Indigenous Peoples, Protected Areas and Biodiversity Conservation - A study of Australia’s obligations under international law

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Abstract

This thesis compares the state obligation under international human rights law to ensure and protect the right of indigenous peoples to participate in the management of biodiversity conservation in protected areas established on their territories with the same obligation under international biodiversity law, and in particular the Convention on Biological Diversity. The purpose of the comparison is to ascertain to which extent the human right of indigenous peoples to conservation, and the corresponding state obligation, conform to the same right in international biodiversity law. This thesis also contains a case study of the joint management model of Kakadu National Park in Australia to assess to which extent Australia fulfils its obligation to ensure and protect the right of the parks’ traditional owners to participate in the parks’ management of biodiversity conservation. In this thesis, a broad definition of the term conservation is used, which includes both the protection of biodiversity and the sustainable use of its components.

Initially, this thesis gives a background on relevant international legal entities, such as conventions and monitoring bodies governing the conventions. A number of rights in international human rights instruments are analysed to identify the meaning and extent of indigenous peoples’ right to participate in the management of biodiversity conservation and the corresponding state obligation to ensure and protect that right. The joint management model of Kakadu National Park is then examined through its Draft Management Plan, legislation governing the management of biodiversity conservation in the park and non-legal sources describing the implementation of the joint management model.

Finally, a conclusion is made on the state obligation, and in particular Australia’s obligation, to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories. Kakadu National Park can in many ways be seen as a role model when it comes to including indigenous peoples and the traditional practices in conservation measures. However, there are indications that the proceedings of the Board meetings is not culturally appropriate for its Aboriginal members, that the possibility for Aboriginal rangers to reach higher positions in the park service hierarchy is limited and that Aboriginal fire management practices have not been fully incorporated in the park management. Therefore, there are doubts if the participation of the traditional owners in the park management of biodiversity conservation should be considered effective and appropriate. Suggestions on how to improve management practices which involve indigenous peoples are given, and include the recommendation that states should
consider in-situ conservation outside of protected areas to achieve effective involvement from indigenous peoples.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>ALRC</td>
<td>Aboriginal Land Rights Commission</td>
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<td>ALRA</td>
<td>Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth of Australia)</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<tr>
<td>CERD</td>
<td>United Nations Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>CEACR</td>
<td>ILO Committee of Experts on the Application of Conventions and Recommendations</td>
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<tr>
<td>CESCR</td>
<td>United Nations Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>COP</td>
<td>Conference of Parties to the Convention on Biological Diversity</td>
</tr>
<tr>
<td>EPBCA</td>
<td>Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth of Australia)</td>
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<tr>
<td>HRC</td>
<td>United Nations Human Rights Committee</td>
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<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>ILO Convention No. 107</td>
<td>Indigenous and Tribal Populations Convention, 1957 (No. 107)</td>
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<td>ILO Convention No. 169</td>
<td>Indigenous and Tribal Peoples Convention, 1989 (No. 169)</td>
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<td>IUCN</td>
<td>International Union for Conservation of Nature</td>
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<td>NPWCA</td>
<td>National Parks and Wildlife Conservation Act 1975 (Commonwealth of Australia)</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UNCED</td>
<td>United Nations Conference on Environment and Development</td>
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<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>WGIP</td>
<td>United Nations Working Group on Indigenous Populations</td>
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<td>WWF</td>
<td>World Wide Fund for Nature/World Wildlife Found</td>
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1. Introduction

1.1 Settling the scene

The history of non-indigenous peoples’ dealing with indigenous peoples has been described as a history of injustice. Indigenous peoples throughout the globe have been subject to conquest, dispossession from their territories, the introduction of exotic disease, economic exploitation, exclusion from political decision-making and forced assimilation by non-indigenous peoples. This has in turn led to the disruption of the integrity of indigenous cultures and massive human suffering amongst indigenous peoples.¹

Indigenous people, numbered by some estimates to over 370 million or approximately 5 per cent of the global population living in about 90 countries worldwide, continue to experience serious abuses of their human rights.² As a result, the cultures of indigenous peoples are also still under severe threat. It is held that one of the greatest threats to the survival of indigenous peoples is the loss of their traditional territories.³ Natural resource exploitation driven or encouraged by states are disproportionately affecting indigenous peoples and often lead to their dislocation from their territories. As a consequence, natural resource exploitation on indigenous territories often lead to violations of indigenous peoples’ human rights.⁴

It has been suggested that modern natural resource exploitation not only threatens the survival of indigenous peoples and their cultures, but also is the main cause to the irreparable loss of biodiversity.⁵ The Living Planet Report from 2014 by the World Wildlife Fund (WWF) suggests that the growth of human population and consumption are increasing the pressure on natural resources and ecosystems, with a devastating impact on biodiversity. To illustrate this, the Living Planet Report has used a Living Planet Index, which has been calculated using trends in 10,380 populations of over 3,038 vertebrate species. The Living Planet Index showed a decline of 52 per cent of vertebrate species populations between 1970 and 2010. The main threats to the populations in the Index have been identified as habitat loss and degradation, exploitation through hunting and fishing and climate change. In others words, the dramatic decline of vertebrate species is primarily caused by human activities.⁶

⁵ Ibid, 44.
As a result of the decline of biodiversity worldwide, the importance of the participation of indigenous peoples in biodiversity conservation has been increasingly recognised. The territories of indigenous peoples often coincide with areas of high biodiversity, and a correlation between areas of high biodiversity and the high cultural diversity represented by indigenous peoples has also been established. This is often explained by the close spiritual connection indigenous peoples have with their territories, which reflects both an attachment to the territories and a responsibility for preserving them for use by future generations. This has in turn led to the evolvement of a rich body of traditional knowledge, which has been used by indigenous peoples for conservation of their territories for millennia.7

However, some argue that instead of focusing on including indigenous peoples in conservation measures, such measures have ignored the traditional knowledge of indigenous peoples and justified violations of their human rights. The usual means of conserving biodiversity worldwide has been through the establishment of national parks and other protected areas. The most common management model for protected areas has been the so-called "Yellowstone model", named after the world’s first national park, Yellowstone in the United States. This model was based on the concept that protected areas should be owned and managed by the state, and that the biodiversity in the protected areas should be conserved through the creation of uninhabited areas of "wilderness." Thus, where protected areas have overlapped with the territories of indigenous peoples, the adoption of the "Yellowstone model" has led to the exclusion and eviction of indigenous residents.8

Since the establishment of Yellowstone National Park in 1872, and in particular in the last decades, the number of protected areas worldwide has grown radically. In 2014, there were 209,429 official protected areas in the world, covering over 32.8 million square kilometres or 14 per cent of the world’s terrestrial areas.9 By some estimates, approximately 50 per cent of the protected areas in the world, and over 80 per cent of the protected areas in the Americas, are established on territories traditionally occupied by indigenous peoples.10 Furthermore, additional protected areas are also planned all over the world, and many of them overlap with the territories of indigenous peoples.11

The establishment of protected areas worldwide has undoubtedly contributed to indigenous peoples’ loss of their territories, often without their consent or proper compensation. For instance, the estimates of the number of people in Africa that conservation efforts have displaced from protected

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areas range from 900,000 to 14.4 million people, turning them into "conservation refugees." Furthermore, an additional number of indigenous people living inside or next to protected areas have, while not been forcibly removed, been affected by restriction of access to natural resources within the protected areas.

Indigenous peoples have lost access to their natural resources and the integrity of their cultures have been threatened as a result of their dislocation from their territories for the creation of protected areas. Furthermore, it has also been argued that such dislocations threaten the survival of the traditional knowledge, since it cannot be developed without access to their territories and natural resources.

The limitations of the "Yellowstone model" and the contributions indigenous peoples worldwide have made for the conservation of biodiversity have both been increasingly recognised. However, many countries still lack legislation and policies that recognise indigenous peoples’ right to participate in the management of protected areas on their territories.

In that regard, the aim of this thesis is to investigate the conflict between indigenous peoples’ interest to manage the biodiversity on their territories and the state interest to exercise its sovereign right and fulfil its obligation to undertake measures for the purpose of biodiversity conservation within its jurisdiction. International human rights law and international biodiversity law have different and partially conflicting aims, which makes the interaction between the regimes difficult. With regard to this thesis, the aim of international human rights law is to protect and ensure indigenous peoples’ right to participate in the management of biodiversity conservation, as means of exercising essential elements of their culture and to ensure their survival as indigenous peoples. The aim of international biodiversity law, on the other hand, is to oblige states to undertake measures to stop the loss of biodiversity and restore it for both its intrinsic value and for its value for human use.

Therefore, it will be investigated in this thesis to which extent states are obliged to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation under international human rights law, and to which extent state conservation interests are acceptable limitations of that obligation. With regard to international biodiversity conservation law, the state obligation to manage biodiversity conservation in protected areas will be described in this thesis. Furthermore, the state obligation to ensure and protect the participation of indigenous peoples in the management of biodiversity conservation in protected areas that overlap with their traditional lands will also be investigated.

1.1.1 Australia as an object of study

15 Ibid, 94.
16 Ibid, 93-94.
The contributions of indigenous peoples for the conservation of biodiversity have also been widely recognised in Australia in the last decades, which makes the country an interesting object of study for this thesis. Indigenous Australians have inhabited the Australian continent for between 40,000 and 60,000 years, which makes their cultures not only the oldest indigenous cultures in the world but also the oldest continuing civilisations in the world. However, since British colonisation of Australia began in 1788, indigenous Australians have experienced the same threats to their survival as indigenous peoples elsewhere in the world. For instance, the land rights of indigenous Australians where not recognised until the Australian parliament passed the *Aboriginal Land Rights (Northern Territory)* Act in 1976 with respect to indigenous Australians in the Northern Territory. The former UN Special Rapporteur on the human rights and fundamental freedoms of indigenous people, James Anaya, observed in his report on the situation of indigenous peoples in Australia in 2010 that further efforts are needed to secure indigenous peoples’ rights over lands and resources and that “(l)egislative and administrative mechanisms that allow for the extraction of natural resources from indigenous territories should conform to relevant international standards.”

Australia has also had a history of embracing the "Yellowstone model" in the management of its national parks, which lead to the exclusion of indigenous Australians from the control and use of national parks established on their territories. However, Kakadu National Park was established in Australia in 1978 as the first national park in the world to be formally co-managed by a state agency and indigenous peoples. The joint management model of Kakadu National Park has been seen as an example of successful collaboration where the traditional practices of indigenous peoples have been included in state conservation measures. Therefore, the joint management of Kakadu National Park has also been seen as a model from which experiences for the successful management of other

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protected areas with indigenous residents can be gained.\(^{24}\)

In that regard, this thesis will include a case study of the joint management model of Kakadu National Park. The purpose of the case study is to assess how the different and partially conflicting aims of the joint management model, to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation and the state obligation to manage biodiversity conservation, are resolved in the management of the park. Thus, it will be determined through the case study to which extent Australia fulfils its obligation to ensure and protect the right of the indigenous peoples in Kakadu National Park to participate in the management of biodiversity conservation on their territories.

1.2 Objective

The aim of this thesis is to examine the management model of Kakadu National Park in Australia through the framework of international law. The purpose is to determine to which extent Australia, with respect to Kakadu National Park, fulfils its obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation under international human rights law and biodiversity law.

1.3 Method

In this thesis, it will be investigated to which extent states are obliged to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation under international human rights law, and to which extent state conservation interests are acceptable limitations of such obligations. This task is associated with several methodical difficulties. The human rights of indigenous peoples are found in *ILO Convention No. 169*, which only has been ratified by 22 countries,\(^{25}\) and *the United Nations Declaration on the Rights of Indigenous Peoples*, which is a non-binding instrument.\(^{26}\) Furthermore, the jurisdiction of the Inter-American Court of Human Rights (IACtHR), which has interpreted the rights of indigenous peoples in its case law, is limited to the 23 countries that are bound by *the American Convention on Human Rights (ACHR)*.\(^{27}\) Moreover, the meaning and scope of the rights under the different legal entities are not identical, and in the cases where corresponding rights exist under the entities the terminology may differ. Since these instruments were adopted only in the last decades, this also raises questions on which rights of indigenous peoples should be considered norms under customary international law. This also has importance for the case study of Kakadu National Park, since Australia is not a party to ILO Convention No. 169.

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However, a significant synergy between the rights in the mentioned regimes can still be identified. Therefore, the rights in the mentioned regimes that are relevant for assessing the extent of the state obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation will be assessed. With reference to case law, legal doctrine and official reports interpreting the rights in the mentioned entities, the meaning of these rights under international human rights law will be clarified. Consequently, it will be assessed to which extent these rights should be considered norms under customary international law, which has importance for identifying Australia’s obligations in relation to the traditional owners in Kakadu National Park.

Regarding international biodiversity law, and in particular the Convention on Biological Diversity (CBD), the state obligations with respect to biodiversity conservation in protected areas will be described in this thesis. Furthermore, the state obligations in relation to the participation of indigenous peoples in the management of biodiversity conservation in protected areas on their territories will also be investigated.

In the case study of Kakadu National Park, relevant pieces of Australian federal legislation, the Draft Management Plan of Kakadu National Park from 2014, the Technical Audit Summary Report of the fifth Kakadu National Park Management Plan from 2014 and other sources describing the implementation of the joint management scheme will be examined and compared with relevant international legal instruments. The purpose of the comparison is to clarify the state obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories, and to assess to which extent Australia has fulfilled that obligation with respect to Kakadu National Park and its indigenous inhabitants.

In the case study, different aspects of the national park model of Kakadu National Park relevant for the management of biodiversity conservation will be analysed. After a background section where the history of indigenous peoples in Australia and Kakadu National Park is briefly described, it will be analysed to which extent indigenous peoples’ right to participate in the management of biodiversity conservation is ensured and protected. Subsequently, it will be investigated to which extent the traditional knowledge and practices of indigenous peoples are recognised and implemented in conservation practices in Kakadu National Park. Finally, it will be analysed to which extent indigenous peoples’ right to customary use of biological resources in Kakadu National Park is recognised.

1.4 Research questions

In line with the aim of this thesis, the research questions are:

What are the relevant legal instruments regarding indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international human rights law and biodiversity conservation law, and what state obligations can be identified through those instruments? To which extent does indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international biodiversity law correspond with the same right under international human rights law? To which extent has Australia fulfilled its

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obligation to ensure and protect the traditional owners’ right to participate in the management of biodiversity conservation on their territories with respect to Kakadu National Park?

1.5 Delimitation

The objectives of the CBD are, according to its Article 1, the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. Since the first two objectives are related to indigenous peoples’ right to participate in the management of biodiversity conservation, it will be assessed in the case study of Kakadu National Park to which extent the indigenous inhabitants of the park have the right to participate in the management of biodiversity conservation and to the sustainable use of biological resources. However, due to the objective of this thesis, indigenous peoples’ right to access to genetic resources and benefit-sharing from the use of genetic resources will be left out of the scope of this thesis. Thus, the provisions in the CBD on genetic resources and the Nagoya Protocol will also be left out of the scope of this thesis.

The research questions of this thesis are related to biodiversity conservation in general and not biodiversity conservation with respect to certain species, habitats and regions of the world. Thus, the CBD is the international biodiversity law instrument which is in the main focus of this thesis. This means that legal instruments focusing on conservation of certain species, habitats and regions of the world, such as the Ramsar Convention and the Bonn Convention, will be left outside of the scope of this thesis.

Kakadu National Park has been declared a UNESCO World Heritage Site, which imposes an obligation on parties to conserve and protect the natural heritage of such sites. However, the purpose of this thesis is to assess to which extent Australia fulfils its obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation, irrespective of whether their territories are UNESCO World Heritage Sites or not. Thus, the World Heritage Convention will be left out of the scope of this thesis.

In this thesis, references are made to sources applicable to protected areas in general, in order to clarify indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories under international human rights law and biodiversity conservation law. However, this thesis primarily focuses on national parks, since it has become the most widespread category of protected areas worldwide and where the conflict between the participation of indigenous peoples in biodiversity conservation and state conservation measures has become most accentuated. Therefore, it will not be referred to sources that exclusively address protected areas other than national parks.

34 Convention Concerning the Protection of the World Cultural and Natural Heritage, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975).
Regarding indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international human rights law, references will only be made to instruments that have been adopted and are explicitly applicable to or have been applied to indigenous peoples. Therefore, the European Convention on Human Rights, 35 the case law of the European Court of Human Rights and the Draft American Declaration on the Rights of Indigenous Peoples 36 will not be discussed in this thesis.

1.6 Terminology

Definitions of several terms are necessary for understanding this thesis. However, this subchapter will only include definitions of terms relevant for understanding the research questions of this thesis. Thus, definitions of terms relevant for the understanding of certain chapters or subchapters will be explained in those chapters or subchapters.

Regarding the term "indigenous peoples", it should be noted that there is no universally accepted definition of the term in international law. One reason why no uniform definition of "indigenous peoples" has been adopted, is because it has been held by the UN and the ILO that it is impossible to capture the full range and diversity of indigenous peoples worldwide. 37 Therefore, ILO Convention No. 169, which is the only binding international human rights instrument that defines the term "indigenous peoples", regards self-identification "as a fundamental criterion for determining the groups to which the provisions of this Convention apply" under Article 1(2) of the Convention. 38 However, to determine the indigenous peoples that are protected under ILO Convention No. 169, an objective criterion is used in Article 1(1)(b) of the Convention, which defines "indigenous peoples" as peoples “who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

A working definition formulated by José Martínez Cobo in his Study on the Problem of Discrimination against Indigenous Populations 39 have often been used as guiding principles for identifying indigenous peoples in international human rights law: “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 on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.”

However, it has been suggested that the criterion of historical continuity may not be applicable to a number of peoples worldwide that fulfil the other criteria of the definition of “indigenous.”

Therefore, the term “tribal peoples” has also been established in international law. The ILO Convention No. 169, which offers the same protection for both indigenous and tribal peoples, defines “tribal peoples” under its Article 1(1)(a) as peoples “whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.”

The IACtHR has in its case law defined the Saramaka people and the Moiwana community, both Afro-descendant peoples native to Suriname, as “tribal peoples”, using a definition similar to the one in Article 1(1)(a) of ILO Convention No. 169. The IACtHR has also concluded that its jurisprudence on indigenous peoples’ right to property also should apply to tribal peoples, since they share similar characteristics which “require special measures under international human rights law in order to guarantee their physical and cultural survival.”

In that regard, the term “indigenous peoples” will in this thesis refer to the established definitions of indigenous and tribal peoples set out above. Thus, the term “indigenous peoples” refers to both indigenous and tribal peoples, if not mentioned otherwise.

The term “protected area” has been defined in Article 2 of the CBD as “a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.” Another definition has been adopted by the International Union for Conservation of Nature (IUCN), which defines “protected area” as “(a) clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of

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nature with associated ecosystem services and cultural values.”

Thus, the term “protected area” does in this thesis refer to any of the definitions used in the CBD or by the IUCN.

In this thesis, the term “biological diversity” or “biodiversity” refers to the definition in Article 2 of the CBD, which defines “biological diversity” as “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.”

No definition of the term “conservation” has been adopted in the CBD, except in relation to in-situ conservation. The term “in-situ conservation”, which includes conservation in protected areas, is defined in Article 2 of the CBD as “the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.”

The World Conservation Strategy, which was prepared by the IUCN and the WWF in 1980 with the purpose of drawing attention to the urgent need for the conservation of the land and marine ecosystems of the world as an integral part of economic and social development, defined conservation as the maintenance of life support system, preservation of genetic diversity, and sustainable use of species and ecosystems. Two of the main objectives of the CBD is the conservation of biodiversity and sustainable use of its components, and the connection between conservation and sustainable use of biodiversity is established in many of the Articles of the CBD. Therefore, “conservation of biodiversity” or “biodiversity conservation” does in this thesis refer to both conservation in the strict sense, i.e. the protection and maintenance of biodiversity, and the sustainable use of biodiversity within the meaning of Article 2 of the CBD.

