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Protection of Indigenous Peoples' Sacred Sites within the International
Legal Framework of FoRB and the Impact of the UNDRIP

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Alessandra Macrì

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ao. Univ.-Prof. i.R. Dr. René Kuppe

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights
AFCHPR	African Court on Human Peoples' Rights
ATR	Andaman Trunk Road
CAS	Committee on the Application of Standards
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CIL	Customary international law
CMP	Climbing Management Plan
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
EctHR	European Court of Human Rights
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
ENIP	European Network on Indigenous Peoples
FCMP	Final Climbing Management Plan
FoRB	Freedom of Religion or Belief
FPIC	Free Prior and Informed Consent
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law
ILA	International Law Association
ILO	International Labour Organization
MDA	Master Development Agreement
NPS	National Park Service
OAS	Organisation of American States
OSCE	Organisation for Security and Co-operation in Europe
PGCA	Pololeti Game Controlled Area
PGR	Pololeti Game Reserve
RoN	Rights of Nature
SCC	Supreme Court of Canada

SNSs	Sacred Natural Sites
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNPFII	United Nations Permanent Forum on Indigenous Issues
WGDD	Working Group on the Draft Declaration
WGIP	Working Group on Indigenous Populations
WHC	World Heritage Convention
WHL	World Heritage List

INTRODUCTION

Indigenous religions are distinctively marked by a spatial dimension which demands a ‘spatial turn’¹ in the legal construction of the definition of ‘religion’ in order to include indigenous religions under the protections afforded to majoritarian religions within the international legal framework of the right to Freedom of Religion or Belief (FoRB). The thesis questions the effectiveness of the current international legal standards on FoRB, specifically the supposedly universal scope of its foundational provisions, and it calls for substantive reform of the dominant legal framework on the matter. Indeed, the formulation of the established instruments to protect FoRB contravenes its universal vocation, marginalising *de facto* Indigenous Peoples’ religions. Nevertheless, the thesis not only aims to critically examine the limits of religious freedom law, but also its possibilities in the context of claims of Indigenous peoples to their sacred lands considering the impact and potential of the UNDRIP’s provisions.

After introducing the topic by providing a narrower definition of sacred natural sites and highlighting their importance to Indigenous Peoples, the first chapter will contextualise the right to FoRB within the international human rights legal framework. It will follow a critical analysis of the advantages and the limits of resorting to the right to FoRB as a means of protection for Indigenous Peoples’ sacred sites. The first part of the chapter will examine the reasons for the right to FoRB’s suitability to protect sacred sites compared to other legal instruments within the international human rights legal framework. The second part will question the adequacy of the Western category of ‘religion’ when applied to indigenous worldviews and spiritual practices, ultimately arguing for its inadequacy mainly due to its Westernised cultural bias. The contrasting elements between non-indigenous religions and indigenous religions legally relevant to the formulation of religious rights- namely, individual adherence to religious belief /communal exercise of religion in sacred sites- will be introduced here to be further discussed in the context of the UNDRIP (II chapter). The cultural bias intrinsic to the formulation of religious freedom provisions translates into the adoption of double standards for non-indigenous religions and indigenous religions when guaranteeing religious freedom leading, in several cases, to the discriminatory treatment of the latter.

The II chapter will provide a brief overview of the relevant provisions of ILO 169 and the UNDRIP and delve into the religious rights elaborated therein, particularly Art.12 and Art.25 referring to sacred sites. The limitations of ILO 169 and UNDRIP will be addressed. The

¹ Dwight G Newman, ‘Arguing Indigenous Rights Outside Section 35: Can Religious Freedom Ground Indigenous Land Rights, and What Else Lies Ahead?’ in Thomas Isaac (ed), *Key Developments in Aboriginal Law* (Thomson Reuters 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289750>

concluding section of the chapter will focus on the analysis of the case of *Ktunaxa Nation v. British Columbia*², particularly explicative of the cultural colonial bias that pervades the conventional formulation of freedom of religion law.

Finally, the third chapter will examine four legal avenues enhancing measures for the protection of Indigenous Peoples' sacred sites. The first proposal is centred around the broadening of the legal definition of religion to recognise the specificities of indigenous religions and accommodate Indigenous Peoples' sacred land claims. The second solution suggests the recognition of the religious rights enshrined in the UNDRIP (articles 12 and 25) as Customary international law (CIL); the third proposal stems from the premise that the element of indivisibility and interdependence of human rights is of crucial importance for Indigenous Peoples' protection of sacred lands. Therefore, the implementation of the set of human rights linked with Indigenous Peoples' religious rights will favour and reinforce them. The fourth proposal considers granting legal personality to sacred sites as a viable option for their protection, referencing landmark cases: Te Awa Tupua, Gaṅgā and Yamunā rivers and Pachamama.

² *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* [2017] SCC 54, [2017] 2 SCR 386 [Thereinafter *Ktunaxa*]

CHAPTER I

The Significance of Sacred Sites for Indigenous Peoples

One of the main defining traits of Indigenous Peoples' identity, which transcends the cultural and social specificities among different indigenous communities worldwide, is the unique relationship they maintain with their ancestral lands. Specific areas of Indigenous Peoples' territories, besides retaining a universal value as rich repositories of biodiversity and being the main source of livelihood for their inhabitants, hold a distinctive spiritual value for the indigenous communities, crucial for the perpetuation of their religious practices. Although an accurate and unanimously accepted definition of 'sacred natural sites' (SNSs) is lacking within the framework of international law, an operational definition can be provided here by identifying sacred natural sites as lands, bodies of water or specific natural features that bear spiritual significance for Indigenous Peoples according to their customs³. The adjective 'natural' is particularly relevant here as it differentiates Indigenous Peoples' sacred sites from sacred sites where the anthropic element is predominant such as temples, mosques, synagogues or churches. The definition of SNSs provided above is deliberately broad to include the numerous and diverse types that fall under the category; they greatly vary in their physical features and functions, often encompassing intangible elements. Although it is important to stress the unique connotation that each Indigenous community confers to a specific SNS, their quality of sacredness, which sets them apart from ordinary places, runs deep in every Indigenous culture and it demands the observance of a specific 'etiquette'. Indeed, despite the variety of designations and functions that can pertain to SNSs in different Indigenous communities, and even within the same community, and despite the semantic inaccuracy that can occur in the translation to English, everywhere the concept of 'sacred sites' implies the observance of a set of restrictions and prohibition on human behaviour⁴. Conservation-based approaches have developed numerous classifications based mainly on the physical features of SNSs. For the purposes of this thesis, a mainly anthropological classification based on their religious functions will be adopted. Due to space constraints, the list of SNSs according to their religious functions cannot be exhaustive, therefore three primary typologies will be considered to enhance the understanding of the legal issues under analysis: ceremonial sites, burial sites and abodes of deities, spirits or ancestors. Ceremonial SNSs are mainly devoted to the performance of ceremonies which include prayers, songs, dances, chants and specific rituals.

³ Robert G Wild, Les Valeurs and Unesco. Programme Intergouvernemental Sur L'homme Et La Biosphère, *Sacred Natural Sites: Guidelines for Protected Area Managers* (Iucn; Paris 2008)

⁴ David L Carmichael and others, *Sacred Sites, Sacred Places* (Routledge 1994) 10

This function reinforces the bond existing among the community members and their sense of belonging to the community itself, ensuring the continuity of their culture. A prominent ceremonial site is Mato Tipila ('Bear's Lodge') in Wyoming, otherwise known as 'Bear Butte', 'Bear Tipi', 'Tree Rock' and other translations of Indigenous designations of the place. This site is highly revered by over twenty Great Plains tribes that therein perform some of their most traditional rituals such as the sweat lodge, fasting rituals and the annual Sun Dance during midsummer.

Among the SNSs, burial sites have become the focus of heated controversy in many cultural contexts due to the numerous claimants willing to impose their particular interests on these sites. Ultimately, the question arising from this is whether the right to dispose of these grounds should be indisputably granted to the Indigenous communities whose ancestors are buried there. Burial sites can vary considerably in their physical features, but overall, they constitute places where the presence of the ancestors is especially felt and honoured. An example of burial sites is the Māori *urupā* ('burial ground, graveyard'); 'sustainable' sites that allow Māori to meet their custodial obligations towards Papatūānuku ('Mother Earth')⁵ and revere their ancestors. *Urupā*, like other Indigenous burial sites, can vary in size from small plots to large cemetery areas. The larger ones have been progressively reduced in their extension due to the appropriation of Māori lands from British colonisers. However, some have received formal legal recognition from the settler state⁶. The last typology of SNSs is conceived as the preferred dwelling places for spirits, deities, ancestors and other non-human entities. Remaining within the Māori cultural heritage, an example is the Hikurangi, the sacred mountain of the Ngati Porou, which is the resting place of the canoe of Māui, the legendary demi-god protagonist of the mythological cycle that bears his name. Another remarkable example is the sacred groves in the Indian subcontinent. Sacred groves are enclosed patches of virgin forests inhabited by spirits, ancestors or specific deities. The existence of sacred groves is attested in several regions of the world (Ghana, Togo, Japan, Malaysia ...) and they date back many centuries. However, in the majority of cases they have been assimilated into the practices of the dominant religions and ultimately vanquished or significantly altered. In contrast, in India, this general trend of acculturation operated by the major religions took another, more 'inclusive', form resulting in a

⁵ Hinematau Naomi McNeill, Hannah Linda Buckley and Robert Marunui Iki Pouwhare, 'Decolonizing Indigenous Burial Practices in Aotearoa, New Zealand: A Tribal Case Study' (2022) 89 OMEGA - Journal of Death and Dying, 208

⁶ Te Kooti Whenua Māori. Māori Land Court, 'Discussion on Urupā Reservations (Māori Burial Grounds) | Māori Land Court' (Māori Land Court March 2014) <<https://www.xn--morilandcourt-wqb.govt.nz/en/who-we-are/our-judges/news-and-notice/discussion-on-urupa-reservations-maori-burial-grounds/>>

notably high number of sacred groves still being recorded today. The beliefs and practices associated with Indian sacred groves are incredibly diverse and usually connected with the local lore. Some of the most notorious sacred groves are Kovikaadugal in Tamil Nadu, Jhakeri in Odisha and Western Ghats in Maharashtra.

For the sake of completeness, in addition to the three typologies described above, it might be beneficial to list some other important types of SNSs that present features and fulfil functions found extensively in many Indigenous cultures, such as memorial sites (sites connected to specific mythological or historical event), commemoration sites, medicine-gathering sites, vision quest sites, sacred pathway and pilgrimage routes.

Threats to SNSs

In the majority of cases, usually as a result of historical colonisation, SNSs are either privately owned and managed by non-indigenous people or owned by the settler state whose economic interests more often than not collide with the interest of Indigenous Peoples to preserve their sacred sites from external disturbance. Indeed, Indigenous Peoples' rights to access, use and protect their lands continue to be exposed to serious threats coming from different sources. Private companies' industrial operations and state economic activities such as large-scale agricultural projects, extractivism (or neo-extractivism) and touristic infrastructures are among the most persistent issues that endanger SNSs globally. This paragraph aims to provide a brief outline of the main challenges faced by Indigenous communities when it comes to the protection of their sacred sites.

Currently, many SNSs located in different geographical areas enormously suffer from the impact caused by the extractive sector (including logging and oil extraction), more specifically from the consequences of neo-extractivism. According to the definition provided by Burchardt and Dietz, 'new or (neo-) extractivism partially breaks with the neoliberal strategy of privatising the export of raw materials, an idea known as classic or conventional extractivism[...]'⁷, intensifying the damaging effects typically produced by this form of environmental exploitation. Indeed, the neo-extractivist process involves multiple stakeholders at different stages alongside private companies, visibly increasing environmental degradation and social conflicts⁸. The deployment of security forces by the state, which often is involved in neo-

⁷ Hans-Jürgen Burchardt and Kristina Dietz, '(Neo-)Extractivism – a New Challenge for Development Theory from Latin America' (2014) 35 Third World Quarterly 468, 469

⁸ Bernardo Jurema and Maria Cecilia Oliveira, 'The Indigenous Struggle against "New" Extractivism in the Peruvian Amazon' (2023) 15 Cosmopolitan Civil Societies: An Interdisciplinary Journal 126, 127

<<https://epress.lib.uts.edu.au/journals/index.php/mcs/article/view/8543>>

extractivist activities, to repress the Indigenous-led protests or resistance against the dispossession or exploitation of their lands, often results in acts of atrocious violence. Moreover, the remoteness of many SNSs exploited for their natural resources aggravates the risk of impunity as law enforcement and consequent oversight might be less effective and the human rights violations may go unnoticed⁹. SNSs are ideal targets not only for extractive activities, but also for large-scale land acquisition (‘land grabbing’) for commercial, agricultural or industrial purposes such as palm oil and soy plantations, often leading to the displacement of the resident Indigenous communities. The occurrences of SNSs violations and human rights abuses on Indigenous communities due to land-grabbing and the extractive industry that can be mentioned are woefully numerous and the occurrences of forced evictions appear to be escalating worldwide¹⁰. Landmark cases such as *Awat Tingni v. Nicaragua*¹¹, *Orissa Mining Corporation v. Ministry of Environment & Forest & Others*¹², or the most recent developments in Halmahera Island, Indonesia, where the uncontacted Hongana Manyawa people are threatened by the nickel mining operations conducted by the worldwide leading mining company Weda Bay Nickel among others¹³, demonstrate the capillarity of the phenomenon worldwide. In all these instances the instruments devised to regulate relationships between Indigenous communities and business enterprises, namely the UN Guiding Principles on Business and Human Rights¹⁴, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct¹⁵ and the instruments to implement the principle of Free, Prior and Informed Consent (FPIC)¹⁶ were not respected, impacting on Indigenous Peoples right to self-determination.

⁹ Johannes Rohr and José Aylwin, ‘Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples. IWGIA Report 16 - IWGIA - International Work Group for Indigenous Affairs’ (IWGIA & European Network on Indigenous Peoples (ENIP) 2014) 16

<<https://www.iwgia.org/en/resources/publications/308-human-rights-reports/3166-business-and-human-rights-interpreting-the-un-guiding-principles-for-indigenous-peoples-.html>>

¹⁰ Jérémie Gilbert, ‘LAND GRABBING, INVESTMENTS & INDIGENOUS PEOPLES’ RIGHTS to LAND and NATURAL RESOURCES: CASE STUDIES and LEGAL ANALYSIS’ (Marianne Wiben Jensen & Genevieve Rose ed, 2017) 8 <<https://www.iwgia.org/images/publications/new-publications/land-grabbing-indigenous-peoples-rights.compressed.pdf>>

¹¹ *Mayagna (Sumo) Awat Tingni Cmty. v. Nicaragua* (2001) Series C N 79 (ICtHR)

¹² *Orissa Mining Corporation v Ministry of Environment & Forest & Others* (2013) Writ Petition (Civil) No 180 of 2011 (Supreme Court of India)

¹³ Survival International, ‘Indonesian Senate Leader: Protect Uncontacted Tribe from Nickel Mining’ (www.survivalinternational.org 7 June 2024) <<https://www.survivalinternational.org/news/13940>>

¹⁴ UN – OHCHR. The Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. New York and Geneva: UN – OHCHR, 2011
<https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>

¹⁵ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023)

¹⁶ See Chapter II

Another compelling issue that severely affects SNSs is related to the tourism industry¹⁷. The list of SNSs transformed into tourist destinations is incredibly long, ranging from Mato Tipila to Uluru in Australia. Tourism can affect the integrity of SNSs in various ways: provoking physical damages for instance through the construction of tourist facilities that alter the landscape, disturbing the sites by allowing access to groups of tourists or commercialising the area by turning it into a tourist attraction. A notable case law that testifies to the negative impact on Indigenous Peoples' religious freedom of the latter form of tourism related to commercial and recreational activities, centres on the long-contested site of the Mato Tipila monolith¹⁸, designated as America's first national monument in 1906. The site under the management of the National Park Service (NPS), a unit of the U.S. Department of Interior, is also a famous destination for technical rock climbing, attracting numerous climbers and spectators every year. Since the late 1980s, Native American tribes from the Great Plains gathering at Mato Tipila to perform their ceremonies complained about the rock-climbing activities interfering with their religious observances. In 1995 after three years of consultations with Native American groups, the NPS adopted a Climbing Management Plan (CMP) to regulate climbing activities asking the public to voluntarily refrain from climbing during June when Sund Dance and other Native American ceremonies are performed at Mato Tipila. The Bear Lodge Multiple Use Association, a group advocating for public access to natural resources, filed a lawsuit against the park service, claiming that the voluntary climbing ban wrongfully promoted religion and breached the Establishment Clause of the First Amendment of the United States Constitution¹⁹. In 1998 the Court of Appeal issued its final decision, claimed as a victory by Native Americans and their supporters for the free exercise of their religious rights²⁰, holding that the plaintiffs 'lack standing to challenge as a violation of the Establishment Clause the National Park Service's voluntary closure of Devils Tower National Monument in its final climbing management plan (FCMP)'²¹.

In many cases, tourism exploitation of Indigenous communities and their sacred sites is intertwined with conservationist plans. As counterintuitive as it might seem conservationist policies that aim at the preservation of biodiversity can be often included among the sources

¹⁷ For a comprehensive analysis of Indigenous Peoples tourism see: Anna Carr, Lisa Ruhanen and Michelle Whitford, 'Indigenous Peoples and Tourism: The Challenges and Opportunities for Sustainable Tourism' (2016) 24 *Journal of Sustainable Tourism* 1067

<<https://www.tandfonline.com/doi/full/10.1080/09669582.2016.1206112>>

¹⁸ *Bear Lodge Multiple Use Ass'n v Babbitt* 175 F 3d 814 (10th Cir 1999)

¹⁹ US Constitution amend I: 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

²⁰ Allison M Dussias, 'Cultural Conflicts Regarding Land Use: The Conflict between Recreational Users at Devil's Tower and Native American Ceremonial Users' (2001) 2 *Vermont Journal of Environmental Law* 13, 40

²¹ *Bear Lodge Multiple Use Ass'n v Babbitt*

that cause severe human rights violations against Indigenous communities that inhabit the protected lands eventually leading to the alienation of Indigenous Peoples's lands. Evidence of the positive effects on biodiversity produced by SNSs can be found in different geographical areas across numerous countries²², consequentially drawing the attention of conservationists towards the issue of the protection of SNSs. A recent example of how conservationist policies can be highly detrimental to local tribes infringing upon their core human rights and their very lives is the case of the NaturAfrica project²³, promoted by the European Commission, and the Maasai people in Tanzania. On June 5, 2024, the European Commission revoked Tanzania's eligibility for a proposed grant of €18.4 million to be shared with Kenya for the protection of biodiversity under the scheme of the NaturAfrica programme. This measure was prompted by concerns over the violent evictions of Maasai executed in Loliondo, in the Ngorongoro District by the Tanzanian government in June 2022, with the complicity of the Frankfurt Zoological Society and WWF²⁴. The forcible eviction followed an operation approved by the Minister for Natural Resources and Tourism and the President to annex 1,502 km² of village land in Loliondo with the purpose of establishing the Pololeti Game Controlled Area (PGCA) and, upgrading it to the Pololeti Game Reserve (PGR) for wildlife conservation. Even to date, residents in Loliondo risk arbitrary arrests, interrogation and intimidation by the governmental security forces, who try to prevent them from claiming their human and land rights²⁵. Also in this case the declared manifesto of worldwide well-known organisations to protect wildlife and ecological diversity together with the government's declarations of intent to enhance environmental policies remained merely theoretical, perpetrating a conservation model ('fortress conservation') based on the exploitation of protected areas and the creation of trophy hunting zones.

