter II for a discussion on the adoption of the Eurocentric model of agriculture in Australia and Colombia and its repercussions for the environment.

[24] See, Wilson, *Future...*, above n 19, 91–92.

[25] Stephen Wroe et al, 'Climate Change Frames Debate over the Extinction of Megafauna in Sahul (Pleistocene Australia-New Guinea)' (2013)(Early edition) *Proceedings of the National Academy of Sciences of the United States of America* 1.

[26] Tim (Timothy Fridtjof) Flannery, *Here on Earth–An Argument for Hope* (The Text Publishing Company, 2010) 81–83 ('*Here on Earth*').

continent until the present times. The Indigenous peoples thus became the key species of the ecosystem,[27] weaving an inextricably dependent relationship between people and their soil.[28] This is a feat that European settlers failed to accomplish altogether; a fact many stubbornly refuse to recognise even today. European farmers relied instead on imported agricultural practices and farming techniques involving introduced species of plants and animals, including wheat, cows, chickens, rabbits, barley and cabbage. Diamond accurately comments in this respect that Europeans may have colonised Australia, but they never learned to survive in the country autonomously, especially in the desert regions. 'The people who did create a society in Australia were Aboriginal[s] ... the society that they created was not a literate, food-producing, industrial democracy. The reasons follow straightforwardly from features of the Australian Environment'.[29]

The settlers failed to grasp that they were confronting, to phrase it in rational, scientific terms, a tested and developed environmental management system. This system understood the fluctuating weather patterns of the continent, respected animal migration and reproduction cycles, and generally guaranteed the continuous supply of food, water and other necessities for generations. This is an empirical sample of TEK at its best. Even their aversion to war responded to a very simple factor: the reduced size of populations. Thus, when Aboriginal tribes had a conflict, each side chose a champion to fight. They fought just to draw first blood, because there was no sense in wasting perfectly suitable people by sending them to die needlessly when one non-lethal duel would suffice. This was, and still is, a very logical solution. Unfortunately, the British saw it as a sign of cowardice, and a further justification for the doctrine of *terra nullius*.[30]

The history of the first human occupation of the Americas remains a subject of much debate. It is generally agreed that the first humans arrived to the continent by crossing the Bering Strait during the last glaciation. However, some researchers interpret

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[27] For the meaning and role of key-species in ecosystems see Chapter II, subheading II.2.2.

[28] Flannery, *Here on Earth*, above n 26, 99–101. For the human rights implications of this relationship in Australia refer to Lisa M Strelein and Jessica K Weir, 'Conservation and Human Rights in the Context of Native Title in Australia' in Jessica Campese et al (eds), *Rights-based Approaches: Exploring issues and opportunities for conservation* (CIFOR-IUCN, 2009) 123.

[29] Jared Diamond, *Guns, Germs and Steel–A Short History of Everybody for the Last 13,000 Years* (Vintage Random House, 1998) 221.

[30] Parts III and IV of this Chapter address the implications that *terra nullius* had, and still has, for the current deficits in the recognition of the human rights of Indigenous peoples in Australia.

the evidence for the first arrivals to the Neotropics as starting 10 000 years BP,[31] whereas others place it as far back as 30 000 years BP.[32] Regardless, the Indigenous peoples of the Americas have had a long time to adapt to the ecological particularities of these lands, as compared to the five centuries since Spanish colonisation.

Research conducted in the Colombian Amazon validates the theory of coevolution and proposes a link between the sound state of the lands occupied by Indigenous peoples for prolonged periods and their practices.[33] The case of the Indigenous peoples that inhabit this vast rainforest is revealing. The Amazon is composed of delicate ecosystems that self-sustain their own variability. The only way for the forest to nourish itself is by recycling humus and other animal and plant detritus because the soils that support it are poor in nutrients. Clearing the jungle for agriculture or pastoralism only guarantees crops for a short span of time; after as little as two years, the stored nutrients are completely depleted and land becomes unproductive. Indigenous peoples recognised the delicacy of the jungle. To reap the benefits of seasonal crops over the long term, they devised the *chagras* model. As a coevolution mechanism it can be compared to firestick farming in Australia because it relies on ecological cycles and, most importantly, places people as guardians and active participants in the ecosystem.

As Van der Hammen and Rodríguez explain, *chagras* are very small plots of land converted by Indigenous peoples into seasonal crops whose variety of species yields their produce several times a year. The key to the *chagras* is that the land is not cleared randomly. Every single plant removed, including the epiphytes and bryophytes that grow on the trees, are replaced by a domesticated species that fills its ecological niche. After the shamanistic ritual of asking permission to the spiritual owners of the forest, the

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[31] Cristián Samper, 'Cultural Ecology in the Americas' (Paper presented at the IDB Cultural Center Lectures Program, Inter-American Development Bank, Washington DC, 3 December 2003) 3.

[32] The main contested evidence is between purely archaeological research based on the presence of Clovis instruments in the entire territory of the Americas, and mitochondrial DNA (mtDNA) findings that suggest earlier migrations. See, Sandro L Bonatto and Francisco M Salzano, 'A Single and Early Migration for the Peopling of the Americas Supported by Mitochondrial DNA Sequence Data' (1997) 94 *Proceedings of the National Academy of Science* 1866; Tom D Dillehay, 'The Late Pleistocene Cultures of South America' (1999) 7 (6) *Evolutionary Anthropology: Issues, News, and Reviews* 206; M V Monsalve et al, 'Evidence of Mitochondrial DNA Diversity in South American Aboriginals' (1994) 58(3) *Annals of Human Genetics* 256; Emõke JE Szathmary, 'mtDNA and the Peopling of the Americas' (1993) 53 *American Journal of Human Genetics* 793.

[33] See eg, Dolors Armenteras, Nelly Rodríguez and Javier Retana, 'Are Conservation Strategies Effective in Avoiding the Deforestation of the Colombian Guyana Shield' (2009) 142(7) *Biological Conservation* 1411; Sascha Müller, 'The Pan Amazon Rain Forest Between Conservation and Poverty Alleviation: Property Rights Regimes at the Triple Border in the Southern Colombian Trapecio Amazónico' (Paper presented at the 11th Biennial Conference of the International Association for the Study of Common Property, Indonesia/Bali, 19–24 June 2006); Van der Hammen and Rodríguez, above n 22.

community makes a pact of reciprocity with the ecosystem. The careful replacement of native species by their domesticated counterparts mimics the forest's original composition and guarantees the flourishing of biodiversity.[34] This method can thus be considered as a completely sustainable strategy that guarantees the survival of the forest and the livelihoods of its peoples. After an appropriate period, the plot is abandoned and the community moves to another part of the jungle. The benefits for the ecosystem and ecosystem services the *chagra* model brings are palpable. First, by acting as artificial clearings, they promote the spreading of fast growing plants that would otherwise not have access to enough light. These plants in turn bring different species of associated organisms, such as insects and fungi that start colonising the empty niches left. Thus, the ecosystem is renewed and the dispersal of species to previously unoccupied spaces allows for genetic variability within populations.[35] For climate change, the clearing pattern allows for effective new carbon sinks, given that only growing plants have the capacity to store new carbon. These relationships nurtured for generations survive even to this day. This relationship is embodied in TEK, which is explained in the following paragraphs.

II.2. Traditional Ecological Knowledge

It is better to operate under a non-restrictive definition of what can be understood as TEK.[36] In general, TEK is part of the oral tradition; passed from generation to generation and nurtured with experience. Johnson presents a functional explanation that encompasses some of its nuances:

[34] Van der Hammen and Rodríguez, above n 22, 264–265. Note that the studies by Van der Hammen and Rodríguez of the *chagras* in the Amazon and the relationship of the peoples with their forest were used by the Constitutional Court to reconceptualise the collective right to a healthy environment as a *fundamental* constitutional right of Indigenous peoples. See the comment on the ruling in Chapter IV. Constitutional Court, *Judgement SU-383/2003* ('*Illicit Crops Case*').

[35] Recall the importance of genetic variability as one of the components of biodiversity discussed in Chapter I.

[36] Intellectual property is located in the *CBD*, arts 14 to 19, under the access and benefit-sharing regime. These provisions were in turn regulated by the *Nagoya Protocol*. See *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 2 February 2011 (not yet in force), UN Doc UNEP/CBD/Dec/X/2 (29 October 2010) ('*Nagoya Protocol*'). As the introduction explained, the subject of traditional knowledge of Indigenous peoples that may be subjected to intellectual property regulation, such as medicinal plants, is not discussed here.

> Traditional environmental knowledge, or TEK, can generally be defined as a body of knowledge built up by a group of people through generations of living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use. The quantity and quality of traditional environmental knowledge varies among community members, depending upon gender, age, social status, intellectual capability, and profession (hunter, spiritual leader, healer, etc.). With its roots firmly in the past, traditional environmental knowledge is both cumulative and dynamic, building upon the experience of earlier generations and adapting to the new technological and socioeconomic changes in the present.[37]

TEK is linked directly to the efforts made in the international arena regarding the human rights of Indigenous peoples. The recognition of the link between cultural identities and ancestral territories is a common theme not only in legal documents,[38] but also in scholarly publications.[39] These sources also tend to highlight the link between TEK, rights over land and Indigenous cultural identities.

TEK should be understood as a vital and inseparable component of the ways of life of some Indigenous peoples. 'Some' because this assertion cannot be generalised. The application of TEK is usually subordinated to the use or ownership rights that Indigenous peoples exert over the lands.[40] TEK can be lost in some cultures dispossessed of their lands over a long period or assimilated into the dominant culture.[41] Thus, to create a legal strategy to preserve biodiversity by means of TEK without including rights over the land and resources would be unlikely to succeed. Worse, it could be confused with a moot gesture towards recognition of the value of the different cultures of Indigenous peoples without tangible legal implications.[42]

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[37] Martha Johnson, 'Research on Traditional Environmental Knowledge: Its Development and Its Role' in Martha Johnson (ed), *Lore: Capturing Traditional Environmental Knowledge* (Dene Cultural Institute and the International Development Research Centre, 1991) 3, 4.

[38] Eg, Editors, 'The Kimberley Declaration (Reaffirming the Kari Oca Declaration 1992)' (2002) 7(3) *Australian Indigenous Law Reporter* 68 <http://www.austlii.org/au/journals/AUIndigLawRpr/2002/50.html>; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*'); *ILO 169* art 13; *CBD* Preamble and art 8(j).

[39] See especially, Fikret Berkes, *Sacred Ecology–Traditional Ecological Knowledge and Resource Management* (Taylor & Francis, 1999); Peter J Usher, 'Traditional Ecological Knowledge in Environmental Assessment and Management' (2000) 53(2) *Arctic* 183; Nigel Crawhall, 'Valuing Traditional Ecological Knowledge: Supplementing a Rights-Based Approach to Sustainability in Africa' (2010) 17(Exploring the Right to Diversity in Conservation Law, Policy, and Practice) *Policy Matters* 228.

[40] Borrini-Feyerabend, Kothari and Oviedo, above n 2, 9.

[41] See the comments regarding the *Yorta Yorta* case further in this chapter. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*').

[42] This chapter discusses such a 'gesture' in relation to the changes in the Constitution of Victoria.

The problem with the application of TEK is that its legal recognition, without any other associated protection of human rights, may not be sufficient to reach its full potential. In the international law sphere, the only hint to TEK were the provisions from the *Convention Concerning Indigenous and Tribal Populations* (*ILO 107*), adopted in 1957, paternalistic and with no reflection of cultural values.[43] More than three decades had to pass for the *Biodiversity Convention* (*CBD*) to include some specific articles linking Indigenous peoples with their lands.[44] As a community-conservation strategy, the use of TEK can bring advantages, especially when the fossilisation approach is applied. There are many justifications of TEK, especially linked to some limited rights of local communities and Indigenous peoples in general. The use of TEK as a conservation strategy, especially in countries like Australia that, as will be argued further in this chapter, do not have a human rights–based legal framework governing the relationships with its Indigenous populations, can be an effective bridging policy.

II.3. Co-Management Agreements

In the event that environmental law rather than human rights–based strategies is the prevailing framework in place, co-management agreements are an efficient means to achieve community involvement. Co-management is one of the preferred ways for implementing CBC related strictly to nature reserves, natural parks and other protected areas.[45] Castro and Nielsen comment that the definitions vary widely within the literature, and so do the conceptions of what it means in practice. Thus, co-management may range from specific agreements with defined obligations, to broad entitlements to local communities, inclusive of goals other than conservation.[46] The literature is consistent in

[43] *ILO 107*. Note that the International Labour Organization revised the *ILO 107* Convention, and an international agreement superseding it for the signatory parties, *ILO 169*, was adopted in 1989. This document is the subject of the next chapter.

[44] See, *CBD* Preamble, art 8(j), art 10(c), these provisions are critiqued in the last part of this chapter.

[45] It is evident that communities may independently and of their own accord decide to devise a management strategy of lands and resources used communally by all their members.

[46] Alfonso Peter Castro and Erik Nielsen, 'Indigenous People and Co-management: Implication for Conflict Management' (2001) 4 Environmental Science & Policy 229, citing B J McCay and J M Acheson, 'Human Ecology of the Commons' in B J McCay and J M Acheson (eds), *The Question of the Commons* (University of Arizona Press, 1987) 1; G Borrini-Feyerabend et al, *Co-Management of Natural Resources* (GTZ & IUCN, 2000); and P Holm, B

stressing that co-management involves sharing power between the government and the communities: a vision that transcends the purely top-down approach of fortress conservation. Co-management thus implies that the community is not alone in its conservation endeavours, acting hand-in-hand with the State authorities. The processes to reach this stage vary, but they are usually the result of negotiation between the interested parties.[47] This is precisely the problem. Given the wide breadth of possibilities for co-management agreements, it may be difficult to find an optimal balance between the interests of biodiversity protection and the human rights of Indigenous peoples in this instance.

As Chapter II discussed, the creation of National Parks and other protected areas may be construed as a type of exclusion, not different from that exerted in colonial times, when large expanses of land were set aside as hunting grounds for the aristocracy. However, it is a paradox that promoting the use of TEK only as a strategy for protecting biodiversity without a deep consideration of its cultural implications may also be interpreted as neo-colonialism.

It is relevant to note here that the literature on the subject has revolved around a notion of progress from a Western point of view,[48] neglecting to analyse in a deeper way Indigenous peoples' understanding of the matter. It is tempting to use the wage-earning jobs within a National Park as poverty alleviation strategies. The rationale behind this is that the communities involved can find suitable alternatives to the destruction of biodiverse areas caused by livelihood pressures.[49] It is clear that employment opportunities are a source of development and do address poverty issues. However, in the case of Indigenous peoples, a consultation process has to take place to assess whether this is the appropriate course of action. West et al have a sceptical opinion of these strategies and the token consults that accompany them.[50] They argue that alliances between the government and Indigenous peoples to manage protected areas jointly actually reflect a new form of colonialism, promoting:

Hersoug and S A Ranes, 'Revisiting Lofoten: Co-Managing Fish Stocks or Fishing Space?' (2000) 59(3) *Human Organization* 353.

[47] Castro and Nielsen, above n 46.

[48] Anne Deruyttere, 'Indigenous Peoples and Sustainable Development: The Role of the Inter-American Development Bank ' (Paper presented at the IDB Forum of the Americas, Washington DC, 8 April 1997) 4.

[49] See the discussion on poverty alleviation and population pressures in Chapter I.

[50] Paige West, James Igoe and Dan Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2006) 35 *Annual Review of Anthropology* 251.

> …a neoliberal conservation agenda that needs biodiversity or nature to become commodities and natives to become labor. In such settings, natives may also become commodities, as their culture becomes part of the selling point for people-centered conservation initiatives or ecotourism marketing.[51]

It is pointless to over-romanticise the link between Indigenous peoples and nature,[52] given that some of their practices can be admittedly harmful to the environment, and that sustainable practices can be compromised the minute there are overpopulation pressures.[53] This claim is linked to the findings of Brockington and Igoe, which revealed that most of the 'conservation evictions' occurred in zones of high population pressures such as India and South-East Asia,[54] which may be construed as a further reason that a compromise is needed.

II.4. World Heritage Convention: Inadequate for the Protection of Cultural Rights

The last chapter reviewed the listing system of the *Ramsar Convention* and the *World Heritage Convention* ('*WHC*').[55] The context for the discussion was the evolution of the understanding of the separation between nature and people in fortress conservation. This section is a critical analysis of the methodology used in the *WHC* to select listed sites, and reviews whether or not the participation in this convention adequately respects the human rights of Indigenous peoples as legally protected interests.

Monuments and other forms of built heritage have been consistently protected, especially in Europe, the cradle of Western traditions and arts. In 1972, the signing of a heritage protection treaty in times of peace took advantage of the opportunity to regulate

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51 Ibid 257.

52 See generally Benjamin J Richardson and Donna Craig, 'Indigenous Peoples, Law and the Environment' in Benjamin J Richardon and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2007) 195.

53 D Nepstad et al, 'Inhibition of Amazon Deforestation and Fire by Parks and Indigenous Lands' (2006) 20(1) *Conservation Biology* 65, 70.

54 Dan Brockington and Jim Igoe, 'Eviction for Conservation: A Global Overview' (2006) 4(3) *Conservation & Society* 424.

55 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975) ('*WHC*'); *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention*').

the protection of natural heritage sites as well. It is possible that the protection of tangible heritage is a nod towards the recognition of cultural diversity in all its expressions. However, this is not true. This drive has been criticised for having elitist and even chauvinist tints, whereby only expert committees, usually of the European persuasion, determine the outstanding universal value of sites.[56] In 1996, Titchen questioned the disproportionate representation of Western Europe religious monuments on the World Heritage List, begging the question of whether they truly satisfied the 'universality' factor.[57] This phenomenon is also related to the increased drive to strengthen national identities in a globalised world that seems smaller every day. Citizens of all countries would agree that people recognise themselves in their history. They would also agree on the importance for foreigners to identify a country for the positive aspects of its culture. Quintero Morón notes that until the mid-1960s, the collective memory associated with heritage was attached to institutional formulas that sought to reinforce the Nation-state concept. The same process fostered the internal legal monism discussed in Chapter II.[58] Only unambiguous readings, linked to the dominant sectors of society, were admitted in this model. Hence, it was foreseeable that these same sectors used them to legitimise their own versions of what their State or Nation represented in front of the world.[59] Smith reviewed the literature on this nationalist drive, concluding that this nineteenth century universalising discourse reaches its full expression today, where the 'dominant discourse is intrinsically embedded with a sense of the pastoral care of the material past'.[60]

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[56] Note the language change from the term *monuments* to *sites*. This was in response to the aggressive monumentalisation policies that took place in Europe, whereby the surrounding buildings of the proposed monument were demolished to enhance it. Turner critiques this policy of monumentalisation because it entailed an unfair discrimination of poorer countries in the illustrated cultural sphere. Peter Turner, 'What is Heritage Good For? Report on the Pocantico Conference for the *International Journal of Cultural Property*, October, 19–21, 2005' (2006) 13(3) *International Journal of Cultural Property* 351, 352.

[57] See generally, Sarah M Titchen, 'On the Construction of "Outstanding Universal Value": Some comments on the implementation of the 1972 UNESCO World Heritage Convention' (1996) 1 *Conservation and Management of Archaeological Sites* 235.

[58] Refer, for example, to the nation construction process that took place in Latin American countries in the first decades of the twentieth century, as described in Raquel Irigoyen Fajardo, 'Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas y el constitucionalismo andino' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 537, 542–543.

[59] Victoria Quintero Morón, 'El patrimonio intangible como instrumento para la diversidad cultural ¿una alternativa posible?' in Gema Carrera Díaz and Gunther Dietz (eds), *Patrimonio inmaterial y gestión de la diversidad* (Instituto Andaluz de Patrimonio Histórico, Junta de Andalucía, 2005) 69, 71.

[60] Laurajane Smith, *Uses of Heritage* (Routledge, 2006) 17.

The national identity motivation, doubtless a political approach but valid nonetheless, is a cultural construction seminal for the protection of heritage.[61] Feeling proud of something makes people want to share it: 'one could argue that all aspects of national history and heritage make important contributions to a sense of national identity that is an honest representation and involves all citizens'.[62]

III.4.1. Outstanding Universal Value of Sites[63]

To determine which items are worthy of protection, the *WHC* implements a methodology called the OUV test.[64] This methodology has been controversial, especially considering its focus on Western values,[65] reflective of a homogenising and globalised point of view.[66] This is deeply linked to nation construction processes, which only admitted a single heritage protection model for cultural items: the conservation of imposing monuments and buildings. This vision results in a gross over-representation of listings by developed countries, especially in Europe and, in the cases of developing countries, of monuments and buildings from the colonial past.[67] Colombia serves as an example of this phenomenon. There are seven natural and cultural elements listed by the country since the Convention's ratification in 1983; two of the five cultural heritage sites are representative of colonial architecture: the Port, Fortresses and Group of Monuments, Cartagena; and the Historic Center of Santa Cruz de Mompox.[68] Also, at a

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61 Graeme Aplin, *The Nature of Heritage* (Oxford University Press, 2002) 16.

62 Ibid 25.

63 This section is based on part of a published co-authored paper. See, N Rodríguez-Uribe and D Rodríguez-Uribe, 'Emerging Indigenous Voices: Safeguarding Intangible Heritage in Colombia and the Reaffirmation of Cultural Rights' in Rogério Amoêda, Sérgio Lira and Cristina Pinheiro (eds), *Heritage 2012–Proceeding of the 3rd International Conference on Heritage and Sustainable Development* (Green Lines Institute for Sustainable Development, 2012) vol 2, 1469 (page 1471, section 2.1 'The Shortcomings of Tangible Heritage Protection').

64 The OUV methodology stems from the *WHC* arts 1 and 2 and is developed in the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention* (2012) ('*Operational Guidelines*').

65 Sarah Harding, 'Value, Obligation and Cultural Heritage' (1999) 31 *Arizona State Law Journal* 291, 301.

66 Janet Blake, 'On Defining the Cultural Heritage' (2000) 49 *International and Comparative Law Quarterly* 61, 75.

67 Paul Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage' (2004) 1(1) *Macquarie Journal of International and Comparative Environmental Law* 111, 115.

68 UNESCO, *World Heritage List* <http://whc.unesco.org/en/list/>.

national level, most of the listed Assets of Cultural Interest refer to constructions of colonial architecture.[69]

For Indigenous peoples, the methodology problem is twofold. First, the focus on the protection of all things past can be reflective of the assimilationist policies and perspectives that dominated most of the twentieth century. It could imply that the only sites associated with Indigenous cultures worth protecting are those that are not in use anymore, thus severing the link between land and peoples. The case of Colombia is significant, as the two archaeological sites listed by the country, the National Archaeological Parks of Tierradentro and San Agustín, were built by cultures that are extinct today.[70] Second, the universality factor may seem to miss altogether the deep meaning that the territory, and especially sacred sites, represents to the peoples concerned. The case of Australia illustrates this second concern. Not every place of cultural significance for Aboriginal peoples, sacred, secret or otherwise, has the obvious magnificence of Uluru or the iconic caves that gave rise to the *Tasmanian Dam Case*.[71] Thus, the requirement to prove the universal significance of a site to audiences from other cultures may prove impossible.

Harding comments that 'cultural heritage is a very large category of tangibles and intangibles including things that seem to have no intrinsic beauty but serve a valuable cultural purpose, and things that are stunningly beautiful but have very little cultural connection'.[72] It would be tempting to argue that this connection with determined pieces of soil is sufficient to protect the site as tangible heritage. After all, the word tangible implies a physical object or place. However, this is not the meaning adopted by the *WHC*. Under the OUV criteria, sites must, by their sheer beauty, architectural design or historical importance, 'speak' to humanity as a whole and bear witness to a past now gone; factors that are not readily evident in the case of sacred sites and traditional lands.[73]

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69 See for instance the Colombian Representative List of Cultural Interest Assets and National Monuments, which has a big proportion of protected buildings and monuments from the Colonial era. Grupo de Investigación y Documentación - Dirección de Patrimonio, *Lista de bienes declarados Bien de interés cultural del ámbito nacional - Monumento nacional* (28 September 2012) Ministerio de Cultura <http://www.mincultura.gov.co/?idcategoria=37666>.

70 The next chapter discusses the rights-based approach of the Colombian 1991 Constitution and the ratification of the *Intangible Heritage Convention* shifted the focus on tangible aspects of culture.

71 *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

72 Harding, above n 65, 304.

73 Helaine Silverman and D Fairchild Ruggles, 'Cultural Heritage and Human Rights' in Helaine Silverman and D Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer Science + Business Media, 2007) 3, 6–8.

In this case, the living connection to sacred sites and traditional lands held by Indigenous peoples is not recognised in the provisions of the *WHC*.[74] Even if managed under a CBC scheme such as co-management, there are risks for the concerned peoples. Often, their inclusion is more of an afterthought, rather than a conscientious participatory process.

Kirshenblatt-Gimblett notes that 'there has been an important shift … to include not only the masterpieces, but the masters'.[75] That was the motivation for the drafting of the *Intangible Heritage Convention* (*CSICH*).[76] Prior to its subscription, UNESCO recognised that the *WHC* was insufficient for the appropriate protection of wider aspects of culture, such as its intangible components.[77] Moreover, that it had marginalised 'a vast range of cultural expressions which belong to the countries of the "South" and which are crucial for the map of cultural diversity'.[78] Australia could indeed benefit from a framework that includes intangible aspects of culture, beyond those of the *Burra Charter*, linked to places and traditions.[79] However, the discussion on this subject borders the sphere of human rights protection and the country is now reticent to become a party to the *CSICH*.[80]

Nevertheless, the adequacy of the OUV methodology to safeguard cultural rights in all their magnitude, especially in relation to Indigenous peoples, can be questioned. Recalling the deep relationship between peoples and their lands, which is arguably as tangible as it is intangible, this shortcoming can also be extended to natural sites with cultural significance. If the persons or institutions in charge of valuing heritage and of deciding the appropriate ways to manage it are external to the culture and do not

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[74] See the discussion on how intangible cultural heritage protection can be the appropriate legal framework to recognise the deep relationship between peoples and their lands in Chapter IV (especially sections II.3 and III.6).

[75] Barbara Kirshenblatt-Gimblett, 'Intangible Heritage as Metacultural Production' (2004) 56(1–2) *Museum International* 52, 53.

[76] *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) ('*CSICH*'). The first discussions in the international community for the creation of a treaty that would specifically protect intangible heritage started in 1952. However, the negotiations only began in earnest in the 1990s. Kirshenblatt-Gimblett, above n 75, 53–54

[77] Not even the periodical revisions of the OUV methodology of the *Operational Guidelines* seem to satisfy the requirements of this kind of heritage. *Operational Guidelines*, above n 64.

[78] Koïchiro Matsuura, 'Preface' in Sebastian Veg (ed), *First Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity* (UNESCO, 2001).

[79] *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance 1999 with associated Guidelines and Code on the Ethics of Co-Existence* (Australia ICOMOS Incorporated, 2000).

[80] The subjects of the implementation of the *CSICH* and the empowerment opportunities for Indigenous peoples and ethnic minorities are discussed in Chapter IV as an integral part of the collective legal autonomy concerning TEK. Cf Logan argues that the *CSICH* can be a source of violations of human rights, precisely because it can promote a sort of enforced primitivism incompatible with the fluid concept of culture. Bill Logan, 'Playing the Devil's Advotcate: Protecting Intangible Cultural Heritage and the Infringement of Human Rights' (2009) 22(3) *Historic Environment* 14, 17.

participate in a consultation or debate process, the perspectives of the involved Indigenous community in question may be missed. If this happens, its members can be alienated or supplanted from the site, eventually eroding the value and meaning of the site. A new avenue for the protection of sacred sites was opened by the acknowledgement that the OUV methodology lacks a participatory component, being reserved for expert committees or, as Kuruk calls them, 'the illustrated elite'.[81]

II.5. Overcoming the Tragedy of the Commons

The 'Tragedy of the Commons' scenario was one of the references of choice to oppose any sort of communal management.[82] Its basic premise is, *grosso modo*, that human beings do not work well together when there is an obvious benefit in free riding. Thus, whenever people share a common pool of resources without having a clear *individual* ownership component, eventually a free rider will appear and the commons will deteriorate to the point of being barren for the rest of the community. This is a rational premise that follows the classic utilitarian perception of property. It defends its private component under the argument that owners are the ones most interested in defending their land and its resources because their livelihood depends on this management. Hardin presents a fictional scenario of pasture free riding to raise the alarm of the mismanagement of common-pool resources shared by all nations.[83] Thus, resources such as fisheries in the high seas or freshwater catchments from riparian beneficiaries are vulnerable to deterioration from overuse by a free rider pursuing only his or her personal interest.

The lifetime works of the Nobel Laureate Elinor Ostrom have shown conclusively that community management of the commons does not necessarily entail their complete

[81] Kuruk, above n 67, 127.

[82] Garrett Hardin, 'The Tragedy of the Commons' (Pt American Association for the Advancement of Science) (1968) 162(3859) *Science* 1243. The author revisited and expanded his thesis a couple of decades later, see Garrett Hardin, 'Extensions of "The Tragedy of the Commons"' (Pt American Association for the Advancement of Science) (1998) 280(5364) *Science* 682.

[83] Van Griethuysen specifically contests the economic foundations of the 'Tragedy of the Commons', which he calls a 'famous confusion', and is critical in the assessment of the damage of this view to the implementation of community-based conservation strategies. Pascal van Griethuysen, 'A Critical Evolutionary Economic Perspective of Socially Responsible Conservation' in Gonzalo Oviedo, Pascal van Griethuysen and Peter B Larsen (eds), *Poverty, Equity and Rights in Conservation* (IUCN, Gland; IUED, Geneva, Switzerland, 2006) 7, 20–22.

destruction, as Hardin suggested.[84] Indeed, empirical evidence collected in various parts of the world suggests that community management arises naturally, and in some places has spelled the difference between survival and poverty. This discussion can be linked directly to the case of Indigenous peoples in Colombia and Australia and their relationships with the State. It is interesting to note that both countries have strategies in place to overcome overuse by free riders. Colombia has committed to collective rights over property, protected as an inalienable entitlement of Indigenous peoples and communities of African descent in the Chocó-Pacific bioregion.[85] Meanwhile, Australia has implemented stakeholder involvement in various mechanisms with the aim of 'mainstreaming biodiversity conservation'.[86]

III. ECOSYSTEM APPROACH IN BLACK COMMUNITIES IN COLOMBIA AND COMMUNITY-BASED CONSERVATION IN AUSTRALIA

At the beginning of the 1990s, Colombia and Australia had two landmark legal developments that would represent a radical change for the relationship between Indigenous peoples and the State. As commented on in the last chapter, Colombia enforced a new Constitution in 1991 based on the model of participatory, rather than representative, democracy. It also committed to an ecological perspective of the country and embraced multiculturalism, in line with several human rights treaties that now hold a supranational status. The magnitude of these changes created the right conditions for the collective legal autonomy concerning TEK. Australia's turning point, even if it did not change the organisation of the State, was no less paradigm-shifting. In 1992, the landmark case of *Mabo v Queensland*[87] finally dismantled the myth of *terra nullius* and

[84] See especially, among several publications, Elinor Ostrom, *Governing the Commons–The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990); Elinor Ostrom, 'A General Framework for Analyzing Sustainability of Social-Ecological Systems' (2009) 325 *Science* 419; Edella Schlager and Elinor Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68(3) *Land Economics* 249.

[85] See Chapter IV.

[86] National Biodiversity Strategy Review Task Group, 'Australia's Biodiversity Conservation Strategy 2010–2030' (Policy Strategy, Natural Resource Management Ministerial Council, Australian Government, Department of Sustainability, Environment, Water, Population and Communities, 2010).

[87] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo No 2*').

enabled the implementation of the Native Title *sui generis* right.[88] Native Title was regulated in the *Native Title Act*[89] and the doctrine of the High Court has interpreted its scope.[90] However, even though this bundle of rights holds room for the application of TEK, it falls short of a real legal autonomy.[91] Note that both events coincide with the shift towards participatory law and policy frameworks for biodiversity conservation, espoused in the *Rio Declaration* and the *CBD*.[92]

Australia has been more active in involving diverse stakeholders in conservation strategies. One of the highlights is that the co-management initiatives have been some of the first serious efforts to begin the process of reconciliation with Aboriginal and Torres Strait Islander peoples. In Colombia, the fortress conservation model in National Parks prevails as a practical feature, but some initiatives have been implemented for communities living in the fringe zones not blanketed by the ethnic minority constitutional protections.[93] However, it is interesting to note that the black communities entitled with collective territories on the Pacific coast (Chocó province) have benefited from the ecosystem approach.[94] These communities have received differential rights guarantees that equate their collectively entitled territories to the regime that covers

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88 '[T]he rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law'. *Mabo No 2*, 65 (Brennan J).

89 *Native Title Act 1993* (Cth).

90 Native Title has been developed in the Common Law in the cases of, among others, *Yorta Yorta*, the *Pastoral Leases Case*, *Ward* and *Jango*. *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Pastoral Leases Case*'); *Western Australia v Ward* (2000) 170 ALR 159 ('*Ward*'); *Jango v Northern Territory of Australia* (2007) 159 FCR 531 ('*Jango*').

91 See the explanation later in this chapter of the inadequacy of treating Native Title as a bundle of rights that have to be claimed individually, rather than as a single unit.

92 *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, UN Doc A/CONF.151/26 (vol 1) (13 June 1992) ('*Rio Declaration*').

93 For the engagement of these local communities, the Government, through the National Park System, designed the policy *Parques con la Gente*, to secure social participation. However, lack of funding and the internal armed conflict have affected the implementation of this initiative. See, Hernán Darío Correa C, 'La Política de Parques con la Gente, el conflicto armado interno y el gobierno de la "segunda democracia"' in Martha Cárdenas and Manuel Rodríguez Becerra (eds), *Guerra, sociedad y medio ambiente* (Friedrich-Ebert-Stiftung en Colombia (Fescol), Tropenbos, Fundación Alejandro Ángel Escobar, Ecofondo, Internacional Colombia GTZ, 2004) 253–296; Unidad Administrativa Especial del Sistema de Parques Nacionales Naturales, *Política de participación social en la conservación* (Parques Nacionales de Colombia–Ministerio del Medio Ambiente, 2001).

94 Refer for example to the case study of the protection of connected ecosystems in the region in which the government and NGOs have been working together with local communities. Ángela Andrade Pérez, 'El corredor de conservación Chocó Manabí y la aplicación del Enfoque Ecosistémico' in Ángela Andrade Pérez (ed), *Aplicación del Enfoque Ecosistémico en Latinoamérica* (CEM-UICN, 2007) 17.

Indigenous peoples.[95] Within the Indigenous *resguardos*, however, the collective legal autonomy concerning TEK model applies. This is the subject of the next chapter.

Such is the case of the *Familias Guardabosques* (Forest Ranger Families) programme, which offered a micro-financing incentive to families at risk of becoming, or already, involved in the planting of illegal crops. The programme was a success during the years it was implemented, but it was a short-term contingency strategy rather than a commitment.[96] This programme serves as a parallel with community-based strategies in Australia. There is a risk involved in linking these types of strategies to the political agenda of the government in office: the next government could reverse them. In the case of Indigenous peoples, the most pressing issue is the achievement of a long-standing recognition based on the protection of their human rights. For this reason, this chapter focusses on current Australian legal policies, and the next one will have a greater focus on the Colombian rights-based model.

Davies et al comment that, in the Australian case, there is a fundamental difference between the approaches to land management held by Indigenous and non-Indigenous sectors of the population. Drawing on Bradley's definition, they explain that the majority society in Australia sees management as a 'process that people do to land', whereas Aboriginal and Torres Strait Islander peoples see the relationship with their lands as a 'two way interaction between people and country' where the latter 'teaches people and sustains people. People negotiate with country for these beneficial outcomes'.[97] The Colombian Constitutional Court has recognised this special relationship between the Indigenous peoples of the country and their collective territories.[98] In different rulings, this institution has held that 'the collective property exercised by the indigenous communities over their reserves and territories is of the nature of a *constitutional right*, not

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[95] 'Black' is understood here in the sense of cultural identity, not as 'race' in the pseudo-genetic and discriminatory sense. The Act that regulates the collective entitlement and cultural rights of the Pacific Basin communities of African Descent is *Act 70 of 1993 Recognising the Occupation of Territories in the Pacific Basin by Black Communities* (Colombia).

[96] Republic of Colombia – Plan Colombia Counsellor for Alternative Development, *Familias Guardabosques Programme 2002–2006*, Presidencia de la República de Colombia Report No 2007-9-PlanColombia (2007).

[97] Jocelyn Davies et al, 'Attention to Four Key Principles can Promote Health Outcomes from Desert Aboriginal Land Management' (2011) 33 *The Rangeland Journal* 417, 418, citing J Bradley, 'Landscapes of the Mind, Landscapes of the Spirit: Negotiating a Sentient Landscape' in R Baker, J Davies and E Young (eds), *Working on Country: Contemporary Indigenous Management of Australia's Lands and Coastal Regions* (Oxford University Press) 295, 297.

[98] Chapter IV explains why the rights over land and territory, as well as other constitutional rights that have Indigenous peoples as holders, are categorised as collective, as opposed to individual, human rights.

only because these territories constitute their main means of subsistence, but also because they form part of their world vision and religious practices'.[99] Note the importance of the customary aspect of property that is recognised in Colombia but that, as will be shown next, Australia lacks.

III.1. Case Study: The Recognition of the African-Colombian Identity

Colombia jumped from an assimilationist policy to the inclusion of Indigenous peoples via constitutional accommodation, as the next chapter will show. This was accompanied by a transition in the legal arena in which the goals of biodiversity conservation and ethnic inclusion met; that is, in the case of the black communities settled in the lands of the Pacific basin, in the provinces of Chocó, Valle del Cauca, Cauca and Nariño. This part refers specifically to the case of the people of Chocó, and how the law evolved from an Act akin to a co-management agreement, to the implementation of a framework with more elements in common to the collective legal autonomy concerning TEK. Notably, this transition has strengthened the relations of stewardship between the Chocó people and their environment, in a process of identity construction that has been beneficial to both biodiversity and the human rights of this ethnic minority. Linking the creation and reinvention of ecological identities by the country's minorities has been possible because it has been fostered and supported by government sectors. Consequently, Colombia may be in the process of realising that its greatest capital is its biodiversity and the diversity of its peoples.

The Chocó Darién region is a hotspot of biodiversity. It is entitled in its majority to Indigenous and Afro communities, has two National Parks, one of them a UNESCO World Heritage area, and has one of the five zones of the country protected under the *Ramsar Convention*.[100] On paper, this would mean that the province is a biocultural goldmine, protected by the constitution. However, this is also the poorest province in the

[99] Emphasis in text; translated by author. Constitutional Court, *Judgement SU-510/1998* ('*United Pentecostal Church Case*'). The ruling cites these other precedents and unifies them: T-188/93, T-380/93, C-104/95 and C-139/96.

[100] The National Parks are *Utría* and *Los Katíos*. This last one is a UNESCO World Heritage Area, currently on the Danger List. The Ramsar area is the *Delta del Río Baudó*. See Tables 1 and 6 in Chapter II.

country, marginalised because of its poor potential for agriculture. Experiences in other parts of the world suggest that the places most affected by endemic poverty and marginalisation are more prone to escalations of environmental degradation born of necessity; why then is the Chocó still mostly covered by tropical rainforests? The hopeful answer would be the use of TEK as a successful management strategy, and this may indeed be the case.

The black communities of Chocó have nurtured an ecological identity, validated and encouraged by human rights–based instruments. This can have profound legal implications for conservation policies. The inception of this recognition is located in Transitory Article 55 of the Constitution, which ordered the Congress to pass a statute recognising and normalising the legal status of the black communities of the Pacific coast. This culminated in the passing of *Act 70 of 1993*.[101] Even though the mandate of the article was limited to recognising collective property, the enacted legislation applied other provisions, such as the pluralist makeup of the country, to implement a much broader set of rights. The conceptual scaffolding that allows this autonomy of tradition and recognition of customary governance is reinforced with the notion of Tribal peoples of *ILO 169*.[102] Moreover, taking into account the megadiverse status of the region and recalling the principles set in the 'ecological constitution',[103] the Act created a comprehensive set of principles that link life, sustainable development and cultural rights.[104] Thus, article 2(5) defines black communities as the 'group of families of Afro-Colombian descent, that *possess their own culture, share a history, and have their own traditions and customs within the relationship country-settlement*, that reveal and conserve an identity consciousness that differentiates them from other ethnic groups'.[105] Note that the concept that makes these minorities unique is no longer the purely racial component. Rather, it is their cultural traditions and unique histories. The focus on the customary elements that differentiate ethnicity is a step towards the re-definition of the nation as multicultural.