The term “territories” is used in relation to several rights in ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), often together with the terms “lands” and “resources”. Article 13(2) of ILO Convention No. 169 defines “territories” as covering “the total environment of the areas which the peoples concerned occupy or otherwise use.” The International Labour Organization (ILO) has concluded that “territories” includes forests, rivers, mountains and coastal sea, the surface and the sub-surface. Furthermore, the ILO has also concluded that natural resources falling under the term “territories” encompass both renewable and non-renewable resources, such as flora and fauna, sand, minerals, waters and ice pertaining to the lands traditionally occupied by the peoples concerned.

Thus, since the term “territories” includes the terms “lands” and “resources” and is equivalent to the term “environment”, which lacks a uniform definition in international law, the term “territories”

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45 Dudley, Nigel (ed), Guidelines for Applying Protected Area Management Categories (Gland: IUCN, 2008) 8.
48 Cf Articles 10, 25-30 and 32 of the UNDRIP and Article 7(4) of ILO Convention No. 169.
will be used in this thesis. Therefore, the term "territories" refers in this thesis to the definition used in Article 13(2) of ILO Convention No. 169.

The term "management" is used both in ILO Convention No. 169 and the UNDRIP,\textsuperscript{52} without being given a legal definition. However, the term “management” will in this thesis, with respect to biodiversity conservation, refer to both the planning and the enforcement of measures with the purpose of conservation of biodiversity.

Finally, the term “traditional owners” or “traditional Aboriginal owners” does in this thesis, with regard to Kakadu National Park, refer to the definition of “traditional Aboriginal owners” used in Section 3 of the Aboriginal Land Rights (Northern Territory) Act. According to the definition, “traditional Aboriginal owners” is, in relation to land, “a local descent group of Aboriginals who have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land are entitled by Aboriginal tradition to forage as of right over that land.”

\textbf{1.7 Structure}

This thesis is divided into chapters and subchapters where each chapter ends with a short conclusion.

Following this introductory chapter, chapter 2 gives a historic background on the evolvement of the rights of indigenous peoples in international human rights law. The chapter also includes a description of the most important international legal instruments for the human rights of indigenous peoples and their status in international law.

In Chapter 3, rights in the international legal instruments that have been described in Chapter 2 will be analysed in further detail. The purpose of the analysis is to assess the meaning and extent of indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international human rights law. Consequently, the purpose of the analysis is also to analyse to which extent states are obliged to ensure and protect that right. The rights that will be analysed in Chapter 3 – the right to self-determination, the right to autonomy and participation, the right to consultation, land rights, minority rights in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), and the right to conservation – will be analysed in separate subchapters.

Chapter 4 contains a historic background on the evolvement of international biodiversity law and its implications for indigenous peoples. The chapter then continues with an analysis of international biodiversity law instruments, and in particular relevant articles of the CBD, with the purpose to ascertain if there is a right for indigenous peoples to participate in the management of biodiversity conservation in protected areas on their territories in international biodiversity law. Consequently, the purpose of the analysis is also to assess to which extent states are obliged to ensure and protect that right.

In Chapter 5, the joint management model of Kakadu National Park will be analysed through the framework of international human rights law and international biodiversity law. The purpose of the case study is to assess how the different and partially conflicting aims of Kakadu National Park, to ensure and protect indigenous peoples’ right to participate in the management of biodiversity

\begin{flushleft}
\textsuperscript{52} Cf preambular para 11 of the UNDRIP and Article 15(1) of ILO Convention No. 109.
\end{flushleft}
conservation and the state obligation to undertake measures for the purpose of biodiversity conservation, are dealt with in the joint management scheme. Thus, it will be determined to which extent Australia fulfils its obligation to ensure and protect the right of the indigenous peoples in Kakadu National Park to participate in the management of biodiversity conservation on their territories under international human rights law and international biodiversity law.

This thesis ends with chapter 6, which contains a conclusion where the research questions of the thesis are answered on the basis of the conclusions in the previous chapters. The chapter also contains thoughts and suggestions on how international human rights law and international biodiversity law can be harmonised regarding the requirements to include indigenous peoples in the management of biodiversity conservation. Thoughts and suggestions will also be given on the measures states may undertake to better conform to its obligations under international human rights and international biodiversity law to include indigenous peoples in the management of biodiversity conservation in protected areas on their territories.

2. Indigenous peoples and human rights

This chapter contains, following a brief background on the evolvement of indigenous rights, an introduction of international legal instruments relevant for this thesis. Each subchapter following the first one will include a brief introduction of the instrument or regime in question and a description of its legal status in international law.

Only two international legal instruments, the ILO Convention No. 169 and the UNDRIP, contain human rights applicable exclusively to indigenous peoples. However, other international legal instruments that have been applied explicitly to indigenous peoples and thus have interpreted their rights under international human rights law will be introduced in this chapter to the extent that they are relevant for this thesis.

2.1 The evolvement of indigenous rights

Since the time of the colonisation of indigenous peoples, they have demonstrated their conviction and determination to survive through resistance, interface or co-operation with states. Indigenous peoples were often recognised as sovereign peoples by states, which is illustrated by the numerous treaties concluded between indigenous peoples and the governments of states in the Americas. However, as the indigenous populations declined and settler populations grew, states became less inclined to recognise the rights of indigenous peoples, and rather relied on doctrines which justified the continuing colonisation and suppression of indigenous peoples. Furthermore, international law has traditionally been seen as a discipline made by and for states. This conception together with the doctrine of state sovereignty disallowed the intervention of the internal affairs of the states, including their treatment of their indigenous peoples.

The idea of indigenous rights as exclusively a matter of national law started to change with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 and the evolvement of

human rights as a discipline under international law. Moreover, the adoption of General Assembly Resolution 1514 of 1960,\(^{56}\) which granted independence to colonial countries and peoples, and of the International Covenant on Civil and Political Rights (ICCPR)\(^ {57}\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^ {58}\) which recognised peoples’ right to self-determination,\(^ {59}\) recognised the existence of collective human rights which can be enjoyed by “peoples.”\(^ {60}\)

However, the dominant conception was still that human rights were enjoyed by individuals rather than peoples, and indigenous peoples were still not seen as “peoples” with the right to self-determination. Consequently, ILO Convention No. 107,\(^ {61}\) which was the first international treaty dealing with the rights of indigenous peoples, applies to “members of tribal or semi-tribal populations” according to Article 1(1) of the Convention. Thus, the Convention does not refer to “peoples.”\(^ {62}\) ILO Convention No. 107 was adopted in 1957, and the purpose of the Convention was to enhance the social and economic welfare of the members of “indigenous populations.”

However, ILO Convention No. 107 was also based on the assumption that the only possible future for indigenous people was integration into the larger society, and that the distinct indigenous cultures would disappear once indigenous persons would have achieved full access to the benefits of modern society.\(^ {63}\)

Nevertheless, this notion started to change through the creation of a great number of indigenous organisations nationally and internationally in the 1960s and 1970s. These organisations raised awareness of the violations of the human rights of indigenous peoples occurring worldwide, and finally made the UN undertake measures in indigenous matters. In 1982, the UN Working Group on Indigenous Populations (WGIP) was established as the first UN mechanism on indigenous peoples’ issues. This has been followed by the establishment of a number of UN mechanisms with the purpose of addressing indigenous issues. These mechanisms include the UN Permanent Forum on Indigenous Issues, which was established by the Economic and Social Council in 2000, and the Expert Mechanism on the Rights of Indigenous Peoples, which replaced the WGIP and explicitly recognises indigenous peoples as ”peoples” under international law.\(^ {64}\)

\(^{56}\) Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV), UN Doc A/RES/1514(XV) (14 December 1960).

\(^{57}\) International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).


\(^{59}\) Article 1 of the ICCPR and the ICESCR.


\(^{61}\) International Labour Organization, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (The Indigenous and Tribal Populations Convention), C107, opened for signature 26 June 1957 (entered into force 2 June 1959).


2.2 Indigenous peoples and the United Nations

The ICCPR and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* are the most important binding UN legal instruments on the human rights of indigenous peoples.\(^65\) The conventions are monitored by different UN treaty bodies; the ICCPR is governed by the UN Human Rights Committee (HRC) and the ICERD by the UN Committee on the Elimination of Racial Discrimination (CERD). The instruments requires from the state parties which have recognised the competence of the respective treaty bodies to submit periodic reports on implementations of the provisions of the instruments for review and comment by the treaty bodies.\(^66\) Furthermore, the HRC also has the competence, with respect to state parties which have ratified the First Optional Protocol of the ICCPR,\(^67\) to receive communications from individuals who claim to be victims of violations of the rights in the ICCPR.\(^68\)

A majority of the rights in the ICCPR and the ICERD are referred to as rights “of every human being,” “of everyone” or of “all persons.” However, the HRC and the ICERD have in their jurisprudence given several of these rights a special meaning with respect to indigenous peoples.\(^69\) For instance, the HRC has developed a rich body of case law on the interpretation of indigenous peoples’ right to culture under Article 27 of the ICCPR.\(^70\)

Another important UN mechanism for interpreting the human rights of indigenous peoples is the Special Rapporteur on the human rights and fundamental freedoms of indigenous people (Special Rapporteur on the rights of indigenous people), which was established by the UN Human Rights Commission in 2001.\(^71\) According to its current mandate, the Special Rapporteur is requested:

(a) To examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples, in conformity with his/her mandate, and to identify, exchange and promote best practices;

(b) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples;

(c) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the rights of indigenous peoples;

(d) To work in close cooperation and coordination with other special procedures and subsidiary organs of the Council, in particular with the Expert Mechanism on the Rights of Indigenous


\(^{67}\) *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).


Peoples, relevant United Nations bodies, the treaty bodies, and regional human rights organizations.\textsuperscript{72}

The Special Rapporteur performs these duties mainly on the basis of communications received and country-specific visits.\textsuperscript{73} The reports of the Special Rapporteur are not legally binding upon states in the same manner as the jurisprudence of the UN treaty bodies, but it has been held that it still plays a critical role in interpreting and promoting international legal instruments.\textsuperscript{74}

\subsection*{2.3 The ILO Convention No. 169}

The International Labour Organization (ILO) was founded in 1919, and is now a standard-setting specialised UN agency with the aim of improving living and working conditions for working people worldwide without discrimination on the basis of race, gender or social origin. Unlike other UN agencies, it is not only composed of governments but of governments, employers and workers.\textsuperscript{75} One of the main organs of the ILO is the International Labour Conference, which provides a forum for debate and discussion on important social and labour issues. Furthermore, the Conference also adopts standards, and is the principal policy-making body of the ILO.\textsuperscript{76}

\textit{ILO Convention No. 169}\textsuperscript{77} was adopted by the International Labour Conference on 27 June 1989 as a successor to ILO Convention No. 107, and entered into force on 5 September 1991. The adoption of ILO Convention No. 169 was a result of criticism by indigenous peoples of the assimilationist and integrationist approach of ILO Convention No. 107, which was deemed not duly respecting indigenous culture and identity.\textsuperscript{78} ILO Convention No. 169 has been characterised as a procedural convention, emphasising procedural rather than substantive rights. This means that ILO Convention No. 169 sets forth procedures that the state is required to follow and comply with in relation to indigenous peoples.\textsuperscript{79} To date, ILO Convention No. 169 had been ratified by 22 countries,\textsuperscript{80} and the Convention has also been characterised as an international reference point with respect to

\begin{thebibliography}{99}
\bibitem{72} HRC Res 15/14, 51st sess, UN Doc A/HRC/RES/15/14 (6 October 2010).
\end{thebibliography}
indigenous peoples’ rights, since it is cited and used by UN bodies, regional human rights bodies and national courts. Furthermore, the Convention has also been cited as a source for inspiration for numerous development and safeguard policies and national legislative frameworks. Therefore, ILO Convention No. 169 has been defined as forming part of a larger process of developing norms of customary international law on the rights of indigenous peoples.81

Ratifying states commit themselves to submit regular reports on the implementation of ILO Convention No. 169 to the ILO at least every five years. These reports are reviewed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which in turn issues comments to the concerned states in order to further guide the implementation process. Thus, the CEACR is the ILO supervisory body that has had the greatest importance in interpreting the rights in ILO Convention No. 169. Also employers’ or workers’ organisations can file representations under Article 24 of the ILO Constitution for alleged violations of ILO Convention No. 169. In such cases, a tripartite committee will be set up which addresses the representations and issues conclusions and recommendations.82

2.4 The United Nations Declaration on the Rights of Indigenous Peoples

On 13 September 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)83 after more than 20 years of intense negotiations between governments and representatives of indigenous peoples. A majority of 143 states voted in favour of the UNDRIP, with eleven abstentions and four states, Australia, Canada, New Zealand and the United States, voting against the UNDRIP. Since then, the governments of the states that voted against the UNDRIP have endorsed it, and of the abstaining states, Colombia and Samoa have reversed their positions.84

The UNDRIP is the most elaborate UN human rights instrument to date with 46 articles, and has been seen as the most advanced and comprehensive international instrument on indigenous peoples’ rights. The UNDRIP is not binding upon UN member states. However, with reference to Article 43 of the UNDRIP, it has been held that it defines “the minimum standards necessary for the survival, dignity and well-being of indigenous peoples of the world”, and that it builds on existing human rights enshrined in international human rights treaties and embodies global consensus on indigenous peoples’ rights. Thus, the UNDRIP may have importance in the future in developing customary international law on the human rights of indigenous peoples.85

84 Inter-Parliamentary Union, Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians N° 23 (Geneva: Inter-Parliamentary Union, 2014) 3.
2.4 The American Convention on Human Rights

The ACHR\(^6\) was adopted by the Organization of American States on 22 November 1969 and entered into force on 18 July 1978. The ACHR has currently 23 State Parties to the Convention.\(^7\)

The Inter-American Commission of Human Rights (IACHR) is responsible for monitoring the implementation of the ACHR through, for instance, receiving and examining petitions from individuals and groups of individuals.\(^8\) The IACtHR has gained considerable importance in interpreting the provisions of the ACHR, and thus also evolving the international human rights of indigenous peoples. Although the ACHR does not provide any rights specific to indigenous peoples, the IACtHR has through its innovative and extensive interpretation of the Convention given the rights in it special meaning with respect to indigenous peoples, especially the right to property in Article 21 of the ACHR. For instance, Awas Tingni v. Nicaragua\(^9\) was the first case where an international court issued a legally binding decision recognising the collective rights of indigenous peoples to their lands. Furthermore, Saramaka People v. Suriname\(^10\) was also the first case where an international court explicitly referred to the UNDRIP.\(^11\) Thus, it has been held that the case law of the IACtHR does not only have importance within its jurisdiction, but has helped evolving the human rights of indigenous peoples worldwide.\(^12\)

2.5 Conclusion - Indigenous peoples and human rights

As illustrated by this chapter, a rich body of legal instruments and jurisprudence addressing the human rights of indigenous peoples have emerged in international law in the last decades. As a result, customary law on indigenous peoples’ human rights have also developed in a remarkably fast pace. However, the UN system has still been criticised by many indigenous peoples for being weak and not effectively protecting their rights.\(^13\) Furthermore, as it will be shown in the following chapter, indigenous peoples’ right to participate in the management of biodiversity conservation has only to a limited extent been addressed in international human rights law, and that right may be restricted in a number of cases.

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\(^9\) Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights, Ser. C., No. 79 (31 August 2001).


In this chapter, rights in international human rights instrument that have been described in the previous chapter will be analysed. The purpose of the analysis is to assess the meaning and extent of indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international human rights law. Consequently, the purpose of the analysis is also to analyse to which extent states are obliged to protect and ensure that right.

3. The right to conservation under international human rights law

The right to self-determination has been named one of the most important innovations in international human rights law, and has been qualified as a norm of customary international law or even as jus cogens. Unlike the other rights of the ICCPR and ICESCR, the right to self-determination is not formulated as a right “of every human being,” of “everyone” or of “all persons,” but as a right of “all peoples.” Thus, the right to self-determination is a collective right enjoyed by people rather than an individual right enjoyed by persons.

The right to self-determination is found in the common Article 1(1) of the ICCPR and ICESCR, which reads: “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.”

Indigenous peoples have explicitly been defined as “peoples” with the right to self-determination in Article 3 of the UNDRIP, which stipulates: “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.”

Indigenous peoples’ right to self-determination has been characterised as a form of internal self-determination, which refers to “the rights of all peoples to pursue freely their economic, social and cultural development without outside interference”, following from the second sentence of Article 1(1) of the ICCPR. Professor Erica-Irene Daes, former chairperson of the WGIP, has argued that indigenous peoples’ right to self-determination is exercised through the free negotiation of their political status and representation in the states in which they live. Erica-Irene Daes has described this as a form of “belated State-building, through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion.” Furthermore, Erica-Irene Daes emphasises that this exercise of the right to self-determination “does not require the assimilation of individuals, as citizens like all others, but

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the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.”

Thus, the right to self-determination has been conceptualised as a sliding scale of different levels of rights to political emancipation, where indigenous peoples are entitled to the “level” of internal self-determination. Professor James Anaya, former Special Rapporteur on the rights indigenous people, has characterised the right to self-determination as a framework right which is concretised in more specific rights. James Anaya holds that the rights elaborating the elements of indigenous peoples’ right to self-determination include the right to self-government, cultural rights and the rights to land, territories and resources.

3.2 The right to autonomy and participation

With respect to indigenous peoples, two different aspects of self-government have been distinguished; autonomy and participation. Autonomy refers to the right of indigenous peoples to maintain and develop their own institutions, whilst participation refers to the right of indigenous peoples to participate at all levels of decision-making in the states where they live. The distinction between autonomy and participation is confirmed in Article 5 of the UNDRIP, which stipulates: “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

Indigenous peoples’ right to participation is recognised in Article 7(1) of ILO Convention No. 169, which stipulates that indigenous peoples “shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.” This imposes a corresponding obligation on states to “establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them” under Article 6(b) of ILO Convention No. 169.

Indigenous peoples’ right to participation is also recognised in Article 18 of the UNDRIP, which stipulates: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

The individual right to participation is contained in various human rights instruments. However,


103 Cf Article 21 of the UDHR, Article 25 of the ICCPR and Article 23 of the ACHR.
the right to participation has been given a certain meaning and takes on particular importance with respect to indigenous peoples. For instance, the CEACR has observed “that the establishment of appropriate and effective mechanisms for the consultation and participation of indigenous and tribal peoples regarding matters that concern them is the cornerstone of the Convention, yet remains one of the main challenges in fully implementing the Convention in a number of countries. Given the enormous challenges facing indigenous and tribal peoples today, including regularization of land titles, health and education, and the increased exploitation of natural resources, the involvement of the indigenous and tribal peoples in these and other areas which affect them directly, is an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue.”

Management of biodiversity conservation on the territories of indigenous peoples clearly belong to matters which would affect their rights. Thus, indigenous peoples right to participate in the management of biodiversity conservation follows from their general right of participation provided in Article 7(1) of ILO Convention No. 169 and Article 18 of the UNDRIP. The fact that such a right is exercised in the formulation, implementation and evaluation of plans and programmes for national and regional development under Article 7(1) of ILO Convention No. 169 could also be interpreted as that indigenous peoples should have an active role and participate in an early stage of the planning and implementation of conservation measures. Furthermore, relying on Article 6(b) of ILO Convention No. 169, it could also be argued that states have the obligation to establish procedures by which indigenous peoples freely participate in the management of biodiversity conservation.

