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DIPLOMARBEIT

INDIGENOUS PEOPLES' CULTURAL HERITAGE: CULTURAL DIVERSITY and BIODIVERSITY vs. NEOCOLONIAL STRUCTURES

Verfasser

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angestrebter akademischer Grad

Magister der Philosophie (Mag.phil.)

Wien, 2014

Studienkennzahl lt. Studienblatt:

A 057 390

Studienrichtung lt. Studienblatt:

Internationale Entwicklung

Betreuer:

ao. Univ.- Prof. Dr. iur. René Kuppe

Acknowledgements:

First of all, I would like to thank Univ. Prof. Dr. René Kuppe for his sensitive support and for encouraging me to finalize this thesis. Although I do not belong to an Indigenous People, I seem to perfectly match the stereotypic cliché of so called “Indian time”. In this regard, my special thanks to Univ. Prof. Dr. Georg Grünberg as well. He instantly supported me in agreeing to be my second examiner. The way he acted was more I could have asked for.

Thus, I would also like to thank the tireless staff of the IE-Secretariat, particularly Mag. Elke Christiansen, for making the finalization of this thesis possible. I really appreciate it and am grateful for these efforts.

Besides, I am happy to thank my parents, especially my mother for her support.

In regards to the content of this thesis, once again, I would like to thank Univ. Prof. Dr. René Kuppe for his already decade long advice.

Many thanks also to AKIN – the Working Circle Indians of North America, a rather small NGO with a bunch of wonderful, committed people.

However, I dedicate this thesis to my friends who belong to distinct Peoples, called to be “indigenous”. Particularly, I would like to thank the following persons:

Dr. Debra Harry has become one of my dearest friends, I am honored that we have shared countless moments of friendship and solidarity. I am also quite proud to call Dr. Donna Goodleaf, Laura Calm Wind, Sylvia McAdam Saysewahum and Dr. Sharon Venne my friends.

These truly powerful ladies, their energetic actions for their Peoples, their kindness and wisdom have massively impressed me. In this regard, I would also like to thank Rebecca Sommer for being who she is. Though not belonging to an Indigenous People, her efforts are beyond comparison. An “amazon” warrior in the best sense.

I would like to dedicate this piece of work also to the young ones, especially my friend Cody Harry and Tessa Maytwayashing. They are the next generation of “troublemakers”, persons of whom their Indigenous Peoples can truly be proud of.

My thanks also go to Art Manuel, honorable member of our Working Circle for many years. He

walks his father's way, one of the most prominent founders of the international Indigenous Peoples' movement.

I truly hope that this thesis aligns with their commitment.

Abstract (English)

Contrarily to Indigenous Peoples' traditions and cultural practices, the monetary “valorization”, the exploration and exploitation for profit maximization often profoundly dissents with Indigenous Peoples' cultural core values. As will be seen, Indigenous Peoples identify themselves as “stewards”, assigned with caretaking obligations, embedded in a holistic system which is eurocentrically called “environment” or categorized as “nature”. They articulate this exceptional relationship concerning their cultural identity through the term “Cultural Heritage”

Like other Peoples, Indigenous Peoples assert their right to self-determination regarding their “Lands, Territories and Resources” (LTRs). Thus, Self Determination represents an essential key factor, it constitutes the existential foundation – the precondition – for any egalitarian discourse. As such, it also determines the interaction to the “environment”, the freedom to practice and live their unique, holistically grown and collectively developed identity. As a consequence, this holistic relationship towards nature has to be understood as being inextricably intertwined with and “rooted” in Indigenous Peoples' self-determination, LTRs and dynamically transforming identities.

Thus, it will be shown that its legitimacy is still rooted in colonialism: Particularly the papal bulls “Inter Caetera” and accompanying cognitive patterns shall serve as best examples to sustain this presumption. In this sense, interdependencies between colonial expansion, its persistent perpetuation through present neoliberal structures and pursuant impacts are intended to become revealed and exposed. Therefore, a major component will be a critical review of involved actors as well as related backgrounds, influences and ideologies.

Reflecting on the various contexts, the main focus of this thesis is vested on the analysis of International documents/instruments which claim to protect Indigenous Peoples and their Cultural Heritage.

Contrarily, In critically investigating these documents, I intend to expose what I consider to be neocolonial structures in order to access, dominate and exploit Indigenous Peoples' Cultural Heritage.

Moreover, this thesis is dedicated to Indigenous Peoples' resistance: Their voices shall unveil the more disguised but still quite thriving, persistent system of colonialism, implicit in so called “instruments to protect indigenous Cultural Heritage.”

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I

INDIGENOUS PEOPLES' CULTURAL HERITAGE: CULTURAL DIVERSITY and BIODIVERSITY vs. NEOCOLONIAL STRUCTURES

INTRODUCTION

1.1 The Problem:

“Despite their vulnerable position, they account for 80% of the world's cultural and biological diversity but occupy only 20% of the world's land surface.”¹

This quote already provides essential information, which shall form the core of this thesis. A focus on resulting „central elements” and associated, inherent problems will be particularly relevant:

✧ „Indigenous Peoples“

✧ „vulnerable“

✧ „cultural diversity“

✧ „biological diversity“

✧ „occupy“

✧ „land“

✧ „20%“ vs. „80%“

In reference to the above citation, Peoples who are defined as “indigenous” or who identify themselves as such, encompass an abundance of cultural diversity, which is directly interwoven with a vast biological diversity. Nevertheless, this relationship is not reflected in recognition of property rights regarding their lands, territories and resources (LTRs). Hence, a manifestation of hegemony is perceptible: Its intrinsic structures of power and dominance have to be exposed as well as further scrutinized.

¹ c.f.: University of Minnesota Human Rights Center, Study Guide: *The Rights of Indigenous Peoples*, www1.umn.edu/humanrts/edumat/studyguides/indigenous.html

Consequently, the thesis focuses on the following 3 goals:

- To unveil these structures of dominance in regards to contemporary examples, especially within the tense relationship between so called “environmental policies” and Indigenous Peoples' traditions - specifically translated and manifested as “Cultural Heritage”.
- A critical reflection of the recent historical context, particularly concerning colonialism, which main constituents continue to be a persistent force against Indigenous Peoples and the panindigenist movement, still vitally evident today. The revelation of these prevailing, euro-centric patterns of discrimination and dominance, specifically interpreted according to “modern” structures of capitalism/neoliberalism, will form a crucial part of the analysis.
- A fundamental deconstruction of this hegemony, manifested through indigenous voices which convey as well as request a possible and most indispensable switch of paradigms.

The tension “environmental policies/green economy – Indigenous Peoples' traditions/Cultural Heritage” manifests itself on different spheres and can be generally visualized in regards to the term “Access and Benefit Sharing” (ABS).

This modern, capitalistically infused term is especially problematic due to its fundamental implications: Its implicit demand – the prerequisite - to access so defined “resources”. The pursuant procedure proposes to “share benefits” among certain categories of “stakeholders”. Affected communities - frequently Indigenous Peoples - are becoming reduced to be merely “beneficiaries” according their own “resources” on their own lands and territories.

Due to these opposing perspectives, a clash of interests as well as accompanying, pursuant conflicts inevitably seems to be unavoidable. These conflicts are embedded within structures of power and dominance, a context, which is still massively influenced by colonialism.

1.2 As a result of these identified controversies, I pose the following **hypothesis**: Indigenous Peoples' Cultural Heritage is still vitally threatened by persistent colonial structures, implicit within contemporary national and particularly international policies, stabilizing the domestic spheres. Thus, I even claim that international instruments which pretend to respect and protect Indigenous Peoples' rights and particularly their Cultural Heritage, do not meet this self-acclaimed task - instead, I suppose, in upholding colonial-based structures of dominance they are partially intended to facilitate access to as well as

exploitation of Indigenous Peoples' Cultural Heritage.

1.3 Structure/Methodology:

In this respect, an analysis inevitably has to examine this colonially infused framework of power and dominance : the reasons, causes, and genesis.

Thus, part 1 of this thesis will be dedicated to Indigenous Peoples' recent history, particularly in reflection of Indigenous Peoples' collective resistance against colonialism. Most fundamental in this regard: the Indigenous Peoples' self-determined creation of an international panindigenous movement, which has entered the international arena and has requested its place at the United Nations. Due to increased influence and various battles on the international terrain, focal documents and instruments addressing Indigenous Peoples' rights have evolved – some of these significantly influenced by them, others still massively dominated by the states.

The juxtaposition of the most relevant international documents/instruments concerning Indigenous Peoples' rights and their Cultural Heritage as well as Indigenous Peoples' sources/documents and instruments will serve to unveil implicit contradictions. The comparison of documents, their reflection in regards to Indigenous Peoples' originally proclaimed requests, will be a rather significant method in both parts of this thesis.

Within the first part the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as well as its original, powerful predecessor documents and the International Labour Organization Convention ILO 107, the subsequent International Labour Organization Convention ILO 169, will be specifically highlighted.

The second part will imply an extensive analysis regarding assorted instruments – their thorough examination in reflection of substantial criteria to reveal presumed threats to Indigenous Peoples' Cultural Heritage and persistent structures of domination. Hence, the UNDRIP – the document which is reasonably regarded as a milestone in reference to Indigenous Peoples' Rights – will be particularly under scrutiny in order to review its relevance and applicability. Furthermore, Indigenous Peoples' Cultural Heritage in regards to the “Daes studies” and associated contexts of UNESCO will be juxtaposed to each other as well.

In concluding part 2, two distinct examples shall especially envision most recent contested battlefields which intrinsically stress the contradictions between “Indigenous Cultural Heritage” and “capitalistic, neoliberally influenced green economy”: The Convention of Biological Diversity

(CBD) and its Nagoya Protocol and the Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (IGC) of the World Intellectual Property Organization (WIPO).

Eventually, Indigenous Peoples' voices - their manifestations - are of utmost importance for this thesis and shall be promoted: A deconstruction of the mentioned power relations, web of dominance, a true switch of paradigms from indigenous perspectives towards a self determined, decolonized world shall be emphasized in concluding this thesis. Therefore, Indigenous Peoples' Declarations such as the „Mataatua Declaration“ will be emphasized.

1.4 Methodology:

Due to my personal, extensive experience as an activist/action anthropologist in supporting Indigenous Peoples within the represented fora, I do not claim to be objective. Thus, though not belonging to an Indigenous People myself, my assertions are influenced by an “emic” perspective. Notwithstanding, this condition substantially helped me in experiencing myself the vitally persistent domination of colonial structures, which I intend to unveil with the pursuing thesis.

Thus, on the one hand my assertions are on the one hand the result of my activities as an activist – not the classic ideal of a distanced scientist, on the other hand, my elaborations are based on a thorough analysis of presented documents/instruments and their implicit terminology.

Hopefully, this thesis can be supportive to promote Indigenous Peoples' resistance in order to expose the continuity of neocolonial injustice.

1.5 Indigenous ?

As many before, I basically adhere to the UN “Working Definition” elaborated by the Special Rapporteur for the Sub-Commission on the Prevention against Racial Discrimination and the Protection of Minorities José Martínez Cobo, which he developed in his *Study of the Problem of Discrimination against indigenous Populations*², (1972-1986):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Thus the subsequent terms are of utmost relevance. Yet, not all of them are mandatory to match in order to claim indigenusness:

- historical continuity
- pre-colonial societies
- consider themselves distinct
- present non-dominant sectors of society
- ethnic identity (own cultural patterns, social institutions and legal systems)
- continued existence as peoples
- territory

Basically, Indigenous Peoples have developed their own ethnic identity, which they consider to be different from other identities. Moreover, they want to keep this specific collective identity and request to continue their existence as peoples. In general, this identity is rooted in and interwoven

² c.f.: UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4. The conclusions and recommendations of the study, in Addendum 4, are also available as a United Nations sales publication (U.N. Sales No. E.86.XIV.3). The study was launched in 1972 and was completed in 1986, thus making it the most voluminous study of its kind, based on 37 monographs.

with a certain territory. Consequently, to maintain their identity as a collective entity simultaneously means to maintain, occupy, use and own a certain territory. As peoples, they are supposed to have the full right to self determination, including sovereignty. To self identify and being recognized as belonging to such a shared identity is crucial. Another imperative part of this working definition is marginalization. Indigenous Peoples are supposed to be not dominant in society due to colonization and similar processes such as internal colonization. Although this element of being indigenous indicates a rather relevant part of this thesis, it has to be criticized as well because it assumes marginalization as a precondition as such. Consequently, “indigenous” as a term would then be dependent on unequal power relations. Thus, if domination ends through decolonization, would an indigenous people cease to be indigenous? Nonetheless, this criteria has to be seen as a focal one in order to comprehend central assumptions and conclusions of this thesis.

Furthermore, Art. 8 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also emphasizes self identification as a collective entity:

“Indigenous peoples have a collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.”

However, this thesis is intended to provide space for those persons belonging to and speaking of their peoples, who are called, claim to be and identify as indigenous. Their voices will articulate and express what it means to be indigenous.

Nonetheless, within the given dominant structures of international policy and human rights, the Martinez Cobo working definition - though not perfect – functions as a consent, a sort of translation which implies essential elements of being indigenous. As such, it remains relevant due to the fact that international institutions, corporations and States neither can deny nor ignore it anymore.

FIRST PART 1: Recent History of Indigenous Peoples' Movements: Evolving Panindigenism in the Mirror of Colonialism and Decolonization:

2.1 The Beginnings: First Steps on the International Terrain:

Indigenous Peoples' recent involvement inside the international arena of modern politics reaches back to the 1920's. Famous Haudenosaunee chief Deskaheh³ was the first one who crossed the Atlantic in order to speak against Canada and the British Empire in front of the League of Nations⁴, Geneva, Switzerland.

Deskaheh sought to ascertain the Haudenosaunees' status as a people, to emphasize his people's self determined position as a sovereign nation/confederacy, independent from the colonial powers. Based on the fact that Canada was a colonial power itself, he objected against Canada's right to claim its own independence: „Much to the shock of Canada, Deskaheh twice requested, on 7 August and 4 September 1923 that the League grant the (Haudenosaunee) formal membership as a state“. Given that his argument relied upon treaties his ancestors made with the Netherlands before Great Britain's invasion and afterwards on the 1784 Haldimand Treaty, wherein Britain acknowledged the independence of the Confederacy, „Ireland, Panama, Persia, and Estonia requested that the petition be presented to the League and that the case for Iroquoian independence be brought before the international court.“ (Hele, 2008:pp712-13)

Canada was unable to halt the process until 1924. Nonetheless, eventually the British Empire successfully intervened and prevented him to speak at the League of Nations: „Great Britain regarded support for Deskaheh as interference in its domestic affairs, and lobbied Deskaheh's supporters to back down. The efforts of Canada and Great Britain to prevent Deskaheh from appealing to the League of Nations succeeded.“ (Venne, 2011:558)

Another endeavor to appeal against a colonial power was started by Maori religious leader T.W. Ratana. Just one year after Deskaheh's odyssey, Ratana's Delegation sought justice at King George's the V in Great Britain and then in front of the League of Nations. They traveled all the way from Aotearoa/New Zealand to object against the British Crown's broken promises in complying with the Treaty of Waitangi⁵ (1840). The delegation did neither succeed in Great Britain nor in Geneva –

3 Regarding more background information I recommend the site of the Haudenosaunee confederacy: <http://www.haudenosauneeconfederacy.com/deskaheh.html>

4 The League of Nations was the intergovernmental predecessor organization of the UN, founded in 1919 after the Paris Peace Conference. Like the UNO its main purpose was to maintain peace.

5 The Treaty of Waitangi constitutes the main relationship between the British Crown and its *pakeha* (white settlers)

their attempts were simply ignored⁶.

Despite these brave, courageous attempts by Indigenous leaders to achieve justice, revitalize and regain power for self-determination, assimilation and genocidal⁷ policies just have continued to be exercised by the colonizers. Different strategies have been applied, some of these more directly aiming for assimilation, ethnocide⁸ (actually a part of genocide, see Art 2 b, c, and e of the UN Genocide Convention) and physical genocide, some more invisible, hidden and disguised.

James Sa'ke'j Henderson further differentiates: "Since the *UN Convention on the Prevention and Punishment of the Crime of Genocide*...., five types of genocide against Indigenous peoples have been identified: cultural genocide, in which assimilation is the aim of the state; latent genocide, which is the result of activities that have unintended consequences, such as the spread of diseases; retributive genocide, in which states attempt to punish Indigenous or minority groups that challenge their legitimacy; utilitarian genocide, which involves the extermination of peoples to obtain control of economic resources, and optimal genocide, which is characterized by the slaughter of a people to achieve their obliteration." (Henderson, 2008:111)⁹

For example, Canadian State's political strategists elaborated certain obstacles in order to diminish and deny Indigenous Peoples' sovereignty, thus blocking them the access to the international arena. Even the creation of "Pseudo-indigenous representative bodies" and modifications of the core documents, such as amendments to the Indian Act¹⁰, in order to legitimize the oppressor's

and the Maori Indigenous Peoples of Aotearoa. Conflicts arose due to different versions and several breaches of the treaty by the government of New Zealand.. For more information: <http://www.postcolonialweb.org/nz/dewes1.html>

6 More information for Tahupotiki Wiremu Ratana, URL: <http://www.nzhistory.net.nz/people/tahupotiki-wiremu-ratana>, (Ministry for Culture and Heritage), updated 3-May-2013 and at <http://www.teara.govt.nz/en/biographies/3r4/ratana-tahupotiki-wiremu> and at <http://www.theratanachurch.org.nz/twratana.html>

7 The UN Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948. In Article 2 it defines genocide as: "...any of the following acts committed with intent to destroy, in whole or in part a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Convention of Genocide, Article 2

8 UNESCO Declaration of San José: "Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity."

9 Further extensive references in Henderson, 2008:111-112

10 The Indian Act of 1876 derived from Section 91 (24) of the Constitutional Act of 1867, which provides Canada's federal government exclusive authority to govern in relation to "Indians and Lands Reserved for Indians". The Indian Act got amended several times through the following decades, almost always to the disadvantage of Indigenous Peoples/First Nations. To get more information about the different spheres of the Indian Act read James

subjugation policies, were applied. According to Sharon Venne: „The imposition of an elected council under the rules of Canada was done by force. The state took action in Geneva and in Canada to stop the assertion of nationhood by Indigenous Peoples. Canada went one step further by changing the Indian Act in 1927 to prohibit Indians from raising money or taking legal action against Canada.“ (Venne, 2011:559)

In Australia similar developments took place: “There have been wide-ranging claims which have challenged the legitimacy of the doctrines upon which colonial states have built their foundations. Australian Aborigines have consistently challenged the doctrine of *terra nullius* or 'empty land' which has been used to deny the advancement of any claims to territory.” (Tuhiwai Smith, 1999:111)

Notwithstanding, after World War II, new power relations evolved: shifting borders and territories but also changing a collective conscience of States towards the utmost necessity of securing peace on a global scale, preventing the world against any such catastrophe to happen ever again. Thus, the United Nations Organization (UNO), the successor of the League of Nations, was born in 1945. Contrary to its predecessor, the UN was comprised of almost all major focal global players and – this is quite relevant – also delineated decolonization as one of its main topics in order to aspire a peaceful world. Consequently, decolonization is inscribed into the UN's written foundation – the UN Charter¹¹:

The UN Charter¹² and Decolonization

The urgent need to decolonize is manifested as a requirement in chapter XI, XII and XIII of the UN Charter. Primarily chapter XI – the Declaration regarding Non-Self-Governing Territories – clearly exemplifies the reasons as well as its utmost relevance:

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and

S. Frideres, „Native Peoples in Canada – Contemporary Conflicts“, Prentice Hall Inc., Scarborough, Ontario, 1993.

11 Introductory Note: „The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October. 1945.“ <https://www.un.org/en/documents/charter/intro.shtml>

12 The entire document is available at: <https://www.un.org/en/documents/charter/>

security established by the present Charter; the well-being of the inhabitants of these territories, and, to this end:

- a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;*
- b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;*
- c) to further international peace and security;*

The above article distinctly promotes self-governance of peoples who are still occupied, subjected or otherwise influenced by and dependent on UN members. It does so through expressing a mutual relationship between the colonizer and the people still colonized. Article 73 emphasizes the responsibilities as well as urgent obligations UN members do have in order to guide and release these still oppressed peoples into manifold freedom, their “well-being”. Moreover, these developments for freedom and independence of peoples are obviously regarded as a precondition to “further international peace and security”.

Additionally, the UN established an international trusteeship system (UN Charter Chapter XII) to administrate and supervise so called “trust territories”. As a consequence, the “Trusteeship Council” (UN Charter Chapter XIII) was developed – along with the Economic and Social Council and the Security Council – as one of the main UN pillars, solely below the UN's General Assembly and Secretariat within the UN hierarchy.

Article 76 of Chapter XII's language is more specific in highlighting and encouraging not only self-governance but also the right to independence of such trust territories and their peoples.

Furthermore, this article associates independence with human rights as well as fundamental freedoms, regardless of “race, sex, language or religion”.

- b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;*

c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world;

The above completely aligns with the UN Charter's principles such as stated in chapter I, Article 1.2:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

Apparently, the UN has acknowledged the imperative necessity to promote decolonization. Hence, the following question arises: If all peoples do have the right to self-determination, self governance and independence, would it not be most rational – evidently the logical consequence - to stop discriminating Indigenous Peoples, treating them equally, recognizing their inherent right to self determination, liberating them from domination and decolonize their territories as well?

Indigenous expert and activist James (Sa'ke'j) Henderson underscores: “The Charter sets out the rights and obligations of member states and establishes the UN's organs and procedures. It was based on an innovative concept of peoplehood rather than statehood.” (Henderson, 2008)

However, since the UN system is comprised of and formed by States - States which are built upon Indigenous Peoples' territories and/or dependent on their lands and resources - a genuine decolonization process represented, and still represents, a profound threat or is at least perceived as such by the colonizer countries. Thus, the following articles were added to diminish and dilute the UN Charter's strong expressions in favor of decolonizing the world:

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 80

nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which

Members of the United Nations may respectively be parties.

Rather similar expressions will appear in later analysis of UN and UN affiliated documents, in support of as well as legitimizing asymmetric global power relations and dominance as it happened to develop since the so called “age of discovery”¹³.

Notwithstanding, the decolonization process has started after World War II and has changed the globe through creating new nations - frequently artificially formed in mimicry to former oppressors, reflecting and imitating oppressive structures themselves, being more or less visibly dependent on the “past” colonial powers. (c.f.:Homi Bhabha,1994)

Maori lawyer and academic Claire Charters and former UN Special Rapporteur on Indigenous Peoples¹⁴ Rodolfo Stavenhagen explain: “During the decades that the UN concerned itself with decolonization, it was believed that the indigenous people living in the former European colonies would benefit from national liberation. In many cases, all the peoples in the colonies were considered to be “indigenous”. (Charters and Stavenhagen, 2009:10)

Accordingly, a general distinction among the different peoples inhabiting these territories was lacking at that time. Neither a perception of the still prevalent precolonial plurality with its heterogenous structures, often suppressed by postcolonial homogenous nations, nor the rather dominant, prevailing hierarchy of the settler states¹⁵ was sufficiently problematized and criticized. Particularly, the latter seemed to be unaffected by the decolonization process.

Indigenous academic and renowned expert Linda Tuhiwai Smith remarks:

“The international relations established by indigenous peoples in this context existed within the boundaries of empire, defined within these boundaries more as domestic matters than as 'international relations'. “ (Tuhiwai Smith, 1999:113)

Though the UN Charter called for the freedom and self determination of all peoples, the subsequently elaborated instruments focused primarily on individual rights - such as the International Bill of Human Rights - “ without any benefit to Indigenous peoples living within

13 The period of European expansion between the 15th and the 17th century due to the fall of Constantinople, among other reasons. More accurately, it should be called the “age of global conquest” instead of promoting a eurocentric euphemism for the conquest, colonialism and subjugation of territories which were discovered and inhabited by Indigenous Peoples.

14 " UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous People“

15 In this context primarily Canada,,Australia, New Zealand, USA often referred to as the „CANZUS“ states. Concerning a definition of “settler states”: <http://settlercolonialstudies.org/about-this-blog/>

colonizer states.”, as Sharon Venne states. She points out: “for Indigenous peoples, individualism leads away from the collective towards assimilation, which had been the goal of many states, as reflected in the 1957 ILO Convention. (Venne, 2011:572)

Thus, the ILO Convention 107 is worth to be scrutinized more in detail:

2.2 The ILO Convention 107:

In regards to the international context, the first significant multilateral document explicitly addressing Indigenous Peoples was the International Labour Organization's Convention 107 (ILO 107). Although the ILO's¹⁶ major concern principally encompasses social justice through developing and promoting labour rights, it happened to be the first specialized agency committing itself to focus on the rights of Indigenous Peoples: Disproportionally confronted with human rights violations related to Indigenous Peoples, the United Nations assigned the ILO to elaborate an instrument: the „Convention concerning Indigenous and Tribal Populations“. The task was fulfilled in 1957 and came into force 2 years later.

Though this instrument aimed to protect so called “Indigenous and Tribal Populations”, it is a reflection of the then still prevailing, paramount „Zeitgeist“: a colonized world dominated by European based powers and their successors, disseminating mainly eurocentric ideals of human rights in order to provide progress and development for each individual. Although colonization was increasingly disregarded, the proclaimed structures were still permeated by a clear hierarchy of power and domination, assuming that Indigenous Peoples' cultures would naturally – by evolution - fade away.

Thus, its members would have to „integrate“ - in other words, assimilate into modern homogenous States' societies in order to survive as individuals. The document's assorted examples below are intended to visualize the above mentioned:

Considering that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social,

¹⁶ The ILO was founded in 1919 to pursue a vision based on the premise that universal, lasting peace can be established only if it is based on social justice. The preambular refers to the following: “Whereas universal and lasting peace can be established only if it is based upon social justice.....Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.“

In 1946 it was the first organization which become a specialized agency of the UN. It is located in Geneva, Switzerland. c.f.: www.ilo.org/global/about-the-ilo

economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population.... “ (ILO Convention 107, Preamble, 5th paragraph)

“..assure the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions...”
(ILO Convention 107, Preamble, 7th paragraph)

The full text of 10 pages contains the terms „integration“ or „progressive integration“ 9 times, followed by „integrated“ for 3 times, obviously expressing the Convention's purpose.

Nonetheless, for reasons of fairness it has to be asserted that the ILO made a distinction between „assimilation“ - which it actually condemned - and „progressive integration“ - which it promoted as an end:

Article 2:

2. Such action shall include measures for--

(c) creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations.

3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.

4. Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.

„Assimilation“ did not seem to be the politically correct term anymore. Neither was the application of „force“ or „coercion“ defined as an eligible means. Instead, „assimilation“ got replaced by „integration“, though the difference between these two is neither entirely feasible nor clearly visible in regards to Indigenous Peoples:

Article 1:

2. For the purposes of this Convention, the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the

national community.

Article 2

1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

Apparently, these paragraphs of ILO 107 illustrate the State's dominant position as the equipotent decision-maker who determines unilaterally about “Indigenous communities” fates. They were expected to form a part of the nation's society.

Despite, other articles emphasize some respect towards Indigenous Peoples' cultures and rights, such as in:

Article 4

In applying the provisions of this Convention relating to the protection and integration of the populations concerned, governments shall-

(a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change;

(b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised;

Article 7

1. In defining the rights and duties of the populations concerned regard shall be had to their customary laws.

2. These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes.

Concerning lands and indigenous territories some remarkable implications can be identified as well:

Article 11

The right of ownership, collective or individual, of the members of the populations concerned over

the lands which these populations traditionally occupy shall be recognised.

Article 12

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

According to these articles, a certain awareness and sensitivity regarding “cultural and religious values” and customary laws has to be applied. Even recognition of their (indigenous) “customs and institutions”, their “right of collective or individual ownership, specifically concerning traditionally occupied land” and their “free consent” regarding their removal should be realized.

Notwithstanding, all these is solely being granted as long as it would not contradict “national laws and regulations”, “national security”, “objectives of integration programmes” and/or the “interest of national economic development”.

Yet, the ILO 107 content incorporated some important changes in regards to the acknowledgement of Indigenous Peoples' rights, On the other hand it obviously confirmed and perpetuated hierarchical patterns of the colonial order. Indigenous Peoples are diminished as „communities“ which have to integrate into the national system. The State has the obligation to take responsibility and unilaterally decides upon „indigenous communities“ fate, particularly in reference to the nation's well being and development. Eventually, it is all about a controlled transformation into the dominant, colonially-infused, homogeneously-invented nation-system, under the “patriarchal” State's surveillance.

Today the ILO itself retrospectively announces: „The ILO Convention No. 107 was ratified by 27 countries. However, it has an integrationist approach that reflects the development discourse of the time at which it had been adopted.“¹⁷

As Sharon Venne puts it: „The Indigenous and Tribal Communities Convention (No 107) was

¹⁷ c.f.: <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>

adopted by the ILO as an instrument of assimilation.“ (Venne, 2011: 560)

In compliance with Sharon Venne's criticism regarding ILO convention 107 as being “assimilationist”, its relevance for the evolution of the Indigenous Peoples' international movement can be emphasized as well.

According to other crucial indigenous voices, Linda Tuhiwai Smith: “This convention did not contain all that indigenous people wanted but was significant in its recognition and use of the term 'indigenous'.” (Tuhiwai-Smith, 1999:114).

And James (Sa'ke'j) Youngblood Henderson: “This Convention was based on an assimilationist approach, and was heavily criticized by indigenous workers, but at least it provided a means to survive.” (Henderson, 2008:26)

However, though the ILO Convention 107 got substituted by its successor document ILO Convention 169 in 1989, it still remains - at least theoretically - in force and ratified within 17 countries' legislations due to their opposition concerning ILO 169. Consequently, in some regions the ILO 107 prevails as an anachronistic relict, promoting assimilation of “indigenous and tribal communities” instead of Indigenous Peoples' self-determination.

Simultaneously to this development, decolonization processes moved on: In spite of international law demanding decolonization, these activities more often turned out to be violently rather than pacifistic. Former colonial powers' fear of losing geopolitical significance as well as increasing tensions between the two remaining major global players – cold war betwixt the USA and the UDSSR and their related proxy wars – massively complicated and blocked true decolonization and independence from their influence¹⁸.

Yet, at least in theory, a new instrument encouraged and promoted decolonization: In 1960 the “Declaration on the Granting of Independence to Colonial Countries and Peoples” was adopted by the UN General Assembly. It continued where the UN Charter's mentioned articles had ended, affirming already declared and advancing distinct articulation about decolonization, as the following examples apparently will show:

18 According to cultural geographer Bernhard Niemann Indigenous Peoples' decolonization was gravely affected by these violent, destructive processes. In a survey, cultural geographer Bernhard Nietschmann identified 120 armed conflicts in the world. Of these, 86 were being waged by states against Indigenous nations, while only four were being waged by states against other states (a further eighteen were political insurgencies within states. c.f.: Bernhard Nietschman (1987) 'Militarization and Indigenous Peoples: The Third World War' 11 *Cultural Survival Quarterly* 1.

Accordingly, James Sa'kej Youngblood Henderson points out: "It was the Special Committee on Decolonization, not the Commission on Human Rights, that addressed questions of the self-determination of dependent peoples." (Henderson, 2008:27)

2.3 The Declaration on the Granting of Independence to Colonial Countries and Peoples, as adopted by General Assembly resolution 1514 (XV) of 14 December 1960

Preambular:

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence.

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace.

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations.

Affirming that 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,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith.

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory.

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

The Declaration's Preambular already clearly identifies the problem, indicates its causes as well as negative consequences and its solution: colonialism is unjust, colonialism is a severe threat for peace, all peoples have the right to self-determination, sovereignty and independence. The subsequent articles expressively manifest these core issues:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All 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.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

According to the Preambular and above mentioned articles 1-5, colonialism gravely violates “fundamental human rights”, thus, is unjustifiable and has to be condemned “in all its manifestations”. Furthermore, the articles highlight the role of subjugated Peoples themselves in attaining independence and freedom through self-determination. Nonetheless, the Declaration incorporates ambivalence as well, particularly articles 6-7 have to be interpreted in contradiction to the before referred. Eventually, they undermine the powerful message, its strong expression for independence and decolonization because of emphasizing “national unity”, “non-interference in

internal affairs” and affirming “territorial integrity”.

As a consequence, this raises the reasonable question of the instrument's effectivity. Again, the UN's fundamental, inherent problem - its composition of State members - reveals itself. States are the ones in charge, the actors who decide and whose territorial integrity has to be respected.

Despite, the Declaration's unusually compelling content supports the legitimacy of decolonization claims. Though Indigenous Peoples are not explicitly referred to, the Declaration unmistakably is directed to all Peoples who suffer from colonialism, subjugation and dependency.

Nevertheless, to recall Charter's and Stavenhagen's quotation once again: “In many cases, all the peoples in the colonies were considered to be “indigenous”.” (Charters and Stavenhagen, 2009:10). The lack of awareness as well as differentiation – may it be intended or unintended – promoted further racism and discrimination, occasionally even within newly independent nations which continued to follow the colonies' illusion of a homogenous national society.

Meanwhile, the settler states ignored Indigenous Peoples claims and persistently pursued various assimilation tactics. Indigenous Peoples worldwide had to react: They united in order to achieve public awareness as well as to conquer the international arena, vice versa traveling across the oceans to the roots of imperialism, “to conquer” the center of colonialism, reaching out to the international system to achieve justice. However, this endeavor needed to be built on solid regional fundamentals in advance.

2.4 Indigenous Peoples Movements' Origins: Regional contexts and examples

As already stated before, the prestigious Indigenous Peoples' representatives Deskaheh and Ratana were the first to journey to the League of Nations, seeking support against their colonial oppressors. Yet, it needed five more decades to significantly impact the international arena: Indigenous Peoples from the Americas took the leading role to continue with this tradition, manifesting their claims at the UN.

During aforesaid five decades, assimilation strategies had persisted in various forms and applications. Some of them through restrictions and punishments such as the prohibition to practice

religious freedom¹⁹ and speak the indigenous mother tongue²⁰, often legitimated by genocidal procedures like forced removal, relocation, assimilation²¹ and sterilization²². Others had transformed into more “positively” associated policies in order to achieve equality among all citizens of a homogenous colonial State regime, such as promoted through the ILO Convention 107.

Concerning North America, the region from which the international indigenous resistance had been initiated, two political incidents specifically influenced the increasing formation of a collective Indigenous opposition: the Termination Policy²³ in the US during the 1950's and Canada's White Paper Policy during the 1960's. Besides requested decolonization regarding other parts of the world, the settler states proceeded to assimilate the Indigenous Peoples within. The strategic concepts reflected the same pattern as the ILO 107: development through so called “integration”.

19 Concerning banning of cultural practices in Canada through the Indian Act: “First introduced in Canada in 1876, sections of the Indian Act prohibited the gatherings and celebrations at which Native dancing was central. By 1884 the potlatch ceremony, integral to many Pacific Northwest Coast peoples could not legally be performed....In 1885 the Indian Act was extended to allow the prohibition of the Sundance ceremony and its related music and dance for the Plains Nations. Many traditions and customs were suppressed through these bans, but despite this many persons attempted to keep the traditions alive, even though they faced fines and/or imprisonment if caught. It was not until 1951 that the Canadian government lifted the bans on these cultural celebrations and ceremonies, but by this time, some of the knowledge, music and dance that were integral to these celebrations had been forgotten.” (Hoefnagls, Anna: *Renewal and Adaptation: Prohibitions to Native Dance*. <http://www.native-dance.ca/index.php/Renewal/Prohibitions?tp=z&bg=3&ln=e&gfx=l&wd=3>)

In the USA similar developments occurred: “The last old-time Sun Dance was held in 1883 on the Rosebud Reservation in South Dakota. It was then prohibited by the Bureau of Indian Affairs along with other religious ceremonies, although it is possible that some Sun Dances may have been held surreptitiously during the period when it was under proscription. Under the administration of John Collier as Commissioner of Indian Affairs during the Presidency of Franklin D. Roosevelt, the Sun Dance was revived around 1934 although without the self-torture, the piercing of the flesh, which had formerly accompanied it. It was held sporadically from this time onward until about 1958, since when it has been held every year at Pine Ridge and a number of times on the Rosebud Reservation also.” (Zelitch, Jeffrey: *The Lakota Sundance*. <http://www.penn.museum/sites/expedition/the-lakota-sun-dance/>)

20 In regards to the US Boarding School System: “For more than two centuries, schools were the only institutions both to demand exclusive use of English and prohibit use of the mother tongue (Kari & Spolsky, 1973, p. 32). ‘There is not an Indian pupil ... who is permitted to study any other language than our own,’ the US Commissioner of Indian Affairs wrote in 1887, articulating a federal policy that would remain in effect for much of the next century (cited in Crawford, 1992, p. 49).” (McCarty, 2003:148)

21 According to Reconciliation Canada, the Canadian Residential School system, which reaches back to 1870's, is responsible for the forced removal of 150000 indigenous children from their families, 90-100% suffered from severe physical, emotional, and sexual abuse with a mortality rate of 40 to 60%. (c.f.: <http://reconciliationcanada.ca/explore/history>) The US Boarding School System between the 19th and 20th century and its consequences is comparable to the Canadian experience. (c.f.: Meriam Report, 1928)

22 Compulsory/forced sterilization (Alberta Sexual Sterilization Act of 1928, amended 1937) was committed between 1937 and 1972 in two provinces of Canada - Alberta and British Columbia (1933-1972) – which had a disproportionally high indigenous/aboriginal population. Dr. Jana Grekul: “While the province’s Aboriginal population hovered between 2% and 3% of the total over the decades in question. Aboriginals made up 6% of all cases represented.” (Grekul, 375:2004) In Peru under president Fujimori it was even practiced between 1990 and 2000 with a focus on the indigenous population. (c.f.: Le Monde Diplomatique, May 2004)

23 For a more extensive analysis on the Termination Policy from an indigenous point of view I recommend Vine Deloria, jr.'s book 'Custer died for your sins', chapter: 'The Disastrous policy of Terminations', 1988, University of Oklahoma Press

Vine Deloria, jr and David E. Wilkins explain: "Termination was the official policy of the federal government toward a number of several Indian Tribes from 1953 through the 1960s....A "terminated tribe" had its share of federal benefits, programs, and services severed." (Deloria, Wilkins, 1999:174) Frideres adds: "Between 1953 and 1960 over 60 reserves were eliminated in the United States. By 1960, the results were clearly so disastrous that the scheme was halted" (Frideres, 1993:324) Frideres refers to the Klamath, who were known to be more individualistic-oriented than other tribes. Nevertheless, terminating their reserve eventually tremendously impacted their thriving, self-sustaining collective identity and caused manifold problems such as high unemployment, an increased crime and drug addict rate. The Klamath community had deteriorated into a social disaster area.