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[101] *Act 70 of 1993 Recognising the Occupation of Territories in the Pacific Basin by Black Communities* (Colombia).

[102] *ILO 169* art 1(a): 'This Convention applies to: tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other section of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations'.

[103] See Chapter II.

[104] The formalities for the collective entitlement of the land are located in *Act 70 of 1993* Chapter III. The link between land use and environmental protection is developed in Chapter IV.

[105] Ibid art 5(2) (emphasis added, translated NRU).

Under this framework, five principles govern the protection of communities of African descent in the country, as set out in article 3:

1. The foundational recognition and protection of the cultural and ethnic diversity of the nation.[106]
2. The right to equality of every culture that shapes the Colombian nation.[107] Note that here the right to equality is treated as a collective right, entitled to entire cultures as opposed to individual members.
3. The respect to the cultural integrity and dignity of the cultural life of black communities.[108] Note that here cultural integrity is inextricably linked to the human right to dignity, again as a collective rather than individual right.
4. The autonomous participation of black communities and organisations in the decisions that may affect them and in *all decision-making processes in the nation* in a condition of equality with all other citizens.[109] This principle fulfils the double function of guaranteeing differentiated human rights of autonomy and of endeavouring to secure the inclusion of the communities in the political life of the State as equals.
5. The protection of the environment by *recognising the relationships that black communities have established with nature*.[110] Here the environment is acknowledged as the beneficiary of a pre-existing relationship, allowing the interpretation that the Act recognises that black communities in the country, even if they did not inhabit the country prior to colonisation, nevertheless developed a form of TEK.

Indeed, it is pertinent to highlight the initiative of the province's capital municipality, Quibdó, to make it a life mission to turn the town into a World Centre for

[106] Ibid art 3.1. Consistent with *Colombian Constitution 1991* art 7.

[107] *Act 70 of 1993 Recognising the Occupation of Territories in the Pacific Basin by Black Communities* (Colombia) art 3.1. See the discussion on collective rights as a key conceptual component of recognition of the human rights of Indigenous peoples.

[108] Ibid art 3.2.

[109] Ibid art 3.4.

[110] Ibid art 3.5.

Biodiversity.[111] The mission statement also mentions a new development model completely based on sustainability and the defence and wise use of the territory and natural resources through the generations.[112] This is not a moot objective. The municipality is indeed creating new education curricula that have sustainability and biodiversity protection at their core. Ecological values underpin the most important celebration of the Province, the Festival of Saint Francis of Assisi (*Fiestas de San Pacho*), held in honour of the patron saint of the town. This cultural element is currently part of the intangible heritage of the nation, and was declared as intangible heritage of humanity at the UNESCO December 2012 Conference.[113] The possibility of international recognition of an element that has biodiversity at its core by popular initiative is yet another indication of the mainstreaming of the protection of different cultural values as a manifestation of democratic processes. In another era, the Chocó may have been seen as yet another impenetrable wilderness to be chopped down and turned into unproductive pastures and croplands. To be presented and, most importantly, appropriated by its inhabitants as a biological haven can represent opportunities for conservation-related activities based on popular initiative, rather than imposed by the State.

This brief case study described the legal leap taken by *Act 70 of 1973* in acknowledging that the descendants of freed or escaped slaves could also find their sustenance and livelihoods in Colombia's forests. This recognised, by statute, that they had developed a relationship with the land and resources.

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[111] As the official website of the town proclaims, 'Quibdó is a municipality that supports an abundant natural wealth in terms of flora, fauna, water and mineral resources. It is also rich in cultural expressions, represented in different musical demonstrations, crafts and religious cults. Its great legacy, however, is the warmth of its people. Its municipal seat is the capital of the Chocó province. Quibdó is projected as a welcoming city and global biodiversity centre, located in one of the country's most densely forested regions near large ecological and indigenous reserves'. Quibdó Sitio Oficial, *Información general* (24 March 2013) <http://www.quibdo.gov.co/Home/Contenido/7> (translated NRU).

[112] Ibid.

[113] UNESCO-Intangible Cultural Heritage, *Festival of Saint Francis of Assisi, Quibdó* <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011&RL=00640>.

III.2. Australia: A *Terra Nullius* of the Mind

The recognition of Indigenous peoples in Australia has been piecemeal, slow and incomplete. The reluctance of the country to implement international law treaties inclusive of human rights provisions has played a central role in this slow development.[114] However, the stance taken by the Commonwealth in the early 1970s in regards to a centralisation of an environmental legal framework for the country, developed primarily using the foreign affairs power in the constitution, perhaps inadvertently resulted in the passing of favourable policies for Indigenous peoples' human rights.[115] For example, Uluṟu-Kata Tjuṯa and Kakadu National Parks are often cited in the literature as successful examples of co-management, communal-based or 'contractual parks'. [116] However, despite the effort and budget devoted to the management of these parks to ensure their biological diversity and cultural heritage, they do not meet the standards of recognition of the human rights of Indigenous peoples. Moreover, these agreements may also promote a fossilisation perspective.

This section starts by briefly outlining the current state of engagement of Indigenous peoples in conservation strategies, which is mainly through public policies. From this, the status of recognition of the five sets of human rights in Australia can be discussed. As to this, the rights to cultural integrity are assessed within the framework of heritage protection legislation. Then, the issue of race discrimination is presented, followed by a reflection on the status of the human rights to self-determination and governance autonomy.

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[114] See in this respect the critiques raised by Niarchos and Zifcak. Nicholas Niarchos, 'Human Rights in Australia: A Retreat from Treaties' (Article prepared for the Human Rights Committee of the Law Society of South Australia, April 2004); Spencer Zifcak, 'The New Anti-Internationalism: Australia and the United Nations Human Rights Treaty System' (Discussion Paper No 54, The Australia Institute, April 2003).

[115] For example, Kakadu National Park had its first contractual agreement with Aboriginal communities over the land in 1978.

[116] For instance, Taubman, who is otherwise very critical of the approach taken by Australian authorities in regards of the recognition of the cultures and traditions of Indigenous peoples, commends the joint management of Kakadu and Uluṟu-Kata Tjuṯa as examples of 'indigenous peoples exercising meaningful control over their affairs in consultation with the government'. Aliza Taubman, 'Protecting Aboriginal Sacred Sites: The Aftermath of the Hindmarsh Island Dispute' (2002) 19(2) *Environmental and Planning Law Journal* 140, 157.

III.2.1. Caring for Country or Working For Country?

In 2010, the International Year of Biodiversity, the Natural Resource Management Ministerial Council (NRMMC) delivered the result of 10 years of research, deliberative processes and negotiations with stakeholders, in the form of a long-term strategy that plans for the next 20 years.[117] The main goal of this ambitious strategy is 'engaging all Australians' in regards to three sub-priorities: 1) mainstreaming biodiversity, 2) increasing Indigenous engagement and 3) enhancing strategic investments and partnerships. The strategy thus aims to engage every stakeholder in Australia, including the government, industry, private landowners and Indigenous peoples, in improving biodiversity conservation efforts in Australia. The document acknowledges the ecosystem approach by highlighting that people and nature are not separate entities that lead an independent existence:

> Biodiversity is essential for our own existence and that of the other species with which we share our continent. Our actions impact on biodiversity every day. All Australians—the public, businesses, Indigenous peoples, private landholders, non-government organisations and all levels of government—must take responsibility for biodiversity conservation.[118]

To engage Indigenous peoples, the strategy focusses on job-creation, while recognising the importance of TEK in management strategies. The instrument is sound from the perspective of biodiversity protection and the idea of mainstreaming biodiversity to all sectors of society should be followed by other countries. However, in regards to the human rights of Indigenous peoples, the policy can be construed as a homogenisation attempt that risks promoting a managerial approach akin to assimilation or, in some cases, fossilisation.[119] This raises the issue of land allocation and redress of past injustices.

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[117] Note the application of Principle 10 of the *Rio Declaration*, which promotes the cooperation and participation of 'all concerned citizens' in environmental decision-making. *Agenda 21* develops the application of this principle and provides guidelines for best practice. *Agenda 21: Programme of Action for Sustainable Development*, UN Conference on Environment and Development, 46th sess, Agenda Item 21, UN Doc A/Conf.151/26 (13 June 1992) ('*Agenda 21*').

[118] National Biodiversity Strategy Review Task Group, 'Australia's Biodiversity Conservation Strategy 2010–2030' (Policy Strategy, Natural Resource Management Ministerial Council, Australian Government, Department of Sustainability, Environment, Water, Population and Communities, 2010).

[119] See the critiques raised in Section IV of this chapter regarding the inadequacy of assimilation and enforced primitivism, or 'fossilisation' policies.

A trend in Australia that can be considered successful if measured by the number of subscriptions is the negotiation and entering into a mutual contract between Aboriginal and Torres Strait Islander communities and relevant stakeholders who have legal prerogatives over the land. By 2002, more than 3000 agreements had been negotiated,[120] and there has been an increase since then, because they are a much easier alternative to native title processes.[121] Both the National Parks information website and the fourth country report to the *CBD* have highlighted the existence and active encouragement of these agreements.[122] This is a community-based management strategy that fosters the application of TEK.

The inception and widespread allocation of Indigenous Protected Areas in Australia follows an underlying pact: the peoples that sign the agreements have an obligation to demonstrate that they are capable of managing the land and to do so according to 'an international standard',[123] which 'brings together traditional Indigenous knowledge and modern science for effective land management'.[124] This approach can be problematic because it may be construed to impinge upon the autonomy of Indigenous peoples. It would appear that state policies have an underlying mistrust of the capacity of Indigenous peoples to conduct sound management if left unsupervised. Creating jobs and opportunities is not only commendable but necessary and compatible with international instruments such as *UNDRIP*.[125] However, it has to be done in a culturally appropriate and concerted fashion that takes the wishes of the concerned peoples into account.[126]

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[120] These contracts can include different objectives such as land access and compensation and they are not necessarily confined to agreements that have environmental governance at their core. Michelle Sanson, Thalia Anthony and David Worswick, *Connecting with Law* (Oxford University Press, 2nd ed, 2010) 270.

[121] For a recent analysis on Indigenous co-management of protected areas in Australia and the growing of agreements, including Indigenous Land Use Agreements, especially in NSW and the NT, see David Farrier and Michael Adams, 'Indigenous-Government Co-Management of Protected Areas: Booderee National Park and the National Framework in Australia' in Barbara Lausche (ed), *Guidelines for Protected Areas Legislation* (IUCN, 2011) 1-40 (Protected Area Types), 24-34.

[122] Australian Government-Department of Sustainability, Environment, Water, Population and Communities, *Indigenous Australians Caring for Country* <http://www.environment.gov.au/indigenous/index.html>; National Biodiversity Strategy Review Task Group, above n 118.

[123] Ibid.

[124] Australian Government Department of Sustainability, Environment, Water, Population and Communities, *About Indigenous Protected Areas – Factsheet* <http://www.environment.gov.au/indigenous/ipa/pubs/fs-about-ipas.html>.

[125] *UNDRIP* art 21(1): 'Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security'.

[126] See in this respect the specific duties of the States, enshrined in arts 11(2), 12(2), 13(2), 14(2), 15(2) and 16(2) of *UNDRIP*.

Bearing this in mind, the next section assesses the application of tangible heritage protection legal provisions and their capacity to safeguard cultural rights in the country.

III.2.2. Cultural Integrity: Shortcomings of Tangible Heritage Protection

The human rights of cultural integrity are framed under the rights of freedom of religion, language, culture, oral history and tradition.[127] To illustrate the status of these rights in Australia, the best avenue is to assess the regulations related to heritage. Laws and policies for the protection of Indigenous cultural heritage have been shaped mostly by the cultural majority with limited input from the affected communities. As Taubman comments, there has not been much change in this *modus operandi* in recent times, considering that heritage protection is mostly driven towards the protection of tangible heritage.[128] She observes that said protection follows the premise of affording protection to places of 'outstanding' or 'significant' heritage values. These values, as discussed above, are not well suited to protecting certain places because it 'may not be obvious to non-Aborigines that a particular site is sacred to Aborigines'.[129] The inadequacy of protection of sacred sites is at odds with the optimisation of the promotion of the interests of Indigenous peoples in biodiversity conservation strategies.

Australian policy-making in this respect is committed to the implementation of the *WHC* following the strict criteria of the OUV listing methodology. This methodology does not require a consultation process, thus Aboriginal groups are not directly asked about what constitutes *their* cultural heritage. This can be problematic especially if the tangible assets that need protection are not considered to comply with the definitions of the *WHC*.[130] Memmot comments that the places of significance to Indigenous Australians have been continuously 'disrupted, degraded, desecrated and in some instances destroyed' from the beginning of colonisation.[131] He also notes that legislation reflects the colonial Eurocentric view of heritage focussed on tangible places and elements, which tends to exclude 'Aboriginal and Torres Strait Island worldviews and

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127 See Chapter I, Section III.2.4.
128 Taubman, above n 116, 140, 142.
129 Ibid 142.
130 *WHC*, art 8. See also, *Operational Guidelines* above n 64.
131 Paul Memmot, 'The Significance of Indigenous Place Knowledge to Australian Cultural Heritage' (1998) 83(4) *Indigenous Law Bulletin* <http://beta.austlii.edu.au/au/journals/ILB/1998/83.html#fnB1>.

intellectual traditions from cultural heritage management practice'.[132] This is a direct product of the history of settlement in Australia under the doctrine of *terra nullius*, which did not allow an interpretation of Indigenous peoples as valid participants in the political life of the country.

After the referendum,[133] Australia saw the emergence of legislation seeking to recognise Indigenous legal interest in regards to heritage. Of special relevance are the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (*ATSIHP* Act), the *Protection of Movable Heritage Act* 1986 (Cth) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).[134] The first instrument has the advantage of providing emergency measures for the protection of areas or objects of Indigenous importance that are in danger of being damaged or desecrated.[135] An Indigenous group or individual may seek this protection by way of a written or oral submission to the Minister, who will then consider the merits of the petition and whether to grant or deny it.[136] It would seem that this mechanism could effectively safeguard Aboriginal heritage and tradition. However, it still relies on an external valuation to be effective. Coupled with the fact that the protection only has an interim character,[137] and that the request can only be used when the relevant protection mechanisms are not in place in the State in which the site or artefact is located, the measure is insufficient.

The law has been criticised for its lack of efficiency and is now the subject of law reform.[138] Moreover, even if the Act is considered adequate, the Hindmarsh Island dispute showed that the Court is not an appropriate forum through which to air the issues, especially when they are of a secret nature. The dispute generated a string of litigation over the proposed construction of a bridge between the mainland and

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132 Ibid.

133 The 1967 Referendum, approved by more than 90% of the population, removed the only two mentions of Aboriginal peoples in the Constitution, both of which were discriminatory. Removed provisions: s 51(xxvi) saw the phrase 'other than Aboriginal race in any State' removed. s 127: 'In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.

134 Additionally, Aboriginal and Torres Strait Islander peoples can negotiate and register Indigenous Land Use Agreements (ILUAs) under the *Native Title Act 1993* (Cth), Part 2 Subdivision B.

135 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) Part II ('*ATSIHP Act*').

136 See ibid ss 9, 10 and 12.

137 For example, Emergency Declarations under s 9 of the Act cannot exceed 30 days.

138 Australian Government-Department of the Environment, Water, Heritage and the Arts, 'Indigenous Heritage Law Reform, Possible Reforms to the Legislative Arrangements for Protecting Traditional Areas and Objects' (Discussion Paper Australian Government, Department of the Environment, Water, Heritage and the Arts, August 2009).

Hindmarsh Island, located at the mouth of the Murray River in South Australia.[139] In the final litigation, the question put to the Court was whether the *Hindmarsh Bridge Act*, enforced by the Commonwealth using the Race Power of the constitution, could override the provisions of *ATSIHP*. The disregard of and misconstructions related to Indigenous cultures were also of note. In particular, the use of the Race Power to discriminate against Aboriginals evidenced the insufficiency of the referendum to meet the standard of respect that Indigenous communities in Australia deserve.

There are clear problems with the protection of culture by means of a tangible heritage framework. First, differences in values place the external observer, be it a judge, the Minister or any other member of the public, in the position that they are unlikely to comprehend certain aspects of heritage. Deeply linked to this shortcoming is the lack of legal recognition of customary law. In the Hindmarsh Island bridge dispute, the neglect of the value and importance of custom was seen when the existence of 'woman's business' at the site was questioned. The Ngarrindjeri people, who opposed the building of the bridge, gave their reason as the site being the place of secret business by women, which it was important not to reveal to men or the public. The Royal Commission appointed to ascertain the legitimacy of their claims decided that it was a 'fabrication' and the law was passed.[140] Eventually, the secret business was made public to gain protection, but the bridge was built regardless. Thus, the failure of heritage protection regimes to 'recognise the existence of Aboriginal customary law [forced] Aborigines to infringe their own laws in order to gain protection under Australian law and [resulted] in inappropriate litigation of indigenous religious beliefs'.[141]

Moreover, under an interpretation consistent with the *Racial Discrimination Convention* and the *Racial Discrimination Act*,[142] it was generally understood that the amendment of the

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[139] *Chapman v Tickner*; *Tickner, Norvill & Milera v Chapman & Others*; *Tickner v Chapman* (1995) 133 ALR 74; *Kartinyeri v The Commonwealth* [1998] HCA 22.

[140] South Australia, The Hindmarsh Island Bridge Royal Commission, *Report of the Hindmarsh Island Bridge Royal Commission* (1995). For a detailed comment on this report refer to James F Weiner, 'Culture in a Sealed Envelope: The Concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair' (1999) 5(2) *The Journal of the Royal Anthropological Institute* 193.

[141] Taubman, above n 116, 158.

[142] *CERD* art 1.4: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals *requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination*, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved (emphasis added)'. *International Convention on the Elimination of All Forms of Racial Discrimination*,

Race Power would mean that 'the Commonwealth would only pass laws for the benefit of Aboriginal people and not to discriminate them'.[143] The decision to confirm the capacity of the parliament under this section to pass the *Hindmarsh Island Bridge Act*,[144] excluding it from the operation of the *ATSIHP Act*, shows that the protections to the human rights of cultural integrity and not to be subjected to discrimination are unstable.[145]

Aside from the shortcomings evidenced in the Hindmarsh Island Bridge case, there are other practical issues with the *ATSIHP Act*. Notably, very few declarations have been made: 93 per cent of approximately 320 valid applications received since its commencement in 1984 have not resulted in declarations. Moreover, Federal Court decisions overturned two of the five long-term declarations made for areas.[146] The *EPBC Act*, implementing the *WHC*,[147] defines what to protect in heritage matters in similar terms to the *ATSIHP Act*. In defining Indigenous Heritage Value, it states:

> 'Indigenous heritage value' of a place means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history.[148]

Sections 324, 324(a), 324(c) and 324(d) of the *EPBC Act* provide the criteria for assessing the significance and importance of heritage places to protect. In line with the convention it implements, the regulation is limited to physical sites and does not accord effective protection to self-defined Indigenous cultural values and expressions, which ultimately mould the core meaning of the place to be protected.[149] The definition of what exactly

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opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*'). This article is enforced in Australia in ss 8(1) and 10 of the *Racial Discrimination Act 1975* (Cth).

143 Taubman, above n 116, 149. Brennan J noted in regards to the Referendum and the Race Power that 'the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the *Racial Discrimination Act* manifested the Parliament's intention that the power will hereafter be used only for the purpose of discriminatorily conferring benefits upon the people of a race for whom it is deemed necessary to make special laws'. *Tasmanian Dam Case*.

144 *Hindmarsh Island Bridge Act 1997* (Cth).

145 *Kartinyeri v The Commonwealth* [1998] HCA 22.

146 Australian Government-Department of the Environment, Water, Heritage and the Arts, above n 140, 4.

147 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 324, 324(a), 324(c) and 324(d) ('*EPBC Act* ').

148 *EPBC Act* s 528.

149 Taubman's critique of heritage regulations and their shortcomings in Australia comprehensively canvassed the issues and it remains valid today, although the law reform process, started in 2009, may finally put an end to the Eurocentric methodologies surrounding the discipline of heritage protection. See generally Taubman, above n 116, and Australian Government-Department of Water, Heritage and the Arts, above n 140.

constitutes a sacred site has to be culturally oriented.[150] In the guidelines for natural sacred sites, the IUCN provides an open-textured definition of sacred sites as being areas of special spiritual significance to communities. Further, the document notes that many of these sites are important for biodiversity protection. 'In fact, for many communities it is difficult to separate the reasons for protecting the spiritual connections between people and the earth, and for conserving biodiversity in their lands'.[151] This is an argument in favour of the recognition of the human rights to cultural integrity promoted in *UNDRIP*, which are intimately linked with the protection of intangible heritage.[152] The lack of separation between Indigenous communities and their territories implies that a failure to protect sites for not satisfying the OUV criteria can threaten Indigenous cultures.

The flaw of the regulation is that, although it seeks to safeguard important places, importance is awarded from the Western perspective of 'historical value', marginalising the understanding of value of Indigenous peoples. As Shearing notes, the *WCH* and its implementation law thus divide cultural and natural heritage into two separate entities,[153] failing to acknowledge the link between man and nature.[154]

Coupled with this problem, Australian States still hold the power to regulate heritage inside their territories, and the laws and policies can vary from State to State. It is desirable that heritage management and protection be centralised or at least harmonised.[155] However, as long as heritage protection remains linked to places or artefacts—that is, to *tangible* things—while failing to recognise a holistic cultural heritage including *intangible* aspects, it will remain incomplete.

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[150] In the Durban Accord, the 3000 participants of the Fifth IUCN World Park Congress agreed that several protected areas had spiritual values beyond the aesthetic and tangible components and these considerations should take centre stage in the drafting of law and policy. Robert Wild and Christopher McLeod (eds), *Sacred Natural Sites: Guidelines for Protected Area Managers* (IUCN, Gland & UNESCO, Paris, 2008) 6.

[151] Ibid 7.

[152] The collective human rights of Indigenous peoples to practice and revitalise their culture, customs, spiritual and religious traditions, as well as their oral history, languages and heritage are enshrined in arts 11, 12 and 13 of *UNDRIP*.

[153] Susan Shearing, 'Australian State and Territory Indigenous Cultural Heritage Laws' (2006) 3 *Macquarie Journal of Comparative and Environmental Law* 1, 2.

[154] Michael Carley and Ian Christie, *Managing Sustainable Development* (Earthscan Publications Ltd, 1992) 69–71.

[155] For example, after ratifying the *Convention on Intangible Heritage*, Colombia centralised the management of the entire nation's heritage in one Act, in the head of the Ministry of Culture. The protection and management of intangible elements is done with the constant participation of the communities involved. The role of intangible heritage as part of the rights that make the collective legal autonomy concerning TEK model are discussed in depth in Chapter IV. See *Act 397 of 1997 developing articles 70, 71, 72 and all the concordant articles of the Constitution and enforcing other rules regarding cultural heritage, promotion and incentives for culture, and creating the Ministry of Culture* (Colombia) ('*General Culture Act*'), as amended by *Act 1185 of 2008 which modifies and amends the Act 397 of 1997 - General Culture Act - and enforces other provisions* (Colombia).

The perspective that informs the drafting of laws and policies needs to be reviewed to acknowledge that importance is not always measured under a *universal* or even *national* standard. By conceding that every group has the right to determine under its own understanding and vision of the world what constitutes heritage,[156] the 'value' assigned would not be instrumental but would rather be based on the intrinsic way in which peoples value themselves and their communities.[157] It would be sensible to enhance Indigenous public participation mechanisms. This has been identified by the 2009 Law Reform paper, which seeks to transcend mere tokenisms and include Indigenous Australians in all of the processes involving management, monitoring, conservation and listing of Indigenous heritage.[158]

The *Hindmarsh Island Dispute* was just one aspect of the issues present in the legal provisions regarding racial discrimination in Australia, as will be seen next.

III.2.3. Racial Discrimination: A Pervading Issue

Before discussing racial discrimination, it is imperative to caution against the use of the *démodé* concept of 'race' and the violence that its use can and does entail. Several jurisdictions have changed their laws to embrace the term 'ethnicity', which means belonging to a group that shares a cultural tradition. The reason for this change is the acknowledgement of the profound biological, genetic, cultural and psychological incorrectness of the prior concept, discussed in the following paragraphs. This thesis advocates that the only acceptable use of the term 'race' exists when it is accompanied by 'prevention and elimination of discrimination by motive of', as used in several human rights instruments.[159]

As mentioned in Chapter II, the *Tasmanian Dams Case* was seminal for determining the scope of the Commonwealth in regards to the external affairs power.[160] It also set the

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[156] *UNDRIP* art 31: '(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures ... (2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights'.

[157] Nigel Stobbs, 'What Can We Do You For? Naïve Conception of the Value of Indigenous Cultures and Communities' (2005) 6(10) *Indigenous Law Bulletin*.

[158] Australian Government-Department of Water, Heritage and the Arts, above n 140.

[159] Especially, *CERD*; *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 36/55, UN GAOR, UN Doc A/RES/36/55 (20 November 1963).

[160] *Australian Constitution 1900* s 51(xxix).

precedent for the listing of heritage protection sites under the *WHC*. The area going to be dammed by the contested project was a network of caves, long used by the Tasmanian Aboriginals. Given that the heritage value of the site depended at least in part on its meaning for the original inhabitants of the island, the Court found an opportunity to set the precedent for the determination of who could be considered an Aboriginal person. Only Justices Brennan and Deane referred to the issue, but it was Deane J who defined the three-part test that even today serves to determine the status as an Aboriginal:

> The phrase ['people of any race' in s 51(xxvi) is], in my view, apposite to refer to all Australian Aboriginals collectively … The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aboriginals. By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of that term, [1] *a person of Aboriginal descent, albeit mixed,* [2] *who identifies himself as such* and [3] *who is recognized by the Aboriginal community as an Aboriginal.*[161]

As De Plevitz and Croft note, the first element of this three-part test soon came to be interpreted based on blood tests due to advances in genetics.[162] Thus, aside from the cultural components of self-identification and recognition from the Aboriginal community, genetic descent should be ascertained to access certain benefits. However, the use of this test at all contravenes the rights of self-determination and cultural integrity, and promotes the out-dated concept of the existence of 'races' as subspecies of *Homo sapiens*. This is precisely what happened in Tasmania during the elections for The Aboriginal and Torres Strait Islander Commission (ATSIC) in 2002. In this instance, more than a thousand people that were initially enrolled to vote were challenged due to doubts over their 'Aboriginality', prompted by the 'whiteness' of the candidates. Only 130 were eventually 'proven' Aboriginal.[163] This form of discrimination is what the current Aboriginal and Torres Strait Islander Justice Commissioner Mick Gooda calls *lateral violence*, whereby the members of these minorities suffer constant abuse and denial of their rights not only for how they look but also for how they *do not* look.[164] Other interesting critiques on the cultures of Aboriginal nations are that they have changed,

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[161] (1983) 158 CLR 1, 273-74 (Deane J) (emphasis added).

[162] See generally, Loretta de Plevitz and Larry Croft, 'Aboriginality Under the Microscope: The Biological Descent Test in Australian Law' (2003) 7 *Queensland University of Technology Law Journal* 1.

[163] See the analysis on ibid 4-5.

[164] Mick Gooda, 'Native Title Report 2011' (Report by the Aboriginal and Torres Strait Islander Justice Commissioner, Australian Human Rights Commission, 28 October 2011).

their myths are fluid[165] and that they are nepotistic, hermetic and based on secret.[166] However, considering that ATSIC was the primary representative institution through which Indigenous peoples could be not only represented but also elected, this challenge to who could stand for election can be construed as an impediment to fundamental civil liberties.[167]

Regarding the test, the cultural identification components should be sufficient to ascertain belonging to an Indigenous group. Self-determination should operate here as a right that every individual has to determine who they are, find their own identity, their religion and their culture. Coupled to this parameter is the equivalent of the cultural acceptance part of the test.[168] The key then is the word 'self'. Nobody has the right to define who a person is except the person concerned, and nobody can be forced to belong to a community or group.[169]

Indigenous Australians do not necessarily follow a lineal family line, but have extended families and, in many cases, adopt individuals from other groups. This complicates, or obviates, the process of tracking a bloodline and making rights and benefits contingent on the results.[170] For the blood test to bear any reliable result, the genes would have to be tracked to the times before settlement, which is simply unfeasible. Moreover, in the case of exterminated groups or of adopted persons belonging to the stolen generations, such a test is useless. Adoption within Indigenous groups should not be subjected to different legal regimes in cases that the adopted child

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165 Examples of these critiques are abundant in conservative think tanks, such as the Samuel Griffith Society. In a contribution by one of its members, the author questions the fluency of the myths, citing the adoption of the dingo as a totemic animal, even when their arrival occurred long after the aboriginals. He uses this criticism, among others, to discard the existence of secret business in Hindmarsh Island. Geoffrey Partington, 'Hindmarsh Island and the Fabrication of Aboriginal Mythology' (Paper presented at the Fifteenth Conference of The Samuel Griffith Society 'Upholding the Australian Constitution', Adelaide, May 2003).

166 Simons, referring to conservative right-wing critics of the existence of secret women's business in Hindmarsh Island. Margaret Simons, 'Hindmarsh: Where Lies the Truth?' *The Age*, 9 May 2003 <http://www.theage.com.au/articles/2003/05/08/1052280376344.html>.

167 In the case of *Shaw v Wolf* (1999) 163 ALR 205 eleven people running were challenged and two of them declared ineligible for not complying with the race test. See the analysis of this case in De Plevitz and Croft, above n 164.

168 The right to self-determination, enshrined in art 3 of *UNDRIP* is complemented by art 9: 'Indigenous peoples and individuals have the right to belong to an indigenous community or nation, *in accordance with the traditions and customs of the community or nation concerned*. No discrimination of any kind may arise from the exercise of such a right' (Emphasis added).

169 This is actually one of the fiercest criticisms to the concept of 'collective rights'. It will be fully addressed in the next chapter.

170 See generally the criticisms that O'Connell raise to the false promises of genetic identification in Karen O'Connell, '"We Who Are not Here": Law, Whiteness, Indigenous Peoples and the Promise of Genetic Identification' (2007) 3(1) *International Journal of Law in Context* 35.

is considered to be related legally to the adoptive parents or to have the same rights as biological children. It would not be fair to subject the members of the stolen generations to a second dispossession.

Australia implemented the *Racial Discrimination Convention* in the *Racial Discrimination Act*.[171] Although it transcribes this international instrument almost to the letter, there is a hurdle to this Act, which is that the rights consigned therein are not considered to have a special hierarchy. Hence, it has been acceptable to suspend it to further other agendas, supposedly well-meaning but incompatible with the inalienable character that these rights should have.[172]

The highly contended 'Race Power' of article 51 of the Constitution has empowered the Commonwealth Government, after the 1967 referendum, to pass laws in regards to Indigenous populations. Although the referendum was the first and most momentous step towards recognition and equality for Indigenous Australians, its reach has proven to be very limited.[173] As mentioned above, the power has not been construed as being restricted to the passing of affirmative action provisions.[174] What is more alarming is that the *Racial Discrimination Convention* is one of the very few treaties signed and ratified by Australia.[175] The residual power of State governments to regulate other matters relating to Aboriginal and Torres Strait Islander peoples is still in force, and some States have taken steps towards their recognition. For instance, Victoria amended part of its *Constitution Act* in 2011 to acknowledge expressly the failure to consult Aboriginals in its drafting. This is a very positive step in the reaching of full equality, although it needs

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171 *Racial Discrimination Act 1975* (Cth). S 7 ratifies *CERD*.

172 Cf *Colombian Constitution 1991*. Art 13 enshrines the fundamental right to equality before the law in exactly the same terms as the *Universal Declaration of Human Rights*: 'free from discrimination by reasons of sex, race, national or family origin, language, religion, and philosophical or political opinions'. Moreover, the article states that there is an obligation for the State to adopt affirmative action measures to ensure that 'equality is real and effective' (translated by author).

173 The Referendum's elimination of s 127 only annulled complete exclusion.

174 'In *Koowarta v Bjelke-Petersen* four justices rejected Murphy J's assertion that s 51(xxvi) could only support laws "for the benefit of" the peoples of a race and not laws which would "affect adversely" those people. In fact, Stephen J's view that laws made under 51(xxvi) "may be benevolent or repressive" was supported by two other justices'. Taubman, above n 140, citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

175 The country's record of compliance with the treaty is not encouraging. Perhaps the Freudian slip of the Australian delegate before the CERD Committee on 21 March 2000 was more honest than it appears. In this instance, the Honourable Phillip Ruddock, Minister and envoy of the Howard government, there to present the country's overdue 10-year report, started his opening remarks with: 'Now this report is not simply a reflection of the Government's commitment to racism…'. Transcription of the proceedings quoted in Spencer Zifcak, above n 114.

further reinforcement. The result is an additional section in the Preamble (1A), entitled *Recognition of Aboriginal People*:

> (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
> (2) The Parliament recognises that Victoria's Aboriginal peoples, as the original custodians of the land on which the Colony of Victoria was established–
> a. have a unique status as the descendants of Australia's first people; and
> b. have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
> c. have made a unique and irreplaceable contribution to the identity and well-being of Victoria.
> (3) The Parliament does not intend by this section–
> a. to create in any person any legal right or give rise to any civil cause of action; or
> b. to affect in any way the interpretation of this Act or of any other law in force in Victoria.[176]

This sort of recognition can be construed as insufficient; to acknowledge the status and existence of the spiritual, social and cultural links of Indigenous peoples with their traditional lands is moot in the absence of rights or legal mechanisms to protect this special status and relationship effectively. To deny this preamble the possibility to be at least a parameter of interpretation for the Constitution raises concerns about its true function. Thus, this provision as it is, even if the political and symbolic significance it has cannot be denied, will never achieve the legal potential that it has reached in countries that fully embrace their multicultural nature.[177] Currently, propositions for a referendum to amend the Australian Constitution 1900 are underway. The proposed amendments will have the form of a package to avoid the passing of only some of them because, as it

[176] *Constitution Act 1975* (Victoria) s 1(A). Note that the wording of this provision is similar to that used in Queensland. A bill proposing amendments to the Constitution of New South Wales, proposed in 2010, makes exactly the same reservations.

[177] More importantly, the elimination of racial discrimination cannot be left to the whims of the politicians that happen to be in power. See for instance the case of the transition from Paul Keating to John Howard. Whereas the former was open to the inclusion of Aboriginal peoples and the recognition of past harms, the latter reversed the trend and, under his rule, the application of human rights treaties in Australia, in general, ceased. See, for example, Prime Minister Paul Keating, 'Redfern Speech: Year of the World's Indigenous People' (Speech delivered at the Redfern suburb, 10 December 1992). Keating also commissioned the report on the Stolen Generations in 1995, presented to Howard in 1997. See, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 'Bringing Them Home' (Report Human Rights and Equal Opportunity Commission, 1997). For the international policy change between the Keating and Howard Governments, see generally, Spencer Zifcak, above n 114.

bears repeating, the human rights of Indigenous peoples should be articulated in a framework of interlocked and interdependent provisions.[178]

Linked to the capacity to be recognised and not being subjected to discrimination, Indigenous peoples should be able to engage in public participation and consultation procedures. The next section briefly assesses this access in Australia.

III.2.4. Public Participation and Consultation

The drive to incorporate the inputs of Aboriginal and Torres Strait Islander nations in decision-making processes involving environmental protection, especially if said policies can affect them directly, should be a regular occurrence.[179] However, said processes and the resulting projects are being passed without any participation of Indigenous nations. This is the case of the Murray-Darling Basin Plan, passed by the Gillard government in October 2012. The plan has, amid its objectives, the aim of the restoration of environmental flows to counteract the impacts of intense irrigation.[180] However, Aboriginal elders claim that 'It's all about putting money into ways to save water for irrigation and there's no money for anything such as research into cultural flows and what they mean to Aboriginal people of the Murray Darling Basin'.[181] Here, the interest to be protected would seem to be primarily that of farmers, followed by the environment in its most utilitarian interpretation, and lastly the nations that have their livelihoods vested in preserving the flows.

This is symptomatic of deeper problems on the participation deficit of Aboriginal and Torres Strait Islander peoples in Australia, as a residual effect of the myth of *terra nullius*. As early as 1993, the Koori Centre noted in regards to the research of Aboriginal nations and communities that:

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[178] Refer to the defence of the need for constitutional reform raised by Davis. Megan Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6.

[179] Aside from the consultation requirements that permeate several provisions of *UNDRIP*, art 29 specifically addresses the rights of Indigenous peoples associated with the environment: '(1) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination'.

[180] See the comment in regards of the Murray Darling Basin in Chapter II.

[181] Statement by Fred Hooper, chair of the Northern Murray Darling Basin Aboriginal Nations, a group of more than 30 nations that depend on the river for their sustenance, given to SBS. SBS World News Australia, *Murray-Darling Plan: Indigenous Nations 'Not Consulted'* (26 October 2012) <http://www.sbs.com.au/news/article/1705425/Murray-Darling-plan-Indigenous-nations-not-consult->.

> Much of the present research is based on definitions by non-Aboriginals, of what is perceived to be Aboriginal problems. Coupled with this are non-Aboriginal solutions. Thus Aboriginal people become objects of research where problems and solutions are defined outside Aboriginal and Torres Strait Islander frames of reference.[182]

As regards Aboriginal representation, participation and input, it should be noted that ATSIC, a democratic and representative institution, was in place between 1989 and 2005, when it was dismantled.[183] The institution was criticised by the public and the dismantlement occurred amidst accusations of corruption and poor performance.[184] It is strange that instead of choosing to pursue reforms or amendments of the Act, the government decided on the dismantlement of ATSIC and its replacement with non-elected members of the National Indigenous Council. Behrendt surmises that the real reasons behind the suppression were that ATSIC tended to be critical of the government and had a long-term rights-enforcement agenda.[185] This is consistent with Bradfield's comment regarding the Howard government's 'one nation' agenda, the policy direction of which was to incorporate Indigenous Australians into the mainstream, without separate rights.[186] The argument makes sense. Framed in the discussion of managerial approaches towards Indigenous peoples favoured in Australia, voices claiming for a differentiated approach represent a threat to the non-plural legal system. Every institution has its problems, which provide opportunities for improvement. Dismantling ATSIC became a campaign promise of both the Liberal and Labour parties in 2004, meaning that they negated the distinctness of the institution and left it to the mercy of the public.

Effective representation and direct empowerment appear not to sit well with the majority opinion, which uses the shield of interpreting democracy as the rule of the

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[182] Preamble of the Koori Centre, University of Sydney, *Principles and Procedures for the Conduct of Research*, 1993, quoted in Terri Janke, *Our Culture: Our Future–Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel & Company, prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998) 33.

[183] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth); *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth).

[184] Stuart Bradfield, 'Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC' (2006) 52(1) *Australian Journal of Politics and History* 80, 95.

[185] Larissa Behrendt, 'The Abolition of ATSIC - Implications for Democracy' (Issues Paper, Democratic Audit of Australia, November 2005).

[186] Bradfield, above n 186, 94–96.

majority rather than promoting the right of minorities to be heard.[187] This is one of the sets of rights promoted by *UNDRIP*, which begs the question of whether Australia would have been able to silence Indigenous voices had it already subscribed to the Declaration. Compare this to the affirmative action–based move in Colombia towards the relevant and effective inclusion of Indigenous communities in decision-making at all levels of democracy. This has not only resulted in a more inclusive legal system, but has also empowered communities to challenge government and private initiatives that may prove deleterious for the environment.[188]

One of the arguments that may be raised against the participation and consultation rights in *UNDRIP* is that they only operate concomitantly with a certain recognition over lands and resources.[189] However, this is not the case. The instrument is specific in the provision of a blanket requirement of cooperation and prior informed consent before the adoption of any administrative or legislative measures that may affect Indigenous peoples.[190] Nevertheless, the issue of land and resource use should now be reviewed.