3.3 The right to consultation

Unlike the right to participation, the right to consultation has been characterised as a right specific to indigenous peoples under international human rights law. In that regard, James Anaya has held that indigenous peoples’ right to participation gives “rise to requirements of consultation that are to be applied whenever the state makes decisions that may affect indigenous peoples.” James Anaya has also held that the widespread acceptance among states of indigenous peoples’ right to consultation has made it a norm under customary international law.

Indigenous peoples’ right to consultation is recognised under Article 6(1)(a) of ILO Convention No. 169, which stipulates that, “(i) applying the provisions of this Convention, governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.” Article 6(2) of ILO Convention No. 169 also stipulates that “(t)he consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or

Indigenous peoples’ right to consultation is also recognised under Article 19 of the UNDRIP, which stipulates that “(s)ates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” The right to consultation has also been explicitly recognised regarding measures affecting indigenous territories in Article 32(2) of the UNDRIP, which stipulates: “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.”

The ILO has defined “appropriate procedures” as such procedures that “create favourable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained.” According to the CEACR, this means that, for the procedures to be rendered appropriate, “(t)he form and content of consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties.”

Thus, the ILO Committee made under Article 24 of the ILO Constitution has held that a simple information meeting cannot normally be considered as consistent with Article 6 of ILO Convention No. 169. The ILO Committee has also held that “(t)here is no single model of appropriate procedures,” and that whether such procedures were considered to be appropriate depended on “national circumstances, the circumstances of the indigenous peoples concerned and the nature of the measures which are the object of the consultation process.”


The ILO Committee made under Article 24 of the ILO Constitution has concluded that the institutions representative of indigenous peoples that have to be consulted under Article 6 of ILO Convention No. 169 should be determined through a process of the indigenous peoples themselves.\(^{113}\) The ILO has held that the determination of representative institutions depend on “the characteristics of the country, the specificities of the indigenous peoples and the subject and scope of the consultation.” Furthermore, the ILO has also held that the appropriate institution may be representative at the national, regional or community level, depending on the circumstances.\(^{114}\)

However, James Anaya has held that indigenous peoples’ right to consultation would not give them a veto power in all state programmes affecting them. Instead, it means that states have an obligation to undertake consultations with indigenous peoples before adopting measures that may directly affect them, and that those consultations should be aimed at reaching a consensus concerning those measures. However, if consensus had not been reached after a good faith procedure in which the indigenous party had participated fully and adequately, the indigenous party would not have a veto power to stop the proposed measure.\(^{115}\)

Indigenous peoples’ right to consultation has also in recent years been linked to the requirement from states under international law to obtain indigenous peoples’ free, prior and informed consent.\(^{116}\) This link has been made in the above mentioned Articles 19 and 32(2) of the UNDRIP, and also by the CERD, which has called upon states to ensure that no decisions directly relating to the rights and interests of members of indigenous peoples are taken without their informed consent.\(^{117}\)

The IACtHR interpreted the state obligation to obtain the free, prior, and informed consent of indigenous peoples in *Saramaka People v. Suriname*. In the case, the Government of Suriname had granted logging and mining concessions to private companies on the territories of the Saramaka people without consulting the Saramaka people first.\(^{118}\) The IACtHR concluded that, regarding

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large-scale development or investment projects that would have a major impact on the property rights of the indigenous peoples affected to a large part of their territory, the state has a duty, not only to consult with the indigenous peoples, but also to obtain their free, prior and informed consent, according to their customs and traditions. Therefore, the IACtHR concluded that Suriname must “adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory.” The IACtHR also held that the Saramaka people must be consulted when establishing this process.

James Anaya has, referring to Saramaka People v. Suriname, elaborated on indigenous peoples’ right to give their free, prior and informed consent. Anaya concluded that indigenous peoples would not have a right to free, prior and informed consent regarding all state action with a potential impact on them, but a general right to participation and consultation that only in special cases may require the consent of the indigenous peoples concerned. Thus, the state would have the duty not to adopt a measure without the indigenous community concerned only if the measure may have substantial impacts that may endanger the basic physical or cultural well-being of the community. James Anaya noted that “the extent of the duty and thus the level of consultation required is a function of the nature of the substantive rights at stake.” Therefore, James Anaya has concluded that the states also have the obligation to obtain the free, prior and informed consent of indigenous peoples with respect to forced removal from their territories under Article 10 of the UNDRIP and storage or disposal of hazardous materials on their territories under Article 29(2) of the UNDRIP.

Management of biodiversity conservation on the territories of indigenous peoples clearly belong to legislative or administrative measures which may affect them directly. Thus, it follows from the right of indigenous peoples to participate in the management of biodiversity conservation that they also have a right to be consulted in those matters. The right to be consulted also imposes a corresponding and far-reaching obligation on states to consult with indigenous peoples in matters related to the management of biodiversity conservation on their territories.

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120 Saramaka People v. Suriname, para 178(d), 214(8).
Through *Saramaka People v. Suriname*, it is established that states are not allowed under international human rights law to relocate indigenous peoples from their territories without their free, prior and informed consent. However, states are normally not obliged to obtain the free, prior and informed consent of the indigenous peoples concerned regarding the establishment of protected areas on their territories or other measures affecting indigenous peoples’ right to participate in the management of biodiversity conservation on their territories. This is provided that the measure in question may not have substantial impacts that may endanger the basic physical or cultural well-being of the indigenous peoples concerned, and that they have been consulted by the state regarding the measures according to the procedures in Article 6 of ILO Convention No. 169 and Articles 19 and 32(2) of the UNDRIP.\(^{125}\)

Thus, the number of situations where state conservation measures negatively affect the right of indigenous peoples to participate in the management of biodiversity conservation in a manner where their basic physical or cultural well-being is endangered are probably few. Therefore, when there is a conflict between states and indigenous peoples regarding the management of biodiversity conservation on the territories of indigenous peoples, state decisions on the matter can override the interests of the indigenous peoples concerned in a majority of situations. This fact considerably weakens the right of indigenous peoples to participate in the management of biodiversity conservation on their territories, and limits the correspond obligation on states to ensure and protect that right.

### 3.4 Land rights

Indigenous peoples’ right to participate in the management of biodiversity conservation on their territories is not only linked to their general right to participation and to be consulted in matters which may affect them, but with their right to their traditional lands. Indigenous peoples’ land rights have been recognised in Article 26 of the UNDRIP, which stipulates:

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.

Indigenous peoples’ land rights are also protected under Article 14(1) of ILO Convention No. 169, which stipulates: “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.”

Erica-Irene Daes has identified a number of unique elements in indigenous peoples’ relationship to their traditional lands: ”(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous

peoples’ identity, survival and cultural viability.”

The spiritual aspect of indigenous peoples’ land rights has been recognised in Articles 25 of the UNDRIP, which stipulates: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” Similarly, Article 13(1) of ILO Convention No. 169 stipulates that in applying the provisions on land rights in 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.”

The spiritual aspect of indigenous peoples’ land rights has also been emphasised by the IACtHR in *Awas Tingni v. Nicaragua*. The IACtHR argued that "(i)nigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”

As Erica-Irene Daes, the IACtHR has also characterised collective ownership of land as something typical for indigenous peoples in *Awas Tingni v. Nicaragua*. The IACtHR described that “(a)mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.” Thus, the IACtHR concluded that, “(t)hrough an evolutionary interpretation of international instruments for the protection of human rights”, Article 21 of the ACHR protected the right to property in a sense which included, “among others, the rights of members of the indigenous communities within the framework of communal property.”

Similarly, the CEACR has held that the purpose of Article 14 of ILO Convention No. 169 was to recognise that indigenous peoples have a “right of land ownership, possession and use, in accordance with their own customs and traditions, even though these may be different from those prevailing and other members of national society.” Thus, according to the CEACR, the purpose of the use of the words “ownership” and “possession” is to let the indigenous peoples concerned decide their own preferential form of land holding and ownership. ILO Convention No. 169 does therefore recognise both individual and collective ownership of indigenous lands, depending on the customs and traditions of the indigenous people concerned.

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129 *Awas Tingni v. Nicaragua*, para 148; *Sawhoyamaxa v. Paraguay*, para 89; *Yakye Axa v. Paraguay*, para 14.

The IACtHR has interpreted the meaning of the term “traditional occupation” with regard to indigenous peoples’ land rights, in Xákmok Kásek v. Paraguay. The IACtHR concluded, referring to its previous case law, that indigenous peoples have to maintain their physical and spiritual relationship to their lands to have their right to ownership of those lands recognised under Article 21 of the ACHR. For recognition of indigenous peoples’ land rights, the IACtHR held that their physical and spiritual relationship to their lands “can be expressed in different ways depending on the indigenous people in question and their specific circumstances”. The IACtHR held that the relationship could be proven through, inter alia, “traditional presence or use, by means of spiritual or ceremonial ties; sporadic settlements or crops; hunting, fishing or seasonal or nomadic gathering; use of natural resources related to their customs, and any other element characteristic of their culture.”

The IACtHR also concluded, considering the fact that the Xákmok Kásek Community had lost possession of their lands approximately 2 years before the decision of the IACtHR, that events beyond the control of indigenous communities that prevent them from maintaining their physical and spiritual relationship with their lands does not affect their right to ownership of their lands.

The IACtHR also interpreted the relationship between occupation and indigenous peoples’ land rights in Xákmok Kásek v. Paraguay. Referring to its previous case law, the IACtHR concluded that indigenous peoples’ rights land rights under Article 21 of the ACHR do not depend on formal recognition within the national state legal framework. The IACtHR held that indigenous peoples’ land rights meant that “traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title” and that “traditional possession entitles indigenous people to demand official recognition and registration of property title.”

The CEACR has also interpreted the meaning of “traditional occupation” with respect to the provision on land rights in Article 11 of ILO Convention No. 107 in a complaint involving tribal people in India. The CEACR held that indigenous peoples’ land rights apply to lands that indigenous peoples presently occupy irrespective of immemorial possession. Thus, the CEACR held that it is sufficient that the people in question have some form of relationship with the land presently occupied, even for a short time, for the recognition of rights to that land. The ILO has held, with respect to ILO Convention No. 169, that this means that indigenous peoples’ land rights also may in some cases include lands which have been recently lost.

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132 Xákmok Kásek v. Paraguay, para 77.


However, Dr Jérémie Gilbert and Dr Cathal Doyle have emphasised that Article 26(2) of the UNDRIP only applies to present day occupation. Thus, there is a distinction between the right to own lands presently occupied by indigenous peoples under Article 26(2) of the UNDRIP and the rights to land traditionally occupied by indigenous peoples under Article 26(1) of the UNDRIP. Jérémie Gilbert and Cathal Doyle define Article 26(1) of the UNDRIP as an “ambiguous compromise”, since it gives national jurisdictions the freedom to define what rights indigenous peoples have to the lands they have traditionally owned, occupied or used in the past.137

Furthermore, the IACtHR has also concluded that states in some cases are allowed to impose restrictions on the right to property under Article 21 of the ACHR. The IACtHR has affirmed its general jurisprudence in that the following requirements must be fulfilled for restrictions to be admissible: “a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.”138 The IACtHR has held that “(t)he necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest.” Furthermore, the IACtHR argued that a restriction on the rights to property has, to be rendered proportional, to be “closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right.” Finally, the IACtHR argued that a restriction on the rights to property has, to be considered having a purpose attaining a legitimate goal in a democratic society, to “be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.”139

The IACtHR added another special criterion for restrictions on the property rights of indigenous peoples in Saramaka People v. Suriname. The IACtHR concluded, with reference to the HRC communication Länsman v. Finland140 that a restriction on the indigenous peoples’ right to property cannot be admissible if “the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.”141 Therefore, the IACtHR subsequently found in Xákmok Kásek v. Paraguay, referring to Saramaka People v. Suriname, that the state had the obligation under Articles 21 of the ACHR to ensure the effective participation of the members of the community, in accordance with their customs and traditions, in any plan or decision that could affect their traditional lands and restrict the use and enjoyment of these lands.142

In Xákmok Kásek v. Paraguay, the President of Paraguay had declared a private protected nature reserve on a part of the traditional lands of the Xákmok Kásek Community. The decree establishing the reserve contained restrictions to use and ownership, including the prohibition to occupy the land, as well as the traditional activities of the members of the Community such as hunting, fishing

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139 Yakye Axa v. Paraguay, para 145.

140 Saramaka People v. Suriname, note 126.


and gathering. The IACtHR found that the fact that the Community had filed a claim to the land where the reserve had been established was not taken into account when the reserve was declared. Furthermore, the IACtHR also found that the Community was not informed nor consulted about the plans of the declaration of the reserve, and that the said declaration prejudiced the way of life of the members of the Community. In that regard, the IACtHR held that the decree establishing the reserve should be considered null.

It has been suggested that indigenous peoples’ collective rights to their traditional lands, territories and resources have reached such widespread acceptance among states that these rights have attained the status of customary international law. However, “ownership” under Article 14 of ILO Convention No. 169 covers only lands, whereas in Articles 15 and 16 of ILO Convention No. 169, the term “lands” includes the concept of territories, which covers the total environment of the areas that the peoples concerned occupy or otherwise use. Thus, indigenous peoples’ land rights under Article 14 of ILO Convention No. 169 does not include the natural resources on their lands.

It also follows from indigenous peoples’ land rights that states have an obligation to recognise indigenous peoples’ land rights and to demarcate indigenous lands. For instance, Article 26(3) of the UNDRIP stipulates that “(s)ates 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.” Similarly, Article 14(2) of ILO Convention No. 169 stipulates that “(g)overnments 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.

The IACtHR has also concluded in Saramaka People v. Suriname that it follows from, inter alia, Article 21 of the ACHR that states parties to the Convention have an obligation to demarcate indigenous peoples’ lands. More specifically, the IACtHR concluded that the State of Suriname had an obligation with respect to the Saramaka people to “delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and indigenous communities.” The State of Suriname also had an obligation, until the demarcation had taken place, to “abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people.”

Thus, it remains clear that indigenous peoples have the right under international human rights law to own the lands they traditionally occupy or have traditionally occupied until recently, and that such

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143 Xákmok Kásek v. Paraguay, para 82.
144 Xákmok Kásek v. Paraguay, para 80-82, 158.
145 Xákmok Kásek v. Paraguay, para 312.
ownership does not depend on formal recognition within the national state legal framework. Since indigenous peoples have the right to participate in decisions affecting their lands, this also gives them the right to participate in the management of biodiversity conservation on their lands.

Furthermore, indigenous peoples’ right to participate in the management of biodiversity conservation on their lands should be strengthened by the spiritual aspect of their land rights, if participation in the management of biodiversity conservation is necessary to maintain and strengthen their spiritual relationship with their lands. Moreover, although the right to ownership is restricted to lands, the right to participate in the management of biodiversity conservation should encompass their whole territories since indigenous peoples have the right to maintain and strengthen the spiritual relationship with their whole territories.149

Since it also follows from Article 13(1) of ILO Convention No. 169 and Awas Tingni v. Nicaragua that states have the obligation to recognise and respect the spiritual aspect of indigenous peoples’ land rights, states should also have an obligation to include indigenous peoples in the management of biodiversity conservation on their territories. Furthermore, this also includes an obligation to legally recognise and demarcate lands presently occupied by indigenous peoples in order to identify to which territories indigenous peoples have the right to participate in the management of biodiversity conservation. It also follows from the case Xákmok Kásek v. Paraguay that the establishment of a protected area on the territories of indigenous peoples without consulting them first, considering their occupation of the territories or allowing them to participate in the management of biodiversity conservation on those territories is a violation of that obligation.

However, the spiritual aspect of indigenous peoples’ land rights is only recognised with respect to territories presently occupied by indigenous peoples under Article 13(1) of ILO Convention No. 169, and it remains unclear if Article 25 of the UNDRIP also applies to territories occupied by indigenous peoples in the past. Thus, due also to the fact that states have the freedom to define what rights indigenous peoples have to the lands they have traditionally occupied in the past according to Article 26(1) of the UNDRIP and Article 14(1) of ILO Convention No. 169, it is not clear to which extent indigenous peoples have the right to participate in the management of biodiversity conservation on territories to which they maintain a spiritual connection but where the physical connection was lost a long time ago. Therefore, due also to the fact that no definition under international human rights law of what should be considered a “recent” loss of indigenous territories, indigenous peoples may in practice be excluded from participating in the management of biodiversity conservation on territories they have occupied until relatively recently in a number of cases.

Furthermore, as illustrated through the case law of the IACtHR, states may in some cases restrict the land rights of indigenous peoples. For instance, state measures for the purpose of biodiversity conservation should in many cases be considered as necessary and attaining a legitimate goal in a democratic society. Therefore, if the measures in question are established by law, are rendered proportional, have been preceded by effective and fully informed consultations with the indigenous peoples affected and the measures do not deny their traditions and customs in a way that endangers their very survival, the measures would be considered as acceptable restrictions on the land rights of indigenous peoples.

Consequently, acceptable restrictions on indigenous peoples’ land rights may also restrict their right to participate in the management of biodiversity conservation on their territories. Thus, such restrictions considerably weaken indigenous peoples’ right to participate in the management of biodiversity conservation on their territories.

biodiversity conservation on their territories, and as a consequence also weakens the correspondent obligation on states to ensure and protect that right.

### 3.5 Cultural rights

Indigenous peoples’ right to participate in the management of biodiversity conservation on their territories is also strongly entwined with their right to culture.\(^\text{150}\) The right to culture for minority groups is protected under Article 27 of the ICCPR, which stipulates: "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."

The HRC has emphasised that the rights in Article 27 of the ICCPR are "conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.",\(^\text{151}\) However, it has also been held that the rights under Article 27 of the ICCPR may be thought of partially as collective rights which can be exercised individually, since the right applies to members of a minority.\(^\text{152}\) The HRC illustrates this through concluding that Article 27 of the ICCPR obliges states to ensure "the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.",\(^\text{153}\)

Despite that indigenous peoples have a special status in international law through the UNDRIP and ILO Convention No. 169, the HRC has confirmed that indigenous peoples are treated as a “minority” for the purposes of Article 27 of the ICCPR.\(^\text{154}\) The HRC has also concluded that the right to culture protected under Article 27 of the ICCPR "may consist in a way of life which is closely associated with territory and use of its resources", which "may particularly be true of members of indigenous communities constituting a minority."\(^\text{155}\)

Despite the fact that Article 27 of the ICCPR is expressed in negative terms, the HRC has argued that States also have the obligation to protect the rights mentioned in the Article. For instance, the HRC has observed that indigenous peoples’ rights protected under Article 27 of the ICCPR “may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”\(^\text{156}\) Moreover, the HRC has also concluded that Article 27 of the ICCPR imposes

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\(^\text{151}\) Human Rights Committee, General Comment No. 23: Article 27, 50th sess, UN Doc HRI/GEN/1/Rev.1 at 38 (1994), paras 1-2.


\(^\text{155}\) Human Rights Committee, General Comment No. 23: Article 27, 50th sess, UN Doc HRI/GEN/1/Rev.1 at 38 (1994), para 3.2.

an obligation on states to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.”

The HRC argued in the communication Kitok v. Sweden that an economic activity, in this case reindeer husbandry, which ”is an essential element in the culture of an ethnic community” may be protected as a right falling under Article 27 of the ICCPR. This may be the case even when the indigenous community has adapted its methods of the economic activity in question and practice it with the help of modern technology. However, the HRC established in the communication Diergaardt v. Namibia a distinction between a traditional activity that form part of the way of life of an indigenous community and a purely economic activity, claiming that the latter could not be considered an economic activity that forms part of an indigenous culture. Thus, for an activity to be considered as an essential element of an indigenous community, the HRC argued that the community through the activity in question should have a historical relationship to the land and be a part of the traditional way of life of the indigenous community, not simply an economic activity.

The HRC concluded in this case that despite the fact that the Rehoboth community in question had used the disputed lands for cattle raising for 125 years, it was not the result of a relationship that would have given rise to a distinctive culture.