The former Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz in her statement at the 72nd session of the General Assembly²⁶, observed that a common

²² For an updated review of the effects of SNSs globally see: Piero Zannini and others, 'Sacred Natural Sites and Biodiversity Conservation: A Systematic Review' (2021) 30 Biodiversity and Conservation 3747

²³ European Commission, 'NaturAfrica - European Commission' (international-partnerships.ec.europa.eu) <https://international-partnerships.ec.europa.eu/policies/programming/programmes/naturafrica_en#:~:text=NaturAfrica%20contribute%20to%20EU%20global>

²⁴ Survival International, 'European Commission Cancels Planned Conservation Funding in Tanzania over Maasai Abuses' (www.survivalinternational.org 7 June 2024) <<https://www.survivalinternational.org/news/13943>>

²⁵ IWGIA, 'The Indigenous World 2023: Tanzania - IWGIA - International Work Group for Indigenous Affairs' (iwgia.org 24 March 2023) <<https://iwgia.org/en/tanzania/5063-iw-2023-tanzania.html>>

²⁶ Victoria Tauli-Corpuz, 'Statement of Ms. Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, at the 72nd Session of the General Assembly' (2017)

justification adduced by States and conservation organisations to displace Indigenous Peoples is that they overgraze and overuse natural resources, hence hindering conservationist measures. The former Special Rapporteur continues criticising this statement claiming that it fails to acknowledge the results of the numerous studies conducted on SNSs environmental conditions. According to these findings, Indigenous Peoples territories who have been granted land rights have been significantly better conserved than the adjacent lands.

The Relevance of the Right to Freedom of Religion or Belief for the Protection of Indigenous Peoples' Sacred Sites

Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on the question of freedom of religion or belief in his 2001 report following his visit to Argentina, succinctly states in the section dedicated to Indigenous Peoples:

‘The principal problem regarding freedom of religion and freedom to manifest one's religion or belief relates to the question of land [...] A Mapuche tenet holds that "the land does not belong to the Mapuche, the Mapuche belongs to the land"’.²⁷

Beginning in the 1960s in response to the expansion of the mining sector, the development projects, and the progressist assimilationist policies post-World War II especially promoted by Commonwealth nations such as Australia, Canada and New Zealand, Indigenous Peoples demanded the respective settler states the recognition of their land rights to preserve their own cultural and religious identity. The settler governments did not accommodate their requests, and this led in the 1970s to the emergence of an Indigenous land rights movement that brought Indigenous Peoples's land claims to courts and under the scrutiny of appointed commissions of inquiry. These institutions, historically hostile or dismissive towards Indigenous Peoples instances, for the first time addressed their issues legally and seriously evaluated their legitimacy²⁸. It was in the wake of these new historical and political developments that Indigenous Peoples, particularly in contexts such as Australia and others during the subsequent decades, started to frame their land claims also in terms of religious freedom. In these occurrences, Indigenous land claims were articulated then as ‘sacred claims’ by ‘harnessing religious traditions to particular objects, in this instance rights in land’.²⁹

<<https://www.ohchr.org/en/statements/2018/02/statement-ms-victoria-tauli-corpuz-special-rapporteur-rights-indigenous-peoples>>

²⁷ Abdelfattah Amor, ‘Report / Submitted by Abdelfattah Amor, Special Rapporteur on Freedom of Religion or Belief, in Accordance with Commission on Human Rights Resolution 2001/42’ (2022)

²⁸ Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler State* (Oxford University Press 2016) 2-3

In examining the relevance of the Right to Freedom of Religion or Belief (FoRB) to the protection of Indigenous Peoples' sacred sites, the present work acknowledges the principle of interdependency and indivisibility of human rights and maintains that normative efficacy of human rights is better achieved by retaining their integrity as a cohesive system, instead of interpreting them hierarchically delegitimising the value of certain human rights in favour of others. Nonetheless, resorting to the right to FoRB for Indigenous Peoples's land claims as opposed to relying solely on other guarantees such as property rights, cultural rights³⁰ or environmental rights proved to be more efficacious under certain circumstances. Moreover, equating legal protections for religion to culture, heritage or other specific interests might undervalue the significance of FoRB itself and the established guarantees it holds³¹. Being the protections under FoRB and their legal implications one of the central themes under analysis throughout this work, the following section will offer a brief sketch of the main reasons that qualify FoRB as a valid instrument for SNSs protection and explain why it is often preferable in terms of legal strategy to other guarantees.

Firstly, the right to FoRB is well-established in International Human Rights Law (IHRL), hence many national legal systems recognise it and can provide solid foundations for SNSs protection within their jurisdictions, including constitutional guarantees. Although there are several reservations in constitutional texts which significantly alter the meaning of Article 18 of the *Universal Declaration of Human Rights* (UDHR)³² and restrict the scope of the protection afforded by the other international instruments based on it- especially in *Shari'ah* law countries and Catholic-majority countries³³- the right to FoRB is less likely to be overridden by competing rights. The legal basis of FoRB, despite the formal and social restrictions to it³⁴, is overall solid as also confirmed by supporting jurisprudence. Indeed, the judicial precedents can be adduced as the second main reason that qualifies the FoRB legal apparatus as a valid tool to secure the protection of Indigenous Peoples' SNSs. Landmark cases such as *Lyng v Northwest Indian Cemetery Protective Association*³⁵, *Western Australia v Ward*³⁶ or *Attorney-General v.*

²⁹ Miranda Johnson, 'Sacred Claims and the Politics of Indigeneity in Australia' (2018) 4 *Journal of Religious and Political Practice* 78, 79

³⁰ For an overview of the provisions which might be invoked for the protection of SNSs see: Stuart R Butzier and Sarah M Stevenson, 'Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent' (2014) 32 *Journal of Energy & Natural Resources Law* 297, 300.

³¹ Richard Collins, 'Sacred Sites and Religious Freedom on Government Land' (2003) 5 *University of Pennsylvania Journal of Constitutional Law* 241, 243

³² Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UNGA), art 18. See subsequent paragraphs.

³³ See Brett G Scharffs, 'Religious Majorities and Restrictions on Religion' (2016) 91 *Notre Dame Law Review*

³⁴ See Samirah Majumdar and Sarah Crawford, 'Globally, Government Restrictions on Religion Reached Peak Levels in 2021, While Social Hostilities Went Down' (2024) <https://www.pewresearch.org/wp-content/uploads/sites/20/2024/03/PR_2024.3.5_religious-restrictions_REPORT.pdf>.

*Ngati Apa*³⁷ even when not decided in complete favour of Indigenous Peoples's religious interests like in the case of *Lyng v Northwest Indian Cemetery Protective Association*³⁸, testify the progressing recognition of Indigenous religious rights. Although *Lyng v Northwest Indian Cemetery Protective Association* is often cited in scholarly works³⁹ as an example of a strikingly narrow formulation of the First Amendment and discriminative treatment of Native American religious heritage, the latter has not been destroyed in the end and 'the case also stands as a powerful testament to Indian cultural survival against great odds'⁴⁰. The legal limits of FoRB⁴¹ do not undermine the significance of the protections it affords to SNSs and the deference that it enjoys from the judiciary internationally as a fundamental right. Indeed, significant advancements in the defence of SNSs are also reflected in judicial decisions at a regional level, such as the 2009 decision on *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*⁴², the first time the African Commission on Human and People's Rights (ACHPR) recognised Indigenous Peoples land rights under the African Charter on Human and Peoples' Rights. Among the violations that the ACHPR found, the Kenyan government was held responsible for breaching Article 8⁴³: by forcibly evicting the Endorois tribe from their ancestral lands, it 'denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artefacts [...]'⁴⁴

In addition to the legal history, established doctrine and legal practice of FoRB, its legal standing would be further strengthened by conferring to FoRB provisions the status of Customary International Law (CIL). The recognition of FoRB as a principle of CIL, which derives from general and consistent state practice and their subjective legal obligation (*opinio iuris*), remains an issue of ongoing debate; nonetheless, many scholars and legal practitioners advocate for it⁴⁵. Regarding specifically the foundational principle of FoRB, Article 18 of the

³⁵ *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988)

³⁶ *Western Australia v Ward* [2002] HCA 28, 213 CLR 1 (HCA)

³⁷ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA)

³⁸ See especially Dana Lloyd, 'STORYTELLING and the HIGH COUNTRY: READING LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION (1988)' (2021) 36 *Journal of Law and Religion* 181.

³⁹ See e.g. Michael W McConnell, 'Religious Freedom at a Crossroads' (2016) 59 *University of Chicago Law Review* 115; RJ Miller, 'Correcting Supreme Court "Errors": American Indian Response to *Lyng v. Northwest Indian Cemetery Protective Association*' (1990) 20 *Environmental Law* 1037; Ira C Lupu, 'Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion' (1989) 102 *Harvard Law Review* 933.

⁴⁰ Amy Bowers and Kristen Carpenter, 'Challenging the Narrative of Conquest: The Story of *Lyng v. Northwest Indian Cemetery Protective Association*', *INDIAN LAW STORIES* (Foundation Press 2011), 533

⁴¹ See para: *Limits of FoRB*

⁴² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2009] AHRLR 75 (ACHPR 2009)

⁴³ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 8. See para: *Regional Systems and their Monitoring Mechanisms*.

⁴⁴ *Endorois case n* [40], para 250

UDHR, already in 1992 Bruno Simma and Phillip Alston, in their influential article *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*⁴⁶, outlined key perspectives that sought to establish the UDHR as part of CIL⁴⁷.

Another factor that makes FoRB overall more suitable for the protection of SNSs and enables Indigenous Peoples to avail themselves of stronger legal arguments, is its broader scope of interpretation compared to other rights often invoked for the defence of SNSs, potentially offering more extensive protections. Whereas rights such as cultural, property or land rights are usually narrowly defined and offer a less comprehensive range of protections when applied to cases concerning SNSs, FoRB intersects with other rights thus covering the multidimensional interests typically linked with Indigenous Peoples' sacred land claims⁴⁸. For instance, grounding the defence solely on property rights is not always a viable option, primarily due to the difficulties in establishing the ownership of the sacred site in question. As previously observed, many Indigenous communities went through a process of historical dispossession of their lands that became government-owned. In most of the cases, proving the prior right to property of Indigenous Peoples 'imposes challenging evidentiary requirements'⁴⁹ that can hardly be met. Moreover, the defence of SNSs, if argued solely on property rights grounds, risks overlooking other crucial interests of Indigenous communities strictly connected with sacred sites that are not entirely translatable into property rights as they are conceived in the Western legal tradition. For instance, in the final decision on *Milirrpum v Nabalco Pty Ltd*⁵⁰, the first time a native title claim was brought before an Australian court, Judge Richard Arthur Blackburn ascertains the impossibility of translating into common law property rights Yolngu's legal system as they entertain a 'more cogent feeling of obligation to the land than of ownership of it'⁵¹, a religious bond not referable to any concept of Western property. On the contrary, focusing on FoRB's intersectionality allows Indigenous Peoples to translate their specific

⁴⁵ This topic will be discussed in greater detail in the third Chapter.

⁴⁶ Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 *The Australian Year Book of International Law* Online 82

⁴⁷ Shea Esterling, 'Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples' (2021) 28 *International Journal on Minority and Group Rights* 280

⁴⁸ For a property rights approach see for example: Kristen A Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners* (School Of Law, University Of California, Los Angeles 2005); also Butzier and Stevenson (n 31). As for the intellectual property approach in the case of Aboriginals and Torres Strait Islanders Peoples see Stephanie Barclay, Michalyn Steele and Stephanie Hall, 'Rethinking Protections for Indigenous Sacred Sites, 134 Harv' (2021) 1294 *L. Rev.* For an overview of the cultural rights: Gilbert, Jérémie, 'Cultural Rights and Natural Resources: Cultural Heritage, Traditional Knowledge, and Spirituality', *Natural Resources and Human Rights: An Appraisal* (Oxford, 2018; online edn, Oxford Academic, 22 Nov. 2018), <https://doi.org/10.1093/oso/9780198795667.003.0006>

⁴⁹ Newman (n 1) 5

⁵⁰ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141

⁵¹ *Ibid.* 270

interests into legal practice since Indigenous worldviews are usually connoted by a high degree of interconnectedness. Every facet of Indigenous cultures and their physical environments are deeply intertwined, contrasting with the compartmentalising outlook of modern Westernised societies. Since stark dichotomies such as secular/religious and nature/culture do not apply to Indigenous cosmovisions, it follows that any imbalance in a certain ‘sphere’ affects all the others. Therefore, the intactness of Indigenous Peoples' sacred sites, besides being of utmost importance for religious purposes, is vital to the overall identity of the Indigenous communities and the ‘plasticity’ of FoRB grants inclusion of other concomitant rights.

Resorting to other means such as conservation or environmental law might prove to be ineffective and also reductive as well. These means prioritise biodiversity and environmental preservation not addressing the cultural and spiritual dimension connected to the very nature of SNSs. An example is the conservation-based approach adopted by the World Heritage Convention (WHC). The ultimate purpose of the World Heritage Committee is to safeguard immovable properties, either of cultural or natural significance for the ‘mankind as a whole’⁵², and include them in the World Heritage List (WHL). Federico Lenzerini, professor of international law and human rights at Siena University, provides an insightful analysis underscoring the drawbacks of the conservation approach and criticising the adoption of the ‘outstanding universal value’ criterion as a mandatory prerequisite for a cultural or natural heritage to be inscribed in the WHL. The ‘outstanding universal value’ is attributed to each cultural or natural site which inspires a sense of awe and respect for humankind as a whole. In Lenzerini’s opinion, this criterion appears to be inadequate to address Indigenous Peoples's concerns and grant the protection of their sacred sites since ‘the *subjective* interest [Indigenous Peoples’ spiritual link to their lands] over cultural heritage [...] greatly supersedes its outstanding universal value’⁵³. Lenzerini concludes by maintaining that in order to protect the subjective interest of Indigenous Peoples in the context of the implementation of the WHC, the State parties should comply with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)⁵⁴ provisions where the rights of Indigenous Peoples are specifically addressed according to their *sui generis* nature.

The authority of FoRB as a well-established right within the international human rights framework, its intersectionality and potential wide interpretation, together with its

⁵² UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, 1037 UNTS 151), Preamble, sixth recital.

⁵³ Federico Lenzerini, ‘Indigenous Cultural Heritage and International Law’ in Dwight Newman (ed), *Research Handbook on the International Law of Indigenous Rights* (Edward Elgar Publishing Limited 2022), 341

⁵⁴ Universal Declaration of Indigenous Peoples Rights (adopted 13 September 2007, UNGA Res 61/295)

jurisprudence explains the significance it holds for Indigenous Peoples's sacred claims, despite its indisputable limits.

The Right to Freedom of Religion or Belief in International Human Rights Law: The Legal Sources

In the international human rights system, the right to FoRB is among the human rights with the longest lineage⁵⁵. The dominant international legal framework on the right to FoRB is essentially grounded on Article 18 of the UDHR together with the other instruments based upon it, notably Article 18 and Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁶. Space precludes a lengthy account of the complex history of the right to FoRB and a detailed analysis of the multifaceted, still contentious issues that arose since its formulation and establishment in legal doctrine and practice. Therefore, only the aspects relevant to the protection of Indigenous Peoples' religious rights and specifically their sacred lands will be treated. The following section will provide an overview of the wider context of protections in which Indigenous Peoples' religious claims can be articulated which encompasses both soft-law and hard-law instruments. Firstly, the main legal sources on FoRB will be introduced focussing on the relevant UN-based instruments and their monitoring bodies. Secondly, a brief introduction of the relevant provisions in the regional systems, considering that the basic structure of Article 18 of UDHR is found in regional and national legal instruments as well, together with their monitoring bodies will be provided. It will follow a critical analysis of the relevant FoRB provisions, pointing out their theoretical and ideological bias, and of the annexed monitoring bodies.

Universal Declaration of Human Rights

The recognition and subsequent codification of a universal right to freedom of religion or belief within the international human rights legal framework are traceable to post-Second World War historical developments which led to the adoption of the UDHR in 1948. The UDHR, being a General Assembly resolution, has no binding effect on the signatory States, however, its provisions acquired normative character in several international, regional and national human rights documents, first of all in the *International Covenant on Economic, Social and Cultural*

⁵⁵ Sarah Joseph and Adam Mcbeth, *Research Handbook on International Human Rights Law* (Edward Elgar Publishing 2010) 467

⁵⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Rights ('ICESCR')⁵⁷ and the ICCPR. This is also the case of Article 18 of the UDHR on FoRB whose contents and structure shaped numerous other international instruments, including Article 18 of the ICCPR. It follows the text of UDHR Article 18:

'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'⁵⁸.

The content of the Article is threefold. The first proposition, 'Everyone has the right to freedom of thought, conscience and religion', states the universality of the right to freedom of religion or belief and links the concept of religion with the freedom of thought and conscience. The words 'thought' and 'conscience' point to the subjective dimension of the individual and connote the right to freedom of religion or belief primarily as an intellectual act. This first part of the Article is classically interpreted as referring to the *forum internum*, the internal and private sphere of the individual against which any State interference is forbidden under every circumstance. The second part of Article 18 identifies one of the main components of religious freedom with the freedom to voluntarily choose to change religion or belief, stressing the importance of religious conversion for the definition of religious freedom. Finally, in the third part, Article 18 affords protection to the free exercise of religion or belief both in private and in public. This part of the Article denotes the *forum externum*, the manifestation of religion or belief that can be carried in a number of ways of which the provision lists four: 'teaching, practice, worship and observance'. Contrary to the absolute nature of the right to freedom of thought, conscience and religion, the right to free manifestation is subject to proportionate restrictions in order to protect other fundamental rights.