III.2.5. Access to Land and Resources

The first steps towards recognition of rights over ancestral lands, not to be confused with the voluntary agreements with other stakeholders discussed before, started just after the 1967 referendum. In the years between the referendum and *Mabo*, statutory laws in the Northern Territory (NT), New South Wales (NSW), South Australia (SA) and Victoria started a process of land allocation to Indigenous peoples. Note that these processes promoted the granting of land rights previously non-existent. After *Mabo*, the laws of Native Title could be used to gain recognition of pre-existent rights. The concept of Native Title presented in *Mabo* was paradigm shifting because it meant that claimants

[187] See in this respect the discussion in Chapter IV defending the suitability of collective rights for certain minorities and how this view clashes with the universalist interpretation of human rights as a purely individual matter.

[188] See Chapter IV.

[189] The rights to land and resources in *UNDRIP* are enshrined in art 25, which recognises the spiritual link between it and Indigenous peoples, and in art 26, enshrining the right proper. Note that both articles connect the rights to land with the recognition of the customary laws of the peoples concerned.

[190] *UNDRIP* art 19.

were no longer required to have a continued material occupation of the land, only to prove a continued spiritual connection.[191]

Native Title is a *sui generis* bundle of rights that seeks to give legal footing to the claims of Indigenous peoples over their traditional territories.[192] For the purposes of a possible implementation of the collective legal autonomy concerning TEK model in Australia, the current legal status of Native Title is insufficient. This is verified by the reticence of the High Court in recognising the customary laws of Indigenous Australians. The evolution of the judicial doctrine in regards to Native Title has not been smooth. It is even possible to venture that it has experienced a regression in terms of providing guarantees to Aboriginal and Torres Strait Islanders. Although it is clear that a certain amount of optimism is warranted, and that the situation for Indigenous minorities in Australia has improved, reservations remain. As Reynolds states:

> While debate will persist and fluctuate about the question of whether Indigenous Australians on the whole benefited from Mabo and Wik, there can be no doubt about the enhancement of their status. They are now either actual or potential landowners or dispossessed landowners. And the Mabo judgment suggested that the loss of property was, if not illegal, then certainly morally wrong, although the High Court has been careful to shut the jurisprudential door on the question of compensation for expropriated land.
>
> These changes may not seem to be all that significant but the symbolic importance was profound, given that the doctrine of *terra nullius* had been premised on the assumption that the Aborigines and Torres Strait Islanders were uniquely primitive, having no traditional system of land ownership at all.[193]

Indeed, *Mabo* marked the beginning of an era of recognition and reconciliation in Australia, especially because of the express rejection of the doctrine of *terra nullius* and the admission that using it in the first place had been a mistake that spawned a long period of injustice. Nevertheless, as McHugh comments, the claims for Native Title in the aftermath of *Mabo* have been 'based on extant rather than historically lost rights of possession and use'.[194] Additionally, the doctrine of the Court has watered down the regulations of the Native Title Act. For example, it was held in *Yorta Yorta* that the

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191 *Mabo No 2* 59-60 (Brennan J). Mason CJ and McHugh J agreed with this position.

192 *Native Title Act 1993* (Cth).

193 Henry Reynolds, *The Law of the Land* (Penguin Books, 3rd ed, 2003) 2.

194 P G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004) 546.

community's claim to Native Title could not be substantiated because of the continued exposure to the colonial process and the dominant culture.[195]

This points to the issue encapsulating all of the prior points raised in this section: the lack of recognition of the right to self-determination. The curtailment of this collective human right weakens the foundation for all other rights to be respected.

III.2.6. Status of the Right to Self-Determination

Writing in 2005, Irene Watson, of the Tanganekald Peoples, traditional owners of the Coorong in South Australia, denounced the insufficiency of the welfare policies of the Howard Government, and of all others before him, for reinforcing the 'conjuring act' of supposedly improving Aboriginal well-being. Tired of 'acting from the margins', she highlighted that 'Aboriginal Australia is a complex and layered landscape "always was, always will be," a place of not only Aboriginal sovereignty but a diversity of those sovereignties'.[196] Her claim was that there is no recognition of difference in Australia. This thesis agrees, and further holds that it is for this reason that a model like the collective legal autonomy concerning TEK cannot currently be enforced in Australia.

Note that under the standards of the UN, the Australian policies are purely assimilationist, *not integrationist*, as some would call it.[197] The framework for integration was drafted in 1992 in the *Declaration on the Rights of Persons Belonging to Minorities*, which does not include the right to self-determination. However, it promotes respect of the practices of minorities inside countries, free from interference; and exhorts countries to foster minorities' participation in the political life of the country, without discrimination, under the framework of the protection of human rights.[198]

In 2006, Bradfield raised the concern that Australia had the peculiarity of being one of the sole settler countries to not recognise Indigenous peoples as 'nations'.[199] He argued that the common view in Australia was that Aboriginal and Torres Strait Islanders

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[195] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*').

[196] Irene Watson, 'Illusionists and Hunters: Being Aboriginal in this Occupied Space' (2005) 22 *Australian Feminist Law Journal* 15, 15.

[197] These policies are critiqued in Part IV of this chapter.

[198] See especially arts 1 to 5. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, GA res 47/135, UN GAOR, Supp No 49, UN Doc A/47/49 (18 December 1992) Annex I.

[199] Bradfield, above n 186, 80, 82.

had pursued a separatist agenda.[200] The result would have been an increase of inequality regarding their socio-economic situation, which justified the assimilationist approach that continued even after *Mabo*. The author deplores the interpretation of claiming distinct rights as tantamount to an attempt at secession or creation of a 'Black State', and the nullification of claims for self-determination. The conclusion he reaches is consistent with the arguments raised in the next section of this chapter: the logic behind judicial executive, legislative and administrative decisions has been one of 'domestication', whereby identity is leashed to State-controlled standards.[201] The author's position is consistent with the design of accommodation policies, which strive to recognise a distinct status of Indigenous peoples, based on their differences.[202] There can be no equilibrium between the interests of biodiversity and the human rights of Indigenous peoples if this pivotal point is not recognised.[203]

Coming back to Watson's claims, it has to be noted that she wrote the commented paper before the Parliamentary Apology in 2008 that gave way to the bi-partisan pact that would engage all Australian States in the *Closing the Gap* policy.[204] This policy can be considered as in harmony with article 21 of *UNDRIP*[205] only if the consultation and

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[200] 'By "separatism" I refer to an agenda which asserts that a distinct and separate identity or status of Indigenous peoples should be reflected in a number of institutional arrangements. It implies recognition of a distinct Indigenous political status as the basis of an altered relationship between peoples who regard themselves as "different" in some fundamental way. I regard the term separatism as neutral; in itself, separatism is neither to be applauded or derided'. Ibid 81.

[201] Ibid 96.

[202] See generally McGarry, O'Leary and Simeon, who propose that accommodation is the preferred method for regulating the acknowledgement of multicultural societies. Kymlicka specifically proposes that accommodation policies embody the claims of Indigenous peoples, whereas integration has been preferred by national minorities, especially in Europe. The next chapter contains a thorough discussion on this topic. See, Will Kymlicka, 'The Internationalization of Minority Rights' (2008) 6(1) *International Journal of Constitutional Law* 1; John McGarry, Brendan O'Leary and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) 41.

[203] The next chapter discusses how the concept of multiculturalism was determinant for the collective legal autonomy concerning TEK in Colombia. The rulings of the Constitutional Court have reiterated in several instances that this is one of the foundational principles of the State.

[204] The six goals adopted in 2008 after the Parliamentary Apology were to: '1) close the gap in life expectancy (by 2031); 2) halve the gap in mortality rates for Indigenous children under five by 2018; 3) ensure access to early childhood education for all Indigenous four year olds in remote communities by 2013; 4) halve the gap in reading, writing and numeracy achievements for children by 2018; 5) halve the gap for Indigenous students in Year 12 (or equivalent) attainment rates by 2020; and 6) halve the gap in employment outcomes between Indigenous and other Australians by 2018'. Council of Australian Governments-COAG, *Closing the Gap in Indigenous Disadvantage* <http://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage>.

[205] *UNDRIP* art 21(1), quoted verbatim in above n 122.

participation processes that this declaration espouses are also respected.[206] The thin line between assimilation and inclusion is drawn through the opening of effective participatory spaces in which Indigenous peoples can reach an equal footing while simultaneously having their rights to be different respected. This is a fine balancing act.[207]

Nevertheless, Watson's claims still stand. The country has been slow to recognise the sovereignty of its Indigenous inhabitants, doubtlessly as a product of the brainwash nurtured by the *terra nullius* concept for two centuries. Thus, despite Native Title rights having been recognised, it is relevant that exactly one year after *Mabo*, Mason CJ reiterated the decision of 1979 in *Coe v Commonwealth* that refused to recognise that an Aboriginal nation could have sovereignty.[208] This declaration is now more than 20 years old, but it may serve as a reminder of an attitude towards the Indigenous inhabitants of Australia that has to be expunged. The Chief Justice stated in no uncertain terms that:

> [I]t is not possible to say, as was said by Marshall CJ of the Cherokee Nation, that the aboriginal people of Australia are organized as a 'distinct political society separated from others', or that they have been uniformly treated as a state … They have no legislative, executive or judicial organs by which sovereignty might be exercised.[209]

Although the *1966 Covenants*[210] are the main international treaties ratified by Australia to incorporate the right of the peoples to self-determination, violations to its application are apparent in several instances. As discussed above, the abolition of ATSIC as a mechanism of participation for Indigenous peoples in the government was detrimental, especially because there was no consent sought within the affected communities for its dismantlement.[211] It also impinged upon the rights of self-determination and governance autonomy by sending the message that Australia did not trust the capacity of Aboriginal

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[206] Contrast Australian policy with *UNDRIP* art 23, which enshrines the right to decide development priorities and strategies for exercising their right to development. 'In particular, indigenous peoples have the right to be *actively involved in developing and determining* health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes with their own institutions' (Emphasis added).

[207] For instance, the Special Rapporteur noted that the health programme of *Closing the Gap* has a 'dearth of Aboriginal physicians, nurses and other health care workers', meaning a lack of cultural adaptation creates a barrier to health outcomes. S James Anaya, *Report by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People. Addendum, The Situation of Indigenous Peoples in Australia*, 15th sess, UN Doc A/HRC/15/ (4 March 2010).

[208] *Coe v Commonwealth* (1979) 24 ALR 118.

[209] *Coe v Commonwealth* (1993) 118 ALR 193.

[210] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

[211] This was one of the main concerns of the Special Rapporteur in his visit to Australia. Anaya, above n 209 [13].

and Torres Strait Islander peoples to hold positions of governance responsibility. This position echoes the critiques of the management structure of Kakadu and Uluṟu-Kata Tjuṯa, where the Indigenous peoples working in the Parks are unable to access management positions.[212] Further, and most notably, the intervention in the Northern Territory that started in 2007 [213] also impinges upon the human rights of non-discrimination for Indigenous Australians, and indicates the main source of impingement as being the misunderstanding of the cultures, mores and traditions of Aboriginals and Torres Strait Islanders. This is what Bradfield calls a 'psychological *terra nullius*', which perpetuates the 'fundamental misconception as to the unity of the Australian polity'.[214]

To close this section, it is relevant to refer to article 5 of *UNDRIP*, which encapsulates the harmonisation between the rights to be different, protected by self-determination and cultural integrity, and the political status with the settler state:

> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The next section draws on these objections to the Australian strategies to involve Indigenous peoples without the recognition of differentiated human rights. These rights would allow them to participate fully in the political life of the State, while retaining their prerogative to maintain and nourish their cultural diversity. The section is a critique grounded on philosophical considerations of the reasons behind the treatment of Indigenous peoples in Australia and Colombia by the State. The comments related to Australia shed light on the continued reluctance to recognise the human rights of Indigenous peoples, whereas the ones related to Colombia serve as an introduction on the embracing of multiculturalism and legal pluralism in that country.

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[212] See the comparative empirical study between contractual National Parks in Australia and South Africa by Reid et al. Commenting directly on Kakadu and Uluṟu-Kata Tjuṯa, the authors conclude that the Western managerial structure of the Park prevents equality in treatment for aboriginals *vis-à-vis* non-aboriginals. Hannah Reid et al, 'Co-Management of Contractual National Parks in South Africa: Lessons from Australia' (2004) 2(2) *Conservation & Society* 377, 401–402.

[213] *Northern Territory National Emergency Response Act 2007* (Cth). Note that this Act was superseded in 2012 by the *Stronger Futures in the Northern Territory Act 2012* (Cth). This new regulation keeps the bans on alcohol in 'protected areas', the breach of which can be penalised by up to six months in prison. It also regulates 'food security' by actively micro managing what community stores can sell, to guarantee that the food is 'healthy' (see Part II *Tackling Alcohol Abuse* and Part IV *Food Security*). Clearly, the statute still discriminates against Aboriginal peoples in the Northern Territory, conveying the message that they are not able to manage themselves and need constant supervision for their own good.

[214] Bradfield, above n 186, 97.

IV. THE LINGERING MYTH OF THE PRIMITIVE SAVAGE IN THREE ACTS: DISPOSSESSION, ASSIMILATION AND FOSSILISATION

The rising international awareness of the human rights of Indigenous peoples in the legal arena has prompted the acknowledgement that cultural diversity is deeply linked to the right of self-determination.[215] How cultures are defined depends not on the interpretations and descriptions that the cultural majority provide, but rather on those that the peoples concerned accept and embrace.[216] This definition contravenes the notion of progress that has been the norm in the West because it suggests that the evolution of human societies need not follow a linear pattern towards betterment.[217] Thus, if one decided that all societies had to abide by this inclination, then one would realise that the term is completely restricted to only *one kind* of progress: the Eurocentric model.[218] The Eurocentric model of progress can be traced linearly and has different stages, which range from the most primitive forms of society (eg. Hunter-gather groups), to the pinnacle of civilisation as exhibited by the West in the twenty-first century.

The last chapter described the shortcomings of the linear conception of progress in regards to the environment, based on the separation between people and nature. The following section analyses the implications that creating tropes and promoting skewed narratives had for the relationship between the State and Indigenous peoples before the advent of the *Indigenous Peoples and Tribal Peoples Convention* ('*ILO 169*')[219] and, later, the *Declaration on the Rights of Indigenous Peoples*.

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[215] See Chapter I of this thesis. This argument is expanded in the next chapter, regarding the collective legal autonomy concerning TEK.

[216] *UNDRIP* art 3: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

[217] See the discussion on the Western conception of progress in the Introduction to this thesis.

[218] See for instance the case of the Tasmanian aboriginals. As Flannery recounts, at a previous point in their history, the Tasmanian people had their population decimated, probably because of a massive poisoning roughly three millennia before the present. The aftermath of this catastrophe was the death of many of the elders. They were the holders of key knowledge such as how to start a fire or manufacture needles for making clothes. Coupled with the isolated situation of Tasmania, the event brought stagnation and even a setback in the 'progress' of these aboriginals. However, it also resulted in the development of a new way of life that incorporated a new connection with the environment. This connection entailed the detailed understanding of the advantages and shortcomings of the ecosystem and its resources, an understanding that ultimately guaranteed the survival of the Tasmanian tribes for 3500 years after the catastrophe. Sadly, the Tasmanian aboriginals, their knowledge and their ways disappeared because of the European colonisation. See, Flannery, *Future Eaters*, above n 18, 246–269.

[219] *International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1358 (entered into force 5 September 1991) ('*ILO 169*').

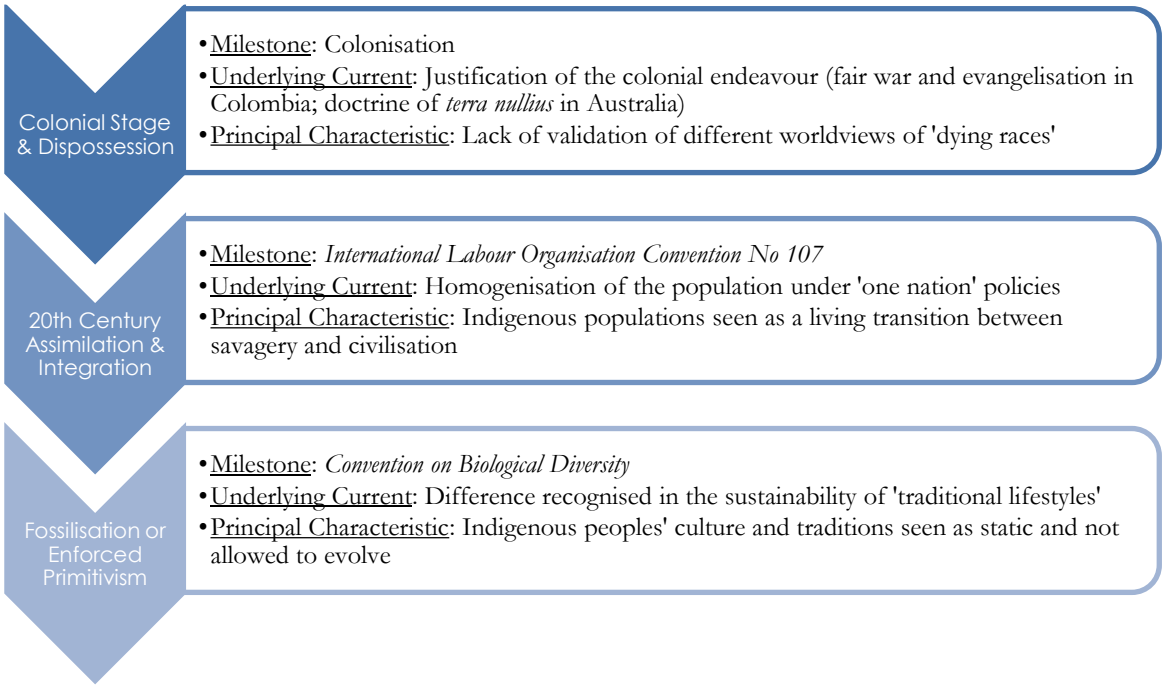

FIGURE 5: THREE STAGES OF STATE INDIGENOUS POLICIES (PRIOR TO *ILO 169* AND *UNDRIP*)

IV.1. Prelude: The Manichaean Noble Savage

To fall *a priori* into the easy, romantic and even childish description of Rousseau's 'Noble Savage'[220] means to simplify overly the connection between Indigenous peoples and their lands. Under this imagery, Indigenous peoples roam the forests without industry, language, war, domicile, progress or education; they have no need for social interaction and are subject to very few passions.[221] From the perspective of conquering Empires, the Noble Savage myth justified the education and enlightenment of the primitive inhabitants of the conquered lands.

The notion of Indigenous peoples as faithful representatives of the trope of the Noble Savage has to be removed from the legal arena altogether. Even if today, as will be

[220] The Noble Savage Myth (*Le Mythe du Bon Sauvage*) is exploited by Jean Jacques Rousseau in several of his works, including *Du Contrat Social*, *Discours sur les Sciences et les Arts* and *Discours sur l'origine et les fondements de l'inégalité parmi les hommes*. The main premise is that humanity is essentially good, but is corrupted by society. To illustrate the validity of his argument, Rousseau uses the analogy of Indigenous peoples living in harmony with nature. See, Jean Jacques Rousseau, *Du Contrat Social* (1762); Jean Jacques Rousseau, *Discours sur les Sciences et les Arts* (1750); Jean Jacques Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1755).

[221] Jean Jacques Rousseau, 'Quelle est l'Origine de l'Inégalité parmi les hommes et si elle est autorisée par la loi naturelle' in Garnier Frères (ed), *Du Contrat Social ou Principes du droit politique. Discours, Lettre à D'Alembert, etc.* (Éditions Garnier, 1963) 25, 63.

analysed further in the following paragraphs, the trope has evolved and new ideas of integration based on respect of certain rights have arisen, the approach towards Indigenous inhabitants is still slanted. The idea was nurtured by colonial powers to influence perceptions of Indigenous peoples as primitive.[222] This engrained perspective, pervasive since the times of Montaigne, Rousseau and Voltaire,[223] has skewed the possibility of true participation and recognition of Indigenous peoples within their countries. Applying this imagery today is at best inaccurate and at worst plainly inappropriate to account for the reach of the link between Indigenous peoples and their lands, and may foster unfair treatments of Indigenous peoples living in urban settlements. The assimilation and fossilisation approaches discussed in this section have their source in this myth and debunking it opens the way for a rights-based approach: the collective legal autonomy concerning TEK.

To romanticise or even directly define Indigenous peoples as pure natives completely in tune with Mother Nature, shunning any and all technological advances as alien, is a Manichaean exercise that can turn against itself. Not every practice by Indigenous peoples is environmentally 'good'. Nor should they be viewed as an intrinsic part of nature, or an exotic antithesis to modern life.[224] Likewise, not every industry or enterprise espoused by the dominant society is purely 'bad'.[225] It is thus necessary to reflect on the convenience of assuming the responsibility of repairing the historical debt created by colonisation.[226]

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[222] Torgovnick, for example, considered that the approach by colonial societies to the 'other', in this case Indigenous peoples, was marked by the perception of their occupation of the lowest rungs of society, in contrast to Europeans, who placed themselves in the high positions. The justification was built upon the trope of the wild, irrational and lustful native, used readily by the colonisers. This is the myth of the noble savage. Marianna Torgovnick, *Gone Primitive. Savage Intellects, Modern Lives* (The University of Chicago Press, 1990) 8, quoted in Astrid Ulloa, *La construcción del nativo ecológico–Complejidades, paradojas y dilemas de la relación entre los movimients indígenas y el ambientalismo en Colombia* (Instituto Colombiano de Antropología e Historia-ICANH, 2004) 263.

[223] For example, in *Candide* Voltaire depicts the natives in a caricature of Rousseau's noble savage. See, Voltaire, *Candide ou l'Optimisme et autres contes* (Presses Pocket, 1989). An anthology of Montaigne's essays is available in Yvonne Bellenger, *Essais–Montaigne* (Hatier, 1972).

[224] In this respect, Ulloa provides an interesting analysis of how the Colombian media and international movie productions have portrayed Indigenous peoples as in tune with nature, arguing that their language and imagery contribute to reinforce the stereotype of the noble savage. Her observations find expression in the ultra-Manichaean movie, Avatar. See, Ulloa, above n 224, 278–289; *Avatar* (Directed by James Cameron, Twentieth Century Fox Film Corporation, 2009).

[225] Again, the perfect caricature of this stance is the movie *Avatar*, above n 226.

[226] Related to this historical debt, it is arguable that Australia has to answer, if not for colonisation, then definitely for the practices that led to the Stolen Generations. As Lawry correctly argues, this matter falls under the *Basic Principles to Remedy and Reparations* declared by the UN General Assembly in 2005, which calls for the respect and dignity of victims of gross human rights violations. The author explains that, in Australia, such reparations have to transcend the purely economic aspect and enable broad reconciliation. She condemns the lack

Connected with this responsibility is another greater risk of unquestioned Manichaeism. To interpret the mores and traditions of Indigenous peoples as primitive would be to deny that Indigenous peoples have a society in the first place.[227] This implies a legal system, governance capacity and an understanding of rights and duties. To consider that Indigenous peoples are tantamount to naïve children can empower others, such as the colonial powers or the dominant society, to create and impose norms for them that lead to the extinction of their cultural heritage through assimilation.[228] A more subtle policy is to fossilise culture by recognising some legal guarantees and protections for Indigenous peoples and their ways of life, but under the condition, sometimes unspoken, that they remain static and do not develop. These different perspectives are discussed next.

Note that the emergence of universal human rights after 1945 constitutes a turning point. Writing in 1993, Tennant argues that the legal approaches after the Second World War were marked by two distinct stereotypes that he calls the 'noble' and the 'ignoble' primitive. 'The ignoble primitive represents the antecedent state which the West has had to overcome, assimilate or destroy in order to become modern … The noble primitive represents what the world has lost in becoming modern: a locus of authenticity and community'.[229] The latter arose between 1945 and 1948 and it is consistent with the discourses that justified assimilation policies. The former, between 1971 and 1993, is deeply related to fossilisation, as will be seen in the next sections.[230]

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of political will on the matter. See Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 60/147, UN GAOR, 3 Comm, 60th sess, 64th mtg, Agenda Item 71(a), UN Doc A/Res/60/147 (16 December 2005).

[227] The 'proto-society' idea was one of the images used by, for example, Malinowski in efforts to conceptualise why Indigenous societies belong to a lower scale of development, which can eventually be corrected. See the comments in Ulloa, above n 224, referring to the critiques by Torgovnick, above n 224, 263–264.

[228] The process of evangelisation in Colombia fits in this category. In Australia, the 'whitening' endeavour is physically visible. There are charts depicting this process from 'pure' aboriginal, passing by 'half-castes' and 'quadroons', until no visible traits remained. De Plevitz and Croft cite early legislation from three States that regulated the treatment of each of these. It is obvious that whiter skin was the desirable standard. De Plevitz and Croft, above n 164, 1, citing *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 4, the *Liquor (Amendment) Act 1905* (NSW) s 8(4), and the *Aborigines Act Amendment Act 1936* (WA) s 2.

[229] Tennant, above n 16, 6.

[230] After a careful review of the literature, the author can say that not much was written during the 1959–1971 period (ibid 12). This is not surprising because this was a time of consolidation of the assimilation policies proposed by *ILO 107* in the domestic contexts.

IV.2. Act One: Justifying Dispossession

The colonial impetus of European empires such as Britain and Spain cannot be reduced to a mere expansion for resources. To legalise and normalise the inhabitants of these 'new' lands, elegant doctrines justifying dispossession emerged. The underlying motif of these philosophies was the transformation of settlers into 'saviours', bringers of good news and of the ways of civilisation. This section briefly discusses these two philosophies, which would seal the fate for Indigenous peoples in Australia and Colombia. In the former, the British perpetrated the myth of *terra nullius*, which deemed the home of the most ancient cultural group on Earth a legally empty land. The Spanish had a more typical approach based on right by conquest; the doctrine to justify the invasion would be the 'fair war' to the Western Indians. Once dispossession is justified, the imposition of laws and management policies then occurs as a matter of course.

IV.2.1. The Doctrine of *Terra Nullius*

It is appropriate to start with the Australian case because of its *sui generis* nature. The dispossession occurring in this country was brazen, yet simple. Bluntly, and regardless of the legal doctrine's efforts to justify, defend or even romanticise the move, with the stroke of a royal pen in the British Isles sanctioning the First Fleet, the nations of Australia were remotely dispossessed of any claim they could have to the territory. The land was legally presumed empty in the absence of settled inhabitants:

> The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[231]

Coupled with the established doctrine that wherever an Englishman went he carried the law of the Empire with him, the settlement of Australia took place under very strange

[231] *Cooper v Stuart (51) (1889) 14 App Cas*) 291 (Lord Watson), cited in *Mabo No 2*, 38 (Brennan J).

legal circumstances. The premise of alleged racial superiority allowed the settlers to feel certain that there were no sovereignty issues to negotiate, because the original peoples of Australia were not capable of understanding the concept.[232] The peoples encountered clashed with the utilitarian paradigm of land productivity.[233] They appeared not to meet any of the standards of a 'civilised' society.[234] They had not domesticated any animal or plant, could not write, had not invented the wheel and did not use basic metal-smithing.[235]

The laws adopted to regulate the relations with Aboriginal peoples were thus administrative in character: 'establishing welfare bonds, appointing protectors, guardians, managers, or other forms of legal custodianship'.[236] In practice, the treatment of the Indigenous inhabitants was akin to that of minors, with the adoption of a semi-messianic stance of bringing well-being to communities that continues today. As seen earlier in this chapter, this was a misconstruction that has been proven wrong by empirical research that demonstrates the importance of traditional management strategies like firestick farming.[237]

This is not the Noble Savage living in a State of Nature. To paraphrase Rousseau, Australian Aboriginals were not waiting patiently in their loincloths, contemplating and leisurely eating fruit, for society to come and corrupt them. They did, and still do, have sophisticated societies with customary legal systems. It is possible to hazard that the British confronted an organised system, with its faults and virtues like any other, very

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[232] John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10(1) *Aboriginal History* 7, 8. This resonates with the definitions of Rousseau of savages incapable of complex rational thought processes. Rousseau, 'Quelle est l'Origine de l'Inégalité parmi les hommes et si elle est autorisée par la loi naturelle', above n 223, 63–64.

[233] In the early case of *R v Bonjon*, Justice Willis presents a lyrical account of the colony, summarising perfectly the perspective of the British settlers of the first fleet: 'They sailed from England in the early part of the year 1787, and arrived in Botany Bay in January 1788. On the shore appeared a body of savages, armed with spears, which, however, they threw down as soon as they found the strangers had no hostile intention; they had not the least particle of clothing, yet they did not seem surprised at the sight of well clad persons, or impressed with a sense of shame ... While the majority of the men were clearing the ground of the trees and underwood with which it was encumbered, a hasty encampment afforded temporary shelter; and at a meeting of the whole colony, formal possession was taken of that part of New Holland ... The Governor, in various excursions, endeavoured to conciliate the natives, but they long continued to be shy and jealous; they appeared to belong to the numerous race dispersed over the South Sea Islands; they had made little progress in the arts, their canoes were wretchedly formed, their huts were very slight and incommodious; and, they could not secure themselves against the frequent visitations of famine'. *R v Bonjon* [1841] (Unreported, NSWSC, Port Phillip District, Willis, April 1841).

[234] See the construction of the noble savage trope and the perception of the 'other' in the narratives of the West regarding Indigenous peoples in Ulloa, above n 224, 261–267.

[235] Jared Diamond, *Guns, Germs and Steel–A Short History of Everybody for the Last 13,000 Years* (Vintage Random House, 1998) 298–300.

[236] McCorquodale, above n 234, 8.

[237] See Section II.1. of this Chapter.

different from that of the British, particularly in not holding the view of nature as an external entity to be mastered. Enter here the declaration of Australia as *terra nullius*, an empty land waiting to be taken.

Banner pertinently questions why this concept succeeded as a doctrine, even when the British Empire was at that time advocating for buying the lands from natives in some of its colonies and either buying or negotiating treaties was the norm.[238] As a legal doctrine, *terra nullius* is a surprising justification for the imposition of a legal system and validation of not only sovereignty but also ownership rights.[239] It was usually reserved for lands devoid of human habitation, as the term implies. As Reynolds comments, 'the doctrine of terra nullius was premised on the assumption that the Aborigines and Torres Strait Islanders were uniquely primitive, having no traditional system of land ownership at all'.[240] It is thus concerning that a form of this concept continues to be extant in Australia, as seen for example in the dismantlement of ATSIC, which took away the vow of confidence in the capacity of Indigenous peoples to manage their own affairs.

IV.2.2. Conquest, Missions and Submission

The colonisation process in Latin America followed a more evangelical approach, whereby Indigenous peoples were taught to embrace the Catholic religion. The justification for waging war on the American Indians, used by the Spanish Empire, was developed in a complementary fashion by theorists like De las Casas, De Sepúlveda and De Vitoria. Their writings were inspired to a greater or lesser degree by Aristotle. In his *Politics*, Aristotle justifies slavery by determining that there are people who are 'serfs by nature', people without tribe, laws or homes.[241] Without further elaboration, Aristotle's theories about the serfs by nature suited colonial empires because it provided a philosophical justification for conquest and war. Here, enslavement and other forms of 'taming' aggressive or otherwise bellicose peoples was a path for enabling their eventual civilisation.

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238 Stuart Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (Pt University of Illinois Press for the American Society for Legal History) (2005) 23(1) *Law and History Review* 95, 95–97.

239 See generally, Reynolds, above n 195.

240 Ibid 2.

241 Felipe Castañeda, *El Indio: entre el Bárbaro y el Cristiano–Ensayos sobre filosofía de la conquista en Las Casas, Sepúlveda y Acosta* (Alfaomega Colombiana, 2002) 3–7, quoting Aristóteles, *Política* (Instituto de Estudios Políticos, Madrid, 1951) 3, 1253a.

The interpretation of De las Casas was more humane than that of his counterparts.[242] Applying the concept of the serfs by nature to the American Indians, he concluded that, although they could be considered barbarians, degrees or different interpretations of barbarism could be discerned. As Castañeda explains, De las Casas provided a key differentiation between the absolute and relative concepts of the term 'barbarian'.[243] The first coincides with the concept of 'serfs by nature' and indicates those that cannot live in society or respect any laws or pacts because they are not rational or able to cultivate their minds. The relative sense allows for a wider interpretation whereby Indigenous peoples are construed as in an intermediate or transitional stage of development, in need of the civilising influence of more advanced men.[244] This would ultimately be the foundation for the humanist stance of De las Casas, who would advocate for the evangelisation and Christian treatment of the Indians, rather than their extermination.[245] The confrontation of the Spanish *conquistadores* with full-fledged societies such as the Incas and the Aztecs undoubtedly lent credence to more restrained interpretation of barbarism. In Colombia, this perspective influenced the creation of special regimes that would allow Indigenous peoples to keep possession, but not full ownership, of some of their traditional territories. From the outset, it can be seen that during the Colonial period in Colombia, the system was not the single imposition of the Spanish legal system, as in the translocation of the Common Law into Australia, but rather a situation that would

[242] As contentious as this approach sounds today, the works of De las Casas and other Catholic theorists such as Francisco de Vitoria have been recognised as a seminal effort to respect the lives of the original inhabitants and their subsequent survival. For a complete analysis on how the philosophy of De las Casas and De Vitoria contributed to the fairer treatment of Indigenous peoples in America, and to human rights in general see Mauricio Beuchot, *Los fundamentos de los derechos humanos en Bartolomé de las Casas* (Editorial Anthropos, 1994). Note however that De Vitoria was adamant in the construction of the inhabitants of the New World as typical barbarians and wrote several texts on the disturbing use of people as food. See Francisco De Vitoria, *Relección sobre la templanza o del uso de las comidas & Fragmento sobre si es lícito guerrear a los pueblos que comen carnes humanas o que utilizan víctimas humanas en los sacrificios* (Felipe Castañeda et al trans, Ediciones Uniandes, 2007); Francisco De Vitoria, *Relección sobre el homicidio & Comentario a la Cuestión 64 'Sobre el homicidio' de la Suma Teológica II^{a}- II^{ae}* (Felipe Castañeda trans, Ediciones Uniandes, 2010). For a comment on the theories of De Vitoria, refer to Francisco Castillo Urbano, *El pensamiento de Francisco de Vitoria: Filosofía política e indio americano* (Anthropos, 1992).

[243] The Latin terms used by De las Casas in this instance are *simpliciter* for the strict interpretation, and *secundum quid* for the relative one, ultimately applied to the inhabitants of the new continent. Castañeda, above n 243. The author analyses the text *Historia Apologética*, available in *Biblioteca de Autores Españoles* (T. 105(I), T. 106(II) Madrid, 1957–1958).

[244] Note that this stance of stages of development differs somehow from Juan Ginés de Sepúlveda's account. He argued that all of the peoples of the New World were barbarians, in the Aristotelian serf by nature sense. Castañeda, above n 243, 7–10.

[245] For a comment on the doctrine of De las Casas as one of the earliest influences of humanitarian law and human rights, see Beuchot, above n 244.

foreshadow the legal pluralism adopted in the country following the precepts of *ILO 169*.[246]

Irigoyen comments that during the colonising process, the conquerors needed certain projects that would integrate the conquered to the new rule. Under the conquest doctrine, different policies were tailored to address the particular situation of the peoples. Three approaches took place in the Andean region: conquest and submission, evangelisation of communities living in places difficult to access, and the subscription of treaties with those nations that could not be conquered.[247] The latter was not applied in what is today the Colombian territory; it was the last resort with the final frontier lands of the Southern cone.[248]

In the part of the Viceroyalty of Nueva Granada that now corresponds to Colombia, the different approaches of conquest-submission and evangelisation implemented a sort of dual-legal regime. First, the peoples that lived in difficult places to access, such as the Amazon, Orinoco plains and Guajira deserts, were left to the works of the missionaries: Catholic friars with peaceful objectives sent by the *conquistadores*. Under a sort of subordinate legal pluralism in the legal anthropology sense,[249] the peoples were allowed to keep some of their laws and customs if they abided by the missionary model.[250] Second, the conquered peoples became known as *pueblos de indios* (Indigenous settlements) and some of the customary laws of the Indians remained operational. The system, called *mita* and *encomienda*, allowed some space for Indigenous peoples to apply

[246] Legal pluralism is used in this thesis in the sense given by De Sousa Santos as 'different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless life'. Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279, 297–298.

[247] Irigoyen, above n 58.

[248] These treaties resembled the British pacts with the native nations of Canada and New Zealand. However, after independence in the mid-1800s, Chile and Argentina refused to recognise the validity of these treaties and the governments enforced a military campaign that resulted in the massacre of approximately 300 000 individuals and the appropriation of their territories. Argentina and Chile also enforced brutal assimilation 'missionary' policies during the twentieth century that were only reversed in the 1990s. In 1994, the Argentinean Constitution was amended to include recognition for the first time of pre-existing Indigenous peoples, and the country would ratify *ILO 169* in 2000. Chile would recognise certain rights to Indigenous peoples via statute in 1993. It is the only Andean country that has not elevated recognition and rights to Indigenous peoples to a constitutional level. Ibid 543–544.

[249] Legal pluralism in the sense of traditional legal anthropology means a situation 'in which the different orders are conceived as separate entities coexisting in the same political space'. De Sousa Santos, above n 248, 297. Contrast this with the definition of legal pluralism defended by the author.

[250] Irigoyen, above n 58, 542. Note that after independence, the new Republic also made use of missionaries. This time, however, they were used as the first advance of a military offence rather than protectors of the faith. Ibid 543.

their laws and to be represented by their own authorities (*curacas* and *alcaldes*). Serious disputes were settled by the Spanish authority in charge (*corregidor*).[251] The fundamental differences then between the colonial rule in the Andes and the 'peaceful settlement' in Australia is, first, that the policies in Colombia favoured the recognition of local governance and Indigenous law, whereas in Australia Indigenous peoples were assumed incapable to govern and were thought to have no laws. Second, that in Colombia, the Spanish crown assumed a role of protection of the peoples already conquered. This protection was not *de facto* but *de iure*. The Indigenous peoples were placed under the protection of the Crown and its laws, under the conception that this would have a civilising influence. Contrast this with the situation is Australia, perfectly portrayed by Reynolds' comments in the conclusion to *The Law of the Land*:

> It is symptomatic that Australian courts have quite consciously rejected the idea that the Crown had a duty of care—a fiduciary relationship—towards the Indigenous people … It is not that the Australian judiciary is unaware of this. They have decided not to walk in that direction.[252]

Due to the space limitations of this thesis, the different stages during the aftermath of settlement and initial years of the current jurisdictions of Australia and Colombia have not been treated in any detail here.[253] However, they had in common the perception of Indigenous peoples as savages in a lesser or greater degree of 'nobility', needing the alleged civilising influence of the Crown. The transition from the colonial rule would enable the implementation of assimilation, as will be seen next.

IV.3. Second Act: Assimilation

After the independence process in Colombia, and the drafting of the Constitution of Australia, the forging of a unitary national identity was paramount. This was to set the new citizens aside from their colonial forebears and had the aim to validate a certain administrative independence. The Anglo-Saxon law tradition was 'received' in

[251] Ibid 540.
[252] Reynolds, above n 195, 248.
[253] Refer to Irigoyen, above n 58, and Reynolds, above n 195 for more detailed information.

Australia,[254] while Colombia implemented a legal system based on the Roman tradition.[255] Both countries adopted the systems of the colonial empires, and tailored them to strengthen a unique national identity. The creation of this new personality had no place for cultural or ethnic minorities that did not conform to this unitary standard. This excluded the possibility of multiculturalism and, perhaps more importantly, of legal pluralism, which is the foundation for the recognition of customary law in Indigenous communities.[256]

The State policies of the early years of the Colombian Republic were characterised by government intervention that sought to annihilate and reduce those communities that reminded the newly born nation-state of the Spanish Crown.[257] Among these colonial institutions was the respect for the Indigenous peoples in duly established *resguardos*.[258] To 'remedy' this situation, where lands were kept idle in the hands of unproductive communities, the State allowed the entitlement of the land, its resource *and its inhabitants* to productivity-oriented entrepreneurs.[259]

In Australia, the new Constitution only reinforced the British perspective towards Aboriginals, seeing them as a dying race that needed to be managed *for their own good*. The case of the 'Stolen Generations' is perhaps the most brutal of all the assimilationist

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[254] This term is prominent in Australian legal literature. The 'reception' of the English legal system in Australia can be interpreted concomitantly with the doctrine of *terra nullius*, discussed above. For a succinct account on 'reception' see John Carvan, *Understanding the Australian Legal System* (Thomson Lawbook Co, 5th ed, 2005) 26–31. See also, Sanson, Anthony and Worswick, above n 120, 234–37.