The HRC elaborated on the extent of the state obligation to protect indigenous cultures in the communication Lubicon Lake Band v. Canada. The HRC argued that the rights protected under Article 27 of the ICCPR encompass ”the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.” In this case, the Canadian government had, despite the fact that it through federal legislation and a treaty had recognised the right of the Lubicon Lake Band to continue their traditional way of life on their traditional lands, allowed the provincial government of Alberta to expropriate the lands of the Lubicon Lake Band for the benefit of private corporate interests. The HRC held that the expropriation constituted a failure to assure the Lubicon Lake Band land ownership through reservation. The private enterprises in question had also performed oil and gas

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162 Lubicon Lake Band v. Canada, para 29.1, 33.
exploration and exploitation on the traditional lands of the Lubicon Lake Band. The HRC concluded that those two circumstances threatened the way of life and culture of the Lubicon Lake Band, and thus constituted a violation of Article 27 of the ICCPR.

The conflict between indigenous peoples’ right to culture under Article 27 of the ICCPR and state conservation policies was actualised in the HRC communication Mahuika v. New Zealand. The communication concerned a conflict between the Maori peoples, who enjoyed the right to control tribal fisheries according to the Treaty of Waitangi of 1840 with the British Crown, and the modern commercial fishing industry. Due to concerns about depleting fish stocks and the conservation and sustainable use of New Zealand’s fisheries resources, the New Zealand Parliament passed the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (NZ). The act represented a final settlement of all Maori commercial and non-commercial fishing claims under the Treaty of Waitangi. Furthermore, the act gave the Maori peoples over 40 per cent of New Zealand’s commercial fishing quota, and non-commercial fishing was to be governed by regulations to be made after further consultation with the Maori peoples.

The HRC held, referring to previous case law, that “the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.” The HRC emphasised that the various Maori communities and organisations were consulted and also participated in the negotiation of the act. Furthermore, the HRC also emphasised that special attention was paid in the consultation process “to the cultural and religious significance of fishing for the Maori, inter alia to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities,” and that many of the Maori people concerned accepted the settlement. In that regard, the HRC held that the settlement was an acceptable limitation of the Maori peoples’ right to culture, and thus did not violate Article 27 of the ICCPR. However, the HRC also held, referring to its previous case law, that the Government of New Zealand in future implementation of the act would have the duty to bear in mind that “measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture.”

163 Ibid, para 29.1.
166 Mahuika v. New Zealand, para 9.5. Cf Länsman v. Finland, para 9.6, 9.8; Nowak, Manfred, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl: N.P. Engel, Publisher, 2nd ed, 2005) 664;
Thus, as with indigenous peoples’ general right to participation, right to be consulted in matters which may affect them and their land rights, it follows from the cultural rights protected under Article 27 of the ICCPR that indigenous peoples have the right to participate in decisions affecting their lands.\(^{169}\) Thus, it also follows from Article 27 of the ICCPR that indigenous peoples have the right to participate in the management of biodiversity conservation’s essential elements of their culture on their territories. As illustrated by the HRC jurisprudence, conservation measures that are protected as cultural rights under Article 27 of the ICCPR include both strict preservation measures and subsistence use of natural resources. However, relying on Diergaardt v. Namibia, subsistence activities that are considered as purely economic activities without forming part of the way of life of an indigenous community are not protected under Article 27 of the ICCPR.\(^{170}\)

It follows from indigenous peoples’ right to participate in the management of biodiversity conservation protected under Article 27 of the ICCPR that states have a corresponding obligation to ensure the effective participation of indigenous peoples regarding such management. Similarly to the conclusion by the IACtHR in Saramaka People v. Suriname regarding land rights, the HRC has also concluded in Lubicon Lake Band v. Canada that Article 27 of the ICCPR imposes an obligation on states to protect indigenous peoples against the acts of states or other persons within the State that threaten the way of life and culture of the indigenous peoples affected.\(^{171}\)

However, as concluded in Mahuika v. New Zealand and similar to the decision in Saramaka People v. Suriname, state measures for the purpose of biodiversity conservation may be rendered acceptable limitations of indigenous peoples’ right to participate in the management of biodiversity conservation, provided that the indigenous peoples in question have had the opportunity to participate in the decision-making process in relation to these measures and they will continue to benefit from their traditional economy.\(^{172}\) Thus, as regarding indigenous peoples’ land rights, indigenous peoples’ right to participate in the management of biodiversity conservation on their territories becomes in practice weak when there is a conflict with state measures for the purpose of biodiversity conservation. As a consequence, the correspondent state obligation to ensure and protect such right is limited when states undertake measures on indigenous peoples’ territories for the purpose of biodiversity conservation.

### 3.6 The right to conservation

The importance of recognising indigenous peoples’ right to conservation of their territories has been acknowledged in both the UNDRIP and ILO Convention No. 169. For instance, the General Assembly recognises in the preamble of the UNDRIP that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.”\(^{173}\) Similarly, the International Labour Conference calls in the preamble of ILO Convention No. 169 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.”\(^{174}\)

Consequently, indigenous peoples’ right to conservation of their territories has also been recognised

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\(^{169}\) Cf Human Rights Committee, General Comment No. 23: Article 27, 50th sess, UN Doc HRI/GEN/1/Rev.1 at 38 (1994), para 7.

\(^{170}\) Cf Diergaardt v. Namibia, para 10.6.


\(^{173}\) Preambular para 11 of the UNDRIP.

\(^{174}\) Preambular para 7 of ILO Convention No. 169.
in both instruments. Article 29(1) of the UNDRIP stipulates: “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.” Similarly, Article 7(4) of ILO Convention No. 169 stipulates: “Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.” Furthermore, Article 24(1) of the UNDRIP stipulates that “(i)ndigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.”

The right of indigenous peoples to actively participate in the management of the conservation of their territories is also recognised in the UNDRIP and ILO Convention No. 169. In that regard, Article 32(1) of the UNDRIP stipulates: “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.” Similarly, Article 15(1) of ILO Convention No. 169 stipulates: “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.”

The CEACR addressed the issue of participation of indigenous peoples in conservation measures under Article 15 of ILO Convention No. 169 in a direct request to Bolivia, which mentioned the Ulla National Park and its indigenous inhabitants, the Aymara people. The CEACR noticed with interest that the Ulla National Park was under the administration of the Aymara people. Nevertheless, the CEACR also noticed that, despite this, no regulations had yet been issued under Bolivian environmental legislation, which guaranteed “the right of indigenous populations to participate in the use, management and conservation of renewable natural resources pertaining to their territories.” Therefore, the CEACR urged the Government of Bolivia to keep the CEACR “informed of any progress made in the adoption of the above regulations and of any other relevant development.”

The issue was also raised in a direct request by the CEACR to Honduras. The CEACR noted that under Honduran environmental legislation, “indigenous ethnic groups shall receive special support from the State in relation to their traditional systems for the integral use of renewable natural resources.” Therefore, the CEACR requested the Government of Honduras to, inter alia, “indicate the manner in which the indigenous communities concerned participate in decisions relating to the use to be made of their natural resources.” The CEACR also requested the Government of Honduras to indicate in what manner indigenous communities participate in the decisions which, according to national Honduran legislation, are adopted for the protection of, inter alia, the environment, the ecosystem and ethnic minorities.

The question of indigenous peoples’ right to participate in conservation measures was also raised in


a direct request by the CEACR to Costa Rica. The CEACR noted in particular the training of indigenous persons as inspectors and guards in reservations and Costa Rican legislation regarding supervision of forest resources. The CEACR also noted the adoption of a biodiversity law which “envisages the participation of indigenous persons in all matters relating to the conservation of biodiversity and the sustainable use of natural resources.” In that regard, the CEACR hoped that the Honduran government would provide additional information in its next report on the application of this legislation in practice.177

Another report on indigenous peoples’ right to participate in the management of the conservation of protected areas on their lands is from the Special Rapporteur on the rights of indigenous people on the situation of indigenous peoples in Nepal. The Special Rapporteur noticed that Nepal lacked consultation mechanisms in relation to the management of natural resources in national parks established on the territories of indigenous peoples. Therefore, with reference to Article 6(1) and 15(2) of ILO Convention No. 169, the Special Rapporteur concluded that the indigenous peoples of Nepal must be consulted in good faith, insofar as their means of subsistence, cultures, or other such interests are implicated in the decisions, with the objective of achieving their free, prior and informed consent to the aspects of the management schemes or projects that affect them directly. Furthermore, the Special Rapporteur also concluded that the consultations should include ample consideration of the rights or interests at stake and any needed mitigation measures.178 Therefore, the Special Rapporteur urged Nepal to, in accordance with the standards set forth in ILO Convention No. 169 and the UNDRIP, to amend its national parks legislation to include enhanced participation of the indigenous communities in, inter alia, “the management of the parks and guarantee their access to natural resources on which they traditionally have depended for their subsistence.”179

Indigenous peoples’ right to participate in the management of conservation in protected areas on their territories was also actualised in the friendly settlement in the case of Mercedes Julia Huenteao Beroiza et al180 before the Inter-American Commission on Human Rights (IACHR). The petitioners belonged to the Mapuche Pehuenche people and complained about the implementation of a hydroelectric plant project on their territories.181 The petition resulted in an agreement between the Government of Chile and the Mapuche Pehuenche people, which provided that measures needed to be agreed upon to “ensure the participation of indigenous communities in the management of the Ralco Forest Reserve.”182 In the agreement, the parties agreed that “(t)he Government of Chile shall arrange the signing of a “partnership” agreement between the National Forestry Corporation, Eighth Region (CONAF VIII Región) and the families that traditionally occupy those lands.” The agreement included recognition of ancestral land-use rights in the reserve, such as the access to natural resources, “of the Pehuenche families that currently and traditionally occupy the areas inside and adjoining the reserve; determination of the responsibilities of the parties in protection and conservation activities for the natural resources involved;” and “a Development and Investment

178 Human Rights Council, 12th sess, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, on the situation of indigenous peoples in Nepal, UN Doc A/HRC/12/34/Add.3 (20 July 2009), para 68.
179 Ibid, para 90.
180 Inter-American Commission on Human Rights, Mercedes Julia Huenteao Beroiza et al. (Chile), Petition 4617/02, Report No. 30/04, Friendly settlement (11 March 2004) (“Beroiza et al.”).
Plan to enable Pehuenche participation and the conservation of the natural resources in the Reserve.”

Thus, indigenous peoples’ right to participate in the management of biodiversity conservation on their territories does not follow only from the rights referred to in the previous subchapters, but is explicitly recognised in Articles 29(1) and 32(1) of the UNDRIP and Articles 7(4) and 15(1) of ILO Convention No. 169. The right for indigenous peoples to participate in conservation measures within the meaning of Articles 29(1) and 32(1) of the UNDRIP and Articles 7(4) and 15(1) of ILO Convention No. 169 may not yet be considered a norm under customary international law. However, relying on the rights examined in the previous subchapters, it clearly follows from those rights that indigenous peoples have a right under customary international law to participate in the management of biodiversity conservation in protected areas on their territories.

The CEACR jurisprudence and the above mentioned report from the Special Rapporteur have concluded that states have the obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation on their territories through national legislation, and that such legislation has to be applied in practice. This follows also from Articles 29(1) and 32(1) of the UNDRIP and Articles 7(4) and 15(1) of ILO Convention No. 169, and conforms to the state obligations following from the rights examined in the previous subchapters. Furthermore, the agreement resulting from Beroiza et al may also help developing customary international law on the manners in which indigenous peoples shall have the right to participate in the management of biodiversity in protected areas on their territories and the measures states are obliged to undertake to ensure and protect that right.

3.7 Conclusion - The right to conservation under international human rights law

As it has been demonstrated in this chapter, it is clear that indigenous peoples’ have a right to participate in the management of biodiversity conservation in protected areas on their territories under international human rights law. Such a right can be derived from a number of rights, which have been examined in the previous subchapters, protected under international human rights instruments.

The right which has the greatest importance for indigenous peoples’ right to participate in the management of biodiversity conservation is the right to self-determination, since it is a framework right which is concretised in more specific rights from which the right to conservation can be derived. The general right to participation, the right to consultation, land rights and the right to culture as ethnic minorities clearly give indigenous peoples’ the right to effective participation in matters which would affect their rights. Thus, this also includes a right for indigenous peoples to participate in the management of biodiversity conservation in protected areas on the territories that they presently occupy and territories that they have lost recently.

Indigenous peoples’ right to participate in the management of biodiversity conservation is also explicitly recognised in Articles 29(1) and 32(1) of the UNDRIP and Articles 7(4) and 15(1) of ILO Convention No. 169. In conformity to the rights from which the right to conservation can be derived, the CEACR jurisprudence and the Special Rapporteur has concluded that indigenous peoples’ right to participate in the management of biodiversity conservation imposes an obligation...
on states to protect that right through national legislation, and that such legislation has to be applied in practice. Moreover, the Special Rapporteur has concluded that such legislation has to guarantee the access of indigenous peoples to natural resources on their territories necessary for their subsistence.

However, as also demonstrated in this chapter, indigenous peoples do not have a veto power with respect to state measures for the purpose of biodiversity conservation, which means that the right to participate in the management of biodiversity conservation is not absolute. For instance, it follows from Diergaardt v. Namibia that Article 27 of the ICCPR does not protect purely economic activities that do not form part of an indigenous culture.\textsuperscript{184} Diergaardt v Namibia may not be helpful to clearly identify the categories of activities which are not protected under Article 27 of the ICCPR, and since the HRC has not done so in any other communication it is unclear which these categories may be.

Furthermore, it is not clear to which extent indigenous peoples have the right to participate in the management of biodiversity conservation on territories which they have occupied in the past. Since no clear distinction has been made between “recent” and “non-recent” loss of territories, states may in practice deny indigenous peoples the right to participate in the management of biodiversity conservation in a number of cases where the loss of territories have occurred in recent times.

Moreover, the spiritual aspect of indigenous peoples’ land rights is only recognised with respect to territories presently occupied by indigenous peoples under Article 13(1) of ILO Convention No. 169, and it remains unclear if Article 25 of the UNDRIP also applies to territories occupied by indigenous peoples in the past. Thus, due also to the fact that states have the freedom to define what rights indigenous peoples have to the lands they have traditionally occupied in the past according to Article 26(1) of the UNDRIP and Article 14(1) of ILO Convention No. 169, it is not clear to which extent indigenous peoples have the right to participate in the management of biodiversity conservation on territories to which they maintain a spiritual connection but where the physical connection was lost a long time ago. Therefore, due also to the unclarity under international human rights law on what should be considered a “recent” loss of indigenous territories, indigenous peoples may in practice be excluded from participating in the management of biodiversity conservation on territories they have occupied in the past in a number of cases.

As concluded in Mahuika v. New Zealand and in conformity to Saramaka People v. Suriname, state measures for the purpose of biodiversity conservation may also be rendered acceptable limitations of indigenous peoples’ right to participate in the management of biodiversity conservation, provided that the indigenous peoples in question have had the opportunity to participate in the decision-making process in relation to these measures and the measures in question do not threaten their traditional economy.\textsuperscript{185} As a consequence, it is likely that state conservation measures on the territories of indigenous peoples in a majority of cases do not require from states to obtain the free, prior and informed consent of the indigenous peoples concerned.

The HRC has in its jurisprudence focused on the circumstances under which state conservation measures are acceptable limitations on indigenous peoples’ right to subsistence use of natural resources. As illustrated through for instance Xákmok Kásek v. Paraguay and Mahuika v. New Zealand, many indigenous peoples, unlike non-indigenous peoples, do not distinguish between conservation measures for the purpose of strict preservation of biodiversity and subsistence use of biodiversity. Therefore, state measures for the purpose of biodiversity conservation on the territories of indigenous peoples may considerably restrict indigenous peoples’ right to participate in the

\textsuperscript{184} Diergaardt v. Namibia, para 10.6.
management of biodiversity, and thus weakens the correspondent state obligation to ensure and protect that right.

Regarding the human rights of indigenous peoples, the UN system and the IACtHR have in their jurisprudence mainly focused on the impact state exploitation of natural resources on the territories of indigenous peoples have on the exercise of the human rights of the indigenous peoples concerned. Regarding state measures for the purpose of biodiversity conservation on the territories of indigenous peoples, the focus has mostly been on states that apply the “Yellowstone model” in the management of their protected areas. As a result, the states in question have completely excluded indigenous peoples from the management of biodiversity conservation on their territories, as was the case in Xákmok Kásek v. Paraguay. Thus, international human rights law has only to a limited extent focused on cases where states allow include indigenous peoples in the management of biodiversity conservation on their territories but the level of participation is not appropriate.

The IACHR friendly settlement Beroiza et al., which resulted in an agreement between the Government of Chile and the indigenous people in question, determining inter alia the responsibilities of the parties in protection and conservation of natural resources, can be seen as a good example of appropriate involvement from indigenous peoples in the management of biodiversity conservation on their territories. However, the agreement can still not be seen as an outcome of customary international law but rather as an example of best practices. Thus, further jurisprudence from the UN system and the IACtHR is needed to identify in what manners indigenous peoples shall participate in the management of biodiversity conservation on their territories, and to identify the measures states have to undertake to ensure and protect that right. As a consequence, the UN system and the IACtHR will bring more clarity on the meaning of indigenous peoples’ right to participate in the management of biodiversity conservation on their territories and develop customary international law in that regard.

4. The right to conservation under international biodiversity law

This chapter will begin with a brief introduction of the evolvement of international biodiversity law and its implications for indigenous peoples. Subsequently, the state obligation to conserve biodiversity in protected areas will be described. Moreover, the IUCN and its importance for interpreting indigenous peoples’ right to participate in the management of biodiversity conservation will be investigated. Finally, the state obligation to protect traditional knowledge and practices under the Convention on Biological Diversity and its importance for indigenous peoples’ right to participate in the management of biodiversity conservation will be analysed.

4.1 Conservation and indigenous peoples

Official conservation initiatives have existed for thousands of years, and there are documentation of game and nature reserves in many societies in Europe and Asia since ancient times. Peoples all around the world have often been good environmental custodians, and thus keeping their living space more or less intact. However, human impact have in more densely populated areas increasingly altered the landscape. Many European societies had developed the cultural-historical concept of wilderness, which created a sharp divide between man and nature. Wilderness was often

187 Grundsten, Claes, National Parks of Sweden (Värnamo: Bokförlaget Max Ström, 2009), 9.
seen as a hostile environment which needed to be tamed and conquered. This view of wilderness affected the European colonial powers’ exploitation of the virtually unlimited natural resources in the Americas and Oceania in the colonial times.  

However, the Romantic Movement which started in Europe in the 18th century had a different approach towards wilderness. Unlike the previous perception, the supporters of Romanticism saw wilderness as something sacred, beautiful and refreshing. The American painter George Catlin was inspired by the Romantic Movement and concerned about the Western settlers’ exploitation of the wilderness areas of the United States, which he feared would lead to their disappearance and the extinction of buffaloes and Indians. Therefore, he suggested the creation of a “nation’s park” where Indians and wildlife could live in harmony.  

Yellowstone National Park in the United States was established as the world’s first national park in 1872, “dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people.” Thus, public recreation rather than conservation was one of the main concerns leading to the creation of Yellowstone National Park and other American national parks in the late 19th century. Furthermore, cultural nationalism expressed in the will to protect scenic natural monuments as an expression of the unique American identity has been identified as another impetus for the establishment of national parks. Also the fact that the American Congress only agreed to establish national parks on lands that were considered “worthless” from a natural resources point of view, makes clear that economic considerations also played a crucial part in the establishment of national parks. Also democracy and the idea of public ownership made it possible to set aside land for the “enjoyment of all”, and thus enabled the establishment of national parks. 