Despite the negative experiences in the US, Canada "copy pasted" the same procedures and persuaded the same ideology just a few years later: "The Statement (White Paper) sought to terminate the separate constitutional status of Indians and lands reserved for Indians under federal jurisdiction....Included in the policy were plans for ending the treaties, terminating the legal status of Indian peoples in the *Indian Act*, and denying the existence of Aboriginal rights to the land (at the same time, it sought to settle existing land claims)." (Henderson, 2008:32) Frideres emphasizes: "To some extent, the 1969 White Paper reflected the basic sentiments of White Canada. It assumed that if Canadian Natives were to become fully integrated into Canadian society, they would have to change radically: the separate legal status of Natives would keep them from fully participating in the larger society." (Frideres, 1993:321) Thus, the White Paper settled on the racist assumption that "integration" into the superior, dominant society would solve Indigenous Peoples' problems. In fact, behind this hypocritical argument. It was more about getting rid of the "Indian problem" than solving Indigenous Peoples problems.

Frideres clearly points out: "The White Paper proposal's strategists were in essence advocating for cultural genocide" (Frideres, 1993:327) Hereby it is relevant to note the perfidious tactical move: The elimination of indigenous cultures was not related to the application of classic, ancient stigmas such as "barbarism" or "savagery", rather it was urged for "development", integration into a "better", "modern" society, a higher social status in order to achieve equality as full Canadian citizens – without any primordially inherent rights, of course.

According to Frideres, this has to be associated with the "myth of equality": "This myth claims that, since everyone is equal, no one should be discriminated for or against.". But, as he correctly points out, "Removal of the legal status of Natives would not lessen discrimination against them. Natives

would occupy the same depressed economic position as they do now, but without any group identification.” (Frideres, 1993:327)

Although these policies truly reflected the pattern of a homogenous nationalism, rooted in colonialism and comprised of a dominant white elite, eventually, they supported the indigenous opposition: Indigenous Peoples across the borders of North America reunited to fight against the governments' planned destruction of their collective identities. For this reason resistance movements were born to effectively coordinate actions and battle for Indigenous Peoples' rights. In this regard, Frideres even refers to the White Paper as a “catalyst for Indian cooperation.” (c.f.: Frideres, 1993:286)

Boldt calls it a “pan-Indian concept....a movement to enhance a sense of commonality and group consciousness which goes beyond mere political organizations to include recognition of a shared history of oppression, cultural attitudes, common interests, and hopes for the future.” (Boldt,1980:4)

Thus, the next chapters will take a closer look at Indigenous Peoples united activities and achievements concerning the international sphere.

2.5 Panindigenism: National and International: First approaches in the international arena

The fundament of modern pan-Indianism reaches back to the creation of several originally regional organizations which increasingly organized among each other and gained power as well as importance through the influence of the civil rights movement. There happened to be a switch of paradigms, caused by different trigger-elements, positive ones, like the mentioned global request for decolonization in order to secure peace, negative ones, such as the prevalent, rigid assimilation policy, blatant racism, and ethnic misogyny – also described above.

These different, mutually enhancing causes for proactive resistance eventually facilitated the realization of “disobedient” actions, legitimized its acceptance as well as its broad, globally reflected impact. Additionally, the general context of the civil rights movement provided the stage to claim justice. According to Linda Tuhiwai-Smith: “In New Zealand, Australia and Canada as in the United States, the rise of indigenous activism paralleled the activism surrounding the civil rights movement, women's liberation, student uprisings and the anti-Vietnam movement. (Tuiwai-Smith,

For example, the “American Indian Movement” (AIM)²⁴ was formed in 1968 as a response to various discrimination. It participated in the Rainbow Coalition²⁵, comprised of several civil rights movements during the 1960's. AIM's diverse spectacular actions such as the occupation of Alcatraz in 1969, the occupation of the Bureau of Indian Affairs (BIA) office in Washington D.C. 1970, the “Trail of broken Treaties” march to the capital 1971, as well as the siege at Wounded Knee in 1973, reached attention worldwide. Albeit positive and negative reactions, Indigenous Peoples raised awareness and could not get ignored anymore.

Similarly, in Canada the pan-Indian resistance is rooted in the North American Indian Brotherhood (NAIB)²⁶, the predecessor of today's less radical official representative of status Indians, the Assembly of First Nations (AFN). The NAIB originated in British Columbia in the 1950's under the leadership of Andrew Paull.

These organizations and movements, though often heterogenous and deriving from various backgrounds – some still very traditional, others due to the States' assimilation policy, “urban Indian” led- reunified due to their common goals:

- to revitalize
- to maintain their cultural identities, Lands, Territories and Resources (LTR's)
- to protect from and defend against further cultural genocide and discrimination
- to decolonize from imperialist driven, occupational structures and fight for their right to self-determination as peoples - like all other colonized peoples - frequently relying on primary nation to nation treaties or the fact that some peoples never have officially surrendered²⁷.

24 AIM was inspired by another indigenous organization, the National Indian Youth Council (NIYC), which was founded in 1961 in Gallup, New Mexico. The NIYC started to proactively organize against diverse oppressions, such as restrictions to tribal fishing rights or diverse mining operations. More information at: <http://www.niyc-alb.org/history.htm> Concerning AIM, more information at: <http://www.aimmovement.org/> as well as regional representations AIM West: <http://www.aimwest.info/> and AIM Colorado: <http://www.coloradoaim.org/>

25 For additional information on the Rainbow Coalition: Amy Sonnie and James Tracy, *Hillbilly Nationalists, Urban Race Rebels and Black Power: Community Organizing in Radical Times* (Melville House Publishing, 2011)

26 c.f.: Frideres, 1993:296 and the AFN's official homepage: <http://64.26.129.156/article.asp?id=59>

27 As is the case concerning Indigenous Peoples of British Columbia

Accordingly, Frideres announces: “the development of pan-Indian organizations has been the first step in fostering a spirit of unity and brotherhood among Native people. While some of the local or band goals were opposed to those of the pan-Indian movement, all were united in opposing Indian Affairs and developing greater self-determination. (Frideres, 1993:316)

Like Sharon Venne, James Sa'ke'j Youngblood Henderson also participated in these movements right from the start. According to him, “Indigenous Diplomatic Network began as a talking circle at various national and international conferences among the first generation of Indigenous peoples educated in the Eurocentric universities....Traditional leaders, along with leaders of newly formed national and provincial organizations, united with the first generation of Eurocentric-educated Indigenous people to reveal what constitutes the Indigenous humanness of human rights.” (Henderson, 2008:29)

Similar revitalization and resistance driven developments of Indigenous Peoples took place rather simultaneously all over the globe. Especially Indigenous Peoples of the settler states shared and actually still share the same struggles. Thus, broad, well organized resistance of Aborigines in Australia were primarily initiated during the 1960's for quite the same reasons: The colonizers denial of their title to the lands, territories and resources among other fundamental rights.

Linda Tuhiwai-Smith refers to the following: “Substantive citizenship rights at a federal level for all Aborigines, including the right to be counted in the census, were not won until after a national referendum was held in 1967 to change the Australian constitution. Although the referendum was overwhelmingly supportive, it is ironic that white Australians were asked to vote on whether indigenous Australians could have rights in their own land.” She continues: “All these national struggles have their own independent histories but the rising profile of political activities occurring on a world-wide scale did give a renewed impetus to other indigenous groups. (Tuhiwai Smith, 1999:109)

Thus, Indigenous Peoples world-wide realized that it it was not sufficient to unite within the “occupied domestic territory”. The next step had to be the international arena, to fight colonialism on the global scale: Sharon Venne affirms:

“By the mid 1970s, it was clear to our Elders that the world needed to know what was happening to the indigenous peoples living in 'America'. Indigenous Peoples were being driven from our lands, our resources were being used without our consent, and our treaties were being disregarded by Canada and the United States. There was a need to work towards the protection of our rights as

nations, our territories, our resources and the implementation of our treaty rights by the states.“
(Venne, 2011:559)

Chief George Arthur Manuel – head of the North American Indian Brotherhood (NAIB) between 1970 and 1976 - was credibly the first who traveled to almost all world regions in order to unify Indigenous Peoples allies. South of the border, AIM persuaded the same idea and organized a big international event to promote Indigenous Peoples' rights, emphasizing particularly the right of self determination. Consequently, AIM members founded the IITC – the International Indian Treaty Council in 1974 - and Chief George Arthur Manuel created the World Conference of Indigenous Peoples (WCIP) in 1975 as the first indigenous non governmental organizations which achieved NGO ECOSOC status at the UN.

Their ultimate goal: To fight for self-determination as sovereign nations and peoples, confirming recognition as such within the international community, incorporated as members in the United Nations (UN) system – to decolonize in all its sense and meaning.

2.6 Doors unlocked: Human Rights mechanisms at the UN

In the meanwhile a Guatemalan lawyer named Augusto Willemsen Diaz was appointed to work at the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) on a UN study – the “Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres” (the UN Study on Racial Discrimination). He had to dedicate himself to the analysis of “Measures adopted in relation to the protection of Indigenous Peoples.”, Chapter IX of the mentioned study. Willemsen Diaz personal background - grown up and been raised in Guatemala in contact with Indigenous Peoples, faced with their problems on a daily basis, inspired him to advocate for them²⁸.

Affected by Indigenous Peoples global activities and their ally Willemsen Diaz within, the UN could not ignore Indigenous Peoples' protests anymore and had to react: Persistent engagement opened up discussions which lead to another study, fundamental to all subsequent developments concerning Indigenous Peoples at the UN: “On 21 May 1971, ECOSOC unanimously approved

²⁸ “Indigenous peoples have inhabited my country, Guatemala, since time immemorial and these peoples were determined to maintain and protect their different identity, their own culture, customs, traditions and institutions, as well as their lands and territories, which had been the object of attempted usurpation and dispossession....I felt it was particularly important that indigenous peoples’ specific collective way of viewing the cosmos and themselves, their different world view, should be respected, in particular in relation to respect for Mother Earth and nature, which is of vital importance to them. I therefore devoted myself to this issue, in the confidence that success was possible, while fulfilling my obligations as a civil servant within the UN General Secretariat.” (Willemsen Diaz, 2009:18)

Resolution 589 authorising the Sub-Commission to conduct a general and complete study into the problem of discrimination against indigenous populations and to suggest the necessary national and international measures by which to eliminate this.” (Willemssen Diaz, 2009:24)

The study was entitled “study of the problem of discrimination against indigenous populations.” (the Cobo Indigenous Populations Report). Though the report was called after its Special Rapporteur José Ricardo Martínez Cobo, Willemssen Diaz played a major role in its elaboration. Several countries were visited, numerous meetings with Indigenous Peoples' representatives organized, countless information gathered. As a consequence, the rights of Indigenous Peoples advanced to an acknowledged topic inside the UN and gained relevance within the international discourse.

2.6.1 The NGO Conference on Discrimination against the Indigenous Populations in the Americas, 1977, and the World Conference to Combat Racism and Racial Discrimination, 1978

Thus, in 1977, from 20 to 23 September, the *International Conference of NGOs on Discrimination against the Indigenous Populations in the Americas*, was held at the UN in Geneva, Switzerland. The IITC primarily had realized its initiation in cooperation with the *NGO Subcommittee on Racism, Racial Discrimination, Apartheid and Colonialism of the Special NGO Committee on Human Rights*. Numerous Indigenous Peoples' representatives – amongst them also Sharon Venne - actively attended the event and participated in the conference. Their participation was a powerful statement of showing their existence and demands:

“The NGO Conference was a turning point for the Indigenous peoples' movement within the international arena. Over 100 Indigenous peoples testified about the effects of natural resources exploitation, 'development' projects, repression and genocide on our peoples.” (Venne, 2011:559)

Besides, manifold non-indigenous NGOs and even 38 UN State members officially attended the meeting. As a consequence of vast participation and effective work done by the Indigenous Peoples' representatives, a “program of actions for NGOs”, containing certain recommendations, was being formulated with the aim to submit these to several UN divisions. Indigenous activist, professor and eye-witness Roxanne Dunbar Ortiz: “The recommendations included a call for respect for traditional law and customs, and for unrestricted rights of landownership and control by indigenous peoples over natural resources in their territories.” (Roxanne Dunbar Ortiz, 2010:124) ²⁹

29 c.f.: *The Hidden 1970s: Histories of Radicalism*, edited by Dan Berger, Rutgers Univ Press (October 2010)

Eventually, based on the elaborated recommendations, a '*Draft Declaration of Principles for the Defense of Indigenous nations and peoples of the Western Hemisphere*' resulted, issuing 13 Principles to address the "Recognition of Indigenous Nations", "Subjects of International Law", "Guarantee of Rights", "Accordance of Independence", "Treaties and Agreements", "Abrogation of Treaties and other Rights", "Jurisdiction, "Claims to Territory", "Settlement of Disputes", "National and Cultural Integrity", "Environmental Protection and Indigenous Membership".³⁰ (the "Conclusion" is the last Principle of the Declaration.)

The before mentioned Program of Action and the subsequent Draft Declaration constituted a solid fundament concerning further dialogs within the UN system: Sharon Venne points out: "The principles adopted at the 1977 NGO Conference formed part of the final Declaration and Program of Action of the World Conference to Combat Racism and Racial Discrimination, 1978, which 'recognized the special relationship of Indigenous peoples to their land and stress(ing) that their land, land rights, and natural resources should not be taken away from them'."³¹ (Venne, citing article 21 of the report, 2011:564)

The report of the UN World Conference addresses Indigenous Peoples several times, and, even more relevant, also refers to them as "Peoples".³² Thus, based on Indigenous Peoples' broad activities and advocacy, the UN recognized them and their conflicts within the final document.

Notwithstanding, a crucial "bone of contention" was already implicit: The document urges states to allow indigenous peoples within their territories to develop cultural and social links with their own kith and kin everywhere, with strict respect for the sovereignty, territorial integrity and political independence and non-interference in the internal affairs of those countries in which the indigenous peoples live. (article 8)

Although Indigenous Peoples are called and identified as such, the article clearly emphasizes the territorial integrity and sovereignty of the countries in which they live – a contradiction with massive negative consequences, still remaining until today.

In spite of this conflict, Indigenous Peoples had a significant influence on the outcome document of a UN World Conference, a first victory towards defeating discrimination at the international level

30 c.f.: e.g. in Ortiz:2010, 124-126

31 The entire „Report of the World Conference to Combat Racism and Racial Discrimination" can be found under the following document reference: UN Doc A/CONF.92/40 (1979) online: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N79/055/79/PDF/N7905579.pdf?OpenElement>

32 Specifically important already cited article 21, page 14, but also articles 8-11, page 21

was won. Hence, the doors stood open for Indigenous Peoples, or probably more accurately, Indigenous Peoples pushed the doors open by themselves due to the fact that their requests could not be ignored anymore.

2.6.2 Access: The Working Group on Indigenous Populations (WGIP)

The next crucial step happened in 1982: The creation of the UN Working Group on Indigenous Populations (WGIP)³³ – a UN Special Procedure under the Sub-Commission on the Promotion and Protection of Human Rights. It consisted of 5 experts (UN diplomats) representing the official geopolitical regions of the UN.³⁴ The WGIP convened five day long annual meetings in order to fulfill the following mandate³⁵:

- *to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples*
- *“to give attention to the evolution of international standards concerning indigenous rights.*

In spite of this positive development of creating the first UN Special Procedure solely adherent to Indigenous Peoples, one fundamentally controversial issue was (and still is) related to the annual meeting's title and associated participatory-regulations, actually the UN rules of procedure in general: Indigenous Peoples' representatives expected – requested - to participate as peoples, recognized on similar footing as all other nations, merely with the distinction, that they were still colonized.

Linda Tuhiwai Smith affirms: A key issue in the international debates has focused on the term 'peoples'. It is regarded as crucial by indigenous activists because it is peoples who are recognized in international law as having the right to self-determination. (Tuhiwai-Smith, 1999:114)

The Working Group on Indigenous Populations, as the name already indicates, was formed in reflection of the dominant colonial structures, diminishing Indigenous Peoples to mere “populations”. This ignorant position was certainly not new, it just perpetuated the assimilationist/integrationist approach already present in former documents, such as the before mentioned ILO 107 Convention.

³³ ECOSOC Resolution 1982/34 of 7 May

³⁴ Africa (African Group), Asia-Pacific (Asia-Pacific Group), Eastern Europe (Eastern European Group), Western Europe and Others (Western Europe and Others Group – WEOG), Latin America and the Caribbean (Latin America and the Caribbean – GRULAC)

³⁵ <http://www2.ohchr.org/english/issues/indigenous/groups/wgip.htm#mandate>

Concerning this problem's evolution at the UN, Augusto Willemsen Diaz refers back to his primary involvement – the Special Study on Racial Discrimination and its chapter dedicated to the indigenous. He himself deliberately applied the term “Indigenous Peoples”. Nevertheless, Special Rapporteur Santa Cruz - responsible for the study – preferred “Indigenous Populations” instead, which was eventually chosen. According to Willemsen Diaz, the continued utilization of the term “population” in the subsequent essential Cobo Study, mainly happened because of: “UN member states with indigenous peoples living on territory under their jurisdiction only accepted the term indigenous populations” (Willemsen Diaz, 2009:25)

Thus, these states regarded Indigenous Peoples' complaints as domestic issues, pretending that they would be minorities and as such part of the dominant nation, accordingly, not eligible for self determination. Among those states were and still are quite powerful and rather influential nations. As a consequence, the international community refused Indigenous Peoples the access to the UN as peoples/state-like collective entities who urged for their decolonization. Though the two incidents were remarkable steps forward, this discrimination was already quite evident at the 1977 NGO Conference and continued to be persistent at the WGIP.

Sharon Venne, as being proactively involved from the beginning, explains the then current situation from her first hand engagement in detail:

There were no instruments within the United Nations that could be used by Indigenous peoples as a collective to protect ourselves and our future generations.“ (Venne, 2011.561)

“Indigenous peoples' rights to the lands and resources of the Americas were not recognised by the international community. Indigenous Peoples were living under colonial domination, as is the case to this day. We could not use international mechanisms then in existence to decolonise ourselves, because the United States, Canada and other states refused to allow Indigenous peoples to use the UN Committee on Decolonization. If Indigenous peoples could have used the Committee to decolonise ourselves, then the work through the processes in Geneva would not have been necessary. If we had access to the decolonization process, Indigenous nations would have decolonised, as did many other nations around the world after the creation of the United Nations. However, powerful forces did not want Indigenous peoples who were colonised, and continued to be colonised, to use these mechanism. We were offered a carrot that was taken. The NGO conference gave an opportunity for Indigenous peoples to push for our recognition. (Venne,

2011:564)

Ward Churchill confirms: At the first International conference on the Indigenous Peoples of the Americas in Geneva, Switzerland. Of the more than 50 participating NGOs, there was only one – the International Indian Treaty Council (IITC) – directly representing Indigenous Peoples. (Churchill, 2011:536)

As Sharon Venne and Ward Churchill emphasize, Indigenous Peoples were being welcomed as NGOs, not as legitimate representatives of their nations: “However, UN processes did not adequately accommodate Indigenous peoples, who did not like to be classified as 'non-governmental': it was part of the colonization process to be labelled as 'non'-entity and diminished in status. (Venne, 2011:565) During the 1980's the only process possible was through the WGIP. (Venne, 2011:564)

In spite of this grave intrinsic flaw and the fact that the WGIP was hierarchically situated at a rather low position, it had a strong mandate to support Indigenous Peoples, providing them an international plenary hall to make their voices heard. Countless Indigenous Peoples' representatives used this space accessible for them within the UN. Though the WGIP was no complaint body, the experts did listen to the numerous reports concerning the manifold atrocities committed against Indigenous Peoples. Over the years, the relationship also improved from a rather paternalistic relationship to a less hierarchical partnership between UN experts and representatives. The development of standards – based on Indigenous Peoples' reports - as a fundament for subsequent laws and norms was a magnificent achievement.

Besides, the WGIP changed the UN's rules of procedure: Contrary to the formally degrading specification as NGO's, the UN enabled Indigenous Peoples to participate without the usual obligation of having ECOSOC³⁶ consultative status. This modification permitted the engagement of numerous Indigenous Peoples, some of those representatives even being informally accepted as official ambassadors from their Indigenous nations.

According to the WGIP, the Office of the United Nations High Commissioner for Human Rights states the following: “The Working Group is open to all representatives of indigenous peoples and their communities and organizations. The openness of the Working Groups' sessions, which also includes the participation of representatives of Governments, non-governmental organizations and

³⁶ Usually, a consultative status approval of ECOSOC was a precondition to participate as an NGO – a complicated and long lasting procedure, which can take years, without assurance to be granted.

United Nations agencies, has strengthened its position as a focal point of international action on indigenous issues.”³⁷

However, the significant improvements within and in regards to the WGIP, did not substantially change the fact that Indigenous Peoples' status as self determined, collective entities in progress of decolonization has been continued to be denied. This shift from the original auspices of decolonization and independence to vaguely articulated cultural rights under the UN human rights regime has occurred in various ways and on different terrains. As will be shown later, it still is a ³⁸matter of existential concern.

Despite unlocked doors, crossing the threshold attached prerequisites: A massive clash of contradicting perspectives inside the enemies' arena, a battle for identity - getting recognized as collective entities who had been illegally subjugated, dominated killed and robbed by the forces of colonization: “We wanted our rights to our territories, our lands, our resources, our treaties and our right to self-determination to be recognised and accepted by the other nations of the world as set out in the UN Charter.” (Venne, 2011:564)

2.6.3 Excursus: Treaties as a crucial element of Self-Determination

Just above Sharon Venne stresses treaties as a crucial key issue. The reason in doing so derives from the implications of a treaty - its significance: According the dominant international, eurocentrically influenced definition a ““treaty” is defined as an international agreement concluded between States, in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation“. (UN Vienna Convention on the Law of Treaties, 1969:5) Furthermore, according the UN, a treaty has to be based on various criteria³⁹:

- it has to be binding, intended to create rights and duties
- it must be concluded by states or international organizations possessing treaty-making power.
- It must be under the governance of international law

37 <http://www2.ohchr.org/english/issues/indigenous/groups/wgip.htm#mandate>

38 c.f.: <http://www.worldtradelaw.net/misc/viennaconvention.pdf>

39 For more information: United Nations Treaty Collection: https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#treaties

- it has to be in written form

The roots of international law and the treaty policy concerning Indigenous Peoples of the Americas can be dated back to the famous Spanish theologian and jurist Francisco de Vitoria. As an adviser to the Spanish king he argued in favor of Indigenous Peoples against the “Doctrine of Discovery”. In recognizing Indigenous Peoples' sovereignty he confirmed the obligation to establish treaties with them.⁴⁰

Although dominant international law is evidently a product of a euro-centric worldview, treaties are common among and between all cultures and peoples. Indigenous Peoples of North America have elaborated countless treaties before any European colonizer set a foot on their territories. These treaties were confirmed through rituals, ceremonies and bartered paraphernalia: The *Potlatch* offering ceremonies at the NW-coast, the utilization of the Plains- and Prairie Peoples' peace-pipe *Galumet*, the exchange of the Iroquois⁴¹ *Wampum* belts in the North East, just to mention a few. Therefore, the concept of treaty-making was nothing new to Indigenous Peoples at the time when the colonialists entered Turtle-Island.

During the first centuries it was absolutely existential for the Europeans to elaborate treaties: Friendly relations, particularly Indigenous knowledge, and alliances against other colonial powers were urgently needed in order to survive. For example, In 1755 Braddock's British forces – lacking Indigenous Peoples' support - were devastatingly defeated by the French and their indigenous allies at Fort Duquesne.

Treaties were established between sovereign nations. The Proclamation Act (1763) of the British Empire and its US successor, the Trade and Intercourse Act (1790) indirectly confirmed this fact, in permitting solely the federal government to elaborate commerce and treaties with the Indigenous Peoples' nations. The first American Indian Treaty⁴² was constructed in 1787 between the Delaware Nation and the newly constituted USA. Under article II it implied mutual military protection against foreign aggression. The Delaware were invited to join the federation as a State but refused to do so. They wanted to keep their identity as a sovereign nation which was recognized and respected by the

40 The „ Doctrine of Discovery“ (papal bull *Inter Caetera*, 1493) was endorsed by pope Alexander VI in order to conquer the Americas and to avoid war between the Spanish and the Portuguese concerning territorial claims overseas. He referred to a former bull by Nikolaus V, which legitimized the conquest of all territories occupied by heathens. (Papal bull *Romanus Pontifex*, 1454). Despite Vitoria's seemingly sympathetic position towards Indigenous Peoples, he later justified Indigenous Peoples' subjugation due to the liberty of commerce, among other reasons.

41 The Iroquois even established a Confederacy among their 6 nations (Mohawk, Onondaga, Oneida, Seneca, Tuscarora, Cayuga) which served as an inspiring model of the US-constitution.

42 More specific information about American Indian Treaties: c.f.: Canby, C. 2004, Kickingbird, Kirke, 1995, Tsosie, Rebecca, 2004

USA at that certain time.

However, as the power relations increasingly became asymmetric, the treaty policy changed too. Discrimination against Indigenous Peoples culminated when Judge John Marshall⁴³ created new terminology in order to justify the subjugation of the Cherokee, and consequently, all “Indian Nations”. He relied on the already mentioned Doctrine of Discovery, and eventually defined Indigenous Peoples as “domestic dependent nations” under the “trust relationship of the USA”. In a unilateral act massively degrading Indigenous Peoples' sovereignty, those cases legitimized the dominance of the USA and promoted further expansion. This has not changed till today.

Linda Tuhiwai-Smith points out: “The assertion of European sovereignty over indigenous peoples effectively shifted the focus of indigenous international relations to a colonizer/colonized relationship.” (Tuhiwai-Smith, 1999:112)

Notwithstanding, Indigenous Peoples never relinquished their sovereignty and still adhere to their original treaties. They do not accord to aforementioned unilaterally determined colonial policies. Treaties, such as the Haldimand Treaty to which Deskaheh referred to at the League of Nations, had been realized between the colonial powers and Indigenous Peoples – nation to nation – consequently, acknowledging the mutual status as distinct collective entities, without reservations. Ward Churchill clarifies:” Both the British and Canadian states had entered into treaty relations with nations Indigenous to their territory now demarcated as 'Canada', thereby conveying in practice a clear recognition of those peoples and nations as 'subjects of international law'. „...such recognition is irrevocable unless the people or nation recognised either voluntarily relinquishes its standing or ceases to exist.“ (Churchill, 2011:542)

Perhaps the most relevant international instrument for Indigenous Peoples in compliance and affirmation of this perspective, represents the extensive UN study by the late Chairman of the WGIP and Special Rapporteur Miguel Alfonso Martinez: The Study on treaties, agreements and other constructive arrangements between States and indigenous populations, 1999:

In paragraph 110 Martinez confirms: “...the European parties clearly understood they were entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period in question.”(Martinez, 1999:para 110) He further continues: “treaties with Indigenous nations 'maintain their original status and continue fully in effect'. (Martinez,1999:para 271-272)

43 The legal cases: Johnson v. McIntosh, Cherokee v. Georgia und Worcester v. Georgia.

Thus, even from a European based perspective, international law and related treaties confirm Indigenous Peoples' legitimacy to be fully recognized as nations within the dominant eurocentric world order. Based on this firm conviction, Indigenous Peoples sought and still seek justice at the global, international arena.

Sharon Venne additionally clarifies: “Indigenous peoples wanted to be accepted as subjects of international law. Our elders had told us that we were citizens of our own nations , with our own histories, our own values and ways of approaching life. We were living within our territories under our own laws and governance when the colonizers arrived. We did not need another state to 'give' us any kind of blessing in order to be 'recognized'. It was the process of colonization that dispossessed us of our legal status under international law. Through our efforts at the United Nations, we were merely putting our status back into place for our future generations.” (Venne, 2011:568)

However, even without adhering to treaties, several other elements constitute the validity of Indigenous Peoples' claim of being a collective entity with a distinct identity, equal in status to a nation or a state. I have already mentioned the Martinez-Cobo framework-definition as the common ground of shared elements that express “indigenous”. Michael Dodson, renowned aboriginal leader particularly regarding the Australian decolonization process, summarizes: 'By any reasonable definition. Indigenous peoples are unambiguously „peoples“. We are united by common territories, cultures, traditions, histories, languages, institutions and beliefs. We share a sense of kinship and identity, a consciousness as distinct peoples and a political will to exist as distinct peoples. (Dodson,1994:24-25)

2.6.4 The Long Way to the Declaration on the Rights of Indigenous Peoples

In 1985 at its fourth session the WGIP – besides its ordinary mandate - was assigned to devote itself primarily to an additional important task which had been articulated already earlier: the elaboration of a Declaration⁴⁴ on the Rights of Indigenous Peoples as a foundation for future relations. From that stage onwards the formulation of such a declaration was determined to be of utmost relevance and dominant at its pursuing sessions.

44 Cree activist/attorney Sharon Venne: „A Declaration is not considered a primary source of international law. However, a declaration becomes influential on the future role and action of states. Over time and with usage, a declaration can become accepted as an international law norm in that it becomes representative of customary international law“ (Venne, 1998:135)

As already stated before, Indigenous Peoples had elaborated a “Draft Declaration of Principles” at the 1977 conference. From an indigenous perspective, this had been the foundation from which to start. Since 1982 Indigenous Peoples had already been working on their own declaration within preparatory meetings outside the UN. Sharon Venne remembers:

“The Indigenous Declaration was an evolving international instrument drafted by Indigenous peoples for ourselves. The process of drafting our principles was an exercise of our right to self-determination.” (Venne, 2011:568)

This fundamental right - to exert self determination as a people - was and still is the vitally central factor. It is a main principle within the main UN instruments, perpetually engraved, such as in the 1966 UN Human Rights Covenants, the Covenant of Economic, Social, and Cultural Rights (CESCR) and the Convention on Civil and Political Rights (CCPR) which distinctly affirm the right to self-determination as a cornerstone under article 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.*

Though these Covenants do not specifically mention Indigenous Peoples⁴⁵, they refer to peoples in general.

Consequently, Indigenous Peoples reclaimed this inherent right at the UN and articulated self-determination in compliance with their contexts, according to above stated UN language. In 1985 the then main Indigenous Peoples' organizations⁴⁶ manifested the following statement:

“All Indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership/citizenship, without external interference. No State shall assert any jurisdiction over an Indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned... Indigenous nations and peoples are subjects of international law. Treaties and other agreements freely made with Indigenous nations or peoples shall be recognized and applied in the same manner

45 References to the rights of minorities are covered under article 27 of the CCPR: “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.” Yet, Indigenous Peoples have always been urging their distinction and continue to ascertain their collective rights, particularly to self-determination. Nevertheless, some indigenous individuals used article 27 to claim cultural rights. c.f.: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

46 the IITC, ILRC (Indigenous Law Resource Center), WCIP, Inuit Circumpolar Conference, Four Directions Council, National Indian Youth Council, National Aboriginal and Islander Legal Service, more comprehensive elaboration: Clech Lam 2000 52-53

and according to the same international laws and principles as treaties and agreements entered into with other States...Indigenous nations and peoples may engage in self-defense against State actions in conflict with their right to self-determination.” (c.f.: Churchill, 2011:539-540)

2.6.4.1 The 22 Principles:

Pursuant to this statement, the 22 Principles of the Indigenous Declaration embedded the right to self-determination as their core element. Every single principle is formulated in reflection and relation to this inherent right and ties a solid web in conjunction with the other principles – eventually, a holistic whole.

James Sa'ke'j Henderson reminds: “Self-Determination is more than a paper right, it is a state of being, and it is a difficult and complex duty.” (Henderson, 2008:71)

Generally, the original language of the 22 principles was quite strong. It clearly expressed the decolonization character and conveyed the central issue: the right to self-determination as peoples and nations.

Thus, in almost all of the principles Indigenous Peoples are being mentioned as “Indigenous nations and peoples” who are “subjects of international law” (**Principle 15**). **Principle 20** emphasizes equality, “the enjoyment of all the human rights and fundamental freedoms” of all UN instruments without “discrimination”. **Principle 16** highlights once again the relevance of treaties, its recognition and application “in the same manner and according to the same international laws and principles as treaties and agreements entered into with other States,”. Thus, colonial concepts like the “discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation” in order “to claim or retain the territories of Indigenous nations or peoples” are condemned. (principle 6) In cases where this already occurred, “the Indigenous nation or people concerned is entitled to immediate restitution, including compensation for the loss of use, without extinction of original title.” (**Principle 7**) Consequently, they must not be deprived from their original title to their territories. The title prevails.

Quite a few articles imply the terms “ownership”, “possession” and “control”, affirming rights which are directly related to Indigenous Peoples' self-determination, their sovereignty as peoples and nations: “possession and control of sacred sites” (**Principle 7**), to “own and control the material culture, including archaeological, historical and sacred sites, artifacts, designs, knowledge, and works of art.” (**Principle 11**), the prohibition of “scientific or social investigations....in relation to

Indigenous nations or peoples, or their lands, without their authorization, and continuing ownership and control.” (**Principle 13**), “the right to their own traditional medicine....and control the resources respecting health, housing, and other social services affecting them. (**Principle 21**)

Basically, above stated principles are subsumed in Article 4 which claims:” Indigenous nations and peoples are entitled to the permanent control and enjoyment of our aboriginal ancestral-historical territories. This includes air, space, surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based on these resources.” Thus, the “permanent control” encompasses the entire territories including all resources. Solely article 5 gives permission to “share and use land” under certain conditions: the recognition of the “underlying and inalienable title of the indigenous nation or people”, and “the free and informed consent, as evidenced in a valid treaty or agreement”.

In essence, Indigenous Peoples requested the prospect to decolonize, the full right to self-determination as a people, including all its implications – even the right to “self-defense⁴⁷ against State actions in conflict with their right to self-determination”. In fact, they merely demanded for equality – for rights usually acknowledged, respected and granted to any people, nation or state without hesitation. As expected, the right to self-determination was and actually still is of major concern.

The Indigenous Declaration was submitted in 1985 and also adopted by the WGIP in the same year. Nonetheless despite its adoption it contained quite a few points the States objected to. Therefore: “the focus for Indigenous peoples was on ensuring those key provisions of the Indigenous Principles were maintained in the final text of the Declaration.” (Venne, 2011:571)

The 22 Principles were contested by the UN State-members, peculiarly the settler states Canada, Australia, New Zealand and the USA (CANZUS States) blocked every article of substance which seemingly criticized their omnipotent dominance, especially concerning Indigenous Peoples' collective rights.