International Covenant on Civil and Political Rights

The ICCPR is the only international treaty containing provisions relating to FoRB that are legally binding for the signatory States. FoRB is mainly enshrined in Article 18 of the ICCPR which significantly extends the scope of Article 18 of the UDHR, marking a paradigmatic shift towards a pluralistic conception of religion and beliefs, including also non-theistic and atheistic beliefs. Article 18 of the ICCPR is generally regarded as the core provision on religious freedom in IHRL, given also to its non-derogable nature. Indeed, according to Article 4(2) of ICCPR,

57 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

58 UDHR, art 18

the provisions of Article 18 cannot be contravened under any circumstances, including state emergency. The provision reads as follows:

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.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.⁵⁹

The first paragraph of the Article rephrases Article 18 of the UDHR emphasising the fundamental principle of freedom of choice ('freedom to have or adopt a religion or belief of his choice') and highlighting the word 'belief' which has to be interpreted as encompassing also non-theistic and atheistic convictions. The second paragraph expressly mentions freedom of coercion, but without providing a precise definition of the coercions which would interfere with FoRB. The wording of paragraph 3 on the freedom to manifest religion or belief is the same as Article 18 of the UDHR, except that it places the word 'worship' before 'observance' and lists the preconditions to its limitations, firstly that they have to be prescribed by law. The structure of the Article reiterates the subdivision found in Article 18 of the UDHR between an inalienable right to the individual's *forum internum* and a *forum externum* subjected to specific restrictions. Finally, paragraph 4 recognises the right of the parents or legal guardians to provide their children with religious and moral education reflecting their own values and beliefs.

The pluralistic approach conveyed by Article 18 of the ICCPR widens the scope of FoRB by including under its protection forms of religions and beliefs, such as those practised by Indigenous Peoples, that do not fall under the spectrum of the 'hegemonic religions'. Paragraph 2 of the General Comment (22), issued by the Human Rights Committee in 1993 to interpret the provisions of the covenant, clarifies and expands on the content of the first paragraph of the Article:

⁵⁹ ICCPR, art. 18

‘Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. Article 18 is not limited in its application to traditional religions or religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community’.⁶⁰

The text explicitly refers to the broad construction of the concept of religion including those religions or beliefs that are not classifiable as ‘traditional’ both in terms of their institutional organisation and practices. Moreover, the HRC clearly expresses concerns about discriminatory tendencies against any form of religion or belief for whatever reason.

The ICCPR contains another provision, Article 27 regarded as the most prominent provision protecting minorities’ rights in international law⁶¹. Even though it does not exclusively address FoRB, the scope of Article 27 indirectly includes the protection of Indigenous communities’ religious rights and their ancestral lands, as it provides:

‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.⁶²

In paragraph 3.2 and paragraph 7 of General Comment (23), the HRC clarifies that the way Indigenous Peoples dispose of their lands is an essential element for the full enjoyment of their right to culture falling under the protection of Article 27. Therefore, the HRC derives not only negative obligations from this provision but also positive ones specifying that the protection of Indigenous communities’ lands has to be implemented through positive legal measures enforced by the state⁶³. Although the ICCPR does not encompass land rights or property clauses, nor refer to Indigenous rights protection or the notion of ‘indigeneity’ directly, it has nonetheless become one of the key instruments in human treaty law for Indigenous Peoples’ land claims⁶⁴. Indeed, on the basis of case law, HRC practice and paragraphs 3.2 and 7 of General Comment (23), the applicability of Article 27 to Indigenous Peoples has been established. Although the

⁶⁰ Human Rights Committee, ‘General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)’ (1993) UN Doc CCPR/C/21/Rev.1/Add.4

⁶¹ See Dieter Kugelman, ‘The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity’ (2007) 11 Max Planck Yearbook of United Nations Law Online 233, 237

⁶² ICCPR, art.27

⁶³ See also ‘General Comment No 23: Article 27 (Rights of Minorities)’ (1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 6.1

⁶⁴ Martin Scheinin, ‘Indigenous Peoples’ Land Rights under the International Covenant on Civil and Political Rights’ (2004), Aboriginal Policy Research Consortium International (APRCI) 195, 196

status of Indigenous Peoples as a ‘minority’ is a matter of contention, the ICCPR acknowledges Indigenous Peoples as a group falling under the definition of ‘minority’, hence entitled to the protections afforded under Article 27.

Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief

The *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* (1981 Declaration)⁶⁵, adopted after nineteen years of negotiation, is the only UN soft-law document that exclusively addresses religious freedom issues and it is regarded as the most comprehensive statement on the matter⁶⁶. The document consists of eight articles with wide-ranging contents for the protection of FoRB, however, as can be inferred by the title of the declaration, it focuses mainly on ‘both violations *of* and violations based *on* religion or belief’⁶⁷. The provisions enshrined in the 1981 Declaration, besides the attested normative influence that they exerted in shaping regional and national provisions on FoRB worldwide⁶⁸, provide guidelines for a uniform interpretation of the different statements on religious freedom rights embedded in other international instruments, such as the relevant articles of the ICCPR⁶⁹. It bears mentioning that the preamble of the 1981 Declaration defines ‘religion or belief’ as a fundamental element in the life conception of the individual who professes either⁷⁰, conveying an inclusive interpretation of these terms. Furthermore, this phrasing emphasises the existential value of ‘religion and belief’, preventing any sort of trivial belief from claiming protection under FoRB.

⁶⁵ Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (adopted 25 November 1981, UNGA Res 36/55)

⁶⁶ Derek H Davis, ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ (2002) *BYU L Rev* 217, 227: ‘If the importance of a document were measured in terms of its path-breaking qualities, the 1948 Universal Declaration would undoubtedly be most important.⁴⁰ If importance were measured in terms of an instrument’s enforceability in courts, the 1966 Covenant would be the most important. But if by importance we refer to the comprehensiveness of rights addressed and the degree to which a document is looked to by the international community to define the religious rights that should be respected, then it is clearly the 1981 Declaration that deserves the “most important” label.’

⁶⁷ Malcolm Evans and others, ‘Article 18: An Orphaned Right’ (2013), 30

⁶⁸ See Heiner Bielefeldt, ‘Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief’ (2021) 5

⁶⁹ Derek H Davis, ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ (2002) 2002 *Brigham Young University law review* 217, 231

⁷⁰ UDHR, preamble

UN Monitoring Mechanisms for FoRB

There are several monitoring mechanisms overseeing the implementation of FoRB and promoting the right to FoRB such as the Organisation for Security and Co-operation in Europe (OSCE) or the International Religious Freedom Alliance (IRF Alliance), however, the following paragraphs will focus on the UN ones directly referring to the ICCPR, the UDHR and the relevant articles analysed above.

Human Rights Committee

The work of HRC consists of overseeing the implementation of the ICCPR as a whole and, therefore, does not exclusively address matters related to FoRB. However, since the ICCPR is ‘the only global human rights treaty dealing with religion that contains measures of implementation’⁷¹, the Committee holds an important role in setting international standards within the context of FoRB. The HRC is composed of eighteen independent experts and it operates mainly on two fronts: monitoring and normative development of human rights standards. Concerning its monitoring function, the HRC examines the compulsory periodic reports submitted by the State parties to the ICCPR, as Article 40 of the covenant requires⁷² to ensure the guarantee of the civil and political rights protected under the covenant. Additionally, the HRC, in relation to State parties that have ratified the *Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol)*, grants individuals the right to directly lodge complaints with the HRC about any alleged violations of the ICCPR by these States. As for the HRC’s function to contribute to the normative development of human rights standards, it is mainly carried out through the production of texts which contain legal interpretation of the relevant ICCPR provisions. The most influential contributions regarding religious issues produced by the HRC so far are the already mentioned General Comment (22) on freedom of thought, conscience or religion and General Comment (23) on the rights of minorities. Both Comments clarify and expand on the provisions contained in ICCPR Art. 18 and provide recommendations on their effective implementation. It is especially through the General Comments that the conventions take on the role of ‘living instruments’, interpreted based on new developments in the field of religious rights and considering the concomitant case law.

⁷¹ Natan Lerner, *Religion, Secular Beliefs and Human Rights* (Martinus Nijhoff, Leiden and Boston, 2006) 26

⁷² ICCPR, art.40

Special Rapporteur

Since 1986 a ‘Special Rapporteur on religious intolerance’ (renamed in 2000 to ‘Special Rapporteur on Freedom of Religion or Belief’) has been mandated by the UN Human Rights Council as an independent expert to assess governments’ compliance with the 1981 Declaration and to recommend remedial measures whenever States’ policies do not align with its provisions. In order to fulfil his/her/their duty, the Special Rapporteur is entitled to request information from the governments and undertake ad-hoc visits to the country under scrutiny to investigate the state of FoRB. Currently, the Special Rapporteur is Nazila Ghanea who assumed her mandate on the 1st of August 2022.

Regional Systems and their Monitoring Mechanisms

The existent regional human rights systems have developed a range of documents aimed at regulating FoRB, and established monitoring bodies specifically tasked with overseeing the implementation and enforcement of these provisions. These efforts are intended to ensure that the rights related to FoRB are upheld across different jurisdictions, with a focus on creating consistent standards and accountability mechanisms. A list of the pertinent articles from regional documentation in alignment with FoRB foundational provisions will be presented in chronological order based on the date of their adoption. Due to limited space, only the three well-established regional human rights systems will be taken into consideration.

The founding States of Europe adopted the *European Convention on Human Rights* (ECHR) in 1950 which entered into force in 1953 to ensure the protection mainly of civil and political rights. The compliance with the provision enshrined in the ECHR is monitored by the *European Court of Human Rights* (EctHR) and the relevant article to FoRB is Article 9:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’.⁷³

⁷³ European Convention on Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended) (ECHR) art 9

The second human rights regional system that included an article related to FoRB in its convention is the Inter-American System. The Inter-American System aims to protect human rights in 35 independent countries members of the *Organisation of American States* (OAS), through the *Inter-American Commission on Human Rights* (IACHR) and *Inter-American Court of Human Rights* (IACtHR) deciding on individual complaints concerning alleged human rights violations. In the *American Convention on Human Rights* (1978), Article 12 reads:

‘1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions’.⁷⁴

Concerning the African System, which established as main monitoring mechanisms the already mentioned ACHPR and the *African Court on Human Peoples’ Rights* (AFCHPR), included in the *African Charter on Human and Peoples’ Rights* (1981) Article 8:

‘Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms’.⁷⁵

The aforementioned provisions, while crucial for the safeguarding of the right to FoRB and providing exhibit certain deficiencies that will be examined in the following paragraphs.

Limits of FoRB

While leveraging on FoRB protections may constitute an effective strategy in Indigenous land rights advocacy, the international legal framework on FoRB has proved in many instances inadequate to protect Indigenous Peoples' sacred sites and consequently their free exercise of religion. The inadequacy of FoRB legal apparatus stems not exclusively from the difficulty of grasping and integrating into the human rights international legal framework legal systems

⁷⁴ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 12

⁷⁵ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 8

which are foreign to dominant Westernised culture, namely the Indigenous ones, but also from intrinsic limits of the formulation of its provisions and the ineffectiveness of its implementing mechanism. Overall, despite the existence of religious rights provisions within several major international instruments that afford protection to specific groups, including Indigenous Peoples, the dominant legal framework for FoRB proved to be inadequate to effectively safeguard Indigenous Peoples' religious rights and their SNSs. Although this thesis posits that resorting to FoRB's guarantees is presently the most effective venue for the protection of Indigenous SNSs, it also critically examines their deficiencies and the frequent failure in their implementation. The reasons for the existent implementation gap are multiple, namely the ingrained intellectual bias in the formulation of the relevant provisions⁷⁶, narrow interpretation of the norms, political agendas that favour interests of other sort, discrimination towards indigenous peoples, lack of adequate enforcement and monitoring mechanisms.

The wide scope of the right to FoRB as it is formulated in Article 18 of the UDHR and the relevant articles of the ICCPR is often narrowly interpreted by individual States which, due to the non-binding nature of the UDHR, enjoys a considerable margin of appreciation. Furthermore, a significant historical factor contributing to the restrictive interpretation of FoRB provisions is the enduring impact of the colonial legacy within the jurisdiction of states that encompass the Indigenous population. Indeed, a large part of the present national and regional legal frameworks that regulate the relationship between settler states and Indigenous communities reflect the colonial legislative schemes. The observations that James Anaya, former Special Rapporteur on the Rights of Indigenous Peoples, made in the case of the U.S. where many of the treaties established during the colonial period with Native American tribes are still in force as federal law and define U.S. government-tribal relationships⁷⁷, apply also to other jurisdictions.

Moreover, problematic aspects in FoRB provisions can be detected in their formulation as they posit particularised forms of dominant, Westernised religions as 'universal' parameters for defining the very word 'religion', disregarding the non-westernised, spatial-oriented indigenous ones. A compelling example is the final decision of *Ktunaxa Nation v. British Columbia* wherein the Supreme Court of Canada (SCC) found that the right to religious freedom protected under section 2(a) of the *Canadian Charter of Rights and Freedoms*⁷⁸ did not include the 'object of beliefs': 'The state's duty under s. 2(a) is not to protect the object of beliefs or the

⁷⁶ See the following paragraph.

⁷⁷ James Anaya, 'Report of the Special Rapporteur of the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in the United States of America' (2012) 56

⁷⁸ See next Chapter

spiritual focal point of worship, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination'.⁷⁹ FoRB provisions focus on protecting the act of belief rather than according protection to the contents of religion or belief⁸⁰, but in the case of many Indigenous Peoples's religious traditions, the object of belief is inextricably linked with the right holders and it is integral to their belief system.

However, it has to be noted that the 'nebulous' wording of FoRB provisions might as well benefit Indigenous Peoples's interests as it is potentially more inclusive in its scope of protection, depending on its contextual interpretation.

Another neglected set of rights by FoRB provisions, yet essential for the protection of SNSs pertains to property rights. Although, as already explained, relying exclusively on property rights for the protection of SNSs is not a commendable strategy, the absence of references to property rights in FoRB provisions weakens the possibility of grounding Indigenous sacred land claims. For instance, the whole text of the ICCPR does not address property rights and to comply with Art.27 it is sufficient to guarantee the non-interference with the use of Indigenous sacred sites. Therefore, for Indigenous land claims to be successful they need to be based on other legal grounds.

In addition to the rights necessary for securing Indigenous Peoples' SNSs that are not covered by FoRB instruments, the lack of effective implementation of the rights that are addressed represents a major impediment to the protection of FoRB.

Being the UDHR and the 1981 Declaration soft law instruments their enforcement is largely dependent on state compliance, which diminishes their overall effectiveness. However, the same constraints apply to both Articles 18 and 27 of the ICCPR: even though the ICCPR is a binding treaty, the signatory states still maintain a certain degree of discretion in enforcing them. As underscored in Articles 2(2)⁸¹ and 40(1)⁸² of the treaty, the legal force of its provision heavily depends on the State parties, for instance, whether they confer to them constitutional or quasi-constitutional rank. Even in this case, ultimately the successful implementation of FoRB norms is determined by the efficacy of its enforcing mechanisms. The fallacies in the

⁷⁹ *Ktunaxa*, 388

⁸⁰ Heiner Bielefeldt, Nazila Ghanea-Hercock and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press 2017) 11

⁸¹ ICCPR art. 2(2) 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'

⁸² ICCPR art.1(1): 'The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.'

implementation not only strongly depend on states' cooperation, but are also attributable to the structural limits of the monitoring bodies. For example, despite the valuable work carried out by Special Rapporteurs in international standard-setting within the FoRB context⁸³, the only repercussion for the conduct of States that violate FoRB provisions is negative publicity instead of more substantial sanctions. Moreover, being just one individual in charge of investigating and advising on the way state policies align with the UN standards on FoRB, his/her/their personal background may affect the results of the assessment by emphasising certain figures and deeming others less relevant. The lack of enforcing authority greatly limits also the extent to which the HRC can operate confining its action, although extremely important, to issuing advice and, as the Special Rapporteur, setting international standards. Hence their function remains essentially advisory.

Theoretical Inadequacy of FoRB

The formulation of the foundational articles of FoRB on an international level, namely Article 18 of the UDHR, Article 18 of the ICCPR and the 1981 Declaration, inevitably reflect the major political and religious issues faced by the original drafters. The most significant areas of contention that ignited the early debates during the drafting process of Article 18 of the UDHR revolved around the resistance of some Islamic countries to explicitly recognise the right to conversion; opposition from several communist countries to prioritise individual rights over state interest; general concerns about the possibility that free manifestation of religion or belief might lead to proselytism⁸⁴. It is evident that Indigenous Peoples's interests were not considered in the drafting process, also because Indigenous Peoples became recognised as distinct subjects and holders of rights in international law only in the '70s. The underlying principles of FoRB as it is formulated in the most prominent international legal instruments dedicated to the matter are mainly traceable back to the Western cultural tradition and the concept of FoRB as embedded in Article 18 of the UDHR presents certain features that reveal markedly Western cultural assumptions. Disclosing these 'precomprehensions' is of utmost importance to critically examine the whole system of protections for religious rights and to assess its suitability concerning Indigenous Peoples' religious claims.

The first substantive issue that needs to be dealt with is the very definition of 'religion' since the Westernised, therefore restrictive, meaning of the concept still informs its contemporary

⁸³ Carolyn Evans, 'Strengthening the Role of the Special Rapporteur on Freedom of Religion or Belief' (2006) 1 Religion & Human Rights 75, 89

⁸⁴ Paul M Taylor, 'Introduction', *Freedom of Religion UN and European Human Rights Law and Practice* (Cambridge University Press 2005) 2

understanding in legal practice. Although the term ‘religion’, starting from the twenty-first century, has encompassed a much wider range of meanings in the context of Western liberal democracies, its embodiment and conceptual boundaries are confined to a private sphere precisely separated from what it is instead commonly labelled as ‘social sphere’. Conversely, as highlighted above, Indigenous cultures do not conceive and experience religious practices as separated from the other dimensions of their lives, it permeates their daily lives⁸⁵. The ontological perspective that underlies most of the Indigenous cosmologies envisions a relational universe, where animals, plants, ancestors, and other entities within the natural world are active agents capable of participating in social relationships that contribute to the well-being of the community. With a certain amount of caution, the neologism introduced by Raimon Panikkar: ‘cosmotheandric’⁸⁶ can be applied as a conceptual framework to characterise the ontological structures of most Indigenous worldviews. This term synthesises the intricate interconnectedness of the *cosmos* (the universe), *theos* (the divine element), and *anthropos* (the human element), which together form an inseparable triad. By recognising this holistic integration, the cosmotheandric perspective offers an interpretative tool through which Indigenous ontologies—often defined by a harmonious relationship between the spiritual, natural, and human realms—can be understood. However, its application requires careful consideration to avoid overgeneralising the diverse and context-specific nuances of Indigenous cultural systems.