However, the growing appreciation of wilderness and the continuing exploitation of wilderness areas made conservation the main impetus for establishing national parks in the United States. The conservation movement in the United States was divided into a preservationist and conservationist group. The preservationists held that wilderness areas should be strictly protected from human impact because of its intrinsic value. The conservationists, on the other hand, saw wilderness areas as sources of natural resources which could be used sustainably. It has been held that the preservationists have been more influential in creating the management policies of American national parks.  

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191 Act of March 1, 1872, An Act to set apart a certain tract of land lying near the headwaters of the Yellowstone River as a public park, 17 Stat. 32.  
However, American national parks have often been created on Indian territories. Therefore, it has been suggested that the conception of national parks as uninhabited wilderness areas unaltered by humans have justified the dispossession of Indians from their territories in order to create these national parks. This also became the norm for the creation of national parks in the United States, with documented negative impact on the balance of the ecosystems in the parks.  

The "Yellowstone model", where national parks are established on state land and managed by state agencies for wilderness preservation and without human interference, has also been the most influential one in biodiversity conservation internationally. This was confirmed by an early definition of national park adopted by the IUCN General Assembly in New Delhi in 1969, which defined the term as a large area where, inter alia, "one or several ecosystems are not materially altered by human exploitation and occupation," and "where the highest competent authority of the country has taken steps to prevent or eliminate as soon as possible exploitation or occupation of the whole area."  

However, the relationship between the protection of the human environment and the wellbeing of peoples and the importance of indigenous traditional knowledge for conserving biodiversity gained increased attention worldwide. The real breakthrough occurred during the UN Conference on Environment and Development (UNCED), also known as "Earth Summit", held in Rio de Janeiro in Brazil in 1992, when indigenous peoples’ specific relationship with the environment was recognised. The UNCED led to the adoption of the Rio Declaration, a non-binding instrument related to the concept of sustainable development, and Agenda 21, a non-binding action programme related to the concept of sustainable development. Both instruments recognised the importance of indigenous participation in the achievement of sustainable development.  

Moreover, the UNCED also resulted in the adoption of the Convention on Biological Diversity (CBD), which recognises "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources" in its preamble. Furthermore, the CBD contains a number of provisions regarding "indigenous and local communities" and their role in biodiversity conservation.

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201 Preambular para 12 of the CBD.
4.2 The Biodiversity Convention and protected areas

The CBD was opened for signature at the UNCED on 5 June 1992, and had received 168 signatures when it closed for signature on 4 June 1993. The CBD entered into force on 29 December 1993, and has to date been ratified by 196 countries.

CBD has been named the most important international legal instrument on the conservation of biological diversity. Unlike other conventions that have protected certain categories of species or certain ecosystems, the CBD takes a look at biodiversity as a whole and thus including all its parts. The three main objectives of the CBD are identified in Article 1; the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. The CBD contains a number of Articles imposing obligations to be fulfilled by states, ”as far as possible and as appropriate,” related to the three objectives of the Convention.

The CBD is governed by the Conference of Parties to the Convention on Biological Diversity (COP), which advances implementation of the Convention through the decisions it takes at its periodic meetings according to Article 23 of the CBD. The COP decisions are legally binding on states parties, since they constitute authoritative interpretations of the CBD. The CBD also lead to the establishment of the Secretariat of the CBD, which is led by the Executive Secretary and has as principal functions to prepare for and service the COP meetings under Article 24 of the CBD. Additionally, the COP has also established a number of ad-hoc open-ended working groups to address implementation of certain articles of the CBD, such as the Working Group on Protected Areas and the Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity.

Two of the core principles of the CBD are embodied in its Article 3, which stipulates: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

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The second part of Article 3 embodies the general obligation of states to not cause transboundary environmental harm, which the International Court of Justice has identified as a rule under customary international law.\textsuperscript{211} With respect to biodiversity conservation, the COP has interpreted the obligation as including, for instance, to “recognize the risk that they may pose to other States as a potential source of alien invasive species, and should take appropriate actions to minimize that risk.”\textsuperscript{212} Such actions include preventing the introduction of invasive alien species, between and within States. If such species have been introduced, they have to be detected and eradicated or contained and subject to long-term control measures.\textsuperscript{213} The COP has also invited Parties and other States, in order to address Article 3, “to identify activities and processes under their jurisdiction or control which may have significant adverse impact on deep seabed ecosystems and species beyond the limits of national jurisdiction.”\textsuperscript{214}

The first part of Article 3 of the CBD embodies the principle of State sovereignty over natural resources. However, the exercise of this right “in accordance with the Charter of the United Nations and the principles of international law” means that a State must respect its obligations under both international biodiversity law and international human rights law. The requirement from states to respect their obligations under the human rights conventions they have ratified when implementing the CBD also follows from Article 22(1) of the Convention, which stipulates that “(t)he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”\textsuperscript{215}

This was also confirmed by the CERD in its concluding observations on Indonesia, where it held that, “while noting that land, water and natural resources shall be controlled by the State party and exploited for the greatest benefit of the people under Indonesian law, recalls that such a principle must be exercised consistently with the rights of indigenous peoples.”\textsuperscript{216} This has also been confirmed explicitly with respect to the UNDRIP by the Special Rapporteur on the rights of indigenous people, who recommended that existing treaties “should be interpreted and implemented in a way that is consistent with the Declaration on the Rights of Indigenous Peoples, whether or not the specific texts of these instruments reflect language which exactly matches the terms of the Declaration, unless the wording clearly does not allow for such an interpretation. If the wording of a text is such that it cannot be applied consistently with the Declaration, it should be amended or


The principle of State sovereignty over natural resources is also limited through the state obligations regarding in-situ conservation in Article 8 of the CBD. According to Article 8(a) of the CBD, the Contracting Parties shall "(e)stablish a system of protected areas or areas where special measures need to be taken to conserve biological diversity." Furthermore, Contracting Parties shall also "(d)evelop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity" according to Article 8(b) of the CBD.

The COP has through its Programme of Work on Protected Areas emphasised that protected areas "are essential components in national and global biodiversity conservation strategies. They provide a range of goods and ecological services while preserving natural and cultural heritage. They can contribute to poverty alleviation by providing employment opportunities and livelihoods to people living in and around them."218

The Secretariat interpreted the term "system" in Article 8(a) of the CBD at the second meeting of the COP as meaning "that the protected areas of a country or region may be chosen to form a network, in which the various components may conserve different portions of biological diversity, often using a variety of approaches to management." Furthermore, the Secretariat has also claimed that "(e)xperience shows that a well designed and managed system of protected areas can form the pinnacle of a nation’s efforts to protect biological diversity."219

The Secretariat also held that "(a)n important first step is to make a protected areas system plan, which states the objectives of the national network, outlines what each existing protected area contributes to achieving those objectives, identifies gaps and provides a plan of action to fill the gaps."220 Furthermore, the Secretariat held that, "(i)n order to best meet the objectives of a national protected area system, each protected area needs to have clear objectives for biological diversity management and appropriate boundaries, legal status, funding and personnel. As protected areas need to be well integrated into national social, environmental and economic structures, production of a management plan for each protected area provides an opportunity for cooperation between conservation agencies, local people and user groups."221 In that regard, the Secretariat held that measures taken by countries to implement Articles 8(a) and 8(b) of the CBD include "developing guidelines for the selection, establishment and management of these areas, including management plans and systems plans. This measure implies ensuring public involvement, especially of local and indigenous peoples in planning and management."222

Thus, it follows from Article 3 of the CBD that the sovereign right of states to its natural resources gives them the right to undertake measures for the purpose of biodiversity conservation within their jurisdictions. Moreover, it also follows from Article 3, as interpreted by the COP, that states have an obligation to identify activities and processes under their jurisdiction or control that may have
negative effects on the biodiversity in other states. Thus, it follows from Article 3 that states have the obligation to undertake measures for the purpose of biodiversity conservation within its jurisdiction.

Furthermore, states have the obligation under Article 8(a) and (b) of the CBD, as far as possible and as appropriate, to establish protected areas where measures are undertaken to conserve biodiversity. As interpreted by the Secretariat, it also follows from Article 8(a) and (b) that states are required to have clear objectives for the management of biodiversity conservation in each protected area. Moreover, notwithstanding that the IUCN management categories for protected areas are not binding upon state members of the IUCN, the categories may bring further clarity on which measures states need to undertake to conserve biodiversity in their protected areas.

Article 3 of the CBD has been criticised for weakening the commitment of states to conserve biodiversity according to the other provisions of the CBD, and it has been suggested that Article 3 does not impose a general obligation on states of conservation and sustainable use of all natural resources within their jurisdictions. However, it remains clear that when states establish protected areas on the territories of indigenous peoples, states have the obligation to respect its human rights obligation with respect to the indigenous peoples concerned. Furthermore, the Note by the Secretariat from the second COP meeting should also be construed as that indigenous peoples under Article 8(a) and (b) of the CBD shall participate in the management of biodiversity conservation in protected areas established on their territories.

4.3 The IUCN and indigenous peoples

The IUCN was established in 1948, and is a non-governmental organisation which "focuses on valuing and conserving nature, ensuring effective and equitable governance of its use, and deploying nature-based solutions to global challenges in climate, food and development." The IUCN is the world’s oldest and largest global environmental organisation with more than 1,200 members, including both governmental and non-governmental organisations. Therefore, the IUCN has been characterised as an important player on the international environmental scene, and has in particular paid attention to protected areas and the local population through its resolutions and recommendations. Although the IUCN resolutions and recommendations do not give rise to binding obligations, it has been held that they represent the essence of the IUCN.

The protected area categories adopted by the IUCN have also been influential in the management of protected areas worldwide, and have also been referred to by the COP as guiding with respect to the state obligations under Article 8(a) and (b) of the CBD. For instance, national park is defined in IUCN category II as a "(l)arge natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the..."

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area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities.”

The IUCN has identified the primary objective of category II as protecting "natural biodiversity along with its underlying ecological structure and supporting environmental processes, and to promote education and recreation.” The IUCN has also concluded that the other objectives of category II include taking ”into account the needs of indigenous people and local communities, including subsistence resource use, in so far as these will not adversely affect the primary management objective.”

Thus, category II also illustrates the great importance the IUCN has had for the integration of the rights of indigenous peoples in conservation policy and practice. Furthermore, the World Conservation Congress of 1996 in Montreal, Canada passed Resolution WCC 1.53, which requested the IUCN, within available resources, to endorse, support, participate in and advocate the development and implementation of a clear policy in relation to protected areas established in indigenous territories. These measures should be based on the principles of; "a) recognition of the rights of indigenous peoples with regard to their lands or territories and resources that fall within protected areas; b) recognition of the necessity of reaching agreements with indigenous peoples prior to the establishment of protected areas in their lands or territories; c) recognition of the rights of the indigenous peoples concerned to participate effectively in the management of the protected areas established on their lands or territories, and to be consulted on the adoption of any decision that affects their rights and interests over those lands or territories.

In response to the Recommendation, the IUCN and the WWF jointly adopted a set of “Principles and guidelines on protected areas and indigenous/traditional peoples” in 1999. Principle 1 stipulates:

“Indigenous and other traditional peoples have long associations with nature and a deep understanding of it. Often they have made significant contributions to the maintenance of many of the earth’s most fragile ecosystems, through their traditional sustainable resource use practices and culture-based respect for nature. Therefore, there should be no inherent conflict between the objectives of protected areas and the existence, within and around their borders, of indigenous and other traditional peoples. Moreover, they should be recognised as rightful, equal partners in the development and implementation of conservation strategies that affect their lands, territories, waters, coastal seas, and other resources, and in particular in the establishment and management of protected areas.”

Guideline 1.1 stipulates that, where protected areas overlap with the territories of indigenous peoples, “agreements should be sought between the respective communities involved and

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228 http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_pacategory2/

229 http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_pacategory2/


conservation agencies, without prejudice to any other existing treaty or legal arrangement involving indigenous and other traditional peoples. Such agreements should: establish common objectives and commitments to the conservation of protected areas; define responsibilities for conservation and sustainable use of biodiversity and natural resources contained in them; and be the basis for management objectives, standards, regulations, etc.”

Principle 2 stipulates that the above mentioned agreements should be based on full respect for the rights of indigenous and other traditional peoples to traditional, sustainable use of their territories. However, such agreements should also "be based on the recognition by indigenous and other traditional peoples of their responsibility to conserve biodiversity, ecological integrity and natural resources harboured in those protected areas.”

Indigenous peoples’ right to participate in the management of biodiversity conservation on their territories is also restricted through Guideline 1.2, which stipulates that development of the above mentioned agreements "should be framed within national protected area objectives, plans and policies, and within the framework of national laws and regulations. This is necessary to ensure that such agreements are consistent with national objectives and obligations towards the protection of the natural and cultural heritage of a given country, including any relevant international obligations (e.g. under international conservation agreements).” However, Guideline 2.2 stipulates that the above mentioned agreements should respect the rights of indigenous and traditional communities to, inter alia, require that States obtain the free and informed consent of the respective communities, prior to the approval of any project affecting their territories.

Since the adoption of the above mentioned Principles the IUCN has elaborated its policy on indigenous peoples and protected areas. For instance, the Fourth World Conservation Congress held in Barcelona in 2008 resulted in the adoption of Resolution WCC 4.048, with the purpose to apply the requirements of the UNDRIP “to the whole of IUCN's Programme and operations.” Furthermore, the Resolution called on governments to work with indigenous peoples' organisations to reform national legislation, policies and practices so that they contribute to the realization of the relevant parts of the CBD Programme of Work on Protected Areas and the UNDRIP, and ensure that protected areas which affect or may affect indigenous peoples' territories are not established without indigenous peoples' free, prior and informed consent and to ensure due recognition of the rights of indigenous peoples in existing protected areas.

Thus, the IUCN has rejected the conception that there should be a conflict between state conservation measures in protected areas and indigenous peoples’ right to participate in the management of biodiversity in protected areas on their territories. Instead, according to the IUCN, indigenous peoples should effectively participate in and be consulted regarding the management of biodiversity in those protected areas. This corresponds with the rights of indigenous peoples under human rights law which were analysed in chapter 3 in this thesis. However, the IUCN goes further and has adopted the position that indigenous peoples should be recognised as rightful and equal partners in the management of protected areas on their territories. Furthermore, the IUCN also confirms the position adopted by the CERD that no state decisions regarding the management of biodiversity conservation on the territories of indigenous peoples shall be adopted without their

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234 Ibid.
235 Ibid, 8.
236 Ibid, 7.
237 Ibid, 9.
The IUCN also recognises indigenous peoples’ right to use the natural resources on their territories, which corresponds with the rights of indigenous peoples that were analysed in chapter 3 of this thesis. Furthermore, the IUCN adopts the solution in the IACtHR case Beroiza et al that indigenous peoples’ right to participate in the management of biodiversity conservation on their territories may not only be ensured and protected through national legislation but also through formal agreements between states and the indigenous peoples concerned. As in Beroiza et al, the IUCN adopts the position that such agreements should determine the rights and responsibilities of the parties with respect to conservation and sustainable use of biodiversity in those protected areas. Furthermore, Resolution WCC 4.048 should be interpreted as that the IUCN resolutions, principles and management categories for protected areas should be applied consistently with the UNDRIP.

However, the IUCN has also concluded that indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories is subordinate to national legislation and protected area objectives. This corresponds with the state obligation to undertake measures for the conservation of biodiversity in its protected areas under Articles 3 and 8(a) and 8(b) of the CBD and with the outcome in Mahuika v. New Zealand. Furthermore, the position held by the IUCN that agreements between states and indigenous peoples regarding the management of protected areas should define indigenous peoples’ responsibilities regarding biodiversity conservation may in practice restrict indigenous peoples’ right to participate in the management of biodiversity conservation even further. Thus, despite the fact that states are obliged under Article 3 of the CBD to respect the human rights of indigenous peoples with respect to biodiversity conservation on indigenous peoples’ territories, indigenous peoples’ position as rightful and equal partners in the management of biodiversity conservation may in practice be considerably eroded by the IUCN principles.

Furthermore, despite the position held by the CERD, the state obligation to not undertake measures for the purpose of biodiversity conservation on the territories of indigenous peoples without the latter’s free, prior and informed consent cannot yet be seen as a norm under customary internal law in either international human rights law or international biodiversity law. Furthermore, despite the approach by the IACHR in Beroiza et al and by the IUCN, the state obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories does not impose an obligation on states to conclude joint management agreements with indigenous peoples in that regard. Rather, joint management schemes should still only be seen as examples of best practices.

The IUCN has developed the meaning of indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories, and has in regard to many aspects indicated that indigenous peoples should have a higher level of participation than the one ensured and protected under international human rights law. However, the IUCN has imposed limitations on indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories corresponding on those given in international human rights law, and many of the IUCN principles cannot yet be considered norms under customary international law.

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240 Cf Beroiza et al, para 35.
4.4 Traditional knowledge and practices

The traditional knowledge of indigenous peoples also has importance for their participation in the management of biodiversity conservation. This is recognised in Article 8(j) of the CBD, which stipulates that each Contracting Party shall, "(s)ubject 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. The term "sustainable use" has been defined in Article 2 of the CBD as "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."

A Workshop on Traditional Knowledge and Biological Diversity was held in Madrid, Spain, in November 1997 to advise the COP on the possibility of developing a work plan on Article 8(j) of the CBD.242 The Executive Secretary characterised traditional knowledge in the note from the Workshop as "a term used to describe a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use."243

The Executive Secretary emphasised at the third COP meeting that knowledge is not defined as "traditional" through "its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its "traditionality"." Furthermore, the COP also emphasised the dynamic character of traditional knowledge: "Much of this knowledge is actually quite new, but it has a social meaning, and legal character, entirely unlike the knowledge indigenous peoples acquire from settlers and industrialized societies. This is why we believe that protecting indigenous knowledge necessarily involves the recognition of each peoples' own laws, and their own processes of discovery and teaching."244

The Executive Secretary defined the term “innovation” at the Workshop on Traditional Knowledge as "a feature of indigenous and local communities whereby tradition acts as a filter through which innovation occurs. In this context, it is traditional methods of research and application and not always particular pieces of knowledge that persist. Practices should therefore be seen as the manifestations of knowledge and innovation."245

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245 Convention on Biological Diversity, Traditional Knowledge and Biological Diversity, Note by the Executive Secretary.
Relevant for the state obligations in relation to traditional knowledge under Article 8(j) of the CBD is also the customary use of biological resources. In that regard, Article 10(c) of the CBD stipulates that each Contracting Party shall "(p)rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. The term "biological resources" has been defined in Article 2 of the CBD as including "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity."