Sharon Venne remembers: “From 1985-1993, Indigenous peoples experienced endless struggles and challenges within the Working Group. (Venne, 2011:573) “It was a struggle....(i)n some ways, the

47 The assert the right to self-defense underscored their right to full self-determination, as it is recognized in relation to all peoples within the UN-Charter. This has to be interpreted as being intervoven with decolonization and the right to independence. Consequently, Indigenous Peoples demanded to decide themselves about their self-determined status, internally – such as broad autonomy rights, or externally – to be fully independent nations, free from any colonization. Further assertions e.g.: Clech Lam, 2000.

struggle continues to this day.” (Venne, 2011:571), as will be extensively illustrated in part 2 of this thesis..

2.6.4.2 Another Battle on a different yet related international terrain/level: The ILO Indigenous and Tribal Peoples Convention 169⁴⁸ - A Pyrrhic Victory for Indigenous Peoples?

Simultaneously to the process at the UN and affected by its influence, the ILO revisited its guidelines concerning Indigenous Peoples. Though once meant to be a protective tool for individual human rights and equality among all workers – even indigenous - the Convention 107 did not occur to be appropriate anymore. From its current point of view the ILO claims:

“However, it has an integrationist approach that reflects the development discourse of the time at which it had been adopted. During the 1970s, when the United Nations began to examine in more detail issues concerning indigenous and tribal peoples, and when indigenous peoples began to be more visible at the international level, the approach began to be questioned.”⁴⁹

Consequently, the ILO revised its policy towards Indigenous Peoples, which finally resulted in the elaboration of the ILO Convention 169 in 1989. In this regard, the ILO highlights its “belief that indigenous and Tribal Peoples are permanent societies”, its “recognition of, and respect for, ethnic and cultural diversity” and its general reference to “Peoples”.⁵⁰

Particularly the latter reference has evoked ambiguous feelings and heavy criticism, especially from Indigenous Peoples' representatives. Though the application of the term “peoples” would certainly be a positive development towards their recognition, ILO Convention's 169 article 1.3 relativizes: “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.”

Thus, in creating its own category of “peoples” apart of the common meaning under international law, the ILO diminishes major implications - in essence, the right to self determination. As a diplomatic strategy to avoid conflicts with the states as well as to achieve more ratifications this seems to be understandable. Still, to maneuver around the central issue, eventually circumcises Indigenous Peoples' claims to get recognized as “peoples”.

48 c.f.: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

49 c.f.: <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>

50 *ibid*

Therefore, though the ILO undertook a switch of paradigms and promotes increased autonomy rights, the convention can not be interpreted as a tool for self-determination.

Several articles clearly indicate nation-states as the final decision-maker:

For example **article 8.1**: *In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.*

and **article 8.2**:

These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.

Notwithstanding, according to significant elements in relation to self-determination and land, subsequent articles 13 to 17 are of extraordinary importance.

Article 13.1. calls for respect concerning the peoples' "cultural and spiritual values" in relation to their lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

Article 13.2 refers to the term "lands", which *shall include the concept of territories - covering the total environment of the areas which the peoples concerned occupy or otherwise use.*

Admittedly, an encompassing, broad frame is being applied in order to grasp Indigenous Peoples specifications – collective rights, territorial rights, the essential relationship – culturally and spiritually – towards the land. To manifest these elements within the convention and acknowledge its utmost relevance shall be seen as a positive step forward - beyond an individualistic, minorities associated, assimilationist-based approach.

Article 14 additionally explains: *....rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. Moreover, the article urges to safeguard their right to use lands not exclusively occupied by them, to which they have traditionally had access for their subsistence and traditional activities.* (14.1)

The application of the terms "ownership" and "possession" has to be interpreted as strong language

in support of Indigenous Peoples' self determination, particularly due to the recognition of their territories, including inherent, collective rights and specifications as above mentioned. In this regard, the convention even refers to rights to use lands not exclusively occupied, such as places to gather medicinal plants and/or the access to sacred places of spiritual significance. Furthermore, it urges the State to identify the lands which are traditionally occupied and *to guarantee effective protection of their rights of ownership and possession*. (14.2) and to establish procedures *within the national legal system to resolve land claims*. (14.3)

Again, rights to ownership and possession are being affirmed. However, article 14.3 indicates procedures based on the national legal system to resolve land claims - thus, not promoting or referring to any Indigenous Peoples' legal systems and covering the topic under the dominant national structures.

Articles 15 and 16 further diminish earlier stated, strong terminology. **Article 15** explicitly stresses *the rights to natural resources pertaining to their lands*. The terms “ownership”, “property”, “possession” or “territory”⁵¹ are being avoided, instead the article merely refers to “safeguards” including the “participation” *in the use, management and conservation of these resources*. (**Art. 15.1**) Besides “rights to participate,” **Article 15.2** emphasizes *consultation before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands*. To “consult” does not recognize any inherent Indigenous Peoples' property rights to the mentioned resources. The “Free, Prior, and Informed Consent” (FPIC) is not even mentioned. Moreover, “participation in the benefits” is being promoted “wherever possible”, thus, indirectly supporting the nation state's omnipotent decision-maker's role. The article also calls for “fair compensation” if *damages of such activities* occur.

FPIC does solely appear - though also in a quite soft form - in **article 16**, concerning relocation. Quite worrying is the article's reference in case FPIC can not be achieved: to call for “*appropriate procedures established by national laws*” - whatever this entails.

Additionally, **article 17.2** also promotes a rather soft right to consultation: *The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community*.

51 Although it has to be stated that article 13.2 explicitly associates its content – including the concept of territory – to article 15 and 16: *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*. c.f.: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

Yet, **article 17.3** as well as **article 18** slightly contradict the above. 17.3 speaks about “**securing**” *the ownership, possession or use of land belonging to them (Indigenous Peoples) against persons not belonging to these peoples*. **Article 18** additionally affirms the latter through the recommendation of establishing “**measures**” and “**penalties**” against “**unauthorised intruders**”

Interestingly, ILO Convention 169 promotes “ownership”, “possession” and “use” of the land, even explicitly acknowledges “territory” as part of these land rights on the one hand, yet on the other hand it does not recognize logically accompanying inherent rights to resources nor Indigenous Peoples' self-determination, usually implicit in every people within the international community. Eventually, the positive impact of using strong legal language while simultaneously qualifying it - massively reducing its significance, diminishing its substantial, fundamental essence - can be doubted.

Though the convention contains useful terminology, particularly in regards to autonomous structures within the nation state - therefore dismissing its assimilatory approach - it can still be interpreted to promote “integration” into the national structures, distinctly recognizing and confirming the State's dominant role and final decision-maker. Thus, as already stated above, ILO Convention 169 can not be used as a tool to achieve the unqualified, original and non-discriminatory right to self-determination. Recalling Indigenous Peoples' fundamental requests inscribed within the 22 principles, the foundation of the primary DDRIP, ILO Convention 169 lacks substantial implications, parts of it even strongly deviating from Indigenous Peoples' primordial intention – a decolonization process based on the full right to self-determination and pursuant recognition as Peoples. This represents a contradicting friction - obviously a paradox - which has to be rather critically questioned.

2.6.4.3 1994: The Year of the DDRIP – Consensus on the Draft Declaration on the Rights of Indigenous Peoples

Nevertheless, despite the CANZUS States' manifold tireless efforts to lobby against, manipulate and sabotage the endeavor to inscribe Indigenous Peoples' rights within the UN framework, they were unable to stop Indigenous Peoples' progress: In 1994 the Draft Declaration on the Rights of Indigenous Peoples (DDRIP)⁵² was finally adopted by full consensus of Indigenous Peoples and the WGIPs experts at the Sub-Commission on Prevention of Discrimination and the Protection of

52 c.f.: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument)

Minorities.

The DDRIP 1994 happened to be the only Draft which was fully consented to by all Indigenous Peoples participating. It contained 45 articles, based on extensive discussions, elaborations and analyses within the WGIP.

Notwithstanding, in comparison with the 22 Principles of the original Indigenous Peoples Declaration, the DDRIP 1994 did not contain identical wording: Crucial terms which had been manifested in the 22 Principles but were lacking inside the DDRIP:

- „Indigenous Peoples and Nations“
- „Permanent control of (our) historic-ancestral territories“ including „surface and subsurface rights“, „renewable and non-renewable resources and the economies based on these resources“
- inalienable title
- self defense in order to keep the right to self determination

While a more detailed elaboration and wider differentiation doubtlessly resulted - a process to soften the original Principles obviously has to be identified as well. Already mentioned powerful language - especially concerning the nature of decolonization - was eliminated in order to seek recognition within the UN. Basically, the DDRIP 1994 was understood as a „minimum standard“ (**Art. 42**). Thus, even though it did not imply some key terminology, it was accepted as a compromise and important tool to transmit most relevant substance: to be recognized as Peoples and, its core element, the right to self-determination (**Art.3**).

James Sa'ke'j Henderson points out: “They created minimum standards in human rights for our peoples and their children without diminishing or extinguishing any existing or future rights of Indigenous peoples.” (Henderson, 2008:66)

Though not in its original, rather effectively manifested combination of Principle 4 and 5, the associated right to **FPIC**, particularly in regards to **LTRs**, still got inscribed in a solid manner as **article 30** suggests:

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. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

In its resolution 45/1994 the Sub-Commission adopted the text presented by the WGIP and passed it on to the Commission on Human Rights. Due to States' pressure, the Commission did not approve the DDRIP. Instead it created another additional working group, the Inter-sessional Working Group on the Draft Declaration (WGDD) to further examine the DDRIP⁵³. As a consequence, the elaboration of the UNDRIP was not in the hands of the WGIP anymore, which continued to focus on its main mandates, standard setting and reviewing processes.

The Inter-sessional Working Group on the Draft Declaration (WGDD)

Unlike its predecessor, the WGDD did not maintain the open policy towards Indigenous Peoples and requested ECOSOC status in order to participate. Furthermore, States had a much bigger say, and played a dominant role within the WGDD. In 1996 a significant, rather intense incident took place: Indigenous Peoples who participated at the WGDD demonstratively “walked out” of the meeting due to severe discrimination⁵⁴ within the WGDD: They had been diminished to mere “observers” concerning their own declaration. Indigenous Peoples' protest finally resulted in the permission to participate actively.

“Indigenous peoples felt they were being exposed to yet another degrading procedure, and our engagement with the nation-states became antagonistic. This was a time of hard, challenging conversations as each day revealed deep and conflicting interests. It was a time of intrigue, dissent, deceit, and diversity. It brought out the worst - and the best - in all the participants.” (Henderson, 2008:67)

Over many years that followed almost no progress could be achieved, solely two non-controversial articles were adopted, article 5⁵⁵ and 43⁵⁶. Not surprisingly, the CANZUS States took a leading position in blocking seemingly critical articles once more. Again, the focal articles of utmost controversy prevailed to be about SD, LTRs and FPIC. According to Andrea Carmen⁵⁷, the then

⁵³ resolution 1995/32

⁵⁴ c.f.: Andrea Carmen in Charters and Stavenhagen, 2009:90

⁵⁵ *Every indigenous individual has the right to a nationality.*

⁵⁶ *All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.*

⁵⁷ Andrea Carmen in Charters and Stavenhagen, 2009:90

WGDD's Chairperson, Mexican diplomat Luis Enrique Chavez, played a positive role because he promoted and affirmed the original DDRIP 1994, thus preventing further deterioration. Eventually, his influence was seen ambiguous by many Indigenous Peoples. In order to conform with UN reform requests to finalize the UNDRIP within the Indigenous **People's** first UN Decade⁵⁸, he created an exclusive group to work on the DDRIP and presented the result in 2005.

This compromise version - though not unanimously accepted by Indigenous Peoples - was pushed through in order to achieve its approval. On 29th of June 2006, the newly established Human Rights Council, the successor of the discredited Human Rights Commission, adopted the 2005 DDRIP in one of its first resolutions⁵⁹. The adoption's realization was facilitated due to its “package”⁶⁰ - the DDRIP was tied together with the International Convention for the Protection of all Persons from Enforced Disappearance. Yet, it still took 1 year to realize the DDRIP's adoption due to the objection of the majority of African States – foremost Namibia and Botswana, which, behind the curtain, got lobbied/pressured by the CANZUS States to block the proceeding. The reasons: in essence, same as always, self determination and matters of territorial integrity.

Regino Montes and Torres Cisneros explain: “Australia, Canada and New Zealand launched an intensive lobbying campaign with one of the key groups involved in adopting this instrument: the African Group. In the UNGA held on 20 December 2006, the African countries, headed by Botswana, Namibia and others, backed by those powers that had played a leading role in the most recent chapters of colonisation of indigenous lands and territories, decided to postpone the examination and adoption of the declaration to have more time to continue holding consultations in this regard. (Regino Montes and Torres Cisneros in Charter and Stavenhagen, 2009:149-150)

In addition, a conflict regarding competences between the Human Rights Council and the 3rd Committee of the General Assembly – in charge of human rights - was being abused to delay the UNDRIP's adoption.

58 First *International Decade of the World's Indigenous **People*** (1995-2004), resolution 48/163 of 21 December 1993 the main objective: strengthening international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health. The theme for the Decade : "Indigenous people: partnership in action". More information: c.f.:

<http://www.ohchr.org/en/Issues/IPeoples/Pages/InternationalDecade.aspx>

59 Resolution 2006/2

60 c.f.: Regino Montes and Torres Cisneros in Charter and Stavenhagen, 2009:149

2.6.4.5 The *Draft Aide de Memoire*

Thus, at the end of 2006 the African States came up with a so called “Draft Aide de Memoire” which put every fundamental task Indigenous Peoples have been fighting for decades into question: the Indigenous Peoples' open working definition, the right of self-determination, the right to FPIC, rights to LTRs, and the recognition of treaties and other constructive arrangements. It even suggested the replacement of the “right to self-determination” through the “right to participate in the political affairs of the State”⁶¹

Moreover, the African States *Aide de Memoire* urged for the subsequent paragraph in the DDRIP's preamble:

Recognizing that the situation of indigenous peoples varies from region to region, country to country and from community to community, every country or region shall have the prerogative to define who constitutes indigenous people in their respective countries or regions taking into account its national or regional peculiarities. (Barume in Charters and Stavenhagen, 2009:172)

Obviously, the African States, spurred by CANZUS, strived to block everything that could question their territorial integrity and neo-colonial identity. According to Albert Barume, expert on indigenous issues working at the ILO the proposed amendments included “national law” twelve times, to highlight the domestic omnipotence and dominant competence over Indigenous Peoples' rights.

After 25 years of tireless work, these proposals seemed to be absolutely absurd. Albert Barume, expert on indigenous issues working at the ILO, Barume adds: “One might, indeed, think that African states wanted their own UN Declaration. As a matter of fact, the large number and suggested amendments by the African Group left many skeptical about any chance of ever reaching a consensus between states and indigenous peoples.” (Barume in Charters and Stavenhagen, 2008:172)

Nevertheless, after extensive lobbying efforts, particularly by the African Commission on Human and Peoples' Rights (ACHPR) among others, the African states were convinced to cede most of their requests and support the DDRIP's adoption. However, they insisted on 9 amendments, one especially problematic.

Nothing in this Declaration may be interpreted as implying for any State, people or group or person any right to engage in any activity or perform any act contrary to the Charter of the United

61 cf.: Barume in Charters and Stavenhagen, 2009:172

Nations.

It was amended with the following additional phrase:

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.

As a consequence, this massive modification was confirmed and added to the DDRIP under the notorious **article 46**.

2.6.4.6 The adoptions of the UN Declaration on the Rights of Indigenous Peoples – the “Modified Declaration”

Eventually, on September 13th 2007, 143 states voted in favor of the Declaration, the substantively qualified DDRIP version got adopted by the UN General Assembly. The CANZUS States, of course, even rejected the finally proposed draft and were the only ones who voted against it. Yet for different reasons, the adoption was neither unanimously welcomed by Indigenous Peoples. Certainly the UNDRIP 2007 seemed to be a prestigious achievement after a 25 year long drafting process, especially because of its presentation soon after the UN reform.

Nonetheless, particularly due to the infamous article 46, its meaning vastly deviated - actually degenerated from its original intent and failed to achieve the primary goal: decolonization in all its diverse, heterogenous approaches and variations.

Although article 46 embodied the main bone of contention, also other qualified articles were identified as problematic. A thoroughly, quite sophisticated analysis by AILA (*American Indian Law Alliance*) at the “dawn of the adoption” of the DRIP was widely distributed amongst Indigenous Peoples: AILA called the DRIP 2007 the “modified Declaration on the Rights of Indigenous Peoples (MD)” and, along with others⁶², announced its “disavowal of the harmful provisions”. (AILA, Memorandum on the Modified Declaration, 10.9.2007:2)

The following below is an excerpt⁶³ of their main arguments concerning the 9 modifications to the

62 “...expressed in various ways by others including Laguna Pueblo, Owe Aku, Aotearoa Indigenous Trust, Consejo de Todas las Tierras-Mapuche, other Latin American organizations identified by Estebancia Castro Dias and Fortunato Turpo Choquehuanca, Bill Means of IITC, and Tonatierra. In addition, Kekuni Blaisdell as Convenor of Kanaka Maoli Tribunal Komike, and the Seventh Generation Fund for Indian Development, as well as the Flying Eagle Woman Fund for Peace, Justice and Sovereignty add their voices to this disavowal.” (AILA, Memorandum on the Modified Declaration, 10.9.2007:2)

63 c.f.: AILA, Memorandum on the Modified Declaration, 10.9.2007:1-7 or inside American Indian Law Alliance (AILA), Paper on the General Assembly Adoption of the Declaration of the Rights of Indigenous Peoples (DRIP), 17.10.2007:16-22. e.g.:

https://faculty.washington.edu/pembina/all_articles/AmIndLawAlliance2007.doc+American+Indian+Law+Alliance

final text. AILA identifies 9 alterations: To them 3 changes seem to be indifferent (FN initial sentence, PP14, Article 32 (2)), 3 even positive (PP 1, PP 23, article 8(d)) However, another 3 are rather problematic and imply gravely harmful content (PP16, Art 30, Art 46):

1. MD PP 16. *This paragraph's reference to the 1993 Vienna Declaration and Programme of Action, which refused to recognize our status as "peoples" and also incorrectly designated us "minorities", re-inscribes the violation of the dignity of our peoples contained in that Declaration.*

2. MD Article 30. *This article guts the already minimal protection that the text of the Human Rights Council's Declaration on the Rights of Indigenous Peoples (CD) offers our peoples against military activities on our territories. The MD article now permits these activities if justified by a mere "relevant public interest" as opposed to the CD's "a significant threat to a relevant public interest". Our peoples live and die every day in the havoc that attends states' military activities. We cannot, and will not, go back to our communities with the stain of our silence as states continue to tolerate that situation.*

3. MD Article 46. *International law, since the UN Charter was adopted in 1945, has consistently maintained a scrupulous balance between the principles of the self-determination of peoples and the territorial integrity of states. See the 1970 Declaration on Friendly Relations. MD Article 46, which is the final "caveat" article in the MD, upsets this balance by highlighting only the second principle AND by placing the duty to respect states' territorial integrity on peoples for the first time in an international law instrument. Until now, that duty had only been imposed on states.*

In conclusion, AILA hereby commits to working in good faith partnership with states to implement the provisions of the MD with reservations, as noted here, regarding MD PP 16 and Articles 30 and 46 in as much as these provisions incorrectly represent fundamental principles of international law and/or re-inscribe, rather than correct, past indignities and injuries done to our peoples.

For this work, as already mentioned, article 46 is of elementary significance. Thus, I would like to focus a little bit more on AILA's explanations concerning its adverse impact. AILA is juxtaposing the UNDRIP's article 46 (1) with two former documents, the Vienna Declaration and its Programme of Action⁶⁴, 1993 and the Declaration on Friendly Relations⁶⁵, 1977.

[+\(AILA\)+Memorandum+on+the+Modified+Declaration.&cd=1&hl=de&ct=clnk&gl=at](#)

64 Adopted at the World Conference on Human Rights in Vienna, 25th of June 1993. c.f.: <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>

65 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted on 24th of October, 1970. c.f.: <http://www.un->

In addition I would like to show a few assorted articles of the *Declaration on Friendly Relations* to emphasize AILA's argument. The following articles distinctly highlight the right to self determination. **Principle 5**, „the principle of equal rights and self-determination of peoples“ determines in 8 articles the relationship between Peoples, States, the UN and colonialism. Particularly expressive are:

- 1) By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
- 2) Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
 - (a) To promote friendly relations and co-operation among States; and
 - (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.
- 4) The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.
- 5) Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.
- 6) The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory

have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

7) Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Apparently, self-determination is a rather immanent topic in the above mentioned articles. Six of the eight articles specifically highlight the right to self determination, decolonization and independence. Article 2 and 5 imply particularly strong terminology, including the “duty” of the State to respect as well as promote the self-determination of the peoples concerned. Article 5 even stresses the peoples rightful “actions against, and resistance to, such forcible action” (against the States' forcible denial of the right to self-determination), whatever this may include.

Solely two articles, article 7 and 8, emphasize the State's “territorial integrity”. Merely article 7 promotes territorial integrity in such a way that it can be associated with the peoples mentioned. Yet, article 7 also clearly expresses the prerequisite of such territorial integrity: “conducting themselves in compliance with the principle of equal rights and self-determination of peoples”.

Thus the Declaration of Friendly Relations dedicates itself affirmatively to the right of self-determination of all peoples.

Notwithstanding, the UNDRIP's article 46 merely adheres to parts of article 7, which are identical. It avoids to apply the remaining references to self-determination as evident in article 7 and peculiarly represented in the before stated articles. Therefore, once more the infamous article 46 shall be underscored :

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.
(UNDRIP 2007, Article 46 (1))

Moreover, according to AILA, the inclusion of peoples, groups and individual persons in article 46 has never occurred before and has to be seen especially problematic if associated to the fundamental right of self-determination and the discrimination concerning Indigenous Peoples at the Vienna

Declaration and Programme of Action (1993). Though the Vienna Declaration encourages decolonization as well⁶⁶ and does not widen the term “territorial integrity” in its application to peoples or groups⁶⁷, it explicitly adheres to the then still problematic term “indigenous people”⁶⁸ (FN,) even subsuming it under the section “minorities”:

*Persons belonging to national or ethnic, religious and linguistic minorities.*⁶⁹

Thus, one can assume that according to the Vienna Declaration, “Indigenous People” do not have the right to self-determination and are excluded from the decolonization process. In reiterating the Vienna Declaration within the highly sensitive context of the UNDRIP and presenting a rather selective part of the Declaration of Friendly Relations in article 46, it has to be considered that “Indigenous Peoples” and their right to self-determination as manifested in the UNDRIP, creates a special qualified status for Indigenous Peoples. But does not seem to be the then resulting term and related rights solely a matter of political correctness in favor of continuing disguised colonialism?

Consequently, according the three especially harmful amendments, AILA concludes the following:

a. These 3 provisions substantively weaken important rights we negotiated in Geneva.

b. On the other hand, we are ready to immediately collaborate in good faith partnership with states on all the other provisions of the MD to our mutual benefit either because we have already accepted them in Geneva or, if new, because we find that they merely clarify or enhance our rights, but do not weaken them.

c. The MD's acceptable provisions constitute valuable foundations on which we can begin to repair the lives of our nations and peoples.

66 *dismember Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.* (Vienna Declaration and Programme of Action, 1993:2)

67 *In accordance with the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind".* (Vienna Declaration and Programme of Action, 1993:2)

68 c.f.: Vienna Declaration and Programme of Action, 1993:11-12.: Part II (B)(2) “Indigenous people” Art. 28-32,

69 *Ibid.*

d. States that commit to international instruments that they generally endorse typically express reservations over particular parts. We can do likewise.

e. A statement preserves a historical record of indigenous peoples' disavowal of the 3 most harmful MD provisions. This record will be important to have when the Human Rights Council begins its task of overseeing the implementation of our rights.

f. A statement will protect us, when the time comes for working on a Convention, from allegations that indigenous peoples as a whole agreed to these harmful provisions in 2007.

g. Our non-indigenous friends need to know the mixed nature of the MD so that they may continue to support our rights in an informed way, rather than throw their blanket support to the MD.

(c.f.: AILA, 2007:22)

Intermediate Conclusions: What remains....

The first part of my thesis intends to expose and unravel the inherent complexity of Indigenous Peoples' quest for recognition within the international arena. It is a story about power relations, persistent colonialism, dominance, resistance and the attempt to decolonize.

The beginnings of Indigenous Peoples' resistance builds upon their survival. After all the cruelties and injustice, such as various genocidal and assimilatory strategies committed by colonial powers or their successors, Indigenous Peoples are still vitally alive: Revitalization, increased self consciousness and strength, manifested through heterogenous sources, such as activism and advocacy - partly militant, partly peaceful - , rooted within the traditions and cultural revival, transformed into already existing, but dynamically changing collective identities. Pan-Indigenism was born - first regionally, then globally.

As the presented, recent historical timeframe has hopefully clarified, these beginnings are embedded in decolonization processes of the 20th century and the establishment of an international regime of States in order to achieve and secure global peace. Apparently, this “regime of States” represents a contested terrain: a battlefield between dominant and less powerful actors. Indigenous Peoples, once nations or state-like entities, had to vehemently fight in gaining access to this exclusive lions' cave – the place where all those powers of dominance have been assembling.

Indigenous Peoples were regarded as “minorities” who were expected to integrate – which basically meant to assimilate - into the nation-state, of course, “for their own sake”. This would have provided them individual rights like every ordinary citizen. The first international legal document concerning Indigenous Peoples, the ILO Convention 107, though acknowledging important elements, reflected this ideology of integration.

Contrary, the UN Charter and the Declaration on Decolonization contain and promote powerful language for peoples in order to achieve self-determination, decolonization and independence in all its facets. Nevertheless, the access to the original procedures concerning decolonization was denied, yet, another door opened: Through the Human Rights mechanisms Indigenous Peoples were able to enter this contested international arena. International public awareness due to manifold Indigenous Peoples' actions worldwide and allies within the UN system forced the international regime to react. Thus, several conferences and studies resulted in a major step forward: the establishment of the WGIP and the endeavor to elaborate a Declaration on the Rights of Indigenous Peoples (UNDRIP).

However, the battle for the development of such a declaration lasted almost forever and implied compromises - compromises which have massively altered the original requests of Indigenous Peoples: the recognition of their existence like any other people, equal to States, founded upon their right to self-determination and related collective rights.

The original 22 Principles elaborated by Indigenous Peoples clearly emphasized these primary goals. Although the DDRIP 1994 did not reiterate all the Principles, it was at least regarded as a minimum standard and consented to by all participants. Nonetheless, this was not welcomed by their colonial and neo-colonial opponents. Particularly the CANZUS States applied every possible strategy to sabotage, manipulate and block recognition of Indigenous Peoples as Peoples, their right to self-determination and collective rights in general.

Eventually, a DRIP resulted out of the process, yet, containing quite a few substantially controversial articles. The “modified Declaration” as AILA calls it, does not sufficiently reflect Indigenous Peoples' urgent requests for self-determination. The described qualifications massively circumscribe Indigenous Peoples' collective rights and keep them under the sovereignty and territorial

integrity of the dominant actor, the State.

It occurs that original Indigenous Peoples' demands have been nicely incorporated and watered down to fit into a still unbroken system of dominance, which pretends to promote freedom while upholding the unjust colonial order of the past.

In this regard, Indigenous academic and activist Irene Watson⁷⁰ explains: “This is because the Declaration upholds the hegemony of the state and its right to contain Aboriginal peoples. As the state will continue to determine and translate all reference to indigenous knowledge on governance, culture and identity, assimilation remains the dominant paradigm. The state will tolerate those Aboriginal ways that it is able to assimilate; all else is rejected and remains at the margins, to be ultimately extinguished and annihilated.” (Watson, 2011:638)

Despite the decades of tireless engagement, countless studies and even quite a few victories which resulted in progress concerning the evolution as well as recognition of indigenous collective rights, the struggle still continues: After all these years, Indigenous Peoples are still confronted with the same fundamental problem, which remains to be unsolved: The recognition of their inherent rights as self-determined peoples, free to chose about their destiny. Thus, the decolonization process has not been finished in relation to Indigenous Peoples.

Consequently, the second part of my thesis is dedicated to the same implicit problem: the tension between decolonization and neocolonial processes concerning Indigenous Peoples. However, the focus will leave the general discourse towards a more detailed one: Indigenous Peoples' Cultural Heritage in reflection of and affected by this inherent conflict.

First of all, I will examine the term “Cultural Heritage”. This analysis will encompass its eurocentric roots, especially related to the UNESCO, as well as its specific alteration in order to cover and translate Indigenous Peoples' holistic lifeways – their “indigenous Cultural Heritage” existentially related to their LTRs.

Subsequently, it will be shown that “Indigenous Peoples' Cultural Heritage” is of major interest and seems not to be reserved to Indigenous Peoples only. Thus, ancient colonial patterns already

⁷⁰ Irene Watson, from the Tanganekald and Meintangk First Nations Peoples, besides being an Indigenous Peoples' rights advocate for decades, serves as a professor in Aboriginal Studies at University of Southern Australia.

reached out to seize Indigenous Peoples' Cultural Heritage, particularly their LTRs. In this regard, the “Doctrine of Discovery and Domination” will serve as a significant example.

Moreover, already represented instruments will be examined in regards to their effectivity to protect - or to the contrary - threaten Indigenous Peoples' Cultural Heritage. The analysis shall identify and unveil colonial structures within the environmental discourse. The 22 principles, among other documents, will be applied and juxtaposed on this specific terrain in order to uncover still prevailing patterns of colonialism.

Finally, two most recent examples shall visualize the prevalent situation, conveying the ancient colonial pattern in a new disguise. - The Convention on Biological Diversity and its Nagoya Protocol as well as the World Intellectual Property Organization aka the “World Piracy Organization”, as quite a few Indigenous Peoples' representatives and non indigenous activists use to call it.

SECOND PART 2:

Indigenous Peoples' Cultural Heritage: a Story of Resistance and Colonization

3.1 Introduction

“They are as diverse as the lands they live on, Throughout time, tribal groups have developed a unique and harmonious relationship with their natural surroundings. This harmonious existence has developed from a respect, dependence, and spiritual relationship with nature.”

“By living in harmony and developing a respect of all living things Indigenous Peoples developed a symbiotic relationship with nature.” (indigenous academic, expert and activist, Priscilla Settee, 2008:44)⁷¹

“The land and people, the natural resources that are on the land and the animal life that exists with the land, have always lived together. We believe it's always been a coexistence of both my people and the humans on the land with the physical things around them. It is a shared spiritual relationship.” (Petuuche Gilbert, 2008:36)⁷²

As the above quotes from famous Indigenous Peoples' representatives verify, the people, the land, the “natural surroundings” and “natural resources” do form a holistic, mutually interdependent web.

According to the diverse cultures of Indigenous Peoples and their various lands, this web manifests itself in manifold ways and relations. Nevertheless, all of these have proven to be harmonious in order to grant the peoples' survival – a symbiotic, physical and spiritual coexistence based on respect.

Within the international discourse, these complex relationships have been subsumed and translated as “Indigenous Peoples' Cultural Heritage”.

The following assertions shall envision this term's evolution in regards to Indigenous Peoples. They are intended to elucidate its roots, relations and applications.

⁷¹ Dr. Priscilla Settee, Cree, is an Associate Professor in the Department of Native Studies at the University of Saskatchewan, and active regarding Indigenous Peoples' rights for many years, particularly regarding Cultural Heritage and Food Sovereignty.

⁷² Petuuche Gilbert is a famous traditional leader from Acoma Pueblo. As an indigenous activist, he has been involved in fighting for Indigenous Peoples' rights for decades, especially at the UN.

3.2 Cultural Heritage?

In this thesis' context, Cultural Heritage is meant to be a term of translation, conveying the holistic lifeways and cultures of Indigenous Peoples throughout different times and spaces. This includes complex dynamics which are inseparable from Indigenous Peoples' lands, territories and so called “resources” LTRs. In this regard, the studies conducted under Special Rapporteur Erica Irene Daes are absolutely relevant.

Nevertheless, from a dominant westernized view the roots of this term derive from the United Nations Educational, Scientific and Cultural Organization (UNESCO), which has to be mentioned as the mainstream source in order to define the terms “Natural Heritage” and, specifically, “Cultural Heritage”.

3.1.2 The UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1972)

Thus, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 1972 provides the pursuing definitions of cultural and the natural heritage⁷³:

Article 1

For the purposes of this Convention, the following shall be considered as ‘cultural heritage’:

monuments : architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings : groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science ;

sites : works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

⁷³ c.f.: <http://whc.unesco.org/en/conventiontext/>

Article 2

For the purposes of this Convention, the following shall be considered as 'natural heritage':

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Although Indigenous Peoples' Cultural Heritage is partly compatible and able to match certain criteria of the above, both definitions lack the holistic spectrum which is most important to Indigenous Peoples. The last passage of article 1 “combined works of nature and man...” as well as the “anthropological and ethnological view” at least senses an approximation and enable interpretation in this regard. Thus, implications concerning Indigenous Peoples can be assumed, although they are not once to be found within the text.

Contrarily, in numerous articles the convention confirms and promotes the sovereignty of the State parties: Article 3 and 6 serve as best examples:

Article 3

It is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above.

Article 6

1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is, situated; and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage

constitutes a world heritage for whose protection it is duty of the international community as a whole to co-operate.

Consequently, the Convention ensures the State's role as the primary decision-maker: Besides its obligation to respect cultural and natural heritage as a world heritage for the entire international community, it is still regarded as a national property on the State's territory. The State is in charge of its delineation and identification. Indigenous Peoples - frequently the inhabitants and (precolonial) “owners” of such territories - are not mentioned at all within the Convention.

However, during the last decades, the UNESCO's understanding concerning “culture”, “cultural diversity” as well as “cultural-” and “natural heritage” has not been unaffected by the international Indigenous Peoples' discourse.

3.2.2 The UNESCO Universal Declaration on Cultural Diversity⁷⁴ (2001)

For example, the UNESCO's Universal Declaration on Cultural Diversity of 2001 states the following in its Preambular:

Reaffirming that culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs. (5th paragraph)

On “cultural diversity” the Declaration further asserts in **article 1**: *...As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.*”

Although no references to Indigenous Peoples are to be found within these two quotes, they incorporate a quite holistic, open view in defining culture and cultural diversity – beyond the former quite eurocentric perspective.⁷⁵

However, article 4 mentions Indigenous Peoples - especially in relation to human rights and their

⁷⁴ c.f.: http://ec.europa.eu/avpolicy/docs/ext/multilateral/gats/decl_en.pdf
http://www.unesco.org/confgen/press_rel/021101_clt_diversity.shtml

⁷⁵ **Article 2** further affirms this fundamental interpretation of cultural diversity: *...In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities.*

significance to protect cultural diversity:

“The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope. “

In this regard, article 5 further promotes the relevance of “cultural diversity” and emphasizes, inter alia, “*....all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.*”

Remarkably, the Declaration adheres to the term “Indigenous Peoples” instead of “indigenous communities”, which would presumably imply collective rights and self-determination, Notwithstanding, it merely refers to “*persons belonging to....indigenous peoples*”, consequently, focusing on individual rights rather than collective rights, which is also confirmed in **article 5**.

In **article 7** “Cultural heritage” is defined as “*the wellspring of creativity:”heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.*

The article clearly expresses the fundamental significance of Cultural Heritage for all humankind, particularly concerning future generations. Although this appraisal shall be interpreted positively in light of cherishing cultural diversity and Cultural Heritage, it also contains threats towards Indigenous Peoples' collective Cultural Heritage. it implies the promotion to have access to cultures in order to “*foster creativity*” and promote dialogue. Thus, if dialog is forcibly sought, this can evolve to another phere of disguised colonialism, in order to *ensure the free flow of creativity and ideas for all humankind.*

This argumentation would not be a new one, concerning colonialism it reaches back to the beginnings of the so called “age of discovery”. Eventually, though not a supporter of the Doctrine of Discovery and its implicit justification to subjugate the so called “heretics/savages”, De Vitoria argued in favor of a free trade and the omnipotent prerequisite, the inherent natural law to promote and affirm trade and exchange between all cultures. Thus, a foreign culture/people is not permitted to deny the “free flow of trade/commerce” since this is a “natural law” an obligation of

This presumption would also align with the according **Action Plan of the Declaration** which, on the one hand, stresses the preservation and enhancement of the cultural and natural heritage, notably the oral and intangible cultural heritage, and combating illicit traffic in cultural goods and services, and promotes strategies for Respecting and protecting traditional knowledge, in particular that of indigenous peoples; recognizing the contribution of traditional knowledge, particularly with regard to environmental protection and the management of natural resources, and fostering synergies between modern science and local knowledge. Yet, on the other hand, the Action Plan is encouraging universal access through the global network to all information in the public domain and places Cultural Heritage in an economic context, which should be, under certain prerequisites, accessible.

The dominant actor and decision-maker remains to be the state, as **Art. 9** underscores: ...It is for each State, with due regard to its international obligations, to define its cultural policy and to implement it through the means it considers fit,...