Another crucial aspect that distinguishes indigenous religions from Westernised forms of religions and, specifically, the way religion is defined in article 18 UDHR is the ‘hierarchical distinction of internal and external freedom’⁸⁷. The conception of religion expressed in the Article, as noted previously, centres around the element of individual conscience which supersedes in value the external manifestations that enact that belief consequently marginalising Indigenous religions that do not recognise this distinction in the first place. As Eli Elizabeth Shakman Hurd states:

‘Inasmuch as the protection of religious freedom hinges upon, and even sanctifies, a religious psychology that relies on the notion of an autonomous subject who chooses beliefs, and then enacts them, such projects privilege particular kinds of religious subjectivity while disabling others’.⁸⁸

⁸⁵ Martin Ramstedt, ‘The Right to Freedom of and from Religion for and among Indigenous Peoples’, *Routledge Handbook of Freedom of Religion or Belief* (Cardiff University 2020) 234

⁸⁶ See Raimundo Panikkar, Sacerdote and Scott Eastham, *The Cosmotheandric Experience: Emerging Religious Consciousness* (Motilal Banarsidass Publishers 1998)

⁸⁷ Linde Lindkvist, ‘The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights’ (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 429, 443

Thus Article 18 also provides an implicit definition of religion alluding to ‘what it means to be an authentic subject’⁸⁹ of the right to FoRB consequently excluding other categories of subjects. Adopting a more inclusive definition for FoRB can heavily influence judicial resolutions on the matter granting equal treatment to Indigenous Peoples seeking to protect their religious rights and their SNSs ‘and yet respecting the self-understanding of all human beings must remain the starting point and a guiding principle for any universalistic conceptualization of freedom of religion or belief’.⁹⁰

⁸⁸ Elizabeth Shakman Hurd, ‘Believing in Religious Freedom’ (SSRC *The Immanent Frame* March 2012) <<https://tif.ssrc.org/2012/03/01/believing-in-religious-freedom/>>

⁸⁹ Lindkvist (n 88) *ibid*.

⁹⁰ Heiner Bielefeldt, ‘Statement of the Special Rapporteur on Freedom of Religion or Belief during the 19th Session of the Human Rights Council’ (2012) <<https://www.ohchr.org/en/statements/2012/03/statement-special-rapporteur-freedom-religion-or-belief-heiner-bielefeldt-during>>

CHAPTER II

Indigeneity

Indigenous Peoples—capitalised as a plural proper noun— as a distinct category of right-holders presents a number of definitional issues in international law and some of the most authoritative voices in the field argued against the very adoption of one⁹¹. Even in the UNDRIP, the foremost international instrument addressing the rights of Indigenous Peoples, a precise definition is absent. The drafters of the UNDRIP intentionally refrained from providing a definition of Indigenous Peoples largely because of the upholding of the principle of equality, according to which all individuals, without discrimination, are considered equal bearers of human rights under IHRL norms.

A notorious and frequently cited definition is Jose R. Martínez Cobo's in his 1986 study, which identifies Indigenous populations as descendants of those with a 'historical continuity with pre-invasion and pre-colonial societies', who 'consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them' and 'form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.'⁹² The constitutive elements that identify Indigenous Peoples as such in *The Cobo Study* are their shared experience of historical colonisation, self-identification as a group with a specific cultural identity different from the dominant segments of society, historical continuity and a strong tie with ancestral lands. In the *International Labour Organization (ILO) Convention on Indigenous and Tribal Peoples (No 169)*⁹³ Indigenous Peoples are also defined according to the criterion of distinctiveness, but rather than referring to their traditional customs and cultural identity, distinctiveness here is framed as the preservation of their specific institutions⁹⁴. Moreover, ILO 169 emphasises the element of self-identification as essentially constitutive of the category.

⁹¹ For a discussion of the arguments brought against the adoption of a formal internationally accepted definition of Indigenous Peoples see Siegfried Siegfried Wiessner, 'Indigenous Peoples: The Battle over Definition' in Tim McCormack (ed), *Reflection on International Law* (Brill | Nijhoff 2023) 6

⁹² José R Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations: By José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (United Nations 1987) 29

⁹³ Convention on Indigenous and Tribal Peoples 1989 (No 169) (entered into force 5 September 1991) 1650 UNTS 383 [Hereinafter ILO 169]

⁹⁴ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2007) 72

The distinctive relationship of Indigenous Peoples to their land, as more than once stressed throughout this thesis, constitutes the common definitional element of the category. The intricacies of the debate around the definition of ‘indigeneity’ cannot be herein dealt with⁹⁵, but for the purposes of this thesis, it suffices to restate that: ‘the centrality of a distinctive attachment to a particular land⁹⁶ has to be regarded as the fundamental element to “indigenesness,” as territoriality is to be seen as one of the crucial identifiers of indigenous peoples. As a result, this special relationship to a land has to be seen as a crucial issue of concern in the protection of indigenous peoples under international law.’⁹⁷

Indigenous Peoples’ Religious Rights International Legal Framework

Having analysed FoRB general provisions, the following paragraphs will provide an outline of the international legal instruments and oversight mechanisms that specifically address Indigenous Peoples's rights, with particular reference to their religious ones and to the way they impact the protection of SNSs. Firstly, the provisions enshrined in ILO 169 that impact Indigenous SNSs and their religious rights will be introduced together with its monitoring mechanisms and a brief legal analysis of the limitations of ILO 169. The principles and terminology of ILO 169 informed the subsequent works of the UNDRIP⁹⁸ whose articles 12 and 25 will receive particular attention. In the case of the UNDRIP as well, a section will be dedicated to its monitoring bodies and the limitations of the formulation and implementation of its religious rights. In analysing the legal instruments related to the protection of Indigenous Peoples' SNSs, the most contentious issues of the UN discourse on Indigenous Peoples' religious rights will be touched upon. Finally, the case law of *Ktunaxa Nation v. British Columbia* will be analysed in order to offer a contextual example of the application of double standards in the enforcement of FoRB.

ILO Convention on Indigenous and Tribal Peoples (No 169)

The only legally binding international instrument that specifically protects Indigenous Peoples' rights is the ILO 169 adopted by the International Labour Conference of the ILO in 1989 and

⁹⁵ For a comprehensive overview of the topic see: Wiessner (n 92)

⁹⁶ As previously stated regarding the operational definition of SNSs, ‘land’ here has to be understood as a large or small area of territory, but also other natural features, including rivers and the sea.

⁹⁷ Jérémie Gilbert, *Indigenous Peoples’ Land Rights under International Law* (BRILL 2007), xvii

⁹⁸ MRG, ‘A Practitioner’s Perspective on the Rights of Indigenous Peoples since the Adoption of ILO Convention No. 169’ (Blog 22 January 2024) <<https://minorityrights.org/a-practitioners-perspective-on-the-rights-of-indigenous-peoples-since-the-adoption-of-ilo-convention-no-169/>>.

ratified so far by twenty-three States⁹⁹. Before the Indigenous rights movement gained global visibility in the 70s, the ILO, inaugurating the first systematic inquiry on indigenous workers in 1921, was the sole UN agency that consistently engaged with Indigenous Peoples's rights-related matters. These efforts were primarily driven by the pervasive exploitation of indigenous labour, a concern that falls into the areas of intervention of ILO's core mandate: the protection of workers' rights and the improvement of working conditions. The intent of ILO 169, as declared in its preamble, is to promote: 'the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.'¹⁰⁰ ILO 169 results from the revision of a prior convention: *The Indigenous and Tribal Populations Convention (ILO 107)*¹⁰¹, the first international instrument addressing Indigenous Peoples's rights adopted by ILO in 1957. ILO 107's declared aim was explicitly assimilationist, reflecting the prevailing contemporary 'benevolent evolutionary' political views and pursuing the integration of Indigenous Peoples in the states where they resided through progressive assimilation. The assimilation process, consistent with the paternalistic approach of the time towards Indigenous Peoples, was supposed to be facilitated by 'protective measures' aiming at safeguarding the transition of Indigenous communities to mainstream society. Although ILO 169 replaced ILO 107, the latter continues to be in effect for countries that ratified it but have not ratified ILO 169¹⁰² remaining thus an authoritative and binding and legal source for Indigenous communities residing in those contracting States.

The debate around Self-determination

One of the main points of contention during the revising process of ILO 107 revolved around whether to replace the word 'populations' with 'peoples'. During the discussion, the adoption of the term was opposed by a consistent number of States led by Canada. Far from being just a terminological dispute, the adoption of the term 'peoples' would have implicitly recognised and asserted Indigenous communities' right to self-determination, central to Indigenous claims. Self-determination is also a well-established core principle in IHRL which subsumes all the specific individual human rights, representing, as Antonio Cassese put it, the *summa* of them

⁹⁹ Argentina, Bolivia, Brazil, the Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Luxembourg, Mexico, Nepal, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela.

¹⁰⁰ Ibid. Preamble

¹⁰¹ Indigenous and Tribal Populations Convention 1957 (No 107) (entered into force 2 June 1959) 328 UNTS 247 [Hereinafter ILO 107]

¹⁰² Angola, Bangladesh, Belgium, Brazil, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syria and Tunisia.

all¹⁰³. Being this right traditionally attributed to independent statehood in international law, specifically under Article 1 of the ICCPR and the ICESCR¹⁰⁴, the adoption of the term ‘peoples’ was particularly problematic for it represented a potential threat to state sovereignty. The final solution saw the inclusion of the word ‘peoples’ in the document but with a significant restriction framed in Article 1(3) as such:

‘The 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’.¹⁰⁵

The shift of perspective in the revision of the *Convention*, with emphasis placed on the recognition of Indigenous Peoples's entitlement to have control of their own cultural and political institutions, is overall visible, but this is meant to be exerted within the legal boundaries of the States where the Indigenous communities reside. Therefore, the right to self-determination appears as a derivative right within the geographical and political State borders to be enjoyed without affecting national integrity¹⁰⁶. As observed by José Urrutia, former Chairman/Rapporteur of the Working Group that elaborated UNDRIP draft, in his 1995 report¹⁰⁷, several scholars and Indigenous Peoples representatives have argued that the recognition of self-determination in ILO 169, which is crucial to the recognition of Indigenous Peoples as subject of International Law and not only objects¹⁰⁸, is only partial. Although progress was made in framing the same principle in the UNDRIP, also by including the word ‘peoples’, overall, self-determination remains restricted to internal matters: Indigenous Peoples are autonomous in the exercise of their self-governance without prejudice to the territorial integrity of the ‘host’ nation¹⁰⁹. Article 46(1) of the UNDRIP reads:

¹⁰³ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1998) 298

¹⁰⁴ Article 1 of the ICCPR and the ICESCR read:

‘1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.’

¹⁰⁵ ILO 169, art.1(3)

¹⁰⁶ Rashwet Shrinkhal, “‘Indigenous Sovereignty’ and Right to Self-Determination in International Law: A Critical Appraisal” (2021) 17 *AlterNative: An International Journal of Indigenous Peoples* 71

¹⁰⁷ José Urrutia, ‘Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32’ UN Doc E/CN.4/1996/84 1996

¹⁰⁸ See Joanne Barker, *Sovereignty Matters Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Unp - Nebraska 2006)

¹⁰⁹ Shrinkhal (n12) 77

‘1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’.¹¹⁰

Due to space constraints, and given the complexity of the topic, an in-depth analysis of the principle of self-determination in the context of Indigenous Peoples' rights cannot be presented. Nevertheless, it is important to reiterate the centrality of this right for Indigenous Peoples's claims and the strong linkage existing with the content of all other associated rights.

ILO 169, Relevant Provisions for the Protection of SNSs

ILO 169 ‘contains the most explicit treaty obligations on the protection of Indigenous Peoples’ rights to natural resources in international law’¹¹¹, however, it has to be specified that the land rights provisions only recognise rights over land that Indigenous Peoples currently use and occupy; they don't apply retrospectively over lands acquired by the government through colonisation. The provisions that explicitly refer to Indigenous Peoples religious rights relevant to the protection of SNSs are primarily Article 5(a), 7(1),7(3), 7(4) and 13:

Article 5(a) reads:

‘the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;’¹¹²

Article 5(a), besides protecting the cultural and spiritual heritage of Indigenous Peoples, recognises also the collective dimension of the right concerned.¹¹³

Article 7(1), (3), (4):

‘1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the

¹¹⁰UNDRIP art.46(1)

¹¹¹ Pia Marchegiani, Elisa Morgera and Louisa Parks, ‘Indigenous Peoples’ Rights to Natural Resources in Argentina: The Challenges of Impact Assessment, Consent and Fair and Equitable Benefit-Sharing in Cases of Lithium Mining’ (2019) 24 The International Journal of Human Rights 224, 235

¹¹² ILO 169, art.5

¹¹³ See para: *Collective Rights*

formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit'.¹¹⁴

Article 7 is often cited as one of the most important articles that affirms the participatory approach of the *Convention* as a whole as its object is the right to consultation before the commencement of any activities that might affect Indigenous communities' lives. While a generally accepted definition of 'consultation' remains elusive, the process entails a dialogue between the State, corporate entities, and Indigenous communities, considered as equal interlocutors, which aims at targeting potential issues that may arise from the proposed actions¹¹⁵. The definition of 'consultation' in ILO 169 is established in Article 6(2) such: '[t]he 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.'¹¹⁶ Article 7(3) focuses on procedural requirements for developmental activities, providing that preparatory studies in cooperation with Indigenous Peoples must be carried out before initiating any developmental project. Article 7(4) stresses the State's responsibility in protecting the territories Indigenous Peoples inhabit.

Finally, Article 13 mandates:

'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 or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term **lands** in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'.¹¹⁷

¹¹⁴ Ibid. art.7

¹¹⁵ Butzier and Stevenson (n 31) 312

¹¹⁶ Ibid. art. 6(2)

¹¹⁷ Ibid. art.13

In Article 13(1) land rights and religious rights are articulated in a manner that explicitly recognises the spiritual tie linking Indigenous Peoples to their ancestral lands. Emphasis is placed also on the government's duty to ensure that the above-mentioned rights are respected. Moreover, the collective aspect of Indigenous Peoples's land ownership is here highlighted. Paragraph 2 specifies that the term 'lands', the definition of which elicited similar concerns to the term 'peoples' during the drafting process, as used in Articles 15 and 16 refers to the entirety of the environment in which Indigenous peoples live, therefore including water resources and other natural elements not mentioned in ILO 107.

ILO Monitoring Systems

The implementation of ILO's standards is monitored by two regular supervisory bodies: the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards. The CEACR is composed of twenty independent legal experts, who meet annually in Geneva to examine the application of ILO Conventions, Protocols and Recommendations submitted by ILO Member States according to Article 22 of the ILO Constitution¹¹⁸. The Conference Committee on the Application of Standards (CAS) is a tripartite body made up of government, employer and worker delegates in charge of examining the yearly reports published by the CEACR. In addition to the regular supervisory system, special procedures are available to constituents to report alleged deficiencies in the manner ratifying States comply with ILO standards and uphold its fundamental principles.

Indigenous Peoples do not have direct access to the regular supervisory procedure, but they can ensure that their issues are addressed by influencing CAR by building alliances with workers' or employers' organizations for example or by highlighting pertinent official information from other UN supervisory bodies.¹¹⁹

¹¹⁸Constitution of the International Labour Organization (adopted 1 April 1919, entered into force 28 June 1919) 15 UNTS 35, art 22

Article 22 reads:

'1. Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.'

¹¹⁹ International Labour Organization, Monitoring Indigenous and Tribal Peoples' Rights through ILO Conventions (International Labour Office 2010) 8

Limits of ILO 169

ILO 169 exhibits several problematic aspects from both an ideological and procedural standpoint, as well as in its substantive provisions and scope of application. Adopted in 1989 and based on the ILO 107 framework, the Convention does not fully meet the needs of contemporary Indigenous communities neglecting fundamental issues like the protection of Indigenous Peoples' cultural heritage through intellectual property rights¹²⁰ which is intimately linked with sacred land rights claims¹²¹. Formally speaking, the language of the overall document presents a number of criticalities as it appears ambivalent and susceptible to a broad interpretation that can be used to the detriment of Indigenous Peoples's interests. From an operative perspective, for instance, the Convention does not expand on the type of measures to be taken in order to enforce the rights protected, on the contrary, the terminology used is rather vague and aleatory. Locutions like 'effective measures', 'appropriate mechanisms', 'as appropriate', 'effective protections', 'to the extent possible', 'effective means' and similar are frequently used throughout the whole text¹²². Another example that can be mentioned relates to property rights ambiguously established in the Convention. For instance, in Article 14 the terms 'ownership' and 'possession' are thus coupled:

'1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.'¹²³

¹²⁰ See Robin Ramcharan and Mpazi Sinjela, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights: Issues, Challenges and Strategies' (2005) 12 International Journal on Minority and Group Rights 1.

¹²¹ Erica-Irene Daes, 'Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples / by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations.' (1993) E/CN.4/Sub.2/1993/28, para 1 <<https://www.refworld.org/reference/themreport/unsubcom/1993/en/39989>>

¹²² See for instance ILO 169, art. 4, 6, 7, 12, 14, 16, 20, 25 and 33

¹²³ Ibid. art. 14

The inclusion of the term ‘possession’ is a novelty of ILO 169, since in ILO 107’s provisions only the term ‘ownership’ was employed, and it raised concerns as it might considerably weaken the provisions protecting Indigenous Peoples’ land rights since the right to ownership entails full proprietary status. Several eminent scholars in the field, among whose James Anaya¹²⁴, Patrick Thornberry¹²⁵ and Alexandra Xanthaki¹²⁶, have underscored the shortcomings deriving from the ambiguity of the provision which restricts the application of Indigenous Peoples’s land rights. The main argument held by these authoritative voices is that possession rights confer only a limited form of title, rather than full ownership rights, therefore States might leverage this term to curtail the full realisation of Indigenous land rights. This ambiguity has led to significant legal disputes, as illustrated in the case of the Sámi’s demand in Finland for the protection of land rights pursuant to ILO 169, often referred to in legal literature¹²⁷. Sámi’s claims for ownership rights are based on the long-term occupation of their traditional lands. However, the Finnish government contends that the ILO 169 provisions only safeguard occupation rights, not full ownership and the ongoing debate over the interpretation of ‘possession’ versus ‘ownership’ has been a primary factor in Finland’s decision not to ratify the Convention. Not only the rights of ownership are not clearly granted, but despite the commendable advancements compared to ILO 107, ILO 169 still admits the displacement of Indigenous Peoples from their ancestral lands under certain specific circumstances (Article 16)¹²⁸ and allows governments to conduct explorative inquiries for extractive operations, therefore exploiting subsoil resources on which they retain exclusive ownership (Article 15)¹²⁹.

¹²⁴ S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004).

¹²⁵ Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2013).

¹²⁶ Xanthaki (n 163)

¹²⁷ See for instance: Tanja Joona, ‘ILO Convention No. 169 and the Governance of Indigenous Identity in Finland: Recent Developments’ (2019) 24 *The International Journal of Human Rights* 241.