[255] Although Colombia, like many Latin American countries, developed a legal system with different influences based on what the *libertadores* considered best practice: 'They borrowed their legal systems and public administrations from Spain and France, their political constitutions from the United States, their economic liberalism from Great Britain and their military codes from Prussia'. Rodolfo Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate' in Rachel Sieder (ed), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan, 2002) 24, 26.

[256] See Chapter IV.

[257] In Colombia, the Constitutional Court has lost no time in distancing its doctrine from this Republican period, which was inspired by the ideas of the nineteenth century, and which the Court does not hesitate to call 'the seed of a racist and dominant State'. Constitutional Court, *Judgement T-405/1993* ('*DEA Radar Case*').

[258] *DEA Radar Case*. Note that this obiter has been cited in other judgements as a reminder of the marginalisation of Indigenous peoples and the impetus of the country to redress these past injustices after 1991. In an injunction against the imposition by the municipal authorities of external community action committees within Indigenous lands of the *Resguardo* San Lorenzo. The Court found in favour of the peoples, recalled the historic marginalisation and reminded the authorities that even well-meaning acts like the imposition of local action groups is void without the appropriate consultation processes. Constitutional Court, *Judgement T-601/2011* ('*Community Action Committees Case*').

[259] *DEA Radar Case*. See also, Ramiro Feijoo Martínez, 'Gerstión de Parques Nacionales en Colombia, asuntos indígenas y el Parque Nacional Amacayacu' [1994] *ERIA* 49, 50.

policies in the country.[260] It consisted of forcibly taking the children of Aboriginal and Torres Strait Islander communities and placing them in white families, missions or orphanages. The purpose was to sever the ties of these children to their true forebears so that they could grow up as members of the dominant society, under the guise of helping them in their inevitable transition to civilisation. As De Plevitz and Croft noted, human rights were a prerogative of people that had no apparent admixture of Aboriginal blood.[261] By virtue of different Acts, notably the Queensland *Aboriginal Protection Acts*, in force until 1984, Indigenous peoples were 'forced to live on Reserves or Missions, work for rations, given minimal education, and needed governmental approval to marry, visit relatives or use electrical appliances'. [262] Note that Australian policy in regards to Indigenous peoples did not experience major changes until the referendum of 1967, and even then, the country did not engage in inclusion policies. Rather, the removal of children from Aboriginal households, now known as the Stolen Generations, continued until the mid-1980s.[263]

Note that in both countries, the drive was towards the suppression of diversity, and this was thus perhaps the time during which the human rights of Indigenous peoples were most conscientiously suppressed. In the pursuit of a homogenous nation, self-determination of minorities is out of the question, along with the human rights associated with cultural integrity. There would be no sense in encouraging the traditions and cultural practices of peoples who should be in a transition towards progress.

The literature that nurtured assimilationist policies, especially the *Política Indigenista* in Latin America, portrayed a clear image of the Indians as lethargic and incapable of using the natural resources of their environment. This conceptualisation legitimised development policies enforced by the Government.[264] Moreover, it would swiftly switch towards a paternalistic perspective whereby the State acts as the bringer of productivity and enables different sectors of the population to join the work force. Under the Andean

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[260] Although the implications of this policy deserve a deeper analysis, this is outside the scope of this thesis. For a comprehensive account involving first-hand statements, refer to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 'Bringing Them Home' (Report Human Rights and Equal Opportunity Commission, 1997).

[261] Aboriginals, as defined in several Acts, could be pure-blooded, half-castes born of an Aboriginal mother and other than Aboriginal father or a quadroon. De Plevitz and Croft, above n 164, 1.

[262] Ibid.

[263] *UNDRIP* links like practices to genocide: 'Art 7(2) Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, *including forcibly removing children of the group to another group*' (Emphasis added).

[264] Tennant, above n 16, 16.

Indian Program of the International Labour Organisation (ILO), expert committees were deployed first to Bolivia, Ecuador and Peru, and later to Colombia, Argentina, Chile and Venezuela.[265] Their goal was to achieve the integration of Indigenous populations into the life of their States, including through working opportunities and the mainstreaming of their customs.

The prevailing stereotype used to justify assimilation policies during the post-war era was a degradation of the 'noble' savage, to the 'ignoble primitive located *outside* and *before* the beginnings of modern Western civilization'.[266] The transition towards modernity seemed thus not only inevitable but desirable. Under the cited stereotype, several international bodies found the theoretical foundation to 'allow the imposition of expert knowledge y of development programs to transform them into civilized peoples'.[267]

Concerned with the possible abuses during the process, a framework of principles and obligations was negotiated within the *International Labour Organisation*, which gave birth to the *Convention Concerning Indigenous and Tribal Populations* (*ILO 107*).[268] The agreement sought to design ways to manage the 'natives', aiming to make the transition between their primitive ways and the dominant society as painless as possible. The focus of the instrument is paternalistic. It encourages the signatories not to mistreat their Indigenous populations but to help them 'find the way' towards the mainstream progress of the country, integrating them as 'previously untapped human resources'.[269] It aimed thus to breach the gaps in terms of opportunity, access and fairness of working conditions between the minorities and their dominant culture counterparts.[270] However,

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[265] Ibid 28. The author comments that the attitude of the Expert Committee appointed by ILO was enthusiastic in its approach. He quotes its Deputy Director-General as stating: '... the members of our staff feel that they are making a direct and substantial contribution to the *transformation and improvement* of the hard realities of the underdeveloped world ... All this helps to explain the *devotion and enthusiasm* with which so many of the members of the Office carry out their technical assistance missions' Ibid 10.

[266] Tennant, above n 16, 10.

[267] Ulloa, above n 224, 278.

[268] *International Labour Organization Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 6 February 1959) ('*ILO 107*').

[269] Statement of the Director-General of ILO in 1961, quoted in Tennant, above n 16, 27.

[270] The Preamble to *ILO 107* states: 'Considering that there exist in various independent countries Indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation *hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population*, and/Considering it desirable both for humanitarian reasons and in the interest of the countries concerned to promote continued action to *improve the living and working conditions of theses populations by simultaneous action in respect of all the factors which have hitherto prevented them from sharing fully in the progress of the national community of which they form part*, and/Considering that the adoption of general international standards on

the same convention encourages the preservation of traditions, for example in the fostering of handicraft industries.

The Convention presents an interesting dichotomy in this respect, espousing both the assimilation and fossilisation interpretations, to the ultimate detriment of the 'populations' concerned. Under this perspective, Indigenous peoples are one of two things: 'Savages' or 'barbarians' that have to be 'civilised';[271] or charming remnants of a simpler past, living in quaint villages in harmony with nature. To borrow the words of Rudyard Kipling in his infamous poem *The White Man's Burden*, *ILO 107* sees them as 'half devil and half-child',[272] their industries and traditional livelihoods usually being regarded as nothing more than handicrafts. These, it should be emphasised, are only encouraged as a way to raise the standard of living of the population. To 'adjust themselves to modern methods of production and marketing', and only in a manner that 'preserves the[ir] cultural heritage and improves their artistic values and particular modes of cultural expression'.[273]

The previous description mirrors the fossilisation interpretation explained in the following paragraphs and reflects the unifying perspective that prevailed for most of the twentieth century. To recapitulate, on the one hand, the Convention has the aim of protecting Indigenous 'tribal and semi-tribal populations'. On the other, this protection comes as easing the way for these populations[274] in their transition through their 'progressive integration into their respective national communities'.[275]

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the subject will facilitate action to *assure the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions…*' (emphasis added).

[271] This seems to indirectly contradict the *Declaration of Philadelphia*, which states in article II(a): 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'. *Declaration Concerning the Aims and Purposes of the International Labour Organisation, Annex to the International Labour Organization (ILO) Constitution*, opened for signature 10 May 1944 (entered into force 10 May 1944) ('*Declaration of Philadeldphia*').

[272] Rudyard Kipling, *The White Man's Burden* (part of the global commons, 1899).

[273] *ILO 107* art 18.

[274] Note that the term 'populations' changed in *ILO 169*, to be replaced with 'peoples'. See discussion in Chapter I.

[275] *ILO 107* Preamble, subs 8.

IV.4. Third Act: Fossilisation

The last chapter presented the ecosystem approach espoused by the *CBD* as the final step for weaning biodiversity conservation policies from the separation between people and their environment. In respect to Indigenous peoples, the treaty was a breakthrough. Articles 8(j) and 10(c) of the *CBD*, in tune with the Preamble,[276] strive to recognise the interdependence of Indigenous peoples with renewable natural resources. However, these provisions fall short of recognising the deep link between Indigenous peoples and their land, being too vague in their scope.[277] More concerning, they appear to interpret Indigenous cultures as static.

In 1992, in the wake of the Rio Summit, Grey warned against two related threats to Indigenous peoples and their cultural diversity. These ethnocidal practices are, first, to impose models of development, religion and others that do not take into account the wishes of the concerned peoples. The second is to interpret said wishes as a yearning for withdrawal to nature.[278] In the light of *UNDRIP*, this contravenes the right of Indigenous peoples to develop on 'their own terms' and 'in accordance to their own needs and interests'. [279] In other words, it may impinge upon their human rights of self-determination and cultural integrity because it imposes an interpretation by an external valuer that may not correspond to what the peoples themselves identify.

This 'fossilisation' perspective is akin to enforced primitivism.[280] This term refers to the well-meaning but misguided perception that Indigenous peoples and their cultures should be protected only in so far as their ways of life remain, to an external, dominant society and often Western observer, 'authentic' or 'traditional'. By this token, they should

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[276] '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'.*CBD* Preamble §12.

[277] *UNDRIP*. See also, Nancy Adriana Yáñez, 'Reconocimientos legislativos de los derechos ambientales indígenas en el derecho internacional' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 489, 492–493.

[278] Andrew Gray, 'Entre la Integridad Cultural y la Asimilación: Conservación de la biodiversidad y su impacto sobre los pueblos indígenas' (Documento IWGIA No 14, IWGIA International Work Group for Indigenous Affairs, December 1992) 17.

[279] *UNDRIP* Preamble §6. The right is developed in art 23.

[280] The International Alliance of the Indigenous Peoples of the Tropical Forests, 'The Biodiversity Convention: The Concerns of Indigenous Peoples' (1995), reproduced (1996) 1(4) *Australian Indigenous Law Reporter* 731, 732.

become a living, unchanging cultural referent of a past long gone. The wording of article 8(j) promotes this view. By exhorting nations to 'respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities *embodying traditional lifestyles* relevant for the conservation and sustainable use of biological diversity', the article effectively prevents Indigenous peoples from deciding their own fate.[281]

This perspective has been heavily criticised by Indigenous peoples' lobby groups with good reason.[282] It can be considered a revamping of the mindset of former colonial powers, impinging once again upon the human rights of Indigenous peoples. For instance, by placing an unfair restriction on them, the rights of self-determination and cultural integrity can be compromised. From this perspective, Indigenous peoples can only enjoy their rights by freezing their traditions.[283] In Colombia, Lorenzo Muelas, one of the Indigenous representatives of the Constituent Assembly, later elected as senator, specifically denounced article 8(j) as contrary to autonomy and the aspirations of Colombia's Indigenous peoples. The normative implications of the article suggested freezing the peoples in an externally regulated legal framework that imposes certain values contrary to local relationships with nature.[284]

The problem in article 8(j) is not a matter of mere semantics. A paradox of the legal mechanisms used for protecting the cultures of Indigenous peoples is that the efforts have resulted in a sort of '*enforced primitivism*, meaning that they are denied the right, in the name of conservation, to adapt on their own terms'.[285] It would seem logical to think that every group with a distinct cultural identity should have the right to evolve and adapt. This does not seem to be the case in article 8(j). However, note that the soft-law

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[281] Compare the terms 'protect, preserve and maintain' with the *Native Languages and Linguistic Rights Act* enforced in Colombia in 2010. This instrument seeks 'the recognition, protection and development of the collective or individual linguistic rights of ethnic groups that have their own linguistic tradition. It also promotes the use and development of these native languages'. (art 1). Other articles of the Act stress the pertinence of revitalisation actions, always working in a completely concerted fashion with the concerned communities, who are the owners and managers of their heritage. *Act 1381 of 2010 Developing Articles 7, 8, 10 and 70 of the National Constitution and Articles 4, 5 and 28 of Act 21 of 1991 (Approving the Convention Number 169 on Indigenous and Tribal Peoples in Independent Countries), and Enforcing Norms on the Recognition, Promotion, Protection, Use, Preservation and Strengthening of the Languages of Colombian Ethnic Groups and on the Linguistic and other Attached Rights of the Speakers* (Colombia).

[282] Cynthia Morel, 'Conservation and Indigenous Peoples' Rights: Must One Necessarily Come at the Expense of the Other?' (2010) 17(Exploring the Right to Diversity in Conservation Law, Policy, and Practice) *Policy Matters* 174, 176.

[283] As will be seen in Chapter IV, it is not necessary to sacrifice the right to cultural integrity to achieve positive outcomes for biodiversity protection.

[284] Ulloa, above n 224, 338.

[285] Note that the right to decide development priorities was one of the main changes to the ILO 107 revised convention, ILO 169 in art 7. It is also part of UNDRIP and will be fully discussed in Chapter IV.

documents subscribed in the Rio Summit, the *Rio Declaration* and *Agenda 21* have a more flexible language. Perhaps because of their guideline nature, the inclusion of Indigenous peoples in conservation strategies has a more open approach, especially as regards participation. Principle 22 states:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[286]

The issue of enforced primitivism and fossilisation has been tempered by other guideline documents. Akin to *Agenda 21*, they have a soft-law component because they are adopted by mutual agreement by the Conference of the Parties to environmental agreements (COP). This means that they are not binding. Whereas certain declarations contain sets of principles that can be used as, at the very least, inspiring parameters for future regulation, voluntary guidelines present the problem of uncertainty. As with any soft-law instrument, voluntary guidelines have a language that denotes only encouragement, or the deployment of best efforts by the parties. In COP7 of the *CBD*, the *Akwé Kon Guidelines*,[287] coordinated and drafted with the Working Group of Indigenous peoples, were issued. They seek to facilitate the operation and procedures proposed developments undertaken by the State that will take place on, or are likely to impact sacred sites, lands or waters traditionally occupied or used by Indigenous and local communities.[288]

The greatest risk of the fossilisation perspective is that it is very convenient for the majority society to embrace. Where Indigenous peoples are construed and publicised as exotic jungle-dwellers of good heart but limited wits, the complacent attitude whereby it is sufficient to employ them to manage, and allow them to remain on, their traditional lands, now a nature reserve, will follow. This leads to the second risk. Should the Indigenous peoples in question choose to adopt some aspects of the majority society, this may be interpreted as an abandonment of 'tradition' and may have a potential impact

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[286] *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, UN Doc A/CONF.151/26 (vol 1) (13 June 1992).

[287] Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment 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* (Secretariat of the Convention on Biological Diversity, 2004).

[288] Ibid.

upon their claim over the lands. Recall that the wording of articles 8(j) and 10(c) talk of 'traditional lifestyles' without further explanation. The *CBD* by itself is thus ill-equipped to deal with the concept that Indigenous cultures, and any other culture for that matter, are fluid, adaptable and constantly evolving.

IV.5. Final Reflections: Legal Status of Human Rights in Australia

Latin America's advent of modernity had a clear reflection in that continent's legal systems by the adoption of an internal legal monism 'endorsed by policies of cultural homogenisation and politico-legal centralisation'.[289] Not to be confused with the school of treaty adoption, domestic legal monism in the Latin American context involved the reinforcement of a unitary identity. In this scenario, the legal system served the purpose of reinforcing cultural homogenisation, of denying diversity and of strengthening nation-building strategies. Latin American constitutionalism has since abandoned this approach, at least in theory. However, the interpretation remains alive in Australia. For instance, as recently as 2006, conservative think tanks aligned with the Howard government posited that the rights-based aspirations of Indigenous peoples in the country had a damaging separatist agenda. Under this perspective, any recognition of otherness would be contrary to the conception of Australia as 'one nation'.[290]

Linked to this is the trust in the Australian legal system to respect a general framework of human rights in the absence of an adopted bill of rights. Perhaps one of the arguments preventing Australia from adopting such a bill is that, currently, it is commonly held that the laws, government and people respect human rights and do not tend to violate them; hence, the Common Law is sufficient to guarantee the protection of human rights in Australia. However, this is not true. The absence of a human rights framework comprising fundamental inviolable entitlements has been detrimental to Indigenous peoples. The lack of recognition said rights engenders different kinds of

[289] Simone Rodrigues Pinto and Carlos Federico Domínguez Ávila, 'Sociedades plurales, multiculturalismo y derechos indígenas en América Latina' (2011) 35(primavera) *Política y Cultura* 49, 50.

[290] Bradfield, above n 186, 81. The problem of separation is obviously not exclusive to Australia. Several Latin American countries have struggled with the balance of recognising differentiated rights to their Indigenous peoples while keeping the sovereign power of their government. Harvey comments on these hurdles in a comparative analysis of the experience in countries such as Peru and Bolivia with the negotiations with the Zapatistas in Mexico. See, Neil Harvey, 'La difícil construcción de la ciudadanía pluriétnica: el zapatismo en el contexto latinoamericano' (2007) V(001) *Liminar. Estudios Sociales y Humanísticos* 9.

institutional violence in the legal language of statutes and cases, which transcend to law enforcement agencies and various sectors of the dominant culture. Moreover, the claimed respect for the human rights of Indigenous Australians remains tainted by the legacy of the myth of *terra nullius*.

The absence of a bill of rights or a legal instrument that places the respect of human rights in a *prima facie* priority position in regards to other regulations affects other areas of the law. Consider, for example, the widespread illegal sterilisation of disabled women,[291] which infringes upon the rights of women and of persons with disabilities enshrined in two specific treaties ratified by the country.[292] Similarly, in the State of NSW, and contravening the civil rights of due process, the presumption of innocence and equality before the law,[293] criminal procedure provisions were changed retrospectively to convict one person.[294] These cases are beyond the scope of this thesis but the consistent denial of Aboriginal and Torres Strait Islander peoples' rights is not. In the words of commentator John McCorquodale, in 1986:

> In this era of professed and proclaimed human rights, of subscription to International Conventions and protocols asserting those rights, and of political sensitivity to domestic

[291] The High Court of Australia ruled in *Marion's Case* in 1992 that sterilisation to disabled females by complete removal of the uterus and ovaries could only be carried out with the approval of the Family Court or other competent tribunal. The only exceptions to this authorisation are: a) when it happens as a by-product of a lawful and successful treatment, and b) if it is in the best interest of the child *and* any other treatment has failed or there are no other alternatives. Between 1992 and 1997, only 17 sterilisations were approved by the Court and an additional estimated 1000 took place as 'exceptions'. See, *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ('*Marion's Case*'). The data on how many girls with disabilities have been sterilised can be found in the reports by Brady and Grover from 1997 and Brady, Britton and Grover from 2001. Susan M Brady and Sonia Grover, 'The Sterilisation of Girls and Young Women in Australia' (Report Commissioned by Federal Disability Discrimination Commissioner Elizabeth Hastings, Australian Human Rights Commission, December 1997); Susan M Brady, John Britton and Sonia Grover, 'The Sterilisation of Girls and Young Women in Australia: Issues and Progress (2001)' (Report jointly commissioned by the Sex Discrimination Commissioner and the Disability Discrimination Commissioner at the Australian Human Rights Commission, Australian Human Rights Commission, 2001).

[292] Although these papers pre-date Australia's subscription to the *Convention on the Rights of Persons with Disabilities* in 2006, and its ratification in 2008, the practice of sterilisation has a eugenics tint that requires careful scrutiny. In any case, reproductive rights are a choice of the most personal nature and thus the safeguards of *Marion's Case* should be more strictly observed. See, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*'); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, [2008] ATS 12 (entered into force 3 May 2008).

[293] These rights are enshrined in the *ICCPR* art 14.

[294] This is the case of the trial of Bilal Skaf, accused of a brutal rape. When the trial miscarried because of the undue involvement of the jury in forensic examinations of the crime scene, the victim in the case was reluctant to testify again in a new trial and confront her attacker once more. The criminal law in NSW at the time did not allow for this kind of testimony to be valid in a new trial. Due to the media and public clamour asking for a prompt conviction, the State Parliament had no problem changing the laws and *applying them retroactively* so that Skaf could be convicted. He was tried with the same evidence and is currently serving his sentence.

> and international feelings about those rights, a consideration of Australia's treatment of its indigenous population ***demonstrates the hollowness of our touted egalitarian traditions***. To paraphrase Kipling Aborigines were—and still are—'lesser breeds within the law'.[295]

In the last couple of decades, these 'hollow egalitarian traditions' have not changed much. In addition to racial discrimination, the lack of recognition of customs and traditions continues into the present. Biodiversity conservation law and policy in Australia may be advanced and committed to mainstreaming and community engagement,[296] but even the most sophisticated environmental legislation has its limits compared to human rights–based frameworks.

Environmental law and policy had a significant impact on the drafting of the reconciliation and inclusion strategies. The influence of initiatives seeking the conservation of biological diversity linked to traditional knowledge represented a first step towards the recognition of rights for Aboriginal and Torres Strait Islander peoples; however, there is much work to be done in this area. During Howard's government, an assimilationist policy was implemented that cannot be allowed to continue, given that it is contrary to *UNDRIP*, especially in its blanket prohibition of assimilation, and promotion of forced integration.[297]

The *CBD*, in the Preamble, article 8(j) and article 10(c) contains the germ for this recognition, but it is risky to rely on these provisions, as they may lead to the application of fossilisation policies. As Nettheim points out: '[the 1967 Referendum], important as it was, it did not frame rights. All it did was removing a limitation on Commonwealth legislative power'.[298] Indeed, it did not even recognise that the continent was inhabited prior to the arrival of the settlers, and the myth of *terra nullius* took another quarter of a

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[295] McCorquodale, above n 234, 8.

[296] See National Biodiversity Strategy Review Task Group, above n 118.

[297] Art 8: '**1.** Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. **2.** States shall provide effective mechanisms for prevention of and redress for: (a) 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; (b) any action which has the aim or effect of dispossessing them of their lands, territories and resources; (c) any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) any form of forced assimilation or integration; (e) any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them'.

[298] Garth Nettheim, 'Human Rights and Indigenous Peoples' (2009) 1(2) *Cosmopolitan Civil Societies* 129, 129.

century to be debunked.[299] However, even more worrisome was the unintended effect of turning the Race Power into a licence to pass discriminatory laws.[300]

Despite the optimism of some commentators about the promising evolution of case law and statute in these areas, further improvements are needed to meet the standards set internationally. In particular, the signing of *UNDRIP* should constitute more than a symbolic gesture and start informing policy. The rights derived from Native Title could also use more recognition, and a more stringent protection of sacred sites as intangible rather than tangible assets is desirable. For this aim, the *Akwé Kon Guidelines* issued by the *CBD* may be a useful document to follow, as they provide clear and appropriate directives for the management of lands that harbour sacred sites.[301] The issues of historical marginalisation spawned by *terra nullius* have clearly created a situation in the legal arena that cannot be solved by strategies devised in the disciplines of environmental law and biodiversity protection. The redress of the past necessitates a radical solution grounded on the recognition of differentiated human rights.

V. CONCLUSIONS

The inclusion initiatives in conservation and natural resource management in Australia are incomplete and do not reflect the international law drive towards a rights-based approach to Indigenous peoples. This strategy does not completely fulfil Pareto equilibrium. The implementation of co-management agreements, especially during the 1980s and early 1990s, did open the door for the progressive inclusion of Aboriginal and Torres Strait Islander peoples in the country, marking the start of a reconciliation process. However, they were not a panacea solution and need to keep evolving, especially after the Parliamentary Apology in 2008 and the subscription of *UNDRIP* in 2009.

The CBC co-management model, even if it is currently considered the state-of-the-art solution in conservation, is insufficient for Indigenous peoples who have a historical

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299 *Mabo No 2*.

300 The interpretation of the Race Power, s 51 (xxvi), in the Hindmarsh Island dispute, where the Court asserted that its use was not restricted to the passing of positive or beneficial rules, seems to confirm this. See, *Kartinyeri v The Commonwealth* [1998] HCA 22. This ruling confirmed the view held in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

301 See, Secretariat of the Convention on Biological Diversity, above n 289.

claim for redress. It is understandable that compromises are necessary and that cooperation between stakeholders is pivotal for the success of conservation. Nevertheless, a compromise that simply cannot be made is the sacrifice of the recognition of Indigenous peoples as diverse in their own right, deserving of positive differentiated treatment that will allow them to have equal footing to the cultural majority. The model of national unity that strives for integration under 'one nation' is not viable. The country needs a profound reform for the inclusion of Aboriginal peoples.

This thesis challenges the model based on CBC co-management strategies applied in Australia and states that it needs a change. For this, the solutions provided by environmental law have already been exhausted. Indeed, law and policy in the area of involvement of Indigenous peoples in conservation strategies has paved the way for inclusion. However, it is insufficient because it regulates a different area of the law. Hence, policy makers should consider the enforcement of human rights provisions grounded in the recognition of the collective right to self-determination of Indigenous peoples.[302] Let it be stressed that biodiversity protection is not sacrificed in this process; rather, the two frameworks can further complement themselves. The next chapter proposes a model for the protection of both biodiversity and the human rights of Indigenous peoples and shows that it is optimal for the promotion and respect of these two legally protected interests. The key to the model is the self-identification process of Indigenous peoples as autonomous entities that choose to act as stewards of the land in accordance with their own customs and traditions. Here, governmental decision-makers acting in a top-down fashion do not decide whether a people are suitable for the endeavour, as this perpetuates the fossilisation perspective.

The next chapter claims that Indigenous peoples in Latin America have used some of the publicity generated by the environmental movement in the 1970s and 1980s to bring attention to the sustainability of their ways of life. Note that here, these Indigenous peoples capitalised on the positive reception that this alignment of interests could provide for themselves. Thus, the roles are reversed. Instead of a group of concerned elites deciding that the livelihoods of Indigenous peoples classify as sustainable in the contemporary sense of the word, the peoples themselves drew attention to this fact. This

[302] See the comments on the importance of the right to self-determination in the discourse of Aboriginal and Torres Strait Islander peoples in Sam Muir, 'The New Representative Body for Aboriginal and Torres Strait Islander People: Just One Step' (2010) 14(1) *Australian Indigenous Law Review* 86.

is not mere semantics. This denotes a key difference between the CBC model and the collective legal autonomy concerning TEK, with the latter promising the empowerment and full enfranchisement of Indigenous peoples in their countries of origin.

CHAPTER IV

COLLECTIVE LEGAL AUTONOMY CONCERNING TRADITIONAL ECOLOGICAL KNOWLEDGE

I. INTRODUCTION

This chapter provides an alternative solution to the fortress and CBC models in territories occupied or otherwise used by Indigenous peoples in Colombia and Australia. It complements the analyses in the two previous chapters, to prove that the application of TEK within a comprehensive human rights–based legal framework is the optimal model for biodiversity conservation in these areas. This chapter addresses the normative research question of how to resolve the collision between biodiversity protection and the recognition of the human rights of Indigenous peoples. The proposal is a radical response to the shortcomings of these two models: the collective legal autonomy concerning TEK grounded on human rights mandatory provisions rather than on environmental law.

As contended in Chapter II, the model of fortress conservation has dominated the regimes for protected areas worldwide, based on the premise that the only wilderness areas worth protecting are those untouched by people. The notion whereby humans are the masters of nature, and form an entirely different entity, was the key to the use of the model: 'In thought, human beings distance themselves from nature in order to arrange it in such a way that it can be mastered'.[1] The flaw of this conception is that many of the areas to be protected have been or are occupied by people, challenging their definition as 'pristine'. Further, the model ignored, sometimes on purpose, that Indigenous peoples not only occupied the areas but had links with the lands tied to their very identities. This identity bond is in turn related to a definition of autonomy distinct from the liberal model of the individual, instead being a cultural collective one. Owing to this entrenched

[1] Max Horkheimer and Theodor W Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott trans, Stanford Univesity Press, 2002) 31.

respect for the lands, Indigenous peoples have managed them such that they seem pristine to the Western eye, whose ways of life tend to ravage lands through human occupation and use. The realisation that human interaction is not necessarily detrimental to land, and that stakeholder engagement in conservation is necessary, gave rise to the more inclusive model of CBC. As Borrini-Feyerabend, Kothari and Oviedo state: 'starting from a focus on "nature" that basically excluded people, more and more protected area professionals today recognise natural resources, people and cultures as fundamentally interlinked'.[2]

The theory that this thesis proposes is grounded on the analysis and assessment of the Colombian legal system and key rulings of the Constitutional Court. This chapter claims that the expansion of the legislative base that protects differentiated human rights for Indigenous peoples in the country has contributed positively to biodiversity conservation. It will prove that the five sets of differentiated collective human rights, congregated around self-determination, are integrally protected in this legal model. One of the key differences present in the collective legal autonomy concerning TEK is the recognition of the non-physical aspects of cultural integrity as legally protected intangible heritage.

As contended in the last chapter, other international treaties have proved ill-equipped to guarantee Indigenous peoples a broad range of rights that respect their individual identities. This was shown in the analysis of the shortcomings of the *Convention Concerning Tribal Populations* ('*ILO 107*') and the *World Heritage Convention* ('*WHC*').[3] In contrast, the provisions of the *Intangible Cultural Heritage Convention* ('*CSICH*'),[4] applied together with the *Indigenous and Tribal Peoples Convention* (*ILO 169*),[5] give TEK full expression and validation as an ecological management strategy. Australia is currently not a party to *ILO 107*, *ILO 169* and the *CSICH*. However, the subscription in 2009 of the *Declaration on the*

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[2] Grazia Borrini-Feyerabend, Ashish Kothari and Gonzalo Oviedo, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation–Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas* (IUCN, 2004) 1.

[3] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975) ('*WHC*'); Ibid; *International Labour Organization Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 6 February 1959) ('*ILO 107*').

[4] *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) ('*CSICH*').

[5] *International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1358 (entered into force 5 September 1991) ('*ILO 169*').

Rights of Indigenous Peoples (*UNDRIP*)[6] can perhaps be interpreted as a step towards better legal protections for Aboriginals and Torres Strait Islanders.[7]

The next section presents the philosophical underpinnings of the proposed model of collective legal autonomy concerning TEK. First, it presents a brief operational definition of autonomy linked to the advent of multiculturalism. It then addresses the commonly raised counterarguments to the conceptualisation of the human rights of Indigenous peoples as collective rights. Finally, the section discusses the advantages of a framework that safeguards intangible heritage for the protection and promotion of cultural rights.

II. MULTICULTURALISM AND LEGAL PLURALISM: CONTEMPORARY PHILOSOPHIES ON INDIGENOUS PEOPLES

The last chapter attacked the myth of the Noble Savage. It argued that this myth justified the dispossession of Indigenous peoples in the two countries of study. Afterwards, the 'benevolent' facet of the myth supported assimilationist policies, especially under the international framework of the *ILO 107*. In Australia, the assimilationist drive was a hallmark of the Howard government policies, which continued until the Parliamentary Apology.[8] It was also suggested that this myth, when coupled with TEK as a community-based management strategy, promoted the fossilisation perspective and disempowerment of Indigenous peoples. Building upon those arguments, this chapter claims that multiculturalism as a legal tool rather than an intangible notion has marked the rejection of the dispossession trends pervading colonial regimes, and the assimilationist drive of most of the twentieth century. This discussion will highlight the change Colombia implemented in 1991 that gave rise to the collective legal autonomy concerning TEK in that country.

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6 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*').

7 See in this respect the Native Title Report 2011, which relates to the application of the *United Nations Declaration on the Rights of Indigenous Peoples,* signed by Australia in 2009. Mick Gooda, 'Native Title Report 2011' (Report by the Aboriginal and Torres Strait Islander Justice Commissioner, Australian Human Rights Commission, 28 October 2011).

8 Prime Minister Kevin Rudd, 'Parliamentary Apology to Australia's Indigenous Peoples' (Speech delivered at the Parliament, Canberra, 13 February 2008).

This thesis does not use the term 'autonomy' in the liberal sense, ascribed purely to the individual. Under this scenario, autonomy 'attaches to (and only to) individual persons; it is not (in this usage) a property of groups or peoples'.[9] To use the term otherwise would not allow the proposal of having collective Indigenous peoples' human rights as a central feature. Thus, this thesis abides by the operational definition of autonomy, understood as linked to cultural identity. Here, autonomy is the prerogative of a group that exercises its rights to self-determination and self-government. Young's understanding of political autonomy is as the basis of intercultural dialogue that promotes inclusion in multicultural societies and opposes homogenisation.[10]

The key contemporary strategy used in the design of new constitutions for countries that have Indigenous populations or other minorities is either to integrate them into the dominant society, or to accommodate them within the system.[11] It is relevant here to note the differences between Indigenous peoples and other minorities. Daes provides an accurate conceptual differentiation:

> … the ideal type of 'indigenous people' is a group that is aboriginal (autochthonous) to the territory where it resides today and *chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory*. The ideal type of a 'minority' is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry.
>
> … From a purposive perspective, then, the ideal type of a 'minority' focuses on the group's experience of discrimination because the intent of existing international standards has been to combat discrimination, against the group as a whole as well as its individual members, and to provide for them the opportunity to integrate themselves freely into national life to the degree they choose. Likewise, the ideal type of 'indigenous peoples' *focuses on aboriginality, territoriality, and the desire to remain collectively distinct, all elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy* (emphasis added).[12]

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[9] John Christman, 'Autonomy in Moral and Political Philosophy' (Spring 2011 Edition) *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/>.

[10] This is one of the arguments she raises to critique the idea of a 'universal citizenship'. Iris Marion Young, 'Polity and Group Difference: A Critique to the Ideal of Universal Citizenship' (1989) 99(2) *Ethics* 250.

[11] John McGarry, Brendan O'Leary and Richard Simeon, 'Integration or Accommodation?' Commented by Kymlicka in below n 12.

[12] Asbjorn Eide and Erica-Irene Daes, United Nations Economic and Social Council (ECOSOC), Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous* Peoples, UN Doc E/CN.4/Sub.2/2000/10 (19 July 2000), cited in Will Kymlicka, 'The Internationalization of Minority Rights' (2008) 6(1) *International Journal of Constitutional Law* 1, 4.

The key difference between the Indigenous peoples conceptualised by Daes and defended by Kymlicka[13] is in the way that these social groups chose to exercise their autonomy. Here, Indigenous peoples, as a collective entity, are entitled to take autonomous decisions in regards to their institutions, exercising their self-government to remain collectively distinct. Thus, it is the desire to retain political distinctness and recognition of their pre-existing status as self-determining political units –or nations– with connection to territory that puts them on a different plane from minorities.

The criticism that Young raises to this division should be noted here. She posits that Kymlicka's account of the differentiation of the rights of ethnic and national minorities 'is unnecessarily dichotomous [with] two categories that are opposing and mutually exclusive in their characteristics'.[14] To persist with such a distinction could lead to enforced primitivism through segregation in the event that Indigenous peoples chose to abide by the integration model. Unlike the fossilised version obligated to maintain and preserve traditions for the sake of the cultural majority, the peoples here *desire* to remain distinct. Equally valid is the aspiration, should they have it, to choose integration policies. Connected to this claim is the prerogative to decide their own development priorities and to revitalise their cultures.[15] This thesis has already argued that culture is not static and has to be allowed to evolve over time, as is consistent with the mandates of *UNDRIP* and *ILO 169*. Thus, the radical dichotomy of Kymlicka, even if it provides useful parameters of operation, cannot be adopted as it stands. Rather, to adopt multiculturalism and legal pluralism provides a more open-textured solution, which respects the claim of Indigenous peoples to be recognised as self-determining political units:[16]

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[13] Kymlicka, 'The Internationalization of Minority Rights', above n 12. This is also the basis of the differentiation he makes between ethnic minorities and national societies. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1996).

[14] Iris Marion Young, 'A Multicultural Continuum: A Critique of Will Kymlicka's Ethnic-Nation Dichotomy' (1997) 4(1) *Constellations* 48.

[15] See eg, *UNDRIP*.

[16] It is convenient to bring back De Sousa Santos' definition of legal pluralism, already cited in Chapter III: '*Legal pluralism* is the key concept in a postmodern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajecttories as well as in the dull routine of eventless everyday life'. Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279, 297.

> As far as law is concerned, the new common sense will be a legal pluralistic common sense. To achieve such a goal the sociology of law must change its priorities: instead of engaging exclusively in the critique of the existing state legality it must also uncover the latent or suppressed forms of legality in which more insidious and damaging forms of social and personal oppression frequently occur.[17]

Both Australia and Colombia have what can be called 'New World' Indigenous peoples, 'colonised by a remote colonial power'.[18] Thus, the key to their difference does not stem from an ethnic consideration or status; rather, it comes from the different aspirations of the two groups.[19] To understand difference from the perspective of *political aspirations* rather than from the racial perspectives attacked in the last chapter can become a new parameter for Australia. This new perspective could put an end to the stalemate whereby Aboriginal and Torres Strait Islander groups are identified by the dark colour of their skin, blood or other dubious genetic considerations.[20] It can revaluate the *White Man's Burden* imagery[21] and start recognising these Indigenous groups as peoples belonging to different nations.[22] The denial of self-determination and the preference for assimilationist policies was based on patronising and *démodé* premises that continue to influence policy today, such as in the well-meaning *Closing the Gap*. In short, this 'requires the state to recognize a multi-layered relationship in which citizenship rights to equal opportunity in

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17 Ibid 299.

18 As Kymlicka notes, it is easier to recognise this differentiation between Indigenous peoples and national minorities in the cultural West, where the latter 'have been incorporated into a larger state dominated by a neighboring people'. However, Africa, Asia and the Middle East present conceptual challenges where it is 'far less clear how we can draw this distinction ... or whether the categories even make sense there. Depending on how we define the terms, we could say that none of the homeland groups in these regions are "indigenous", or that all of them are'. For instance, some African nations have rejected the notion of a separation between the Indigenous groups and colonisers, stating that after the process of decolonisation they are all part of the same group. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, above n 13, 12.

19 Ibid 5.

20 It is necessary to clarify that Aboriginal peoples in Australia use the 'Skin-System' to determine and categorise kinship relations, as subdivisions of their society. Here, the concept 'skin' is not associated with colour; rather, skin names are used as personal identifiers and vary from region to region. For a guide to skin names and the kinship system, refer to Central Land Council, *Kinship and Skin Names* <http://www.clc.org.au/articles/info/aboriginal-kinship>.

21 'Take up the White Man's burden/Send forth the best ye breed/Go, bind your sons to exile/To serve your captives' need;/To wait, in heavy harness,/On fluttered folk and wild/Your new-caught sullen peoples,/Half devil and half child...'. Rudyard Kipling, *The White Man's Burden* (part of the global commons, 1899).

22 Refer to the critique to the 'race' concept in regards to Australia, especially in the aftermath of the inclusion by Deane J of the three-tier test in the *Tasmanian Dam Case*. *Commonwealth v Tasmania* (1983) 158 CLR 1, 274-275 ('*Tasmanian Dam Case*').

employment, education, health etc. sit alongside Indigenous rights to self-determination, land rights and cultural protection'.[23]

It is important to differentiate integration and accommodation from the assimilationist policies critiqued in the last chapter, noting however that both can be seen negatively as euphemisms for assimilation. 'The former seeks to integrate all citizens on a non-discriminatory basis into shared national institutions; the latter seeks to accommodate diversity through minority-specific institutions'.[24] The key difference between this contemporary form of integration and assimilation is that it responds directly to the will of the minorities concerned. It is thus based upon the respect accorded to these groups, which fosters their aspirations. These two perspectives have found defendants in international law, which leaves their domestic implementation to the discretion of the parties.