The Executive Secretary suggested at the Workshop on Traditional Knowledge held that the term "customary use of biological resources" can be considered to be synonymous with the term "traditional practices" used in Article 8(j) of the CBD, since "both are relevant to or compatible with the conservation and sustainable use of biological resources."246 Moreover, the Executive Secretary also linked the whole of Article 8 of the CBD to Article 10(c) of the CBD, since the customary use of biological resources only can exist within the context of in-situ conservation under Article 8 of the CBD.247

The Executive Secretary emphasised at the Workshop on Traditional Knowledge that customary use of biological resources may have both economic and subsistence purposes and spiritual and ceremonial functions.248 Fergus MacKay, former Coordinator of the Legal and Human Rights Programme at the non-governmental organisation Forest Peoples Programme, argues that the subsistence activities that most likely would be considered as customary use of biological resources within the meaning of Article 10(c) of the CBD are, for instance, indigenous agriculture, agroforestry, hunting, fishing, gathering and use of medicinal plants.249

The Executive Secretary concluded at the third COP meeting that the state obligation to "respect, preserve and maintain" traditional knowledge under Article 8(j) of the CBD and the obligation to "protect and encourage" customary use of biological resources under Article 10(c) of the CBD "require Parties to recognize that biological diversity is maintained, and very often enhanced, by the knowledge, innovations and practices of indigenous and local communities and that the preservation and maintenance of biological diversity goes hand-in-hand with the preservation and maintenance of cultural diversity. In order that indigenous and local communities may continue to maintain and develop their knowledge, innovations and practices (in other words, are able to ensure their cultural survival), they need secure access to the basis of such biological diversity and its components."250

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248 Convention on Biological Diversity, Traditional Knowledge and Biological Diversity, Note by the Executive Secretary, UN Doc UNEP/CBD/TKBD/1/2 (1997), para 101. Cf Convention on Biological Diversity, Compilation of Views on Use of the Term "Indigenous Peoples and Local Communities, " Note by the Executive Secretary, UN Doc UNEP/CBD/WG8J/8/INF/10 (2013), para 37.
The Executive Secretary also emphasized at the third COP meeting that Article 8(j) and 10(c) of the CBD implied an obligation for States through national legislation to recognize and guarantee the rights of indigenous and traditional communities to their traditional lands, control over their natural resources and their right to culture. The COP held that if those rights were not recognized and guaranteed through national legislation, "cultural diversity will be lost and this loss is likely to be accompanied by a corresponding loss of biological diversity and of traditional ecological knowledge", which also had been recognized in preambular paragraph 12 of the CBD.251

The Executive Secretary interpreted at the Workshop on Traditional Knowledge the state obligation to "respect, preserve and maintain" traditional knowledge as requiring from states to give such knowledge "a status comparable to that shown to other types of knowledge, innovations and practices", which in itself "acts as a considerable incentive for the conservation and maintenance of traditional knowledge." According to the Executive Secretary, this means that relevant traditional knowledge and innovations should be given a status in national life comparable to scientific knowledge and innovations. Thus, this means, according to the Executive Secretary, that also "(r)eflect relevant practices and customary uses should be recognized as comparable, when not superior, to modern land-use management, agricultural, fishing, medicinal and other activities using biological resources."252

The Executive Secretary also argued at the Workshop that the state obligation to "preserve and maintain" traditional knowledge under Article 8(j) of the CBD implied an obligation for states to adopt incentive measures in that regard. This follows from Article 11 of the CBD, which stipulates that each Contracting Party shall "adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity."253 According to the COP, these measures can be both monetary and non-monetary, and "must be tailored to suit the social, cultural and environmental contexts of each community and must be negotiated between communities and the various providers."254 The Workshop on Traditional Knowledge and Biological Diversity held that such measures could "help communities overcome problems they have not traditionally had to deal with such as overpopulation, presence of alien


253 Convention on Biological Diversity, Traditional Knowledge and Biological Diversity, Note by the Executive Secretary, UN Doc UNEP/CBD/TKBD/1/2 (1997), para 11; Convention on Biological Diversity, Knowledge, Innovations and Practices of Indigenous and Local Communities: Implementation of Article 8(j), UN Doc UNEP/CBD/TKBD/1/2 (1997), para 68.

254 Convention on Biological Diversity, Traditional Knowledge and Biological Diversity, Note by the Executive Secretary, UN Doc UNEP/CBD/TKBD/1/2 (1997), para 11.
species, specific pollution problems, tourism or restoring degraded landscapes to productive uses. The decision to initiate such an approach, in accordance with Article 8(j), rests with national governments in fulfilling the obligations of the CBD.\(^{255}\)

The Executive Secretary emphasised at the Workshop that much traditional knowledge has limited importance outside the environment it arose, and "is likely to be most valuable as a means to achieve sustainable management." To do this, the Executive Secretary that the owners of traditional knowledge must be involved in the management of biodiversity on their traditional lands. This is realised through the involvement in "(i) ownership partnerships, in which local people and the State agree to ownership regimes for traditional lands and its derivatives; (ii) planning partnerships, in which traditional and other forms of knowledge are used together in making decisions on the use of the biodiversity on such lands; and (iii) management partnerships, in which the partners collaborate to put their plans into effect."\(^{256}\)

Furthermore, the Executive Secretary Workshop on Traditional Knowledge and Biological Diversity also concluded the measures to involve indigenous peoples in the management of biodiversity conservation include "(i) identifying and amending, where appropriate, current national laws, institutions and policies which, through inadvertence, promote conflict, competition and disenfranchisement; (ii) identifying customary uses and traditional knowledge compatible with conservation of biological diversity and the sustainable use of its components; and (iii) strengthening community level institutions and promoting effective community participation in management decisions."\(^{257}\)

Subsequently, the COP has recalled at its seventh meeting "the obligations of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and notes that the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations."\(^{258}\) Moreover, the COP also took note "as appropriate of the United Nations Declaration on the Rights of Indigenous Peoples in the further implementation of the programme of work on protected areas."\(^{259}\)

Thus, it clearly follows from Articles 8(j) and 10(c) of the CBD that states have an obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories. The interpretation of the term "customary use of biological resources" in Article 10(c) of the CBD as synonymous with the term "traditional practices" in Article 8(j) of the CBD also recognises that it may be difficult to distinguish conservation measures as strict preservation of biodiversity and measures for the sustainable use of biodiversity.

\(^{255}\) Ibid, para 79.


\(^{257}\) Convention on Biological Diversity, *Traditional Knowledge and Biological Diversity, Note by the Executive Secretary*, UN Doc UNEP/CBD/TKB/1/2 (1997), para 80.

\(^{258}\) Convention on Biological Diversity, *Decisions adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting, Decision VII/28, Protected Areas (Articles 8 (a) to (e))*, UN Doc UNEP/CBD/COP/7/21 (2004), para 22.

As with the rights analysed in chapter 3 of this thesis and the IUCN Principles, it follows from Articles 8(j) and 10(c) of the CBD that states have the obligation to ensure and protect indigenous peoples’ land rights and their access to biological resources as necessary for the preservation of traditional knowledge and practices. Thus, fulfilling that obligation is a condition for the effective participation and the use of the traditional practices of indigenous peoples in the management of biodiversity conservation on their territories. The COP has also confirmed that the state obligations under Articles 8(j) and 10(c) have to be fulfilled through national legislation, which corresponds with the state obligations under the rights described in chapter 3 of this thesis.

Moreover, the Executive Secretary has also adopted the outcome in Beroiza et al and the position adopted in the IUCN principles that indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories may not only be ensured and protected through national legislation, but through formal management agreements concluded between states and indigenous peoples. Furthermore, as in the agreement from Beroiza et al, the COP has also held that states have the obligation to adopt incentive measures under Articles 8(j) and 11 of the CBD to preserve and maintain traditional knowledge, in order to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation. Moreover, the obligation to give traditional knowledge the same status as modern science also puts indigenous peoples in a strong position in the management of biodiversity conservation, similarly to the requirement to recognise indigenous peoples and rightful and equal partners in such management under the IUCN principles.

However, Articles 8(j) and 10(c) of the CBD do not recognise indigenous peoples’ right to traditional knowledge and customary use of biological resources in the strict sense, since it only imposes obligations on states in that regard. Thus, although the COP has noted the UNDRIP as appropriate in the implementation of the Programme of Work on Protected Areas, Articles 8(j) and 10(c) do not give indigenous peoples a right within the meaning of international human rights law to participate in the management of biodiversity conservation on their territories. In that regard, the CBD differs from both the human rights instruments analysed in chapter 3 of this thesis and the IUCN principles.

Furthermore, the CBD does not refer to “indigenous peoples” but to “indigenous and local communities” or “indigenous and traditional communities.” The COP has started to refer to “indigenous peoples and local communities” in its decisions, whilst still referring to “indigenous and local communities” with respect to their participation in the management of biodiversity conservation in protected areas. Since the term “local communities” has yet not been defined by the COP, it remains unclear which communities are governed by the CBD and if the term “indigenous and local communities” under the CBD has the same meaning as the term “indigenous peoples” under international human rights law. Thus, despite the state obligation to conform with international human rights law when fulfilling its obligations under the CBD according to Article 3, and the reference made by the COP to the UNDRIP, it also remains unclear to which extent the CBD corresponds with international human rights law with respect to the state obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity protection in protected areas on their territories.

Furthermore, the lack of definition of “indigenous and local communities” combined with the state obligation to identify traditional knowledge and customary use of biological resources may in practice exclude a number of categories of knowledge and practices that are not rendered

260 Convention on Biological Diversity, Additional Information Received on Use of the Term “Indigenous Peoples and Local Communities,” Note by the Executive Secretary, UN Doc UNEP/CBD/COP/12/INF/1/Add.1 (2014), 4.
“traditional”. Thus, as illustrated by *Diergaardt v. Namibia*, this may cause ambiguity on which communities are governed by the CBD and what categories of knowledge and practices should be considered “traditional.” Thus, this may in practice limit the state obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories under Articles 8(c) and 10(c) of the CBD.

### 4.5 Conclusion - The right to conservation under international biodiversity law

It follows from the provisions in the CBD and the IUCN “Principles and guidelines on protected areas and indigenous/traditional peoples” that there should be no conflict between indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international human rights law and the state measures for conserving biodiversity in protected areas on indigenous territories under the CBD. Instead, it follows from the state obligation to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD and to protect and ensure customary use of biological resources under Article 10(c) of the CBD that states should include indigenous peoples in the management of biodiversity conservation in protected areas on its territories.

The IUCN Principles and the CBD elaborate the norms under international human rights law from which indigenous peoples’ right to participate in the management of biodiversity conservation can be derived. Furthermore, the IUCN Principles and the CBD indicate that indigenous peoples should have a higher level of participation in such matters than the level ensured and protected under international human rights law.

However, it follows from both Articles 3 and 8(a) and (b) of the CBD and the IUCN Principles that indigenous peoples’ right to participation in the management of biodiversity conservation is subordinated national legislation and protected area objectives. Moreover, the CBD and the COP has not referred to “indigenous peoples” but “indigenous and local communities” with respect to their right to participate in the management of protected areas, without defining the term. Thus, it remains unclear to which extent the COP fulfils its commitment to interpret the CBD in conformity with the UNDRIP and other international human rights instruments applicable to indigenous peoples. The fact that the CBD does not contain rights corresponding to the state obligations under the Convention, and has no monitoring body before which alleged violations of articles in the CBD can be brought, also weakens the content of indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories.

As concluded in the previous chapter, the IACtHR has in a number of cases, such as *Saramaka People v. Suriname*, referred to provisions in the UNDRIP and ILO Convention No. 169 and thus helped clarifying norms of customary law on the human rights of indigenous peoples. This illustrates the importance of the COP referring to international human rights law instruments, and also the importance of international courts and UN treaty bodies referring to provisions of the CBD and other instruments under international biodiversity law. This may have importance not only for consistent interpretation and implementation of the state obligations in the different regimes, but to more clearly identify the meaning of indigenous peoples’ right to participate in the management of biodiversity conservation under both international human rights law and international biodiversity

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Thus, the adoption of a clear definition of “indigenous and local communities” by the COP and a richer body of international human rights cases interpreting indigenous peoples’ right to participate in the management of biodiversity conservation with reference to international biodiversity law may initiate such a process.

5. Case study – Australia and Kakadu National Park

This chapter will include a case study of the joint management model of Kakadu National Park and the legislation governing the model. The purpose of the case study is to assess how the different and partially conflicting aims of Kakadu National Park, to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation and the state obligation to manage biodiversity conservation, are dealt with in the joint management scheme. Thus, it will be determined through the case study to which extent Australia fulfils its obligation to ensure and protect the right of the indigenous peoples in Kakadu National Park to participate in the management of biodiversity conservation on their territories.

5.1 Background

Kakadu National Park is located within the Alligator Rivers Region in the northernmost geographical region of the Northern Territory, the so-called Top End, of Australia. Kakadu National Park covers an area of 19,810 square kilometres, and is thus the largest terrestrial national park in Australia.

The Alligator Rivers Region has been named one of the most floristically diverse areas of the Top End and more than 1,600 plant species, including 15 species considered threatened, have been recorded in Kakadu National Park. Also the fauna of Kakadu National Park is considered being of significant scientific and conservation value. For instance, the 71 native mammal species known from the park comprise about 25 per cent of the total number of known terrestrial mammal species in Australia. Furthermore, there are 132 reptile species and 27 frog species within Kakadu National Park, and the 271 species of known bird fauna from Kakadu National Park makes up about one-third of all the bird species found in Australia. Moreover, over 246 species of fish have been recorded in tidal and freshwater areas within Kakadu National Park, which makes the region the most species-rich in freshwater fish in Australia.

Archaeological evidence has been discovered of continuous human occupation in the Alligator Rivers Region dating from between 40,000 to 60,000 years ago. The name “Kakadu” comes from

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262 BELTRAN, JAVIER (ED), INDIGENOUS AND TRADITIONAL PEOPLES AND PROTECTED AREAS – PRINCIPLES, GUIDELINES AND CASE STUDIES (CARDIFF: IUCN, 2000) 125; DIRECTOR OF NATIONAL PARKS, KAKADU BOARD OF MANAGEMENT, KAKADU NATIONAL PARK: DRAFT MANAGEMENT PLAN 2014 (CANBERRA: DIRECTOR OF NATIONAL PARKS, 2014), 11, 48, 51; BELTRAN, JAVIER (ED), INDIGENOUS AND TRADITIONAL PEOPLES AND
the original spelling of "Gagudju", as given by the biologist and anthropologist Walter Baldwin Spencer in 1912. Gagudju refers to the main Aboriginal language once spoken in the northern part of the Alligator Rivers Region. The traditional owners of the Kakadu National Park include about 19 distinct clans that are widely scattered throughout the park.

Like many other Aboriginal peoples in Australia, the economies of the peoples of the Alligator Rivers Region were based on hunting and gathering. Each person or clan had its own tract of land from which it hunted and gathered resources, and they moved between regular, semi-permanent living areas to wherever the resources were most abundant.

The culture and traditions of the Aboriginal peoples in the Alligator Rivers Region remained fairly unaffected until European settlement of Australia began in 1788, when the British Governor Sir Arthur Phillip and the First Fleet arrived in Sydney to establish the penal colony of New South Wales. Through the establishment of a British colony in Australia, Sir Arthur Phillip claimed British sovereignty over the Australian continent, which led to the Aboriginal peoples officially falling under British control. However, it was not until the establishment of a settlement at Port Darwin in 1869 that the British presence in the Alligator Rivers Region became more permanent. This made the contact between the British and the Aboriginal peoples in the Alligator Rivers Region ongoing, with marked effect on the latter peoples.

Asian water buffaloes had been introduced in the Alligator Rivers Region by the British already in the 1840s, and buffalo hunting remained an important subsistence economy for European settlers in the Alligator Rivers Region until the 1950s. Also crocodile hunting, mining, pastoralism and logging were important economic activities in the Alligator Rivers Region before the establishment of Kakadu National Park.


It is estimated that the Aboriginal population in Australia at the time of British colonisation numbered somewhere between 300,000 and 1.5 million, speaking over 250 territorially associated Aboriginal languages, of which around 2,000 Aboriginal people speaking 12 different languages lived in the Alligator Rivers Region. However, as with the Aboriginal population in the rest of Australia, the Aboriginal population in the Alligator Rivers Region declined dramatically from the late 19th century until the early 20th century due to introduced diseases and social dispersal.

The Aboriginal civilisations were perceived by the European settlers as "backward" due to cultural differences, which justified discriminatory legislation and policies directed at Aboriginal people in Australia. No treaties were concluded between the British colonial power or the Australian colonies and Aboriginal peoples in the colonial times, nor were the land rights of Aboriginal peoples recognised by the British colonial power or the Australian colonies. These circumstances justified the dispossession of Aboriginal people from their traditional lands by European settlers.

Also the Aboriginal peoples in Alligator Rivers Region were affected by these discriminatory policies. For instance, the dispossession of Aboriginal peoples from the Alligator Rivers Region were encouraged by the actions of government and mission officials as well as by large-scale military activities across the Top End in World War II. Although this had a considerable impact on the cultures of the Aboriginal peoples of the Alligator Rivers Region, Aboriginal peoples were heavily involved in the economic activities of the European settlers.

The Royal National Park was established in 1879 as Australia’s first national park and the second national park in the world after Yellowstone in the United States. A significant increase of the appreciation of wilderness and the level of public concern for wildlife conservation in Australia.


made the "Yellowstone model" the most influential one in the management of Australian national parks from the early 20th century. This fact, together with a persistent governmental and judicial refusal to recognise Aboriginal land rights, lead to the exclusion of Aboriginal peoples from the control and use of national parks established on their traditional lands.  

However, the Australian community was becoming more interested in establishing national parks for conservation and in recognising the land rights of Aboriginal peoples at the time of the establishment of Kakadu National Park. In 1973, the Australian Government decided to set up the Aboriginal Land Rights Commission (ALRC) led by Justice Edward Woodward. The purpose of the ALRC was to inquire into appropriate ways of recognising Aboriginal land rights in the Northern Territory, while providing for conservation management of the land. Justice Woodward reached the conclusion that "a scheme of Aboriginal title, combined with National Park status and joint management, would prove acceptable to all interests."  

The ALRC led to the passing of the Aboriginal Land Rights (Northern Territory) Act (ALRA) in 1976 by the Australian parliament. Subsequently, this resulted in the Australian Government granting Aboriginal title to areas in the Alligator Rivers Region under the ALRA and establishing Kakadu National Park in stages. An arrangement was made for the traditional owners to lease land granted to them to the Australian Government, represented by the Director of National Parks, for management as a national park.  

As a result, Stage One of Kakadu National Park was declared under the National Parks and Wildlife Conservation Act (NPWCA) in 1979. At the same time, joint management of Kakadu National Park was established when the lease of land in Stage One was signed between the Kakadu Aboriginal Land Trust and the Director of National Parks in 1978, and the government committed to managing the whole park as if it were Aboriginal land. Stage Two was added in 1984, and most of the land included in the Stage was subsequently granted to the Jabiluka Aboriginal Land Trust. Stage Three was proclaimed progressively in 1987, 1989 and 1991, and most of the land in the Stage has subsequently been granted to the Gunlom Aboriginal Land Trust. Currently, approximately 50 per

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cent of Kakadu National Park is Aboriginal land under the ALRA. 286

### 5.2 Indigenous participation in biodiversity conservation

It is acknowledged in the Draft Management Plan that Kakadu National Park was established for the purpose of “preservation of the area in its natural condition” and “the encouragement and regulation of the appropriate use, appreciation and enjoyment of the area by the public.” Furthermore, the vision for the park, according to the Draft Management Plan, is that it continues to be recognised internationally as a place where, inter alia, the cultural and natural values of the park are protected and the culture of traditional owners is respected, traditional owners guide and are involved in all aspects of managing the park, and knowledge about country and culture is passed on to younger traditional owners, and future generations of traditional owners have the option to stay in the park to look after country.” 287

Kakadu National Park was the first national park in the world to be formally co-managed by a State agency and indigenous peoples. 288 Co-managed protected areas, which includes jointly managed protected areas, has been defined by the IUCN as a management form “where management authority, responsibility and accountability are shared among two or more stakeholders”, which can include government bodies and agencies at various levels and indigenous and local communities. 289 In the joint management arrangement of Kakadu National Park, the involvement and participation of the Aboriginal peoples is assured through legislation, conditions of lease, the management plan and other management arrangements, such as the establishment of a Board of Management with a majority of Aboriginal members, and through day-to-day management operations. 290 The last management plan for Kakadu National Park expired on 31 December 2013, and the Board of Management has prepared a new draft management plan to guide park management over the next 10 years. 291

The Environment Protection and Biodiversity Conservation Act (EPBCA), which is the successor to the previous NPWCA, is the central piece of environmental legislation governing the management of biodiversity conservation in Kakadu National Park. The objects of the EPBCA under Section 3 of the Act is to, inter alia, provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; promote the conservation of biodiversity; and promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. The objects of the EPBCA also include promoting a co-operative approach to the protection and management of the environment involving, inter alia, indigenous peoples; recognising the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and promoting the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

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The overarching management role in Kakadu National Park is exercised by the Director of National Parks, which is responsible for the administration, management and control of Australian national parks governed by the EPBCA according to Section 514B of the Act. The Director generally has “power to do all things necessary or convenient to be done for or in connection with the performance of the Director's functions” according to Section 514C of the EPBCA. Additionally the Director has a number of specified powers under the EPBCA and EPBC Regulations, which includes to prohibit or control some activities, and to issue permits for activities that are otherwise prohibited. The Director performs functions and exercises powers in accordance with the Management Plan and relevant decisions of the Board of Management.  