Two years after the adoption of the *Universal Declaration on Cultural Diversity* another UNESCO instrument got implemented: **3.2.3 The Convention for the Safeguarding of the Intangible Cultural Heritage, 2003**⁷⁷:

According to the Convention, “**intangible cultural heritage**” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. (Article 2 – Definitions)

76 c.f.: Francisco de Vitoria: 1532, „De Indis“ and „De Jure Bellis

77 c.f.: <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>

In addition to the quite encompassing definition of “intangible Cultural Heritage” the Convention mentions the subsequent domains as best examples:

1. *(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;*
2. *(b) performing arts;*
3. *(c) social practices, rituals and festive events;*
4. *(d) knowledge and practices concerning nature and the universe;*
5. *(e) traditional craftsmanship.*

Apparently, in contrast to 1972, this Convention truly grasps the diverse facets of Cultural Heritage, particularly mutually interrelated aspects of “nature” and “culture”, its inherent dynamics and collective character, which is transmitted throughout generations. Consequently, the Convention's definition is quite compatible with Indigenous Peoples' holistic sense of Cultural Heritage.

However, despite these important similarities, there are no explicit references to Indigenous Peoples within the definitions.

Contrarily to the Declaration on Cultural Diversity, the Convention's Preamble solely refers to “indigenous communities”: *Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.”*

It can be assumed that due to the binding character of the convention, controversial terminology was avoided in its elaboration. This could explain why the term “Indigenous Peoples”, such as applied within the Declaration on Cultural Diversity, was replaced by “indigenous communities”.

Undoubtedly, the Convention incorporates quite relevant provisions – also its main purposes, *to safeguard intangible Cultural Heritage as well as to raise awareness and ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned*” shall be seen in an attempt to promote awareness about Cultural Heritage. (c.f.: Article 1)

Nevertheless, the Convention lacks powerful terminology, especially in regards to the generally concerned and affected – Indigenous Peoples. Eventually, it also confirms and even promotes prevailing colonial structures of exploitation, as the subsequent articles verify:

Article 11.2: *Each State Party shall....identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non- governmental organizations*

Moreover, **article 13 (ii)** further exposes inherent neocolonial patterns: *To ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory, each State Party shall endeavour to:.... adopt appropriate legal, technical, administrative and financial measures aimed at: ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage:*

In a nutshell, these late UNESCO examples certainly emphasize a holistic definition of Cultural Heritage, based on respect of Cultural Diversity. Of course, this would be a quite significant step towards the recognition of Indigenous Peoples' collective rights, specifically their right to self-determination. Nonetheless, due to rather soft terminology, the confirmation of States as the omnipotent decision-maker and particularly the persistent, penetrant request to access Cultural Heritage – these instruments, disguised as being protective, pose a real threat to Indigenous Peoples.

Quite different to the above, and truly groundbreaking for Indigenous Peoples and the recognition as well as protection of their Cultural Heritage are the subsequent studies:

3.2.4 An Attempt to translate Indigenous Peoples' Perspectives on their Cultural Heritage, as elaborated by Indigenous Peoples' experts and non-indigenous experts, under the auspices of UN Special Rapporteur Erica-Irene Daes:

Probably the most prominent non-indigenous person involved in the elaboration of Indigenous Peoples' rights inside the UN is Madame Daes. She served between 1984 – 2001 as the founding Chairperson & Special Rapporteur of the United Nations Working Group on Indigenous Populations and as a member of the United Nations Sub-Commission on the Promotion and

Protection of Human Rights. In this role - besides promoting the DDRIP - she was responsible for the development of numerous studies regarding Indigenous Peoples – particularly significant, various analysis' about Indigenous Peoples' Cultural Heritage, which were jointly undertaken with the full participation and influence of Indigenous Peoples' experts themselves.

In this regard, a fundamental step ahead was the **Study on the protection of the cultural and intellectual property of indigenous peoples**⁷⁸, released in 1993. Acknowledging that *there is a relationship, in the laws or philosophies of indigenous peoples, between cultural property and intellectual property, and that the protection of both is essential to the indigenous peoples' cultural and economic survival and development* the Sub-Commission had recommended that Special Rapporteur Daes should initiate a study, including a consideration of this relationship.⁷⁹

Based on Indigenous Peoples' input on actual controversies, the study comprises several topics, such as “Protection and use of sacred sites”, “Return and reburial of human remains”, “Recovery of sacred and ceremonial objects”, “Ensuring the authenticity of artworks”, “Communal rights to traditional designs”, “Breaches of confidentiality”, “Medical research and "bio-prospecting"”, “Indigenous science and technology” and “Community control of research”.⁸⁰

In its introduction, the study already extraordinarily expresses the essential elements of Indigenous Peoples' Cultural Heritage, particularly its holistic character in regards to their territories and its significance for their survival: *For indigenous peoples the world over, the protection of cultural and intellectual property has taken on growing importance and urgency. The very concept of "indigenous" embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory. Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.*⁸¹

Furthermore, It is a quite encompassing, critical review, which also addresses the various UN organizations, specifically the UNESCO. On the latter it comments: *The UNESCO Convention has several shortcomings. Requests must be made by States...*⁸². Recognizing Indigenous Peoples' problematic, discriminating situation, it continues to point out: *Thus far, indigenous peoples have not been able to participate in the work of the Committee. The Committee has avoided disputes*

78 Document: E/CN.4/Sub.2/1993/28

79 c.f.: Sub-Commission's 44th session, resolution 1992/35 of 27 August 1992

80 c.f.:

81 Ibid, 1

82 Ibid. III A 124

between States and their constituent peoples, moreover.”⁸³ State ownership can conflict with the interests of indigenous peoples, however.⁸⁴

The study's applied terminology, is rather unanimously in favor of Indigenous Peoples' original language concerning self-determination and decolonization. Uncommon at that certain time due to objections by member states, it “dares” to refer to “indigenous peoples” rather than to “indigenous people” or “communities” - it even calls them, as mentioned above, “distinct nations”.

Thus, the **Study on the protection of the cultural and intellectual property of indigenous peoples** is a remarkable piece in the original sense/spirit of Indigenous Peoples' demands, which provided the fundament for the subsequent study under the responsibility of the Madame Daes:

Protection of the heritage of indigenous people: Final report of the Special Rapporteur, Mrs. Erica-Irene Daes, “in conformity with Subcommission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights”⁸⁵

Successive to the above presented study, which got endorsed, the **Subcommission on Prevention of Discrimination and Protection of Minorities** urged for the elaboration of draft principles and guidelines for the protection of indigenous peoples' heritage. The final report of the Special Rapporteur already consists of a revised version of draft principles and guidelines which had been scrutinized as well as amended by a few UN organizations, states, but most relevant: Indigenous Peoples' representatives⁸⁶.

arise

Consequently, the **Principles and Guidelines for the Protection of the Heritage of Indigenous People**⁸⁷ originated. Although up to this day not adopted by the General Assembly, they are assumably the most encompassing collection and substantive translation of Indigenous Peoples’ holistic lifeways, subsumed under the term “Cultural Heritage”. Thus, the Principles and Guidelines are compatible with the original goals of Indigenous Peoples' decolonization attempts. Together with the 22 Principles they form the cornerstone of this thesis.

⁸³ Ibid. 126

⁸⁴ Ibid. 127

⁸⁵ Document: E/CN.4/Sub.2/1995/26

⁸⁶ American Indian Law Alliance; Black Hills Teton Sioux Nation; Indian Council of South America (CISA); Mapuche Nation (Consejo de Todas las Tierras); National Aboriginal and Islander Legal Services Secretariat.

⁸⁷ Remarkably, although all the references within the document are made to „indigenous peoples“, the title applies – or presumably was forced to apply – the discriminatory term „indigenous people“.

An assortment of the most essential principles and guidelines concerning this piece of work follows below⁸⁸:

Assorted Principles:

2. To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organization.

3. Indigenous peoples should be the source, the guardians and the interpreters of their heritage, whether created in the past, or developed by them in the future.

4. Recognizing, respecting and valuing their customs, rules and practices for the transmission of their heritage to future generations is essential to indigenous peoples, their identity and dignity.

5. Indigenous peoples' ownership and custody of their heritage should be collective, permanent and inalienable, or as prescribed by the customs, rules and practices of each people.

6. The discovery, use and teaching of indigenous peoples' heritage is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection.

8. To protect and preserve their heritage, indigenous peoples must also exercise control over all research conducted on their people and any aspect of their heritage within their territories.

9. The prior, free and informed consent of the owners should be an essential precondition of any agreements which may be made for the recording, study, display, access, and use, in any form whatsoever, of indigenous peoples' heritage.

10. Any agreements which may be made for the recording, study, use or display of

⁸⁸ The entire is included in Document: E/CN.4/Sub.2/1995/26

indigenous peoples' heritage must ensure that the peoples concerned continue to be the principal beneficiaries of any use or application.

Within postulated Guidelines the definitions constitute utmost relevance:

12. *The heritage of indigenous peoples has a collective character and is comprised of all objects, sites and knowledge including languages, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people which may be created or rediscovered in the future based upon their heritage.*
13. *The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic creation such as music, dance, song, ceremonies, symbols and designs, narratives and poetry and all forms of documentation of and by indigenous peoples; all kinds of scientific, agricultural, technical, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge, cultigens, remedies, medicines and the use of flora and fauna; human remains; immoveable cultural property such as sacred sites of cultural, natural and historical significance and burials.*
14. *Every element of an indigenous peoples' heritage has owners, which may be the whole people, a particular family or clan, an association or community, or individuals, who have been specially taught or initiated to be such custodians. The owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.*

This selection – though rather incomplete - clearly highlights what Indigenous Peoples' Cultural Heritage is comprised of: Its collective character, intrinsically interrelated to almost every aspect of traditional life, never independent of Indigenous Peoples' territories. This relationship builds upon self-determination as peoples, being the guardians, holders and owners, maintaining the control over their heritage from the past and the future. Furthermore, it emphasizes Cultural Heritage's ownership as collective, inalienable and permanent, underscores the free, prior and informed consent (FPIC) and Indigenous Peoples as principal beneficiaries. Self-determination (SD) has to be understood as its central key element, such as it is inherent for all peoples in international law. Thus, as articulated, the land – Indigenous Peoples' territories, and its so called “resources” (LTRs) - is

substantially interwoven with their traditions and lifeways – their Cultural Heritage over which they assert self-determination.

3.2.5 The Land as the Heart of Cultural Heritage:

From an Indigenous Peoples' perspective, all life is related to the land, dependent on the land. Indigenous Peoples are part of it. This mutual relationship, their cultures' evolution and genesis is inextricably interwoven with the land and, as a consequence, has established Indigenous Peoples' territories. Thus, the obligation to protect it – their territories -, to act as caretakers and stewards is not “just” traditional practice – it is the core of their existence, a matter of cultural and physical survival.

Another report by Special Rapporteur Daes confirms my assertions: *....it is difficult to separate one indigenous concept from another. This is especially true when trying to describe indigenous peoples' relationship with their lands, territories and resources. The relationship with the land and all living things is at the core of indigenous societies.*⁸⁹ (1999:6)

James Sakej Henderson adds: “the Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource ... Their vision is of different realms enfolded into a sacred space ... It is fundamental to their identity, personality and humanity ... [the] notion of self does not end with their flesh, but continues with the reach of their senses into the land”. (1995:196)

However, the arrival of colonialism had and continues to have a deep, devastating impact on Indigenous Peoples: their Cultural Heritage – particularly their holistic relations to the land have been fundamentally shaken. Since the beginning of the encounter, interrelations have been determined by power, subjugation and dominance. It developed to be an asymmetrical yet dynamic relationship: “Explorers/discoverers” and “visitors”, turned into “conquerers”, “settlers” and “colonialists”, finally, “citizens” - contrarily, independent, sovereign Peoples/Nations, became “indigenous”, happened to be called “Indians”, “savages”, “heathens”, “domestic nations”, “vanishing races” or “minorities”. The most relevant issue concerning this imbalance of power relations: influence over “Lands, Territories, and Resources (LTRs)” - matters of disposal and possession. On the one hand, matters of dominance and resources' exploitation, on the other, much more than that: the interconnectedness with the land, materially and immaterially, maintaining the Cultural Heritage, Indigenous Peoples' identities - a matter of plain survival.

⁸⁹ Indigenous people and their relationship to land: Second progress report on the working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur, 1999, document: E/CN.4/Sub.2/1999/18

The colonial conquest has resulted in a massive friction which remains till today – a shift of paradigms. The shift towards the current, massive asymmetry has to be interpreted in the light of replacing, dominance and destruction: replacing power to access, ownership and possession – to dominate over LTRs, and to destroy the holistic lifeways of the peoples already at place.⁹⁰

However, a major intention of this thesis' also represents Indigenous Peoples' unbroken, powerful resistance against this domination. They are actively reclaiming their right of self-determination, primarily regarding their Cultural Heritage, and, consequently, their right to own, possess and use LTRs. As a result, we are confronted with a clash of opposing interests, a contested battlefield regarding the ownership, control, access and use of LTRs.

Sam Marlow, activist and member of the Colville Confederated Tribe, emphasizes:

“As far as ethics and protocol, what I first need to address is the **land**. We are from a society that had an **abundance of natural resources found within our traditional territory** and **we are obligated and duty-bound to protect and caretake this land that we belong to**. My people are not pacifists. **Our histories have passed down from generation to generation** for thousands of years, it is through these oral processes that we ended up having Okanagan names for the mountains and the streams, as well as the sacred and holy places found within our territory. As Okanagan people, **we are from the land; we are part of it**; therefore, we have an obligation as *sqilxw* (original people who learned to live together on the land in peace), as we call ourselves, to protect and speak for this land that can't speak for itself. **This territory is our home**. If we want to look at it in today's modern context, it is our place in space and time. **If we want to continue to survive in our homeland, we have an obligation to protect it.**” (Marlow, 2008:39-40)

3.3 Conquest: The Doctrine of Discovery (and Domination)

The access to the land was and still is the primary step in order to control. Thus, to get a better picture of this distinct imbalance and adhering asymmetrical power relations, I will highlight one of the main core documents of conquest, the Doctrine of Discovery.

Even though it was not always applied by colonial powers as such, it has worked as a role model of

⁹⁰ As I have tried to exemplify, one is easily able to grasp this asymmetric transformation in regards to the treaty-policy in North America, an apparent relation between the shift of power - specifically concerning LTRs as an existential means – and the increasing subjugation of Indigenous Peoples.

imperialist ideology to which all successive colonial norms and sanctions can be related to: A fundament to justify subjugation and genocide, including the dominance, control and deprivation of LTRs.

In the islands and countries already discovered are found gold, spices, and very many other precious things of divers kinds and qualities. Wherefore, as becomes Catholic kings and princes, after earnest consideration of all matters, especially of the rise and spread of the Catholic faith, as was the fashion of your ancestors, kings of renowned memory, you have purposed with the favor of divine clemency to bring under your sway the said mainlands and islands with their residents and inhabitants and to bring them to the Catholic faith....as is your duty, to lead the peoples dwelling in those islands and countries to embrace the Christian religion; nor at any time let dangers or hardships deter you therefrom, with the stout hope and trust in your hearts that Almighty God will further your undertakings. (The Bull *Inter Caetera* (Alexander VI), May 4, 1493.)

This passage taken from the Papal Bull *Inter Caetera* represents the very core of the Doctrine of Discovery, implies its most significant elements: greed, expansion, disrespect, presumed superiority, conquest and subjugation. According to these elements, Steven Newcomb's definition resumes the most implicit qualities concerning this doctrine: "The first "discovery" by Christian people of non-Christian lands, and the subsequent assertion of Christian sovereignty or territorial dominion. This is why the most accurate term from an indigenous perspective is "Doctrine of Christian Discovery and Domination"."⁹¹ (Newcomb, Conference Room Paper on the Doctrine of Discovery, point 5, 3-4:2012) Consequently, I will further refer to this Doctrine as the "Doctrine of Discovery and Domination" (DDD).

The DDD is a symbol of aggression, it envisages an incorporated aggressive attitude which has been derived from a dualistic worldview: A perspective of dominance, a pattern of superiority and inferiority. Thus, from its very beginning the DDD is about power relations, based on discrimination, merged with self righteousness - asserting power over others, denouncing them as being inferior, dominating and exploiting them, yet simultaneously getting granted the moral assurance of doing right - actually the best in order to "save the pagans for their own and one's self sake".

⁹¹ presented by the Haudenosaunee, the *American Indian law Alliance* and the *Indigenous Law Institute*, Conference Room Paper on the Doctrine of Discovery, 11th Session of the Permanent Forum on Indigenous Issues, 7-18 May 2012, United Nations, New York.

Ethnocentric perspectives conveying inferiority and superiority are probably universal, though existent throughout history in varying degrees, causing different impacts. Despite, beyond any doubt, this pattern of dominance reached a new never before experienced benchmark - persistently manifested during the so called “age of discovery” and the adjacent centuries of imperialism and colonialism.⁹²

To dominate and subjugate others needs to be legitimized, there has to be a fundament of reasons which provides legitimacy - to turn unjust actions into just procedures. This is needed because the dominating power and the individuals of which it is comprised of have to identify with the driving ideology in order to justify their deeds and actions as well as the continuity thereof.

Religion, as one of the main roots amongst many ideologies, can be and has been frequently abused in order to subjugate and dominate. Thus, the then most dominant religious institutional force, the Catholic Church, served the European emperors to legitimize their conquests. Later, protestant churches followed to support the colonial powers - some are still trying very aggressively today⁹³.

In any case, the DDD represents the most prominent embodiment regarding Indigenous Peoples' subjugation of the so-called “Americas”. Yet it merely succeeds other documents related to European kingdoms and the Catholic Church. For instance, In 1344 Pope Clement VI conveyed the Canary Islands to the Castillian Don de la Cerda, Count of Clermont. Neither one of them had ever been in person on the Islands before and after. Notwithstanding, due to this title, the Crown of Castille claimed the Canary Islands in 1479. The consent of the Indigenous inhabitants of the Canaries, the Guanches, was not sought in any way – they were not even consulted or part of any discussions concerning their lands. Although they had lived in their territory for times immemorial, therefore, should have been recognized as having a property title regarding European conceptions of “uninterrupted possession of territory” (Hinsdale: 351:1888 in Newcomb, Steven: point 16, 7:2012) - they were not Christians, consequently, from a eurocentric dominators perspective, not eligible to be the “rightful owners of the land”. According to Steven Newcomb, the lands were considered to have no sovereignty because they were not under the claimed rule of any Christian sovereign – no “Christian owner” or “dominator”. (Newcomb, footnote 8, 8:2012) The Papal Bulls of 1452 *Dum Diversas* and 1454 *Romanus Pontifex* incorporate a similar ideology: in confirming the just war against the Saracens and subjugation of other infidels “situated in the remotest parts unknown to us, and subject them to their own temporal dominion” (Papal Bull *Dum Diversas*, 1454).

In the middle and southern parts of the Americas - what is used to be called “Latin America”

92 Such as all forms of genocide like physical genocide, slavery, forced assimilation, to name a few

93 c.f.: <http://mis.sagepub.com/content/17/1/39.abstract>

nowadays - the *Requerimiento* was applied by the Spanish Crown to justify the unjust since 1514. It was proposed to the Indigenous Peoples, providing them the “choice” to decide whether to subdue or to be unilaterally declared as enemies:

“...that you accept the Church and Superior Organization of the whole world and recognize the Supreme Pontiff, called the Pope, and that in his name, you acknowledge the King and Queen, as the lords and superior authorities of these islands and Mainlands by virtue of the said donation. If you do not do this, however, or resort maliciously to delay, we warn you that, with the aid of God, we will enter your land against you with force and will make war in every place and by every means we can and are able, and we will then subject you to the yoke and authority of the Church and Their Highnesses. We will take you and your wives and children and make them slaves...And we will take your property and will do to you all the harm and evil we can... We avow that the deaths and harm which you will receive thereby will be your own blame...” (The *Requerimiento*, 1513)⁹⁴

Indigenous Peoples were categorized by the intruders as having a status called “sine juribus” a non-jural state, thus “had to subordinate” themselves to the self declared “Christian dominators and owners”.⁹⁵ (c.f.: Peters, Moira, 2010)

This “tradition of dominance and discrimination” was to be continued by other empires as well and has prevailed throughout the subsequent centuries. For instance, King Henry VII of England adhered to the DDD when he instructed John Cabot to “locate, subdue and take possession of the islands, countries, regions, of the heathens and infidels....unknown to Christian people.” (World Council of Churches 1:2012)⁹⁶

However, it should not be forgotten that as long as the intruding European conquerors and settlers relied upon Indigenous Peoples – such as the first settler colonies in North America - or were confronted with superior indigenous enemies, they simply had to engage themselves into treaty-making - treaties, that were based on a sovereign to sovereign, kingdom to kingdom or nation to nation fundament - thus, were confirming Indigenous Peoples' self determined, sovereign status.

Therefore, it has to be remembered that in majority, without respecting Indigenous Peoples as

94 c.f.: <http://www.doctrineofdiscovery.org/requerimiento.htm>

95 Peters, Moira, 2010, This is where the revolution starts, The Dominion, Vancouver Canada
www.dominionpaper.ca/articles/3223

96 World Council of Churches 1:2012 Statement on the Doctrine of Discovery and its enduring impact on Indigenous Peoples, WCC Executive Committee, 14-17 February 2012, Bossey, Switzerland

Peoples at first, entailed “diplomacy”, hypocrisy, followed by insidiousness, and the subsequent application of the already widely approved “divide and conquer” strategy, the papal bulls would just have worked in theory and the European act of aggression would have considerably failed. For instance, the Spanish conquest of what is referred to as Mexico today would have never succeeded without Indigenous Peoples' supportive participation (e.g. Totonacs, Tlaxcaltecas,) against the then dominant Aztec Empire.

Nevertheless, as time passed by, the European Empires and its settlers have constantly gained power and influence, the implicit pattern of discrimination and dominance has simultaneously increased as well. In this sense, the case *Johnson v. M'Intosh*⁹⁷ (1823) was groundbreaking, revealing a new paradigm of how to “deal” with Indigenous Peoples. It is directly related to John Cabot and, consequently, to the DDD. Chief Justice John Marshall referred to the US as being a successor of the British Empire, which, like other Christian European nations had assumed "ultimate dominion" over the lands, and due to this "discovery", the Indians only retained a right of "occupancy" – not the “ultimate title”. The argumentation line directly derives from the above mentioned ideology of Christian superiority over heathens inferiority. Due to its character as a precedent case, this decision even deprived Indigenous Peoples of their self determination - their sovereignty - on a global scale. It has affected Indigenous Peoples in Australia, Canada, and New Zealand as well.⁹⁸ These settler states are still rather vitally vested in their colonial fundament. It must not be forgotten that they were the ones who maintained opposition against the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁹⁹ till the very last moment of its adoption. They just ceded confrontation at a point almost unavoidable for them, due to their reputation – they were quite isolated. However, the CANZUS states have been persistent in opposing in other fora, trying to exclude or weaken the UNDRIP's significance even up to the present stage, as will be shown later.

Apparently, this pattern of dominance, which was so eloquently expressed in the DDD, is still very much in existence.¹⁰⁰ Perhaps the most obvious impact of the persistent pattern of domination manifests itself through the immense, reckless exploitation of resources – resources which in

⁹⁷ *Johnson v. M'Intosh*, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823)

⁹⁸ Robert J. Miller, of Lewis & Clark, and Jacinta Ruru, 2008, University of Otago, Lewis & Clark Law School, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*.

⁹⁹ Adopted on Sept. 13th, 2007 by the UN General Assembly.

¹⁰⁰ Thus, for example, in *Tee-Hi-Ton Indians v. United States*, 1954, the DDD was being used to rule against monetary compensation concerning a federal taking of indigenous timberlands. Just recently, it was also cited as central in the decision concerning the *City of Sherill v. Oneida Indian Nation* of New York.

majority are to be found on Indigenous Peoples' lands and territories.¹⁰¹ In this regard, let's recall the DDD and re-quote the following passage: “In the islands and countries already discovered are found gold, spices, and very many other precious things of divers kinds and qualities.... to bring under your sway the said mainlands and islands with their residents and inhabitants and to bring them to the Catholic faith.”

Well, today the churches have been replaced through national enterprises, multinational and transnational corporations, invading these lands and territories, exploiting resources in the name of another prevalent “religion”: the magic formula “development” and “economy”, accompanied by its inherent forces commercialization and commodification, most elaborated through the neoliberal, capitalist market powers. Capitalist based economy and development have evolved to the new dominant “religion”, its dogmas, though irrational, blindly believed in and stubbornly pursued due to the same ancient reason: “the creed of greed”.

Nowadays, treasures like gold, silver, gems and jewels are not the primary targets anymore, additionally, lands which hold resources such as uranium, coltan, timber, oil, genetic resources inter alia, have become the new “Eldorado”.

Priscilla Settee poignantly summarizes: **“Indigenous lands are highly sought after as man's neocolonial greed for money and resources intensifies. Some have called this lust for earth's last precious resources “the new conquistador”, a reference to the gold seekers who first colonized and pillaged the so-called New World.”** (Priscilla Settee 2008:42)

101 c.f.: the quote within the introduction of this thesis

3.4 Mechanisms to Protect Indigenous Peoples' Cultural Heritage? - A critical Analysis

In reflection of these sharply contrasting perspectives – the DDD and similar patterns of dominance, access and exploitation vs. Indigenous Peoples' Cultural Heritage and self-determination - the adjacent analysis is intended to scrutinize the current status quo of Indigenous Peoples concerning their “Environment”, their Cultural Heritage, including LTRs.

Based on portrayed instruments as well as indigenous voices, specific criteria to distinguish, categorize and evaluate can be extracted¹⁰². They shall serve in order to facilitate the differentiation among aforesaid international instruments' terminologies, especially in capturing the inherent significance towards Indigenous Peoples' Cultural Heritage.

3.4.1 The Criteria/Documents:

1. „Land, Territory and Resources“ (LTRs)
2. “Cultural Heritage” and associated terms such as „Traditional Knowledge“ and „Indigenous Knowledge“
3. „Cultural Diversity“/“Customs“/“Customary Rights“/“Collective Rights“
4. „Environment“/“Nature“/“Sustainability“/“Conservation“/“Biodiversity”
5. „Ownership“/“Possession“/“Control“/“Permanent Control“
6. „Occupancy“/“Access“/“Benefits“/“Access and Benefit Sharing“ (ABS), “stakeholder”, “beneficiaries”
7. „Free, Prior, Informed Consent“ (FPIC)/“Prior, Informed Consent“/“Full Participation“
8. „Consultation“/“Cooperation“/“Participation“
9. „National Law“/“Domestic Law“/“where appropriate“, „if compatible“, Indigenous communities”
10. „Self Determination“/“Sovereignty“/“Decolonization“/“International Law“, “Indigenous Peoples”
11. „Development“

Thus, the analysis is also intended to expose continuing terminology of **colonization and domination – criteria 6, 8, 9, - vs. terminology of decolonization – criteria 5, 7, 10.**

¹⁰²The following criteria are the result of my personal analyzing process .

The other criteria are more or less neutral in their applicability, they can be interpreted in either way.

The documents under scrutiny:

- The original 22 Principles of 1985
- ILO Convention 107 of 1957
- ILO Convention 169 of 1989, the
- DDRIP 1994
- UNDRIP as adopted in 2007

Of course, being aware that only 3 of these documents are applicable in a strictly international legal sense, the original 22 Principles as well as the DDRIP 1994 do still imply paramount relevance due to their indigenous based foundation. They manifest, as already highlighted, Indigenous Peoples' essential demands and substantially influenced the introduced “Daes studies”.

3.4.2 The Chart:

DOCUMENT	INDIGENOUS PEOPLES' 22 PRINCIPLES (1985)	ILO CONVENTION 107 (1957)	ILO CONVENTION 169 (1989)	DDRIP 1994	UNDRIP 2007
RELEVANT TERMS					
LAND, TERRITORY, RESOURCES (LTRs)	Principles 2, 4, 5, 7, 8, 9, 11, 13, 15, 21	Articles 6, 11, 12.1, 13	Articles 13.1, 13.2, 14.1, 14.2, 14.3, 15.1, 15.2, 16.1, 16.3, 16.4, 17.1, 17.2, 17.3, 18	Preambular paragraphs 5, 6, 8 Articles 7 (b)(c), 10, 11(c), 25, 26, 27, 28, 30, 31	Preambular paragraphs 6, 7, 10, Articles 8.1, 8.2(b) (c), 10, 25, 26.1, 26.2, 26.3, 27, 28.2, 30.1, 30.2, 32.1, 32.2, 32.3
CULTURAL HERITAGE/ TRADITIONAL KNOWLEDGE/ INDIGENOUS KNOWLEDGE	Principles 2, 4, 7, 8, 9, 11, 13, 14:	Articles 18.04.14	Articles 23.1. 23.2.	Preambular Paragraphs 2, 6, 10 Articles 7(a), (b) (d), 12, 14, 24, 25, 26, 27, 28, 29, 30, 31	Preambular Paragraphs 3, 7, 11 Article 8.1, 8. 2 (a) (b) (c) (d) (e) 11, 12, 13, 20, 25, 26.1, 26.2, 26.3, 27, 28.1, 28.2, 31, 32

CULTURAL DIVERSITY/ CULTURES/ CUSTOMS/ CUSTOMARY RIGHTS/ COLLECTIVE RIGHTS	Principles 2, 4, 7, 9, 11, 13, 15, 21	Articles 2.2.b, 4, 7, 11	Preambular paragraph 8 Articles 4.1, 4.2, 8.1, 8.2, 13.1, 13.2, 14 (14.1), 17	Preambular paragraphs 1, 2, 6, 8, 9, 16 Articles 7(a)(d), 12, 14, 25, 26, 28, 29, 30, 31, 32, 33, 34	Preambular paragraphs 2, 3, 7, 10, 11, 16 Articles 1, 8 (a) (d) (e), 11, 13, 25, 26, 27, 31, 32, 33, 34, 40
ENVIRONMENT/ NATURE/ BIODIVERSITY/ SUSTAINABILITY/ CONSERVATION	Principles 4, 8, 11, 13, 21		Article 4.1, 13.2, 15.1., 32, 23	Preambular paragraphs 9 Articles 12, 24, 25, 26, 27, 28, 29, 30, 31	<u>Preambular paragraph 11</u> Articles 11, 24.1, 25, 26, 27, 31, 32
OWNERSHIP/ POSSESSION/ CONTROL/ PERMANENT CONTROL	Principles 2, 4, 5, 7, 8, 9, 11, 13, 15, 21,	Articles 11, 13	Articles 14 15.2, 17.3.	Preambular paragraphs 6, 8 Articles 12, 25.1, 27, 28, 29, 30,	Preambular paragraphs 7, 10 Articles 11, 25, 26, 28.1, 28.2, 31.1, 31.2,
OCCUPANCY/ ACCESS/ BENEFITS/ ABS	Principles 13, 21	Articles 11, 13	Articles 13.1, 13.2, 14 (14.1), 15.2, 16.1, 16.4, 17.1, 17.2, 17.3,	Articles 12, 24, 25, 26, 27	Articles 11, 25, 26, 27, 28, 30, 32

FREE, PRIOR, INFORMED CONSENT (FPIC)/ PRIOR INFORMED CONSENT (PIC)/ FULL PARTICIPATION	Principles 5, 13	Articles 12.01.14	Article 16.2	Articles 10, 12, 19, 20, 27, 28, 30	Articles 10, 11.1, 11.2, 19, 28, 32.
CONSULTATION/ COOPERATION/ PARTICIPATION			Articles 5c, 15.1, 15.2, 17.2, 23.1.	Articles 28, 37, 40	Articles 18, 19, 27, 28, 30, 31, 38, 41
NATIONAL LAW/ DOMESTIC LAW/ „WHERE APPROPRIATE“/ „IF COMPATIBLE“		Articles 7, 12.1, 13	Articles 8.1, 8.2, 14.2, 14.3, 15.2, 16.2, 16.3, 16.4, 18, 23	Articles 10, 23, 37	Articles 10, 23, 26, 27, 30, 31, 32, 38
SELF DETERMINATION/ INTERNATIONAL LAW//SOVEREIGN TY DE- COLONIZATION	Principles 2, 4, 5, 7, 9, 11, 13, 15, 21		Article 1.3	Preambular paragraphs 5, 6, 8, 14 Articles 1, 2, 3, (4), 7 , 20, 23, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 42, 43, 45	Preambular paragraphs 6, 7, 10, 16, Article 1, 2, 3, (4), 7, 8, 23, limited: (26.2), 31, 32.2, 32.3, 33, 34, 37, 38, 40, 43, 45, 46

DEVELOPMENT	Principles 2, 4, 8, 9, 11, 13, 15, 21	Articles 2.2b, 6, 13, 18	Articles 2.2b,15.2, 16.4, 23	Preambular paragraphs 5, 8, 9, 14 Articles 14, 19, 20, 21, 23, 26, 27, 28, 29, 30, 31, 42	Preambular paragraphs 6, 10, 11, 16 Article 13, 18, 19, 20, 23, 26, 31, 32, 43
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3.4.3 The Evaluation

3.4.3.1 The 22 Principles:

„**Land, Territory and Resources“ (LTRs):** Because of the absolutely immanent arguments/facts manifested in **Principle 4**, I will quote the entire article once more:

Indigenous nations and peoples are entitled to the permanent control and enjoyment of our_ aboriginal ancestral-historical territories. This includes air; space, surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies_ based on these resources.

Principle 4 contains most powerful language deriving from – though not mentioning it - the right to self determination. The language clearly incorporates the holistic interconnectedness concerning their aboriginal ancestral-historical territories and “the environment”, consequently, constitutes Cultural Heritage and asserts the permanent control over it – including surface and subsurface rights, renewable and non-renewable resources, and the economies based on these resources. Thus, the “permanent control” encompasses the entire territories including all resources. (criteria 1,2,3,4,5,10,(11))

In combination with **Principle 5**, access to (“to share and use the land”) is only permitted through the concerned indigenous nation's or people's free and informed consent and the recognition of its underlying and inalienable title. (criteria 1,7,5,10,)

Principle 7 requests immediate restitution, including compensation for the loss of use in regards to

affected lands, without extinction of original title as well as to regain possession and control of sacred sites. (criteria 1,2,3,5,10)

Additionally, **Principle 11** asserts continuing ownership and control of Indigenous nations and peoples material culture, referring to archaeological, historical and sacred sites, artifacts, designs, knowledge and works of art. Like **Principle 7** it demands the right to regain items of major cultural significance. (criteria 1,2,3,4,5,10,11)

Principle 13 addresses technical, scientific or social investigations in relation to Indigenous nations or peoples, or their lands, and determines their prior authorization¹⁰³ as well as continuing ownership and control as a prerequisite. (criteria 1,2,3,4,5,6,7,10,11)

Principle 8 condemns States' participation regarding the “involuntary displacement of indigenous populations” and the subsequent economic exploitation or military use of their territory. (criteria 1,2,4,5,11,)

Apparently, these assorted Principles distinctly address above mentioned criteria in a quite holistic, encompassing way. All of them refer to the lands and territories which incorporate the Cultural Heritage and request ownership and control of those lands, territories, inherent Cultural Heritage, “including all resources, whether material and/or spiritual”. Therefore, FPIC, prior authorization as well as restitution are the logical consequence.

Principle 21 focuses more on the indigenous knowledge part of Cultural Heritage in asserting indigenous nations' and peoples' right to their own traditional medicine, including the right to protection of vital medicinal plants, animals and minerals as well as their right to determine, plan, implement, and control the resources respecting health, houses, and other social services affecting them. (criteria 1,2,3,4,5,6,10,11)

In line with Principle 21, **Principle 9** emphasizes the recognition of indigenous nations and peoples' laws and customs which must be recognized by States' legislative, administrative and judicial institutions and, in case of conflict with State laws, shall take precedence. (criteria 2,3,5,10,11)

Accordingly, Indigenous Peoples Cultural Heritage, cultural diversity including their customs and collective rights related to “their environment” are being promoted and even more fundamental, permanent, continuing ownership and control is being asserted. Even in case of conflict with States',

¹⁰³Comparable to FPIC

Indigenous Peoples' laws and customs shall prevail¹⁰⁴.

Principle 2 unmistakably announces Indigenous nations and peoples right to self-determination, implying “the right to whatever degree of autonomy or self-governance they choose” as well as “the right to freely determine their political status, pursue their own economic, social, religious and cultural development, and determine their own membership and citizenship without external interference.” (criteria 2,3,5,10,11)

In combination with **Principle 15**, which claims that Indigenous nations and peoples are subjects of international law (criteria 3,5,10,11) **Principle 2** distinctly asserts the full right to self-determination and in excluding external interference, demands decolonization from so called colonialists “domestic and national laws”.