¹²⁸ ILO 169, art. 16:

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

¹²⁹ *Ibid.* art.15:

These limitations on land rights claims are not the only constraints affecting the effective protection of SNS: the broader controversy surrounding the recognition of the principle of self-determination further complicates the contents of these protections. Indeed, as previously explained, the issue of self-determination remains a matter of debate and ultimately the right is not granted to Indigenous Peoples in the Convention. Another crucial point that undermines the applicability of the relevant rights of the Convention and the principle of self-determination, is the overall focus on the process of consultation rather than consent. Free consent is seen as a desirable goal, but the provisions referring to it prioritise state interests and do not mandate the obtainment of FPIC¹³⁰ from Indigenous communities before the implementation of legislative or administrative measures. The ILO Governing Body, the executive body of ILO, specified that the fundamental principle of Indigenous Peoples' participation upheld by the Convention, 'does not require that their consent to the proposed measures is necessary'¹³¹. It follows that the participatory rights of ILO 169 might not be effective if not exercised in conjunction with FPIC¹³² as they might remain subordinate to state interests.

Departing from the criticalities related to substantial aspects of ILO 169 provisions and the participatory rights afforded to Indigenous Peoples, significant challenges affect the protection of SNSs also in the context of domestic legal implementation. Indeed, the limited number of States that ratified ILO 169 makes the majority of Indigenous Peoples unable to rely on its provisions to seek protection of their rights. The support was sparse particularly from African and Asian countries, confirming the generalised reluctance among States to ratify a binding treaty which protects Indigenous Peoples's rights. Moreover, the utility of ILO 169's provisions is thus restricted in terms of strategic litigation.

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities

¹³⁰ See para: *Free Prior and Informed Consent*

¹³¹ ILO, 'Contribution of the ILO to the Workshop on Free, Prior and Informed Consent Organized by the UN Permanent Forum on Indigenous Issues' (2005)

¹³² Alexandra Tomaselli, 'Political Participation, the International Labour Organization, and Indigenous Peoples: Convention 169 "Participatory" Rights' (2019) 24 *The International Journal of Human Rights* 127, 129

UNDRIP Background

The UNDRIP ‘has been one of the most extensively discussed and negotiated texts in the history of the UN¹³³’. The *travaux préparatoire* started in 1985 and, after twenty-two years of strenuous negotiation the UNDRIP was adopted. The process that eventually led to the adoption of the UNDRIP by the UNGA can be schematised in three main stages. In 1982 the United Nations Economic and Social Council (ECOSOC) established, under the Sub-Commission on Prevention of Discrimination and Protection of Minorities¹³⁴ the first United Nations mechanism mandated to exclusively address issues related to Indigenous Peoples, the Working Group on Indigenous Populations (WGIP). The primary task of the WGIP was the development of international standards for the protection of Indigenous Peoples’ rights which was fulfilled in 1993 when the initial draft of the Declaration was completed¹³⁵. In 1994 the Draft Declaration, wherein the wording and the contents of certain provisions were fairly different compared to its final version¹³⁶, was adopted by the Sub-Commission and submitted to the Commission on Human Rights (UNCHR). The initial drafting of the Declaration was reviewed by an inter-sessional working group set up by the UNCHR, the Working Group on the Draft Declaration (WGDD) and, after twelve years of negotiations, was finally adopted by UNGA in September 2007 with 144 countries voting in support, 4 voting against and 11 abstaining¹³⁷. The reviewing works and the concomitant negotiation process were particularly lengthy due to a substantial disagreement around three crucial issues: the definition and identification of Indigenous Peoples, recognition of collective rights, land rights and self-determination. Indeed, before the final adoption, in November 2006 the text was deferred by the Third Committee of the General Assembly¹³⁸ and subsequently amended¹³⁹ in order to address the above-mentioned concerns. After defining the legal status of the UNDRIP within the international human rights framework, the following paragraphs, together with an overview of the contents

¹³³ Mauro Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly* 957, 969-970

¹³⁴ Thereinafter Sub-commission

¹³⁵ Draft Declaration on the Rights of Indigenous Peoples (United Nations General Assembly 2006) UN Doc A/61/L.67 [Thereinafter Draft Declaration]

¹³⁶ See para: *Religious Rights: Article 12 and Article 25*

¹³⁷ The States against being Australia, Canada, New Zealand and the United States; the abstaining States Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine; the absent States were Chad, Côte d’Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gambia, Grenada, Guinea-Bissau, Israel, Kiribati, Kyrgyzstan, Marshall Islands, Mauritania, Montenegro, Morocco, Nauru, Palau, Papua New Guinea, Romania, Rwanda, Saint Kitts and Nevis, Sao Tome and Principe, Seychelles, Solomon Islands, Somalia, Tajikistan, Togo, Tonga, Turkmenistan, Tuvalu, Uganda, Uzbekistan, Vanuatu.

¹³⁸ See UN Doc. A/C.3/61/L.57/Rev.1 (28 November 2006)

¹³⁹ See UN Doc. A/61/L.67 and UN Doc. A/61/L.67 of respectively 12 September 2007 and 13 September 2007

and general principles asserted in the UNDRIP, will briefly discuss the nature of the contentious rights whose recognition delayed its final adoption.

Legal Status of UNDRIP under International Human Rights Law

The UNDRIP, like the other UN declarations and almost any resolution passed by the UNGA have a hortatory character, therefore their adoption does not have a binding effect. Although declarations are not binding *per se*, they can acquire binding character if their provisions are consistently incorporated into state practice and recognised by *opinion juris*.¹⁴⁰ As Mauro Barelli, states: ‘soft law cannot be simply dismissed as non-law’.¹⁴¹ The author claims that, beyond the formal recognition of a legal instrument, other important aspects need to be considered when evaluating its effectiveness. These factors are essentially three: the background that led to its adoption; the institutional context wherein the instrument was conceived and exists and its normative content. Although the ratification of binding instruments entails a higher duty of compliance with their provisions since violation of these obligations implicates sanctions, the UNDRIP ‘generates reasonable expectations of complying behaviour’.¹⁴² Moreover, considerable advantages derive from adopting the UNDRIP as a soft law instrument, for instance, the number of signatory States would have probably been inferior if a universal declaration specifically addressing Indigenous Peoples' issues had been legally binding. Another advantage is that using soft law facilitates the active involvement of non-State actors, in this case, Indigenous Peoples, the first beneficiaries of the UNDRIP provisions. Conversely, when the treaty form is employed, non-state actors are frequently marginalised, being excluded from pivotal phases of negotiations.

Without diminishing the innovative normative import of the provisions enshrined in the UNDRIP, especially the one related to historically contentious issues such as land rights, it should be outscored that they are grounded in IHRL. The rights promoted in the UNDRIP are not ‘separate[d] from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of Indigenous Peoples’.¹⁴³ Therefore not only does the interpretation of UNDRIP articles have to be consistent with current international law standards,

¹⁴⁰ The recognition of the UNDRIP as CIL will be dealt with in the final chapter of the thesis.

¹⁴¹ Barelli (n 131) 960

¹⁴² Ibid.

¹⁴³ SJ Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/9/9 (11 August 2008) para 40

but also with the preambular paragraphs of the Declaration itself which explicitly dispel any possible challenge to the principle of State sovereignty:

‘the recognition of the rights of Indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and Indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith’.¹⁴⁴

Scope and foundational principles of the UNDRIP

The UNDRIP has been described as the ‘most radical instrument in the sphere of international human rights’¹⁴⁵. The UNDRIP is the first international instrument that introduced unprecedented changes in International law recognising controversial rights, *inter alia*, collective rights, the right to self-determination under Article 3¹⁴⁶ (though its full effect under the UNDRIP is contested as previously noted), the right to autonomy under Article 4¹⁴⁷ and land rights¹⁴⁸. The primary goal of the Human Rights Council in adopting the UNDRIP was to devise a universal instrument that could harmonise and unify the various international and local instruments safeguarding Indigenous Peoples' rights such as the Asian Development Bank, the World Bank, the World Intellectual Property Organisation and several UN human rights treaty bodies, ensuring coherence both in terms of approach and contents.

The foundational principles on which the whole text is based are equality and non-discrimination, cultural integrity, autonomy, participation, consultation and consent. Due to space constraints, each one of the principles cannot be analysed in detail. However, the following paragraphs will offer a brief overview of these principles and their interaction with the most controversial rights endorsed by the UNDRIP.

Principle of Equality and Non-discrimination and the Definition of Indigenous Peoples

The principle of equality and non-discrimination plays a major role in the UNDRIP and, as highlighted in the introductory paragraph of this chapter, explains the absence of a clear definition of Indigenous Peoples throughout the text. The right to equality and its ‘mirror norm’¹⁴⁹ of non-discrimination, a core precept under the international human rights scheme, mandates

¹⁴⁴ UNDRIP preamble, para 18

¹⁴⁵ Thornberry (n 124) 375

¹⁴⁶ 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.

¹⁴⁷ 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 ways and means for financing their autonomous functions.

¹⁴⁸ Barelli (n 131) 961

respect for individuals' fundamental freedoms and human rights regardless of their race, sex, religious orientation and language¹⁵⁰. Moreover, the principle of equality protects also the cultural integrity of Indigenous Peoples, namely the right to preserve the perpetuation of their cultural practices and correspondent institutions in harmony with the other societal groups. Notwithstanding, although the UNDRIP lacks a precise definition of Indigenous Peoples as subjects of international law, it distances itself from the predominant assimilationist vision fostered by the earlier national and international legal instruments, wherein the first defining feature of Indigenous Peoples was a shared past of colonial subjugation. Following a general trend that recently emerged in international law, 'codified' by ILO 169, the UNDRIP recognises the principle of self-identification as a basis for the definition instead.¹⁵¹

Free Prior and Informed Consent (FPIC)

Another crucial principle upheld by the UNDRIP and of utmost importance for the protection of SNSs is the already-mentioned FPIC. In line with the recommendations of the UN Permanent Forum on Indigenous Issues (UNPFII)¹⁵², the principle of FPIC involves obtaining consent through a consultative process conducted well in advance of any activity's approval. This process must be free from coercion and based on transparent, readily accessible, and consistently available information regarding the specifics of the proposed project. FPIC has to be sought in several areas concerned with Indigenous Peoples' lives, however, it is Article 10 Article 28 and Article 32 of the UNDRIP that explicitly refer to FPIC with regard to the protection of Indigenous lands against relocation and the pursuit of remedies. The Article read respectively as follows:

Article 10

'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return'.¹⁵³

Article 28

¹⁴⁹ S James Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' (2009) 21 Arizona Journal of International and Comparative Law 13, 16

¹⁵⁰ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art.1(3)I

¹⁵¹ Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 American Journal of International Law 414, 437

¹⁵² See para: *UNDRIP Monitoring System*

¹⁵³ UNDRIP, art.10

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

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.’

Article 32

‘1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.’

It is noteworthy to reference Article 32 as it was framed in the Draft Declaration:

‘Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.’¹⁵⁴

In the original Article, FPIC amounts to a *de facto* right to veto as indicated by the word choice: ‘obtain’ instead of ‘seek’ found in Article 32 of the UNDRIP. Not surprisingly the States participating in the drafting process opposed this framing of FPIC. The obligation imposed upon the States by the Articles of the UNDRIP referring to FPIC is not stringent, but FPIC, if read conjunctly with Articles 3 (self-determination) and Article 26 (land rights)¹⁵⁵ and in

¹⁵⁴ Draft Declaration

accordance with the normative framework established by UNDRIP in its entirety, it cannot be interpreted restrictively and reduced to a mere, formalistic consultation act.

Collective Rights

Although the human rights international legal system typically addresses individuals and is fundamentally based on state consensus, increasing attention has been paid to the articulation of collective rights in the framing of human rights norms and enhancing the role of non-state actors. While Indigenous institutions are mainly kin-based binding ‘communities together by intertwining individuals in webs of shared identity [and] communal ownership’¹⁵⁶, in the liberal, Westernised modern societal system group identity is rather construed as the sum of individuals.

Ensuring collective rights to Indigenous Peoples, that is the recognition of Indigenous Peoples’ rights as a distinct group, is of paramount importance to effectively address Indigenous Peoples's demands. This is particularly evident in the case of land rights that cannot be granted in the form of individual rights since, as repeatedly stated throughout this work, Indigenous communities entertain a special relationship with their territories as a group and they should be able to enjoy land and religious rights as such. An often-cited case to illustrate the legal gap addressing the concerns and needs of Indigenous communities, deriving from the lack of recognition of their collective rights, is *Lyng v. Northwest Indian Cemetery Protective Association*. The request by Yurok, Karuk, and Tolowa Indians to halt a logging road project disturbing their religious practices connected with the sacred area of Chimney Rock was dismissed on the grounds that the government could not provide more extensive rights to Indigenous people than those granted to non-Indigenous individuals, as doing so would violate the principle of non-discrimination.

Moreover, the non-recognition of collective rights to Indigenous Peoples, not only represents an impediment to claiming their land rights, but also represents an obstacle also under a procedural point of view. The emphasis traditionally posed on individual entitlement in IHRL narrows the possibilities of seeking remedies to obtain redress for Indigenous Peoples' rights violations¹⁵⁷. For instance, the complaint mechanism devised by the UN is restricted to

¹⁵⁵ Mauro Barelli, ‘Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead’ (2012) 16 *The International Journal of Human Rights* 1, 22

¹⁵⁶ Joseph Henrich, *The Weirdest People in the World How the West Became Psychologically Peculiar and Particularly Prosperous* (New York Macmillan 2010) 219

¹⁵⁷ Antonietta Di Blase and Valentina Vadi, *The Inherent Rights of Indigenous Peoples in International Law* (Roma TrE-Press 2020) 28

individuals or groups of individuals as communications that can be submitted before the UN HRC under the nine international ‘core’ human rights treaties¹⁵⁸ are exclusively individual. The consequences of this individualistic approach are visible in the claiming of land rights as the lack of recognition of collective rights determines the impossibility for some Indigenous communities to bring their case in front of international courts due to lack of *locus standi*, such in the case of *Tsumib v. Government of the Republic of Namibia*. The UNPFII repeatedly stresses the necessity to adopt a complaint mechanism that recognises the collective rights of Indigenous Peoples (see reports). A significant shift in this regard was marked by Article 1 of the UNDRIP where Indigenous Peoples collective rights are explicitly recognised as such: ‘Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and IHRL.’¹⁵⁹

The assertion of collective rights throughout the text of the UNDRIP does not result in the negation of individual rights, which continue to be safeguarded, as evidenced by the provisions of Article 1. Therefore, the collective rights conferred upon Indigenous Peoples under the UNDRIP do not supersede or replace the individual rights previously guaranteed under IHRL; rather, they serve to complement and enhance those existing protections. Despite the progress that remains to be made in order to adequately accommodate Indigenous Peoples's concerns, the UNDRIP overall marks a new normative direction in international law explicitly acknowledging Indigenous collective rights, notably a historically contentious area of law.

Religious Rights: Article 12 and Article 25

Alongside the other provisions which may have an indirect bearing on issues related to the protection of sacred sites, Article 12 and Article 25 of UNDRIP explicitly refer to the safeguarding of Indigenous Peoples's religious rights concerning their sacred lands and are articulated according to the cultural specificity of Indigenous traditions. As observed in the first chapter, the juridification of Indigenous cosmovisions often constrains the latter into rigorously standardised procedures and Westernised, fixed definitions that fail to acknowledge the distinguishing features of Indigenous traditions and protect their rights¹⁶⁰. Both articles, not only recognise the interconnectedness between Indigenous Peoples's spirituality and their lands

¹⁵⁸ See: United Nations, ‘OHCHR | the Core International Human Rights Instruments and Their Monitoring Bodies’ (OHCHR2023) <<https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>>

¹⁵⁹ UNDRIP, art. 1

¹⁶⁰ Ramstedt (n 86) 243

acknowledging the distinctiveness of Indigenous Peoples's cultures, but also the collective nature of Indigenous Peoples' religious rights significantly expanding the prevailing definition of FoRB in IHRL. As the other UNDRIP provisions, Articles 12 and 25 rearticulate and reinterpret already existing norms adapting them to the specific needs of Indigenous Peoples, specifically Article 18 of the UDHR and Article 18 of the ICCPR. However, the two UNDRIP articles depart from their foundational FoRB provisions in two main aspects. Firstly, as previously explained, Article 18 in UDHR and ICCPR has a clear individualistic framing addressing primarily individuals as beneficiaries of their guarantees, while the UNDRIP Articles address Indigenous Peoples as a collectivity. Secondly, the UNDRIP Articles explicitly recognise the 'lands, territories, waters and coastal seas and other resources'¹⁶¹ as constitutive elements of the definition of Indigenous Peoples religion.

Another important novelty, although not radical according to some scholarly opinion¹⁶², introduced by these two Articles is the framing of Indigenous Peoples's religious rights under this specific set of rights rather than under cultural rights. Historically Indigenous Peoples' religious rights have been primarily safeguarded under the broader framework of cultural rights also in legal instruments specifically addressing Indigenous Peoples' rights from which a higher degree of specificity, which translates into stronger protection, would have been expected. In the Draft Declaration, for instance, this set of rights was incorporated under the rights to culture.¹⁶³ Hence, Article 12 is the first explicit recognition of Indigenous Peoples' religious rights in international law¹⁶⁴ and it reads:

‘1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

2. States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.’¹⁶⁵

¹⁶¹ UNDRIP, art.25

¹⁶² See McNally's argumentation in para: *Limits of UNDRIP and Articles 12 and 25 for the Protection of SNSs*

¹⁶³ Alexandra Tomaselli and Alexandra Xanthaki, 'The Struggle of Indigenous Peoples to Maintain Their Spirituality in Latin America: Freedom of and from Religion(S), and Other Threats' (2021) 12 Religions 869, 7

¹⁶⁴ Ibid.

¹⁶⁵ UNDRIP, art 12

The final version of what is now Article 12 was adopted following the Eleventh Session of the WGDD¹⁶⁶ and differs slightly from Article 13 of the Draft Declaration¹⁶⁷. Article 12 reasserts the right to FoRB conventionally understood within the IHRL framework interpreting it in the specific context of Indigenous Peoples. Article 12 ‘Indigenous peoples’ as the exclusive and legitimate right-holders to religious freedom marking a shift in particular from two precedent articles: Article 5 of ILO 169 and Articles 18 and 27 of the ICCPR where the right-holders are both groups and individuals¹⁶⁸.

The first paragraph of Article 12 applies the already-mentioned interpretation of the HRC to Article 18 of the ICCPR¹⁶⁹, fostering a broader, more pluralistic conception of religion. However, given the specific nature of the UNDRIP, the article replaces the term ‘belief’ with some essential features shared by the majority of Indigenous religious systems, thereby providing a preliminary outline of the main and distinctive characteristics of Indigenous religions. The first paragraph indeed grants protection to the right to access religious and cultural sites in privacy, the use of ceremonial objects and the right to repatriation of human remains. The second paragraph reiterates the pattern found in the whole text: of the 46 UNDRIP articles, 40 include an exhortation to States to take effective measures in order to implement at a domestic level the substantive rights asserted. Article 12 read in conjunction with Article 25 further elaborates on the common elements of indigenous religions and introduces a new legal interpretation of the concept of religion¹⁷⁰.