Colombia has chosen and respected the accommodation model, following the multiculturalism principle of the 1991 text. Within this framework, Indigenous peoples are usually minority groups within their State. This is indeed the case in Australia and Colombia, where these communities account for less than four per cent of the population.[25] As Chapter I mentioned, any attempt to draft a one-size-fits-all definition[26]

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[23] Jane Robbins, 'Indigenous Representative Bodies in Northern Europe and Australia' in Günter Minnerup and Pia Solberg (eds), *First World, First Nations: Internal Colonialism and Indigenous Self-Determination in Northern Europe and Australia* (Sussex Academic Press, 2011) 45, 46.

[24] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, above n 13, 1.

[25] In Australia, the 2011 census showed that 2.54% of the population were of Aboriginal or Torres Strait Islander descent. In Colombia, the 2005 census showed that 3.40% of the population identified themselves as belonging to one of the Indigenous nations of the country. See, Australian Bureau of Statistics, *Census - For a Brighter Future. 2011 Census QuickStats* (23 March 2013) 12. <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0>; Departamento Administrativo Nacional de Estadística, 'La visibilización estadística de los grupos étnicos colombianos' (Report Departamento Administrativo Nacional de Estadística-DANE, República de Colombia 2006). The greatest exception to this rule occurs in some Latin American countries, where the number of individuals of Indigenous descent can exceed the individuals of other ethnicities. The top five countries with the highest percentages of Indigenous populations in Latin America are the Plurinational State of Bolivia (71%), Guatemala (66%), Peru (47%), Ecuador (43%) and Belize (19%). Donna Lee Van Cott, 'Latin America's Indigenous Peoples' (2007) 18(4) *Journal of Democracy* 127, 128. On average, Latin American countries have a population that is 10% Indigenous. Benjamin J Richardson and Donna Craig, 'Indigenous Peoples, Law and the Environment' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2007) 195, 212.

[26] Refer to the Martínez Cobo working definition discussed and reproduced in English in Chapter I. José R Martínez Cobo, *Estudio del problema de la discriminación contra las poblaciones indígenas, informe final que presenta el relator especial*, 36 sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983).

for Indigenous peoples is not only a demanding task,[27] it may also impinge on their most fundamental claim: the recognition of their right of self-determination.

This conceptual differentiation between accommodation and integration allows the drafting of socialised policies tailored for each group. However, it cannot be externally imposed. It must follow the wishes of the group, in an environment of dialogue and participation. The next section reviews the transition towards multiculturalism, with specific reference to Colombia and the implications for group autonomy.[28]

II.1. From Dispossession to Multiculturalism

Indigenous peoples are complex ethnic and cultural minorities within a country.[29] They have developed different legal procedures based on customary law and thus claim the recognition of these within their country.[30] The claim over their ancestral lands is associated to the right to autonomy.[31] The focus on the adjectives 'ancestral' or 'traditional' concerning the territories is paramount. When Indigenous peoples are driven from their lands and relocated to reservations, their link with the land is compromised.[32] This relocation is extremely harmful. It not only severs the deep spiritual connection of the peoples with their homelands,[33] it also threatens their livelihoods because new

[27] Disagreements in this respect permeate NGOs, international treaties and domestic legislation. IUCN Inter-Commission Task Force on Indigenous Peoples, *Indigenous Peoples and Sustainability: Cases and Actions* (International Books, 1997) 27.

[28] 'Liberal discussions that claim sympathy with multiculturalism ... are consistent with a vision of society in which each culturally differentiated group is separate and inward looking, and the task of the liberal state is to umpire their conflicts and assure their relative equality. Such a vision stops short of positively valuing *interaction* of culturally differentiated groups and their presence together in public institutions'. Iris Marion Young, 'Thoughts on Multicultural Dialogue' (2001) 1(1) *Ethnicities* 116.

[29] Even in the countries mentioned in above n 25, where Indigenous peoples represent the majority of the population, the power is usually held by non-Indigenous political elites. The most notable exception is the election of Evo Morales as President of the Plurinational State of Bolivia in 2006.

[30] *UNDRIP* art 4: 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as the ways and means for financing their autonomous functions'.

[31] *UNDRIP* art 26 recognises the right of Indigenous peoples to use, own, develop and control their traditional territories and resources. 26(3) states that the recognition 'shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'.

[32] For a conscientious account on the relocation of the Maasai in Kenya and Tanzania, dividing their traditional pastoral lands and disrupting their livelihoods, see Mark Dowie, *Conservation Refugees–The Hundred-Year Conflict between Global Conservation and Native Peoples* (The MIT Press, 2009) 23–45.

[33] This is the reason that land is such an important part of both *ILO 169* and *UNDRIP*.

ecosystems bring a difference range of resources. These resources may be unknown or impossible to harvest using techniques established in relation to the requirements of their homelands. Thus, the analysis on multiculturalism in this section will be framed specifically under the perspective of the Indigenous peoples' social movement.

The political actions of Colombia's Indigenous peoples have resulted from their empowerment through social movements. [34] However, Fontaine criticises the insufficiency of the three theoretical currents that, since the 1990s, have attempted to integrate Indigenous rights with other more easily recognisable ideologies.[35] He argues that these three theories—neomarxism, culturalism and institutionalism—by pursuing their own set agendas, have obscured the importance of independently pursuing the institutional recognition of the human rights of Indigenous peoples.[36] However, it is necessary to keep in mind that the claim to ancestral territories in Colombia came to prominence during the period 1966 to 1978, when assimilationist policies were still strong. To achieve the entitlement of the territories, without the plethora of differential rights and mechanisms available since the 1980s, it is only natural that the Indigenous movement used the available laws to support their claims. Namely, they sought to prove that their titles over the lands pre-dated the Republican era, having been granted by Royal Decree from the Spanish Crown under the *resguardo*.[37] The rationale was that the lands operated under collective ownership rather than as private property. The evidence required to support the claim to these titles follows similar rules to Native Title claims: continual occupation of the claimed territory, proven by means of documentary evidence *external* from the communities in question.

However, there are more commonalities between this movement and the agenda of the environmental movement, especially in the cases of Colombia and Ecuador, although

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[34] Astrid Ulloa, *La construcción del nativo ecológico–Complejidades, paradojas y dilemas de la relación entre los movimients indígenas y el ambientalismo en Colombia* (Instituto Colombiano de Antropología e Historia-ICANH, 2004) 323. For an early comment on the results of the Indigenous peoples' movement and some of its impacts, see Andrew Gray, 'Entre la Integridad Cultural y la Asimilación: Conservación de la biodiversidad y su impacto sobre los pueblos indígenas' (Documento IWGIA No 14, IWGIA International Work Group for Indigenous Affairs, December 1992) 16–18.

[35] Guillaume Fontaine, *El precio del petróleo: Conflictos socio-ambientales y gobernabilidad en la Región Amazónica* (FLACSO, Sede Ecuador; Institut Français d'Études Andines, 2003).

[36] Ibid 145–150.

[37] Only 8.7% of the territories collectively entitled to Indigenous peoples today were recognised under these rules. Juan Houghton, 'Legalización de los territorios indígenas en Colombia' in Juan Houghton (ed), *La Tierra contra la Muerte–Conflictos territoriales de los pueblos indígenas en Colombia* (Centro de Cooperación al Indígena CECOIN, Organización Indígena de Antioquia OIA, 2008) 83.

each has its own separate identity and goals. Ulloa shares this perspective,[38] interpreting that the emergence of various social movements in Latin America since the 1960s gave the Indigenous peoples' movement its much-needed legitimacy. Specifically, it empowered them to act as independent agencies with their own set of objectives. Such empowerment should be understood in the light of the capacity for action of these groups. Ulloa stresses that one of the factors that have strengthened and legitimised the Indigenous peoples' movement, both internationally and in the Colombian political landscape, is the relation they have with the environment. This 'ecological identity', to use Ulloa's term, has caught the attention not only of environmentalists, but also of powerful NGOs and human rights organisations.[39] However, this begs the question of how this connection, which has its expression in the application of TEK, can be related to contemporary scientific knowledge on conserving nature and biodiversity.[40] One of the strategies was to promote CBC; a model that cannot be construed as real autonomy and that is often at the mercy of the political zeitgeist.

Ulloa posits that Indigenous peoples' movements may be regarded as victorious, precisely because they positioned their ecological identities at the very core of national and transnational environmental discourses, in what she terms 'global ecopolitics'.[41] The key here is that Indigenous peoples found in the environmental cause an ideal forum to consolidate their claims for the recovery of their territories and autonomy.[42] Note that the moment coincides with the recognition by important NGOs, such as the IUCN, of the importance of Indigenous peoples as an integral part of some environmental processes and critical of the injustices performed in the name of Western conservation:[43]

> …scientific ecology recognised that human activities could have positive impacts on the natural environment (enrichment of biological diversity, increase in forest areas, etc.), and a deeper understanding of the rural communities' activities highlighted the

[38] Astrid Ulloa, 'El Nativo Ecológico: Movimientos Indígenas y Medio Ambiente en Colombia' in Mauricio Archila and Mauricio Pardo (eds), *Movimientos sociales, estado y democracia en Colombia* (ICANH-CES-Universidad Nacional, 2001) 323.

[39] Ibid.

[40] Ibid 323.

[41] Ibid.

[42] Ibid.

[43] Van Griethuysen comments that as early as the 1960s, activists such as Raymond Desmann were denouncing the exclusion and social injustice suffered by local populations for the sake of the establishment of protected areas. Pascal van Griethuysen, 'A Critical Evolutionary Economic Perspective of Socially Responsible Conservation' in Gonzalo Oviedo, Pascal van Griethuysen and Peter B Larsen (eds), *Poverty, Equity and Rights in Conservation* (IUCN, Gland; IUED, Geneva, Switzerland, 2006) 7.

> ecological qualities of these societies' ways of life. Under the proper conditions, they were capable of resorting to a *sustainable use* of resources and of ensuring the preservation of their natural environment.[44]

In regards to the relationship between environmentalists and Indigenous peoples, Ulloa argues that the former have helped the latter to build their 'ecological identity' and to use it to be seen in a different light. Note however that the coincidence in certain interests, especially the respect for the land instead of its plundering, has to be approached with caution. There are fundamental differences between the understanding fostered by, for example, the ecosystem approach and the cosmovisions of Indigenous peoples.[45] As Ulloa comments, the inclusion of Indigenous peoples in the *Biodiversity Convention* (*CBD*) misses a fundamental factor. Articles 8(j) and 10(c) miss the relationship to the past,[46] nurtured by the constantly evolving oral tradition. The sustainable development concept embraced by the Convention and the other Rio documents takes into account the fiduciary obligation to the future generations. However, it neglects the value of the history, past, tradition and cultural values embodied in the territory.[47] This is the reason that approaching the legal relationships of the State with its Indigenous peoples only under the lens of environmental law principles is not effective. The problem of the value of the past was also seen from the other side in the comment of the *World Heritage Convention* (*WHC*).[48] Under this lens, the past is gone and only physical, *tangible*, objects remain. There is no room for cultural revitalisation. Hence, the collective legal autonomy concerning TEK is not focussed on either of these two frameworks, but on the promotion of human rights, including cultural *intangible* rights.

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44 Ibid.

45 Refer to the collisions between the legally protected interests of biodiversity conservation and the rights of Indigenous peoples in Chapter I, to the discussion in Chapter II on the evolution of the concept that separated humans and nature and to the critique on the fossilisation approach from Chapter III.

46 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 243 (entered into force 29 December 1993) ('*CBD*').

47 See the comment on the cosmovisions of the peoples of the Pirá Paraná and the relation to territory and traditional ecological knowledge further in this chapter.

48 *WHC*.

II.2. About Collective Human Rights: Dispelling the Counterarguments

The prevailing method to design and implement laws and policies to manage the relations between the State and Indigenous peoples in independent countries has always tended to be top-down and purely government-centred. Dialogue, negotiation, consultation and other forms of public participation have been characterised by imbalances and miscommunication, sometimes being tokenistic at best. If the focus is redirected to a more independent process in which Indigenous peoples become true participants in policy design, rather than just their 'beneficiaries', better results in terms of application of TEK can be achieved. This section argues that there is merit in the human rights–based approach to Indigenous peoples' governance and organisation. This approach is the basis for the domestic implementation of the collective legal autonomy concerning TEK. For the framework of multiculturalism and legal pluralism to work, the customary laws of Indigenous peoples have to be taken into consideration. This is deeply linked to the political aspirations discussed earlier. As the international understanding of Indigenous peoples moves towards the value of difference and away from the mistrust of past policies, the domestic legal frameworks of the settler state must also evolve.[49]

The key to success in a domestic legal framework managing the relations with Indigenous peoples and other ethnic minorities in the territory is the inclusion of legal mechanisms that guarantee and enforce collective human rights. It is relevant to note that international organisations, notably the United Nations Permanent Forum on Indigenous Issues (UNPFII), advocate that the five sets of rights identified in Chapter I are better protected if they are conceptualised as collective rather than individual.[50] Given that the notion of having or protecting collective rights has been debated and critiqued

[49] See the trope of the primitive savage and its implications, discussed in Chapter III.

[50] The rights to territory, participation, cultural integrity and non-discrimination are contingent on the right to self-determination. They should be recognised to the groups in their quality of 'peoples'. See generally, Department of Economic and Social Affairs, Division for Social Policy and Development and Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (December 2009) ('*SOWIP*'). This is consistent with *UNDRIP*. All rights in this declaration can be construed to apply collectively to the 'peoples', except otherwise noted. See for example the differentiation between basic human rights accorded to individuals in art 7(1): 'Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of the person'.

extensively,[51] it is necessary to first dispel the most common counterarguments against them in the legal literature.

The contemporary perspectives of collective rights are the result of an evolution from what Etxeberria calls 'abstract individual universalism' to 'concrete collective particularism'.[52] The former is the common conception of human rights as inherent to the individual and deeply linked to the non-transferrable concept of dignity. This is a simple enough concept, if only because any jurist educated in a Western country has to understand it from the start. However, the second category of collective rights is more difficult to grasp. At first glance, it seems equally simple; it would only differ from individual rights because it is granted to a group of people instead of to just one person. Thus, an individual can be a collective right-holder if and only if she belongs to a differentiated set of people, such as citizens of a certain country, women, disabled persons, Muslims and so on. However, what makes the group so special as to be entitled to a collective right? Moreover, what happens to the individual rights of each member of the set? The problem may be, as Stone saw it in the case of nonhuman entities, 'that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable'.[53]

These are only the first of many objections. To address them, the arguments that commentator Juan Antonio García Amado raise in his text *On Collective Rights. Dilemmas, Enigmas, Chimeras* will be used here.[54] The choice of this article lies in the acute views held by the author. He criticises the notion of collective rights, highlights its abuses and draws attention to the lack of rigour of legal philosophers that take these rights for granted. Although the writer raises various concerns about collective rights in general, this section will only address the ones that apply to the collective human rights of

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[51] Newman provides a review on the literature, focussing on the moral content of collective rights, which differentiates them from collective interests. See generally, Dwight G Newman, 'Collective Interests and Collective Rights' (2004) 49 *The American Journal of Jurisprudence* 127.

[52] *Grosso Modo*: this term means reconciling universalism with the rights that protect collective identities. This is consistent with the operational definition of autonomy presented above. For the history of this transformation in the light of the claims of Indigenous peoples, see Xabier Etxeberria, 'La tradición de los derechos humanos y los pueblos indígenas: una interpelación mutua' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 63, 63–64.

[53] The author was speaking about trees and the possibility of inanimate and non-sentient beings having standing in a court of law. Christopher D Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450, 455.

[54] Juan Antonio García Amado, 'Sobre derechos colectivos. Dilemas, enigmas, quimeras' in Francisco Javier Ansuátegui Roig (ed), *Una discusión sobre derechos colectivos* (Dykinson SL, 2001) 177.

Indigenous peoples; particularly the collective right to land because of its intrinsic challenge to classic notions of private property. Using these criteria, the four concerns to be discussed are:

1. The lack of rigour or uncommitted eclecticism of legal theorists.
2. Whether it makes any sense to talk about collective rights.
3. What constitutes a social group and makes it so special? Individualist and collectivist approaches.
4. How can the interests of the group be reconciled with the individual ambitions of each of its members? Should one prevail over the other?

II.2.1. The Lack of Rigour of Current Theories on Collective Rights

When talking about collective rights, it is easy to fall into the trap of taking them for granted. More easy still is to use slogans or buzzwords currently in vogue, and blindly commit to them without further analytical precision. 'Globalisation', 'principles', 'minorities' and 'multiculturalism' would be prime examples of this trend.[55] Thus, García Amado claims that whenever a political philosopher lightly affirms that collective rights indeed exist, such claim should be received with more than a healthy dose of scepticism. The only possible answer would be a prudent 'it depends'.[56] The following paragraphs claim that there is a consistent usage of the term collective rights in a broad range of jurisdictions in reference to the human rights of Indigenous peoples. This usage, both in legal regulations and domestic and international case law, proves that the existence of collective human rights has transcended usage as a mere buzzword to become the pillar of the legislation seeking to guarantee the rights of Indigenous peoples.

[55] Ibid 177.
[56] Ibid 188.

II.2.1.1. Linguistic Usage of the Term

The current literature, especially policy documents, tends to admit the existence of the collective right to land, and other associated rights, as a fundamental premise.[57] This would be an intriguing notion were it not for the fact that the term appears in several legal texts. Colombian and Australian laws are a case in point. The *Native Title Act* defines the expressions 'Native Title' or 'Native Title rights and interests' as 'the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters'.[58] The bundle of property rights in the regulation of Native Title is based on the premise that all of these rights are ultimately recognised collectively to the community that succeeds in the claim, not to each of its individual members. On the same lines, the Colombian Constitution recognises the collective right to land to Indigenous and Afro-Colombian communities,[59] decreeing that this right is 'protected by a non-lapsable action, inalienable, indivisible, and cannot be subjected to seizure'.[60] Further, the Colombian Constitutional Court has expanded the notion of constitutional collective human rights, linking them to the individual human rights of the country's constitution.[61]

The new Constitution of the Plurinational State of Bolivia (2009) created a special bill of rights for the 'Indigenous peoples ... whose existence predates the Spanish colonial

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[57] For example, Campese and Guignier mention the conceptual problems of having a collective right, for example, to peace or to a healthy environment; but they do not question the literature that supports their assertion whereby '[c]ollective rights are particularly important for understanding the significance of indigenous peoples and local and mobile community rights vis-à-vis conservation practice'. Jessica Campese and Armelle Guignier, 'Human Rights—A Brief Introduction to Key Concepts' (2007) 15(Conservation and Human Rights) *Policy Matters* 10, 13–14. They are not alone. See, among many others, Esther Sánchez Botero, *Los Pueblos Indígenas en Colombia–Derechos, Políticas y Desafíos* (UNICEF, Oficina de Área para Colombia y Venezuela, 2003); Grazia Borrini-Feyerabend, Ashish Kothari and Gonzalo Oviedo, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation–Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas* (IUCN, 2004); Paige M Schmidt and Markus J Peterson, 'Biodiversity Conservation and Indigenous Land Management in the Era of Self-Determination' (2009) 23(6) *Conservation Biology* 1458; Francisco López Bárcenas, 'Autonomías indígenas en América: De la demanda de reconocimiento a su construcción' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 423.

[58] *Native Title Act 1993* (Cth) s 223(1).

[59] *Act 70 of 1993 Recognising the Occupation of Territories in the Pacific Basin by Black Communities* (Colombia). See the case study of the black communities of the Pacific Basin in Chapter III.

[60] *Colombian Constitution 1991* arts 63 and 229.

[61] See, for instance, the construction of the right to a healthy environment common to all Colombians, as tantamount to the right to life in the case of Indigenous communities in the '*Illicit Crops Case*'. Constitutional Court, *Judgement SU-383/2003* ('*Illicit Crops Case*').

invasion'.[62] Besides recognising the uniqueness of the cosmovisions and cultures of each of the groups, the bill is specific in the matters of the collective entitlement to their ancestral lands,[63] and the collective intellectual property right over their traditional knowledge.[64] The equally new Constitution of Ecuador (2008) goes even further. It specifically enforces a bill of rights for Indigenous nations made *exclusively* of collective rights. They include, among others, the ownership of their ancestral lands,[65] the recovery and free entitlement of said lands[66] and the management of natural resources within them.[67] The bill also recognises the special link to the land by recognising the right of Indigenous peoples to 'conserve and promote their biodiversity and natural environment management practices'.[68] Note that this is not an imposition by the State, but rather the recognition of a prerogative, consistent with *UNDRIP*.[69] Akin to the last example, the Constitution of the Bolivarian Republic of Venezuela also recognises the collective right of Indigenous peoples over their lands[70] and over their ancestral knowledge, declared non-patentable.[71] All of these legal provisions have in common that they were fostered by the evolution of international laws regarding Indigenous peoples.[72] These developments were recognised in the wave of constitutional reforms that occurred in Latin America in the 1990s.[73]

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62 *Constitution of the Plurinational State of Bolivia 2009* art 30(I) (translated by the author. Note however that the text refers directly to the colonial invasion).

63 Ibid art 30(II-6).

64 Ibid art 30(II-11).

65 *Constitution of Ecuador 2008* art 57(4). Note that this provision is identical to art 63 of the Colombian Constitution. It also defines that the collective right to land is 'protected by a non-lapsable action, inalienable, indivisible, and cannot be subjected to seizure'.

66 *Constitution of Ecuador 2008* art 57(5).

67 Ibid *2008* art 57(6).

68 Ibid *2008* art 57(8).

69 *UNDRIP* art 29(1): 'Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination'.

70 *Constitution of the Bolivarian Republic of Venezuela 1999* art 119. The same characteristics of the Ecuadorean and Colombian constitutions are enforced here.

71 *Constitution of the Bolivarian Republic of Venezuela* art 124. Note the similarities with the Constitution of Ecuador.

72 Especially the signing of *ILO 169*, which preceded or coincided with the enforcement of new Constitutions. Bolivia and Colombia ratified in 1991, Peru in 1994 and Ecuador in 1998. ILO and NORMLEX, *Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).* <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO>.

73 For example, Colombia enforced a new Constitution in 1991, Peru in 1993, Bolivia in 1994, Ecuador in 1998 and Venezuela in 1999. Bolivia and Ecuador changed their constitutions again in 2008 and 2009, respectively, and some of the major changes in both related to the special rights for Indigenous peoples, even

In the international arena, the most important instruments to uphold these kinds of rights are *UNDRIP* and *ILO 169*. Even though the word 'collective' only appears in a few of their articles, the existence of collective rights can be inferred from the use of the term 'peoples' instead of 'individuals', 'members', 'persons belonging to' or any such expressions.[74] In regards to the right to land, for example, *ILO 169* has a specific provision conceptualising it as a *collective* right based on the spiritual link of the right-holders with the territory.[75] The most important aspect of this legal stance is the recognition of the distinct cosmovisions of Indigenous peoples, which, as seen in Chapter I, is one of the components of cultural integrity.[76] This is not a coincidence. It is the result of years of lobbying and negotiations.

Anaya notes that *ILO 169* is responsive to the demands of Indigenous peoples through international law.[77] The lobby for recognition of Indigenous identity is not a mere aspiration of possession or use of lands. Rather, it encapsulates every aspect of the group in question with the interdependent human rights it entails.[78] In this respect, the author states that Indigenous peoples:

> ...have demanded recognition of rights that are of a collective character, rights among whose beneficiaries are historically grounded communities rather than simply individuals or (inchoate) states. *The conceptualization and articulation of such rights collides with the individual/state perceptual dichotomy that has lingered in dominant conceptions of human society and persisted in the shaping of international standards.* The asserted collective rights, furthermore, challenge notions of state sovereignty, which are especially jealous of matters of social

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when multiculturalism had previously been present. For an analysis of the weaknesses of these two constitutions and their comparison to the Peruvian and Colombian ones see, Donna Lee Van Cott, 'Constitutional Reform in the Andes: Redefining Indigenous-State Relations' in Rachel Sieder (ed), *Multicuturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan, 2002) 45.

[74] *UNDRIP* addresses this potential conflict by stating in art 1 that 'Indigenous peoples have the right to the full enjoyment, *as a collective or as individuals*, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law'. See also art 7(1).

[75] *ILO 169* art 13(1): 'In applying the provisions of this Part of the Convention government shall respect the special importance for the cultures and spiritual values of the peoples concerned of the 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' (emphasis added). The spiritual links with the land are recognised in arts 25 and 26 of *UNDRIP*.

[76] Cultural integrity refers to several aspects such as language, religion, beliefs, practices and traditions. See Chapter I.

[77] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 58.

[78] A common objection is that this raises several obstacles for implementation. Indeed, the transition to a multicultural and pluriethnic model has been seen as a threat to national unity and stability. This was the case in Mexico in the peace process with the Zapatista armed movement. See, Neil Harvey, 'La difícil construcción de la ciudadanía pluriétnica: el zapatismo en el contexto latinoamericano' (2007) V(001) *Liminar. Estudios Sociales y Humanísticos* 9.

> and political organization within the presumed sphere of state authority (emphasis added).[79]

This challenge to State sovereignty is a persistent problem in international treaties with provisions for the protection of human rights of ethnic minorities and in MEAs.[80] This explains why the *Convention on Biological Diversity* (*CBD*) tends to have a 'fossilisation' interpretation of the cultures and traditions of Indigenous peoples.[81] The drafters of the *CBD* had the perplexing task of reconciling perceptions of biodiversity protection, especially *in-situ* conservation, with how Indigenous peoples interact with the environment. The easy choice was to portray Indigenous peoples as living remnants of the past, rather than as evolving societies.[82] The flaw is evident: nobody would suggest that a European nation, such as the French or the Italians, should return to some 'traditional' lifestyle, abandon technology and shun modern medicine, to be 'authentic'. Nor would they suggest that these nations should cease their cultural development as it stands now, to evolve culturally no further. Governments change, politics change, societies change. Why then force Indigenous communities to fossilise? Again, the Western perspective of what it is to be Indigenous is revealed underneath law and policy.

II.2.1.2. International Case Law Usage

The strong resistance from States of the Western-settler persuasion to the enshrining of collective human rights in international instruments has been voiced in international fora, especially during the negotiation of *UNDRIP*.[83] A cursory reading of the major human

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79 Anaya, above n 77, 59.

80 As discussed in the last chapter, Australia operated under a strict 'one nation' vision under the Howard government, preventing the recognition of the Aboriginal and Torres Strait Islanders self-identification as 'nations' and denying the possibility of legal pluralism. Under Rudd's government issued the official apology in 2008; by February 2014 the campaign for the recognition of Australia's original inhabitants in the Commonwealth Constitution via referendum is underway, after the report of the expert panel on the issue. See, Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012); Constitutional Recognition of Indigenous Australians - RECOGNISE, *It's time to RECOGNISE Aboriginal and Torres Strait Islander peoples in Australia's Constitution. It's the right thing to do.* <http://www.recognise.org.au/>.

81 *CBD*.

82 See, Chapter III.

83 See in this respect Xanthaki's summary of the positions of states such as the United States, the United Kingdom, France and Australia during the negotiation of *UNDRIP*, which range from denying their existence in international law to reservations about the possible confusion they might entail in their relation with other human rights instruments. Alexandra Xanthaki, 'The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 413, 414–416.

rights treaties, including the seven to which Australia is a party,[84] reveal a marked dominance of the rights of the individual. *ILO 169* is the clear exception to this rule, being the only multilateral non-regional binding treaty to date to have and exclusive Indigenous focus, and to have mandatory provisions regarding collective human rights. The first mention of a collective right, in this case the right to cultural integrity as defined in Chapter I of this thesis, is in article 27 of the *International Covenant on Civil and Political Rights*.[85] In this treaty, as in article 3(1) of the *Declaration on the Rights of Persons Belonging to Minorities*, the right is tempered by the choice of exercising it either in a collective or individual fashion: 'Persons belonging to minorities may exercise their rights, including those set forth in this Declaration, individually as well as in community with other members of their group, without any discrimination'.[86] Both instruments retain the focus on individuals rather than the implicitly collective term 'peoples'. As discussed earlier, minorities have struggled against discrimination within their countries, and they fight for integration within the State without having to sacrifice their distinct identities.

Despite the scarcity of express provisions guaranteeing the enjoyment of collective rights, the validity of claiming them has been recognised in international tribunals. Notably, the right has been upheld by the Inter-American Human Rights Court (IAHRC) and by the African Commission on Human and Peoples' Rights (ACHPR). The former's landmark case is *Mayagna (Sumo) Community of Awas Tingni v Nicaragua* (*Awas Tingni Case*),[87] where the court recognised traditional tenure and use of the community's territory.[88] Similarly, the latter stressed in *Centre for Minority Rights Development and Minority Rights Group*

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[84] See the table of human rights treaties ratified by Australia at the beginning of this thesis.

[85] Art 27: '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 practice their own religion, or to use their own language' (emphasis added). *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[86] *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, GA res 47/135, UN GAOR, Supp No 49, UN Doc A/47/49 (18 December 1992) Annex I.

[87] *Mayagna (Sumo) Community of Awas Tingni v Nicaragua (Judgement)* (Inter-American Court of Human Rights, Case No Ser C, No 79, 31 August 2001) ('*Awas Tingni Case*').

[88] The main arguments of the decision are given in S James Anaya and Claudio Grossman, 'The Case of Awas Tingni v. Nicaragua: A Step in the International Law of Indigenous Peoples' (2002) 19(1) *Arizona Journal of International and Comparative Law* 1. Note that this seminal case has spawned a wide array of jurisprudence in the Inter-American Human Rights' Court that has delineated how the obligations of Inter-American human rights systems interact with each of the States. Luis Rodríguez-Piñero Royo, 'El sistema interamericano de derechos humanos y los pueblos indígenas' in Mikel Berraondo (ed), *Pueblos indígenas y derechos humanos* (Universidad de Deusto, 2006) 153.

International on behalf of Endorois Welfare Council v Kenya (*Endorois Case*) [89] that Indigenous peoples are not passive beneficiaries of environmental goods and services; rather, they are active stakeholders. It follows that the only way that the Endorois could truly be in charge was to give them a full property title, rather than possession only, over their ancestral lands, with its attached rights and duties.[90]

The facts of both cases are similar. The Awas Tingni in Nicaragua and the Endorois in Kenya are Indigenous peoples that were forcibly driven from their homelands. The main agent behind the evictions was the government, operating on behalf of a commercial interest over the land's natural resources (timber and rubies). Additionally, part of the Endorois' territory was set aside for a National Park in the fortress conservation style. The claims are also similar: to recognise that the Indigenous groups in question have a prior right to the territory, and that their very livelihoods and identities are compromised by the eviction. In both cases, the tribunals found in favour of the communities.

These two decisions show that it is now possible for Indigenous peoples to take their claims to international fora without the concern of having their claims rejected based on State sovereignty. The language used by the decision-makers in their rulings is strikingly similar, with the common use of expressions such as 'ancestral lands', 'traditional ownership' and 'connection with the land', among others. This is indicative of a move to accept the viability of collective rights in international law, and is a nod towards the importance of cosmovisions and their intangible links to the territory.

These decisions also stress that Indigenous peoples are entitled to some rights interconnected to the right to land; notably the human rights of self-determination, the use and management of natural resources, and freedom of religion by recognising their particular cosmovision. In other words, the decisions reinforce the argument that the five sets of Indigenous peoples' rights that support the collective legal autonomy concerning TEK are interdependent and may collapse with the inadequate recognition of any of them.

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[89] *Centre for Minority Rights Development and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya (Communication)* (African Commission on Human and Peoples' Rights, Case No 276/2003) ('*Endorois Case*').

[90] For an analysis on this case see, Cynthia Morel, 'Conservation and Indigenous Peoples' Rights: Must One Necessarily Come at the Expense of the Other?' (2010) 17(Exploring the Right to Diversity in Conservation Law, Policy, and Practice) *Policy Matters* 174.

It would appear then that collective human rights exist because there are positive rules that declare them and judicial decisions that enforce them. However, this reasoning does not seem sufficient to conceptualise the relationship with the land. Remember that this is a matter of identity, which leads into the next point.

II.2.2. Does it Make Any Sense to Talk About Collective Rights?

According to García Amado, it does make sense to talk about collective rights, but only in a trivial way. As an example, he talks about collective rights that have been created by positive law, such as for corporations. He argues that the fact of having a Constitution or other bill of rights recognising groups of peoples as rights-holders does not provide a sufficient theoretical foundation for the existence of collective rights. It only attests to the existence of certain groups, such as families.[91]

The objection that García Amado raises may seem obvious to a positivist. However, think of the counterexample. What happens when, instead of recognising rights to groups, the law denies them? García Amado uses some particularly disturbing accounts from the Nazi regime as a criticism for identifying blindly or forcibly with a group, and for claiming rights solely by belonging to said group.[92] Horkheimer and Adorno raised a similar critique, highlighting the risk of coercion that can be strengthened for denying the personal self, sacrificed at the altar of the collective. Uniting this manipulated collective thus results in the triumph of a 'repressive *égalité*'. [93]

It is revealing that these examples and others, referencing for instance the Franco regime or the validation of the Catholic Church in the crusade against modern infidels in the 1930s,[94] refer to collective rights whose entitled rights-holders belonged to the ruling majority. It is also remarkable that said rights are usually designed as tools to oppress or otherwise discriminate against minorities. In that sense, the censure to the collective as a 'herd' manipulated by power holders lives under an illusory sense of belonging. This population may never realise that they are being manipulated, especially where they belong to the *favoured* group. Thus, the hallmark of these collective rights is that they

[91] García Amado, above n 54, 178–179.
[92] See, ibid 183–184.
[93] Horkheimer and Adorno, above n 1, 9.
[94] García Amado, above n 54, 186.

enable exclusion and discriminatory practices, begging the question of whether this applies to the political aspirations of Indigenous peoples and other historically marginalised minorities. The next point addresses this question.

II.2.2.1. Minorities and Collective Rights

The existence of exclusion, discrimination or disempowerment is the link that has united minority groups everywhere. The bonds may even be stronger between groups that have been denied some particular rights, as compared to those whose rights have been protected.[95] One of García Amado's strongest criticisms of collective rights is that the indiscriminate use of the term 'minorities' often serves as a justification for them, omitting any further explanation. Thus, the term becomes practically a buzzword that prevents legal philosophers from seriously reflecting on the theory of collective rights. As much as one can distrust the word 'minorities', it cannot be lightly discarded as a 'cliché', as the author seems to suggest.

If one thinks about ethnic or cultural minorities, it may be possible to discern a particular group's identity and its link to collective rights, especially the rights to self-determination and cultural integrity.[96] Mitnick encapsulates this in the notion of 'constitutive rights', which are those rights that, by being fought for, come to define a group. As Mitnick explains: 'Human beings are never merely self-constituted. Human beings are, in part and as well, constituted by rights'.[97]

Mitnick's suggested 'constitute rights' represent a third category of rights, adding to those of 'special' and 'general' rights as proposed by Hart.[98] The critique to Hart is rooted in the difficulties of finding a right that encompasses all of humanity as rights-bearers. It is almost impossible to have a universal group entitled to positive rights, because even general rights are situated in particular rather than universal legal systems. This means

[95] Eric J Mitnick, 'Constitutive Rights' (2000) 20(2) *Oxford Journal of Legal Studies* 185, 190.

[96] See eg, *UNDRIP* art 9: 'Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right'.

[97] Mitnick, above n 95, 186.

[98] Ibid 193, citing HLA Hart, 'Are There Any Natural Rights?' in J Waldron (ed), *Theories of Rights* (1984) 77, 84–88.

that there will always be people excluded from the set, where social groups are 'discernible only against a background of difference'.[99]

What then is a constitutive right and what is its relevance? A constitutive right does not arise from particular relationships of transactions, thus it cannot be considered a 'special' right. Nor can it be considered a general right, because it does not 'presume to protect the interests of every person'.[100] Rather, a constitutive right is a kind of right that 'includes only some while obligating many'.[101] Constitutive rights are not common because, first, the groups that hold them usually do not have the sufficient pull to have them crystallised into laws, and, second, when that happens there have to be sufficient reasons to grant them. These reasons have to be based on social justice parameters.[102]

Applying this theory to the rights of Indigenous peoples, it can be seen that the definition fits. The rights fought for by the Indigenous movement in international forums are not special rights, given that they do not involve just one individual in a particular transaction. Neither are they general because they are not applied universally. This leaves the constitutive rights option. It may be possible to ascertain that the human rights of Indigenous peoples are constitutive rights because their rights-bearers are small social groups that are clearly defined, while obligating the entire members of the State in which the groups are located.

However, there is another way to define a constitutive right that challenges this theory. In the plainest sense, a constitutive right is a right that creates an otherwise inexistent legal situation. Thus, if one were to apply this definition, recognising, for example, the right to land would mean to deny the pre-existent relationship with ancestral territories. Maya Aguirre uses this argument to highlight that the lack of property titles to ancestral territories is irrelevant in the claim 'because the object of protection is the ancestral occupation'.[103] However, this is not the meaning that Mitnick uses. Yet, compelling as his argument is, some might be tempted to see it as circular. If dispossession is the characteristic that binds a group, did the group exist in the first

[99] Mitnick, above n 95, 194.
[100] Ibid 197.
[101] Ibid 197.
[102] Ibid 198.
[103] The author draws this observation from the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Ana Lucía Maya Aguirre, 'El derecho a la consulta previa en las decisiones de la Organización Internacional del Trabajo contra el Estado colombiano' (2009) 40 *El Otro Derecho* 75, citing CEACR, 'Observación Individual del Convenio 169 sobre Pueblos Indígenas y Tribales, 1989 Colombia (ratificación 1991)', 2007.

place? The answer is yes, and it brings the opportunity to reconcile the argument of why some social groups are entitled to collective rights.

II.2.3. Social Groups: What Makes Them So Special? Individualist and Collectivist Approaches

The individualist and the collectivist schools of thought may be used to challenge the notion of constitutive collective rights, by questioning the validity of the groups entitled to them.

II.2.3.1. Individualist School

A clear objection to constitutive collective rights comes from the individualist school of thought. An individualist may assume that there is nothing whatsoever in a group that would make it deserve a differential treatment. García Amado posits that this is because groups are an association of individuals that seek to obtain goods or defend interests that would otherwise be unattainable. The fact that such associations are based on a greater affinity because of common language, beliefs or a shared culture is inconsequential; these are solely factors that facilitate the grouping and do not constitute reasons for the group to have a life of its own or for it to become a 'personal' subject of its history and destiny.[104]

How then can discrimination towards other groups be justified? It can only be based on the rational egoism of the grouped individuals that wish to procure a preferential treatment for the other members of the collective. These are pragmatic reasons, they are neither ethical nor ontological, thus there would seem that there is no serious argument to justify a differential treatment.[105]

However, this objection is not entirely accurate. The individuals belonging to social groups of the kind entitled to collective rights are not necessarily in league merely to obtain some individual benefit, only possible through association with similar individuals. In regards to Indigenous peoples, there is a clear drive towards the collective definition of their rights, which, as seen in the previous section, corresponds to Mitnick's category

[104] García Amado, above n 54, 185.
[105] Ibid 185.

of constitutive rights. This move has been consistent in international forums and was a common theme during the negotiation of *UNDRIP*, contributing to why signing the instrument took roughly 15 years to achieve.[106]

Expanding on Mitnick's theory, a group needs to reach a level of cohesiveness much greater than a simple *animus societatis* for being a constitutive right-holder. Mitnick imagines an associational scale ranging from pure individual status, to simple affiliate, to a collective social group. He posits that the first two categories are straightforward, whereas the third category is conditional on something remarkable; that is, on 'a virtually organic moment ... that occurs only upon the creation of a group character of common status strong enough to define a meaningful aspect of each individual member's social identity'.[107] A fourth stage should be added here: a community. This final phase couples the collective understanding from the third stage with some form of collective action. Indigenous peoples can be included in the fourth stage. The collective action they take is strong, vocal and coherent. Despite these being very different cultures, speaking different languages and sharing disparate beliefs, they are united in their aims. The international and domestic legal systems are slowly changing to incorporate their claims.[108]

It must be stressed that Indigenous communities are not solely associations of individuals. Their members share much more than a fleeting interest in collective action. This is the position in Colombia, as stated in one of the first decisions of the Constitutional Court addressing this issue. In the *Exile and Confiscation Case*,[109] the Court stressed that the legal definition of Indigenous communities cannot be reduced to the terms of the right to free association enshrined in the Constitution.[110] The very identity of each individual is tied to a sense of community that would be compromised if unprotected or discriminated against by the social majority. Cases abound illustrating this

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[106] See, Dwight G Newman, 'Theorizing Collective Indigenous Rights' (2006–2007) 31(2, Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law) *American Indian Law Review* 273, 275–276.