The Board of Management of Kakadu National Park was established in 1989 under the NPWCA and continues under the EPBCA. The functions of the Board are, inter alia, make decisions relating to the management of the reserve that are consistent with the management plan in operation for the national park and in conjunction with the Director prepare management plans for the park and monitor the management of the park according to sections 366 and 376 of the EPBCA.

The composition of the Board must be agreed between the Australian Minister for the Environment, who appoints Board members, and the Northern Land Council. However, since Kakadu National Park consists wholly or mostly of Aboriginal land held by the Director under lease, a majority of the members of the Board must be indigenous persons nominated by the traditional owners under section 377 of EPBCA. The purpose of this section is to represent the interests and views of the traditional owners in the joint management of Kakadu National Park. There are currently 21 members of the Board, of which 15 are Aborigines, nominated by the traditional owners, and reflecting the geographic spread of Aboriginal people and the major languages in the Alligator Rivers Region. Currently, the non-Aboriginal members of the Board are two Directors of National Parks, an Assistant Secretary of Parks Australia, a tourism industry representative, a Northern Territory government representative and a nature conservation representative.

However, it has been held that the formal establishment of the Board does not guarantee its effectiveness, nor does the Board’s existence result in Aboriginal decision-making becoming the direction of the management of Kakadu National Park. For instance, the Director of National Parks must inform the Minister for the Environment if the Director believes that a decision of the Board “is likely to be substantially detrimental to the good management” under Section 364 of the EPBCA. If the Minister cannot resolve the matter, the Minister must appoint as an arbitrator to inquire into the matter. The arbitrator must be a person whom the Minister thinks is suitably qualified and in a position to deal with the matter impartially. Subsequently, the arbitrator will give the Minister a report and recommendations, and the Minister will in turn give the Director and the Board the directions the Minister thinks appropriate and a statement of reasons for giving the directions. Both the Director and the Board must comply with the directions given by the Minister under Section 364 of the EPBCA.

The Board of Management of Kakadu National Park is not an indigenous institution, but a State institution where the Aboriginal members of the Board have been chosen through institutions.

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293 Ibid, 31, 206.

representing the traditional owners. Through the election of Aboriginal Board members, the traditional owners have exercised their right to participation under Article 18 of the UNDRIP. However, the application of Section 364 of the EPBCA could lead to directions given by the Minister that negatively affect the right to participate in the management of biodiversity conservation under Articles 29(1) and 32(1) of the UNDRIP for the traditional owners that are not Board members. This means that the traditional owners would have to be consulted regarding the directions given by the Minister with the objective of obtaining their free, prior and informed consent under Articles 19 and 32(2) of the UNDRIP. This means that the section could be applied in a way where the Director and the Board must follow the directions by the Minister, without the traditional owners being consulted through appropriate procedures. Therefore, the application of Section 364 of the EPBCA could violate the right of the traditional owners to be consulted under Articles 19 and 32(2) of the UNDRIP, and thus could also negatively affect their right to participate in the management of biodiversity conservation under Articles 29(1) and 32(1) of the UNDRIP.

Furthermore, the Australian social scientist David Lawrence got through a study of the joint management model of Kakadu National Park the impression that the Board previously operates in a “Western mode”, where meetings tend to promote the values and opinions of the articulate, assertive and confident. Furthermore, David Lawrence has also emphasised that the Board decided early to not hold bilingual meetings, which has been held contributes to uneven participation in discussion. Moreover, David Lawrence also claims that the Aboriginal members of the Board have little time to become familiar with the matters under consideration, expect for pre-meeting briefings which usually lasts only half a day. The ability of Board members to hold pre-meeting discussions is limited by time, distance and the pressure of community responsibilities. Moreover, David Lawrence also refers to how Board members have felt that agenda items at Board meetings sometimes were dealt with too rapidly and that the purpose of some agenda sometimes were not being made clear to Aboriginal Board members.

If this still is the case, it is doubtful whether the procedures of the Board meetings are culturally and socially appropriate for the Aboriginal Board members. Furthermore, it is also doubtful whether the Aboriginal Board members are given sufficient time to fully understand the issues discussed at the Board meetings, and thus are given an effective opportunity to affect the decisions at the Board meetings. Therefore, it is also doubtful whether the procedures of the Board meetings through which the Aboriginal Board members participate and are consulted regarding the management of biodiversity protection should be considered appropriate. Thus, if the procedures of the Board of Management still are as described above, it is doubtful whether the Aboriginal Board members’


296 Lawrence, David, Kakadu: The Making of a National Park (Melbourne: Melbourne University Press, 2000), 266.

297 Ibid, 268.


right to participation under Article 18 of the UNDRIP and to be consulted under Articles 19 and 32(2) of the UNDRIP are effectively protected and ensured. Consequently, the Aboriginal Board members’ right to participate in the management of biodiversity conservation under Articles 29(1) and 32(1) of the UNDRIP could also be negatively affected.

The importance of participation from traditional owners who are not Board members in the management of biodiversity conservation is also acknowledged in the Draft Management Plan. For instance, it is emphasised in the Draft Management Plan that during the life of the fifth Management Plan of Kakadu National Park, 2007-2014, the number of Indigenous people employed in the park improved, with 48 per cent of staff employed on ongoing or non-ongoing contracts identified as Indigenous in 2014. Furthermore, the Kakadu Indigenous Ranger Programme has also provided 11 hosted community ranger positions in the Kakadu National Park and engaged over 30 Indigenous community rangers since 2008–2009.\(^\text{300}\)

In that regard, one of the actions in the Draft Management Plan with respect to indigenous decision-making is to encourage and support traditional owners “to be involved in park decision-making and the development of natural, cultural and visitor programmes and work plans through,” inter alia, “representation on working groups and in staff selection processes.”\(^\text{301}\) Furthermore, the actions also include to engage as many traditional owners as possible to implement this plan through, inter alia, providing traditional owners “with a range of permanent, contract and flexible employment opportunities and associated learning and development support in park management, administration and on-ground programmes.”\(^\text{302}\)

However, the employment and training of Aboriginal rangers has previously received criticism. For instance, David Lawrence has emphasised that the majority of Aboriginal rangers have remained at the bottom levels of the staffing table, and some of the rangers had been at these levels for over ten years. Furthermore, the prospects for Aboriginal rangers to advance in the public service promotion scale has previously been limited. Since Aboriginal rangers also have remained at the lower levels for long periods, recruitment of other Aboriginal rangers have been hindered by the lack of mobility of junior staff.\(^\text{303}\)

David Lawrence has also claimed that people at higher levels of the park service have become skilled in writing abstract, technical or academic English. In turn, this affects the possibility for Aboriginal rangers with poor literacy skills and limited work experience to get promoted in the park service hierarchy and puts them in distinct disadvantage in that regard in comparison to non-Aboriginal rangers. David Lawrence has also mentioned that it has even been suggested that Aboriginal rangers have to sacrifice a part of their Aboriginal culture and community obligations in favour of an Anglo-Australian lifestyle to advance in the system.\(^\text{304}\)

Furthermore, although a number of training programs for Aboriginal rangers have been held during the existence of Kakadu National Park, David Lawrence has argued that no clear policy direction for future have appeared to exist.\(^\text{305}\) For instance, David Lawrence describes that trainees have attended the Northern Territory Open College’s TAFE College in Jabiru, outside of the control of the Kakadu National Park service, to study for the formal Certificate in Lands, Parks and Wildlife Management. The purpose of the course was to offer formal qualifications that could be used in

\(^{301}\) Ibid, 36.
\(^{302}\) Ibid, 37.
\(^{304}\) Ibid, 272-273.
\(^{305}\) Ibid, 274.
other places than Kakadu National Park, and the course runs for two weeks a month and attendance is either full time for a year or part time for two years. The course has been given within a formal Western educational framework, and requires good literacy and numeracy skills and the ability to perform publicly in front of a critical audience of fellow students. The outline of the course has resulted in high failure and drop-out rates among Aboriginal students, since they do not have the skills required to complete the course. Furthermore, the Aboriginal graduates from the course have to compete on the open employment market with non-Aboriginal applicants who may have superior work experience and better qualifications from other institutions.306

David Lawrence describes how Aboriginal rangers were critical of the mentioned training course, since they felt that it encouraged Aboriginal people to reject their own cultural value system to instead adopt a Western, scientifically based land management model. In that regard, David Lawrence argued that Aboriginal people have not been employed in positions where they can actively participate in the planning, implementation and operation of training program. Furthermore, David Lawrence also argued that little attempt has been made to integrate traditional ecological knowledge and training by traditional elders and knowledgeable people into the formal ranger-training program.307

This opinion has been confirmed more recently in the Technical Audit Summary Report of the fifth management plan of Kakadu National Park. It is noted in the report that opportunities for traditional owners other than young people to participate directly or indirectly in park management activities have lacked strategic or structured long term goals. It is also emphasised in the report that most training for traditional owners within Kakadu National Park does not target higher positions in the park service hierarchy. It is also mentioned in the report that business opportunities for traditional owners are limited to short-term and seasonal contracts with no guarantee of continuation.308

Therefore, it could be argued that the employment and training programs for Aboriginal rangers in Kakadu National Park are not appropriate incentive measures under Article 11 of the CBD undertaken by Australia to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD.309 Furthermore, the fact that Aboriginal people have not been employed in positions where they can actively participate in the planning, implementation and operation of training program, could also be seen as Australia not effectively ensuring that Aboriginal rangers can exercise their traditional practices and their right to participate in the management of biodiversity as essential elements in the culture under Article 27 of the ICCPR.310 Therefore, it could also be argued that Australia does not effectively ensure and protect the Aboriginal rangers’ right to participate in the management of biodiversity conservation in Kakadu National Park under Articles 29(1) and 32(1) of the UNDRIP.

5.3 Biodiversity conservation and traditional knowledge

The importance of preserving and using traditional knowledge in biodiversity conservation in

307 Ibid, 276.
309 Cf Convention on Biological Diversity, Traditional Knowledge and Biological Diversity, Note by the Executive Secretary, UN Doc UNEP/CBD/TKD/1/2 (1997), para 68.
Kakadu National Park has been acknowledged in the Draft Management Plan. For instance, it is held with regard to the decision-making process that traditional knowledge and interests of the traditional owners “are incorporated in the planning and implementation of all park programmes.”\textsuperscript{311} As a result, one of the policies for the decision-making process in the Draft Management Plan is that the values, traditional practices and knowledge of traditional owners “will continue to be recognised and incorporated in park planning, implementation and review of all management programmes, and as important components of staff development.”\textsuperscript{312}

The link between cultural diversity and biodiversity conservation is also confirmed in the Draft Management Plan. It is emphasised that the cultural heritage of traditional owners include intangible aspects such as traditional knowledge about country and seasons, and that traditional knowledge of the environment of Kakadu National Park is a crucial component of the life of traditional owners today and cultural heritage of Kakadu National Park. It is held in the Draft Management Plan that the traditional knowledge of traditional owners is used to help keep land, plants, and animals healthy and strong as well as to undertake the right activities at the right time of year. Thus, the traditional knowledge of traditional owners is invaluable, and a great asset for the management of Kakadu National Park.\textsuperscript{313}

One of the most important manifestations of the traditional knowledge of traditional owners are their fire management practices. The Draft Management Plan acknowledges that traditional owners have used fire for thousands of years as a tool for managing and expressing ownership of country, and continue to use fire for that use. More specifically, traditional fire management have created a mosaic of unburnt, early-burnt and late-burnt patches and supported traditional owners’ use of resources and helped to create the landscapes and diversity of native species found in Kakadu National Park today.\textsuperscript{314} However, it is held in the Draft Management Plan that there is now compelling evidence that current fire regimes are a major contributing factor to the decline of many plant and animal species in Kakadu National Park. It is held that many threatened species rely on relatively long-unburnt areas for their survival, and such areas therefore contributes to habitats with higher biodiversity. Therefore, it is concluded in the Draft Management Plan that further changes in the fire management practices are needed, in order to maintain the landscapes, native species and cultural values of Kakadu National Park.\textsuperscript{315}

Another threat to fire management practices identified in the Draft Management Plan is the loss of cultural knowledge related to floodplain burning practices, which poses a threat to the long-term cultural management and use of floodplains. In that regard, it is acknowledged in the Draft Management Plan that it is important to traditional owners that they are involved in the development, implementation and review of fire management programmes to ensure that their views regarding how country should be burnt are incorporated and that they support the programmes.\textsuperscript{316}

Therefore, it is stipulated in one of the policies regarding fire management practices that traditional burning practices of traditional owners “will continue to be recognised and incorporated in fire management programmes.”\textsuperscript{317} Furthermore, one of the actions with regarding to fire management

\textsuperscript{311} Director of National Parks, Kakadu Board of Management, \textit{Kakadu National Park: Draft Management Plan 2014} (Canberra: Director of National Parks, 2014), 36.

\textsuperscript{312} Ibid.

\textsuperscript{313} Ibid, 47-48.

\textsuperscript{314} Ibid, 48, 68, 88.

\textsuperscript{315} Ibid, 63, 88-89.

\textsuperscript{316} Director of National Parks, Kakadu Board of Management, \textit{Kakadu National Park: Draft Management Plan 2014} (Canberra: Director of National Parks, 2014) 90.

\textsuperscript{317} Ibid.
practices is to provide training programmes for traditional owners involved in fire management.318
The fire management practices of traditional owners have also been linked to their cultural rights, since one of the actions for the cultural knowledge of traditional owners and practices is to support the maintenance of the culture of traditional owners through continued incorporation of the cultural knowledge of traditional owners and skills in park natural and cultural heritage management programmes, particularly fire management programmes.”319

However, the Technical Audit Summary Report of the fifth management plan of Kakadu National Park has held that the incorporation of traditional burning practices in fire management programmes only had been partially implemented, and that it was important to assess why that is the case. It was also held in general in the report that traditional owners were not adequately engaged in the fire management of Kakadu National Park, and that specific policies and actions had to be developed in the Draft Management Plan to address tangible engagement and involvement by traditional owners.320

If the fire management practices in Kakadu National Park are reformed without appropriate participation under Article 18 of the UNDRIP and consultation under Articles 19 and 32(2) of the UNDRIP from the traditional owners, and traditional burning practices are not fully incorporated in the fire management practices in Kakadu National Park, there is a risk that the fire management practices are based rather on modern science than traditional knowledge. This could mean that traditional knowledge in practice is not given a status in the fire management practices in Kakadu National Park comparable to modern science.321 If that remains the case, it is doubtful whether Australia fulfils its obligation to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD. The insufficient incorporation of traditional knowledge in fire management practices and changing those practices without the participation and consultation of the traditional owners could also be seen as that Australia does not effectively ensure that the traditional owners can exercise their traditional practices and their right to participate in the management of biodiversity as essential elements in the culture under Article 27 of the ICCPR.322 Therefore, it could also be argued that Australia does not effectively ensure and protect the traditional owners’ right to participate in the management of biodiversity conservation in Kakadu National Park under Articles 29(1) and 32(1) of the UNDRIP.

5.4 Customary use of biological resources

The right of traditional owners to customary use of biological resources in accordance with traditional cultural practices is recognised in the Draft Management Plan. For instance, it is emphasised that traditional owners culture continues today with traditional owners “living, working,
hunting, fishing and collecting and using food and other cultural resources in the park”.

Furthermore, it is acknowledged that these practices involves using a combination of traditional and contemporary methods and knowledge, and that those practices enables traditional owners to live on their land and to maintain those customary traditions. In that regard, one of the actions for the cultural knowledge and practices of traditional owners is to facilitate management of their traditional use of plants and animals through, inter alia, “implementation of policies that help ensure only relevant Aboriginal people are hunting in the park; development and implementation of a strategy to promote sustainable customary harvest practices,” and “incorporation of knowledge gained from customary use into species and landscape monitoring programmes to determine the conservation status of resources used.”

The traditional owners’ customary use of biological resources is especially mentioned in the Draft Management Plan with respect to feral animals and species. The Draft Management Plan defines ”feral animals/species” as ”a domestic animal that has escaped into the wild and now lives there” and that ”in this plan it also includes wild populations of non-native animals.”

It is claimed in the Draft Management Plan that feral animals can have a significant impact on the natural and cultural values of Kakadu National Park. This is shown in the way that they impact on native plants and animals and available food resources, and cause erosion, saltwater intrusion and the spread of weeds and disease.

However, also the positive impact feral animals and species may have on traditional owners’ customary use of biological resources is recognised in the Draft Management Plan. For instance, it is mentioned in the Draft Management Plan that some traditional owners value some introduced species as a source of food or due to their association with the history of the area. Thus, one of the policies for feral management stipulates that authorisation may be given for some feral animals to be retained in the park for cultural reasons, “where this does not significantly affect the natural values of the park or significantly impede the effectiveness of park-wide invasive species management.”

The right of traditional owners to customary use of biological resources for their subsistence has also been recognised in relevant legislation. Sections 354 and 354A of the EPBCA prohibits certain actions being taken in Kakadu National Park except in accordance with its management plan. These actions include, inter alia, killing, injuring, taking, trading, keeping or moving members of native species. However, according to section 359A(1) of the EPBCA, these prohibitions do not prevent traditional owners from continuing, in accordance with the law, the traditional use of an area for non-commercial hunting or food-gathering. More generally, section 8 of the EPBCA also provides that the Act does not affect the operation of, inter alia, the ALRA. Section 71 of the ALRA include provisions that preserve customary rights to use of land and waters, such as non-commercial hunting, fishing and gathering, by Aboriginal people.

However, according to section 359A(2) of the EPBCA, regulations made under the Act do affect an traditional owners’ use of an area in Kakadu National Park if they are made for the purpose of

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324 Ibid, 47, 165, 168.
325 Ibid, 50.
326 Ibid, 200.
327 Ibid, 81, 84.
328 Ibid, 83.
329 Ibid, 86.
331 Ibid 152, 168, 209.
conserving biodiversity in the area and expressly affect the traditional use of the area by the traditional owner. Such regulations could be considered as acceptable limitations of the traditional owners’ land rights under Article 26 of the UNDRIP and their right to culture under Article 27 of the ICCPR, if they participate and are consulted in the process leading to the adoption of the regulations and the regulations will not threaten the sustainability of their traditional economy.  

However, if that is not the case, Australia would not be considered as effectively recognising and protecting the traditional owners’ right to their traditional lands under Article 26 of the UNDRIP or ensure their right to customary use of biological resources as essential elements in the culture under Article 27 of the ICCPR. Under the same circumstances, it is also doubtful whether Australia fulfils its obligation to respect, preserve and maintain traditional practices under Article 8(j) of the CBD and to protect and encourage customary use of biological resources under Article 10(c) of the CBD, if such practices are compatible with conservation or sustainable use requirements. Thus, it is also doubtful whether Australia could be considered as ensuring and protecting the traditional owners’ right to participate in the management of biodiversity conservation through their traditional practices and customary use of biological resources under Articles 29(1) and 32(1) of the UNDRIP.