Article 25 mandates:

‘Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.’¹⁷¹

¹⁶⁶ Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 on Its Eleventh Session, UNCHR, 11th Sess, UN Doc E/CN.4/2006/79 (2006)

¹⁶⁷ Draft Declaration, art.13 reads:

‘Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains. States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.’

¹⁶⁸ BERKELEY CENTER for Religion Peace & World Affairs and Helge Årsheim, ‘Indigenous Religious Freedom: Between Individual and Communal Human Rights’ ([berkeleycenter.georgetown.edu](https://berkeleycenter.georgetown.edu/responses/indigenous-religious-freedom-between-individual-and-communal-human-rights) 23 October 2020) <<https://berkeleycenter.georgetown.edu/responses/indigenous-religious-freedom-between-individual-and-communal-human-rights>>.

¹⁶⁹ See para: *International Covenant on Civil and Political Rights*

¹⁷⁰ Helge Årsheim, ‘Spiritual, Religious or Cultural? Religion and Sámi Human Rights in the Nordic Countries’ in Claude Gélinas, Raphaël Mathieu Legault-Laberge and Sébastien Lebel-Grenier (eds), *International Perspective on Indigenous Religious Rights* (Brill | Nijhoff 2023), 50

The opening statement of Article 25 clearly acknowledges the unique tie existing between Indigenous Peoples and their lands, thereby establishing a foundation for the subsequent recognition of collective rights to land ownership, occupation or use in Article 26:

‘1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.’¹⁷²

Article 25 does not differ greatly from its correspondent article in the Draft Declaration, but its first paragraph where the wording ‘and material’ was removed might support a restrictive interpretation of Indigenous Peoples sacred land claims¹⁷³ :

‘1. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship.’¹⁷⁴

Article 25 expands upon the provision of Article 13(1) of ILO 169 with regard to the protection of Indigenous peoples’ spiritual relationship with their lands and territories and it explicitly extends this protection to include ‘waters and coastal seas’ as part of the relevant resources, while in ILO 169 Article 13(1) the inclusion of waters and coastal seas could only be inferred by a broad interpretation of the phrase ‘the total environment of the areas which the peoples concerned occupy or otherwise use.’¹⁷⁵ It is important to stress that, although Article 25 draws from Article 13(1) of ILO 169, it diverges significantly in what concerns its status. Whereas Article 13(1) of ILO 169 can be defined as an ‘instrumental provision’¹⁷⁶ as it requests governments, when enforcing the Articles which protect land and territories, to ‘respect the special importance for the cultures and spiritual values’ of Indigenous Peoples of ‘their

¹⁷¹ UNDRIP, art.25

¹⁷² UNDRIP, art.26

¹⁷³ See para: *Limits of UNDRIP and Articles 12 and 25 for the Protection of SNSs*

¹⁷⁴ Draft Declaration, art.25

¹⁷⁵ See para: *ILO 169, Relevant Provisions for the Protection of SNSs*

¹⁷⁶ Charters Claire, ‘Part IV Rights to Land and Territory, Natural Resources, and Environment, Ch.14 Indigenous Peoples’ Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27’ in Jessie Hohmann and Marc Weller (eds), *Oxford University Press eBooks* (Oxford University Press 2018) 410

relationship with the lands and territories'¹⁷⁷, Article 25 frames this spiritual relationship as a 'stand-alone right'¹⁷⁸.

Another important aspect stressed in this provision is the trans-generational dimension specific to Indigenous Peoples' land claims. Indigenous Peoples' lands, particularly SNSs, are not only deeply embedded with cultural significance and integral to the daily lives of Indigenous communities, but also serve as vital conduits for communication between past, present, and future generations, thereby ensuring the preservation and continuity of their cultural heritage. 'This notion of 'cultural security and continuity' is a central aspect of Indigenous peoples' relationship with their territories'¹⁷⁹ and it also draws attention to a relatively underdeveloped area of rights and legal obligations focussed on the inter-generational discourse¹⁸⁰.

UNDRIP Monitoring systems

The primary monitoring mechanisms of the UNDRIP are the UNPFII, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the Special Rapporteur on the Rights of Indigenous Peoples. The UNPFII is an advisory body to the ECOSOC, which besides providing it with advice on Indigenous Peoples issues, raises awareness on Indigenous Peoples-related topics and enhances the coordination of the various activities connected to them within the UN agencies. The UNPFII was established in 2000¹⁸¹ and it is composed of sixteen independent experts who meet yearly, eight nominated by governments and elected by ECOSOC and eight by Indigenous Peoples' organisations and appointed by the ECOSOC President. The EMRIP, established in 2007¹⁸², is composed of seven independent experts and it is tasked to monitor the implementation of UNDRIP and assist the Member States in achieving the objectives set in the UNDRIP through thematic reports, *ad hoc* visits and recommendations. Finally, the Special Rapporteur on the Rights of Indigenous Peoples¹⁸³, like the Special Rapporteur on Freedom of Religion or Belief, is entrusted to monitor the adherence of signatory States with the UNDRIP using the established instruments and mechanisms previously mentioned devised by the system

¹⁷⁷ ILO 169, art.13

¹⁷⁸ C. Claire, (n 175) *ibid*.

¹⁷⁹ Jérémie Gilbert, 'Custodians of the Land: Indigenous Peoples, Human Rights and Cultural Integrity', *Cultural Diversity, Heritage and Human Rights* (Routledge 2009) 33

¹⁸⁰ Jérémie Gilbert and Cathal M Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Pub 2011) 297

¹⁸¹ UN Economic and Social Council Resolution 2000/22 'Establishment of the Permanent Forum on Indigenous Issues' (28 July 2000) UN Doc E/RES/2000/22

¹⁸² UN Human Rights Council Resolution 6/36 'Establishment of the Expert Mechanism on the Rights of Indigenous Peoples' (14 December 2007) UN Doc A/HRC/RES/6/36.

¹⁸³ See para: *Special Rapporteur*

of UN Special procedures for this mandate. Currently the mandate holder is Francisco Cali Tzay.

Limits of UNDRIP and Articles 12 and 25 for the Protection of SNSs

Although the UNDRIP has been praised internationally for its progressist approach, it is not exempt from limitations. In terms of contents, UNDRIP is regarded as the most ‘advanced’ and comprehensive instrument dealing with Indigenous Peoples issues, but according to some authors¹⁸⁴, it still retains some features deriving from an ideological liberal background that impede the full realisation of Indigenous Peoples' collective rights. This assessment of the UNDRIP provisions becomes more evident if compared with the Draft Declaration. The widely acclaimed, unprecedented emphasis on collective rights in the UNDRIP has, in fact, been diminished in scope when compared to the original Draft Declaration. In the Draft Declaration a number of provisions regarding collective rights (mostly connected with cultural rights) have been discarded or not stated as collective rights such as Articles 8, 32, 34¹⁸⁵. The main reason adduced by the dissenting States to this revision of the Draft Declaration was the concern that collective rights could potentially override the individual rights firmly established in IHRL. It derives that in the final version of the UNDRIP collective rights rather than be harmonised with individual rights are essentially subordinated: ‘indigenous rights would not be permitted to stray outside the boundaries of ‘human rights protections’¹⁸⁶. The limitations of the scope of certain provisions result from the compromises made by Indigenous Peoples representatives during the drafting process, where divergent and often irreconcilable opinions emerged. Indeed, throughout the negotiations, Indigenous representatives were required to deal with conflicting interests and demands from various states, resulting in concessions that weakened some of the original protections for Indigenous rights. The weakening of the legal bearing of certain UNDRIP articles can also be attributed to the modality through which the review process of the original Declaration was conducted, with Indigenous Peoples having only limited participation. While at the Sub-Commission stage, the drafting undertaken by the WGIP saw the active participation of Indigenous Peoples representatives, the reviewing by the WGDD was mainly carried out among State members of the UNCHR and Indigenous Peoples were not formally involved in the process.

¹⁸⁴ Among the others Karen Engle and Kate Bowery

¹⁸⁵ Karen Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22 *European Journal of International Law* 141, 149

¹⁸⁶ *Ibid.* 150

According to this line of thought, the overall ineffectiveness of the UNDRIP provisions impacts naturally also the religious rights embedded in Articles 12 and 25. For instance, Michael McNally conducted a linguistic analysis of the provisions concerned with Indigenous religious rights in the UNDRIP pointing out the legal implications of the reiterated use of the terms ‘spiritual’, ‘sacred’ and ‘religious’ as descriptive adjectives. According to McNally, these terms function in Articles 12 and 25, as well as throughout the whole text of the UNDRIP, ‘as interchangeable adjectival markers to distinguish sacred or spiritual aspects of culture’.¹⁸⁷ The main thesis of the author is that Indigenous Peoples’ religious rights are subsumed under the category of cultural rights in the UNDRIP. Even in Article 12 where the term ‘religion’ is expressly mentioned it is inflected as an adjective (‘religious traditions’)¹⁸⁸. The terminological choice, although more inclusive in the sense that it better encompasses the variety of Indigenous cosmovisions, raises concerns regarding equitable applicability. Specifically, the term ‘spirituality’ may not afford the same level of legal protection as is typically granted to established religions, causing therefore the exclusion of Indigenous religious practice from the full spectrum of FoRB protections. Even in this case, a critical examination of the amendments to the Articles under discussion in the Draft Declaration is useful to highlight the shortcomings of UNDRIP in effectively safeguarding Indigenous religious rights. The removal of the reference to the material relationship Indigenous entertain with their lands in Article 25 is again illustrative of the States’ concerns regarding the issue of the ownership of colonised territories. The reluctance of some States (among which Australia, Canada and New Zealand) to include the phrase ‘and material’ in the provision follows the opinion that it could have been interpreted as granting Indigenous peoples an unrestricted right to reclaim physical ownership of lands, territories, and resources now controlled or owned by the governments or other parties. It is evident that the initial provision has been weakened in its legal force during the review of the text to the disadvantage of Indigenous Peoples¹⁸⁹.

In terms of enforceability, the UNDRIP shows some criticalities as well. One of the main reasons UNDRIP is considered in some scholarly opinions an overall weak instrument is its status of soft law. Although the UNDRIP undoubtedly ‘has challenged the capacity of human rights enterprise to cope with radical diversity’¹⁹⁰, its applicability ultimately rests on the number of States accepting it as a human rights instrument. According to several scholars, the

¹⁸⁷ Michael D McNally, ‘Religion as Peoplehood: Native American Religious Traditions and the Discourse of Indigenous Rights’ in Greg Johnson and Siv Ellen Kraft (eds), *Handbook of Indigenous Religion(s)* (Brill 2017) 54

¹⁸⁸ Ibid. 70

¹⁸⁹ See for instance: Irene Watson and Sharon Venne, ‘Talking up Indigenous Peoples’ Original Intent in a Space Dominated by State Interventions’ in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012).

continuous invocations of the State's positive obligation throughout the whole document remain largely overlooked given the UNDRIP's limited legal standing in international law. In this regard, Kathy Bowrey interprets the UNDRIP's soft law status as maintaining 'the state monopoly on violence by confining the interpretation of the UNDRIP within the bars of the state. Its productive value is constrained by the interpretative context that privileges the state'¹⁹¹. This statement is echoed and reinforced by other authoritative voices such as Kirsten Engel, who maintains that the UNDRIP 'represents the continued power and persistence of an international human rights paradigm that eschews strong forms of indigenous self-determination and privileges individual civil and political rights'¹⁹².

Ktunaxa Nation v British Columbia

This section will examine the case of *Ktunaxa Nation v British Columbia* providing a concrete instance of the inadequacy of FoRB provisions to protect SNSs discussed so far and the ongoing potential for grounding Indigenous sacred land claims on Articles 12 and 25 of the UNDRIP, despite the decision rendered by the Canadian Supreme Court rejecting Ktunaxa Nation's claims. The significance of the case lies also in the fact that it represents the first instance for the SCC to adjudicate whether the destruction of a SNSs constitutes a violation of freedom of religion under subsection 2(a) of the *Canadian Charter of Rights and Freedom*¹⁹³, setting a precedent for future cases. The majority of legal challenges against the desecration of Indigenous sacred sites have been brought under Section 35 of the *Constitution Act, 1982* or through specific statutes (such as planning or forestry laws), and these challenges have predominantly been unsuccessful¹⁹⁴. The Ktunaxa case poses a critical question regarding whether the scope of FoRB can be sufficiently expanded in order to accommodate Indigenous Peoples' sacred claims.

Facts

In 2012, the British Columbia Minister of Forests, Lands and Natural Resource Operations approved a Master Development Agreement (MDA) with Glacier Resorts Ltd. to build a year-

¹⁹⁰ Thornberry, (n.124), 396

¹⁹¹ Kathy Bowrey, 'Law and Its Confinement' (2011) 20 Griffith Law Review 729, 744

¹⁹² K. Engel, (n 184) 141

¹⁹³ Canadian Charter of Rights and Freedoms, s 2(a), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11 [Hereinafter *Charter*]

¹⁹⁴ Natasha Bakht and Lynda Collins, "'The Earth Is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada' (2018) 62 McGill Law Journal 777, 795

round ski resort in the Jumbo Valley located in the heart of the Purcell Mountains range, about 55 kilometres west of the town of Invermere, British Columbia. The interested area corresponds to Qat'muk, a traditional land of the Ktunaxa people object of extensive litigation since 1991 when the initial proposal of the project was submitted to the provincial government. Qat'muk is a site of paramount importance for Ktunaxa religious traditions as it harbours the Kławła Tukłulakʔis, the Grizzly Bear Spirit, a central figure in Ktunaxa's cosmology. Throughout the consultation process between the provincial government and the Ktunaxa Nation, the Ktunaxa, after adopting a compromising stance, in 2009 firmly opposed the realisation of the Jumbo Glacier Ski Resort maintaining that it 'would drive Grizzly Bear Spirit from Qat'muk and irrevocably impair their religious beliefs and practices'¹⁹⁵. In 2010 the Ktunaxa expressed their position in the *Qat'muk Declaration*¹⁹⁶:

'Qat'muk is a very special place where Kławła Tukłulakʔis, the Grizzly Bear Spirit, was born, goes to heal itself, and returns to the spirit world. The Grizzly Bear Spirit is an important source of guidance, strength, protection and spirituality for the Ktunaxa. Qat'muk's importance for the Grizzly Bear Spirit is inextricably interlinked with its importance for living grizzly bears now and in the future. The Ktunaxa have a stewardship obligation and duty to the Grizzly Bear Spirit and Qat'muk.'¹⁹⁷

The Ktunaxa Nation sought a judicial review before the British Columbia Supreme Court in order to overturn the ministerial approval on two independent legal grounds: the infringement of the Ktunaxa's freedom of religion under Section 2(a) of the *Charter* and the government's breach of the duty of consultation and accommodation imposed on the Crown by section 35 of the *Constitution Act, 1982*. The following analysis of the case will be confined to the first claim under Section 2(a) of the *Charter* given the topic of the thesis¹⁹⁸. Ktunaxa's claims were rejected by the British Columbia Supreme Court which did not find any violation of religious freedom under Section 2(a) of the *Charter*. The Ktunaxa Nation appealed then to the British Columbia Court of Appeal which dismissed the appeal agreeing with the lower court's decision. Finally, the Ktunaxa Nation obtained the leave to appeal from the SCC which reviewed the case and issued its final decision.

¹⁹⁵ *Ktunaxa*, para 6

¹⁹⁶ Ktunaxa Nation, 'Qat'muk Declaration: Ktunaxa Nation' (*Ktunaxa.org* 2023)

<<https://www.ktunaxa.org/who-we-are/qatmuk-declaration/>>

¹⁹⁷ *Ibid.*, Preamble

¹⁹⁸ For a detailed analysis of the Crown's duty to consult and accommodate Aboriginal peoples in this case study see: Robert Hamilton and Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult' (2019) 56 *Alberta Law Review*.

Subsection 2(a) Canadian Charter of Rights and Freedoms

The main issue the SCC has been asked to address relates to whether the Ministerial decision violates Ktunaxa's constitutional right to freedom of religion and the protection of Aboriginal interests under section 35 of the *Constitution Act, 1982*. Although the case centres around two main legal principles: the right to FoRB and the Crown's duty to consult, as previously stated this paragraph will only provide an outline of the right to FoRB under subsection 2(a) of the *Charter*. Ktunaxa Nation's line of argument focussed on religious rights claim under subsection 2(a) of the *Charter*¹⁹⁹.

The *Canadian Charter of Rights and Freedoms* is part of the Canadian Constitution and protects the sets of rights and freedoms considered essential for the democratic Canadian society, namely: fundamental freedoms, democratic freedoms, mobility rights, legal rights, equality rights, language rights and minority-language educational rights. subsection 2(a) of the *Charter* and reads as follows:

'Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly;
- (d) freedom of association.'

The right to FoRB is thus framed as a fundamental right in the Canadian Constitution and it guarantees that individuals exert this right freely without state intrusion: state intervention to restrict this right is permitted just in case of compelling justification. As in *R. v Big M Drug Mart Ltd*²⁰⁰, the first religious freedom case decided under the *Charter* to which the SCC refers in its judgment of *Ktunaxa v British Columbia*²⁰¹, freedom of religion has been defined as:

'[...] the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.'²⁰²

The claimants argued that this protection applies also to the preservation of Qat'muk. Following the freedom of religion twofold test established in *Syndicat Northcrest v. Amselem*²⁰³, the

¹⁹⁹ For a comprehensive analysis on section 35 of the Constitution Act, 1982 see: Kent Williams, 'How the Charter Can Protect Indigenous Spirituality; Or, the Supreme Court's Missed Opportunity in Ktunaxa Nation' (2019) 77 U Toronto Fac L Rev 1

²⁰⁰ *R v Big M Drug Mart* [1985] 1 SCR 295 at 336, 18 DLR (4th) 321

²⁰¹ *Ktunaxa* 2, para 62

²⁰² *Ibid.* 336

²⁰³ *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551, 2004 SCC 47

claimants, in order to prove the violation of their right to FoRB, must first demonstrate the sincerity of the belief they held expliciting the nexus between the practise or belief held and religion; secondly, they must prove that ‘the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with [their] ability to act in accordance with that practice or belief.’²⁰⁴

The claimants aptly demonstrated the sincerity of their belief although some skepticism emerged in the lower courts. As highlighted in the factual background, Ktunaxa Nation withdrew from negotiation on the Jumbo Glacier Ski Resort project only in 2009, after the elder Chris Luke received a spiritual revelation in 2004 and shared it with his community five years later. Elder Chris Luke communicated to the government that Qat’muk was ‘a life and death matter’ and that ‘any movement of earth and the construction of permanent structures would desecrate the area and destroy the valley’s spiritual value.’²⁰⁵ The recency of the declared religious belief regarding Qat’muk and the new uncompromising stance held by the Ktunaxa people during the consultation process raised the question of how the change of belief might affect religious claims.²⁰⁶ However, the sincerity of the claimant’s beliefs was established by the SCC.