[107] Mitnick, above n 95, 191.

[108] Documents such as the Martínez Cobo report validate this claim. The demands for the five sets of rights have steadily made their way in international documents, and their evolution can be seen from *ILO 169* to *UNDRIP*. Martínez Cobo, above n 26.

[109] This judgement applied directly the criteria of art 1 of *ILO 169* to assess the status of Indigenous communities, rather than the constitutional right of free association. Constitutional Court, *Judgement T-254/1994* ('*Exile and Confiscation Case*').

[110] Art 38 'guarantees the right of free association for the development of the various activities that people perform in society'. *Colombian Constitution 1991*.

phenomenon.[111] Thus, can a collectivist discourse be a solid solution to approaching the collective rights of Indigenous peoples?

II.2.3.2. Collectivist Thoughts and Their Contradictions

One of the strongest criticisms to the collectivist school is its artificial status. As García Amado points out, collectivist theories might present themselves as the liberators of oppressed nations and peoples without dwelling on the theoretical hurdles. For instance, suppose that there is an oppressed group claiming a set of rights and that these rights, which are different from those available to other groups, are granted. The group is thus substantialised. However, this substantiation entails that other groups would also have *their* rights justified, substantialised by default.[112] The author argues the misuse of the umbrella term 'collective good' to sacrifice individual rights and civil liberties,[113] often seen, for example, in totalitarian regimes. However, this criticism should not be directed towards the existence of collective rights *per se*, but rather towards the authorities that enforce them to their own end.

Paradoxically, the techniques that impose the prevalence of the 'collective good' over individual rights and liberties have been the main theoretical tool to justify the dispossession and assimilation of Indigenous peoples. Whenever a majority that embraces an extreme collectivist discourse is in power, the legal system will not have room for embracing any kind of multicultural view. Minorities are thus inevitably subsumed and assimilated in a forced acceptance and identification with the majority society.[114] These reflections can be linked to the five interrelated sets of collective human rights of Indigenous peoples. The plight of Colombian, Australian and other Indigenous communities around the world revolves around the recognition of the different worldviews they hold; of their particular cosmovisions. This recognition demands the

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[111] Refer to the critique of *terra nullius* and the stolen generations in Australia in Chapter III.

[112] As an example, García Amado uses the following: 'if it is reproachable to interfere in the freedom of religion of certain Indigenous peoples, then the same holds true for interference with the practices of any Christian group' (translated by the author). García Amado, above n 54, 187.

[113] For instance, García Amado questions the prohibition of using labels in languages other than French in Québec, a measure taken to prevent the language from being replaced in Canada. This would safeguard the linguistic base tied to the collective identity of the Québécois. Ibid 188.

[114] As other sections of this thesis have argued, one of the main problems in Australia and Colombia after the drafting of their Constitutions was the need to create a national identity. This new identity excluded points of view that did not follow the mainstream. For instance, even after the 1967 Referendum in Australia and the *Mabo* decision in 1992, the 'one nation' vision remained. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo No 2*').

acknowledgement, validation and legal protection of cultural identities, which are compromised by assimilationist policies.[115] Thus, it is possible to apply the collectivist discourse to minorities, not as a tool to enforce homogenisation, but as a recognition of their right to be different.

II.2.4. Reconciling the Interests of the Group with the Ambitions of Each of Its Members: Should One Prevail Over the Other?

An often-cited criticism of collective rights is their tense relationship with individual rights. Which interest should prevail? Are the group's interests the interests of a *group entity* or rather the *aggregate* of the interests of its members? This question is addressed from the perspective of the collective right to land. The protection of rights is of seminal importance for the protection of biodiversity, as will be seen in the case studies further in this chapter. Thus, this is a convenient point to close this reflection.

The collective right to land of Indigenous peoples transcends the simple enjoyment of a commons. This assertion begs an explanation of why the often-cited essay by Garret Hardin, *The Tragedy of the Commons*, has been mistakenly used to discredit or otherwise discourage common ownership.[116] The commons were understood as assets so valuable that they should be part of the public trust for the benefit and enjoyment of everyone. They should never be in the private control of one individual. The rationale behind this is that these assets, lands or services are vital to the survival and well-being of entire human populations. Think for instance of the case of the Cochabamba water wars in Bolivia. In this example, the government privatised the water supply service, with the contract having the perverse effect of forbidding people from drawing water from aquifers or collecting rainfall. A large percentage of the population living in the metropolitan area had an income of less than two dollars a day and now had to pay a quarter of this to access drinking water.

Hardin's theory is based on the conception of property of John Locke, whose perspective has informed legal regimes and notions of property in Western systems,

[115] Contrary to *UNDRIP* art 8(1): 'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture'.

[116] This paper was discussed in Chapter III in regards to its convenience to discredit community-based strategies. Garrett Hardin, 'The Tragedy of the Commons' (Pt American Association for the Advancement of Science) (1968) 162(3859) *Science* 1243.

including in Common Law and Civil Law. The basis for private property is the underlying desire of every person that has access to the commons to pursue an individual gain. The key value is the individual productiveness of a person, maximising the yield of the land to make as much profit as possible. This would then mean that if such an individual could abuse the commons by free riding, he or she would have a competitive advantage over the other less business-savvy members of the group. However, this notion of individualistic drive is not applicable to the collective ownership concepts of several Indigenous cultures. They understand that if every member of the commons took more than their share, the commons would eventually be depleted.[117] A corporate vision of the world would say who cares? The profits were made and the money was seen immediately. Future users will have to find another pasture, forest, fishery, stream, mine, and so on. Environmentalists see the flaw in this way of thinking, and fight for future generations to have continued access to at least the same range of resources as are currently available. This is the foundation of sustainability.

For Indigenous cultures, many of the cosmovisions that inform the ways to manage the world provide an understanding of the land as an indivisible connection between the physical and spiritual worlds. This spiritual approach usually involves a sense of responsibility, and of understanding that the land does not belong to the people; the people belong to the land.[118] In Colombia, as for many other cultures, how the land can be used depends on the protection of sacred sites. These sites need to be accessible to all members of the group to visit, pay their respects and give offerings (*pagamentos*).[119]

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[117] See the discussion on coevolution in the last chapter.

[118] In the nomination file of the listed intangible heritage of humanity *The Jaguar Shamans of Yurupari*, the communities explain in great detail the meaning of sacred sites, which goes beyond their physical aspects, and into the intangible spiritual components. The case study further in this chapter refers to this relationship. See, Ministerio de Cultura de Colombia, 'Nomination of the Traditional Knowledge for the Management of the World of the Indigenous Groups of the Pirá Paraná River, Hee Yaia˜Kubua Baseri Keti Oka for Inscription on the Representative List of the Intangible Cultural Heritage of Humanity in 2011' (Nomination File No 00574, UNESCO-Intangible Cultural Heritage, November 2011).

[119] The case of the Indigenous peoples of the Sierra Nevada de Santa Marta in Colombia illustrates this. The shape of this coastal mountain is roughly triangular, and the peoples that inhabited it see this triangle as delimited by a *Línea Negra* or 'Black Line' connected by sacred sites. These places have to be visited regularly to present offerings or *pagamentos*. The functioning of the Sierra and the world around it depends on these traditions. This creates serious conflicts with the land-owners and the State. See the comments on the cosmovision of the Sierra Nevada and the *Línea Negra* in Ulloa, *El nativo ecológico – Complejidades, paradojas y dilemas de la relación entre los movimientos indígenas y el ambientalismo en Colombia*, above n 34, 123–150. See also the opposition to the mega-infrastructure development of the Puerto Brisa harbour, in Consejo Territorial de Cabildos de la Sierra Nevada de Santa Marta, 'Posición indígena de al Sierra Nevada de Santa Marta frente a los proyectos multipropósito Puerto Brisa en Dibulla, Represas en Besotes y Ranchería: Afectación a Nuestras Culturas' (Position Paper Asociación de

Considering further the belief in the existence of a relationship between worlds that necessitates maintaining harmony and balance, it is in the best interest of every member of the group that the sites remain healthy. Were these sites to be divided and the pieces individually adjudicated to each member of the group, the integrity of the world would be compromised. These deep relationships with the land contrast drastically from those underpinning Hardin's theory, which is nevertheless usually applied to every common, without differentiating between particular groups' visions and beliefs.[120]

This section has shown that collective rights are not necessarily incompatible with the individual rights of each of the members of the people to which they are entitled. Under this framework, to reduce the aspirations of Indigenous peoples to the provisions of the *CBD* and the *WHC* is inadequate. The next section addresses the increased protection of cultural rights by means of the implementation of the *Intangible Heritage Convention* (*CSICH*).

II.3. Intangible Heritage: Reinforcing Human Rights through Cultural Integrity[121]

The *CSICH* has been appropriated as a legal tool by Indigenous peoples and other cultural and ethnic minorities to counter the favouritism towards the protection of tangible heritage. The appropriation of the Convention in Colombia has given minorities a voice in the legal arena.[122] To see their traditions as intangible heritage, both of the country and of humanity, gives the communities the validation that has been denied for too long. This is indeed the case for the Latin American ethnic minorities in general, who have been recently represented on the Intangible Heritage List.

Poblaciones de Montañas del Mundo, 1 October 2010) <http://www.mountainpeople.org/documents/posicionfrenteamegaproyectos.pdf>.

[120] Empirical studies have disproven the applicability of the Tragedy of the Commons to all instances of communal ownership. See, among others, the works by Elinor Ostrom. Eg, Elinor Ostrom, *Governing the Commons–The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).

[121] The contents of this subheading are based on part of a co-authored peer-reviewed article, presented at the Heritage 2012 Conference. See, N Rodríguez-Uribe and D Rodríguez-Uribe, 'Emerging Indigenous Voices: Safeguarding Intangible Heritage in Colombia and the Reaffirmation of Cultural Rights' in Rogério Amoêda, Sérgio Lira and Cristina Pinheiro (eds), *Heritage 2012–Proceeding of the 3rd International Conference on Heritage and Sustainable Development* (Green Lines Institute for Sustainable Development, 2012) vol 2, 1469, 1474–1475.

[122] See the case study of the Jaguar Shamans of Yurupari further in this Chapter (subheading IV.2).

The key factor to highlight on the subject of this convention is the empowerment of different communities by promoting the recognition of the difference as a value. The deviation from the unifying stance of the *WHC*, linked to the nation construction processes of the twentieth century, is the cause of contention. As Logan comments, the fact that intangible heritage is 'embodied in people rather than inanimate objects … [opens up] a Pandora's box of difficulties, confusions and complexities'.[123]

The using of the tools by the communities to suit their own needs, and as a means to restore cultural rights, results in the 'appropriation' of the international instrument by the communities. Even though, as stated before, a wide array of constitutional provisions seek to protect and foster cultural diversity, the mechanisms put in place in Colombia as part of the obligations of the CSICH complemented these by providing international visibility and facilitating interpretations that link tangible and intangible aspects of culture.

As elaborated in the case study below, in the process for listing the *Traditional Knowledge of the Jaguar Shamans of Yurupari*, the communities strayed from the pure meaning of safeguarding intangible heritage; that is, to ensure its respect, raise awareness and ensure mutual appreciation (CSICH: art. 1), instead using it to enforce cultural rights. There is an activist element in their interpretation, echoing the aim of the *Policy for the safeguarding of the intangible cultural heritage* (Safeguarding Policy). Table 7 lists the Colombian tangible and intangible heritage recognised by UNESCO.

[123] William S Logan, 'Closing Pandora's Box: Human Rights Cunundrums in Cultural Heritage Protection' in Helaine Silverman and D Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer Science + Business Media, 2007) 33, 33.

TABLE 7. COLOMBIA ON THE UNESCO TANGIBLE AND INTANGIBLE HERITAGE LISTS

CONVENTION	NAME	YEAR
WHC (Cultural)	Port, Fortresses and Group of Monuments, Cartagena	1984
	Historic Center of Santa Cruz de Mompox	1995
	National Archeological Park of Tierradentro	1995
	San Agustín Archeological Park	1995
	Coffee Cultural Landscape of Colombia	2011
WHC (Natural)	Los Katíos National Park*	1994
	Malpelo Fauna and Flora Sanctuary	2006
CSICH (Intangible)	The Carnival of Barranquilla	2008
	The Cultural Space of Palenque de San Basilio	2008
	Carnaval de Negros y Blancos	2009
	Holy Week Processions in Popayán	2009
	Marimba music and traditional chants from Colombia's South Pacific Region	2010
	The Wayuu normative system, applied by the Pütchipü'üi (palabrero)	2010
	Traditional knowledge of the jaguar shamans of Yurupari	2011
	Festival of Saint Francis of Assisi, Quibdó	2012

* Also on the UNESCO In Danger List 2009. Adapted from UNESCO World Heritage Lists.[124]

III. COLOMBIA: APPLYING A HUMAN RIGHTS–BASED FRAMEWORK TO BIODIVERSITY CONSERVATION

Seeing the philosophical underpinnings that cement the model proposed in this thesis, this section argues the following:

1. Indigenous peoples in Colombia are not only entitled to universal individual human rights framed in the Constitution and on international agreements. They are also entitled to collective human rights.
2. The collective human rights enjoyed by Indigenous peoples in Colombia comply with the five sets of rights recognised by international law specialised standards: a) self-determination and governance autonomy, b) territories and resources, c)

[124] UNESCO, *World Heritage List* <http://whc.unesco.org/en/list/>; UNESCO, *Lists of Intangible Cultural Heritage and Register of Best Safeguarding Practices* <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011>; UNESCO, *List of World Heritage in Danger* <http://whc.unesco.org/en/danger/>.

public participation and consultation d) cultural integrity and e) non-discrimination.

3. The collective legal autonomy concerning TEK exists in Colombia and this autonomy belongs in the category of Indigenous peoples' human rights because it derives directly from the application of these collective rights. Note that this category is not trivial;[125] it can position Indigenous peoples at the forefront of the design and administration of management initiatives for biodiversity conservation based on TEK, which reach a Pareto optimal solution to the collision of interests.

As in the High Court of Australia, the Colombian Constitutional Court has sole jurisdiction over constitutional disputes. Nevertheless, it arguably has broader powers in this respect, as it is a specialised tribunal.[126] The implementation of the transplanted Common Law precedent doctrine to its decisions has been controversial, but has also contributed to the creation of normative coherence by the parameters of interpretation of the Constitution in its rulings. Other agencies are the Office of Indigenous, Minorities and Rom Affairs of the Ministry of Interior,[127] in charge of liaising with ethnic and other minorities in the country representing the Executive power, and the permanent Table of Indigenous Affairs.[128]

In Colombia, the involvement of Indigenous communities in environmental protection is not ruled by the norms and principles of environmental law, especially those contained in the *CBD*. Rather, the implementation and judicial enforcement of a human rights–based approach has given Indigenous communities the legal tools to have their

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[125] Refer to García Amado, above n 54.

[126] For example, in the terms of art 241 of the Constitution, the Court has, among others, the functions of 241(1) deciding on the constitutionality of the call for a referendum or a constituent assembly to amend the Constitution. Note that the Court does not decide on merits in this instance, but only on procedural flaws. It also has the function 241(9) to review, in the manner prescribed by law, court decisions related to the application for protection of constitutional rights. It also has the task of automatic judicial review of every treaty signed by the country. Thus, the Court has the last word over the constitutionality of the treaties and their approval laws and, if negatively received, the treaty will not be ratified or the specific reservations will be made to the text. Art 241(10) (translated by author).

[127] The term 'Rom' in Colombia refers to people self-denominated as gypsies and they were declared as distinct ethnicities in the coutry, with the special constitutional protections entitled to ethnic minorities in 1999. See, Ministry of Interior (Division of Ethnicities), *Resolution 022 of 2 September 1999*, cited in Departamento Administrativo Nacional de Estadística, above n 25.

[128] The Permanent Table of Indigenous Affairs is a forum created in 1996 to 'negotiate between the Indigenous representatives and the State all of the administrative decisions and legislation that might affect them, to evaluate the application of the State's Indigenous policies ... and to monitor the compliance with the agreements reached,' (translated by author). *Executive Decree 1397 of 1996 Creating the National Commission of Indigenous Territories and the Permanent Table of Indigenous Affairs, and Enfocing other Provisions* art 10.

cultures respected. The possibility to apply, revitalise, cherish and develop their TEK is associated with this protection, which has resulted in the enhanced safeguarding of biodiversity in the country. The foundational principle for the protection and promotion of the human rights of Indigenous peoples and other ethnic minorities in the country is article 7 of the Constitution, which states that the State recognises and protects the ethnic and cultural diversity of the country. Article 70 complements this by vesting the State with the responsibility of promoting and fostering access to culture, and supporting the creation of a national identity. Culture, thus, becomes the foundation of nationality. Other rights include that Indigenous languages are official within their territories and education should be bilingual (articles 10 and 68), traditional territories are collectively owned, bringing with it an administrative capacity (arts 63, 286, 320), and governance autonomy and customary law is recognised within their lands (art 246).

This first part analyses the provisions in place for the five sets of rights that should be guaranteed to Indigenous peoples; the second presents two case studies in which the different mechanisms available have been used by Indigenous peoples in defence of their territory, directly contributing to the conservation of biodiverse areas. Recall that the main criticism raised against fortress conservation in Chapter II was that it did not acknowledge the role that certain peoples and communities had in the site's management and its apparent 'pristineness'. In Chapter III, the strategy of including Indigenous peoples in conservation strategies only under the monitoring and partial control of the State was argued to be a managerial approach that did not respond to the aspirations of Indigenous peoples, nor make amends for the historical debt owed to these minorities. This part shows that the collective legal autonomy concerning TEK applied in Colombia balances the two legally protected interests of biodiversity conservation and the human rights of Indigenous peoples in a Pareto optimal solution.

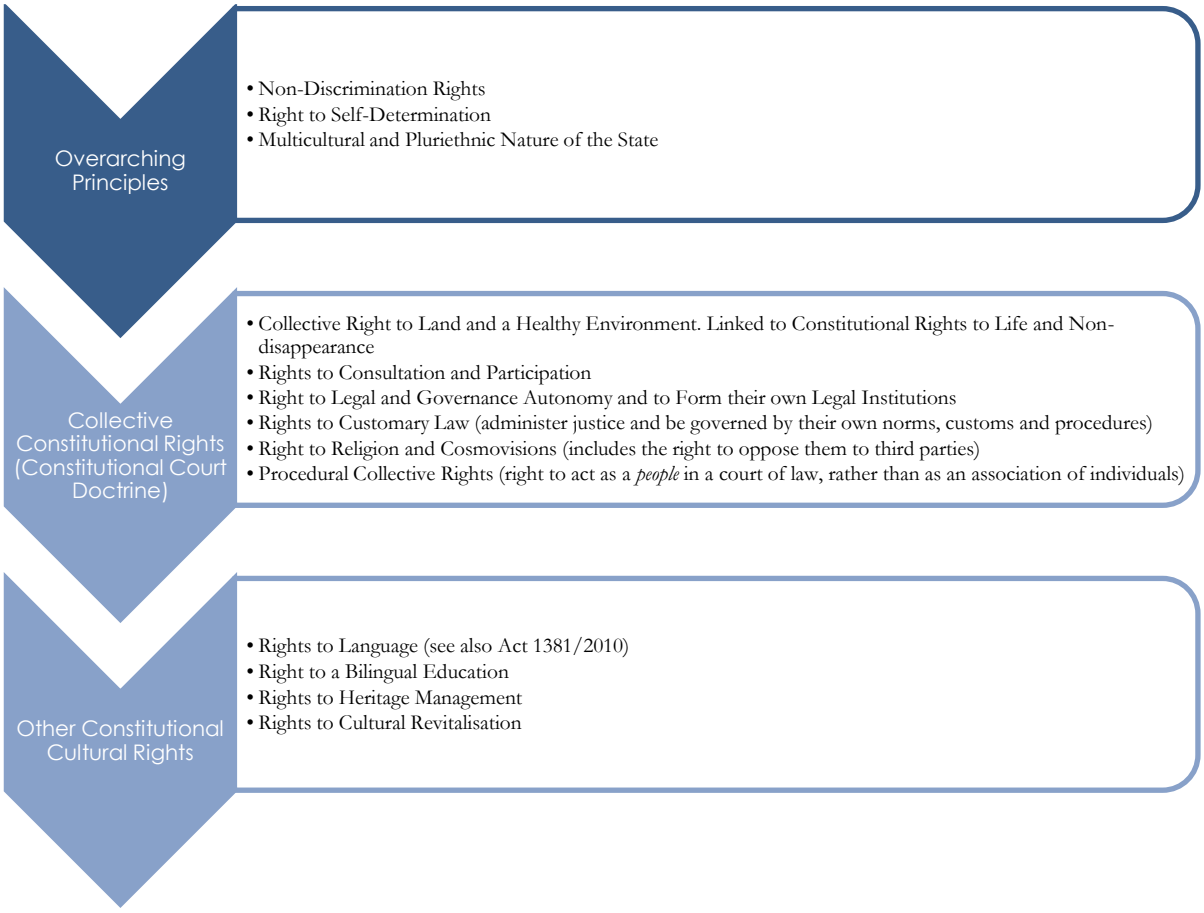

FIGURE 6: RIGHTS AND PRINCIPLES OF THE COLLECTIVE LEGAL AUTONOMY CONCERNING TEK OF INDIGENOUS PEOPLES

The approach to ethnic minorities in the case law of the Constitutional Court is perhaps unique in its thoroughness. This framework is formed by a strong rights-based body of normative doctrine that supports the legal autonomy of Indigenous peoples and ethnic minorities (namely, communities of African Descent) to apply their TEK in the territories they occupy or otherwise use. Under this framework, these communities have demonstrated their effectiveness in the environmental arena. In the 21 years that the Constitution has been in force, there has been a notable shift in the interpretation of rights and the participation of these minorities. Whereas in 1991 these minorities were still seen in a patronising light, after the latest rulings of the Constitutional Court, they can now be considered complete political actors. This means that participation spaces are now available whereby the peoples protected by *ILO 169* can influence political, legislative and administrative processes. Notably, they can trust the Court to safeguard

the intrinsic value that their cosmovisions, customs and traditions have for the pluralist spirit of the State.[129]

III.1. The Principle of Ethnic and Cultural Diversity

The Constitutional Court has taken strong steps to reaffirm that Colombia has moved away from the assimilationist paradigm spawned by the *indigenista* policies pervading the country,[130] and the region, since the 1930s. This perspective had an international echo in the *ILO 107* and in the *Organization of American States* forum, both of which pursued a clear assimilationist aim.[131] Here multiculturalism, as a legal tool rather than an intangible notion, has been used to reject the trend towards dispossession remaining from the colonial regimes.

The Constitutional Court has been proactive in fostering the recognition of Indigenous peoples as valuable members of democracy that should have an equal footing in the decisions that concern them. This is one of the reasons behind the consistent strengthening of the right to prior consultation; the Court has been explicit in reminding the Colombian people that this is an affirmative action provision, elevated to the rank of a constitutional human right, that seeks to guarantee that the protection of multiculturalism in Colombia does not stay as a romantic declaration within the Constitution. In the *Collective Right to Life Case*, the Court provided the following definition of the principle of diversity:

> For the Court, the principle of diversity and personal integrity is not only a rhetorical declaration. Rather, it is a projection, in the legal plane, of the democratic, participatory and pluralistic character of the Colombian republic, based on the "acceptance of the otherness linked to the acceptance of the multiplicity of forms of life and worldview systems different from those of the Western culture." The Constitution allows the individual to define his identity based on their specific differences and in concrete ethnic

[129] *Colombian Constitution 1991* art 7.

[130] The *Indigenista* policies were characterised by the assimilationist approach towards Indigenous peoples in Latin America. These policies were influenced by the expert panels of the ILO, and first influenced and then implemented *ILO 107*. Refer to the comments on assimilation in the last chapter. For a review of the literature, refer to Chris Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993' (1994) 16 *Human Rights Quarterly* 1.

[131] Rodolfo Stavenhagen, 'Indigenous Peoples and the State in Latin America: An Ongoing Debate' in Rachel Sieder (ed), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan, 2002) 24, 27.

> and cultural values, instead of conforming to an abstract and general concept of citizenship, such as the one defined by the States that are liberal, unitary and monocultural. This translates in a valid pursuit to adapt the law to the social realities, with the objective of satisfying the recognition necessities of those groups whose defining characteristic is their difference in matters of race or culture.[132]

Following the previous assertions, the Court, perhaps taking an over-apologetic stance, has insisted on moving away from the doctrine of assimilation previously fostered by *ILO 107*. By specifically denouncing the previous assimilationist policy, the Court's judgements have had the effect of slowly opening efficient participation spaces to Indigenous peoples where their own cosmovisions, development aspirations, priorities and cultural identities are respected, encouraged and recognised as an invaluable part of the Colombian heritage. Moreover, the Court links the rights of participation that resonate with the multicultural dialogue posited by Young,[133] by stating:

> In sum, the recognition of ethnic and cultural diversity obeys in the one hand to the imperative of building a democracy every time more inclusive and participatory. On the other, it is consistent with the conception of justice as an incomplete ideal if it does not satisfy the recognition of the rights to redress of individuals and communities'.

For this democratic inclusion to work progressively, it is necessary to have in place mechanisms to prevent and redress discrimination, while guaranteeing inclusion at all levels of society and equal treatment before the law.

III.2. Non-Discrimination and Affirmative Action

Indigenous peoples have been historically discriminated against and marginalised by society. This creates an imbalance between ethnic minorities and the majority society that cannot be easily corrected by passing antidiscrimination laws. As seen in the case of Australia in the last chapter, the *Racial Discrimination Act 1975* (Cth) has not been sufficient to counteract the effects of more than two centuries of abuse. This is particularly the case where the Act's operation and, more importantly, challenge

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[132] Constitutional Court, *Judgement T-380/1993* ('*Collective Right to Life Case*') (translated by author).

[133] 'Multiculturalism is the specific effort to create institutions and events to which everyone in the society in principle has access, which publicly affirm and bring together society's diverse languages, symbols, historical narratives, imagery, musical traditions, and so on'. Young, 'Thoughts on Multicultural Dialogue', above n 28, 117. See also the comments on autonomy and multiculturalism in Section II of this chapter.

mechanisms and standing, can be suspended at will to pass discriminatory measures such as the *Northern Territory Emergency Response*.[134]

The Colombian Constitution of 1886 did not have any specific mention to non-discrimination or race. However, it did include a complete prohibition of slavery and a declaration that any escaped slave from another country would be freed just by the act of touching Colombian soil.[135] The omission reflects the nation-construction exercise explained before; Colombia worked with one univocal *mestizo* identity.[136]

In addition to the denomination of Colombia as a multicultural country with a plurality of ethnicities,[137] the Constitution has equality before the law and non-discrimination as constitutional rights. The provision mirrors the *Racial Discrimination Convention* in its first paragraph, by stating that:

> All persons are born free and equal before the law, shall receive the protection and treatment from the authorities, and shall enjoy the same rights, liberties and opportunities without discrimination by reasons of sex, race, national or family origin, language, religion or political or philosophical opinion.[138]

This goes beyond a mere prohibition or equality statement by adding that 'the State shall promote the conditions for this equality to be real and effective and will adopt measures in favour of discriminated or marginalised groups'. Moreover, and to extend the possibility of affirmative action to vulnerable sectors of society, the article adds that 'the

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[134] Anaya notes that the NTER 'has an overtly interventionist architecture, with measures that undermine indigenous peoples' self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy ... The Special Rapporteur cannot avoid observing that, on their face, these measures involve racial discrimination'. S James Anaya, *Report by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People. Addendum, The Situation of Indigenous Peoples in Australia*, 15th sess, UN Doc A/HRC/15/ (4 March 2010), Appendix B, §§ 13–14. See also *Northern Territory National Emergency Response Act 2007* (Cth) and its superseding legislation, *Stronger Futures in the Northern Territory Act 2012* (Cth).

[135] *Colombian Constitution 1886* (now repealed) art 22.

[136] The word *mestizo* means 'of mixed race'. Chaves and Zambrano posit that the term *nación mestiza* was born in the nineteenth century to denote a shameful 'past' of racial mixing and set the pace for a new nation construction process with a homogenising aim. While retaining some racial hierarchies, the concept sought to gradually incorporate and assimilate Indigenous and black populations towards 'whitening'. Margarita Chaves and Marta Zambrano, 'From *Blanqueamiento* to *Reindigenización*: Paradoxes of *Mestizaje* and Multiculturalism in Contemporary Colombia' [5] (2006) 80(abril) *Revista Europea de Estudios Latinoamericanos y del Caribe/European Review of Latin American and Caribbean Studies* 5, 6–8.

[137] *Colombian Constitution 1991* art 7.

[138] *Colombian Constitution 1991* art 13. This provision is also similar to the unlawfulness of racial discrimination in Australia: 'It is unlawful for a person to do any act involving a 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 the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'. *Racial Discrimination Act 1975* (Cth) s 9(1).

State shall especially protect those persons that, by reason of their economic, physical or mental conditions, are in a situation of manifest weakness and will sanction the abuses or ill-treatments committed against them'.[139] This provision has helped Indigenous peoples and Afro-Colombian communities to have their rights protected by the Constitutional Court, as seen in the case of the application of the ecosystem approach in the Chocó region.[140]

Another affirmative action provision was the creation of two additional seats in the country's Senate, elected only by Indigenous peoples throughout the territory. The candidates are required to have held the office of traditional authority in their respective communities or to have been the leaders of an Indigenous organisation.[141]

III.3. The Right to a Healthy Environment: Conceptual Differences

The 'ecological constitution' of 1991 enshrined the collective right of all Colombian citizens to a healthy environment in article 79. There is, however, a conceptual difference between this general right and the collective right to the environment of Indigenous peoples and ethnic minorities. The Constitutional Court has developed differentiated normative principles for ethnic minorities, based on the special and recognised relationship they have with their lands; a relationship that transcends mere ownership and enters the realms of the spiritual. Thus, the protection of the environment in the lands occupied or used by Indigenous peoples can be construed as an entity inextricably linked to their collective human right to life as a *people*. Note that the Court's ruling challenges the arguments raised by García Amado, who dismisses Indigenous groups as no more than fleeting associations of like-minded individuals:[142]

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[139] Note that in 2011, the Congress passed a legislation criminalising acts of discrimination in an amendment to the *Criminal Code*. See, *Act 1482 of 2011 Modifying the Criminal Code and Enforcing other Provisions* (Colombia).

[140] Note that ethnic minorities in Colombia have been especially affected by the armed conflict that has ravaged the country for the better part of a century. For a study on black communities as victims of forced displacement by armed groups (guerrillas and paramilitary), see César A Rodríguez Garavito, Tatiana Alfonso Sierra and Isabel Cavelier Adarve, *El desplazamiento afro: tierra, violencia y derechos de las comunidades negras en Colombia* (Universidad de los Andes, Facultad de Derecho, CIJUS, Ediciones Uniandes, 2009).

[141] *Colombian Constitution 1991* art 171.

[142] García Amado, above n 54 See also the rebating of this argument in the discussion on the existence and pertinence of collective human rights earlier in this chapter.

> The constitutional rights of indigenous communities should not be confused with the collective rights of other human groups. *The indigenous community is a collective subject and not a simple sum of individual subjects that share the same rights, or diffused collective interests*. In the first case, who is the holder of these fundamental rights is undisputable. In the second, however, the affected persons may seek the defense of their collective rights or interests using the appropriate group, class actions of public interest litigations. Indigenous communities are entitled, among other constitutional rights, *to the fundamental right to subsistence, which is directly linked to the right to live protected by article 11 of the Constitution*. (emphasis added).[143]

In an early ruling dealing with environmental damages caused by the spraying of Round-Up herbicide over illegal crops, the Court found an opportunity to set a precedent in the matter of the collective right to the environment. The rationale followed by the Court in this case deviates from the purely ecological conception of the environment, to enter the realm of constitutional human rights. Specifically, it expanded on the notion of collective rights and their importance for Indigenous peoples by linking State negligence, even by omission to address environmental damage in their areas, to impinging upon Indigenous peoples rights to subsist as peoples. This is not only related to the right to life of article 11, but also to the right not to be forcefully disappeared of article 12, here construed as a collective human right.[144]

III.4. Governance Autonomy: Ties to Cultural Identity

Colombia has a specific constitutional provision recognising political autonomy for Indigenous peoples. It gives their authorities the power to exercise jurisdictional functions inside their own territories, following their own rules and procedures.[145]

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143 *Collective Right to Life Case* (translated by author).

144 'For the official entities in charge of the care and preservation of the environment to default in the obligation of environmental surveillance, fosters the abuses by third parties in the exploitation of natural resources. This situation can be aggravated if, after the damage to the forest has been caused, the State does not act in a timely fashion to prevent and control the factors causing the environmental damage. The omission to perform the State function of restoring the environment seriously altered, maintains the threat of infringement of the constitutional rights [of the affected Indigenous peoples]' (translated by author). Constitutional Court, *Judgement SU-383/2003* ('*Illicit Crops Case*').

145 *Colombian Constitution 1991* art 246. This article must be read in conjunction with article 286, which states that the Indigenous territories are independent territorial entities; and article 321, which regulates the administrative regimes of territorial entities. It defines what a territorial entity is, and their specific rights within the limits set in the law and the constitution: '1. To be governed by their own authorities. 2. To exercise their corresponding powers. 3. To manage their resources and to establish the necessary taxes for the fulfilment of their functions. 4. To a share of the national income'.

Indigenous territories are governed by councils assembled, formed and regulated according to the customs of their communities. The councils exercise the following functions:

1. Ensure the implementation of the regulations on land use and settlement of their territories.
2. Design the policies, plans and programs of economic and social development within their territory, in accordance with the National Development Plan.
3. Promote and ensure the proper implementation of public investment in their territories.
4. Collect and distribute their resources.
5. To watch over the preservation of natural resources.
6. To coordinate the programs and projects promoted by the different communities within the territory.
7. Cooperate in maintaining the public order within the territory in conformity with the instructions and provisions of the national government.
8. To represent the territories before the national government and other entities to which they are integrated (eg: provinces in which they are located) and
9. Any other matter stipulated by the Constitution and the law.[146]

These functions and powers involve real autonomy of governance and specifically accept the role and preponderance of customary law in the functioning of each territory.[147] This is reflected in the ability to design and develop their policies, and in the capacity to manage their economic resources.[148] Note that the preservation of natural resources is included here. However, this is not an imposition based on the fossilisation perspective. Rather, it is akin to the general obligations that Colombian citizens and authorities have under the 'ecological constitution', commented on in Chapter II.

This autonomy comes with a price. It has the proviso that said rules and procedures cannot be contrary to the Constitution and the laws of the Republic, which may be interpreted as a taxing burden upon autonomy.[149] These limits to autonomy are included to prevent depriving some members of autonomous Indigenous communities of the

[146] Adapted from ibid art 330 (translated by author).

[147] For a comprehensive research resource of the interaction of special jurisdiction and regimes, customary and national laws in Colombia refer to Boaventura de Sousa Santos and Mauricio García Villegas, *El caleidoscopio de las justicias en Colombia. Análisis socio-jurídico* (Siglo del Hombre Editores y Universidad de los Andes, 2001).

[148] For a socio-legal analysis of Indigenous jurisdictions refer to Boaventura de Sousa Santos, 'El significado político y jurídico de la jurisdicción indígena' in Boaventura de Sousa Santos and Mauricio García Villegas (eds), *El caleidoscopio de las justicias en Colombia. Análisis socio-jurídico* (Siglo del Hombre Editores y Universidad de los Andes, 2001).

[149] Ibid art 246.

protection of the Constitution in general and the fundamental rights in particular. The Constitutional Court has had the opportunity to weigh different laws and even some constitutional rights within the Constitution against the limits of Indigenous autonomy. Its rulings have been consistent: autonomy has to be given the widest possible breadth, its limits being marked by the 'hard core' of rights.[150] This is consistent with the de Sousa Santos' proposal whereby societies should aspire to true legal pluralism.[151]

In the case of Indigenous peoples, in Colombia they indeed have a special rights-based protection regime. This includes the redistribution of tax resources to ethnic groups of either Indigenous or African descent. In this case, because in terms of the planning of the stage the *resguardos* or communal lands have a planning structure akin to a municipality, they also share part of the nation's resources.[152] However, they are not territorial entities in the strict sense, because they are a *sui generis* style of collective property, adopted in compliance with *ILO 169*. In this sense, the collective territories are not public property, and Indigenous peoples can restrict freedom of movement to other citizens.[153]

In the early years of the Constitutional Court, the institution set a strong position regarding the definition of Indigenous communities. It committed fully to the precepts of article 8(1) of *ILO 169*, whereby national laws and regulations must consider the customs and customary laws of the peoples concerned. The Court highlighted that these communities are not 'legally comparable to a simple association. They are an historical

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[150] The Court set those limits in the *United Pentecostal Church Case*: 'The Constitution enshrines a conservation regime of *diversity in unity* for Indigenous peoples. According to the Court, "cultural survival is only possible with a high degree of autonomy". This statement reflects the fact that ethnic and cultural diversity, as a general principle, can only be limited when its exercise infringes constitutional or other higher legal norms ... [I]n principle, the efficacy of the rights of Indigenous peoples, requires that the limits that can be imposed to the jurisdictional autonomy of such communities are *only those* that "result truly intolerable for they threaten man's most precious values"' (Emphasis added, translated by author). Note that this is compatible with art 8(2) of *ILO 169*: 'These peoples shall have the right 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'. Constitutional Court, *Judgement SU-510/1998* ('*United Pentecostal Church Case*'), citing Constitutional Court, *Judgement T-405/1993* ('*DEA Radar Case*') and Constitutional Court, *Judgement T-254/1994* ('*Exile and Confiscation Case*').

[151] De Sousa Santos, 'Law: A Map of Misreading', above n 16.

[152] Van Cott, 'Constitutional Reform in the Andes', above n 73, 50.

[153] This doctrine was set in the *New Tribes of Colombia Evangelical Association Case*, where the Indigenous peoples of the Great Vaupés Reservation denied permission to missionaries to use a landing strip in their territory, which the missionaries intended to use as a means to access the territory to convert the inhabitants to the Christian faith. The Court found that this denial was consistent with the right to private property of the *San José Pact* art 22 and the collective rights protected by *ILO 169*. Constitutional Court, *Judgement T-257 of 1993* ('*New Tribes of Colombia Evangelical Association Case*'). See also, *American Convention on Human Rights*, opened for signature 21 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ('*San José Pact*').

reality, dynamic and characterised by objective and subjective elements that cannot be reduced to *animus societatis* that characterised civil associations'.[154] Rather, they are linked to a process of the recovery of identity, and the existence of this collective consciousness is what defines a community.[155]

For the application of TEK, this recognition of self-determination and governance capacity by means of customary law can be a legal tool to justify the positions of Indigenous peoples in the country towards development projects. Indeed, had this recognition been more patronising, the decisions of the Court would not have been so progressive.[156] Nor would Indigenous peoples have been taken into account for the creation of a National Park by their own initiative.[157] Here, instead of imposing a top-down model of development, cultural identities that have been nurtured by different interpretations acquire a voice. The Court also expressed that the dialogue between cultures and nations gives meaning and contents to human rights,[158] which is a sound summary of the change of position of the Colombian legal system after 1991.

In another judgement, this time deciding on an *actio popularis* of unconstitutionality action questioning the validity of nineteenth century legislation, the Court took the opportunity to highlight that there are 81 distinct Indigenous peoples in the country, whose legal systems may be classified into 22 groups.[159] The Court held that 'the effectiveness of the right of ethnic and cultural diversity and the value of pluralism may be satisfactorily achieved only if it allows broad freedom to the indigenous communities'.[160] The decision reaffirms the interpretation that, even if article 246 of the Constitution sets limits to governance autonomy, judicial decisions related to conflicts within ethnic groups should apply a wide margin of tolerance. This is the *mínimos jurídicos* (minimum legal requirements) thesis, which states that if the guarantees to core human rights such as life, non-enslavement and due process are intact, then the communities are

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154 *Exile and Confiscation Case*. Translation of relevant *ratio decidendi* of this judgement, available in ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America: A Case Book* (ILO Publications, 2009).