The 22 Principles represent an all encompassing manifestation of Indigenous Peoples' rights, based on self-determination. The assorted ones perfectly visualize/emphasize the inextricably interdependence of “culture”, “customs” and “LTRs”, which mold Indigenous Peoples' Cultural Heritage. External access (**criteria 6**) to it is only permitted if FPIC, permanent control and ownership rights of Indigenous Peoples are fully recognized and respected

Solely criteria 6, 8, and 9, which represent criteria already modified by colonialism and domination, are scarcely, or not at all embedded within the 22 Principles.

These Principles are In sharp contrast to the next instrument:

The ILO Convention 107:

As already stated in the first part of this thesis, the ILO 107 was primarily intended to assimilate, or in the ILO's terms, “to integrate” Tribal Populations into the national societies. Nevertheless, as highlighted, the Convention contains some remarkable articles, specifically according to Indigenous Peoples' cultures, their environment, their Cultural Heritage and LTRs.

I will particularly focus on the most focal criteria: 1, 2, 5 and 10.

In regards to **criteria 1**, LTRs, but also encompassing criteria 3 cultural diversity, customs..., 5 „Ownership“/“Possession“/“Control“/“Permanent Control“, 6 Access, 7, 8,9, 10 Development, the

¹⁰⁴Unfortunately, as will be illustrated, this is in sharp contrast to all other documents.

subsequent articles of ILO 107 do have relevance:

Article 6 refers to “the improvement of the conditions of life...of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations.” Special projects for economic development of the areas in question shall also be so designed as to promote such improvement. (criteria 1, 10)

Article 11.: right of ownership, collective or individual,...
over the lands which these populations traditionally occupy shall be recognised (1,3,5,10)

Article 12. 1.: The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations. (1,6,7,8,11)

Article 13

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.
2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members. (criteria 1,3,5,6,9,10)

Quite remarkably, although the ILO 107 aims for “integration” and includes, as already mentioned, assimilatory elements, it also implies strong terminology in regards to the recognition of Indigenous Peoples' rights. Thus, **article 11** even promotes the recognition of Indigenous “populations” collective and individual ownership land rights (criteria 1, 5). Nevertheless, the same article also applies the term “traditionally occupy” - on the one hand, quite far reaching due to the recognition of ownership rights concerning traditional territories (before the conquest) which can be interpreted in favor of decolonization (criteria 10). On the other hand, the mere “occupation” (criteria 5) of land

stands in contradiction to full and “permanent” ownership rights - such as asserted within the 22 Principles – and can be construed as reducing the article's inherent terminological power.

Analyzing further, the picture becomes more visible and unveils its purpose: **Article 13** once more ascertains respect concerning indigenous “populations” rights of ownership and use of land especially regarding indigenous customs relating to its transmission (criteria 1,3,5) The article also contains the States' protection to secure these rights “belonging to such members” against “persons who are not members”. (criteria 1,3,5, 9) But to protect in order to secure also implies the State's capability to interfere. This dominant role to interfere and decide is confirmed in subsequent wording such as “within the framework of national laws and regulations”, and in regards to indigenous procedures “in so far as they do not hinder their economic and social development”. (criteria 9,11).

Article 12.1. speaks the same language, granting “free consent” (criteria 7) in matters of indigenous “populations” relocation from “their habitual territories” (criteria 1). Notwithstanding, the same sentence includes the State's determined precondition: “except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations. (criteria 7,8,11) Obviously, this is not what Indigenous Peoples requested within their principles 2 decades later.

Thus, “national economic development” prevails over Indigenous Peoples' land usage and ownership rights. **Article 6** implications regarding “indigenous population's improvement of the conditions of life” does not provide any change. Eventually, it also affirms the national interest and dominance concerning “the over-all economic development of areas inhabited by these populations” (criteria 11).

Thus, despite quite exceptionally significant terminology in association to indigenous “populations” land and territories, ILO Convention 107 distinctively assures the States'/nations' predominance in related matters. LTRs as a connected whole are not part of the document. Questions relating to “resources” are not being mentioned. Matters of criteria 4 „Environment“/“Nature“/“Sustainability“/“Conservation“ are lacking as well. The same accounts for criteria 10. „Self Determination“/“Sovereignty“/“Decolonization“/“International Law“: The right of self-determination in association to decolonization could be interpreted, as stated above, according to ownership rights of traditionally occupied territories. However, this interpretation

would contradict to all other articles and, as a consequence, has to be falsified.

Interestingly, the Convention's **article 18** refers to “**Cultural Heritage**” (criteria 3):

1. Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.
2. Handicrafts and rural industries shall be developed in a manner which preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

Thus, article 18 promotes the “concerned populations” handicrafts and rural industries in regards to their development and urges for the preservation of their cultural heritage. (criteria 2,3,11). Yet, the holistic character of Indigenous Peoples' Cultural Heritage is not conveyed nor comprehended/appreciated within the document. Solely the “economic development” is being highlighted in this regard.

Further articles which are expressing above as well as being of relevance concerning indigenous “populations” criteria 3, 9, and 4 are:

Article 2.2.b includes “promoting the social, economic and cultural development of these populations and raising their standard of living;”. (criteria 3, 11)

Article 4 calls for “the protection and integration of the populations” and especially highlights the “cultures and religious values and the forms of social control” and identifies “problems which face them both as groups and as individuals when they undergo social and economic change;” Further it addresses “the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised;” (criteria 3, 9, 11)

Article 7 promotes “regard” of the populations' “customary laws” according to their “rights and duties” and permits to “retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes”. (criteria 3, 9)

No doubt, ILO Convention 107 aims for “national unity”, to “integrate” and – this is the already mentioned paradox in the thesis' first part - dissolving Indigenous Peoples' cultures in order to create a rather homogenous national society. Notwithstanding, it apparently recognizes their customs, cultures, religious values and institutions - it even claims to protect these - as long as they are compatible with the national society - and acknowledges the inherent dangers of disrupting their cultures. Moreover, the ILO Convention 107 intends to increase their “social, cultural and economic development”, and specifically refers to the areas inhabited by the said populations: If such areas are affected by development projects, the projects have to improve the indigenous and tribal populations conditions of life and development as well. Article 12 even recognizes the populations' “habitual territories” and opposes the populations' removal without their “free consent”, except for certain reasons which are based on the overall wealth of the national society. Outstandingly, the “right to ownership, collective or individual” in regards to the “traditionally occupied lands” “shall be recognised” too.

The ILO Convention 107 also highlights the preservation of the populations' cultural heritage through the promotion of their handicrafts and rural industries. Despite a quite naïve and insufficient reference to the holistic nature of Indigenous Peoples' cultures, the Convention apparently contains most relevant terminology: “collective (and individual) ownership”, “free consent”, “land, habitual territories”, “traditionally occupied territories”, and “cultural heritage”.

Thus, already back then in 1957 the ILO Convention 107 implied a sensible awareness about Indigenous Peoples' cultural specifications and lifeways. Quite a few of its articles distinctly promote the protection of land, territories and even related collective ownership rights as well as Cultural Heritage - (though quite poorly interpreted). However, the Convention still remains to be an assimilationist instrument which does not recognize Indigenous Peoples self-determination and encourages a unified, national society: Indigenous Peoples are subsumed as a part of this society in which they are obliged to integrate in order to develop. Although the nation-state is encouraged to respect indigenous customs and cultures, the nation's interest predominates in matters of national development and as such decides upon the access to Indigenous Peoples' LTRs. Consequently, ILO Convention 107 is an insufficient international instrument to protect Indigenous Peoples' LTRs and Cultural Heritage.

3.4.3.3 The ILO Convention 169:

Due to various developments, especially the international Indigenous Peoples' Movement and further decolonization, the ILO had to react and revise its policy towards Indigenous Peoples.

Despite manifold efforts in order to increase respect towards Indigenous Peoples' cultural rights, I would like to underscore the fact that fundamental structures regarding Indigenous Peoples' most relevant demands according to LTRs and Cultural Heritage were and are still ignored within this document. Thus, the following analysis, while particularly referring to LTRs and Cultural Heritage, is intended to reveal the continuing similarities of the two conventions.

Parts of both Conventions' Preambles already clearly indicate the difference in between the two:

ILO 107:

Considering that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population.... (ILO Convention 107, Preamble, 5th paragraph)
(criteria 9)

ILO 169:

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and
Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding.... (criteria 3, 4, 5/8, 8, 9, 11)

In contradiction to ILO Convention 107 which, despite acknowledgement of Indigenous Peoples' diverse cultures (criteria 3), intends their “integration” into the national society (criteria 9), ILO Convention 169 recognizes Indigenous Peoples' distinct identity (criteria 3) and their pursuit to maintain and “control” their different cultures. (criteria 5/8). It emphasizes “cultural diversity” and even acknowledges Indigenous Peoples' contributions, specifically concerning “social and ecological harmony” - associating these to “environmental issues” (criteria 4).

Thus, ILO 169 promotes autonomy rights instead of blunt “integration”, such as article 2(b) expressively articulates : *promoting the full realisation of the social, economic and cultural rights*.

of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions: (criteria 3, 2, 11)

Yet, ILO 169 does not fundamentally differ from its predecessor : They essentially resemble in prioritizing the framework of states/nations, related territorial integrities' status quo, and nations' domestic omnipotent dominance - ignorant to (former) colonization and prevailing oppression. This is also ather obviously sustained by ILO's 169 preambular: “within the framework of the States in which they live”. (criteria 9)

However, the assorted subsequent articles are also intended to highlight ILO 169 Convention's progress in matters of a holistic perspective regarding Indigenous Peoples' territories, cultures and so called “environment” (criteria 4) as well as their participation/cooperation (criteria 8) in matters affecting them:

Article 4 serves as a good example to illustrate just mentioned:

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

Thus, the article conveys several criteria, it urges, inter alia, for the safeguarding of individuals, their property, which prerequisites certain ownership rights (criteria 5), cultures (criteria 3) and their “environment” (criteria 4). Consequently, acknowledges the mutual interdependency among those elements. Nevertheless, it also contains the term “as appropriate” (criteria 9) as well as “safeguarding” - both imply the state as a final decision-maker.

Other articles still adhere to the original wording of ILO Convention 107, but append above stated content:

Article 5(a) (ILO 169) and **Article 4(a) (107)** are comprised of almost similar terminology: Article 5(a) solely adds “spiritual values” to “social and cultural values”. More significantly, it adjoins “recognized and protected” instead of “protection and integration” and in 5(c) refers to “participation and cooperation”. (criteria 8)

Article 7 (ILO 169) and **Article 6 (ILO 107)** share the same content as well. Article 7.2 incorporates Article 6, just adding a few specifications, such as “with their participation and co-operation”. (criteria 8) Yet, **article 7.1, 7.3 and 7.4** imply some new, quite relevant input particularly regarding Indigenous Peoples and the environment:

Article 7

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 formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. (criteria 11, 3, 1, (2), 6, (5), 8, 9)

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. (criteria 9, 8, 3, 4, 11, 6)

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit. (criteria 9, 8, 4, 1,)

ILO's 169 **article 7** affirms broadly and in much more detail rights to autonomy such as “decide their own priorities for the process of development....and to exercise control”, “participate”, “co-operation”. (criteria (5), 8)

Particularly Article 7.3 as well as 7.4 are rather specific in urging participation/co-operation in regards to “land”, “environment” and “territories”. (Criteria 1, 4, 8) Especially in “ensuring studies concerning social, spiritual, cultural and environmental impacts of development activities” and the implementation of related criteria and in aiming for the protection and preservation of “the environment of the territories they inhabit”. Again, the holistic characteristics of Indigenous Peoples' Cultural Heritage – although never terminologically applied - is being appreciated as well as cooperation assured. Admittedly, positive amendments/revisions in comparison to ILO 107, yet rather limited, due to language such as “to the extent possible” and “whenever appropriate” which apparently emphasizes the domestic level of decision-making - the nation's governmental power to decide and control. (criteria 9) Thus, effective control deriving from self-determination and consent (criteria 5, 7, 10) is replaced by terms like co-operation, participation and “consult”, constituting the colonial order and dominance over Indigenous Peoples.

The exceptional relevance of ILO **articles 13 to 18** in reference to LTRs was already extensively emphasized in the first part of this thesis.

Nevertheless, a few essential terms shall be recalled:

Outstandingly, **Article 13** almost captures the holistic sense of Indigenous Peoples' **Cultural Heritage**. It refers to land and territory as well as associated spiritual implications - but it does not address “resources”. (criteria 1, 2, 3, 4) Moreover, it merely refers to “occupancy” and “usage” instead of “possession” or “ownership” rights. (criteria 6)

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.

Once more, ILO 169 decided to apply ILO 107 wording to express “rights of ownership”: Article 14.1 is almost congruent with ILO's 107 Article 11. This shall be seen in a rather positive light due to the original, powerful implication of granting ownership rights to Indigenous Peoples according to lands and territories. (criteria 1, 3, 5) Notwithstanding, references to the “national system” are being articulated, the diminishing term “occupy” included. (criteria 9, 6)

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.

Adequate procedures shall be established within the national legal system to resolve land claims by

the peoples concerned.

Article 15 is dedicated to resources: Its separation from above mentioned articles according to “ownership and possession” of land and territory is certainly intended: Ownership is merely explicitly mentioned in relation to the State. (criteria 5) Consultation and participation rights are promoted but do not refer to FPIC or any other form of consent. (criteria 8). Article 15 precisely stresses the dominant actor: “The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages....” (criteria 9, 6) Thus, eventually, the State owns and controls the resources and its disposal.

Article 15

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.

Article 16 once more includes language of its predecessor's **article 12**. Both conventions convey rights to FPIC, though solely according to the “removal from lands” (criteria (7), 8). Though also in this regard FPIC is not guaranteed. More than 30 years afterwards, FPIC is still barely and just very vaguely part of the revised convention. Merely **article 6** addresses consent slightly more general:

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. (criteria (7), 8)

Articles 17 and 18 include certain rights in order to protect Indigenous Peoples' land against intruders and to consult them before “alienating their land” - a rather weak form of protection which

distinctly visualizes hierarchical structures of dominance. (criteria 1, 6, 8)

Remarkably, although article ILO's 169 **article 23** is much more encompassing than **article 18** concerning “important factors in the maintenance of their cultures” even referring to “self-reliance” and “whenever appropriate”, ensure that these activities are strengthened and promoted” it does not, unlike its predecessor, include the essential term **“cultural heritage”**. The typical terms “wherever possible” and “whenever appropriate” further weaken the article's essence. (criteria 3, (2), 9)

Besides promoting indigenous health services (art. 25), languages (art. 28), education (article 30) one further article pays respect to the Indigenous holistic concept of culture:

Article 32

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields. (criteria (2), 3, 4, 8)

However, although ILO Convention 169 does particularly imply significant elements towards cultural understanding and respect, eventually, it incorporates the same old patterns of dominance which it is perpetuating. The instrument could be interpreted in the light of the already presented “trust relationship”: The omnipotent government, in most cases the former colonizer, grants certain rights, even autonomy, but remains to be the decision-maker. The land and territories - remarkably called to be “owned and possessed” by Indigenous and Tribal Peoples - can be accessed if the government so wishes. Although the articles partly include strong terminology, essentially, these territories are still comprehended as being only occupied by Indigenous Peoples.

Concerning resources, even weaker language is inserted and applied: *“The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded”* - whatever that means, it does certainly not respect ownership rights such as proclaimed within the original 22 Principles elaborated by Indigenous Peoples as a fundament within the international arena.

As already mentioned, both Conventions include relevant articles regarding Indigenous Peoples' rights to land and territory. Particularly ILO Convention 169 promotes cultural autonomy instead of

integration. Nevertheless, unlike its predecessor, it lacks references to “Cultural Heritage”. Both Conventions do not emphasize Indigenous Peoples self-determination and, as a consequence, are very limited in their application concerning effective protection in regards to ownership rights of Indigenous Peoples' LTRs.

3.4.3.4 The DDRIP and UNDRIP

The next documents to be analyzed and juxtaposed regarding LTRs and Cultural Heritage are the UN Declaration on the Rights of Indigenous Peoples of 2007 (the UNDRIP) and its predecessor, the Draft Declaration on the Rights of Indigenous Peoples of 1994.

The DDRIP

As already stated, the DDRIP 1994 was the first encompassing, groundbreaking international draft document concerning Indigenous Peoples' rights. It was also the only declaration fully consented to as well as primarily elaborated by Indigenous Peoples. As such, though, as already manifested in part 1, it implied a mitigated terminology in comparison to the 22 Principles, it still conveyed the same ideology and message based on self-determination and decolonization.

According to LTRs, the DDRIP was a quite unique milestone: Unseen before, it conformed with Indigenous Peoples assertions regarding Cultural Heritage and incorporated the fusion of their “land, territory and resources” for the very first time in an official document/instrument. Moreover, it condemned associated colonial domination:

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. (Criteria 1, 5, 10, 11)

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, (criteria 1, 2, 3)

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

(criteria 1, 2, 3, 5, 10, 11)

Thus, already the DDRIP's Preamble consists of almost all crucial criteria described before, particularly in relation to LTRs. LTRs are distinctly manifested as a core element, recognized as being indispensably interwoven with Indigenous Peoples' cultures – including spiritual traditions – and as a precondition of Indigenous Peoples' development. Consequently, colonialism as a cause of deprivation and dispossession thereof is identified as denying their right to development “in accordance with their own needs and interests”. Therefore, the “urgent need to respect Indigenous Peoples' inherent rights”, especially regarding their LTRs is recognized, to control the latter by themselves in order to achieve their own development is being promoted.

In referring to Indigenous Peoples' “rights and characteristics”, subsequently grounding these in LTRs and related “political, economic and social structures” as well as Indigenous Peoples' “cultures, spiritual traditions, histories and philosophies” a pattern, which could be appropriately interpreted as “**Cultural Heritage**”, is being manifested. This relationship is further affirmed in the preamble, promoting Indigenous Knowledge, especially in regards to the “environment”:

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,
(criteria 2, 3, 4, 11)

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures,
which constitute the common heritage of humankind,

Juxtaposing the DDRIP's Preamble to the final result, the UNDRIP, one can already identify slight differences, which, in my opinion, decrease its affiliation to LTRs: Instead of highlighting LTRs in reference to “inherent rights of Indigenous Peoples” it deletes that specific part and reduces the paragraphs to “political, economic and social structures”, Indigenous Peoples' cultures, spiritual traditions, histories and philosophies”.

Nevertheless, other references according to LTRs remain and are identical with its predecessor. However, using the phrase “Concerned that indigenous peoples have suffered from historic injustices....” instead of “Concerned that indigenous peoples have been deprived of their human

rights and fundamental freedoms....” might affirm my assumption of diminishment.

Additionally, it has to be mentioned that assorted articles of both Preambles do not clearly address Indigenous Peoples' ownership rights concerning their LTRs – the DDRIP referred to respect and promotion of Indigenous Peoples inherent rights, particularly LTRs, which was to be deleted in the UNDRIP. Both solely refer to the infamous role of colonialism concerning Indigenous Peoples' dispossession of their LTRs but do not explicitly mention existing Indigenous Peoples' ownership rights. However, both urge for Indigenous Peoples' control over their LTRs by which has to be interpreted as including certain ownership rights – but not permanent control/full ownership or the inherent title, such as claimed in the 22 Principles.

The articles below will disclose these issues in more detail:

Seemingly, the DDRIP's article 7 confirms the above:

“Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide....”

The application of the terms “ethnocide” and “cultural genocide” were deleted in the UNDRIP due to the argument that the definition of “genocide” would be sufficient enough to address mentioned violations under DDRIP's article 7. Notwithstanding, explicitly highlighting the specifications encourages a stronger language, particularly in regards to LTRs and Cultural Heritage: Article 7 expressively opposed (a) “Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;(criteria: 2, 3, 10,)

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (criteria 1, 2, 5,)

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures; (criteria 2, 3, 10)

Eventually, UNDRIP's **article 8** covers most of former **article 7**, including the same wording concerning LTRs (8b) but replacing “any form of assimilation” with “any form of forced

assimilation or integration” (8d).

Article 10 of both documents is identical: *Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*

The UNDRIP merely adds “prior” to the “free and informed consent”. Besides that, the article matches criteria 1, 7 and to some extent, 9. FPIC (criteria 7) is definitely being emphasized and affirms Indigenous Peoples' right to their lands and territories (criteria 1). Quite critically scrutinized has to be the phrase “where possible”, which meets criteria 9 and poses the question about who or what determines the option of return.

Article 11 differs from each other: The DDRIP's article 11 articulates Indigenous Peoples' right to *special protection and security in periods of armed conflict* and opposes in 11 (c) any force against *indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes*. (criteria 1)

In contrast, the UNDRIP's **article 11** promotes the Indigenous Peoples' *right to practice and revitalize their cultural traditions and customs*, including the right to *maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature*.

As such, this article strongly affirms Indigenous Peoples' Cultural Heritage, especially regarding Indigenous traditional knowledge. (criteria 2) The quoted part 11.1 is identical with the DDRIP's article 12. Notwithstanding, article 12 of the DDRIP requests *the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs*, thus, clearly highlighting FPIC (criteria 7) and property rights (criteria 5)

Contrary, the UNDRIP's **article 11** merely advises States to provide redress, *which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural*.

intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Apparently, the UNDRIP's article 11 is a quite softer version of its predecessor. It is less about the recognition of ownership rights and restitution of property (criteria 5), it rather seeks “conjunction” and “cooperation” (criteria 8) and can even be understood as sustaining access and benefit sharing (ABS) (criteria 6)

A similar pattern is perceivable concerning the DDRIP's **article 13** in reflection to the UNDRIP's **article 12**: Both significantly imply and convey the meaning of Indigenous Peoples' Cultural Heritage (criteria 2), their first part is identical:

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. (criteria 1, 2)

Thus, the article specifically promotes Indigenous Peoples' spiritual and religious Cultural Heritage (criteria 2), and holistically connects it to the land – most visible through religious and cultural sites (criteria 1, 3). It further calls for control (criteria 5) repatriation, and access in privacy (criteria 6).

Despite, the articles differ in the second part. While the DDRIP version further urges to ensure indigenous sacred places' preservation (criteria 1, 2, 3, 8), the UNDRIP recommends the States *to seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession.... in conjunction with indigenous peoples....* (criteria 6, 9)

Again, the UNDRIP's **article 12** appears to be softer than the original version: “to seek” does not articulate any obligation or liability. Moreover, “enabling the access and/or repatriation” does certainly not incorporate and articulate the same rights impact. However, it has to be stated, that both instruments lack rather strong language, like indicating ownership rights over the spiritual Cultural Heritage, such as clearly manifested in the 22 Principles.

DDRIP's **article 14** equals UNDRIP's **article 13**. Both encourage Indigenous peoples' right “to

revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons” and call for the States' to ensure this right. (criteria 2, 3, 9, 11) Consequently, certain far reaching, encompassing autonomy rights in regards to Indigenous Peoples own development (criteria 10) through their Cultural Heritage is being articulated.

The DDRIP's **articles 19 to 23** share almost congruent content with the UNDRIP's articles **18 to 23**. Their focal issue is Indigenous Peoples' development (criteria 11) and development affecting Indigenous Peoples (criteria 9), which certainly is not the same. Thus, the DDRIP's articles **19 and 20** request the right to “participate fully” (criteria 7) in “decision-making in matters which may affect their rights, lives and destinies” as well as “ in devising legislative or administrative measures that may affect them”. The DDRIP also calls for “representatives chosen by themselves” as well as “procedures determined by them” and “own indigenous decision-making institutions”. The UNDRIP implicates similar but not exactly the same expressions. Thus, it solely applies the term “participate” (criteria 8) instead of “participate fully” (criteria 7). Particularly, the UNDRIP's **article 19** differs from its predecessor: It calls for consultation and cooperation in good faith....in order to obtain their free, prior and informed consent (criteria (7), 8) instead of the DDRIPs **article 20** *States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.*(criteria 7)

Although the differences seem to be small, they do certainly matter. The DDRIP, though already applying weaker terminology in comparison to its primordial fundament, the 22 Principles, stresses language in the sense of self-determination (criteria 10), while the UNDRIP further modifies the DDRIP's articulations to promote autonomy. For example, the UNDRIP's **article 20** does not emphasize a strong claim to FPIC, the latter is merely formulated as a goal.

However, as the DDRIP's articles 21 and 23 as well as the UNDRIP's 20 and 23 indicate, *“Indigenous Peoples have the right to maintain and develop their political, economic and social systems to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.” and “have the right to determine and develop priorities and strategies for exercising their right to development”.*

Accordingly, development (criteria 11), cultural diversity (criteria 3) and also Cultural Heritage (criteria 2) is related to each other in order to enable a self-determined development by Indigenous Peoples themselves – nevertheless, especially in regards to the UNDRIP, it is a rather limited

interpretation of self-determination.

Article 24 of the DDRIP once more promotes Cultural Heritage (criteria 2), specifically in regards to the “environment” (criteria 4): *Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.*

The UNDRIP terminology replaces “protection” through “conservation”, which, again, seems to be quite softer due to the lack of any specific reference to protect this sort of Cultural Heritage against biopiracy. Ownership (criteria 5) of such Cultural Heritage does not seem to be clarified.

Essentially relevant in regards to **LTRs and Cultural Heritage** occur to be the **DDRIP's articles 25-30 and UNDRIP's articles 25-32:**

Article 25

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

Article 25 incorporates the holistic concept of Indigenous Peoples' Cultural Heritage very well and promotes its continuity. It covers the spiritual and material relationship to LTRs (criteria 1, 2, 3, 4) in a rather broad sense and confirms ownership rights which are traditionally rooted in the past (criteria 5, 6)

Unfortunately, the successors article 25, though almost identical, lacks the term “material”, consequently, eliminating an essentially relevant part of holistic Cultural Heritage.

One core element of the DDRIP is article 26. Although it does not fully replicate Principle 4 of the 22 original Principles, it still manifests the focal criteria in a quite exceptional, powerful way:

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories.

including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Apparently, the article covers every strong criteria (criteria 5, 6, 1, 2, 3, 4, 10, 11) in reference to ownership towards LTRs, “the environment” and a self-determined development.

However, the UNDRIP's version of **article 26** has not entirely kept the original content:

- 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.*

The UNDRIP's final version includes some quite controversial content in comparison to the DDRIP: **Article 26.1** does not represent an exact formulation, it just mentions to “have the right to LTRs” - whatever that practically means and entails. In doing so, it affirmatively refers to the traditional roots of these rights. Rather essential is **Article 26.2** due to its stronger and more detailed implications: “have the right to own, use, develop and control the LTRs”. Yet – although Article 26.2, inter alia, mentions “traditional ownership” - it merely links LTRs ownership to the present: “LTRs that they possess”. In combination with Article 26.1 a rather solid frame of rights and claims towards LTRs can be assumed.

Notwithstanding, in juxtaposition to the original DDRIP article, its inherent power remains blurry and reduced. (criteria 1, 2, 3, 5, (9)) The DDRIP version additionally refers to the “total environment” (criteria 4) and the “full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources.” (criteria 1, 2, 3, 4, 5, 7, 10, 11) Neither of the two powerful formulations is part of the UNDRIP. It solely urges for the

“recognition and protection of LTRs” by the state and refers to “due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned”. To some extent, it can be considered as being more about autonomy rights than the recognition of Indigenous Peoples' self-determination. (criteria 9)

The UNDRIP consists of a new article concerning LTRs, **article 27**, which states:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 27 acknowledges Indigenous Peoples' Cultural Heritage in referring to the “recognition” of their “laws, traditions, customs and land tenure systems” (criteria 2, 3,) pertaining to their LTRs (criteria 1). This “recognition” presumingly comprises of ownership rights and rights to use their LTRs. The term “their LTRs” emphasizes these rights. Nonetheless, the mere “right to participate in this process” instead of Indigenous Peoples' right to be main decision-makers, ensured through their right to FPIC, is not sufficient in reflection to its predecessor and particularly soft comparing to the original 22 Principles.

The DDRIP's **article 27**, which has to be compared to the UNDRIP's **article 28**, asserts restitution rights in regards to LTRs.

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. 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.

It strongly stresses restitution instead of redress or compensation. This is also the difference between the DDRIP's article 27 and the UNDRIP's article 28: Although almost congruent, the UNDRIP promotes redress “by means that can include restitution or, when this is not possible, just, fair, and equitable compensation....”. In 28.2 it additionally mentions “.... shall take the form of

lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”

In essence, like before, the articles' content is quite similar and convey criteria 1. However, though the DDRIP also refers to “compensation”, it emphasizes “restitution”, thus, it highlights ownership and property rights. (criteria 5). Contrarily, the UNDRIP does promote “redress”, consequently focuses more on “compensation”, which is less about “ownership” and closer to “Access and Benefit Sharing” and “cooperation” (criteria 6 and 8). Yet, it does neither deny Indigenous Peoples' ownership rights.

The DDRIP's article 28 particularly focuses on “environmental issues” in regards to Indigenous Peoples' LTRs:

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

“States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.”

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

The article clearly comprises strong language concerning “the environment” and Indigenous Peoples' LTRs (criteria 4, 1), manifesting the right to “the conservation, restoration and protection of the total environment and productive capacity.” This presumably includes ownership, possession, and encompassing decision-making rights, which also imply to decide about “military activities on their lands and territories”. (criteria 5 and 10) It further promotes “the assistance from States and through international cooperation” (criteria 10) and States' obligation to prevent any “storage *or disposal of hazardous materials*”.

The UNDRIP's modified version, article 29 and article 30, does not fundamentally deviate: Article 29.1 lacks “restoration” and the term “total” in referring to the environment and the reference to military activities. Though this obvious existent mitigation, it still provides a solid frame.

The UNDRIP's article 29.1 even expresses a stronger emphasis: Basically identical, it adds: “.... *no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples without their free, prior and informed consent.*” (criteria 7)

This could be understood as an advantage. Furthermore, it represents one of the two “hard FPIC” rights within the UNDRIP. On the other hand, it can also be interpreted as providing the opportunity to store and dispose hazardous materials, if the Indigenous Peoples decide so – probably to gain income due to poverty reasons.

The UNDRIP's **article 30** is already broadly discussed at in the first part of this thesis. It remains fundamentally controversial.

The following articles are specifically relevant concerning a subsequent topic – so called “**intellectual property rights**”, which will be examined in greater depth in an adjacent chapter of this thesis.

In this regard, the DDRIP's **article 29** is comparable to the UNDRIP's **article 31**, but they also differ from each other:

Article 29 states:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 31 states:

- 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
- 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

Due to the fact that Cultural Heritage, Traditional Knowledge (TK), Traditional Cultural Expressions, and particularly genetic resources (GRs) have evolved to a most relevant topic during the last decades, the UNDRIP's article 31 is more elaborated and specific, which can be seen as an advantage. For example, it does not only describe essential elements of Cultural Heritage, it even defines it with this term and related TK. (criteria 2). It includes quite strong terminology such as the “right to maintain, control, protect and develop” and “recognize and protect”. (**criteria 5, (10), 11**). Actually, the second part of the DDRIP's **article 29** is incorporated within UNDRIP's **article 31**. However, the rather significant first part is not included. Thus, there is no distinct reference to Indigenous Peoples' “entitlement to to the recognition of the full ownership, control and protection of their cultural and intellectual property” (criteria 5, 10) Undoubtedly, both articles adhere to rather strong terminology, but once more the UNDRIP veers away from its origin: the 22 Principles' solid framework.

The DDRIP's **article 30** once again provides the foundation for the UNDRIP's **article 32**. Article 30 manifests:

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. Pursuant to agreement with the indigenous

peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”

The UNDRIP's article 32 states:

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.

Apparently, the two articles are almost similar. Both emphasize Indigenous Peoples' power as decision-makers regarding their LTRs and associated development (criteria 1, 2, (5), (9), 11), the first paragraph of each is identical, as is the 3rd paragraph, besides differing terms “redress” and “compensation”. Notwithstanding, the exceptionally relevant second paragraph decisively distinguishes from each other: The DDRIP postulates “the right to require that States obtain their free and informed consent prior to the approval of any project affecting their LTRs” whether the UNDRIP merely stresses that “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 LTRs”.

Again, a relevant diminishment of Indigenous Peoples' LTR rights: Assumably, a “hard”, “solid” right to FPIC (DDRIP version, criteria 5, 7, 10) versus a rather “soft” right to FPIC – actually, “to consult and to cooperate.... in order to obtain” FPIC (UNDRIP version, criteria 8, (7), 9).

As a result, Indigenous Peoples do not independently determine about their development. States still reserve authority to interfere, if they decide so. The UNDRIP grants encompassing rights - notwithstanding, basically within the States structures, not threatening the colonial order of states' territorial integrities.

3.4.4 Concluding remarks concerning the analysis

In short, this analysis reveals a certain pattern: The elaboration of represented instruments is massively influenced by diverse powers – particularly the States fear to lose their dominance over LTRs, which used to be the property of Indigenous Peoples. Thus, the original 22 Principles and the resulting, already altered DDRIP, got substantially modified in order to prevent a true decolonization process. Even though all the scrutinized instruments/documents imply and convey various rights in recognition of Indigenous Peoples' diverse, distinct cultures, the officially adopted ones are rather limited in regards to meet the primordial demands of Indigenous Peoples: self-determination, the permanent control and ownership of their Cultural Heritage and related LTRs, FPIC. None of the instruments, neither the ILO Conventions, nor the UNDRIP, sufficiently recognize these rights. The granting of far reaching, encompassing autonomy rights is a step ahead towards a more respectful relationship with Indigenous Peoples. Nevertheless, it has to be doubted that this incorporating step leads – from an Indigenous perspective - into the right direction: to recognize Indigenous Peoples' self-determination and ensuring the protection of their Cultural Heritage.

In highlighting quite recent developments, the next chapter is intended to confirm the aforesaid assumptions: The proceeding of colonial structures under another disguise: The exploitation of Indigenous Peoples' Cultural Heritage, particularly concerning their so called “genetic resources” (GRs) and “traditional knowledge” (TK). - irrespective of existent instruments to “protect” Indigenous Peoples' rights.

3.5 Contemporary Battlefields - Attempted conquest of Indigenous Peoples' Cultural Heritage and Indigenous Peoples' resistance: The Convention on Biological Diversity (CBD) and the World Intellectual Property Organization's (WIPO)

3.5.1 The Context:

The context which has been providing the floor for subsequent conflicts primarily evolved during the early 90's and shall be originally seen in a rather positive light: the development of a critical awareness about the so called “environment”, affected by reckless resources exploitation, pollution and intoxication.

This relationship between “development” and “the environment” got first scrutinized in 1972 at the UN Conference on the Human Environment, held in Stockholm, however, a significant step forward represented the establishment of the UN World Commission on Environment and Development, environmental degradation in 1983. The related Brundtland report¹⁰⁵ of 1987 – also known as “Our Common Future” - initiated by the World Commission's Chair Gro Harlem Brundtland was groundbreaking: Problems such as the ozone depletion, global warming and water pollution were extensively targeted and entered into “mainstream” discourses. Equally important, the Commission elaborated the concept of sustainable development as an alternative approach to one simply based on economic growth.

As a consequence, “sustainability”¹⁰⁶ has evolved to a focal, multifaceted topic, originally comprised of “three pillars”:

105 c.f.: http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf

106 One most famous quote from in this regard: “which meets the needs of the present without compromising the ability of future generations to meet their own needs” (“Our Common Future”:1983) c.f.: <http://www.un-documents.net/ocf-02.htm>

- economic demands
- environmental resilience
- social equity.

Due to the fact that “environmental awareness” has become a major issue in regards to development, the UN General Assembly convened the largest event covering associated subjects: the United Nations Conference on Environment and Development (UNCED), 1992, in Brasil, Rio de Janeiro, also known as the “Earth Summit”

According to the UN “the primary goals of the Summit were to come to an understanding of “development” that would support socio-economic development and prevent the continued deterioration of the environment, and to lay a foundation for a global partnership between the developing and the more industrialized countries, based on mutual needs and common interests, that would ensure a healthy future for the planet.”¹⁰⁷

The Heads of State from over 108 countries participated, some 30 000 people from all around the world were present. The conference resulted in the subsequent agreements and conventions of utmost relevance :

- Agenda 21
- The Rio Declaration on Environment and Development
- The Statement of Forest Principles
- The United Nations Framework Convention on Climate Change (UNFCCC)
- The Convention on Biological Diversity

Interestingly, the 1987 Brundtland report refers to “indigenous and tribal peoples” several times. In contrast, though all of the five UN documents above incorporate the “indigenous” besides the UNFCCC – Agenda 21 even defines them as a “major group”¹⁰⁸ under Principle 22, - they are merely addressed as “Indigenous Population and local communities”. Thus, despite several references evident within the mentioned documents, especially about “Indigenous populations” and their traditional knowledge in matters of conserving “the environment”, Indigenous Peoples are denied to be recognized as collective, self-determined entities.