5.5 Conclusion – Australia and Kakadu National Park

The joint management model of Kakadu National Park may be close to George Catlin’s original vision of a national park. The fact that Australia’s obligations under international agreements that relevant to Kakadu National Park, including the UNDRIP and the CBD, are taken into account in the Draft Management Plan also confirms a clear commitment from the Board of Management and Director of National Parks to fulfil Australia’s obligations to conserve biodiversity and ensure and protect the traditional owners’ right to participate in the management of biodiversity conservation in Kakadu National Park.

The majority of Aboriginal Board members also demonstrates a commitment to ensure effective participation by the traditional owners in the management of biodiversity conservation in Kakadu National Park and ensure that the Aboriginal Board members actively can affect the policies in the management of biodiversity conservation in the park according to the requirements in Article 18 of the UNDRIP. Furthermore, the high number of indigenous people employed in the Kakadu National Park also shows a commitment to engage as many indigenous people as possible in the

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management of biodiversity conservation in the park.\textsuperscript{337}

Furthermore, traditional owners and their fire management practices have been included in the fire management in Kakadu National Park, and the provision of training programmes for traditional owners in that regard has been ensured through the Draft Management Plan.\textsuperscript{338} This corresponds with Australia’s obligation to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD.\textsuperscript{339} The traditional owners’ right to customary use of biological resources is also ensured through sections 8 and 359(1) and section 71 of the ALRA,\textsuperscript{340} which corresponds with Australia’s obligations under Article 10(c) of the CBD.\textsuperscript{341} The possibility under the Draft Management Plan to give authorisation for some feral animals to be retained in Kakadu National Park for cultural reasons where it is not detrimental to the management of biodiversity conservation in the park,\textsuperscript{342} may also be seen as an appropriate solution to a possible conflict between the state obligations in regard to biodiversity conservation under Articles 3 and 8(a) and (b) of the CBD and the state obligation to protect and encourage customary use of biological resources.\textsuperscript{343}

However, the application of the conflict resolution scheme provided under Section 364 of the EPBCA may lead to a violation of Australia’s obligation to consult the traditional owners in matters regarding the management of biodiversity conservation in Kakadu National Park under Articles 19 and 32(2) of the UNDRIP and customary international law.\textsuperscript{344} Moreover, there are also documented indications that the procedures of the Board meetings may not be considered appropriate for the Aboriginal Board members within the meaning of Articles 19 and 32(2) of the UNDRIP.\textsuperscript{345} There

\textsuperscript{337} Director of National Parks, Kakadu Board of Management, Kakadu National Park: Draft Management Plan 2014 (Canberra: Director of National Parks, 2014), 35-37.

\textsuperscript{338} Ibid, 90.


\textsuperscript{340} Director of National Parks, Kakadu Board of Management, Kakadu National Park: Draft Management Plan 2014 (Canberra: Director of National Parks, 2014) 152, 168, 209.


\textsuperscript{342} Director of National Parks, Kakadu Board of Management, Kakadu National Park: Draft Management Plan 2014 (Canberra: Director of National Parks, 2014) 86.


have also been indications that the employment and training programmes for Aboriginal rangers in Kakadu National Park are not appropriate incentive measures under Article 11 of the CBD undertaken by Australia to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD.346

Furthermore, the insufficient incorporation of Aboriginal fire management practices in the fire management regime of Kakadu National Park may also be seen as a violation of Australia’s obligation to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD. Moreover, regulations issued under Section 359(2) of the EPBCA could violate the traditional owners’ right to their traditional lands under Article 26 of the UNDRIP or the state obligation to ensure their rights to customary use of biological resources as essential elements in the culture under Article 27 of the ICCPR.347

Thus, this case study of the joint management model of Kakadu National Park illustrates that much still has to be done to ensure and protect the right of the traditional owners in the park to effectively participate in the management of biodiversity conservation. The case study also illustrates that legislation that conforms to state obligations under international human rights law and international biodiversity law also has to be fully applied in practice to conform with the state obligations. Moreover, the study also shows the importance of regular evaluations of the joint management scheme of Kakadu National Park by independent bodies, such as the Technical Audit Summary Report, to assure that the management of the park conforms to Australia’s obligations under international human rights law and the CBD.

This case study also illustrates the difficulties associated with the state obligation to ensure an appropriate level of participation from indigenous peoples in the management of biodiversity conservation, whilst retaining the overarching responsibility for the management of protected areas. Therefore, other protected areas than national parks, which have been left out of the scope of this thesis, and other management models than joint management may be more suited to achieve a higher level of participation from indigenous peoples in the management of biodiversity conservation on their territories. Thus, such management may better conform to the state obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories under international human rights law and the CBD. In that regard, the COP may in its decisions clarify in what manners states shall ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in

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protected areas on their territories, and identify the IUCN protected area and management categories which are appropriate for ensuring such participation.

6. Conclusions

What are the relevant legal instruments regarding indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international human rights law, and what state obligations can be identified through those instruments?

It is clear that ILO Convention No. 169 and the UNDRIP are the two international legal instruments that have been most influential in developing indigenous peoples’ rights in international human rights law. Despite the fact that the UNDRIP is a non-binding instrument and ILO Convention No. 169 only has been ratified by 22 countries, the importance of the two instruments for developing customary international law on indigenous peoples’ human rights have been widely acknowledged.\(^\text{349}\) The HRC has also had importance in interpreting indigenous peoples’ right to culture under Article 27 of the ICCPR.\(^\text{350}\) Furthermore, the IACtHR has to a great extent referred to ILO Convention No. 169 and the UNDRIP in its cases on indigenous peoples’ rights, especially their right to property under Article 21 of the ACHR, and has thus also helped evolving the human rights of indigenous peoples worldwide. As a result of the evolvement of the human rights of indigenous peoples in the last decades, a number of indigenous peoples’ rights, such as their land rights, right to participation and right to be consulted in matters which may affect them directly, are now considered to have become norms under customary international law.\(^\text{351}\)

Indigenous peoples’ right to self-determination under Article 1 of the ICCPR and Article 3 of the UNDRIP is the framework right from which their right to participate in the management of biodiversity conservation on their territories originally can be derived. The right to participate in decision-making in matters which would affect their rights under Article 18 of the UNDRIP and Article 7(1) of ILO Convention No. 169 gives indigenous peoples a right to participate in the management of biodiversity conservation on their territories, and it follows from Article 6(b) of ILO Convention No. 169 that states have the obligation to establish procedures by which indigenous peoples can freely participate in such management. It also follows from the right to participation that indigenous peoples have a right to be consulted regarding state conservation measures under Articles 19 and 32(2) of the UNDRIP and Article 6(1)(a) of ILO Convention No. 169, and that


states have a corresponding obligation to consult with the indigenous peoples concerned through appropriate procedures and representative indigenous institutions in good faith according to Article 6(1)(a) and 6(2) of ILO Convention No. 169 and Article 19 of the UNDRIP.\footnote{International Labour Office, \textit{ILO Convention on indigenous and tribal peoples, 1989 (No. 169): A Manual} (Geneva: International Labour Organization, 2003) 15.}

Indigenous peoples’ right to their traditional lands under Article 26(1) and (2) of the UNDRIP and Article 14(1) of ILO Convention No. 169 imposes an obligation on states to recognise indigenous peoples’ land rights and to demarcate indigenous lands. This conclusion can be drawn from Article 26(3) of the UNDRIP, 14(2) of ILO Convention No. 169 and the IACtHR case law on indigenous peoples’ land rights.\footnote{\textit{Cf Awas Tingni v. Nicaragua}, para 163-164; \textit{Yakye Axa v. Paraguay}, para 215; \textit{Saramaka People v. Suriname}, para 192, 194(a); \textit{Xákmok Kásek v. Paraguay}, para 109; MacKay, Fergus, \textit{A Guide to Indigenous Peoples’ Rights in the International Labour Organization} (Moreton-in-Marsh: Forest Peoples Programme, 2003) 32, 34; International Labour Office, \textit{Indigenous and tribal peoples’ rights in practice: a guide to ILO Convention No. 169} (Geneva: International Labour Organization, 2009) 95.} This is also necessary for states to identify the territories where indigenous peoples are entitled to participate in the management of biodiversity conservation. Considering indigenous peoples’ right to maintain and strengthen their spiritual relationship with their territories under Article 25 of the UNDRIP and Article 13(1) of ILO Convention No. 169 and as confirmed in the IACtHR case law on indigenous peoples’ land rights,\footnote{\textit{Yakye Axa v. Paraguay}, para 131; \textit{Sawhoyamaxa v. Paraguay}, para 118.} indigenous peoples right to participate in the management of biodiversity conservation shall encompass the whole territories they are occupying and territories they have recently lost. It also follows from Article 27 of the ICCPR that states have the obligation to adopt positive legal measures of protection and measures to ensure the effective participation of indigenous peoples in the management of biodiversity conservation. Furthermore, it also follows from Article 27 that states are obliged to protect indigenous peoples from activities from the state itself or private entities that may threaten the exercise of their management of biodiversity conservation as an essential element of their culture.\footnote{Gilbert, Jérémie, \textit{Indigenous peoples’ land rights under international law: from victims to actors} (Ardsley: Transnational Publishers, 2006) 176; International Labour Office, \textit{Indigenous and tribal peoples’ rights in practice: a guide to ILO Convention No. 169} (Geneva: International Labour Organization, 2009) 35.}

The right for indigenous peoples to participate in conservation measures within the meaning of Articles 29(1) and 32(1) of the UNDRIP and Articles 7(4) and 15(1) of ILO Convention No. 169 may not yet be considered a norm under customary international law. However, such a right can clearly be derived as a norm under customary international law from the right to participation and consultation, land rights and the minority rights in Article 27 of the ICCPR. The right for indigenous peoples’ to participate in the management of biodiversity conservation on their territories imposes an obligation on states to recognise such a right through national legislation and that such legislation has to be applied in practice. Such legislation also has to guarantee the access of the indigenous peoples concerned to natural resources necessary for their subsistence within the protected areas.

Nevertheless, indigenous peoples do not have a veto power over state conservation measures if they have been appropriately consulted by the state according to the requirements in Articles 19 and
32(2) of the UNDRIP and Article 6 of ILO Convention No. 169. Furthermore, states do not have the obligation to obtain the free, prior and informed consent of the indigenous peoples concerned for state conservation measures if such measures do not endanger their basic physical or cultural wellbeing, which probably is reduced to only a few categories of cases. Moreover, state measures for the purpose of biodiversity conservation may also be considered acceptable limitations of indigenous peoples’ land rights under Article 26 of the UNDRIP and Article 14 of ILO Convention No. 169 and their right to culture under Article 27 of the ICCPR. Thus, state conservation measures may in practice considerably restrict indigenous peoples’ right to participate in the management of biodiversity conservation on their territories.

The UN treaty bodies, the ILO committees and the IACtHR have in their jurisprudence to date only to a limited extent focused on cases where states allow their indigenous peoples to participate in the management of biodiversity conservation on their territories but the level of participation is not appropriate. Therefore, further jurisprudence on the topic is required to identify in what manners indigenous peoples shall participate in the management of biodiversity conservation on their territories, and what obligations states have to ensure and protect the exercise of such a right.

To which extent does indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under international biodiversity law correspond with the same right under international human rights law?

In the strict sense, indigenous peoples’ right to participate in the management of biodiversity conservation on their territories under the CBD does not mirror the same right under international human rights law. This is due to the fact that CBD does not contain human rights but state obligations with respect to the conservation of biodiversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. However, the Executive Secretary of the COP has interpreted the state obligations to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD and to protect and encourage customary use of biological resources under Article 10(c) of the CBD also imposes an obligation on states to include indigenous peoples in the management of biodiversity conservation on their territories. Furthermore, the IUCN Principles and guidelines on protected areas and indigenous/traditional peoples refers to “rights” of indigenous peoples with respect to management of protected areas on their territories, and both the IUCN and the COP have committed themselves to apply the UNDRIP to their programmes. Thus, this shows a position from the IUCN and the COP that states should adopt a human-rights-based approach to conservation measures.

The IUCN Principles and CBD clarify in what manners indigenous peoples shall participate in the
management of biodiversity conservation on their territories to a greater extent compared to the UN treaty bodies, the ILO committees and the IACtHR. The fact that indigenous peoples should be recognised as rightful and equal partners with respect to such management under the IUCN Principles and the Executive Secretary has concluded that Article 8(j) of the CBD imposes an obligation on states to give traditional knowledge the same status as modern science, suggests that international biodiversity law recognises a higher level of participation from indigenous peoples in the management of biodiversity conservation than international human rights law.

However, the IUCN Principles and Articles 3 and 8(a) and (b) of the CBD confirms that the participation of indigenous peoples in the management of biodiversity conservation on their territories has to be ensured through national legislation and within national protected area objectives, which in practice may restrict indigenous participation in the management of biodiversity conservation considerably. Furthermore, the COP has in its decisions not referred to “indigenous peoples” but “indigenous and local communities” regard their participation in the management of biodiversity conservation, without defining the term. Thus, it remains unclear which communities are governed by Articles 8(j) and 10(c) of the CBD and to which extent the COP fulfils its commitment to apply the UNDRIP to all its programmes.

As it has been described in this thesis, international legal instruments that contextualise human rights to the situation of indigenous peoples, such as ILO Convention No. 169 and the UNDRIP, have been adopted only in the last decades. Meanwhile, the primary purpose of the establishment of protected areas worldwide has not been to address the interests of indigenous peoples but to protect the areas from human exploitation. These two circumstances have justified the exclusion of indigenous peoples from the management of biodiversity conservation in protected areas and overlooking traditional indigenous knowledge.

Nevertheless, the adoption of the CBD and the IUCN jurisprudence illustrates how a paradigm shift has occurred in international biodiversity law with respect to indigenous participation in the management of biodiversity conservation and the inclusion of their traditional knowledge in conservation measures. However, there is a need to further clarify, both within international human rights law and international biodiversity law, in what manners indigenous peoples shall participate in the management of biodiversity conservation in protected areas and to harmonise the meaning of such a right between the two regimes, to ensure that there is no conflict between the state interest to conserve biodiversity and indigenous peoples’ right to participate in the management of biodiversity. Thus, the adoption of a clear definition of “indigenous and local communities” by the COP and references to international biodiversity law instruments may initiate such a process, and as consequent slow down the rapid loss of biodiversity and traditional indigenous knowledge.

To which extent has Australia fulfilled its obligation to ensure and protect the traditional owners’ right to participate in the management of biodiversity conservation on their territories with respect to Kakadu National Park?

The management scheme of Kakadu National Park has had great importance, both within Australia and worldwide, in establishing joint management as an example of best practices with respect to involving indigenous peoples in the management of biodiversity conservation in protected areas. The vision for Kakadu National Park in the Draft Management Plan recognises the link between biological diversity and cultural diversity. Furthermore, the right of the traditional owners in

360 Director of National Parks, Kakadu Board of Management, Kakadu National Park: Draft Management Plan 2014 (Canberra: Director of National Parks, 2014) iii.
Kakadu National Park to participate in the management of biodiversity in the park is recognised in Australian federal legislation and the Draft Management Plan through, inter alia, a majority of Aboriginal Board members, employment of indigenous people in the park and including traditional knowledge in fire management. Furthermore, approximately 50 per cent of Kakadu National Park is Aboriginal land under the ALRA, and the traditional owners’ access to natural resources in their park for their subsistence is ensured and protected through Australian federal legislation and the Draft Management Plan.

However, the application of the conflict resolution scheme provided under Section 364 of the EPBCA may lead to a violation of Australia’s obligation to consult the traditional owners in matters regarding the management of biodiversity conservation in Kakadu National Park under Article 19 of the UNDRIP and customary international law. Moreover, there are documented indications that the procedures of the Board meetings through which the Aboriginal Board members participate in and are consulted regarding the management of biodiversity conservation in Kakadu National Park may not be considered appropriate within the meaning of Articles 19 and 32(2) of the UNDRIP. These have also been indications that the employment and training programmes for Aboriginal rangers for Aboriginal rangers in Kakadu National Park are not appropriate incentive measures under Article 11 of the CBD undertaken by Australia to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD.

Furthermore, the insufficient incorporation of traditional Aboriginal practices in the fire management regime of Kakadu National Park may also be seen as a violation of Australia's obligation to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD. Finally, regulations issued under Section 359(2) of the EPBCA could violate the traditional owners’ right to their traditional lands under Article 26 of the UNDRIP and in the Draft Management Plan.

Moreover, there are documented indications that the procedures of the Board meetings through which the Aboriginal Board members participate in and are consulted regarding the management of biodiversity conservation in Kakadu National Park may not be considered appropriate within the meaning of Articles 19 and 32(2) of the UNDRIP. These have also been indications that the employment and training programmes for Aboriginal rangers for Aboriginal rangers in Kakadu National Park are not appropriate incentive measures under Article 11 of the CBD undertaken by Australia to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD.

Furthermore, the insufficient incorporation of traditional Aboriginal practices in the fire management regime of Kakadu National Park may also be seen as a violation of Australia’s obligation to respect, preserve and maintain traditional knowledge under Article 8(j) of the CBD. Finally, regulations issued under Section 359(2) of the EPBCA could violate the traditional owners’ right to their traditional lands under Article 26 of the UNDRIP and ensure their rights to practise their customary use of biological resources as essential elements in the culture under Article 27 of the ICCPR.


363 Convention on Biological Diversity, Traditional Knowledge and Biological Diversity, Note by the Executive Secretary, UN Doc UNEP/CBD/TKBD/1/2 (1997), para 11; Convention on Biological Diversity, Knowledge, Innovations and Practices of Indigenous and Local Communities: Implementation of Article 8(j), UN Doc UNEP/CBD/COP/3/19 (1996), para 68.


The case study of the joint management model of Kakadu National Park highlights that Australia has to undertake further measures to ensure and protect the right of the traditional owners in the park to effectively participate in the management of biodiversity conservation. The case study also illustrates the difficulties associated with the state obligation to ensure an appropriate level of participation from indigenous peoples in the management of biodiversity conservation, whilst retaining the overarching responsibility for the management of protected areas.

In protected areas, the Living Planet Index used in WWF Living Planet Report showed a decline of 18 per cent compared to 52 per cent for the whole Index. This may encourage states to establish more protected areas, which also has been confirmed by the COP which at its tenth meeting adopted the target that at least 17 per cent of the world’s terrestrial areas should be covered by protected areas. Thus, when traditional indigenous knowledge is getting lost in an accelerating pace and at the same needed more than ever for biodiversity conservation, the example of Kakadu National Park illustrates the importance of involving indigenous peoples in conservation measures in an appropriate manner.

The inherent logic of state conservation measures appear to be that states should decide its conservation policies and involve indigenous peoples only as far as it does not conflict with the policies. Therefore, the example of Kakadu National illustrates that jointly managed national parks may not be the most appropriate way of involving indigenous peoples in biodiversity conservation. This may be the situation even in cases which are perceived as successful examples of indigenous involvement of biodiversity conservation.

In-situ conservation outside of protected areas may be a more appropriate way of involving indigenous peoples in biodiversity conservation. Indigenous peoples may in those cases have a greater influence on the management of biodiversity and still get appropriate support through incentive measures from state agencies. States may become more inclined to let indigenous peoples retain the control over the management of biodiversity conservation on their territories if they know that certain threatened species are conserved on their territories. In those cases, states can focus on conserving other threatened species in protected areas that do not overlap with indigenous territories.

Therefore, other models of in-situ conservation than national parks, which have been left out of the scope of this thesis, and other management models than joint management may be more suited to achieve a higher level of participation from indigenous peoples in the management of biodiversity conservation on their territories. Thus, such management may better conform to the state obligation to ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories under international human rights law and the CBD. In that regard, the COP may in its decisions clarify in what manners states shall ensure and protect indigenous peoples’ right to participate in the management of biodiversity conservation in protected areas on their territories, and which of the IUCN protected area and management categories are appropriate for ensuring such participation.

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