155 This is consistent with art 70 of the Constitution.

156 See for example the expansion of public participation in the Constitutional Court, *Judgement C-891/2002* ('*Mining Code Case*'); *Judgement C-461/2008* ('*National Development Plan Case*'); *Judgement C-030/2008* ('*General Forestry Act Case*'); and *Judgement C-175/2009* ('*Rural Development Statute Case*').

157 See the case study of the Yaigojé-Apaporis Park further in this chapter (section IV.1).

158 *Exile and Confiscation Case*.

159 Constitutional Court, *Judgement C-139/1996* ('*Savage Management Act Case*').

160 Ibid. The translation of this excerpt and others is available in ILO, above n 154, 68.

free to apply their customary laws and processes.[161] The Court has consistently taken this doctrine into account and developed it further in other judgements.

III.5. Domestic Application of ILO 169: Evolution of Participation and Links to Collective Right to Land

Colombia ratified *ILO 169* through the enforcement of *Act 21 of 1991*.[162] The ratification process took place before the passing of the new Constitution and some of its principles inspired the final text regarding the human rights of Indigenous peoples, including the protection and entitlement of the collective and inalienable right to land of Indigenous groups.[163] Colombia became a party at a momentous time, given that the president at that time, Virgilio Barco Vargas, was the first to 'revive' the legal instruments regarding Indigenous peoples' protection and rights in the country. After a speech delivered in the Amazonian municipality of La Chorrera, Barco acknowledged implicitly the rights enshrined in *ILO 169*, discussed earlier:

> In the town of La Chorrera in the middle of the Amazon jungle, when I granted the indigenous communities of the Witoto, Ocaína, Muinanae and others six million hectares as communal property, I stated that these peoples have the collective right over the territories that they have originally inhabited, that they have the right to determine their own forms of organisation, to fix their own rules, to elect their authorities in the context of the grade of autonomy that characterises the management of their internal affairs. They also have the right to their social, cultural and territorial integrity and the right to participate in the direction, design and execution of the programmes implemented by the State within their territories.[164]

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[161] Rachel Sieder, 'The Judiciary and Indigenous Rights in Guatemala' (2007) 5(2) *International Journal of Constitutional Law* 211, 222. Sieder also compares the progressive and respectful attitude of the Constitutional Court to other more conservative judiciaries in Latin America that only accept the dominant society's due processes as valid.

[162] *Act 21 of 1991 Approving the Convention Number 169 on Indigenous and Tribal Peoples in Independent Countries, adopted in the 76th General Conference of the International Labour Organization, Geneva, 1989* (Colombia).

[163] Art 329 of the *Colombian Constitution of 1991* states that the *resguardos* are inalienable collective property. Similarly, provisional article 55 orders the Congress to undertake studies about the land entitlements to peoples of African descent living in the Pacific basin, and to enforce an Act recognising that the black communities that have inhabited these lands in accordance with their traditional production practices have the collective properties over these areas. This mandate was crystallised in *Act 70 of 1993 Recognising the Occupation of Territories in the Pacific Basin by Black Communities* (Colombia).

[164] Virgilio Barco Vargas, *Discursos 1986–1990* (Presidencia de la República, 1990) vol V (translated by author).

ILO 169 is part of the Constitutionality Block.[165] The obligations contained in the treaty can supersede any acts or decrees that are less favourable to the Indigenous peoples in question, even the Constitution in certain cases. Hence, the obligations of the treaty are not only binding, but also directly applicable over any of the domestic regulations in Colombia. Colombia has been challenged before the International Labour Organisation Panels, under article 24 of the *ILO Constitution*, on two occasions.[166] These challenges have mostly been related to the failure of the State to comply with the participation requirements of article 6,[167] which regulates the right to prior consultation.[168] The explanation for these compliance shortcomings derives directly from the inadequacy of the constitutional provision that regulates consultation. The paragraph in article 330 states:

> Exploitation of natural resources in indigenous territories shall be carried out without weakening the cultural, social and economic integrity of indigenous communities. In the decisions adopted with respect to such exploitation, the government shall foster the participation of the representatives of the respective communities.[169]

The wording of this article is very soft, and it can thus be interpreted as a guideline of the *best efforts* persuasion denoted by the verb 'foster', instead of the mandatory provision it should be. The view of the executive and the legislative branches was that the paragraph in article 330 of the Constitution was a satisfactory application of the rights contained in *ILO 169*. This was a problematic interpretation from the start.

In contrast, the obligations set forth in *ILO 169* leave much less room for speculation. The requisites for consultation are mandatory: consultation should be done through 'appropriate procedures', 'whenever consideration is being given to legislative or administrative provisions that may affect them directly'; it should be 'undertaken in good

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165 *Colombian Constitution 1991* art 93. See the explanation of the Constitutionality Block in Chapter II.

166 *International Labour Organization (ILO) Constitution*, 15 UNTS 40 (entered into force April 1919) ('*ILO Constitution*').

167 For an analysis of the repercussions of the result of these panels, see Ana Lucía Maya Aguirre, above n 103.

168 *ILO* 169 art 6: '1. In applying the provisions of this Convention the governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provided the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.

169 Translation of this article taken from ILO, above n154, 86.

faith and in a form appropriate to the circumstances', and it must pursue the objective of 'achieving agreement or consent to the proposed measures.[170]

It is clear that this goes far beyond the lax provisions of the paragraph in article 330. For one thing, the objective of consultation is to reach a consensus with the potentially affected parties. Read in conjunction with article 7.1, this can be interpreted as a requirement for prior informed consent (hereto PIC), especially relevant in legislative or administrative measures or projects that may affect the environment of the lands used or inhabited by Indigenous peoples. The phrasing of the sentence 'shall foster the participation of the representatives of the communities' cannot be construed to mean or even hint at the mandatory reaching of a consensus that respects the requirements of PIC, as will be analysed next.

The meaning of PIC is straightforward: *prior* means that true participation by Indigenous communities in the decisions that may affect them *must* occur during the deliberating stages of said measure, not as an afterthought or as a token validation of something that has already happened. Article 7(3) of *ILO 169* contains the answer to the meaning of the term *informed*. It requires the government of the signatory country to carry out studies to 'assess the social, spiritual, cultural and environmental impacts' in cooperation with the peoples concerned. The objective such studies should pursue is to evaluate the impacts of the proposed measures or projects, and they must be 'considered as fundamental criteria' for any implementation. Thus, only when these procedures have been duly performed, in good faith,[171] and with the active participation of the concerned communities, shall it be deemed that all of the information needed to consider the implementation of the measures has been obtained.[172] As for *consent*, once the first two requirements have been duly satisfied, the communities concerned will be in a position to make an informed decision. Note that they must possess all of the information to do so.

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[170] *ILO 169* art 6(1).

[171] In the *U'wa Case*, the Court stated that 'when it is not possible to arrive to an agreement, the authority's decision must be free of arbitrariness and authoritarianism'. This doctrine of decisions taken in good faith, and the addition of the clause 'free from arbitrariness and authoritarianism' are a direct application of *ILO 169* art 6(2). The principle of good faith is also constant in *UNDRIP*, where it is mentioned in relation to all consultations and participation procedures (arts 19 and 32), and as one of the guiding principles of the Preamble, reaffirmed by art 46.3. In the *Indigenous Mining Area Case*, the Court reaffirmed these principles as applicable to the *Mining Code* in the determination of any 'indigenous mining area'. Constitutional Court, *Judgement SU-039/1997* ('*U'wa Case*'); *Judgement C-418/2002* ('*Indigenous Mining Areas Case*').

[172] SU-039/97 ('*U'wa Case*'). Relevant extracts of this judgement have been translated in ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America: A Case Book* (ILO Publications, 2009) 71–72.

At this stage, they are also in a position to negotiate with the government and decide whether the trade-offs that the new measure or project entails are acceptable for them. At the end of this process, a consensus is reached.

In the landmark case of the U'wa community against the oil government agency, Ecopetrol, and Oxy, the Court delineated the parameters for consultation.[173] It stressed the importance of channels promoting communication and understanding as the foundation of good faith. For this, at least three requirements have to be satisfied in the consultation process. First, the community has to have full and complete understanding of every aspect of the project. Second, it has to be advised in regards to the effects the proposed mining development may have on the social, economic, cultural and political aspects of their lives. Third, they must have the chance to consider the advantages and disadvantages of the situation freely with their representatives, and to express their concerns without coercion.[174] The problem is that it is possible to use consultation to sabotage development, thereby eroding the conciliatory spirit of the mechanism.

However, the Court has been clear that the fundamental right to prior consultation is not a power of veto. Rather, it should be a manifestation of a democratic process, and that is the key distinction that the Court states is applicable for Colombia, taking into account other constitutional principles. Thus, the normative framework in the country in regards to consultation is not PIC, but rather an informed prior consultation process. Nevertheless, this is not an excuse for the adoption of arbitrary decisions insisting on consultation with communities before the commencement of activities that may affect their lands.[175] Similarly, no considered measure, project or activity of a legislative or administrative nature that can affect the environment, spiritual beliefs, institutions or cultural values of any given Indigenous group can be taken without satisfying the requirements of prior informed consultation. This is the standard expected of the

[173] For in-depth analysis of this judgement, refer to Lilian Aponte Miranda, 'The U'wa and Occidental Petroleum: Searching for Corporate Accountability in Violations of Indigenous Land Rights' (2006–2007) 31(2, Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law) *American Indian Law Review* 651; Taehwa Lee, 'Conflicts and Dialogues Among Technological, Ecological, and Indigenous Paradigms in a Globalized Modernity: A Case Study of the U'wa Peoples' Struggle Against Oil Development in Colombia' (2008) *Bulletin of Science, Technology & Society*.

[174] Constitutional Court, *Judgement SU-039/1997* ('*U'wa Case*').

[175] This doctrine has been thoroughly developed in the judgement repealing the National Statute of Rural Development passed by Congress in 2011 Constitutional Court. See, *Rural Development Statute Case*.

Colombian Government authorities when considering measures that *may affect Indigenous peoples directly*.[176]

The *U'wa Case* is a clear illustration of the challenging decisions that can occur within Indigenous territories or their fringe zones. However, two other crucial shortcomings of the paragraph in article 330 can also be described. First, legislative decisions with a general scope are not considered necessary to undertake consultation proceedings. Second, the paragraph only fosters consultation when the development or mining project is to be carried out *inside* the territories held collectively by an Indigenous community. There is a normative gap for proposed activities to take place outside the territories and their fringe zones. This was put to the test in the *General Forestry Act Case*.[177] This judgement is a milestone in the history of participation in Colombia, and is also evidence of the application of the collective legal autonomy concerning TEK in the country.

III.5.1. The General Forestry Act Case: Affirmative Action and Legislative Process[178]

In April 2006, the Congress passed the *General Forestry Act*,[179] a joint initiative by the Ministers of Environment, Housing and Territorial Development, and Agriculture and Rural Development. The Act established the framework that would govern forestry activities in the entire Colombian territory, including protected areas, Indigenous reserves and lands belonging to peoples of African descent. Environmentalists and human rights activists criticised this Act widely, claiming that it was a step back from the achievements made in the domestic legislation regarding environmental protection.[180] A cursory

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[176] *ILO 169* art 6(1). It should be read in conjunction with art 7(1), which stresses that Indigenous peoples hold the prerogative to 'decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being, and the lands they *occupy or otherwise use*' (Emphasis added).

[177] Constitutional Court, *Judgement C-030/2008* ('*General Forestry Act Case*').

[178] A paper of this case study was presented by the author at the IUCN 'Sharing Power Conference'. Natalia Rodríguez Uribe, 'Self-Determination and Public Participation, A Study of the Empowerment of Colombian Indigenous Peoples' (Paper presented at the Sharing Power Conference, CEESP-IUCN, Whakatane, New Zealand, January 2011).

[179] *Act 1021 of 2006 Issuing the General Forestry Act* (Colombia).

[180] Rodríguez Becerra, former Colombian Minister for the Environment, comments that one of the determining factors of the survival of pristine forest ecosystems in Colombia is that 35 million hectares covered by this type of habitat belong to peoples of Indigenous and African descent. Grupo de Derecho de Interés Público de la Facultad de Derecho de la Universidad de los Andes (G-DIP), '¿Por qué se cayó la Ley Forestal?' *Semana* (Bogotá), 8 February 2008 <http://www.semana.com/on-line/articulo/por-que-cayo-ley-forestal/90896-3>; Manuel Rodríguez Becerra, 'Ley forestal y campeonato ambiental' *El Tiempo* (Bogotá), 29 January 2008 <http://www.eltiempo.com/archivo/documento/MAM-2809343>.

reading of the legislation reveals that it is contrary to the spirit of the 'ecological constitution' devised by the Constituent Assembly.[181] For instance, it suppressed the obligation for the forestry companies to apply for environmental licences of operation.[182] It also disregarded the constitutional right of sustainable development[183] by eliminating the requisite to display a proper bill of lading to certify the origin of the timber transported in the country. Without this requirement, illegal logging inside protected areas, Indigenous reserves or lands belonging to African descendants, without the consent of the respective authorities, was possible.[184]

Many unsuccessful efforts were made to have the law repealed, and the forestry companies began to operate almost indiscriminately throughout the entire Colombian territory. Enter the Association of Traditional Authorities of the Meso-Amazon Indigenous Regional Council (*Consejo Regional Indígena Meso-Amazónico*, CRIMA). The Association filed an injunction on behalf of the Uitoto, Andoque, Muinane and Nonuya communities, claiming that the passing of the Act violated their fundamental right of previous consultation. Although this injunction was denied, the Constitutional Court hinted that an *actio popularis* of unconstitutionality was the appropriate avenue to pursue.[185] The action was filed by a group of lawyers acting pro-bono, claiming that the Congress infringed article 6 of *ILO 169* because no proper consultation was undertaken with Indigenous and Black communities that could be affected.[186]

The Congress and the two Ministers that drafted the Act argued that it was only a framework provision regulating the industry. Thus, it did not affect Indigenous communities directly and was not subject to the regulations of *ILO 169*. They also argued that the law was passed after being publicised and discussed in various forums and debated in both the Senate and the House of Representatives in a public and deliberative scenario. Finally, the respondent stated that in the event that an irregularity had indeed occurred, it was only a procedural error, subject to the statute of limitations that set the

181 See Chapter II.
182 G-DIP, above n 180.
183 *Colombian Constitution 1991* art 80.
184 G-DIP, above n 180.
185 Constitutional Court, *Judgement T-382/2006* ('*Injunction General Forestry Act*').
186 The plaintiff also argued that the Act infringed articles 1, 2, 3, 7, 9, 13, 93 and 330 of the Constitution.

term for bringing this kind of action before the Constitutional Court at a year after the passing of the legislation.[187]

The Court considered that the omission to consult the communities infringed several provisions of *ILO 169*. It determined that the right of consultation previous to the passing of legislation regulating the exploitation of natural resources is a *fundamental collective human right of Indigenous communities* that seeks to guarantee cultural diversity through public participation. Recalling that consultation is a right present in the Constitution and developed by the Court in other judgements, disregarding it could not be considered a mere 'procedural error'. Although not every framework law has to endure the process of previous consultation, this case was different.[188] The Court emphasised that the livelihoods, cultures and beliefs of peoples of Indigenous and African descent are linked to their environment, and thus the activities regulated by the Act were likely to affect them. The consultation in this instance was a mandatory requisite, the omission of which invalidated the act in its entirety, causing it to be invalidated by the Court.[189]

This judgement has meant that now participation is considered an affirmative action provision that guarantees the opening of spaces for Indigenous peoples to be included effectively. For the collective legal autonomy concerning TEK, this means that now the peoples concerned can effectively shape not only isolated policies, but also actively participate in the drafting stages of legislation. Representatives of Indigenous and African descent communities interpreted the decision as a positive step towards effective democratic participation of traditionally neglected sectors,[190] and declared that not only the protection of human rights triumphed in court, but also the recognition of the important spiritual and physical link between the peoples and their lands.[191]

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187 See, *General Forestry Act Case*, 'IV.1. Considerations'.

188 Recall that the Court had already ruled in the *Illicit Crops Case* that the right to a healthy environment is a fundamental collective right of Indigenous peoples.

189 *General Forestry Act Case*.

190 'This judicial ruling is perceived as a recognition of the rights to which the ethnic communities are entitled, as a conquest by the ethnic communities and social movements that can be read as a warning to the State institutions and the Colombian government to respect the principle of Affirmative Action established in the Colombian 1991 Constitution. "The Court was consistent with the rights to which ethnic groups are entitled, and with the principle of Affirmative Action", said Juan de Dios Mosquera, director of the Afro-Colombian Movement "Cimarrón".' (Translated by author). G-DIP, above n 180, citing the declarations of Juan de Dios Mosquera.

191 The National Indigenous Organization of Colombia (Organización Nacional Indígena de Colombia, ONIC) declared that the decision was 'a commendation to Indigenous and Afrocolombian Peoples who have guaranteed the conservation of the forests and their cultures for generations. Therefore, the Court's decision enforces the

III.6. Cultural Rights and Rise of Intangible Heritage Protection[192]

The recent ratification of the *Intangible Heritage Convention* (*CSICH*)[193] in Colombia has provided a very valuable tool for the recognition of cultural rights, adding to the legislative basis for the integral protection of the human rights of Indigenous peoples. Within this framework, the definition of Indigenous heritage, and particularly of living cultural heritage, is critical to its legal protection, and is deeply linked to the human right of self-determination, among other collective rights. In the exercise of self-determination, there has been an emphasis on the inextricable link between peoples and their land,[194] seeing it as much more than property. It is claimed that the right to land has intrinsically spiritual elements, and is thus an imperative for the survival of Indigenous cultures.[195]

The legal instruments enforced in Colombia for the implementation of the *CSICH*, and the associated cultural rights promoted by other treaties and declarations, notably *ILO 169* and *UNDRIP*, have recognised that cultural heritage, far from being a static body frozen in time and space, is a living entity that must be allowed to evolve over time. Culture is thus tantamount to a life form. This is the case made by the Colombian Safeguarding Policy,[196] which states that one of the characteristics of intangible cultural heritage is its dynamism. Therefore, they are expressions of human creativity, highlighting

recognition of the rights of these ethnic groups; it recognises that their rights were violated and prevented the country's jungles to be treated as just timber, as only merchandise instead than life givers' (translated by author). Quoted in G-DIP, above n 180.

[192] A co-authored paper, including a brief discussion of the evolution of cultural rights, the ratification of *CSICH* in Colombia and the case study of the listing of the 'Traditional Knowledge of the Jaguar Shamans of Yurupari' as an example of community involvement and recognition, was presented at the Heritage 2012 Conference in June 2012, peer-reviewed and published without corrections. This subheading expands upon two sections of this paper (namely: the introductory part of Section 2 'Legal Evolution of Heritage Protection', page 1470, and Section 3 'Holistic Protection of Culture: Colombia Ratifies the CSICH'). This paper was co-written and edited in equal parts by the two authors. The bibliographical references used in said paper are also used here, and complemented with further literature. See, Rodríguez-Uribe and Rodríguez-Uribe, above n 121, 1469.

[193] *CSICH*, approved by *Act 1037 of 2006 Approving the 'Convention for the Safeguarding of the Intangible Cultural Heritage', adopted by the UNESCO General Conference in its XXXII meeting, held in Paris and closed on 17 October 2003* (Colombia).

[194] Editors, 'The Kimberley Declaration (Reaffirming the Kari Oca Declaration 1992)' (2002) 7(3) *Australian Indigenous Law Reporter* 68 <http://www.austlii.org/au/journals/AUIndigLawRpr/2002/50.html>.

[195] Anaya, *Indigenous Peoples in International Law*, above n 77, 141–145.

[196] 'Política de salvaguardia del patrimonio cultural inmaterial' in Ministerio de Cultura (ed), *Compendio de Políticas Culturales* (Ministerio de Cultura de Colombia, 2010) 249 ('Safeguarding Policy').

the genius of the communities and their capacity for recreating, adapting and reinterpreting their own cultural elements.[197]

The ratification of the *CSICH* in 2008 is consistent with the promotion, protection and enhancement of cultural rights and the reinforcement of multiculturalism.[198] Thus, it is not a coincidence that the Convention's implementation instruments followed the approach of empowering communities in the proposal, listing, managing and safeguarding of representative cultural elements. To efficiently implement the *CSICH*, the Colombian Ministry of Culture created the Intangible Cultural Heritage Group (ICH Group) as a part of its Heritage Division. In 2008, the ICH Group started to develop the necessary tools to give the communities the opportunity to make this international instrument their own, by implementing guidelines to encourage the identification of cultural elements and their history, and the challenges expected for their protection, condensed in the guidelines of the Safeguarding Policy of 2010.[199]

The Safeguarding Policy builds on the principles of the 1991 Constitution and the *General Culture Act*.[200] Within the framework of respect and recognition of ethnic and cultural diversity, the policy's main objective is to strengthen the social capacity for the self-management of intangible cultural heritage, to ensure its safeguarding and promotion. It clearly acknowledges the threats that development projects pose to this heritage, and offers best-practice guidelines to mitigate or prevent negative cultural, environmental and social repercussions.[201] It seeks also to reorient the public actions of the State to overcome the past limitations towards the safeguarding of intangible cultural heritage in Colombia, which fell short of seeing the country as culturally diverse. This implies the recognition of the particular visions and interpretations of development held by different communities, very much in line with the provisions of *ILO 169*.[202]

The *CSICH* does not state explicitly that its provisions may be used to strengthen the domestic regulations in regards to cultural rights. However, the Colombian legal framework was already mature enough to take a leap forward in this respect. Therefore,

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197 Ibid 251.

198 *Colombian Constitution 1991* arts 7 and 70.

199 Safeguarding Policy, above n 196.

200 *Act 397 of 1997 developing articles 70, 71, 72 and all the concordant articles of the Constitution and enforcing other rules regarding cultural heritage, promotion and incentives for culture, and creating the Ministry of Culture* (Colombia) ('*General Culture Act*').

201 Safeguarding Policy, above n 196, 256.

202 Ibid 266–269; *ILO 169* art 7.

the government aimed, through the Safeguarding Policy, to give its people a tool for defending their cultural rights and traditional beliefs within this framework of cultural diversity. Even when the *CSICH* was still in its drafting stage, the Colombian *General Culture Act of 1997* already included intangible aspects of culture in the principles and definitions. For instance, it defines culture as 'the group of traits that are distinctive, spiritual, tangible, intellectual and emotional that characterise human groups. It comprises, beyond the Arts, ways of life, human rights, value systems, traditions and beliefs'.[203] Thus, this legal tool insists on the futility of artificially dividing tangible and intangible aspects of culture.[204] It is also explicit in the recognition of the dependence of Indigenous peoples on their territory, and points to the relationship between the *CSICH* and the *CBD* by linking traditional knowledge with biodiversity conservation.[205] Another interesting feature is that the Policy places more emphasis on supporting local efforts to protect Indigenous traditions than on ensuring that these traditions are included on UNESCO's Representative List. The reason for this prioritisation of local actions seeks to reinforce the notion that intangible heritage is an important part of the Colombian cultural makeup, which needs grassroots protection regardless of its potential international value.

As a party to the *CSICH*, the Colombian government, through the Ministry of Culture, has the obligation to 'take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory'. It is also charged with identifying and defining the various elements of the intangible cultural heritage through participatory methodologies.[206] Therefore, the Ministry of Culture has to supervise the safeguarding of the cultural elements that are part of the National Representative List of the Intangible Cultural Heritage (RLICH). However, the whole methodology is designed so that the community itself, rather than the State, has to ask for a particular cultural element to be added to the List, unlike in the case of the *WHC*. Indeed, this kind of methodology, which puts the involved human communities at the forefront, is part of what the collective legal autonomy concerning TEK represents. By enfranchising Indigenous peoples from the beginning of processes, better outcomes can be foreseen, as the case

[203] *General Culture Act* art 1(1).
[204] Safeguarding Policy, above n 196, 267.
[205] Ibid 272.
[206] *CSICH* art 11.

study of the listing of the 'Traditional Knowledge of the Jaguar Shamans of Yurupari' will show empirically. The participatory element of the methodology fills one of the most criticised gaps of the *CSICH*,[207] which uses vague language in this respect:

> Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavor to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.[208]

The policy acknowledges the fundamental role played by society in general and communities in particular. As such, the community is in charge of identifying the element, justifying why it should be listed in the RLICH and developing a Special Safeguarding Plan (PES in the Spanish acronym) that reflects the commitments towards it that the community is ready to responsibly assume. The community also, in the future, assumes the responsibility of implementing the PES.

IV. CASE STUDIES

Empirical evidence of the soundness of the use of TEK as a biodiversity management strategy exists. As a representative sample, four studies conducted in the Colombian Amazon referenced here demonstrate that ancestral TEK has allowed several Indigenous groups in different areas and ecosystems to preserve their livelihoods in a manner contingent with the health of the ecosystem.[209] The research of these works falls under the disciplines of ecology, conservation biology and anthropology. Together, they identify

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[207] Paul Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage' (2004) 1(1) *Macquarie Journal of International and Comparative Environmental Law* 111, 127–129.

[208] *CSICH* art 15.

[209] See, Dolors Armenteras, Nelly Rodríguez and Javier Retana, 'Are Conservation Strategies Effective in Avoiding the Deforestation of the Colombian Guyana Shield' (2009) 142(7) *Biological Conservation* 1411; Sascha Müller, 'The Pan Amazon Rain Forest Between Conservation and Poverty Alleviation: Property Rights Regimes at the Triple Border in the Southern Colombian Trapecio Amazónico' (Paper presented at the 11th Biennial Conference of the International Association for the Study of Common Property, Indonesia/Bali, 19–24 June 2006); Manuela Palacios, 'Chorrobocón, el territorio indígena puinave sobre paisajes del río Inírida Guainía, Colombia' (2007) 4(59) *Cuadernos de desarrollo rural/International Journal of Rural Development* 179; María Clara van der Hammen and Carlos Alberto Rodríguez, 'Restauración ecológica permanente: Lecciones del manejo del bosque amazónico por comunidades indígenas del medio y bajo Río Caquetá' in Eugenia Ponce de León (ed), *Restauración ecológica y reforestación* (Fundación Friedrich Ebert de Colombia-FESCOL, Foro Nacional Ambiental, Fundación Alejandro Ángel Escobar, GTZ, 2000) 259.

common threats to the survival of TEK in these communities, such as attempts at forced evangelisation and vestigial policies aimed at concentrating the population in larger settlements.[210] An assessment of the legal tools and their uses complements the evidence.

This section choses two different Colombian cases to provide further evidence of the effectiveness of the collective legal autonomy concerning TEK. They both refer to the Peoples of the Vaupés region who have the common cosmovision of the Jaguars of Yurupari. However, this grouping comprises more than 20 different peoples, with different languages and customs. Collectively, their two *resguardos* cover a large area of the Amazon ecosystems. In two separate instances, the cosmovisions of these peoples have been recognised as a sound and informed management strategy, and they have prevented mining initiatives in the territory. The first such instance was the declaration of the Yaigojé Apaporis *resguardo* as a National Park after the direct request of the Indigenous groups inhabiting the area; the other was the inclusion of the *Traditional Knowledge of the Jaguar Shamans of Yurupari* on the Representative List of the Intangible Heritage of Humanity in November 2011.

IV.1. The Initiative of the Yaigojé-Apaporis

The case of the Amacayacu National Park discussed in Chapter II is a reminder of the damage that imposing protected areas upon Indigenous territories without appropriate consultation process can cause to a peoples culture and way of life. To contrast this experience with the creation of the Yaigojé-Apaporis National Park in 2009 illustrates what participation spaces can achieve.

The first co-management experience in Colombia to create a National Park over a highly biodiverse collective property of Indigenous peoples, where the community had the control of the Park, was the Alto Fragua Indiwasi National Park.[211] Located in the Andes hotspot, one of the most biodiverse areas in the world, it comprises a unique range of ecosystems including cloud forests and *páramo*, between 900 and 3275 metres

[210] The densification of the settlements was one of the issues brought by the creation of the Amacayacu National Park in the fortress conservation style, as commented on in Chapter II.

[211] Ministerio de AmbienteVivienda y Desarrollo Territorial-Unidad Administrativa Especial del Sistema de Parques Nacionales Naturales, *Resolution 028 of 27 January 2007 Adopting the Management Plan of the National Natural Park Alto Fragua Indi Wasi* (Colombia).

above sea level.[212] Given that the area houses extraordinary diversity, including important endemic species like the spectacled bear (*Tremarctos ornatus*), the Government and the National Parks Office took the initiative to negotiate with the communities for the creation of a Park.[213] The area now encompasses 17 different communities that possessed relatively small collective territories.[214] The park is managed under traditional knowledge parameters and the communities, especially the Ingano, are completely in charge.[215] Note that the Park was selected because of its biodiversity and the initiative was from the government. The Yoigojé-Apaporis is the first Park in the country where the Indigenous peoples asked for the creation of a protected area, making it unique.

As it happens with isolated and difficult to access places in Colombia, the communities living in the *resguardo* of Yaigojé Apaporis were subjected to various abuses.[216] The area was harassed by the guerrillas, the territory was invaded at one point for illegal coca crops, and Colombian and Brazilian drug-dealers threatened the population. The great resilience of the peoples ensured their survival.[217] However, the biggest threat to their survival would come from a legal source: more than half the territory was licenced to a multinational company for mining exploration and eventual mineral extraction.[218] The ACIYA, the Spanish acronym for the association of the traditional authorities of the communities living in the Yaigojé-Apaporis, complained about the mining regulations, which would allow an 'inalienable territory' to be drilled and deteriorated because the subsoil was a different legal realm. The solution was not only creative but symbolises the new relationship between Indigenous peoples and the National Park System. Here, the traditional authorities took the initiative to transform the

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212 Parques Nacionales Naturales de Colombia, *Cultura y Sociedad del Parque Nacional Natural Alto Fragua Indi Wasi* <http://www.parquesnacionales.gov.co/PNN/portel/libreria/php/decide.php?patron=01.013403>.

213 Borrini-Feyerabend, Kothari and Oviedo, above n 2, 53.

214 Parques Nacionales Naturales de Colombia, above n 212.

215 Borrini-Feyerabend, Kothari and Oviedo, above n 2, 53.

216 The *resguardo* was legally recognised as a collectively owned territory in 1998 under the reforms implemented by the Barco government. The Gaia Foundation, *Yaigoje Apaporis, Threatened by Gold Mining* <http://www.gaiafoundation.org/yaigoje-apaporis-threatened-gold-mining>.

217 For studies on the threats to the Yaigojé Apaporis in the late 1990s and early 2000s, refer to Oscar A Forero L, Jaime Tanimuca and Ramón Esteban Laborde, 'Colombia: Reserva natural Resguardo Indígena de Yaigojé' in Andrew Gray, Marcus Colchester and Alejandro Parellada (eds), *Derechos indígenas y conservación de la naturaleza: asuntos relativos a la gestión* (Grupo Internacional de Trabajo sobre Asuntos Indígenas (IWGIA), El Programa para los Pueblos de los Bosques (FPP), Asociación Interétnica de Desarrollo de la Selva Peruana, 1998) 112; Alfredo Molano Bravo, Special Report, 'Yaigojé-Apaporis' *Nacional*, *El Espectador* (Bogotá), 4 June 2011 <http://www.elespectador.com/impreso/nacional/articulo-275132-yaigoje-apaporis>.

218 The company is the Canadian multinational Cosigo Resources. The Gaia Foundation, above n 216.

resguardo into a natural protected area.[219] The management plan of the Park was designed by the communities as a systematised and comprehensive expression of their TEK. The communities still depend upon the territory for their livelihoods.[220] This process would not have been possible without the legal developments in the country, which have a deep commitment to the inclusion of ethnic minorities in the political sphere, as opposed to their assimilation.

However, this story has not been free from conflict. Minority opinions were evident *within* the Indigenous communities within the Park that supported the establishing of mining inside the territory. One of the main arguments was that opening the territory for mining would create new jobs, and the security of a stable salary from the company and the possibility of being trained as miners. Thus, the administrative resolution that created the Park has been challenged before several judicial and administrative authorities. The concerned members of the *resguardo* claim that the consultation processes were deficient, and that creating a National Park, the only measure in Colombian legislation that protects the land in an integral fashion that includes the underground, contravenes several constitutional provisions. The claim is that it impinges upon the rights to self-determination, consultation and self-government. The *tutela* injunction was denied on appeal under the doctrine of *forum non conveniens*, by which the mechanism is a last resort and should go through a regular judicial process. The revision has not yet been decided. The Ministry of Environment and Sustainable Development denied the petition to repeal the administrative resolution because the jurisprudence of the Constitutional Court is clear on the respect of the inalienability of National Parks once properly declared and delimited.[221]

According to the Gaia Foundation, the mining company in question is the one instigating the judicial actions to revoke the National Park status.[222] This would create a very negative precedent that would favour multinational mining companies over the well-

[219] To consult the results of the negotiation and the joint proposal refer to Ministerio de Ambiente, Vivienda y Desarrollo Territorial-Unidad Administrativa Especial del Sistema de Parques Nacionales Naturales, 'Propuesta de Declaratoria Parque Nacional Natural Yaigojé-Apaporis ' (Síntesis para su justificación Ministerio de Ambiente, Vivienda y Desarrollo Territorial, Unidad Administrativa Especial del Sistema de Parques Nacionales Naturales, September 2009).

[220] See, Ministerio de Ambiente, Vivienda y Desarrollo Territorial, *Resolution 2079 of 29 October 2009 by which the National Natural Park Yaigojé Apaporis is declared, reserved, delimited, and its borders set*.

[221] Ministerio de Ambiente y Desarrollo Sostenible, *Resolution 0190 of 27 February 2013 deciding on the petition to repeal the Resolution 2079 of 27 October 2009 by which the National Natural Park Yaigojé Apaporis is declared, reserved, delimited, and its borders set.*

[222] The Gaia Foundation, above n 216.

being of local communities and the sovereignty of the State over natural resources. It is foreseeable that with a precedent of this calibre the mining giants would not hesitate to demand the same for other Parks, which would be contrary to the two legally protected interests of biodiversity conservation and the human rights of Indigenous peoples.

IV.2. Traditional Knowledge of the Yuruparí Jaguar Shamans[223]

IV.2.1. Dynamics of Heritage Rescue within the Vaupés Communities

In 1996, when the Vaupés province in Southeast Colombia was a place practically forgotten by the State, the Indigenous peoples living in the area of the Great Reservation (*Gran Resguardo del Vaupés*) realised the necessity of developing a collaborative organisation to respond to the challenges faced by their communities. Thus the Association of Captains and Traditional Indigenous Authorities of the Pirá Paraná River (ACAIPI for its Spanish acronym) was born. The ACAIPI undertook the task to recover the rapidly vanishing traditional knowledge that constitutes the communities' identities. They developed a 'Life Plan' that gave way to four focus areas: environmental governance, education, health and the development of productive projects. The latter focus area includes an effort to catalogue and protect TEK, link it to the territory of the Great Reservation and justify why certain sites are considered sacred. This is deeply linked to the education front, and an effort to redesign the school curriculums for the children of the Pirá Paraná that included transmission of TEK was first created.

Immersed in the shared cosmovision of the Pirá Paraná communities, the Yuruparí Jaguars is a comprehensive view of the world, based on the role of people as managers and stewards of the lands of the Apaporis river basin. It 'condenses the sacred knowledge that was given to us since the origin for the care of the territory and the life; it manifests though rituals, dances and oral stories, sacred sites management, sacred elements and

[223] This case study is part of a co-authored paper, and is reproduced here with modifications for coherence. Some arguments have been developed further. See, Rodríguez-Uribe and Rodríguez-Uribe, above n 121, 1475–1477 (section 5 'Case Study: The Traditional Knowledge of the Yuruparí Jaguars as a Model for Sustainable Development').

plants'.[224] Thus, every community plays a role in keeping the balance of the world upon which health, food, well-being and spirituality depend. Note the inextricable link between land and people that echoes *UNDRIP* and *ILO 169*. It is clear that one cannot survive without the other.

It was commented briefly in the introduction to this thesis that traditional knowledge as a technique to manage the environment and maintain ecosystem health has been documented as compatible with Western scientific knowledge. A discussion of the precise convergence of traditional knowledge with the scientific ecological data of the Vaupés Amazonian ecosystem is better suited to be undertaken by ecologists. However, a deep connection to the land cycles is shown, such that to lose any one element—the land, the sacred sites or the oral tradition—would jeopardise the future of the entire culture and its very life as a people. 'The sacred sites are the context for life to be created'[225] and their profound linkage to the entire culture and livelihoods of the communities is what makes them unique.

IV.2.2. Sacred Sites: Tangible or Intangible?

According to the cosmovision of the communities of the Pirá Paraná, the great Yurupari territory 'is like a human body that breathes, feels and has organs that enable it to function and live. The organs … are places that we consider sacred … places that contain vital and spiritual energy that nurtures all living beings in the surroundings'.[226] The territory is then considered as part of the living body of the community and each of its members, bearing reference to their very origin and maintaining their health. The relationship with the land holds the secrets and the answers for a balanced way of life of the members of the Yurupari peoples. However, the *CSICH* never refers to sacred sites, or to the direct protection of any territory for that matter. This is where the appropriation of the convention by local communities is original in Colombia: for the listing of the Jaguar Shamans of Yurupari as heritage that cannot survive without the

[224] Ministerio de Cultura de Colombia, 'Nomination of the Traditional Knowledge for the Management of the World of the Indigenous Groups of the Pirá Paraná River, Hee Yaia˜Kubua Baseri Keti Oka for Inscription on the Representative List of the Intangible Cultural Heritage of Humanity in 2011' (Nomination File No 00574, UNESCO-Intangible Cultural Heritage, November 2011) 6.

[225] Ibid 19.

[226] Ibid 2–3.

integrity of the land.[227] To threaten it would mean for Colombia the possible risk of defaulting on the obligations of the treaty, and this is another potential tool that ACAIPI can use.

Sacred sites can be seen as a historical and cosmological point of reference: they witness the entire history of the community as a people. As such, they have a double nature. First, they have a cosmological importance, related to the way the ancestors organised the Indigenous territory (creation myths), the rules that this organisation might imply (spiritual and social values) and the need for respecting them to keep the world in balance. Second, they have an 'earthly' component, related to the practical uses given to the site. This can again be seen in the traditional knowledge of the Jaguar Shamans of Yurupari. In the listed area, several sacred sites are in fact places used by animals for reproduction, key aquifers, headwaters or nurseries upon which the balance and health of the ecosystem depends. This double nature of sacred sites has not been reconciled in the international heritage conventions, but it is expressly recognised in *ILO 169*,[228] which again shows that the ratification of this treaty and its incorporation into the Colombian legal system complements intangible heritage safeguarding from a rights-based perspective. The Pirá Paraná peoples of the Great Vaupés Reservation realised that it was possible to argue that their cultural element incorporates both aspects, and UNESCO agreed by listing it in 2011, as discussed below.

IV.2.3. Mining Threats and the Need for Listing the Traditional Knowledge of The Jaguar Shamans Of Yurupari Cultural Element

The current Colombian government, following in the footsteps of the previous administration, has put mining on a pedestal. It is now deemed a critically important 'engine of development' and is being promoted as the new haven for foreign

[227] The reference to the appropriation of the Convention is a development of the discussion of cultural rights in section III.6 of this chapter. It refers to the very positive reception the *CSICH* has had in Colombia by the part of the communities, which become even more involved with the safeguarding of thei cultural intangible heritage.

[228] *ILO 169* art 13(1): '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 and territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship'.

investment.[229] Mining is an obtrusive practice, and this thesis has identified it as a threat to biodiversity, only to be undertaken after strict environmental and social impact assessments. Large-scale operations involve, in the worst-case scenario, open sky pits and, in the best, the contamination of underwater aquifers, which can spread for miles.[230] To allow mining, even under the shield of upholding the public interest, could uproot Indigenous communities, dispossessing them of the land to which their spiritual lives, material livelihoods and belief systems are intrinsically connected.