An instrument of outstanding international significance concerning Indigenous Peoples represents

107c.f.: <http://www.un.org/geninfo/bp/envirp2.html>

108c.f.: http://www.un.org/depts/german/conf/agenda21/agenda_21.pdf

the Convention on Biological Diversity (CBD). Therefore, the CBD and its policies towards Indigenous Peoples will be scrutinized in greater depth.

3.5.2 The CBD:

The CBD's elaboration had already begun a few years before the UNCED, when the United Nations Environment Programme (UNEP) assigned two Ad Hoc Working Groups to dedicate themselves on preparing an international legal instrument for the conservation and sustainable use of biological diversity. The result of the major Working Group - which in the meanwhile had become known as the "Intergovernmental Negotiating Committee" - was presented at the Nairobi Conference: A text concerning the world's biological diversity. A few weeks later the CBD text was opened for signature at the UNCED and entered into force one and a half years later, in December 1993. By that time, 168 countries had signed the treaty. At present, 193 member states are parties to the CBD. Its content is comprised of 42 articles, which are elaborated to meet the CBD's mandate, consisting the subsequent main objectives¹⁰⁹:

- The conservation of biological diversity
- The sustainable use of the components of biological diversity
- The fair and equitable sharing of the benefits arising out of the utilization of genetic resources – Access and Benefit Sharing (ABS)

The CBD's website announces: „The Convention on Biological Diversity was inspired by the world community's growing commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.“¹¹⁰

In regards to the World's Indigenous Peoples', this optimistic statement remains to be proven within the following assertions.

As already explicitly emphasized, Indigenous Peoples request the recognition of their specific role – frequently as stewards – deriving from and rooted in their Cultural Heritage, inextricably interwoven with their „environment“, its biological diversity fused with their cultural diversity. Thus, they demand the recognition of their collective rights, particularly concerning their LTRs,

109 c.f.: <http://www.cbd.int/intro/default.shtml>

110 c.f.: <http://www.cbd.int/history/>

FPIC and ownership rights, holistically merged within their collective right to self determination as peoples, such as all other peoples.

Several articles, including the preambular of the CBD, do address Indigenous Peoples, however, - this is the first fundamental flaw - they are never being mentioned as such.

The Preambular states:

Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Apparently, the CBD's Preambular notes the “traditional dependence” between “indigenous and local communities” and “biological resources”. (criteria 3, 4,) However, even though this relationship is acknowledged, the paragraph does not imply any rights to which Indigenous Peoples could adhere. They are, as already mentioned, not even recognized as “Indigenous Peoples”.

In addition, the paragraph's second part especially articulates the minor position of Indigenous Peoples. In expressing the sole “desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices” the CBD clearly assumes that, firstly, Indigenous Peoples are not the owners and in control of aforesaid resources as well as related traditional knowledge and, secondly, that they strive for sharing “equitably benefits” arising from its usage. (criteria 6, denying 5, urging 11)

Thus, the access towards these resources and associated traditional knowledge is taken for granted. Moreover, the amendment “....relevant to the conservation of biological diversity and the sustainable use of its components” further implies the presumption that someone – except Indigenous Peoples - obviously is in the position to decide about the relevance of these so called “traditional knowledge, innovations and practices ” and associated “components” concerning “the conservation of biological diversity”. (criteria 9, 4)

As will be proven, this position of dominance is most likely taken by the state.

Remarkably, the CBD's preambular acknowledges Indigenous Peoples' Cultural Heritage (criteria 2)

but simultaneously, through the application of assorted certain terms grounded in economics, asserts domination over it and promotes its colonization.

Even more critical relevance bear **articles 8(j)** and **15** of the CBD:

Article 8 especially entails important content in regards to Traditional Knowledge (TK):

Article 8. In-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices:

Already the first sentence of CBD's **article 8** contains two problems:

First, it merely addresses, as almost all UN instruments, “Contracting Parties”, which are solely UN member states. (criteria 9)

Debra Harry additionally explains: “And of course Indigenous peoples are not and cannot be parties to this treaty or any UN organ for that matter because membership in the United Nations is restricted to states. The procedural interface available for Indigenous peoples to participate in CBD processes is as accredited observers.” (Harry, Debra, 2012:707)

Secondly, the rather short introduction-sentence already implies quite controversial, ambiguous terms, permitting arbitrary actions by states: “as far as possible and as appropriate” (criteria 9)

As a consequence, these terms even reduce the already quite questionable subsequent content.

Article 8(j) partly reiterates the before mentioned implications of the CBD's preambular:

“...knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.... equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”

The article adds: “ Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

In fact, article 8(j) merely amends some details to the preambular's manifested implications. To “respect, preserve and maintain” (presumably criteria 2, 3, 4, 6, 8) could be interpreted in favor of Indigenous Peoples' collective rights to their Cultural Heritage. Contrarily, the applied terms “indigenous and local communities” and particularly “subject to its national legislation” (both criteria 9) clearly exemplifies its massive limitations: the state is the omnipotent decision-maker, the dominator, Indigenous Peoples are not to be recognized as owners, and are, from the colonizer's perception, deemed to be mere stakeholders, more or less tolerated as such.

Theses implications are slightly relativized due to another addition: “and promote their wider application with the approval and involvement of the holders of such knowledge...”

Thus, apparently, there exist “holders of such knowledge” - presumably “Indigenous and local communities” who should be “involved” and should give “approval” to “promote” the “wider application”.

Without the before mentioned limitations, these assertions could be quite supportive of Indigenous Peoples' rights towards their LTRs and Cultural Heritage. (even interpreted as being related to criteria 7 (FPIC, full participation) and 5 (ownership/possession/control) – nevertheless, based on actual limitations, “the equitable sharing of benefits is encouraged” - not guaranteed – and the access towards Indigenous Cultural Heritage is disclosed under the auspices of the dominator, the state, who decides through national legislation upon Indigenous Peoples destiny.

Parts of **article 15**, have to be seen as central due to its fundamental impact on the succeeding elaboration of the first ABS regime: the Nagoya Protocol.

Article 15. Access to Genetic Resources

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall endeavour to create renditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties

4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

9 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

Article 15.1 distinctly reveals the before mentioned omnipotent power of states. Its implications and intent could not be articulated more affirmatively. In other words: The states do have the sole sovereign power and authority over allegedly “their” natural resources, which includes genetic resources. Consequently, the national legislation determines the access to such resources. (criteria 9)

Remarkably, regarding access to genetic resources PIC (criteria 7) is implicit in Article 15.5. - certainly only granted to “Contracting Parties”, not Indigenous Peoples. (criteria 9)

Debra Harry perfectly resumes: “Thus, it ignores Indigenous peoples’ status as rights-holders in international law and instead demotes Indigenous peoples to the status of ‘stakeholders’, a category that includes corporations, academic institutions, NGOs and just about any other non-governmental entity.”

She further continues: “The CBD is a specific part of a biocolonial legal construct that refuses to see Indigenous peoples as sovereigns over, owners of and rights-holders to the genetic resources within our territories. Indigenous peoples are seen only as traditional knowledge-holders with some economic rights when that knowledge is used by others, but certainly not as territorial rights-holders whose consent must be sought before accessing resources within our territories.” (Harry, 2012:709)

These rather asymmetrical preconditions – the inherent imbalance of power – provided the structure for the subsequent instrument to regulate ABS of GRs: **The CBD's Nagoya Protocol**

3.5.2.1 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

As, simultaneously with the progress of biotechnology, the seemingly very urgent demand for biological resources and especially genetic resources (GRs) has increased during the last 2 decades, the cry to regulate the access based on a specific regime has been continuously amplified as well.

Debra Harry explains:

“The purpose of such a regime (the Nagoya Protocol) is to lay the ground rules by which states will access and share the benefits from the utilisation of genetic resources and associated traditional knowledge. The user countries – primarily industrialised governments of the North – sought access to genetic resources and associated traditional knowledge with as little restriction as possible, while the provider countries – primarily of the biodiverse-rich global South – were demanding fair and equitable benefit- sharing through a legally binding instrument, from any utilisation of genetic resources, their derivatives and associated traditional knowledge.” (Harry, 2012:710)

During the COP-5, in the year 2000, it was decided to establish an “Ad Hoc Open-ended Working Group on ABS” (WG ABS) “with the mandate to develop guidelines and other approaches to assist Parties and stakeholders with the implementation of the access and benefit-sharing provisions of the Convention”.¹¹¹

In 2002 at the successive Conference of UNCED, the World Summit on Sustainable Development in Johannesburg, the Contracting Parties jointly called for an international ABS regime on GRs within the framework of the CBD. Subsequently, two years later at the COP¹¹²-7 in Kuala Lumpur the World Summit's call was implemented: The Working Group on ABS mandate got modified in order to “mandate the Ad Hoc Open-ended Working Group on Access and benefit-sharing with the collaboration of the Ad Hoc Open ended Inter-sessional Working Group on Article 8 (j) and related provisions, ensuring the participation of indigenous and local communities, non-governmental organizations, industry and scientific and academic institutions, as well as intergovernmental organizations, to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8 (j) of the Convention and the three objectives of the Convention.”¹¹³

From that point onwards, the WG ABS new focus was to establish such a regime.

111 c.f.: <http://www.cbd.int/abs/wgabs/>

112 “COP“ means the “Conference of the Parties”, which are the official meetings of Contracting Members

113 c.f.: <http://www.cbd.int/abs/wgabs/>

According to Debra Harry and Art Manuel¹¹⁴, Indigenous Peoples hoped for a similar procedure within the WG ABS as had been established inside the WG Article 8(j) – a quite participatory process for Indigenous Peoples on rather equal footing with governmental representatives. Furthermore, Indigenous Peoples urged for synergies between the two Working Groups, particularly due to already elaborated progress regarding Traditional Knowledge in the WG Article 8(j). Instead, Contracting Parties, most prominent Canada, opposed the requested synergies and related full participation of Indigenous Peoples.

At the COP-8, a closed so called “Friends of the Chair” Group was established, which was merely accessible for the Contracting Parties – excluding Indigenous Peoples attendance and full participation, not to mention, consent. Within this exclusive group, Canada forced other parties to align with them on matters concerning Indigenous Peoples, otherwise they would not have supported other parties' proposals which were dependent on consensus. Harry and Manuel comment:

”So in a travesty typical for the CBD, Indigenous participation in the ABS negotiations, was debated without Indigenous participation.” (Harry and Manuel, 2010:6)

Comparable to the mentioned shameful influence of the CANZUS States during the elaboration of the UNDRIP, likely the same states – the JUSCANZ (Japan, USA, Canada, New Zealand) tried to block Indigenous Peoples endeavors to protect their Cultural Heritage (criteria 2), particularly any references to their collective rights to PIC¹¹⁵ (criteria 7) and rights of ownership and control (criteria 5).

All TK issues concerning ABS were moved to the WG ABS, which, contrary to the WG TK, increasingly held closed meetings, excluding Indigenous Peoples' participation or massively limiting their attendance to a few assorted individuals who were known to be less critical to the states. In this regard, Harry and Manuel clearly identify a relationship between the CBD's Secretariat and those “diplomatic” Indigenous bureaucrats. They got disproportionally funded more frequently by the CBD Voluntary Fund for Indigenous Participation than the less diplomatic, critical indigenous representatives.¹¹⁶

Addressing further restrictions on Indigenous Peoples' participation, in March 2010 an “*Interregional Negotiating Group (ING)*” was formed at the WGABS-9 meeting in Cali, Colombia

114 c.f.: Harry and Manuel:2010

115 „prior, informed consent“ similar to FPIC

116 (c.f.: Harry and Manuel, 2010:7)

to “facilitate” the stagnant negotiations. Within this ING only two seats were reserved for Indigenous Peoples, though other Indigenous Peoples' representatives could attend as “observers”. If a session was determined to be a closed session, even the Indigenous Peoples' two representatives were not allowed to participate. A so called “Co-Chairs text” - a rather “advanced” draft - was elaborated, most likely in collaboration with the CBD's Secretariat, lacking several essential suggestions which had been proposed by the *International Indigenous Forum on Biodiversity* (IIFB) – the official representation of Indigenous Peoples at the CBD.

Debra Harry points out: “With each subsequent meeting of the WGABS and ING, it became increasingly clear that there was no political will to protect Indigenous peoples’ rights to their genetic resources within their traditional territories, lands and waters, and associated traditional knowledge. Instead, parties chose to use the regime as a means to subject Indigenous peoples’ rights and resources to domestic legislation.” (Harry, 2012:710)

Due to the changed procedures limiting Indigenous participation, and, unfortunately, successful “divide and conquer” strategies – the aforementioned small but influential group of funded indigenous bureaucrats agreed to the imposed restrictions – to enforce strong, unified positions by the IIFB to alter the discriminating text appeared to be impossible.

This precarious constellation had culminated in 2010 at ABS negotiations in Nagoya, just before the COP to finalize the text even started. Inside the ING, one indigenous negotiator from Europe who belonged to the small group of indigenous bureaucrats, agreed to a text proposal on TK, without having consulted the whole IIFB before, not to mention having received any approval or consent of the Indigenous Peoples' majority. The text, which afterwards could not get objected anymore, became part of most critical **article 7** of the Nagoya Protocol – the provision on access to traditional knowledge. It reads as follows:

In accordance with domestic law, parties shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by Indigenous and local communities (ILCs) is accessed with the prior informed consent or approval and involvement of these Indigenous and local communities (ILCs), and that MAT have been established.

Obviously, the article incorporates multiple terms quite hazardous to Indigenous Peoples. First and

foremost, although the UNDRIP was already adopted by then, article 7 continues to diminish Indigenous Peoples as “Indigenous and local communities”, not recognizing their right to self-determination. (criteria 9, criteria 6). Although it identifies Indigenous Peoples as “holders of TK” (criteria 2) - rather similar to the CBD's article 8(j) – it does not recognize or imply any ownership or possession rights. (mere rights pursuant to criteria 6)

Article 7 even recommends “prior and informed consent” (criteria 7) but simultaneously equates it to “approval and involvement” - which is a softer terminology. Importantly, it has to be highlighted that article 7 does not “request” or “demand” these rights. However, the terms “as appropriate” as well as “with the aim of ensuring” additionally tremendously lessen the already weak articulation. (criteria 9) Last not least, the phrase “in accordance with domestic law” wrests away any Indigenous Peoples' right to control upon their Cultural Heritage as owners and stewards. It can be applied to even eliminate the vaguely established protection of international law, such as manifested in the UNDRIP.

Pursuant to Debra Harry and Art Manuel: “The main issues in the **ABS negotiations** related to **Indigenous Peoples** that still remained outstanding during the **COP**, was the whole article on **traditional knowledge**, especially a provision on **publically-available traditional knowledge**; and pre-ambular provisions referring to the **UNDRIP** that **Canada** opposed.

At the outset of **COP-10** the respective **pre-ambular reference (UNEP/CBD/COP/10/5/Add.5)** looked like this:

[Taking into account] [Affirming] [any established] [the existing] rights [in national law] of [individuals,] indigenous and local communities [and countries] to genetic resources and associated traditional knowledge[, subject to national legislation where applicable [and, where appropriate, the United Nations Declaration of the Rights of Indigenous Peoples]],”

(Harry and Manuel, 2010:8)

The brackets indicate that the language within was still under discussion. In regards to Indigenous Peoples, procedures at the COP happened to be as expected:

Despite vivid confrontation, Indigenous Peoples' representatives successfully advocated: “Noting

the significance of the United Nations Declaration on the Rights of Indigenous Peoples as regards this Protocol.”

Canada principally opposed any reference to the UNDRIP in the preambular but though it finally stood quite alone with its discord, could not eliminate the whole reference, Notwithstanding, Canada forced the removal of its substance. Eventually, a quite meaningless remark remained:

Noting the United Nations Declaration on the Rights of Indigenous Peoples.

The still to be discussed provision concerning TK was drawn into a closed group again by the head of the New Zealand delegation. A few already quite familiar indigenous representatives accepted these imposed circumstances and seemingly legitimized the closed negotiations with their attendance. The majority of the IIFB objected and forced those self-acclaimed indigenous delegates to read a statement of opposition, still: “However, rather than making a forceful statement, they said that not everyone in the **IIFB** agreed with the provision at issue. In the end it just sent the signal that we were divided and negotiations on Traditional Knowledge-related issues continued in a closed setting without Indigenous input.” (Harry and Manuel, 2010:9)

Eventually, in spite of many conflicts between so called “developed states” and “developing states”, some countries – particularly the head of the COP, Japan – pushed a final text through and turned the Nagoya Protocol – an international ABS Regime regarding Genetic Resources - into reality.

Debra Harry and Art Manuel resume:

“From an Indigenous perspective it clearly lacked full participation, input and **prior informed consent by Indigenous Peoples** throughout its development and negotiation.

When the **Parties to the CBD** initiated the **ABS negotiations** in 2004 in Kuala Lumpur, Malaysia, **Indigenous peoples** concerned about the proposed protocol issued a warning to Indigenous peoples around the world in a Press Statement. They foresaw the impending dangers, stating “***For the Indigenous peoples anxiously following the discussions in Kuala Lumpur, the agenda of the parties is clear. The parties are developing a regime that will facilitate a biopiracy free-for-all***”¹¹⁷

After a six year long process, **Indigenous Peoples** are now left with a **dangerous protocol** that allows states to refuse **IPs right of prior informed consent**, gives themselves complete discretion

¹¹⁷ http://www.ipcb.org/issues/agriculture/htmls/2004/pr_cop7.html

as to how and when they will address Indigenous Peoples rights in the **access and commercialization of genetic resources and traditional knowledge.**”

(Harry and Manuel, 2010:10)

Thus, the CBD and its Nagoya Protocol distinctly visualize how colonialism and structures of dominance still vitally remain. The Doctrine of Discovery and Domination should be remembered at this point.

Though in another disguise, the main objective still remains to be the exploitation of so called resources without reservations. Sadly, the already quite low, minimum standards concerning Indigenous Peoples' rights are even disrespected in substantial foras, such as the CBD and, as will be stressed below, the WIPO.

3.5.3 The World Intellectual Property Organization (WIPO)

Another example of modern-day colonialism consisting of similar structures of dominance and addressing Indigenous Peoples Cultural Heritage is the WIPO: The World Intellectual Property Organization, or, as quite a few peoples call it: **“The World Intellectual Piracy Organization”**.

Due to the author's active participation at several IGC sessions, the following analysis will be more extensive than the elaborations concerning the CBD.¹¹⁸ Accordingly, Indigenous Peoples' positioning as reflected in their statements - specifically stemming from the Indigenous Caucus¹¹⁹ - as well as personal impressions shall serve as main sources.

Similar to above, it is intended to juxtapose WIPO's core goals with Indigenous Peoples' demands concerning the protection of their Cultural Heritage. Thus, I will focus on WIPO's structure and elaborated mechanisms, particularly the *Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (IGC)* and Indigenous Peoples' participation.

First of all, the role as well as the roots of the WIPO have to be clarified:

¹¹⁸ The author served as an NGO observer at the IGC 19 (2011), IGC 20 (2012) and IGC 22 (2012), gratefully assisting the two Indigenous Caucus Co-Chairs Debra Harry and Tomas Alarcon during the IGC 19, and again tried to do so at the IGC 20. I especially thank Debra Harry and Sharon Venne for their most valuable teaching, providing me deep insights and the opportunity to support.

¹¹⁹ The Indigenous Caucus, though not a formal entity at the IGC, is formed by Indigenous Peoples' representatives and presents their collective opinions. At each session, a Chair, and sometimes two Co-Chairs are elected in order to serve, guide, lead and represent the Caucus.

„Our mission is to promote innovation and creativity for the economic, social and cultural development of all countries, through a balanced and effective international intellectual property system.“¹²⁰

The organization's mission statement clearly illustrates its purpose and implies focal key terms which form the pillars of its structure: „innovation“, „economic, social and cultural development“, „countries“ and “intellectual property system”.

Thus, WIPO's main target is comprised of its commitment to Intellectual Property, promoting the intellectual property system and providing international frameworks to facilitate its application.

WIPO's history shall provide further insight:

The World Intellectual Property Organization (WIPO) was established in 1967. It is the successor of the United International Bureaux for the Protection of Intellectual Property (BIRPI) which was created in 1893. In 1974 the WIPO entered the United Nations and since then belongs to the UN family as a Specialized Agency. Based in Geneva, it currently consists of 185 member States. Though it is affiliated to the UN, it has its own General Assembly and legal foundation. The main target is to dedicate itself to Intellectual Property, promoting the intellectual property system and providing international frameworks to facilitate its application.

The main target: Intellectual Property

As its name emphasizes, the WIPO deals with property. The early roots of intellectual property schemes date back to 1873 when inventors refused to participate at the International Exhibition of Inventions in Vienna because they feared that their inventions would be copied and commercialized by others. As a result, the Paris Convention (1883) and a little later the Berne Convention (1886) were elaborated in order to ensure these rights.

Therefore, protection of individual property rights, particularly concerning inventions, has been a major focus within the intellectual property system. As a consequence, dependent on the issue, different terms and strategies have been developed to serve the aim of intellectual property protection: According to the WIPO, „Intellectual Property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in

120 [www.wipo.int/about-wipo/en/WIPO homepage](http://www.wipo.int/about-wipo/en/WIPO_homepage)

commerce.¹²¹

Two different categories can be distinguished:

- ⤴ Industrial Property: inventions (patents), trademarks, industrial designs, and geographic indications of source
- ⤴ Copyright: literary and artistic works, Rights related to copyright

In a nutshell, all of these mentioned terms share common traits and similarities: they are about property, usually individual property, the identification, definition and protection of this property – mostly granted for a certain period of time. Moreover, they are also about material rewards, access, the commodification and commercial exploitation of such intellectual property in order to enhance financial profit and so called „development“. Therefore, commercial value has to be interpreted as one major incentive regarding the classification under the mentioned categories.

Consequently, this system has to be seen as ambiguous, shifting between protection, particularly concerning individual intellectual property, on the one hand - and access to such intellectual property, the commercialization and exploitation, on the other.

The ambiguity becomes quite feasible in the context of Cultural Heritage defined as TK, TCEs, and GRs by the IGC and has to be unveiled on the subsequent pages. So, the IGC will be under scrutiny.

The Development of the IGC - The Intergovernmental Committee on Traditional Knowledge (TK), Genetic Resources (GRs), Traditional Cultural Expressions (TCEs)

The establishment of the IGC has to be seen in the context of the GRs boom during the 90's: Based on biotechnology GRs became accessible, ready for exploitation and commercialization. Thus, the IGC's creation was a reaction to the urgent necessity to deal with GRs under the auspices of a certain international framework, aiming for the incorporation of GRs and associated TK and TCEs into the general dominant IP system.

Consequently, WIPO, responsible for the promotion of intellectual property worldwide, was requested by its Member States to „undertake exploratory groundwork and facilitate discussions for a better understanding of the often inter-related intellectual property issues regarding genetic

¹²¹c.f.: www.wipo.int/about-ip/en/

resources, traditional knowledge and folklore¹²²

During the 1998-99 biennium WIPO's exploratory Subprogram 11.2 on "Biological Diversity and Biotechnology" was created in order to focus on activities concerning intellectual property and GRs. Jointly together with the United Nations Environment Programme (UNEP), a study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated TK was developed within that period, providing the basis for further studies and conferences. Important to note, already back then **access and sharing of benefits** were a primal target and of utmost significance.

In 2000, as a result of these additional meetings, conferences and consultations with Member States, a cognitive fundament for further development was created: "a distinct body should be established within WIPO to facilitate such discussions and, in addition to the issue of genetic resources, the discussions should also include the results of WIPO's previous work on the related fields of traditional knowledge and expressions of folklore."¹²³

The WIPO already determined the interrelationship between TK, GRs and Indigenous Peoples during the 1998/99 biennium when it convened several studies "to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations."¹²⁴

Concerning TCEs, which is regarded as a subset of TK, WIPO's work dates even back to 1978 when it started to cooperate with the United Nations Educational, Scientific and Cultural Organization (UNESCO), adopting the "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (the Model Provisions) in 1982. Additionally, these two cooperating bodies also recommended the establishment of a separate committee to focus on on TCEs and facilitate future work.

Thus, WIPO's General Assembly decided at its 26th session, September 25 - October 3, 2000, to establish the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

At that session, the WIPO General Assembly (GA) identified the forum's three primary themes:

¹²²WO/GA/26/6, paragraph 3,

note: Later, „folklore“ was regarded to be a diminishing term, so it was replaced by the much broader, more inclusive term TCE.

¹²³WO/GA/26/6, paragraph 10

¹²⁴WO/GA/26/6, paragraph 11

„intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.“ Interestingly, the GA highlighted: „Each one of these themes cuts across the conventional branches of intellectual property law and does therefore not fit into existing WIPO bodies...At the same time, the three themes are closely interrelated, and none can be addressed effectively without considering aspects of the others“¹²⁵

Furthermore, the documents elaborated prior to the IGC's first session clearly indicate the fundament and direction concerning the three major issues¹²⁶:

According to **Access to Genetic Resources and Benefit-sharing (ABS)**, four main contexts were defined:

- ⤴ Contractual agreements for access to genetic resources (Access agreements for genetic resources, such as material transfer agreements (MTAs): e.g.: ensuring control over ex-situ use of genetic resources; technology transfer and joint research and development; the exploration of the possibility of joint ownership of IPRs, ensuring continued customary use of genetic resources)
- ⤴ Legislative, administrative and policy measures to regulate access to genetic resources and benefit-sharing: (e.g.: development of national and regional access legislation include the role of intellectual property rights regarding: prior informed consent procedures; ensuring the recording of ownership interests in inventions that arise from access to or use of genetic resources.
- ⤴ Multilateral systems for facilitated access to genetic resources and benefit-sharing: (e.g.: possible intellectual property-based benefits-sharing mechanisms; acquisition of intellectual property rights over genetic resources placed in the multilateral system; access under the multilateral system to genetic resources covered by intellectual property rights; transfer of and access to technology under the multilateral system, rights of holders of traditional knowledge associated with genetic resources placed in the multilateral system.
- ⤴ The protection of biotechnological inventions, including certain related administrative and

¹²⁵c.f.: WO/GA/26/6

¹²⁶The following terms and examples should emphasize the WIPO's structure beneath, the inherent terminology that unfolds the true goals behind the curtains.

procedural issues: (e.g.: licensing and other issues related to the use of rights in biotechnological inventions; administrative and procedural issues related to the examination of patent applications , the relationship between patents and other forms of intellectual property protection for biotechnological inventions; ethical and environmental issues,

Regarding the **Protection of TK** four categories were identified as well:

- ⤴ Terminological and conceptual issues: (e.g: a clear definition or description of what is meant (and not meant) for intellectual property purposes, study of customary laws and regulatory systems applying to traditional knowledge in local and traditional communities; examination of certain conceptual issues, such as collectivity of creation, innovation and ownership and cultural understandings of property rights)
- ⤴ Standards concerning the availability, scope and use of intellectual property rights in traditional knowledge: (e.g.: facilitating access to the intellectual property system to enable traditional knowledge holders to acquire and use intellectual property rights where available under current standards; the possible development of new standards to protect traditional knowledge not protected by existing intellectual property tools, the elaboration of an international framework for traditional knowledge protection, and the development of a system of “community” or “collective” rights to protect traditional knowledge)
- ⤴ Certain criteria for the application of technical elements of standards, namely legal criteria for the definition of prior art and administrative and procedural issues related to the examination of patent applications: (e.g.: integration of traditional knowledge into the procedures of IP offices for filing, examination, publication and granting of industrial property titles through the documentation and publication of traditional knowledge as searchable prior art, where so desired by the relevant traditional knowledge holders; an analysis of how prior art is established for purposes of patent examinations in the context of traditional knowledge; provision of legal assistance with traditional knowledge documentation.)
- ⤴ The enforcement of rights in traditional knowledge: (e.g.: facilitating access to the intellectual property system, to enable traditional knowledge holders to use and enforce rights under the intellectual property system)

Concerning the **Protection of “Folklore”** it was being mentioned that WIPO should increase and intensify its work in the field of folklore protection: (e.g.: a “sui generis”¹²⁷ form of legal protection at the international level (Asia/Pacific, Arab, LAC Recommendations). Further recommendations: already stated UNESCO-WIPO Model Provisions as an adequate starting point, and from the African countries: “to develop, in the shortest possible time, a broad consensus among States in favor of an international regime”¹²⁸

Though the IGC was officially created to protect GRs, TK and TCEs, the founding documents' inherent language distinctly confirms its creation as an “offspring” of the dominant IP system. It promotes the incorporation under already existing IP rules and applies associated terminology, pursuing its ideology as well as principles.

Above mentioned terms, such as “Ensuring control, access and use of GRs, regulate access, facilitated access, national access, benefit sharing, inventions, acquisition of intellectual property rights, availability, licensing, Standards, integration of traditional knowledge into the procedures of IP offices, prior art, publication, enforcement of rights” affirmatively exemplify the top priority, the primary target: enhancing the feasibility of, and access to GRs, TK and TCEs in order to promote the commodification and regulation of Intellectual Property. In this context, the announced protection of GRs, TK and TCEs, particularly regarding so called “local and traditional communities”¹²⁹, seems more likely to be window-dressing than a serious commitment.

Comparing cognitions of Indigenous Peoples' Cultural Heritage – as translated in the Daes Studies - with the economical structures of Intellectual Property one is able to realize a deep friction in between. Foremost, It has to be questioned if holistic Indigenous Cultural Heritage, based upon the concept of self-determination and collectivity, thriving on and rooted in freely chosen development, can be compatible with the divided, artificially created, commercially exploitable commodities “GRs, TK, TCEs”, as well as generally with WIPO's underlying fundament of global, Western determined development which is based on the individual: Self Determination and protection of identity, being the legitimate holders of Cultural Heritage, in opposition to access, exploitation and commercialization, a dominant economic system which seeks to subsume Indigenous Peoples under its influence, exploiting their Cultural Heritage. In its system deemed, as will be shown, Indigenous Peoples are deemed to be stakeholders, shareholders or beneficiaries, just among others.

127, „new and unique“

128c.f.: WO/GA/26/6

129c.f.: p.6, first reference concerning TK

Apparently, controversies in regards to applied terminology, meaning, and specific interests have been implicit right from the start of the IGC's founding process . The IGC seemingly incorporates these contentions within its own structures and mandate, further transmitting these in its studies. Therefore, the next part is dedicated to a closer analysis of the IGC itself - its sessions and work.

The IGC:

The IGC's first session took place in Geneva, April 30 to May 3, 2001. It was determined that general rules of WIPO would apply. Subsequently, the IGC should be comprised of the WIPO member states and attended by “all Member States of WIPO or the Paris Union, and, as observers, Member States of the United Nations that are not members of WIPO or the Paris Union, and intergovernmental organizations and non-governmental organizations accredited with observer status at WIPO.”¹³⁰

Almost half of the listed NGO observers participating were related to Indigenous Peoples' matters, mainly indigenous NGOs themselves.¹³¹ Thus, already at its beginning, the crucial role of Indigenous Peoples has to be acknowledged – pursuantly, it would have been an obligation to put an emphasis on Indigenous Peoples' issues and recognize them as most relevant partners.

Based upon above, the forum's primary objective has been and continues to be the facilitation of discussions among member states in order to elaborate further studies and to gain know-how about the IP system and related categories.¹³² This also includes cooperation with other international agencies and the elaboration of positive as well as defensive protection measures. Additionally, so called “sui generis” (new and unique) legal concepts have been elaborated.

Every two years the mandate of the IGC has to be reviewed by WIPO's General Assembly (GA). In 2009, a major modification occurred, the mandate got renewed in order to “undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCE's and further to

¹³⁰Rules of Procedure: WIPO/GRTKF/IC/1/2, paragraph 6

¹³¹19 NGOs out of 19, 7 of them indigenous.

¹³²c.f.: WO/GA/26/6: “The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultations: intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.”

submit the text to the WIPO GA in 2011”.¹³³

Hereafter, the focus has been laid on substantiating existent numerous studies in order to elaborate specific draft position papers, aimed at establishing treaties..

Three intercessional working groups of experts were created to analyze the IGC working documents under the following mandate: “The IWG shall provide legal and technical advice and analysis, including, where appropriate, options and scenarios for consideration of the IGC. The IWGs shall report to the IGC on the outcomes of their work and submit recommendations and texts relating to the discussion in the IGC.”¹³⁴

Nevertheless, this target remained incomplete within the conducted period of time. Thus, after the IGC 19, the WIPO GA had to renew the Committee’s mandate at its 40th session, calling upon the IGC to “expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of Grs, TK and TCEs”. Furthermore, this/these text(s) should be submitted to the GA in 2012, at which time it will “take stock of and consider the text(s), progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings.”¹³⁵

Participation of Indigenous Peoples: the Rules of Procedure

Consequently, the IGC usually has met three times a year, focusing on one of the three topics in order to create texts to finally reach consensus in establishing a text-based legal framework. Controversies concerning different perspectives, roots, ideologies and concepts are already mentioned above. In addition, the following intends to show another, structural problem, based on the rules of procedure, a result of subjacent discrimination and colonialism itself – such as articulated in the DDD.

The WIPO is comprised of Member States. As a matter of fact, these states are the ones in charge of directing and determining orientation, contents and results. As remarked, the same structure prevails inside the IGC. States are supposed to be the decision-makers, Indigenous Peoples, subsumed under NGO status, are solely dismissed as “observers” or “ad-hoc observers”. Although Indigenous Peoples' participation took place right at the beginning, opportunities to intervene and advocate concerning their rights have been rather limited. This derives from WIPO's mandatory participatory capacity:

133 WIPO, GA 38th session, 2009, cf. Harry, Debra, 2012, p-715-716

134 IGC 16th session, 2010, WIPO/GRTKF/IC/IC16/REF-DECISIONS

135 cf. Harry, Debra, 2012, p-715-716

„WIPO’s General Rules of Procedure are applicable to the IGC, save as otherwise provided in the special Rules of Procedure adopted by the IGC at its first session in April 2001. In accordance with Rule 24 of the WIPO General Rules of Procedure, observers may take part in debates at the invitation of the Chair, and they may not submit proposals, amendments or motions.”¹³⁶

Nearly since the inception of the IGC, generally, during the IGC sessions, the Chair has allowed observers to intervene on any issue on the agenda and to make drafting proposals for consideration by Member States. Such drafting proposals are incorporated in the text under discussion if supported by at least one Member State, they are nonetheless reflected in the reports of the sessions in cases where reports of sessions do reflect drafting proposals.¹³⁷

Over the years, this discriminatory situation slightly improved. A so called “informal consultative forum for indigenous communities and holders of TK/TCEs” was established in advance of the IGC sessions. Moreover, informal consultative processes and voluntary funding initiatives have been elaborated to enhance the observer status and participation for “indigenous and local communities”¹³⁸. Once again, identical to the the CBD's framework, the applied terminology is of utmost significance: WIPO and the IGC refer to “local and indigenous communities” - avoiding “peoples”, thus, denying any further legal implications which could promote self determination and, as a consequence, equal and effective participation based on an equivalent, non-discriminating standing.

In 2004, in terms of developing towards more equality, strangely enough, a proposal by the Member State New Zealand provided some ground for moving forward:

“While WIPO is obviously an organization of Member States, the subject matter that this committee is considering - traditional knowledge- means that indigenous and local communities have a very high stake in the outcomes of its deliberations.”¹³⁹ New Zealand, relying upon a statement of the Indigenous Kaska Dena Council, urged the IGC “to consider some practical changes to the meeting procedure for the IGC to enable and enhance the more effective participation of indigenous and local community observers.”¹⁴⁰

136c.f.: Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: WIPO/GRTKF/IC/20/7

137Ibid.

138 c.f.: WIPO/GRTKF/IC/7/12

139 c.f.: WIPO/GRTKF/IC/7/14 Interestingly, this proposal was made by NZL, a State usually always blocking Indigenous Peoples' rights inside the international arena, as already extensively exemplified in this thesis.

140Ibid.

The proposal included the following:

- ⤴ Greater speaking time facilitated by the opportunity to intervene earlier in discussions, perhaps interspersed with States.
- ⤴ Changes to seating arrangements, as a measure of respect and in recognition of the value that members and indigenous cultures and local communities can add to discussions.
- ⤴ the election of an indigenous co-chair for the IGC.
- ⤴ The incorporation of panel presentations by members of indigenous and local communities as part of the IGC plenary, similar to previous sessions of the IGC plenary, similar to previous sessions of the IGC that have enabled the committee to learn from the experiences of member States. Such panel presentations would be chaired by the indigenous co-chair.

The original Indigenous Peoples' proposal, annexed to New Zealand's, also urged for the establishment of a Voluntary Fund to financially support Indigenous Peoples' participation and further asked for an indigenous member within the IGC's Secretariat. New Zealand suggested that in case of sufficient support for any or all of the proposals, they should be implemented in the following IGC session.