As for the second requirement, the Ktunaxa people contended that the Minister’s decision substantially interfered with their ability to practice their religion since any movement of the ground on Qat’muk would permanently displace the Spirit from the mountain, undermining the foundation of their beliefs and making their practices ineffective. The argument of the claimants did not satisfy the infringement test and was therefore rejected by the SCC. The majority opinion dismissed the appellants’ arguments determining that their claims did ‘not engage the right to freedom of conscience and religion under section 2(a) of the Charter’²⁰⁷.

Final Judgment

The SCC ruled that the religious freedom claim of the Ktunaxa Nation did not meet the criteria established in the earlier case law and that ‘neither the Ktunaxa’s freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister’s decision to approve the project’²⁰⁸. The main argument against the acceptance of the appellants’s claim was based on the impossibility of accommodating the Ktunaxa Nation’s request to ‘protect the object of

²⁰⁴ Ibid. para 68

²⁰⁵ *Ktunaxa*, para 36

²⁰⁶ Dwight Newman, ‘Implications of the Ktunaxa Nation/Jumbo Valley Case for Religious Freedom Jurisprudence’, *Religious Freedom and Communities* (LexisNexisCanada 2016) 318

²⁰⁷ *Ktunaxa*, para 8

²⁰⁸ Ibid.

[their] beliefs' as it falls outside the FoRB protections. The SCC decision is rather reductive in its interpretation of the Indigenous religion at issue as it imposes the Westernised dichotomic category of believer and object of belief, assuming that Kławła Tukłak?is constitutes a worshipped 'object of belief'. However, the partially concurring opinion of Justice Michael Moldaver and Justice Suzanne Côté, offered a different view maintaining that Ktunaxa's right to FoRB was infringed by the Ministerial decision and acknowledging the centrality of the territorial element to indigenous religions which are irreducible to mainstream religious systems:

'In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself...For Indigenous religions, state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance.'²⁰⁹

As Dwight Newman asserts: the statements of the SCC in its final decision 'are blunt both in their conclusion and in their unnuanced description of the spiritualities at issue, judicially rendering a complex spiritual system into a supposed worship and object of beliefs.'²¹⁰

The definition of FoRB provided in *R. v Big M Drug Mart Ltd* is consistent with the distinction of *forum internum* and *forum externum* of religious beliefs set out in the international instruments protecting the right to FoRB and, as previously discussed, it privileges an internalised view of religious belief which is the one adopted in assessing the *Ktunaxa v British Columbia*'s case. Accordingly, the line of argument fostered by the majority opinion rests on the assertion that the two fundamental components of the exercise of FoRB, namely the freedom to hold religious beliefs and to manifest those beliefs were not violated²¹¹. The reasoning endorsed by the Supreme Court interpreting Ktunaxa's religious belief and the object of their belief as separated failed to sensitively address the issue. As Katzie First Nation, who took part in the litigation as interveners, stated in their factum: 'the spiritual 'belief' and the land are one and the same'²¹² and without land, beliefs cannot be held as they will cease to exist²¹³. It follows that the legal framework provided by Section 2(1) of the *Charter* has been narrowly interpreted by the SCC reflecting inherited colonialist (dis)values of land use and favouring the theological schemes of mainstream Western religions. Indeed, being Western religions mainly

²⁰⁹ Ibid. para 127

²¹⁰ Dwight G Newman (n 1) 2

²¹¹ *Ktunaxa*, para 8

²¹² Katzie First Nation, "Factum of the Intervener Katzie First Nation," online (pdf): <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36664/FM060_Intervener_Katzie-First-Nation.pdf>

²¹³ Chase Blair, 'Indigenous Sacred Sites & Lands: Pursuing Preservation through Colonial Constitutional Frameworks' (2020) 25 Appeal: Rev Current L & L Reform 73, 86

based on an internalised conception of faith, the belief in God does not rely on the existence of a sacred site connected to him and can be held regardless of its persistence. Therefore, within this religious mindset, the ‘focal point of worship’ of the Ktunaxa people is not necessary to hold their religious beliefs and act in accordance with their religious system.

Regarding the *forum externum*, the argument of the Supreme Court again reveals a biased Westernised ideological substrate as it encompassed in the definition of *forum externum* only the range of actions enumerated in the definition of freedom of religion in *R. v Big M Drug Mart Ltd*: *worship, practice, teach, disseminate* a belief. Conversely, practises like *stewardship* and *preservation* essential to indigenous religions are excluded from the manifestations of belief²¹⁴.

An additional conclusive observation that can be made in this context regards the omission of any reference to the UNDRIP in the final decision of the Supreme Court. Articles 12 and 25 could have been appropriately invoked to interpret the content and the scope of subsection 2(a) of the *Charter* given that the appellants were Indigenous Peoples and given Canada’s endorsement of UNDRIP provisions. The SCC seemed to have ignored the international instruments dedicated to Indigenous Peoples’s rights in the interpretation of subsection 2(a) of the *Charter* which would have led to a different outcome, and referenced only the international provisions supporting its view on FoRB, namely Article 18 of the UDHR, Article 18 of the ICCPR, Article 9 of the ECHR and Article 12 of the *American Convention on Human Rights*.

Conclusions

Although the Ktunaxa right to FoRB is granted in the Canadian legal system as a constitutional right which is superior to both common law and legislation, the protection afforded by subsection 2(a) of the *Charter* proved to be inefficient in safeguarding Ktunaxa SNSs and their religious rights proving that Canadian law does not align with UNDRIP requirements. As the renowned Canadian jurist John Borrows, a member of the Chippewas of Nawash unceded First Nation in Ontario Borrows observed²¹⁵, resorting to subsection 2(a) of the *Charter* to defend Indigenous SNSs considerably stretches the Canadian legal framework beyond its original cultural context, which is the minimum requirement in order to address Indigenous sacred land claims. The holding of the SCC did not recognise the intersection between the practice of indigenous religions and their territories, perpetuating colonialist ideological patterns.

²¹⁴ Ibid. 87

²¹⁵ John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press 2010) 252-253

Despite the final judgment which disfavoured Ktunaxa people, some positive aspects have to be highlighted: several factums submitted to the SCC referenced UNDRIP demanding the Supreme Court to refer to it in the interpretation of the constitutional provisions relevant to the case, index of the normative weight UNDRIP holds internationally. Notwithstanding, the SCC dismissed these factums and its decision to refer to Canadian domestic jurisprudence instead of aligning Canadian law with the relevant UNDRIP provisions for the Ktunaxa case suggests that relying exclusively on court judgments to implement UNDRIP is not a valid option²¹⁶.

²¹⁶ Andrew M Robinson, 'Governments Must Not Wait on Courts to Implement UNDRIP Rights Concerning Indigenous Sacred Sites: Lessons from Canada and Ktunaxa Nation v. British Columbia' (2020) 24 The International Journal of Human Rights 1, 19

CHAPTER III

Potential Legal Avenues for the Protection of SNSs

This final chapter will introduce four proposals advancing legal measures for the protection of Indigenous Peoples' sacred sites, invoking the reframing of the Westernised understanding of religious freedom law as a *conditio sine qua non* to effectively address Indigenous Peoples' demands. The first proposal focuses on the prospects for reform of religious rights by widening its scope and reframing its legal definition. The second avenue will discuss the position supported by several scholars according to which UNDRIP religious rights provisions can be recognised as CIL. The third potential legal avenue to promote the protection of SNSs emphasises the positive effects of consistently and practically upholding the doctrine of the interrelatedness of human rights. Granting legal personhood to SNSs will be considered as the final proposal.

Broadening the Legal Definition of 'Religion'

The paring of the words 'indigenous religions' is rather audacious, given the controversial and wide array of meanings that have been attributed to each term in the academic debate, but it is also urgent in light of the current threats Indigenous Peoples are facing globally²¹⁷. This seemingly odd pair, although it lacks anthropological accuracy, represents a valid, if not necessary *terminus a quo* to protect Indigenous Peoples' sacred sites under land rights claims. The term 'Indigenous religion' in the singular form refers to a global discourse that is construed on a collective sense of Indigenous identity which applies a relatively standardised vocabulary to convey what are widely perceived as fundamental common traits²¹⁸ across the diverse Indigenous cultures. In the global discourse of Indigeneity, indigenous religions are made comparable through the creation of a *koinè* where locally characterised cosmovisions, rituals, and other aspects pertinent to the religious sphere can be shared and recognised as similarities, creating a sense of commonality and simultaneously recognising the uniqueness of each specific traditions. This shared vocabulary, however, in order to be effective in advancing Indigenous Peoples's religious rights on an international scale has to be adequate both on the intra-discourse level and on the extra-discourse level²¹⁹. Although using the concept of 'spirituality' might be more inclusive when applied to Indigenous religious customs and world

²¹⁷ McNally (n 186)52.

²¹⁸ Some of these commonalities have been introduced throughout the first chapter

visions as it renders a broader spectrum of spiritual practices, that, strictly speaking, do not fall under the Western category of ‘religion’, it does not bear the same legal weight and protections afforded to the term ‘religion’. Consequently, from a legal standpoint, ‘spirituality’ lacks the formal recognition and enforceable rights typically associated with majoritarian religious practices under international law.

It is worth specifying that expanding the legal definition of ‘religion’ to Indigenous spiritual traditions does not translate into a reduction of their specific features to the mainstream (narrow) understanding of ‘religion’. On the contrary, it means widening the scope of the current legal definition in order to be effectively inclusive. One of the methods through which the expansion of the definition of religion under the FoRB legal framework can be pursued is through judicial interpretation. Especially in common law systems, where the precedent judicial determinations can be fundamental to orientate subsequent decisions, the interpretative method adopted by the court can progressively broaden the scope of ‘religion’ including Indigenous traditions. For instance, by adopting a ‘functional approach’²²⁰, which provides a definition of religion based on the role or function that a belief or set of beliefs plays in the life of the subject rather than substantively defining them, courts can include religious traditions that are not officially recognised as such. As argued in the second chapter, in *Ktunaxa Nation v British Columbia*, the CSC’s final decision applied a narrow interpretation of the definition of ‘religion’, while Justice Moldaver’s partially concurring opinion adopted a broader interpretation recognising the unique characteristics of Ktunaxa people’s beliefs and distinguishing them from majoritarian religions:

‘Unlike in Judeo-Christian faiths for example, where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world.’²²¹

Nevertheless, as discussed previously, the majority’s restrictive interpretation of Section 2(a) succeeded thus limiting the scope of the *Charter*’s protections and creating additional legal hindrances for Indigenous Peoples and minorities seeking to advance new and ‘unconventional’ claims related to FoRB.

As Kristen Carpenter observed, to advance resolution of Indigenous peoples’ religious freedoms in sacred site cases, integrating IHRL in the advocacy strategy could be highly effective²²².

²¹⁹ Siv Ellen Kraft, ‘U.N.-Discourse on Indigenous Religions’ in Greg Johnson and Siv Ellen Kraft (eds), *Handbook of Indigenous Religion(s)* (Brill 2017) 89

²²⁰ See Ben Clements, ‘Defining Religion in the First Amendment: A Functional Approach’ (1989) 74 Cornell Law Review 532

²²¹ *Ktunaxa*, para 127

²²² Kirsten A Carpenter, ‘UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS.’ Religious Freedoms, Sacred Sites and Human Rights in the United States’ (Centre for International

Considering also the well-established jurisprudence surrounding FoRB in IHRL, reforming its legal instruments and enhancing the effectiveness of its monitoring mechanisms might offer a valuable option to enhance Indigenous Peoples' religious rights instead of advocating for an entirely new set of international instruments which more accurately address the specificity of Indigenous Peoples' concerns. While the development of more specialised international instruments specifically designed to advance the unique concerns of Indigenous Peoples could provide greater precision in reflecting their religious and spiritual practices, this approach may come at the cost of reduced implementation and enforcement. Nevertheless, a critical analysis of the actual fallacies of one of the cornerstones of the international human rights framework, namely the right to FoRB, will encourage a further conceptual elaboration of its definition so that it can be adequately implemented in response to the contemporary needs of Indigenous Peoples.

Recognition of Selected UNDRIP Articles as Customary International Law

Similarly to FoRB provisions, the classification of UNDRIP as CIL has been one of the most contentious debates surrounding its drafting and adoption. A considerable number of scholars, among which Adrienne Tessier, James Anaya and Siegfried Wiessner advocate for the raising of UNDRIP to the level of CIL in order to strengthen the enforceability of its provision. Indeed, the recognition of UNDRIP as CIL will include it among the formal sources of international law as per Article 38 of the *International Court of Justice (ICJ) Statute*²²³ which might influence the creation of legally binding rules on Indigenous Peoples-related matters.

Without delving into the complexities surrounding the two defining elements of CIL, namely consistent state practice and *opinio juris*, and what exactly they entail, it is crucial to highlight the inherent circularity underlying these criteria. This circularity raises the question of how state practice can be motivated by a sense of legal obligation before the corresponding rule has been formally recognised as law²²⁴. It is evident that the process of attaining the status of CIL by

Governance Innovation 2022) 59

<[https://lawweb.colorado.edu/profiles/pubpdfs/carpenter/CarpenterReligiousFreedoms\(2020\).pdf](https://lawweb.colorado.edu/profiles/pubpdfs/carpenter/CarpenterReligiousFreedoms(2020).pdf)>

²²³ Article 38 of the ICJ reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a.international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b.international custom, as evidence of a general practice accepted as law;

c.the general principles of law recognized by civilized nations;

d.subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

fulfilling these two criteria is both lengthy and challenging. As Megan Davis Shakspearianly put it in her article the matter revolves around the question: ‘To bind or not to bind?’²²⁵

The prevailing legal opinion on the issue under discussion holds that the UNDRIP in its entirety cannot be considered CIL, but selected provisions can be regarded as having customary status. This opinion was confirmed in 2012 by the International Law Association (ILA) which declared that the UNDRIP ‘as a whole cannot yet be considered as a statement of existing customary international law’²²⁶. However, the committee appointed by ILA and coordinated by Siegfried Wiessner to produce an Expert Commentary with the purpose of clarifying the legal status of UNDRIP identified certain key provisions as CIL in its final report. These provisions include also Indigenous Peoples's land rights:

‘States must comply – pursuant to customary and applicable conventional international law – with the obligation to recognise, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past. Indigenous peoples’ land rights must be secured in order to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions.’²²⁷

ILA, based on the two prerequisites that qualify a rule as CIL, recognised that the selected UNDRIP provisions that guarantee the integrity of Indigenous identities have attained the status of customary law. In light of ILA’s declaration, advocating for the elevation of the entire UNDRIP to the status of CIL may not represent the most effective strategy. However, advancing its legal status by assessing the customary nature of its provisions on an article-by-article basis offers a more viable and pragmatic approach to strengthening its legal force. This method allows for the recognition of specific rights within the UNDRIP that already align with established state practice and *opinio juris*, thereby facilitating the gradual incorporation of individual provisions into binding international law. For instance, with respect to Article 12 and Article 25, as examined in the second chapter, these provisions align Indigenous religious rights with the established interpretation of the right to FoRB as outlined in primary international instruments, including the ICCPR, which carries binding legal force. Moreover, concerning Article 25 there has been notable progress in international jurisprudence that, especially in the

²²⁴ Esterling (n 48) 294

²²⁵ Megan Davis, ‘To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On’ (2012) 19 Australian International Law Journal 17.

²²⁶ International Law Association, Conclusions and Recommendation of The Committee on the Rights of Indigenous Peoples, Resolution No. 5/2012, Conclusions (2)

²²⁷ Ibid. para 7

context of the IACHR, testify to the legal recognition and implementation of this provision in domestic courts.²²⁸

The classic argument supporting the recognition of the customary status of some UNDRIP provisions rests on the premise that their normative foundations are already widely recognised as CIL. As previously discussed, the text of the UNDRIP re-articulates existing rights in the context of Indigenous rights, therefore the provisions based on those norms are as well classifiable as CIL. Wiessner clarified that the body of CIL relating to Indigenous Peoples, ‘not necessarily coextensive with the full reach of the current UNDRIP, may have formed long before this vote occurred, and may emerge thereafter’²²⁹. Furthermore, while some of the UNDRIP provisions are already identified as rights in CIL, others might become ‘*fons et origo* of later-emerging CIL’²³⁰. Indeed, the status of an instrument as a soft law does not inherently preclude the potential for its provisions to become legally binding in the future. Although the preference is still accorded to hard law, the ICJ in its advisory opinion on the *Legality of Nuclear Weapons* stated that: ‘General Assembly resolutions, even if they are not binding, may ... provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*’.²³¹

In addition to the benefits of recognising the UNDRIP or specific provisions within it as CIL for the implementation of Indigenous rights, such recognition would facilitate greater involvement of Indigenous Peoples as non-state actors in defining their rights. This objective is not achievable within the framework of treaty law, where only States are recognised as legitimate actors.

Acknowledging that this proposal needs to be considered with a certain degree of cautiousness due to the conservatory tendency of international law and the complexity of factors determining the formation of customary law²³², the potential of the UNDRIP or some of its provisions does not have to be undermined. On the contrary, the ‘liminal’ legal status of the UNDRIP, functioning as a non-binding yet authoritative instrument while incorporating established binding norms of CIL, creates viable avenues for the text's expanded legal impact and applicability.

²²⁸ Federico Lenzerini, ‘Implementation of the UNDRIP around the World: Achievements and Future Perspectives. The Outcome of the Work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples’ (2019) 23 *The International Journal of Human Rights* 51, 55

²²⁹ Siegfried Wiessner, ‘Re-Enchanting the World: Indigenous Peoples’ Rights as Essential Parts of a Holistic Human Rights Regime’ (2012) 15 *UCLA Journal of International Law and Foreign Affairs*, 256

²³⁰ *Ibid.* 257

²³¹ *Legality of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, 226, para 70

²³² Davis M. (n 222) 19

Enhancing Intersectionality of Human Rights

‘A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre that runs its entire length, but from the many fibres woven together’.²³³

In discussing the implementation of the UNDRIP, Borrows underlines the necessity of ‘braiding international, domestic and Indigenous law’²³⁴. The metaphor of braiding is particularly eloquent in this context as it calls for a holistic approach to the understanding of international human rights²³⁵ and Indigenous Peoples’ rights. Borrows argues that the effective implementation of UNDRIP cannot occur in isolation within international or domestic frameworks alone; it requires the alignment of these legal systems with Indigenous legal traditions by individuating the structural similarities to create a cohesive comprehensive legal framework and allow each system to achieve its specific objectives. The image of braiding suggests that international law, national legislation, and Indigenous legal systems must not merely coexist but must be intertwined in a mutually reinforcing manner. The Canadian context, for instance, already provides a fertile environment for this braiding being the coexistence of multiple legal systems a Canadian tradition²³⁶. Not only Canada’s legal system is bi-juridical combining common and civil law within a unified constitutional framework, but it has also historically recognised and incorporated several Indigenous laws in a variety of ways²³⁷. One of the most effective methods to promote the integration of Indigenous law in domestic and international legal frameworks is through the enactment of recognition legislation of ‘Indigenous law as a primary source of regulation, decision-making, and dispute resolution powers.’²³⁸

The specificity of Indigenous Peoples’s rights claims, as it has been observed in the case of SNSs, might require the development of new, *ad hoc*, standards under international law and this aim can be pursued in alignment with the existing protections under the IHRL regime. In fact, further developments of jurisprudence from the UN human rights treaty bodies do not preclude the establishment of new standards and the consolidation of emerging legal principles that specifically address Indigenous Peoples’ concerns. Although the overall situation of Indigenous rights is far from satisfying, the progressive recognition of Indigenous claims in

²³³ Brenda L et al. Gunn, ‘UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws’ (Centre for International Governance Innovation 2017) 3

²³⁴ Ibid.