The case of the Pirá Paraná communities illustrates this critical situation. Facing more than 30 mining prospecting license requests from external companies and individuals, ACAIPI turned to the Ministry of Culture for yet another tool to fight against mining exploitation. Let it be noted that mining licenses are limited by the fact that, in general, Colombian Indigenous peoples do not separate the soil and its underground resources, as do Western legal systems.[231] They thus threaten a collective right that is supposed to be inalienable, and advancing a notion of development incompatible with cultural rights.

It has been mentioned that *UNDRIP*, *ILO 169* and the 1991 Constitution provide a broad legal framework based on five sets of rights. Although the rights of consultation, public participation and governance autonomy were adequately respected after the formation of ACAIPI in 1996, mining threatened the collective right to land. Without the land, the very life of the communities collapses. As expressed in the inclusion request for the national Representative List, '[f]or us the minerals are part of the territory's life, not just the animals and the plants; without the precious minerals the territory would be without light, without straight (sic) [strength]'.[232]

In light of these threats, intangible heritage protection was seen as tantamount to the right to life of an entire culture. Aware of the challenge, the Heritage Division of the Ministry of Culture undertook the task, with the support of ACAIPI and the Gaia

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229 Departamento de Planeación Nacional, 'Plan Nacional de Desarrollo 2010-2014: Prosperidad para todos' (Política pública Presidencia de la República de Colombia, 2010).

230 For a systematic and precise account of the impacts of mining on vulnerable ecosystems, refer to Julio Fierro Morales, *Políticas mineras en Colombia* (ILSA Instituto Latinoamericano para una Sociedad y un Derecho Alternativo - CCFD Terre Solidaire, 2012). For impacts of coal mining on coastal and dry forest ecosystems see 101–110, impacts of all forms of large-scale mining on biodiversity, protected areas, *páramo* ecosystems and Ramsar wetlands, see 133–152, and case studies of impacts of mining over the Embera and Makuna Indigenous peoples, and over the black communities of the Cauca province, see 170–185.

231 Ibid 158.

232 Ministerio de Cultura de Colombia, above n 224, 19.

Foundation, of formulating the Special Safeguarding Plan and the UNESCO Nomination file for '*Hee Yaia Keti Oka*, the Traditional Knowledge (Yurupari Jaguars) for the Management of the World of the Indigenous Peoples of the Pirá Paraná'. The documents explain how the Creators gave these communities the sacred knowledge of the management of the territories, and outline the underlying order of a chaotic world. The inherited knowledge connects the rhythms of Nature and the Universe with daily ritual human activities. By connecting nature and people, the Creators gave these communities the tools for a good life, based on a series of laws for living in the forest. When the mechanisms for transmitting knowledge from one generation to the next are activated, the word of the elders, the history, the Earth and Nature are preserved by the power of Yurupari.[233]

During this process, the representatives of the community made it clear that they were aware that the Ministry would only provide the recognition and technical support, and that it was the peoples of the Pirá Paraná that would be in charge of the actual protection and safeguarding of the element. They were also aware that recognition as intangible cultural heritage might not be enough to prevent mining companies entering their lands. Regardless, the *Traditional Knowledge of the Jaguar Shamans of Yurupari* encompasses a range of regulations and cultural and social values that constitute a sustainable plan for the management of the environment. Moreover, the effort to transmit the traditional knowledge to the next generations by means of education strategies was deemed a key part of the heritage safeguarding strategy that would guarantee its survival over time. Thus, by recognising this traditional knowledge as of national and world heritage value, the way of life of this group of communities in the Pirá Paraná river basin is protected, and the linking of intangible heritage protection to the rights-based content of *ILO 169* means that more holistic perspectives for the safeguarding of culture can be foreseen for Colombia.

However, safeguarding offers no guarantees if the community holding the cultural element is not empowered to manage and regulate the protection of its heritage. The key here is to have grassroots processes that promote the enforcement of cultural rights. This is how each community lends a voice to their identity. The voices that rose in Vaupés are

[233] Ibid 10.

being heard, not only by the Colombian society that had forgotten them, but they are now internationally protected.

V. LESSONS FROM COLOMBIA

One of the methodological advantages of the modified functionalist approach proposed by Dannemann is the value of difference.[234] The author proposes that comparative law used in this analysis can 'be useful for observing gaps in the law of one country which—almost like the blind spot in our eyes—can be difficult to detect from within'.[235] Identifying these gaps through the analysis of difference allows learning outcomes between systems such that alternatives can be suggested.[236] The identified gap that this section addresses is the reluctance to use human rights frameworks in biodiverse areas occupied or otherwise used by Indigenous peoples in Australia.

Australia can be considered a pioneer nation in the mainstreaming of biodiversity, and its network of Commonwealth and State protected areas is wide, with the potential to expand to protect vulnerable ecosystems and species populations. Moreover, the commitment to the concept of *ecologically* sustainable development from the *Environment Protection and Biodiversity Conservation Act* ('*EPBC*') puts biodiversity at the forefront in Australia, by acknowledging the importance of healthy environmental processes.[237] The inclusion of Aboriginal and Torres Strait Islander peoples in co-management strategies of protected areas since the late 1970s started a process of reconciliation, which was fine-tuned with the application of the ecosystem approach in the 1990s. However, the tools provided by environmental law, even if they abide by the best practice CBC model, are insufficient to reach a Pareto optimal solution. Hence, the lessons drawn from Colombia show that the alternative model of the collective legal autonomy concerning TEK can

[234] Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, 2006) 383. See the introduction of this thesis for the choice of methodology.

[235] Ibid 416.

[236] Ibid 417.

[237] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'). The principles were first proposed in the *National Strategy for Ecologically Sustainable Development*. Refer to Chapter II.

inform law reform in Australia by marring the two legally protected interests discussed in this thesis.

This chapter has shown that the legal developments in the Colombian Constitutional Court, as well as the fostering of the protection of cultural rights via the safeguarding of intangible heritage elements, have benefited the human rights of Indigenous peoples and ethnic minorities in the country. The commitment to the incorporation of *ILO 169* into the Constitutionality Block and the continuous incorporation of the principles of *UNDRIP* into the jurisprudence of the Constitutional Court have reinforced democratic spaces. This institution's constant reminder of the multicultural and pluriethnic makeup of the State has been a key feature in the blossoming of the rights of public participation and consultation. Indeed, it has allowed the ethnic minorities to cause the dominant society to reflect on their worldviews in relation to the mainstream model of progress. Despite some vocal sectors opposing the reach of these rights, especially as regards consultation,[238] the chances of Indigenous peoples reaching equal political footing by means of differentiated human rights are now stronger than ever.

There are still some doubts associated with the risks of giving free rein to Indigenous peoples to exercise their autonomy and governance rights over their territories. However, this scepticism stems from the fear of these communities choosing a Western model of development harmful to biodiversity.[239] It can be contended, however, that a top-down approach to policy-making from the dominant society carries the greater risk factor. Even the most balanced and positive policies must include a participatory process in their drafting to ensure their appropriateness to cultural realities.[240] When these laws and policies explicitly or implicitly promote a judgement value on the part of States in regards of the customs and worldviews of Indigenous peoples, the dangers of perpetuating negative stereotypes arise. The conservation of biodiverse areas occupied or otherwise used by Indigenous peoples based only on regulations derived from the provisions of *Ramsar*, the *CBD* or the *WHC* can easily miss the human rights factor. Value judgements

[238] The media periodically attacks the right to consultation, especially when its due application delays the approval of development projects. For a sample of media articles, see note 40 in the introduction of this thesis.

[239] See for instance the discussion about the Chupa-Pou in Chapter II. For a case study of conservation strategies that backfire once the native owners and managers are removed, see Dowie's case study of the Adivasi tribes in India. Dowie, above n 32, 118–132.

[240] Refer especially to art 21, which enshrines the rights to have their social and economic conditions. This has to be read in conjunction with the provisions related to consultation and participation (arts 18 and 19) and with the key right of defining their own development priorities (art 23).

are the most problematic in cases of policies addressing the marginalised situation of Indigenous peoples. The value of sites is no longer determined by the outstanding features of the site, or by assessing the number and representativeness of species within an ecosystem. Rather, it is now understood that such decisions relate directly to people. Buildings, plants and animals have no say in their destinies where policies are concerned, but to bestow that same fate on rational peoples as if they were representative specimens begs a pause for reflection.

In Australia, as this thesis has argued, the current case law and statute resists the recognition of the right to be different that should be entitled to Aboriginal and Torres Strait Islander peoples. It is time to abandon the messianic mentality of the British administrator and widen participatory spaces.[241] This process starts with recognition of the pre-existence of Indigenous peoples on the continent at a constitutional level.[242] No lasting inclusion can be achieved if the mechanisms in place can be modified or suspended by the government to serve their own agenda.[243] The imposition of external values without a culturally appropriate consultation process[244] results in flawed policies.[245] Until perceptions change to recognise that the customs and traditions of Indigenous

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[241] Davis' anecdote in relation to the eleventh viceroy of the Indian colony, George Nathaniel Curzon, is a perfect example: '"There has never been anything," [Curzon] wrote, "so great in the world's history as the British Empire, so great an instrument for the good of humanity. We must devote all of our energies and our lives to maintaining it." Asked why there was not a single Indian native employed in the Government of India, he replied, "Because among all 300 million people of the subcontinent, there was not a single man capable of the job"'. Wade Davis, *The Wayfinders–Why Ancient Wisdom Matters in the Modern Day* (House of Anansi Press, Inc., 2009) 12.

[242] In early 2013, the Act that will allow the proposal for a constitutional reform to be submitted by the referendum was passed in the Commonwealth Parliament. The Act also enforces recognition:

's **3 Recognition**

(1) The Parliament, on behalf of the people of Australia, recognises that the continent and the islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples.

(2) The Parliament, on behalf of the people of Australia, acknowledges the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.

(3) The Parliament, on behalf of the people of Australia, acknowledges and respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples'. *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

[243] See for example the dismantling of ATSIC or the enforcement of the Northern Territory intervention by suspending the application of the *Racial Discrimination Act 1975* (Cth), commented briefly in Chapter III.

[244] The UN Special Rapporteur stressed that consultation processes, especially in regards to the right to define development priorities (*UNDRIP* art 23) are lacking in the country [60]–[61]. He noted, however, that Aboriginal persons have initiated and run several successful initiatives [63]–[64]. Anaya, above n 134.

[245] See for example Reid et al's critique of the Kakadu National Park co-management agreement, where the management system follows a 'Western' approach, often bureaucratic, that has prevented Aboriginal peoples in the Park from reaching senior positions. The same criticism applies to the Uluṟu-Kata Tjuṯa National Park. Hannah Reid et al, 'Co-Management of Contractual National Parks in South Africa: Lessons from Australia' (2004) 2(2) *Conservation & Society* 377, 393, 398, 401–402.

peoples are equally worthy of being called legal systems and societies, the dialogue will continue to be one-sided.

Aboriginals and Torres Strait Islanders already suffer the misuse of the Race Power that resulted from a referendum that only suppressed portions of the discriminatory aspects of the Constitution. Further, the Native Title recognised in *Mabo* has since been watered down.[246] As at 2013, five years have passed since the Apology, yet the changes to law and policy that have followed have been insufficient, especially considering that the avenues for protection, such as the *Racial Discrimination Act*, can be suspended at will. Australians have not yet come to appreciate the problems faced by their Indigenous communities. The continued confusion between welfare and true inclusion, and between acting in 'their best interests' and accepting that Aboriginal and Torres Strait Islander peoples are mature nations capable of self-determination, will perpetuate marginalisation.

If legal recognition of the rights of Indigenous peoples in Australia is not enforced, the milestone set by the Apology[247] will be relegated as a symbolic gesture. This legal recognition cannot operate as isolated statutory reforms in the States, and it is not practical to leave the matter to the Courts. To level the playing field, only a Commonwealth-level reform is appropriate. It is also owed as a form of redress for past wrongs, such as *terra nullius*. Such a reform is currently underway and will submit the decision to a referendum to amend the Australian Constitution.[248]

The amendment proposals are straightforward in two main aims. The first is to remove remaining discriminatory provisions from the constitution.[249] The second is to achieve recognition in a way that encompasses a holistic perspective, consistent with cultural integrity.[250] The third amendment would see the insertion of a constitutional

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[246] Megan Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6.

[247] Prime Minister Kevin Rudd, above n 8.

[248] The Government has to begin a review process to assess the likely support of the Australian population for the proposals. *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 4 ('*Recognition Act*'). The proposed amendments are the result of research conducted by the Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) ('*Expert Report*').

[249] Proposed amendment: removal of the Race Power, s 51(xxvi) and of s 25. '**Provision as to races disqualified from voting**: For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted'.

[250] This recognition will be in the form of an added s 51A. The amendment will include the recognition of s 3 of the *Recognition Act*, followed by a new power: 'Acknowledging the need to secure the advancement of

prohibition against racial discrimination, while still allowing affirmative action provisions.[251] Finally, the amendments would introduce the recognition of Aboriginal and Torres Strait Islander languages as part of the Australian national heritage.[252] Even if the matter of governance autonomy and self-determination are not expressly mentioned, the inclusion of the acknowledgement of the pre-existence of peoples in the country and of their languages, heritage and culture is crucial for building a new relationship between Indigenous peoples and the State. The proposed amendments do not specifically grant any rights, but they do remove the obstacles that have hampered the efficiency of the ratified human rights treaties, especially the *Racial Discrimination Convention*.[253] The recognition in the constitutions of Queensland, Victoria and soon NSW is incomplete and has crippling caveats. Regarding the *Close the Gap* policy, it is obvious that financial resources are needed to assist key sectors, called 'building blocks' in the agreement, such as health and education. However, both areas present risks and opportunities. The clearest opportunity; that is, that resources not be allocated in a top-down 'missionary' fashion, is consistent with the developments in Latin America in general, and in Colombia in particular. Further, here is a chance to recognise education as a key human right instead of a homogenisation tool. It should be tailored to cultural needs and become a powerful resource for Indigenous peoples for cultural revitalisation strategies. Coupled with governance capacity building aimed at equipping future leaders, positive outcomes can be achieved.

The lesson from the *Jaguar Shamans of Yurupari* serves as a parameter. Recall that the initiative that is now listed as intangible heritage of humanity started as an emergency strategy wherein several communities saw their cultures as threatened by different pressures. One of the first actions they took was to redesign the school curriculums within every community. This allowed for the creation of the 'Life Plan' of the management of the land, which eventually led to their recognition by UNESCO, and

Aboriginal and Torres Strait Islander Peoples the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples'. This power can only be used in the benefit of Indigenous peoples. *Expert Report*, above n 248, 2030.

[251] Proposed amendment: 's 116A (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic and national origin. (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group'. Ibid 231.

[252] The amendment would insert s 127A.

[253] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

which is comparable with the sense of caring for country of Indigenous communities. This makes the Colombian experience different from the co-management strategies in place in Australia. The initiative came from Indigenous peoples themselves, who found in the human rights–based framework of the new Colombian Constitution of 1991 the tools they needed. This was accomplished with very limited resources. Imagine if the budget allocated for the *Close the Gap* initiative could be used by the communities for projects of their own devising. Imagine if the majority society finally entrusted the peoples with their future. In the area of health, a part of the budget could be allocated specifically for initiatives to revitalise and encourage TEK. This is not a rejection of Western medical science; it is obvious that vaccines, antibiotics and the provision of quality medical facilities to reach inaccessible places should continue.[254] However, problems like diabetes have been associated with replacing traditional 'bush food' with diets rich in junk food. To support and encourage practices whereby natural plant and animal resources are used as food and medicine is compatible with the human rights–based approach of the collective legal autonomy concerning TEK.

Do not confuse this proposal with a veiled attempt to promote enforced primitivism. This initiative, as with any other, has to be coupled with consultation processes. Regarding employment, it is imperative to reinforce that generating jobs such as factory work or mining activities is not a panacea. Neither is creating jobs within National Parks if the policies for creating said jobs is not consulted and drafted carefully with the custodians of the land. The main risk here is that this initiative could be construed an assimilation policy. Consider this in parallel with the experiences in Latin America with the *política indigenista* of the mid-twentieth Century. In that case, one of the main strategies was to 'civilise' the peoples who still lived in the jungle, to concentrate them in controlled and denser settlements. The introduction of money and previously unsuspected needs followed.[255] Next, the lands they formerly used to provide their livelihoods, and that they in turn supported and cared for, were colonised and transformed. Hence, the people saw

[254] See the observations of the Special Rapporteur in this respect, noting that the commitments to improve the health in the Aboriginal portion of the population are commendable, but they should also focus on developing programmes that involve physicians and other health workers from the communities. Anaya, above n 134 [33]–[34].

[255] Refer to the testimonies of the Indigenous peoples of the Amazon about their impressions of the arrival of money to their communities in José Gregorio Vásquez and Gerard Verschoor, *En defensa de lo propio: Hacia el perfeccionamiento de las relaciones entre el mundo tikuna y el mundo occidental* (Tropenbos Internacional Colombia, 2011).

their cultures and mores undermined, their language abandoned and their land taken away. For biodiversity conservation, it is clear that to ensure the continuation of practices such as the *chagras* or firestick farming is immensely beneficial.[256] The initiative cannot be approached from the value-laden perspective of fossilisation. Rather, it is the acknowledgement by the dominant society of livelihoods and management strategies that, over time, have worked to maintain the quality of biodiversity in an area.

Recognition starts in the Constitution. This was the case in Colombia, and the results can be seen 20 years later. *Mabo* was not sufficient to create this kind of effect and, in the exact same 20 years, change has been slow to develop. Further contrasting these two examples is the fact that Australia has a strong economy and is not in the midst of a devastating armed conflict. Colombia, despite its general crippling disadvantages, was able to believe that this paradigmatic leap towards multiculturalism was possible. The Constitutional Court was able to commit to these changes and challenges. It is entirely possible that Australia can also commit to a framework that recognises these human rights. Note that a bill of rights does not necessitate the inclusion as a Constitutional amendment. The recognition, especially the affirmative action provision that would replace the Race Power in section 51, can open the door for the passing of legislation with human rights contents. Australia has ratified seven major human rights treaties that can serve as a framework for implementing the collective legal autonomy concerning TEK if they are interpreted under the parameters set by *UNDRIP*.

V.1.The Collective Legal Autonomy Concerning TEK and Fortress Conservation

This thesis is not proposing to abolish fortress conservation altogether, because there are indeed instances when it is both useful, desirable and it fulfils the objectives of biodiversity conservation. This is the case, for instance, of the Yaigojé-Apaporis case study in the Colombian Amazon. Here, Indigenous communities asked for the additional protection of the National Parks model, because it is the only legal strategy for conservation that truly protects the land from mining intrusions that may destroy it or at

[256] See in this respect the comments on these two systems in Chapter II.

least severely pollute it. The case also shows that it is possible to have one of the stricter IUCN Category protected areas over a territory that has been used sustainably for centuries, thus addressing the critiques raised by some conservation biologists regarding the inconvenience of this categorisation.[257]

However, it is possible that this wholly new concept of a Park proposed by an Indigenous people is the exception and will not become the norm. After all, the peoples of the Amazon have been very isolated and their contact with Western civilisation has been limited. Additionally, the ecological identity of Indigenous peoples in Colombia has been a successful survival strategy because of their alliance with environmentalists. It is thus possible to encounter opposition by some sectors that may question the true motives behind the creation of the park.

V.2. Community-Based Conservation and the Collective Legal Autonomy Concerning TEK

Drawing on the arguments against the collective legal autonomy concerning TEK as a valid model from the perspective of fortress conservation, similar attacks can be made from the application of TEK as a government strategy following the CBC precepts. Chapter III was critical of the hiring of Indigenous peoples in National Parks as a poverty alleviation strategy and to satisfy article 8(j) of the *CBD*. The problem is not the hiring per se, but the lack of opportunities to hold significant management positions. In this respect, the strategy does not give TEK the importance it deserves. However, this strategy better encompasses conservation goals because it guarantees a sound scientific basis that controls the activities that can be performed in the area. Hence, a strong general policy designed by pools of scientists and tailored for the area in question guarantees that the peoples allowed to perform limited subsistence activities do so in line with scientifically informed best practice. After all, there have been instances of long separation from the land and there is no guarantee that traditional knowledge, passed orally, will be reliable for the changing situations that the current environmental crisis may bring. The most plausible solution for conflicts between biodiversity conservation

[257] The Yaigojé Apaporis is categorised under Category I-a of IUCN Protected Area Management. Refer to Table 5 in Chapter II for the different categories.

and the human rights of Indigenous peoples is the promotion of the rights of consultation and participation. Joint collaborations based on *mutual* respect are critical.[258]

VI. CONCLUSIONS

The model of the collective legal autonomy concerning TEK successfully balances the interests of biodiversity conservation and the recognition of the human rights of Indigenous peoples. The Colombian case, where the Constitutional Court has developed a legal doctrine that recognises the seminal importance of multiculturalism, shows this balance. The change from a dualist implementation of international treaties to the legal stance where human rights provisions form part of the Constitutionality Block is important here.

This human rights–based approach, combined with the new drive for a multicultural and pluriethnic Colombian identity, had a positive impact for biodiversity conservation. By empowering Indigenous peoples, guaranteeing their access to the Courts, their territorial autonomy and their customary and collective rights, the Colombian legal system and its tools became a weapon for environmental protection through Indigenous initiative. The invalidation of the *General Forestry Act* by the Constitutional Court can be considered a landmark case in this empowerment process. Additionally, the case studies of the *Jaguar Shamans of the Yurupari* and the declaration of the Yaigojé Apaporis reservation as a National Park by Indigenous initiative show what can be achieved when nature and people are not separated by legal and philosophical considerations. Note that this is only an illustrative sample, and is arguably limited to a sector of the Amazon jungle difficult to replicate; however, the lessons to be learned for the empowerment and development of human rights law cannot be ignored.

The main advantage that the collective legal autonomy concerning TEK has over the model of fortress conservation is that it abandons the perspective of the environment as an entity separated from people that should be isolated. The recognition of the right to a

[258] Note that in countries such as Colombia where legal pluralism is the rule, the role of Indigenous peoples and their authorities within their territories is autonomous. Hence, it is not possible for the State or other actors to perform any activities in their collective territories. However, the exception to this rule is mining. In this respect, consultation processes following the standard set by the Constitutional Court are the rule to follow.

healthy environment as a collective fundamental right of Indigenous communities in the *Illicit Crops Case* and the acknowledgement that indirect environmental impacts, such as those created by the repealed *General Forestry Act* or the *Mining Code*, show that the Colombian legal system has taken a stance that respects diversity and strives to place Indigenous communities on an equal footing to majority society in issues that affect them. In these instances, the cosmovisions, interpretations and cultures of different ethnic communities have generated a positive impact for biodiversity conservation. The case study of the *Jaguar Shamans of Yurupari* showed that the link between tangible and intangible heritage values is inextricable in the matter of sacred sites and that reaffirming and enforcing cultural rights contributes to the protection of the two legally protected interests that are the subject of this thesis.

In regards to CBC as a valid alternative that addresses these two issues, it is clear that this model is adequate to integrate the recognition of the human rights of Indigenous peoples. The recognition of the soundness of the management plan of the Yaigojé Apaporis, in which the peoples of the Vaupés communities had the key role, shows that TEK is compatible with Western science. Further, the commitment of the Indigenous authorities to the stewardship of their ancestral territory in defiance of a model that offered them 'job security' to work as miners, counters two of the perceived challenges of the model. First, the peoples represented by ACIYA were not victims of a 'fossilisation' strategy that conditioned their enjoyment of the land to the preservation of a 'traditional lifestyle' in the wording of article 8(j) of the *CBD*. Rather, the peoples asked specifically for the extra protection that a National Park, which categorically forbids mining, could give to their territories and livelihoods. This brings the second point. The argument that only salaried jobs, such as mining, are the answer to poverty within Indigenous communities can be questioned. Perhaps the 'poverty' that these wage-earning opportunities seek to address is, if not imagined, then a matter of perspective. By respecting the autonomy of these communities, who define their livelihoods in terms different from the monetary value, the messianic and managerial top-down approach of State policies can be revaluated.

None of these examples could have taken place in a legal framework that failed to guarantee the human rights of diversity, self-determination, governance autonomy and cultural integrity.

CONCLUSIONS

This thesis set out to ascertain the most suitable model to achieve biodiversity conservation objectives in territories inhabited or otherwise used by Indigenous peoples. It first identified that the recognition of human rights of Indigenous peoples and the protection of biodiversity are legally protected interests that ought to be respected. The two interests can collide in the implementation of protected areas such as National Parks. Both interests are protected by international law and domestic regimes, and neither should be sacrificed in the name of the other. Hence, the legal model for implementation should achieve a Pareto optimal solution in which both interests are maximised to the highest possible extent. Two strategies have dominated the design and implementation of protected areas: the fortress conservation and CBC models. Both are based on the discipline of environmental law.

The following research questions were answered in this thesis:

Question I: How can the collision between biodiversity protection and the recognition of the human rights of Indigenous peoples be resolved? Which of the two legally protected interests ought to prevail in an organised society, ruled by the principles of the Constitutions of Australia and Colombia?

Question II: Do either the fortress conservation or the CBC models provide an adequate solution for this collision?

These questions were addressed through a comparative analysis. The methodology used was a modified version of the functionalist method, which considers the differences between legal jurisdictions and approaches as well as the similarities. This enabled the comparison between a Common Law country, Australia, and a Civil Law country, Colombia, which are both among the top megadiverse countries of the planet and harbour a wide array of Indigenous peoples.

I. BIODIVERSITY AND INDIGENOUS PEOPLES' HUMAN RIGHTS: CONCEPTUAL ANALYSIS AND COLLISIONS

Chapter I of this thesis addressed the analytical component of the first research question. For this, it defined the contents of the two legally protected interests, their place in the legal system and the collisions between the two. It proved the following claims.

The first legally protected interest, biodiversity, is the variability of life on earth. It works as a complex web formed by three components: **1)** genes, **2)** species and **3)** ecosystems. **1)** Genetic variability is vital for the survival of species; if a population is too small, lethal genes can manifest and cause the demise of the species because of inbreeding depression. The best way to protect genetic variability is to have several healthy populations of each species, distributed across a wide geographical range. **2)** The best-known component, species diversity, guarantees ecosystem health because, even if a key species disappears, another will be ready to occupy its niche, thereby preventing the collapse of the ecosystem. Protecting species in different stages of endangerment is moot if the habitat in which they live is threatened, especially if the species are endemic to small areas. **3)** The last component is variability of ecosystems. These also act in an interconnected fashion and their health is pivotal for guaranteeing the supply of key services such as pollination, freshwater supply, recreation and carbon sinks. The most suitable strategy to protect ecosystems and their services is to have a network of protected areas of a fair size, interconnected by biological corridors that enable species mobility.

International and domestic legal regulations that only seek to protect the first two components are ineffectual if they are not complemented with strategies that protect entire ecosystems. Thus, the most suitable way to guarantee the greatest genetic variability of the greatest number of species is to adopt measures to protect entire ecosystems. This notion is called *in-situ* conservation, and the most suitable model by which to implement it is through the system of protected areas.

The second legally protected interest is the recognition of the rights of Indigenous peoples. These distinct human groups share cultures separate from the majority society. The tools of self-identification and self-determination are used to establish who Indigenous peoples are. The marginalisation and historical disenfranchisement to which

these peoples have been subjected makes it ethically and morally relevant to recognise that they have differential human rights. These complement the basic universal human rights enshrined in the *Universal Declaration of Human Rights* and the *Covenants on Civil and Political Rights* and *on Economic, Social and Cultural Rights*. These differentiated rights are entitled to them collectively in their quality as *peoples*, and their recognition does not impinge upon the individual universal human rights of each of the members. The key international instruments that conceptualise these collective rights are the *Indigenous and Tribal Peoples Convention* (*ILO 169*) and the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*).

To recognise human rights with peoples acting collectively as rights-holders, as opposed to individuals, it is imperative to first and foremost guarantee the right to self-determination with a degree of governance autonomy. Deeply intertwined with the recognition and exercise of this human right are four other sets of rights: 2) the rights over territories and resources; 3) the right of public participation and the development of participation spaces; 4) rights associated with cultural integrity, such as the right for their languages to be protected and revitalised, freedom of religion and of enjoyment of their own culture; 5) and the right of non-discrimination.

The protection of biodiversity and the recognition of the human rights of Indigenous peoples are two legally protected interests that have an intrinsic value rooted in diversity. They are both fragile interests that have been threatened by a model of development that only admits a linear understanding of humanity and its resources. The result is that cultural and biological diversity are both in need of special protection. Each of the legally protected interests has a key non-negotiable component. For biodiversity conservation, this is the protection of the maximum amount of variability. For the human rights of Indigenous peoples, it is the full recognition and promotion of the collective human right to self-determination.

The major collision between biodiversity conservation and the recognition of the human rights of Indigenous peoples is when peoples are evicted from protected areas and are no longer able to use these resources. The fortress conservation model promoted this forced eviction, as argued in the critique in Chapter II.

II. A CRITIQUE OF FORTRESS CONSERVATION

Chapter II addressed the question of whether the fortress conservation model provides an adequate solution for the collision between the legal interests of biodiversity protection and the recognition of the human rights of Indigenous peoples. It proved the following claims.

The collision that can arise in countries that have international obligations to protect the two legally protected interests at stake can have the obvious solution of choosing one of them over the other. This is a sacrifice that cannot be made in the two compared countries because of their unique positions as megadiverse countries with a duty to their Indigenous minorities. The fortress conservation model sacrifices the recognition of the rights of Indigenous peoples, especially in regards to their claims to their ancestral lands, and thus it cannot be considered an optimal solution to the collision.

Fortress conservation evolved around the conception of a separation between people and nature. Its key foundational premise was to conserve pristine wilderness untouched by human beings, who were considered *a priori* and indiscriminately as deleterious to the environment. From this premise, three stages of evolution of the philosophical underpinnings of this model can be discerned, as it moved from complete separation to the acknowledgement of people as participants in the environment. **1)** The early era of romantic environmentalism was marked by the creation of the first wilderness reservations in the United States, evicting the Indigenous inhabitants. The complete separation between nature and people was promoted, and the latter were conceptualised as 'visitors who do not remain'. **2)** The second wave of environmentalism, characterised by the realisation of the magnitude of the crises threatening the environment, introduced the listing model for vulnerable ecosystems such as wetlands, or for heritage sites (*Ramsar Convention* and *World Heritage Convention*). The *Stockholm Declaration* acknowledged that the health of ecosystems is paramount for human well-being and conceptualised people as 'creatures and moulders of their environment'. **3)** The ecosystem approach came with the inception of the concept of sustainable development. It is enshrined in the Rio Summit documents, and it marks the turning point away from the artificial dichotomy between people and the environment. Humans are now conceptualised as 'the centre of concerns

for sustainable development … entitled to a healthy and productive life in harmony with nature'. This approach encouraged public participation, and Indigenous peoples, their customs and their TEK are recognised in the *Convention of Biological Diversity*, a binding treaty.

The system evolved from a purist focus on the aesthetic values of wilderness areas towards a more holistic approach that took people into account. This model is satisfactory for areas of special ecological vulnerability that are not inhabited or used by Indigenous peoples. Indeed, the anthropogenic biodiversity crisis known as the Sixth Extinction, which is especially grave in hotspots, necessitates the creation and maintenance of protected areas. However, the legal foundations of fortress conservation rested upon the discrimination and dispossession of already marginalised human groups. The *Parks vs Peoples* debate has taken the problems of fortress conservation to the forefront of academic circles and to policy makers, showing that the foundational deficiencies of the model can no longer be ignored.

The comparative study between Australia and Colombia showed that both countries have a similar history of environmental degradation, characterised by the transplanting of Eurocentric agricultural techniques and land tenure regimes into an ecosystem to which they were wholly unsuited. These transplants were detrimental for both legally protected interests because, first, they caused severe damage to ecosystems and biodiversity and, second, they largely ignored the customary practices of Indigenous peoples.

Both countries embraced the system of National Parks based on the fortress conservation style first promoted in the United States in the early twentieth century. Prior to the 1991 Constitution, Colombia developed a utilitarian approach to protected areas focussed on safeguarding renewable resources like water and timber, and aesthetically pleasing landscapes. The declaration of these areas was a completely top-down process that included the eviction of Indigenous peoples from some of the most iconic National Parks (eg, Amacayacu and Los Katíos). The new Constitution implemented drastic changes such as reconceptualising the nation as multicultural and pluriethnic, and transforming the system into a participatory democracy. Several of its provisions have been dubbed the 'ecological constitution', as they elevate the principles of sustainable development and environmental protection to the constitutional level. The Constitution of 1991 also adopted a purely monist approach to international treaties, wherein human

rights instruments have a supralegal status and are part of the Constitutionality Block. The opening of standing provisions for accessing the Constitutional Court gave rise to cases that sought the protection of the environment, linking it to threats to constitutional rights, such as the rights to life or health. Colombia has a modest number of listed areas under *Ramsar* and *WHC*.

In Australia, the *Tasmanian Dam Case* marked the era of federalism for environmental matters, by virtue of the international affairs power of the Constitution, despite such matters having been previously considered the prerogative of the States. The country has a dualist approach to international treaties. For environmental protection, the compliance with these treaties requires a national effort. The country has entered into a plethora of bilateral, regional and MEAs, which has allowed the area of environmental law in the country to flourish, especially after the late 1970s. The country has an impressive number of protected areas under *Ramsar* and the *WHC*, and it has developed specialised regulations on tangible heritage protection. The tension created by the use of the foreign affairs power to regulate environmental matters peaked in the 1990s, when the country turned to the model of 'cooperative federalism'. The country has also seen the transformation of *locus standi* provisions, allowing the access and participation of 'interested persons'.

In both countries, the system of protected areas has brought important benefits for biodiversity and the safeguarding of key ecosystems, and the evolution of environmental law provisions has enhanced their performance. However, even with the perfect application of this model, the foundational flaw of exclusion of human groups cannot be circumvented. The lack of participatory processes in fortress conservation is one of its greatest flaws. Although both countries expanded standing provisions, the access to Australian Courts in these matters remains restricted. The 1990s would mark the milestone for these countries to adopt models that were more inclusive, based on the ecosystem approach of the *CBD*. Australia put in place CBC strategies, while Colombia saw what this thesis has called the collective legal autonomy concerning TEK.

III. A CRITIQUE TO COMMUNITY-BASED CONSERVATION

Chapter III addressed the research question of whether the CBC model, especially in the form of co-management agreements, could solve the collision between biodiversity conservation and the human rights of Indigenous peoples. It proved the following claims.

CBC is considered in the doctrine as best practice. It applies the ecosystem approach of the *CBD*, tempering the strict preservationist model of fortress conservation. It is still firmly rooted in the environmental law discipline. This is not a model exclusively tailored for Indigenous peoples; rather, it seeks to include all concerned human communities in conservation endeavours, widening the input of different stakeholders. This position represents a shift from the purely top-down approach of the past, and it has promoted public participation and involvement in conservation. However, the assessment of the extent to which Indigenous peoples were allowed to use their TEK within these models, especially co-management agreements, revealed that CBC still does not reach a Pareto optimal solution for the collision between the two legally protected interests.

The supposed 'pristineness' of ecosystems to be protected is made questionable by the long-term habitation and use by Indigenous peoples, prompting the literature to revaluate the negative perception of the role of people *vis-à-vis* the environment. There are strong empirical studies that show that Indigenous peoples have developed a deep relationship with their lands based on TEK that have allowed these territories to appear 'untouched'. It was tempting to capitalise on these efforts, and hence the promotion of the skewed vision of the noble savage trope informed law and policy initiatives to marry cultural values and biodiversity conservation. The protection of tangible heritage seemed a suitable strategy because of the existence of mechanisms for the protection of mixed sites and cultural landscapes, which could cater for the protection of, for example, sacred sites. However, as the dispute of the Hindmarsh Island Bridge exemplifies, there is a gulf between Indigenous peoples' understanding and interpretation of their heritage and that of the majority society. This creates situations that impinge upon the cultural rights of Indigenous peoples, such as by prompting them to break their customary laws.

The application of CBC strategies in Australia, even if it has created employment opportunities for Aboriginal and Torres Strait Islander peoples in the management of their own ancestral lands, is not enough to redress the negative legacy of *terra nullius*.

The critique of the philosophical underpinnings informing the policies towards Indigenous peoples show that there have been three stages; all marked by interpretations of the noble savage myth. These are: **1)** Colonial stage and dispossession. Indigenous peoples considered as backwards or 'dying races'. Forced evangelisation in Colombia and the myth of *terra nullius* in Australia; characterised by the complete lack of validation of different worldviews, and the extermination, 'whitening' and other violent policies against Indigenous peoples. **2)** Integration and assimilation during the twentieth century. Incipient recognition of Indigenous peoples as rights-holders, but only as far as necessary to help them move towards full assimilation with the majority society. This was expressed internationally in *ILO 107*, known in Latin America as the *Política Indigenista*. Indigenous peoples were seen as in transition between 'savagery' and civilised society. Their ways of life and traditional industries were only validated as a means to achieve integration. **3)** Fossilisation or enforced primitivism. Concomitant with the ecosystem approach of the *CBD*, policy takes the perspective of biodiversity protection and sustainable use of natural resources. Recognition of 'traditional lifestyles' as sustainable practices, now part of binding international obligations (arts 8(j) and 10(c) of the *CBD*).

CBC strategies tend to fall into the fossilisation trap, whereby Indigenous peoples enjoy benefits provided their culture remains unchanged. This impinges upon the rights of self-determination and cultural integrity. It can also be seen as a new form of colonialism. Under this approach, Indigenous peoples are subordinated to environmental policies rather than legal or constitutional frameworks.

IV. COLLECTIVE LEGAL AUTONOMY CONCERNING TEK

Chapter IV addressed the normative research question of how to resolve the collision between biodiversity protection and the recognition of the human rights of Indigenous peoples. It proposed an alternative radical model grounded on mandatory human rights obligations rather than on environmental law provisions. The collective autonomy to

TEK reaches a Pareto optimal solution between the legally protected interests. The proposal is based on the following proven claims.

The philosophical underpinnings of the model are, first, that autonomy in this case is not circumscribed to the individuals, but to communities in their capacity as *peoples*. It is linked to the human right of self-determination and governance. Second, linked to this autonomy is the fact that the human rights of Indigenous peoples are entitled in a collective fashion. This is the practice that best suits the demands and claims of these groups in the international and domestic arenas.

The collective legal autonomy exists in Colombia. The peoples in that country are entitled to collective human rights framed in the Constitution and international agreements. These comply with the five sets of rights recognised by international law: 1) self-determination and governance autonomy, 2) territories and resources, 3) public participation and consultation, 4) cultural integrity and 5) non-discrimination. This autonomy places Indigenous peoples at the forefront of the design and administration of management initiatives for biodiversity conservation based on TEK, which reach a Pareto optimal solution to the collision of interests.

The Colombian legal system has taken a stance that respects diversity and strives to give Indigenous communities equal footing. In these instances, the cosmovisions, interpretations and cultures of different ethnic communities generated a positive impact for biodiversity conservation that reconciled fortress conservation with the recognition of cultural and governance rights. The case study of the Yaigojé Apaporis showed that the Indigenous communities were willing to engage in the protection of their land under the figure of a National Park, but on their own terms. Worthy of note is that they sought the guarantee that only fortress conservation could provide: immunity from mining. Thus, instead of a co-management plan drafted and administered by government authorities, the communities themselves took the initiative and are the ones in charge of the protected area. This is a pertinent reinterpretation of CBC based on human rights rather than environmental law. The case of the Jaguar Shamans of Yurupari showed that the protection of intangible heritage as a reinforcement of cultural rights is a sound alternative to the shortcomings of the tangible heritage legal regime. Broadening the scope of biodiversity protection from the merely physical to the intangible components opens the door to more effective and inclusive strategies. This holistic perspective solves

the problem of the artificial separation between people and nature, and takes the affinity view at its core.

Although Australia is not likely to implement a special differentiated bill of rights for Indigenous peoples, the subscription to *UNDRIP* opens the door to more inclusive initiatives no longer based on assimilation. The journey to recognition currently in progress, which will see Aboriginal and Torres Strait Islander peoples finally recognised in the Constitution in a positive light, is a promising sign. Further, seeing that there are indeed mechanisms in place that reconcile biodiversity protection and the recognition of the rights of Indigenous peoples without resorting to patronising fossilisation perspectives may lead to new, or perhaps renewed, radical initiatives.

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