The IGC reacted and implemented the requested enhancements, though in a qualified manner: A Voluntary Fund was established, despite, limited financial support was being granted, extended speaking time was realized, an indigenous member accepted within the Secretariat, as well as a panel created. In regards to the panel, it was decided to be held during the IGC plenary and be comprised of participants and well known experts from “indigenous and local communities” representing different geo-cultural regions.

Concerning the realization of an Indigenous Co-Chair, it has to be asserted that this term was solely “granted” to the main representative of the Indigenous Forum – the Indigenous Caucus - and to the Chair of the newly created panel. An indigenous Co-Chair to the IGC, as being referred to within the NZL proposal and requested by, inter alia, the indigenous Kasda Dena Council, was not taken into account. Moreover, the Indigenous Forum meeting in advance of the IGC as well as the indigenous Panel during the sessions are of informal character. Thus, they get mentioned in the IGC's reports and the Panel discussions' summaries, nevertheless, they do not represent a formal part of the IGC. The Panel discussions, even held in the main room during the IGC's sessions, are

not mandatory to attend - reflecting my own observations, a majority of Member States' representatives usually disrespectfully ignore participation and leave the room. The informal character distinctly manifests the inequality of Indigenous Peoples in comparison to Member States, nations, which used to be and frequently continue to be (former) oppressors and colonizers themselves.

In a nutshell, the inherent problems within the IGC are not merely a matter of perception regarding Intellectual Property, Cultural Heritage, individualism and collectivism. Additionally, the conflicts are bound to and derive from discrimination based on persisting colonialism, which is essentially part of its core structures: Indigenous Peoples are merely subsumed under the term “indigenous and local communities” Consequently, Indigenous Peoples' representatives have to accredit themselves as “observers” or “ad hoc observers”. Although being mostly affected, they are not recognized as decisive right holders, owners and stewards of their LTRs and Cultural Heritage. Despite WIPO's affiliation to the UN system, it is refusing adherence to existing validated sources of international law in regards to Indigenous Peoples' collective rights, such as the UNDRIP. Thus, WIPO denies Indigenous Peoples' self-determined status as “a people” and associated rights to own and control their so called “GRs, TK, and TCEs” - their Cultural Heritage.

Examining the actual texts will further circumstantiate the above.

3.5.3.2 The Texts:

Although the speaking time has increased and indigenous representatives are allowed to speak, yet, their voice is just effectively being heard if their statements are supported by at least one Member State. Nonetheless, internalization inside the final text is certainly not guaranteed. The support merely ensures that the intervention is kept on the negotiation table. The use of brackets indicate contention about specific articles or parts thereof. Passages being underlined are newly inserted content.

The pursuing passages from the IGC's text based discussions are intended to demonstrate the manifold intrinsic conflicts and shall unveil the underlying hegemony, expose imbalanced power relations of dominance – the underlying structural discrimination:

Example 1: TK

19th IGC meeting, 2011, special topic: TK, document: WIPO/GRTKF/IC/19/5

ARTICLE 1

SUBJECT MATTER OF PROTECTION

Definition of traditional knowledge

Option 1

1.1 Traditional knowledge means knowledge including know-how, skills, innovations, practices, and learning which is **collectively generated, preserved and transmitted** in a [traditional] and **intergenerational** [context] within an **indigenous or local community**. [resulting from intellectual activity in a traditional context including the know-how, skills, innovations, practices and learning that form part of the traditional knowledge systems of an **[indigenous people or local community]**.]

Option 2

1.1 (a) Traditional knowledge is **dynamic and evolving**. It is the result of the [intellectual activities] in [diverse traditional contexts], including scientific knowledge, skills, competencies, innovations, practices and teachings in a collective framework including codified knowledge systems, continuously developed, evolved and widely used, following any changes in the environment, geographical conditions and other factors [of **[indigenous peoples or [and] local communities]]**;

Indigenous knowledge of indigenous peoples and indigenous nations must be protected under the principles of the right to self-determination and the right to development.

(b) Traditional knowledge is part of a **collective, ancestral, territorial, spiritual, cultural, intellectual and material heritage**;

(c) Traditional knowledge is **transmitted from generation to generation** in diverse forms and is **inalienable, indivisible and imprescriptible**;

(d) Traditional knowledge is **intrinsically linked to biodiversity natural resources** and sustains cultural, social and human diversity embodied in traditional lifestyles.

Option 3

1.1 For the purpose of these provisions, traditional knowledge refers to the know-how, skills, innovations, practices, and learning resulting from intellectual activity in a traditional context.

While scrutinizing these passages, a contested “battlefield of terms” is recognizable, words and phrases being substituted, deleted and inserted. In this case, the term “TK” should have been defined. Option 1 was getting modified:

Indigenous Peoples' representatives did not favor option 1 due to the term “indigenous and local communities” - not including “peoples” - “indigenous peoples” (criteria 10 vs criteria 9) - which was already bracketed. They urged for option 2, which includes most relevant terms such as “right to self determination”, “cultural heritage” - even reaching beyond this term implying inter alia, “collective heritage” and “territorial heritage”, as well as “transmitted from generation to generation” emphasizing inheritance, adding “inalienable, indivisible and imprescriptible” to clearly indicate TK's roots as being part of the indigenous identity (criteria 1, 2, 5, 10) - furthermore, linking it to biodiversity and emphasizing its dynamic character (criteria 4). Additionally, Indigenous Peoples' Caucus Co-Chair Debra Harry emphasized the recognition of the term “Indigenous Peoples” in the facilitators document (criteria 10).

Not surprisingly, Member States Canada and USA urged for option 3, a completely new inserted option, not referring to Indigenous Peoples, collectivity, cultural heritage and self determination at all. Iran joined them and questioned the term “collectivity” in general in relation to TK. Concerning option 1, the USA suggested a streamlined version and requested to add “within a traditional context”.

The following below is the result of the IGC's facilitators work¹⁴¹ on the text, submitted at the successive session on TK, the IGC 21, held from 16th to the 20th of April, 2012:

ARTICLE 1 SUBJECT MATTER OF PROTECTION

DEFINITION OF TRADITIONAL KNOWLEDGE

Option 1

1.1 For the purposes of this instrument, the term “traditional knowledge” refers to the know-how, skills, innovations, practices, teachings and learning, resulting from intellectual activity and developed within a traditional context.

Option 2

141WIPO/GRTKF/IC/21/4

1.1 Traditional knowledge is knowledge that is dynamic and evolving, resulting from intellectual activities which is passed on from **generation to generation** and includes but is not limited to know-how, skills, innovations, practices, processes and learning and teaching, that subsist in codified, oral or other forms of knowledge systems. Traditional knowledge also includes knowledge that is associated with **biodiversity, traditional lifestyles and natural resources**.

In regards to option 1 it is remarkable that the facilitators fully adhered to the US and Canada's position, they almost completely replaced it through option 3, cutting any reference to collectivity, Indigenous Peoples and local communities, intergenerational aspects as well as preservation.

Option 2 got severely circumsized, eliminating any reference to collectivity, Indigenous Peoples and local communities as well. The intergenerational aspect is, contrarily to option 1, being kept. Due to the protest of the IPCB, the US based phrase “widely known”¹⁴² vanished. Nevertheless, the reference to biodiversity is diluted, and, even more astonishing, above mentioned terms of utmost relevance, particularly “self determination”, “cultural and territorial heritage” and “inalienable” as well as “indivisible” do not exist in the text anymore.

According to the discussion about “criteria for eligibility” it has to be mentioned that, again, some countries urged for terms such as “widely known or used”, thus, limiting the eligibility of protection concerning TK - if already “widely known or used”, being part of the so called “public domain” (criteria 6). Indigenous Peoples' representatives such as Debra Harry and Tomas Alarcon (CAPAJ), protested against this attempt and demanded the deletion of the terms. Moreover, Indigenous Peoples, supported by Mexico and Switzerland, requested “Prior, Informed Consent” (PIC) (criteria 7) within the criteria. Canada and the US, as usual, opposed. However, PIC is still retained in option 1 of the two final options. Indigenous Peoples proposed a new option, option 4, during the 2011 session, inter alia, it included the following reference to (cultural) heritage: “TK is an intrinsic part of the tangible and intangible heritage of Indigenous Peoples and local communities and is transmitted from generation to generation.” (criteria 2). Similarly, as with the definition of TK, the updated facilitators texts ignored this proposal and cut out any reference to Indigenous Peoples' heritage.

Article 2 is committed to the so called “beneficiaries of protection”. While Indigenous Peoples' and local communities' representatives highlighted several times the significance of being the “holders

¹⁴² „widely known“ is related to the „Public Domain“, once part of it, property rights cease to exist.

of TK” (criteria 5) instead of mere “beneficiaries” (criteria 6), particularly concerning the collective dimension, some Member States focused on watering down this issue. Canada insisted on the inclusion of individual rights to TK. Additionally, some Member States pushed for domestically defined regulations (criteria 9) in order to determine beneficiaries and wanted this included in the text. Thus, option 2.1., was proposed by States as follows:

“Beneficiaries of protection**shall be indigenous and local communities, families and individuals or, where traditional knowledge is not specifically attributable to or confined to an indigenous and local community that generated it, any national entity determined by domestic and international law.**”

“Indigenous communities” is being applied instead of “Peoples” (criteria 9 vs criteria 10), furthermore, it includes the individual aspects of Intellectual Property, disclosing opportunities to claim and “benefit from TK” individually or on a family basis, deteriorating the collective rights aspect, and promoting the domestic sphere as being eligible to determine “beneficiaries”. (criteria 6, 9) Another States' proposal even stated the following:

“....and where the traditional knowledge holders are unknown, **State as their legal representative**, and when the holders of traditional knowledge have disappeared but their knowledge remains, **the state could, in accordance with domestic law, remain legal representative of such peoples.**”

Of course, Indigenous Peoples' representatives reacted and contrarily requested the term “indigenous nations” and “international law” (criteria 10) to emphasize the Right to Self Determination as a collective entity. The EU wanted to delete “nations” but preferred to cut out “individuals and families”. Switzerland, South Korea, Bolivia and Venezuela supported Indigenous Peoples' objections and promoted the terms “Indigenous Peoples” as well as “collective holders of TK”. (criteria 10, 5)

An indigenous prepared proposal considered instead: “Beneficiaries of legal protection of traditional knowledge....are indigenous peoples and local communities, and their descendants, who are traditionally the custodians and safe guardians of traditional knowledge in conformity with their customary law and usages. The indigenous peoples are those who maintain, conserve, develop, use and transmit traditional knowledge from generation to generation as genuine, authentic symbols of their social and cultural heritage.” (criteria 1, 2, 3, 4, 5, 10)

Eventually, the pursuing resulted out of the facilitators action:

ARTICLE 2 BENEFICIARIES OF PROTECTION

Option 1

Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples/communities and local communities.

Option 2

Beneficiaries of protection of traditional knowledge, as defined in Article 1, may include: (a) indigenous **peoples/communities**; (b) local communities; (c) traditional communities; (d) families; (e) nations; (f) **individuals** within the categories listed above; and (g) where traditional knowledge is not specifically attributable or confined to an indigenous peoples or local community, or it is not possible to identify the community that generated it, any **national entity determined by domestic law**.

Apparently, both options lack significant input and key words essentially relevant for Indigenous Peoples concerning the protection of their Cultural Heritage. Though the term “Indigenous Peoples” is applied, they are not mentioned as “holders” of TK nor “indigenous nations”. Once more, no reference to “cultural heritage” nor “self determination”, neither “customary laws” nor likewise terms to affirm indigenous legal systems. Rather, highly controversial terms and phrases such as “individuals” and “determined by domestic law” (criteria 9) are still to be found as part of the newly advanced text draft. Specifically point “g” opens the door to define beneficiaries domestically, to eradicate Indigenous Peoples' claims if not found valid through national institutions. Most likely, this is going to happen in countries who do have very weak legal standards concerning Indigenous Peoples or who do not even recognize Indigenous Peoples' existence at all.

GRs and TCEs

Similar discussions are evident concerning TCEs and GRs: At the IGC 19 with special focus on TCEs¹⁴³, article 4 – the collective Management of Rights – specifically confirms already highlighted:

“The collective management of the rights provided for in Article 3 belongs to the

143 WIPO/GRTKF/IC/19/4

beneficiaries as defined in Article 2. [The beneficiaries may authorize [or to] a [designated] national competent authority [(for example, regional, national, or local)] [acting at the request, and on behalf, of the beneficiaries], in accordance with the national law / their traditional decision-making and government process / international law.]”

Inserted language clearly manifests governmental influence and promotes national domestic dominance (criteria 9), further, the article does not confirm Indigenous Peoples as rightful holders and primary decision-makers, it merely mentions beneficiaries. (criteria 6)

Text based negotiations aiming for a framework towards the protection and ABS of GRs are even more restrictive and contested: At the IGC 20, focusing on GRs, the draft¹⁴⁴ referring to article 2 included the following options:

[ARTICLE 2]

[[BENEFITS] / BENEFICIARIES [OF THE PROPOSALS]]

[OBJECTIVES]

OPTION 1

2.1 Measures related to the compliance with existing rules of access and benefit-sharing derived from the utilization [for the protection] of genetic resources, [their derivatives] and associated traditional knowledge shall be **for the benefit of country** providing such resources and knowledge [of origin of genetic resources].

2.2 Parties shall respect the rights of **indigenous and local communities** in the traditional knowledge associated with genetic resources, [their derivatives] **in accordance with the [domestic]/national legislation and existing international agreements and treaties**, in particular the **Convention on Biological Diversity and the Nagoya Protocol** on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity and 135ITPGRFA.

OPTION 2

2.4 A global and **compulsory system** creates a level playing field for industry and the **commercial exploitation of patents, and also facilitates the possibilities** under Article

¹⁴⁴ c.f.: Facilitators' Consolidated Document Relating to Intellectual Property and Genetic Resources – As amended post plenary, February 20, 2012

15(7) of the CBD for the sharing of the benefits arising from the use of genetic resources.

Although option 1 implies at least some references to Indigenous Peoples' rights' in comparison to option 2, it distinctly promotes the States power¹⁴⁵ and reiterates diminishing, discriminating terminology, such as references to the Nagoya Protocol and “benefits for the country”. (criteria 6, 9, 10) Neither option is able to satisfy Indigenous Peoples' needs and requests in any way.

Eventually, in regards to objective 2, the subsequent draft regarding “Patents on Life Forms” clarifies at best inherent clashes of perceptions, primal intentions and ends:

“Prevent [intellectual property rights] [patents] from being granted in error [in bad faith]”, on the issue of “Patents on Life Forms”:

2.7.1 Option 2: Ensure that no patents on life and life forms are granted for genetic resources and associated knowledge.

2.7.2 Option 2: Enhance the availability of patent protection for life forms and new uses for known substances in order to create benefits and support benefit sharing from the use of genetic resources and associated traditional knowledge

In respect to the fundamentally opposing views, the two option-drafts have to be seen as substantial. The options totally contradict each other and visualize already stated, inherent ideological controversies.

Obviously, Indigenous Peoples, though the true holders of “TK, TCEs and GRs”, do not have equal opportunities, participation and decision-making powers as Member States do, not to mention the lack of recognized collective ownership rights concerning their Cultural Heritage, the right to Self Determination and effective FPIC (criteria 1, 2, 5, 10). - Inserted texts covering Indigenous Peoples' demands - though sometimes supported by certain States - get bracketed due to the member states dominant influence, and finally diminished or completely ignored and eliminated.

According to Debra Harry, Chair and Co-Chair of several Indigenous Caucus' at the IGC and

¹⁴⁵ In referring to the Nagoya Protocol under the CBD, this option is further substantiating domestic competence and jurisdiction over Indigenous Peoples.

Executive of the Indigenous Peoples Council on Biocolonialism¹⁴⁶: “participation and input in the WIPO IGC proceedings have increasingly been diminished, particularly during the period of the 2010-11 IGC mandate once active negotiations commenced.” (Harry, Debra: 716:2011)

3.5.3.3 The IGC 18: A clear Response from Indigenous Peoples:

At the IGC 18 in 2011 the situation culminated after a small working group had been assigned by the IGC Chair to clean up the draft proposals regarding articles on TK. Almost all the proposals by Indigenous Peoples had been deleted. Thus, the Indigenous Peoples' representatives decided to withdraw from the process and issued a statement to affirm their position, demanding “equal and effective participation” (c.f.: Harry, Debra: 716:2011)

As stated below:

STATEMENT OF INDIGENOUS PEOPLES TO THE IGC 18

We come to participate in good faith in the IGC representing Indigenous Peoples as owners and rights holders of the subject matter under negotiation. As such, we expect respectful relationships and that our proposals are deliberated and considered on their merits by member states. As an example of a respectful relationship, in Ecuador there is constitutional recognition of the rights of Indigenous Peoples to be the spokespersons for the rights of the natural world.

On Tuesday night, 10 May 2011, a working group was tasked to clean up the text on traditional knowledge. In our experience, this non-drafting group should have simplified text while leaving views intact. Instead, it became a drafting group eliminating proposals in the absence of full and fair deliberation. Our views were dismissed without due consideration.

We present the following to make clear our fundamental principles that must be embodied in the proposed WIPO international legal instrument(s) on Traditional

¹⁴⁶ <http://www.ipcb.org/>

Knowledge, Traditional Cultural Expressions, and Genetic Resources (TK, TCEs, and GR).

THE PRINCIPLES

1. A primary objective of the international legal instrument(s) must be to protect Indigenous Peoples' rights and interests as the owners / holders of TK, TCEs, and GR.
2. The legal instrument(s) must affirm the universal protection of the rights of Indigenous Peoples and nothing in the instrument(s) can be construed as diminishing or extinguishing the rights Indigenous Peoples have now or may acquire in the future.
3. The international legal instrument(s) must comply with international norms by adopting the term "Indigenous Peoples" which respects our lawful status and recognized rights.
4. The international legal instrument(s) must recognize the principle of free, prior and informed consent of Indigenous Peoples.
5. The international legal instrument(s) must not assert or otherwise infer that States or members of WIPO are holders of, or the beneficiaries from the utilization of, Indigenous Peoples' TK, TCEs, and GRs.
6. In the international legal instrument(s), Indigenous Peoples must have the right to redress, including repatriation of, any of their TK, TCEs, and GRs taken or used without their free, prior and informed consent.

PARTICIPATION IN THE IGC 18

The Indigenous Peoples delegates present at this IGC have agreed to the following protocols in light of Tuesday, 10 May 2011, night meeting where our views were dismissed without consideration:

1. Our delegates will continue to be present as observers for the remainder of IGC 18, to

take note of the positions of member states and observers, and the draft documentation.

2. Our delegates are not disposed to make text proposals, while member states fail to give due attention to, or support to, text proposals from our delegates.

3. Our delegates are prepared to speak to clarify matters relating to the rights, freedoms and interests of Indigenous Peoples and to ensure that WIPO and its members are adequately informed of the rights, freedoms and interests of Indigenous Peoples.

4. Our continued presence in IGC-18 in no way can be taken to say that Indigenous Peoples have collaborated in the drafting of these documents in this session. Nor can our observation of this process be inferred as giving any consent to the results of any process in which Indigenous Peoples have not been actively involved.-

FUTURE WORK

WIPO must ensure that Indigenous Peoples have full, effective and equal participation in relevant discussions and decision-making processes concerning the legal instruments at the WIPO IGCs, General Assembly, and the proposed diplomatic conference.

The Analysis:

The above statement is a courageous representation in order to expose the current situation of discrimination against Indigenous Peoples within the WIPO – an essentially relevant stand clarifying the limits of ignorance and disrespect towards them. The last few passages substantially emphasize that there will be no consent regarding any outcome which is based on and built upon the negation of Indigenous Peoples proposals.

Moreover, the fundamental principles (fp) constitute the focal points and issues concerning any discussions and elaborations – the basis to refer to, where any discussion has to embark from. Thus, these manifested fundamental principles are quite similar to the frequently reiterated, original 22 Principles and the promoted Cultural Heritage ünciples of the Daes study: They serve the same purpose: self-determination of Indigenous Peoples and the protection of their Cultural Heritage, including LTRs as well as specifically so called “TK, TCE's and GRs”. (criteria 1, 2, 3, 4, 5, 7,10)

Of paramount importance is the last paragraph, the request to „full, effective and equal participation“ (criteria 7), the reason why the principles have been articulated.

The principles express the legitimacy of this particular request. Specifically, fundamental principle 1 (fp1) emphasizes Indigenous Peoples as „owners/holders of TK, TCEs, and GRs“, thus, highlighting and claiming collective property, ownership and possession rights over their Cultural Heritage (criteria 2, 5). Furthermore, fp5 elucidates that Indigenous Peoples and not the States are the rightful holders and beneficiaries (criteria 5).

clarify

fp3 and 2 have to be seen in a mutual relationship, calling for the application and the implementation of the internationally recognized, legally correct term “Indigenous Peoples” including its implications (fp3) as well as requesting compliance with international norms, affirming respect and protection of Indigenous Peoples' rights (criteria 10).

Likewise, fp4 and 6 do enhance each other. Fp4 demands the application of the principle “Free, Prior, Informed Consent” in regards to Indigenous Peoples. Fp6 urges for the right to redress and repatriation if the FPIC had not been applied before (criteria 7).

Consequently, these principles constitute the terms of reference. Without their recognition, no true, honest and effective dialog is able to be realized, no legitimacy achieved.

The IGC 19: Legal Advice and Broken Promises

Due to the Indigenous Peoples' final statement at the IGC 18, the committee promised to advance participation and install a mechanism called “Friends of the Chair” at its next session. This mechanism is intended to provide direct communication with the Chair of the IGC - formal and informal consultations. The so called “Friends” are comprised of different States' representatives, lobbying for their specific issues.

Though it was announced, that two seats would have been reserved for indigenous representatives, access to this mechanism was ultimately denied to Indigenous Peoples. This became obvious just during the first days of the IGC 19. States had interfered and had pushed the IGC to restrict Indigenous Peoples access, limiting their participation once again.

Nonetheless, Indigenous Peoples continued to fight for their rights, the Indigenous Caucus met regularly every day and prepared strategies in order to seek more influence, advocating for their collective goals. Even the then IGC Chair Ambassador Philip Owade informally visited the Caucus and announced his personal commitment, seemingly trying to honestly respond to Indigenous Peoples' well-grounded, legitimate questions and demands, admitting the negative influence and pressure some member States had exerted on the IGC, particularly concerning the elimination of Indigenous Peoples' Friends of the Chair.

Another Informal Meeting: WIPO's Legal Advisor:

Furthermore, an informal meeting between the Indigenous Caucus and the main representative of WIPO's Legal Council could be arranged during the IGC 19, assessing opportunities to alter Indigenous Peoples' status towards effective participation as well as their standing within WIPO in general .

Outstandingly, the legal advisor – though informally – affirmed Indigenous Peoples' request of being on an equal footing as Member States. Referring to an international legal perspective he also disregarded the very limited option to participate merely as “observers”. Respectively, due to clear evidence during the last decades concerning the acknowledgement of Indigenous Peoples' rights within International Law, he himself suggested a change.

The legal advisor admitted, though equal status as States would currently not be realistic to achieve due to objections by the latter, an almost equal footing in terms of effective participation just in between Member States and observers should be possible instead. Such a status would allow participation as a “non-state” - such as Palestine - and would massively enhance influence, such as no prerequisite to convince States in supporting of Indigenous Peoples' recommendations and proposals at the text based discussions anymore.¹⁴⁷

In order to accomplish this goal a decision is needed at the General Assembly instead of the IGC. Solely within the highest organ the Rules of Procedure could get altered. The Indigenous Caucus would have to become a formal “Special Category”.

¹⁴⁷ In WIPO's “Rules of Procedure” this status is defined as “other”.

Though Indigenous Peoples do have the right to Self Determination according to UN mechanisms¹⁴⁸ and WIPO principally has to obey the International Human Rights Regime, WIPO functions within a “sui generis” system according to its own constitution, not dependent on the UN, creating its own laws which eventually prevail.

Referring to the legal advisor's advice, Indigenous Peoples should raise their concerns and propose a special status at the GA - unfortunately this would also underlie the same structure and has to be supported by at least one State in order to be on the agenda. Nevertheless, he suggested to request an invitation as ad hoc observers at the GA.

Indigenous Peoples Reaction: Indigenous Caucus' Final Statement at the IGC 19:¹⁴⁹

Representing their Indigenous Caucus Statement, Indigenous Peoples reacted with a unified voice, which happened to be the ultimately announced statement just before the closing of the IGC session.

Mainly, based on continuing ignorance and disrespect by the IGC and Member States, the Caucus reiterated principles already stated at former IGCs, but, due to above mentioned informal discussions with the legal advisor, pushing even harder for equal and effective participation:

“The Indigenous Caucus (including local communities) thus

„require full and effective participation in all relevant negotiations and decision-making processes and any other related meetings....The Indigenous Peoples, as peoples and nations, participate in these forums in their own right.” (article 1, Indigenous Caucus Final Statement, IGC 19)

Furthermore, particularly regarding the elaboration of the texts, Indigenous Peoples demand that

„proposals must remain in the text without the qualification of immediate State support in the drafting process or reports. Indigenous Peoples proposals must be accepted on

¹⁴⁸Though SD is qualified within the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, Art.46) not to threaten a State's territorial integrity.

¹⁴⁹Full Statement see <http://indigenouspeoplesissues.com/attachments/article/11486/IPStatement-WIPOIGC-19.pdf>

equal footing as any State proposal. Indigenous Peoples should be consulted on all proposals, deletions and amendments of all text in a collaborative manner.“
(article 2, Indigenous Caucus Final Statement, IGC 19)

To affirm the above stated, the Final Statement emphasizes more explicitly the right to Self Determination (criteria 10):

Fp9 demands respect concerning „the permanent sovereignty over natural resources“ (criteria 5). In this regard, affirming Indigenous Peoples' in international law, fp8 serves as the essential basis: it reiterates article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which is based upon the fundamental human rights conventions – the Convention on Economic, Social and Cultural Rights (CESCR) as well as the Convention on Civil and Political Rights (CCPR) to highlight Indigenous Peoples' Right to Self Determination:

“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.”

Respectively, fp4 demands the adoption and implementation of the internationally recognized term „Indigenous Peoples“ by WIPO, which up to date, shamefully still refers to “indigenous communities”

Finally, The newly inserted fp2, clearly articulates that “(t)he legal instruments must establish a new international regime that conforms to customary TK, and TCE belonging to Indigenous Peoples.” Thus ownership and property rights must be ensured as being part of Indigenous Peoples' customs, affirming the non-commodity Cultural Heritage in relation to a new international regime. (criteria 2, 4, 5, 10, 11)

Consequently, the Indigenous Peoples Caucus' requests similar status as State Members in order to fulfill its legitimate responsibilities as owners, holders, stewards and guardians of their Cultural Heritage.(criteria 2, 5)

The Secretariat's Draft Study:

Again, the Indigenous Caucus sent a strong, unified, collective Statement message to the IGC and

WIPO, signed by all Indigenous Peoples' Representatives. The WIPO GA received this message and responded at its 40th session, Sept. 26th – Oct. 5th, 2011:

“With a view to enhancing the positive contribution of observers, the General Assembly invites the Committee to review its procedures in this regard. To facilitate this review, the General Assembly requests the secretariat to prepare a study outlining current practices and potential options.”¹⁵⁰

The Secretariat prepared a draft study - WIPO/GRTKF/IC/20/7 - and released an executive summary at the IGC 20, the first session in 2012.

The so called “Summary of potential options for enhancing participation and positive contribution of observers to the IGC process” is intended to identify “the main, concrete options that arise from the draft study”. The following 9 proposals are meant to be interpreted as a “package of complementary steps”.¹⁵¹

- ✧ Clarifying relationship with diverse categories of observers
- ✧ Cooperating in a spirit of partnership
- ✧ Substantiating policy debate through enhanced engagement
- ✧ Facilitating coordinated expert advice and input
- ✧ Enhancing national and regional dialogue and awareness-raising
- ✧ Fortifying financial and other means of support for direct participation
- ✧ Expanding interaction through information exchange
- ✧ Awareness-raising and communications tools
- ✧ Strengthening cooperation with other United Nations bodies, programs and agencies

Undoubtedly, these proposals sound nice, nonetheless, their content does not imply a meaningful, effective commitment to change the status quo. The most relevant proposals according to the Indigenous Peoples' Caucus statement - “Clarifying relationship with diverse categories of observers” and “Cooperating in a spirit of partnership” - do not include a reference concerning a reform of WIPO's rules of procedure. However, the Secretariat's analysis does refer to Indigenous Peoples and local communities as “arguably the key stakeholders in the process” (criteria 6) , simultaneously it weakens its own message with the term “arguably” and soft phrases like “might be practically useful to recognize the heterogeneous nature of participating observers” (criteria 9).

¹⁵⁰ The WIPO General Assembly, at its Fortieth (20th Ordinary) Session, held from September 26 to October 5, 2011
¹⁵¹ c.f.: WIPO/GRTKF/IC/20/7, p2

Particularly concerning the latter, the Secretariat calls for a clarification regarding “IGC’s relationship with diverse categories of observers towards establishing a meaningful dialogue.” The Secretariat emphasizes a distinction among observers, not taking into account Indigenous Peoples demands towards equal participation. It further suggests Member States as being eligible to differentiate between relevant observers on a national basis (criteria 9).

In regards to “a spirit of partnership”, the secretariat recommends the already mentioned “Friends of the Chair” option. Notwithstanding, it does not promote a substantial elevation of the Indigenous Peoples' status. At least the third proposal contains a quite useful necessary recommendation: it calls for an interactive dialogue as part of the formal proceedings, instead of the informal panel discussions which are not mandatory to attend for the Member States.

IGC 20: Indigenous Peoples' Withdrawal

However, the Secretariat's prepared study significantly lacks substance, substance which has been demanded by the Indigenous Peoples' Caucus numerous times, as mentioned above. The continuing discrimination – specifically the current IGC Chair Ambassador Wayne McCook has been very disrespectful and not cooperative at all¹⁵² - as well as the ignorance by the Secretariat – Indigenous Peoples were apparently not directly involved in the study above – eventually culminated in the only possible response: the withdrawal of Indigenous Peoples as long as no substantive change concerning Indigenous Peoples' participation is going to happen:

“....The IGC, in its overall procedures, has systematically ignored our rights, as Indigenous Peoples and as Nations with internationally recognized collective rights, to self-determination and full and equitable participation at all levels.

The draft study of the Secretariat on the participation of observers before the IGC does not contain modifications proposed by the Indigenous Peoples to WIPO’s rules of procedure....

Distinguished delegates: we, the Indigenous Peoples, are the titleholders, proprietors and ancestral owners of traditional knowledge that is inalienable, nonfortifiable and inherent to the genetic resources that we have conserved and utilized in a sustainable manner within our territories. (criteria 1, 2, 3, 4, 5, 10) For this reason, we appeal to the States to

¹⁵² Not even once he referred to Indigenous Peoples as “Peoples”, one time even correcting himself in the last second, “Indigenous Peo....hmm.....communities”.

acknowledge that the discussion on intellectual property rights and genetic resources should include Indigenous Peoples on equal terms with the States since the work will directly impact our lives, our lands, our territories and resources, and will reach to the very heart of our cultures, which are the inheritance of future generations.

Therefore, the Indigenous Peoples present at IGC 20 have reflected seriously on our role in this process and have decided, unanimously, to withdraw our active participation in the work developed by this Committee until the States change the rules of procedure to permit our full and equitable participation at all levels of the IGC and until the instruments recognize and are consistent with the existing international frameworks for the rights and interests of Indigenous Peoples within the scope of the IGC (criteria 7, 5, 10)

IGC 20, February 21, 2012

The IGC 22: The Empire Strikes Back

Unfortunately, the Strategy of “divide and conquer” does still remain as “business as usual”. Similar to processes within the CBD, Member States intervened and pushed the WIPO to establish so called “expert groups”. These unilaterally created groups are intended to “facilitate” the legal texts, the “final product”. Accordingly, communication between Member States and carefully selected, hand picked indigenous delegates who are willing to follow their own individual paths absent of traditional collectivity, is frequently taking place more or less confidentially. Quite remarkable but probably not surprising, the same indigenous individuals who collaborated with the states inside the CBD concerning the Nagoya Protocol, are now also involved at the IGC as self acclaimed “experts”, acting on their own behalf.

At the IGC 22, the decision to facilitate the texts on TCEs through such an expert group was thrust upon Indigenous Peoples' delegates - without any former consultation, not to mention consent. This unilateral action created confusion accompanied by the loss of valuable time in order to react adequately. Generally, in limiting participation, the main intended purpose of such a group is to get rid of critics blamed as being “troublemakers” and therefore, faster, “easier”, results. Access was just granted to two Indigenous persons, though only one of these was allowed to have a voice within the group sessions. The experts' group on TCE's took place behind closed doors, limited to 30 Member States' representatives and 2 indigenous delegates, further access to observe was denied. However, the same Rules of Procedure also adhere to the Expert Group, as a consequence, an

Indigenous person's voice does only have some impact if it gets supported by at least one of the participating Member States. So who would be eligible, who would be the privileged one? The one to take responsibility for 370 million Indigenous? Who has the legitimacy? Or would these persons just observe, not interfere? Or wouldn't it be much better to refuse to accept this diminishing, humiliating and discriminating means of dominance at all, boycotting it in order to withdraw legitimacy?

In this regard, the roots of the problem are WIPO's already mentioned "Rules of Procedure", linked to and inextricably interwoven with the DDD and its inherent pattern. These rules represent the prevailing law within this forum. They build the fundamental structure of dominance, establishing Member States with a voice to determine on the one hand, and restricting so called "observers" with limited voices on the other, creating and perpetuating the dehumanizing pattern of superiority and inferiority once again. Though the WIPO is independent, these rules do not even have to align with already established and recognized Human Rights Law. The UNDRIP is not being recognized, nor is the correct indigenous rights based terminology, such as "Indigenous Peoples", "Free, Prior, Informed Consent (FPIC)", or "Cultural Heritage".

The CBD's Nagoya Protocol and the WIPO's IGC: similarities

As the assertions above certainly clarify, neither the CBD nor the WIPO are compatible with Indigenous Peoples original requests to decolonize. Even worse, the presented instruments do not respect already recognized instruments, such as the UNDRIP. Thus, these recent developments should be interpreted as a massive backlash against established instruments, which are – as my analysis of their implicit terminology has proven, insufficient and do also partly uphold colonial structures due to the negation of Indigenous Peoples true, unqualified self-determination.

Nonetheless, these recent elaborations clearly reflect unequal power relations and convey colonial structures within. Indigenous Peoples are reduced to be "indigenous and local communities", degraded as "observers", "beneficiaries", and "stakeholders". Besides this ignorance, "divide and conquer" tactics are being applied in order to weaken the already rather limited opportunities of Indigenous Peoples' participation. No FPIC, no full and equal participation is possible within these discriminating structures of domination.

Presumably, the reason for this severe backlash derives from the massive interest in GRs and associated TK – Indigenous Peoples' Cultural Heritage, due to the fact that the majority of these so

called “resources” are to be found on Indigenous Peoples' territories. The exploitation promises “big business” and profit for states as well as transnational corporations (TNCs) – it is the “El Dorado” of our time.

Thus, since the dominator's perspective excludes Indigenous Peoples' self determination, solely the laws and Rules of Procedure created by himself - based on the concept of nation states - are being accepted. Apparently, this is the application of the same ancient pattern of “discovery, invention and domination”, only modified into a new fitting fabric – the magic formula “economy and development”. Thus the same pattern of superiority and inferiority, so vividly incorporated in the DDD, has been applied by force and perpetuated until now.

Nevertheless, Indigenous Peoples resistance is vitally alive. Thus, I would like to conclude with the following extracts of statement which was submitted at the UN Permanent Forum on Indigenous Issues, endorsed by numerous Indigenous Peoples' organizations:

„We call upon all Indigenous Peoples to stand in solidarity with indigenous peoples who are standing in opposition to this 21st Century version of the Doctrine of Discovery, and withdraw our active participation in the WIPO processes on GRTKF unless and until the States change the rules of procedure to permit our full and equal participation at all levels of the IGC, and until the instruments recognize and are consistent with the existing international frameworks for the rights and interests of Indigenous Peoples and Nations within the scope of the IGC.”

“We recommend that Indigenous Nations and Peoples set our own legal standards for the protection of our traditional knowledge, traditional cultural expressions, and genetic resources and we insist that the UN inform WIPO that it must respect Indigenous Peoples’ traditions, practices and laws on these issues.”

“We say, ¡no mas!, no more! WIPO has no right to take any more from us –not one more drop of blood, not one more seed, not one more song or story or teaching. Nothing!”