²³⁵ Bielefeldt (n 81) 29

²³⁶ Borrows (n 230) 125

²³⁷ For a detailed analysis of the Canadian legal model see: Borrows (n 212)

²³⁸ Ibid.181

individual cases highlights Indigenous law's generative capacity to challenge and potentially dismantle the constraints imposed by the settler-states' legal structures, loosening the bind of colonisation²³⁹. Moreover, it reveals the potential of Indigenous claims to influence international human rights norms.

The holistic approach to human rights required for enhancing the implementation of UNDRIP and consequentially of the safeguarding of SNSs, is exemplified by the following statement of the outcome document of the 1993 Vienna World Conference on Human Rights: '[a]ll human rights are universal, indivisible and interrelated and interdependent.'²⁴⁰ It follows that depriving the IHRL framework of specific human rights protections inevitably weakens the overall structure of the legal system. Conversely, reinforcing certain human rights strengthens related rights within the broader legal framework. This principle equally applies to the rights of Indigenous Peoples as enshrined in the UNDRIP. For instance, the right to self-determination can be regarded as the foundational principle from which all the other specific rights of the UNDRIP are derived. In the absence of recognition of this right, the safeguarding of SNSs cannot be adequately pursued since '[f]rom the very first statements of the indigenous peoples' movement at the international level self-determination was the top and unrenounceable demand. It was vital to maintaining the indigenous peoples' culture, which, in turn, was inextricably tied to their land'²⁴¹. The autonomy granted by the principle of self-determination directly impacts Indigenous Peoples' capacity to preserve their sacred sites and practice their own religions, as it allows them to assert control over their lands and resources.

Another key principle embedded within the UNDRIP, essential for safeguarding SNSs from external threats, is the already examined principle of FPIC. Upholding and reinforcing the legal framework surrounding the right to consultation and FPIC will significantly enhance the possibility of successfully defending SNSs against illegitimate appropriation or illegal actions that infringe upon the human rights of the resident communities. Several examples can be cited where the implementation of this right has been recognised in judicial decisions at a regional and national level. For instance, in *Kichwa Indigenous People of Sarayaku v. Ecuador*²⁴² the IACtHR referred to the rights to consultation and FPIC, as related to rights established in ILO 169, the American Convention, and UNDRIP, ruling in favour of Kichwas on whose land concessions to a private oil company were granted by the Ecuadorian government without

²³⁹ Kristen Carpenter and Angela Riley, 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights' (2014) 102 California Law Review 173, 175

²⁴⁰ Vienna Declaration and Programme of Action (World Conference on Human Rights, 25 June 1993) UN Doc A/CONF.157/23, chapter I, para 5

²⁴¹ Wiessner (n 226) 243

²⁴² *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No 245 (27 June 2012)

consultations. Thus, relying on established jurisprudence that has integrated an intersectional approach to human rights issues will serve as a persuasive precedent, encouraging the adoption of this framework in future judicial and quasi-judicial decisions.

Another potential pathway to protect SNSs upholding an intersectional approach to human rights, is establishing fruitful collaboration between Indigenous communities and conservationist efforts by leveraging the role of Indigenous stewardship in ecosystem management. As in the case of *Ktunaxa v British Columbia*, it has been observed that generally Indigenous communities share a sense of moral obligation towards the protection of their lands: ‘The Ktunaxa have a stewardship duty to the Grizzly Bear Spirit and Qat’muk’²⁴³. Highlighting and legally recognising this stewardship obligation not only serves to protect SNSs, but also ensures that Indigenous peoples maintain autonomy over the management of their lands, free from external interference or intromission of third parties that often, as seen in the case of conservationism, are indifferent to Indigenous Peoples’ needs. While substantial progress is still required, over the past fifteen years heightened public awareness of the adverse impacts of climate change, coupled with dissatisfaction with development models prioritising economic growth at the expense of environmental sustainability and ‘collective well-being’, has converged with Indigenous peoples’ aspirations for self-determination paving the way for new strategies of protection of SNSs. Additionally, this shift confirms how the implementation of the set of human rights linked with Indigenous Peoples’ religious rights, in this case environmental rights, greatly favours and reinforces them.

Granting Legal Personhood to SNSs

Since Christopher Stone’s seminal work *Should Trees Have Standing?*²⁴⁴ the legal discourse surrounding the recognition of nature's rights and their formal affirmation has evolved significantly. The proposal to confer legal personhood upon SNSs aligns with this emergent legal paradigm, representing an effective strategy for ensuring their protection. By conferring juridical personhood upon SNSs, they are endowed with legal subjectivity which enables them to hold rights and interests that can be enforced through legal mechanisms, changing their status from objects of protection to rights-bearing entities with a legal standing in judicial proceedings. This approach reverses the anthropocentric orientation in environmental law that focuses primarily on preventing and remedying environmental problems that have direct consequences

²⁴³ See (n 194)

²⁴⁴ Christopher D Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects* (Tioga Pub Co 1988)

on human beings and promotes a view closer to the ones of Indigenous communities facilitating the braiding of Indigenous law and international law. Moreover, the legal regime of juristic personhood allows Indigenous Peoples to articulate their claims in ways that are consistent with their communal values as the legal recognition of non-human natural entities might increase the possibilities for collective rights to be recognised. Once identified as juristic persons, SNSs possess legal standing, but still require legal guardians to act on their behalf. The guardians, being entrusted with the duty to represent the interests of the juristic entity, it is preferable that their role be exercised under the authority of a local ‘community of believers’ or stakeholders, who are most intimately connected to the entity and can best advocate for its cultural, spiritual, and environmental well-being.

The example of water rights, traditionally held by States, is particularly illustrative due to the pivotal role of the recognition of river rights in advancing collective rights²⁴⁵ and to the fundamental questions related to their guardianship. The case of *Te Awa Tupua* (Whanganui River) in Aotearoa New Zealand, for instance, illustrates the feasibility of a compromise between state sovereignty and Indigenous collective rights. On March 15, 2017, the New Zealand House of Representatives enacted the *Te Awa Tupua* Act (Whanganui River Claims Settlement), officially recognising *Te Awa Tupua* as a legal person after 170 years of litigation by the Māori. For the first time, a new legal framework was established for a river granting to *Te Awa Tupua* ‘all the rights, powers, duties and liabilities of a legal person’²⁴⁶. Under the new legal structure, two guardians, known as *Te Pou Tupua*, are appointed jointly by nominations from both the *iwi* (Māori confederation of tribes) with vested interests in the river and the Crown. Their responsibilities include acting on behalf of *Te Awa Tupua* and safeguarding the river’s health and well-being, as outlined in Clauses 19(a) and (b)²⁴⁷. Additionally, the *Te Pou Tupua* are supported by a *Te Karewao*, an advisory committee comprising representatives from the *Whanganui iwi*, other *iwi* with interests in the river, and local authorities. The *Te Pou Tupua* are tasked with engaging with relevant agencies, local government, and the *iwi* and *hapū* (sub-tribes) associated with the river. Not only *Te Pou Tupua* have been invested with rights and duties, but in a ‘statement of significance’, also the presence of *kaitiaki* (spiritual guardians) that reside in each of the more than 240 rapids (*ripo*) along the river has been acknowledged²⁴⁸.

²⁴⁵ Rhett Larson, ‘Holy Water and Human Rights: Indigenous Peoples’ Religious Rights Claims to Water Resources’ (2011) 2 Arizona Journal of Environmental Law & Policy 81, 108

²⁴⁶ *Te Awa Tupua* (Whanganui River Claims Settlement) Act 2017 (NZ) s14

²⁴⁷ *Ibid.* Clauses 19(a) and (b). The Clauses read as follows:

The functions of *Te Pou Tupua* are

- (a) to act and speak for and on behalf of *Te Awa Tupua*; and
- (b) to uphold—
 - (i) the *Te Awa Tupua* status; and
 - (ii) *Tupua te Ka*;

Another well-known example of river rights is the granting of juristic personhood to the historically sacred rivers of the Gaṅgā and Yamunā by the Supreme Court of India²⁴⁹. However, it is noteworthy to notice that the Supreme Court of India invoked the doctrine of *parens patriae* to appoint the state as guardian of the rivers regardless of the fact that the Indian government is globally recognised as one of the major polluters itself²⁵⁰. Finally, a conclusive example that can be mentioned for its pioneering and revolutionary value in the context of the Rights of Nature (RoN) and protection of SNSs is the guarantees afforded by Article 71 of the Ecuadorian Constitution to Pachamama. Article 71 reads:

‘Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.’²⁵¹

The rendering of Pachamama as ‘nature’ is rather reductive, however for the purposes of this paragraph it suffices to specify that Pachamama in Andean cosmovisions is an entity represented as a magnanimous and motherly goddess of fertility²⁵². According to the Ecuadorean Constitution, everyone is virtually entitled to enforce RoN, extending the possibilities for Indigenous Peoples to efficiently protect their religious rights. Ecuador was the first country that granted RoN at a constitutional level and explicitly referred to an Indigenous concept, *sumak kawsay* (*buen vivir*)²⁵³ in its preamble and other four provisions²⁵⁴. Although the concept of *sumak kawsay* has slightly different connotations among the Andean and Amazonian Indigenous communities where it is widespread, in the Kichwa language generally refers to the state of collective well-being or ‘good life’, achievable through establishing a harmonious relationship with nature. Granted that the incorporation in national constitutions and legislation of Indigenous conceptions and tribal institutions such as in the case of *sumak kawsay* or *kaitiaki* is a laudable endeavour, recognising legal personhood to SNSs raises theoretical questions about the coherence of the concept in legal doctrine and its consequences

²⁴⁸ John Studley, *Indigenous Sacred Natural Sites and Spiritual Governance* (Routledge 2018) 36

²⁴⁹ *Salim v State of Uttarakhand and Others* (2017) Writ Petition (PIL) No 126 of 2014 (Uttarakhand HC)

²⁵⁰ Stellina Jolly and KS Roshan Menon, ‘Of Ebbs and Flows: Understanding the Legal Consequences of Granting Personhood to Natural Entities in India’ (2021) 10 *Transnational Environmental Law* 467, 492

²⁵¹ *Constitution of the Republic of Ecuador* (2008) art 71

²⁵² Andreas Gutmann, ‘Pachamama as a Legal Person? Rights of Nature and Indigenous Thought in Ecuador’ in Daniel P Corrigan and Markku Oksanen (eds), *Rights of Nature A Re-examination* (Routledge 2023) 40

²⁵³ Philipp Altmann, ‘Sumak Kawsay as an Element of Local Decolonization in Ecuador’ (2017) 52 *Latin American Research Review* 749.

²⁵⁴ *Constitution of the Republic of Ecuador*, Articles 14, 250, 275, 387(2)

within legal systems. Visa Kurki in his article *Can Nature Holds Rights?*²⁵⁵ critically evaluates this concept from a legal and philosophical standpoint challenging the *anything-goes approach*²⁵⁶, according to which potentially any entity can be conferred legal personhood as long as the relevant legal authority designates it as such. The author labels this perspective as ‘deferential’²⁵⁷, arguing that the assignment of legal personhood requires more rigorous criteria than simply the discretion of legal institutions and stating that attributing direct juridic personhood²⁵⁸ to natural entities is practically impossible. The direct personhood model entails the recognition of rights and duties to a newly created legal person such as in the case of *Te Awa Tupua*, while by applying the indirect personhood model the rights and duties are conferred to an already recognised legal person who is in charge to manage and protect the natural entity in question. Kurki argues that direct legal personhood ultimately conflates into indirect legal personhood as natural entities do not possess the main characteristic of juridic personality: they cannot be wronged, held accountable, or exert legal competencies capacities. Despite arguing the ontological impossibility of granting direct legal personhood to nature, the author concludes that such measures are ‘legal fictions with symbolic value’²⁵⁹ can favour the protection of natural sites.

Conclusive Remarks

As the decision issued in *Ktunaxa Nation v British Columbia* demonstrated, the legal definition of religion and supervisory mechanisms of FoRB present several limitations that result in discriminatory treatment towards those religions which defy the Western legal categorisations of ‘religion’ and ‘beliefs’, especially indigenous religions. The UNDRIP, while does not encompass all of the issues Indigenous communities seek to address, establishes a ‘minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’²⁶⁰ and it constitutes an extremely valuable instrument for Indigenous communities to see their rights observed and their SNSs protected. As human rights bodies adopt an intersectional approach in their analyses, their efforts to provide remedies to Indigenous Peoples’ rights violations will increasingly reflect a more comprehensive and nuanced application of human rights principles being ultimately more effective and tailored to their specific needs. The

²⁵⁵ Visa AJ Kurki, ‘Can Nature Hold Rights? It’s Not as Easy as You Think’ (2022) 11 Transnational Environmental Law 525

²⁵⁶ Ibid. 526

²⁵⁷ Ibid.

²⁵⁸ Ibid. 527

²⁵⁹ Ibid.

²⁶⁰ UNDRIP, art.42

metaphor of braiding mentioned in this final chapter to promote legal pluralism is also applicable to the legal avenues discussed earlier. These avenues should be understood as mutually reinforcing and inter-reliant to achieve the shared objective of safeguarding SNSs and the religious traditions of Indigenous Peoples.

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Die Rechte indigener Völker auf Zugang, Nutzung und Schutz ihrer heiligen Naturstätten (SNS) sind ernsthaften Bedrohungen ausgesetzt, die von verschiedenen Quellen ausgehen. Die industrielle Tätigkeit privater Unternehmen und staatliche Wirtschaftsaktivitäten wie landwirtschaftliche Großprojekte, Extraktivismus (oder Neo-Extraktivismus) und touristische Infrastrukturen gehören zu den hartnäckigsten Problemen, die SNSs weltweit gefährden. Ziel dieser Arbeit ist es, die Grenzen und Möglichkeiten des Schutzes zu analysieren, den der internationale Rechtsrahmen des Rechts auf Religions- und Glaubensfreiheit (FoRB) im Zusammenhang mit den Ansprüchen indigener Völker auf heiliges Land bietet, wobei ein besonderer Schwerpunkt auf den Artikeln 12 und 25 der Erklärung der Vereinten Nationen über die Rechte indigener Völker (UNDRIP) liegt.

Die Arbeit gliedert sich in drei Kapitel. Das erste Kapitel gibt einen Überblick über die grundlegenden Bestimmungen der FoRB: Artikel 18 der Allgemeinen Erklärung der Menschenrechte (AEMR), Artikel 18 des Internationalen Pakts über bürgerliche und politische Rechte (IPbpR) und die Erklärung über die Beseitigung aller Formen von Intoleranz und Diskriminierung aufgrund der Religion oder der Überzeugung (Erklärung von 1981). Das FoRB bietet zwar einen bedeutenden Schutz und stellt potenziell ein gültiges rechtliches Instrument dar, um die Ansprüche indigener Völker auf heiliges Land zu artikulieren, wird jedoch durch seine Abhängigkeit von westlich orientierten Definitionen von Religion eingeschränkt, die sich als unzureichend erwiesen haben, um die SNS indigener Völker und folglich ihre freie Religionsausübung zu schützen. Diese kulturelle Voreingenommenheit führt häufig zu einer diskriminierenden Behandlung der Ansprüche indigener Völker, wie das im zweiten Kapitel der Studie analysierte Fallrecht zeigt: *Ktunaxa Nation v. British Columbia*. Der zentrale Teil der Studie befasst sich mit den kritischen Aspekten und Vorteilen der Bestimmungen des IAO-Übereinkommens über indigene und in Stämmen lebende Völker (Nr. 169), die sich indirekt auf die SNS indigener Völker auswirken, sowie mit den Grundprinzipien der UNDRIP und den Artikeln 12 und 25, die sich speziell auf SNS beziehen. Schließlich werden vier rechtliche Möglichkeiten zur Verbesserung des Schutzes von SNSs vorgestellt: die Erweiterung der rechtlichen Definition von Religion, um die Besonderheiten indigener Religionen einzubeziehen; die Anerkennung der Artikel 12 und 25 der UNDRIP als internationales Gewohnheitsrecht (CIL); die Verbesserung der Intersektionalität der Menschenrechte; die Zuerkennung der Rechtspersönlichkeit für SNSs.

Indigenous Peoples' rights to access, use and protect their Sacred Natural Sites (SNSs) are exposed to serious threats deriving from different sources. Private companies' industrial operations and state economic activities such as large-scale agricultural projects, extractivism (or neo-extractivism) and touristic infrastructures are among the most persistent issues that endanger SNSs globally. The thesis aims to analyse the limits and potential of the protections afforded by the international legal framework of the right to Freedom of Religion or Belief (FoRB) in the context of Indigenous Peoples' sacred land claims, with a particular focus on Articles 12 and 25 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The thesis is structured into three chapters. The first chapter provides an outline of the foundational provisions of FoRB: Article 18 of the *Universal Declaration of Human Rights* (UDHR), Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) and the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* (1981 Declaration). While FoRB provides significant protections and potentially represents a valid legal tool to articulate Indigenous sacred land claims, it is constrained by its reliance on Western-centric definitions of religion, which proved to be inadequate to safeguard Indigenous Peoples' SNSs and consequently their free exercise of religion. This cultural bias often leads to discriminatory treatment towards Indigenous Peoples' claims, as exemplified by the case law analysed in the second chapter of the study: *Ktunaxa Nation v. British Columbia*. The central part of the study focuses on the

criticalities and advantages of the provisions of the ILO *Convention on Indigenous and Tribal Peoples (No 169)* that have an indirect bearing on Indigenous Peoples' SNSs, on the foundational principles of the UNDRIP and Articles 12 and 25 that specifically address SNSs. Finally, four legal avenues to enhance the protection of SNSs will be introduced: the broadening of the legal definition of religion to include the specificities of indigenous religions; recognition of Articles 12 and 25 of UNDRIP as Customary international law (CIL); the enhancement of intersectionality of human rights; granting of juristic personhood to SNSs.