(Speaker: Debra Harry, Joint Statement, UNPFII, 11th session, 10.5.2012, Full Statement in Annex)

3.6 Indigenous Peoples' Voices – Indigenous Peoples' Resistance:

In line with this Indigenous Peoples' statement and in stark contrast to scrutinized “Pseudo Instruments for the protection of indigenous communities” which support and perpetuate neo-

colonial structures, the following selected extracts of declarations/instruments shall again emphasize Indigenous Peoples' resistance. They truly express uncompromising positions which convey Indigenous Peoples' primordial demands. In this sense, they are also intended to abandon the stereotype of marginalized/victimized Indigenous Peoples “begging for the permission to get their cultural rights recognized”. Instead, these voices ascertain Indigenous Peoples' self-determination as peoples, their collective identity which is inextricably inherent in their Cultural Heritage and rooted within their LTRs. As stewards, they rightfully claim and defend their permanent control and ownership over their Cultural Heritage, including LTRs.

The subsequent extracts of Indigenous Peoples' instruments speak for themselves and incorporate their collective voices. Thus, my comments will be rather limited. They shall conclude the present part of my thesis.

The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples¹⁵³

2. RECOMMENDATIONS TO STATES, NATIONAL AND INTERNATIONAL AGENCIES

In the development of policies and practices, States, National and International Agencies must

2.1 Recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.

2.2 Recognise that indigenous peoples also have the right to create new knowledge based on cultural traditions.

2.3 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Cultural and Intellectual Property Rights.

2.4 Accept that the cultural and intellectual property rights of indigenous peoples are vested with those who created them.

2.5 Develop in full co-operation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:

¹⁵³ The Mataatua Declaration was the first International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples. It was held in Whakatane, 12-18 June 1993 Aotearoa, New Zealand, June 1993. Nine Tribes of Mataatua (in the Bay of Plenty Region of Aotearoa) convened the conference. Over 150 delegates from fourteen countries attended, including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA, and Aotearoa. It can be accessed at: http://www.kaupapamaori.com/assets/iri/cultural_intellectual_property.pdf

- collective (as well as individual) ownership and origin
- retroactive coverage of historical as well as contemporary works
- protection against debasement of culturally significant items
- cooperative rather than competitive framework
- first beneficiaries to be the direct descendants of the traditional guardians of that knowledge
- multi-generational coverage span

BIODIVERSITY AND CUSTOMARY ENVIRONMENTAL MANAGEMENT

2.6 Indigenous flora and fauna is inextricably bound to the territories of indigenous communities and any property right claims must recognise their traditional guardianship.

2.7 Commercialization of any traditional plants and medicines of Indigenous Peoples, must be managed by the indigenous peoples who have inherited such knowledge.

2.8 A moratorium on any further commercialisation of indigenous medicinal plants and human genetic materials must be declared until indigenous communities have developed appropriate protection mechanisms.

2.9 Companies, institutions both governmental and private must not undertake experiments or commercialisation of any biogenetic resources without the consent of the appropriate indigenous peoples.

2.10 Prioritise settlement of any outstanding land and natural resources claims of indigenous peoples for the purpose of promoting customary, agricultural and marine production.

2.11 Ensure current scientific environmental research is strengthened by increasing the involvement of indigenous communities and of customary environmental knowledge.

Although the Mataatua Declaration was manifested a while ago (1993), its significance and substance has not changed at all, as the pursuant Declaration (2007) which was elaborated by the Indigenous Peoples Council on Biocolonialism (IPCB) and endorsed by 48 Indigenous Peoples organizations¹⁵⁴, perfectly demonstrates. Additionally, it is a great source of references to other

¹⁵⁴ 1. Andes Chinchasuyo, Ecuador 2. Traditional Circle of Indian Elders and Youth 3. Tonatierra 4. Rapa Nui Parliament 5. Indigenous Environmental Network (ein) 6. International Indian Treaty Council (IITC) 7. Indigenous Peoples Council on Biocolonialism (IPCB) 8. Seventh Generation Fund for Indian Development 9. Native Women's Advocacy Center 10. Native Women's Association of Canada 11. South Asia Indigenous Women Forum 12. Indigenous Peace Commission, Nepal 13. Indigenous Women Republic Front, Nepal 14. American Indian Law Alliance 15. Fundación Cholsamaj 16. Centro de Estudios Integrados para el Desarrollo Comunal 17. Centro de Proyectos para el Desarrollo Comunal 18. Turaga Nation 19. Vanuatu Indigenous Peoples Forum 20. Columbia

Indigenous Peoples' declarations in this regard.

Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge¹⁵⁵

Convened at the Sixth Session of the United Nations Permanent Forum on Indigenous Issues May 14-25, 2007 New York, New York

We, the undersigned Indigenous peoples and organizations, having convened during the Sixth Session of the United Nations Permanent Forum on Indigenous Issues, from May 14-25, 2007, upon the traditional territory of the Onondaga Nation present the following declaration regarding our rights to genetic resources and indigenous knowledge:

Reaffirming our spiritual and cultural relationship with all life forms existing in our traditional territories;

Reaffirming our fundamental role and responsibility as the guardians of our territories, lands and natural resources;

Recognizing that we are the guardians of the Indigenous knowledge passed down from our ancestors from generation to generation and we reaffirm our responsibility to protect and perpetuate this knowledge for the benefit of our peoples and our future generations;

Strongly reaffirming our right to self-determination, which is fundamental to our ability to carry out our responsibilities in accordance with our cultural values and our customary laws.

Strongly reaffirming our commitment to the United Nations Declaration on the Rights of Indigenous Peoples as adopted by the Human Rights Council, including, Article 31, which establishes that:

River Education, Economic Development 21. Diné Care 22. Dewan Adat Papua Jayapura 23. Juventud Indígena Argentina 24. Call of the Earth Llamado de la Tierra 25. El Molo People 26. El Molo Eco-Tourism Rights and Development Forum 27. Tatanka Oyate (Buffalo Nations) 28. Confederacy of Treaty 6 First Nations 29. Instituto Indígena Brasileiro para Propriedade Intelectual (INBRAPI) 30. Sutsuin Jiyeyu Wayúu –Fuerza de Mujeres Wayúu 31. Red de Mujeres Indígenas Wayúu 32. Consejo Nacional de la Mujeres Indígena 33. Tob Qom Choco Argentina 34. Chirapaq, Centro de Culturas Indígenas del Perú 35. Ecuador CONAIE 36. Consejo de Todo los Tierra – Mapuche Chile 37. Corporacion de Mujeres Mapuche 38. Federacion de Pueblos de Pichincha 39. Nacionalidad Waorani Del Ecuador 40. Asociacion de Comunidades Indígenas 41. Fundacion Para la Promocion del Concimiento Indígena 42. Luz y Vida, Ecuador 43. Cultural Conservation Act (CCA) 44. International Alliance of Indigenous and Tribal Peoples of the Tropical Forests 45. United Confederation of Taino People 46. Indigenous Peoples Caucus of the Greater Caribbean 47. Consejo General de Tainos Borincanos 48. Russian Association of Indigenous Peoples of the North (RAIPON)

¹⁵⁵ Accessible at the IPCB webpage: http://www.ipcb.org/resolutions/htmls/Decl_GR&IK.html

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Recalling the Declaration of Indigenous Organizations of the Western Hemisphere, Phoenix, Arizona (February 1995), which asserted, "Our responsibility as Indigenous peoples is to ensure the continuity of the natural order of all life is maintained for generations to come...We have a responsibility to speak for all life forms and to defend the integrity of the natural order. ...We oppose the patenting of all natural genetic materials. We hold that life cannot be bought, owned, sold, discovered or patented, even in its smallest form."

Recalling the Beijing Declaration of Indigenous Women, issued at the United Nations Fourth World Conference on Women in Beijing, which stated that "We demand that our inalienable rights to our intellectual and cultural heritage be recognized and respected. We will continue to freely use our biodiversity for meeting our local needs, while ensuring that the biodiversity base of our local economies will not be eroded. We will revitalize and rejuvenate our biological and cultural heritage and continue to be the guardians and custodians of our knowledge and biodiversity."

Recalling the Ukupseni Declaration, at Kuna Yala, Panama, 12-13 November 1997, which declared that "We reject the use of existing mechanisms in the legalization of intellectual property and patent systems use of existing mechanisms including intellectual property rights and patents to legalize the appropriation of knowledge and genetic material, whatever their source, and especially that which comes from our communities."

Recalling the INTERNATIONAL CANCUN DECLARATION OF INDIGENOUS PEOPLES at the 5th WTO Ministerial Conference - Cancun, Quintana Roo, Mexico, (12 September 2003), which stated, "Stop patenting of life forms and other intellectual property rights over biological resources and indigenous knowledge. Ensure that we, Indigenous Peoples, retain our rights to have control over our seeds, medicinal plants and indigenous knowledge."

Concerned by the accelerated elaboration and negotiation of an international regime on access and

benefit sharing under the auspices of the Convention on Biological Diversity and the nation-states who are Parties to the Convention failure, to date, to recognize the rights of Indigenous peoples to control access to, and utilization of, the genetic resources that originate in our territories, lands and waters.

Therefore, we urge the United Nations Permanent Forum on Indigenous Issues to

1. Prepare a legal analysis on States, peoples and sovereignty and their relationship, scope and application, to assist the parties to the Convention on Biological Diversity in understanding sovereignty in the context of the Convention and the role of sovereignty in developing an international regime on ABS;
2. Recommend to the Convention on Biological Diversity that, consistent with international human rights law, states have an obligation to recognize and protect the rights of Indigenous peoples to control access to the genetic resources that originate in their lands and waters, and associated traditional knowledge. Such recognition must be a key element of the proposed international regime on ABS.
3. Prepare a report on the social, cultural and economic impacts of commercialization of genetic resources and indigenous knowledge on Indigenous peoples.
4. Disseminate this Declaration and the above recommended reports to all relevant UN fora. Indigenous Peoples and Organizations Supporting the Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge.

The next most recent example was manifested on 17th June in 2012 during the United Nations Conference on Sustainable Development Rio+20, the successor conference of already mentioned UNCED which had taken place 20 years earlier. Although negative incidents concerning Indigenous Peoples arose at the Rio+20 Conference – particularly in regards to the application of an ancient, well approved, quite successful strategy called „divide and conquer“ - the Indigenous Peoples' official outcome document manifests all the essentially relevant critique against neo-colonialism and all its facets. Thus, extracts of the Kari-Oca Declaration including its document “The Future We Want” shall conclude part 2 of this thesis:

The Kari-Oca 2 Declaration, “Indigenous Peoples Global Conference on Rio+20 and Mother

The institutionalization of Colonialism

We see the goals of UNCSD Rio+20, the “Green Economy” and its premise that the world can only “save” nature by commodifying its life giving and life sustaining capacities as a continuation of the colonialism that Indigenous Peoples and our Mother Earth have faced and resisted for 520 years....

Since Rio 1992, we as Indigenous Peoples see that colonization has become the very basis of the globalization of trade and the dominant capitalist global economy. The exploitation and plunder of the world’s ecosystems and biodiversity, as well as the violations of the inherent rights of Indigenous Peoples that depend on them, have intensified. Our rights to self determination, to our own governance and own self-determined development, our inherent rights to our lands, territories and resources are increasingly and alarmingly under attack by the collaboration of governments and transnational corporations....

The Green Economy is nothing more than capitalism of nature; a perverse attempt by corporations, extractive industries and governments to cash in on Creation by privatizing, commodifying, and selling off the Sacred and all forms of life and the sky, including the air we breathe, the water we drink and all the genes, plants, traditional seeds, trees, animals, fish, biological and cultural diversity, ecosystems and traditional knowledge that make life on Earth possible and enjoyable.

We must focus on sustainable communities based on indigenous knowledge, not on capitalist development....

We demand that the United Nations, governments and corporations abandon false solutions to climate change, like large hydroelectric dams, genetically modified organisms including GMO trees, plantations, agrofuels, “clean” coal, nuclear power, natural gas, hydraulic fracturing, nanotechnology, synthetic biology, bioenergy, biomass, biochar, geo-engineering, carbon markets, Clean Development Mechanism and REDD+ that endanger the future and life as we know it....

In order to achieve sustainable development, states must recognize the traditional systems of

156 Accessible at: <http://www.ienearth.org/docs/DECLARATION-of-KARI-OCA-2-Eng.pdf>

resource management of the Indigenous Peoples that have existed for the millennia, sustaining us even in the face of colonialism. Assuring Indigenous Peoples' active participation in decision making processes affecting them, and their right of Free Prior and Informed Consent is fundamental. States should likewise provide support for Indigenous Peoples appropriate to their sustainability and self determined priorities without restrictions and constricting guidelines....

In all matters we will gather and organize the solidarity of all Indigenous Peoples from all parts of the world, and all other sources of solidarity with non-indigenous of good will to join our struggle for food sovereignty and food security. We reject the privatization and corporate control of resources such as our traditional seeds and food....

We reject the assertion of intellectual property rights over the genetic resources and traditional knowledge of Indigenous peoples which results in the alienation and commodification of Sacred essential to our lives and cultures. We reject industrial modes of food production that promote the use of chemical substances, genetically engineered seeds and organisms. Therefore, we affirm our right to possess, control, protect and pass on the indigenous seeds, medicinal plants and traditional knowledge originating from our lands and territories for the benefit of our future generations.

The Future We Want

In the absence of a true implementation of sustainable development, the world is now in a multiple ecological, economic and climatic crisis; including biodiversity loss, desertification, de- glaciation, food, water, energy shortage, a worsening global economic recession, social instability and crisis of values. In this sense, we recognize that much remains to be done by international agreements to respond adequately to the rights and needs of Indigenous Peoples. The actual contributions and potentials of our peoples must be recognized by a true sustainable development for our communities that allows each one of us to Live Well.

As peoples, we reaffirm our rights to self-determination and to own, control and manage our traditional lands and territories, waters and other resources. Our lands and territories are at the core of our existence – we are the land and the land is us; we have a distinct spiritual and material relationship with our lands and territories and they are inextricably linked to our survival and to the preservation and further development of our knowledge systems and cultures, conservation and sustainable use of biodiversity and ecosystem management.

We will exercise the right to determine and establish priorities and strategies for our self-development and for the use of our lands, territories and other resources. We demand that free, prior and informed consent must be the determinant and legally binding principle of approving or rejecting any plan, project or activity affecting our lands, territories and other resources. Without the right of Free Prior and Informed Consent, the colonialist model of the domination of the Earth and its resources will continue with the same impunity.

We will continue to unite as Indigenous Peoples and build a strong solidarity and partnership among ourselves, local communities and non-indigenous genuine advocates of our issues. This solidarity will advance the global campaign for Indigenous Peoples rights to land, life and resources and in the achievement of our self-determination and liberation.

We will continue to challenge and resist colonialist and capitalist development models that promote the domination of nature, incessant economic growth, limitless profit-seeking resource extraction, unsustainable consumption and production and the unregulated commodities and financial markets. Humans are an integral part of the natural world and all human rights, including Indigenous Peoples' rights, which must be respected and observed by development.

We invite all of civil society to protect and promote our rights and worldviews and respect natural law, our spiritualities and cultures and our values of reciprocity, harmony with nature, solidarity, and collectivity. Caring and sharing, among other values, are crucial in bringing about a more just, equitable and sustainable world. In this context, we call for the inclusion of culture as the fourth pillar of sustainable development.

The legal recognition and protection of the rights of Indigenous Peoples to land, territories, resources and traditional knowledge should be a prerequisite for development and planning for any and all types of adaptation and mitigation to climate change, environmental conservation (including the creation of "protected areas"), the sustainable use of biodiversity and measures to combat desertification. In all instances there must be free, prior and informed consent of Indigenous Peoples.

We continue to pursue the commitments made at Earth Summit as reflected in this political declaration. We call on the UN to begin their implementation, and to ensure the full, formal and effective participation of Indigenous Peoples in all processes and activities of the Rio+20 Conference and beyond, in accordance with the United Nations Declaration on the rights of Indigenous Peoples (UNDRIP) and the principle of Free, Prior and Informed Consent (FPIC). We continue to inhabit and maintain the last remaining sustainable ecosystems and biodiversity hotspots in the world. We can contribute substantially to sustainable development but we believe that a holistic ecosystem framework for sustainable development should be promoted. This includes

the integration of the human-rights based approach, ecosystem approach and culturally- sensitive and knowledge-based approaches.

We declare our solidarity and support for the demands and aspirations of the Indigenous Peoples of Brazil found in the Annex to this Declaration.

We Walk in the Footsteps of our Ancestors.

Accepted by Acclamation, Kari-Oka Village, at Sacred Kari-Oka Púku, Rio de Janeiro, Brazil, 17 June 2012.

4. CONCLUDING REMARKS

My central hypothesis postulates that Indigenous Peoples' Cultural Heritage is still vitally threatened by persistent colonial structures, implicit within contemporary national and particularly international policies.

Thus, I argue that the decolonization process concerning Indigenous Peoples has not ended yet. In fact, my assertions should have proven the vital continuity and persistence of neo-colonial structures – structures which are vested in ancient patterns of dominance but approach in a new disguise: The attempted conquest of Indigenous Peoples “Cultural Heritage”.

To confirm this assumption, I divided my thesis into two parts:

The first part is dedicated to the beginnings of the international pan-indigenous movement, and its development throughout the successive decades. Comprised of Indigenous Peoples from all over the world, similarities were identified and forces bundled to relieve from the colonizers' subjugation. Consequently, in reflecting the history of this movement, I intended to envision its causes and major goals, which can be summarized as a fight for the inherent right of self-determination in order to decolonize.

As a major step in this regard, the successful access to enter the international community – the UN – has to be seen as a milestone. Nevertheless, as my general analysis hopefully clarified, this has been a rough road until today. Indigenous Peoples urged for their decolonization and adhered to their right of self-determination as peoples equal to other nations. But this door was blocked due to the influence of states, primarily the settler states which feared and continue to fear about losing “their” territorial integrity, and, pursuantly, claims to LTRs, which, as mentioned, are to be found in majority on Indigenous Peoples lands.

In this sense, these states have persistently continued to oppose Indigenous Peoples' demands till today, as part 2 verifies. However, although meeting several criteria and thus most presumably being eligible to address the United Nations instruments regarding decolonization, they were denied to access.

Nevertheless, Indigenous Peoples were able to enter through the doors of the UN human rights regime. The WGIP provided a convenient floor and made history due to its innovative – according UN structures - quite non-conformistic and dynamic character.

Despite that, the settler states, particularly CANZUS, have tried everything to diminish Indigenous Peoples' influence, especially in regards to their right of self-determination and their LTRs. Thus, a Declaration on the Rights of Indigenous Peoples finally got adopted by the UN's General Assembly – but not without reservations and partly in sharp contrast to the original demands of Indigenous Peoples, as clearly asserted in the 22 Principles of 1987.

The first part's purpose is intended to unveil the still rather dominant structures of colonialism, within the different documents, which, as was expressed, even massively affected the UNDRIP based on its various modifications, most substantially through article 46.

Therefore, in identifying these intrinsic tensions and hidden battlefields, the first part provides the ground to comprehend further, more detailed assertions concerning Indigenous Peoples' Cultural Heritage and related terms, which are of central significance to my thesis.

Consequently, the second part transfers already proclaimed controversies regarding decolonization and self-determination into a specific sphere which has to be associated with the so called “environment”.

Thus, second part is intended to grasp most important, inextricably interwoven elements of Indigenous Peoples' holistic lifeways – their collective identity – and incorporates these within the term “Cultural Heritage”. In this regard, “Cultural Heritage” serves as a translational term to comprehend Indigenous Peoples' complex relationships to their so called “LTRs” and “traditional knowledge” (TK), as the studies led by UN Special Rapporteur Erica Irene Daes extensively confirm.

As emphasized, these studies are the result of Indigenous Peoples' full and equal participation, quite uniquely, they stand in line with the original Principles of Indigenous Peoples and convey a similar message: The utmost relevance of Indigenous Peoples' self-determination, their permanent control

and collective ownership rights concerning their LTRs and TK. These are most substantial, interdependent core elements of Indigenous Peoples' Cultural Heritage, which distinguishes from the UNESCO's definitions. The latter do not sufficiently refer to Indigenous Peoples' self-determination and, subsequently, accept the states as final decision-makers concerning the disposal of such heritage.

An additional task inherent in within the second part is also the exposure of colonial patterns in order to relate these to recent colonial conquests and exploitation. In this sense, the Doctrine of Discovery and its successors serve as best examples to visualize implicit racism, subjugation and greed to accumulate and rob Indigenous Peoples' Cultural Heritage and associated LTRs.

My elaboration of specific criteria to analyze the viability of already mentioned instruments concerning the protection of Indigenous Peoples' Cultural Heritage and intrinsic LTRs turned out to be rather voluminous. Notwithstanding, these criteria confirmed my hypothesis due to the fact, that none of the officially legitimized instruments in regards to Indigenous Peoples Cultural Heritage, sufficiently meet these tasks.

To the contrary, the analysis revealed substantial flaws within the documents, especially the ILO Conventions but also in comparison to the 22 Principles and already softened DRIP 1994, the highly celebrated UNDRIP. Undoubtedly a significant milestone, however, it severely lacks its primordial purpose, to promote Indigenous Peoples' decolonization and ascertain their collective rights as peoples and nations regarding their LTRs. Thus, the UNDRIP mainly ensures vast autonomy rights but is perceived to be futile to recognize Indigenous Peoples' self-determination and permanent control of their Cultural Heritage.

In this regard, my hypothesis seems to be confirmed.

Nevertheless, the subsequent analysis of recent international developments in relation to Indigenous Peoples Cultural Heritage substantially sustains my presumption. Within the fora of the CBD and the WIPO Indigenous Peoples are not even granted the minimum standards of the above mentioned and analyzed instruments. Instead, the omnipotent power of the states most blatantly exposes itself.

Additionally, the ancient pattern of “divide and conquer” is applied in order to diminish even more the already rather limited participation of Indigenous Peoples' representatives. Eventually, it has to be assumed, that the decades of Indigenous Peoples' tireless engagement have not been able to substantially alter the asymmetry of power relations. Doubtless, Indigenous Peoples gained

recognition, but my analysis of these 2 fora distinctly visualize that in regards to the “conquest of the new El Dorado” - genetical resources and related Indigenous Peoples' Cultural Heritage - even the established low standards are not being addressed and mostly ignored., primarily the settler states that used to block the adoption of the UNDRIP for decades, are nowadays once again opposing Indigenous Peoples' requests in these fora.

Nonetheless, Indigenous Peoples' resistance is unbroken and will continue. Today there are more extensively educated Indigenous Peoples representatives than ever before. Many of them can switch between their worlds and fight against proceeding colonialism in various ways – traditionally and within its the imposed system of eurocentric based law.

Accordingly, in asserting their inherent right of self-determination as Indigenous Peoples, therefore pertaining to their cultural heritage, exercising their own laws in reference to their collectively hold rights, Indigenous Peoples are able to free themselves from the DDD and its illegitimate successors.

Nonetheless, not the European based law has to prevail, first and foremost, Indigenous Peoples own self-determined collective laws and rights have to be exercised by themselves for their own protection. In this regard, Steven Newcomb refers to the “intertemporal indigenous law” - based on Indigenous Peoples evident law systems, which have existed before the European aggression. These laws have never been legitimately abrogated. (c.f.:Newcomb, 15:2012) Their substantial power is vested in the right to self-determination.

In quoting Debra Harry I will also conclude this thesis. She adds: “Standards established at the international level must recognise the collective rights of Indigenous peoples to protect their genetic resources and Indigenous knowledge on their own terms and to live free from the threat and impacts of biocolonialism. This necessarily requires recognition of Indigenous peoples’ right of self-determination and the ability to control or stop any aspect of the biocolonial process when it affects our peoples or territories. Anything less is not acceptable. In the long run, it will not be changes to Western law that will truly protect Indigenous knowledge and biodiversity. The only way that all aspects of our cultural heritage will survive is to ensure its continued practice by Indigenous peoples within the distinct and unique life-ways of our peoples. It must retain its communal nature and not be exploited for commercial gain. We must learn from the wisdom of our Elders that our Indigenous knowledge and cultural heritage must be lived and practised, and transmitted from generation to generation within our communities, as we have been doing for millennia.”¹⁵⁷ (Harry, Debra: 725:2011)

157 c.f.: <http://www.youtube.com/watch?v=XXvLX3tfHp8>

As the founder of the Emerging Indigenous Leaders Institute Programme, Debra Harry and Donna Goodleaf do exactly provide this Cultural Heritage for the Indigenous Peoples' generations to come.

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http://ec.europa.eu/avpolicy/docs/ext/multilateral/gats/decl_en.pdf

The Convention for the Safeguarding of the Intangible Cultural Heritage, 2003,

MISC/2003/CLT/CH/14

<http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>

Main Indigenous Declarations/Statements:

Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993.

AILA, Memorandum on the Modified Declaration, 10.9.2007:1-7 or inside American Indian Law Alliance (AILA), Paper on the General Assembly Adoption of the Declaration of the Rights of Indigenous Peoples (DRIP), 17.10.2007:16-22. e.g.:

[https://faculty.washington.edu/pembina/all_articles/AmIndLawAlliance2007.doc+American+Indian+Law+Alliance+\(AILA\)+Memorandum+on+the+Modified+Declaration.&cd=1&hl=de&ct=clnk&gl=at](https://faculty.washington.edu/pembina/all_articles/AmIndLawAlliance2007.doc+American+Indian+Law+Alliance+(AILA)+Memorandum+on+the+Modified+Declaration.&cd=1&hl=de&ct=clnk&gl=at)

The Kari-Oca 2 Declaration, "Indigenous Peoples Global Conference on Rio+20 and Mother Earth" Accessible at: <http://www.ienearth.org/docs/DECLARATION-of-KARI-OCA-2-Eng.pdf>

Declaration on Indigenous Peoples' Rights to Genetic Resources and Indigenous Knowledge

http://www.ipcb.org/resolutions/htmls/Decl_GR&IK.html

Internet Sources:

Doctrine of Discovery: <http://www.doctrineofdiscovery.org>

FindLaw: www.findlaw.com

IPCB: Indigenous Peoples Council on Biocolonialism: www.ipcb.org/

Indigenous Peoples' Issues: www.indigenouspeoplesissues.com

Intellectual Property Watch: <http://www.ip-watch.org>

docip: Indigenous Peoples' Center for Documentation, Research and Information: www.docip.org

University of Minnesota Human Rights Center, Study Guide: *The Rights of Indigenous Peoples*,
www1.umn.edu/humanrts/edumat/studyguides/indigenous.html.

WIPO: World Intellectual Property Organization: www.wipo.int/tk/en

Annex

The 22 Principles:

Declaration of Principles (1987), adopted at the Preparatory Meeting of Indigenous Peoples, Geneva, Switzerland, submitted to the 5th session of the WGIP

Principle 1

Indigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression.

Principle 2:

“All Indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine our political status, freely pursue our own economic, social, religious and cultural development, and determine our own membership and citizenship without external interference.” (2,3,5,10,11)

Principle 3

No State shall assert any jurisdiction over an Indigenous nation and people, or its territory, except in accordance with the freely expressed wishes of the nation and people concerned.

Principle 4

Indigenous nations and peoples are entitled to the permanent control and enjoyment of our aboriginal ancestral-historical territories. This includes air, space, surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based on these resources.”

Principle 5

Rights to share and use land, subject to the underlying and inalienable title of the Indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.

Principle 6

Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of Indigenous nations or peoples.

Principle 7

In cases where lands taken in violation of these principles have already been settled, the indigenous nation or people concerned is entitled to immediate restitution, including immediate restitution, including compensation for the loss of use, without extinction of original title as well as to regain possession and control of sacred sites must always be respected.

Principle 8:

No State shall participate financially or militarily in the involuntary displacement of indigenous populations, or in the subsequent economic exploitation or military use of their territory.
(1,2,4,5,11,)

Principle 9 emphasizes the recognition of indigenous nations and peoples' laws and customs: The laws and customs of indigenous nations and peoples must be recognized by States' legislative, administrative and judicial institutions and, in case of conflict with State laws, shall take precedence. (2,3,5,10,11)

Principle 10

No State shall deny an Indigenous nation, community or people residing within its borders the right to participate in the life of the State in whatever manner and to whatever degree they may choose. This includes the right to participate in other forms of collective action and expression.

Principle 11:

Indigenous nations and peoples continue to own and control their material culture, including archaeological, historical and sacred sites, artifacts, designs, knowledge and works of art. They have the right to regain items of major cultural significance and, in all cases, to the return of the human remains of their ancestors for burial according with their traditions.

Principle 12

Indigenous nations and peoples have the right to education, and the control of education, and to conduct business with States in their own languages and to establish their own educational institutions

Principle 13:

“No technical, scientific or social investigations, including archaeological excavations, shall take place in relation to Indigenous nations or peoples, or their lands, without their prior authorization, and their continuing ownership and control. (1,2,3,4,5,6,7,10,11)

Principle 14

The religious practices of Indigenous nations and peoples shall be fully respected and protected by the laws of States and international law. Indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of sacred sites in accordance with their own laws and customs, including the right of privacy.

Principle 15

Indigenous nations and peoples are subjects of international law. (3,5,10,11)

Principle 16

Treaties and other agreements freely made with Indigenous nations or peoples shall be recognized and applied in the same manner and according to the same international laws and principles as treaties and agreements entered into with other states

Principle 17

Disputes regarding the jurisdiction, territories, and institutions of an Indigenous nation or peoples are a proper concern of international law, and must be resolved by mutual agreement or valid treaty

Principle 18

Indigenous nations or peoples may engage in self-defense against State actions in conflict with their right to self-determination

Principle 19

Indigenous nations or peoples have the right freely to travel, and to maintain economic, social and religious with each other across State borders.

Principle 20

In addition to these rights, Indigenous nations and peoples are entitled to the enjoyment of all the human rights and fundamental freedoms enumerated in the International Bill of Human Rights and

other United Nations instruments. In no circumstances shall they be subjected to adverse discrimination.

Principle 21:

All indigenous nations and peoples have the right to their own traditional medicine, including the right to protection of vital medicinal plants, animals and minerals. Indigenous nations and peoples also have the right to benefit from modern medical techniques and services on a basis equal to that of the general population of the States within which they are located. Furthermore, all indigenous nations and peoples have the right to determine, plan, implement, and control the resources respecting health, houses, and other social services affecting them.

Principle 22

According to the right of self-determination, all Indigenous nations and peoples shall not be obligated to participate in State military services, including armies, paramilitary services or “civil” organizations with military structures, within the country or in international conflicts.

ABSTRACT (German)

Problemstellung:

“Despite their vulnerable position, Indigenous Peoples account for 80% of the world's cultural and biological diversity but occupy only 20% of the world's land surface.”¹⁵⁸

Demzufolge verdeutlicht sich eine Disbalance bezüglich Völker, welche als „indigen“ definiert werden oder sich selbst als solches definieren, ein immenses Ausmass an kultureller Diversität aufweisen, welches wiederum in direkter Relation zur biologischen Diversität steht, jedoch nicht tatsächliche Besitzverhältnisse hinsichtlich politisch territorialer Ansprüche reflektiert. Es manifestiert sich eine Hegemonie, ein Machtgefüge, dass es zu beleuchten gilt.

Die Arbeit verfolgt daher 3 Ziele:

- ✧ Die Entschleierung dieses Machtgefüges anhand aktueller Beispiele, insbesondere im Spannungsverhältnis „Green Economy“ und indigener Traditionen, letztere übersetzt im Begriff „Cultural Heritage“.
- ✧ Eine Reflexion des geschichtlichen, durch Kolonialismus geprägten Kontext, welche persistente eurozentrische Muster der Diskriminierung aufdecken soll und im speziellen in Relation zu modernen, kapitalistischen Strukturen interpretiert wird.
- ✧ Eine grundsätzliche Dekonstruktion dieses Gefüges, manifestiert durch indigene Stimmen, welche einen möglichen Paradigmenwechsel implizieren und fordern.

Um diese Beziehung näher zu erörtern, sollen indigene Realitäten beleuchtet und im Spannungsfeld zur „Green Economy“ und Menschenrechten reflektiert werden. Hierbei liegt der Fokus auf panindigene Bewegungen und deren Kampf auf internationalem Terrain. Anhand zweier Beispiele wird beabsichtigt, die inhärenten Gegensätze zwischen indigenem „Cultural Heritage“ und kapitalistisch geprägter „Green Economy“ samt hegemonialem Kontext zu verdeutlichen: Das „Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (IGC)“ der „World Intellectual Property Organization (WIPO)“ und das „United Nations Reducing Emissions from Degradation and Deforestation Programm (UNREDD)“.

Zudem wird beabsichtigt, sowohl Dokumente/Instrumente des internationalen Rechts als auch

¹⁵⁸ c.f.: University of Minnesota Human Rights Center:
www1.umn.edu/humanrts/edumat/studyguides/indigenous.html

indigene Quellen/Instrumente zu beleuchten und gegenüberzustellen. Insbesondere hervorzuheben sind die „United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)“, die „International Labour Organization Convention ILO 169“, die „Convention Biological Diversity (CBD)“ und damit assoziiertes „Nagoya Protocol“, die „Mataatua Declaration“ und die Daes Studien bezüglich Cultural Heritage. Die UNDRIP - jenes Dokument das wohl zu Recht als Meilenstein hinsichtlich der Rechte Indigener Völker gilt – soll hierbei einer kritischen Analyse bezüglich des dargestellten Spannungsfeldes unterzogen werden und ihre Anwendbarkeit zu überprüfen sein.

Zuguterletzt sollen jedoch indigene Stimmen selbst in der Arbeit manifest werden - eine Dekonstruktion des dargelegten Machtgefüges, ein wahrer Paradigmenwechsel aus indigener Perspektive, hin zu einer selbstbestimmten, dekolonialisierten Welt.

Curriculum Vitae

Mag. Gawan Maringer

PERSONAL INFORMATION

Date of birth: 4th of May 1978

Place of birth: Vienna, Austria

Nationality: Austrian

EDUCATION & TRAINING

Elementary School: 1984 – 1988: Volksschule Sperlg..

High School: 1988 – 1997: BRG Vereinsgasse, High School Diploma 1997.

Civil Service: 1997 – 1998: Nursing Home Caritas Socialis Rennweg.

University: University of Vienna

1998/99: Cultural and Social Anthropology/ Media Sciences.

1998 – 2005: Cultural and Social Anthropology, M.A. of Social Sciences.
Thesis: Spatial Cognitions of Indigenous Peoples of North America and resulting sacred territorial right conflicts.

1998 – 2005: Media Sciences, B.A.

2003 – Present: International Development

2012- Present PhD Candidate in Cultural and Social Anthropology

PROFESSIONAL EXPERIENCE AND INTERNSHIPS

Human Rights/Activism to support Indigenous Peoples

2002, 2003,: Participation as NGO representative at the Meetings of the UN Working Group on Indigenous Populations (WGIP), Geneva.

2005: Participation at a Student Forum regarding the post World Summit 2005 developments, including IAEA efforts to halt nuclear proliferation, held by UNIS – Vienna at the UNVIC.

2004, 2005, 2006: Participation as NGO representative at the Meetings of the UN Working Group on Indigenous Populations (WGIP), Geneva.

2006, 2007: Meetings of the Vienna NGO Committee on Human Rights at the VIC, e.g. speaker UN Special Rapporteur on Torture Manfred Nowak.

2008: Executive Director of the Society for Threatened Peoples Austria

2009 – 2014: Participation as NGO representative at the UN Permanent Forum on Indigenous Issues at the UN headquarters in New York

2009 – 2011: Project Management Assistant at Global 2000 – Friends of the Earth Austria,

2011 – 2014: Expert concerning Indigenous Peoples at Global 2000, freelancer

2010 – 2012: Austrian representative of CAPAJ - Comisión Jurídica Para el Autodesarrollo de los Pueblos Originarios Andinos

2011: Speaker at the International DGV anthropologists' Conference in Vienna

2011 – 2012: NGO representative at the UN Expert Mechanism on the Rights of Indigenous Peoples and the UN Human Rights Council

2011 – 2012: NGO representative and assistant of the Indigenous Caucus representatives Dr. Debra Harry and Tomás Alarcón at the Intergovernmental Committee concerning GRs, TK, and TCEs at the World Intellectual Property Organization (WIPO)

2012: Guest lecturer at the Cultural and Social Anthropology Institute: "Ringvorlesung Klimawandel"

2012 – 2013: Internship at the Hawaii Institute for Human Rights and TA of Prof. Joshua Cooper at the University West Oahu

1999- now: Active member of AKIN Working Circle Indians of North America

OTHER WORK EXPERIENCE

Fieldwork on the Navajo Nation and in British Columbia

Personal Fitness Trainer since 2002

SKILLS AND COMPETENCES

- Computer Skills: - MS Word, Excel, Power Point intermediate
- Language Skills:

German: Mother Tongue

English: Fluent, written and spoken

Spanish: Intermediate

French: Intermediate

HOBBIES AND PERSONAL INTERESTS

Powerlifting, Traveling, Martial Arts, Arts