

Applying A UNDRIP Lens To The CBD: A More Comprehensive Understanding Of Benefit-Sharing

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ABSTRACT

The special relationship of indigenous peoples with the territories in which they live and the natural resources located therein has been recognized in Principle 22 of the 1992 Rio Declaration on Environment and Development. Given the close link between the preservation of indigenous peoples' ways of life, traditions, and knowledge, on the one hand, and the protection of biological diversity, on the other, this paper argues that the UN Declaration on the Rights of Indigenous can be used as a powerful instrument to suggest an evolutionary interpretation of some of the provisions of the Convention on Biological Diversity (CBD). In particular, indigenous peoples' rights to land, natural resources, traditional knowledge, as well as their right to a healthy and protected environment are analysed in order to provide a more comprehensive interpretation of CBD article 8(j). A careful reading of the above-mentioned rights makes it possible to reinforce the interpretation that while implementing the provisions on access to genetic resources and State-to-community benefit sharing, CBD parties shall take into account the rights of indigenous peoples as affirmed by the UNDRIP. Furthermore, the UNDRIP offers specific indications on the procedural measures needed to implement those rights (free prior informed consent and participation rights). In this respect, it is argued that these procedural mechanisms offer a partial response to the challenges posed by the concrete implementation of the UNDRIP.

1. INTRODUCTION

On 13th September 2007 the UN General Assembly passed Resolution 61/295 adopting the text of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).² The lengthy process that led to the adoption of this declaration demonstrates that respect for the human rights of indigenous peoples is still a very sensitive topic for States (Deer, 2010, Daes, 2011).

The United Nations started to deal with the issue of indigenous peoples' and local communities' rights in the early 1970s,³ when the Preliminary Report on the Study of the Problem against Indigenous

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2 UN Declaration on the Rights of Indigenous Peoples, New York, 13 September 2007, UN doc. A/RES/61/295.

3 In 1957 the International Labour Organisation (ILO) has already adopted the first international instrument on indigenous peoples, the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107, signed in Geneva on 26 June 1957, 328 UNTS 247). In this case, however, the issue of indigenous peoples was tackled from the sectoral perspective of a UN agency dealing mainly with labour rights. Therefore, the social perspective of integration was privileged. Furthermore, ILO Convention 107 has been replaced later on by Convention No. 169, of which this contribution provides a partial account.

Populations, submitted by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, defined indigenous peoples as composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant.⁴

It should be noted here that one of the United Nations' first attempts to define indigenous peoples points to native lands and natural resources as very significant factors (Fodella, 2005-2006: 565-594).⁵ The centrality of the rights to land and natural resources goes well beyond the issue of the identification of indigenous peoples. In this contribution, I argue that these rights may have important implications for the protection of biological diversity since they are vital for the interpretation of some of the provisions of the Convention on Biological Diversity (CBD).⁶

The official endorsement of the UNDRIP is a success story for at least two reasons. First, it represents one of the most comprehensive legal documents on the collective and individual rights of indigenous peoples. Second, it can be used as a powerful instrument to clarify the scope of those provisions of the CBD concerning the sharing of the benefits that derive from the exploitation of the traditional knowledge of indigenous peoples. Furthermore, although the Declaration is not legally-binding (Boyle and Chinkin, 2007, Frowein, 1989, Shelton, 2003), I contend that the UNDRIP can have an instrumental role both in protecting the rights of indigenous peoples and attaining the international objectives on biodiversity protection and benefit-sharing.

The role of indigenous peoples in the preservation of biological diversity is of fundamental importance. Many indigenous peoples are highly dependent on the environment in which they live for their very survival. Moreover, their traditional knowledge embodies a wealth of customs and practices, whose loss would be detrimental to the full use of certain plant and mineral varieties. Accordingly, Principle 22 of the Rio Declaration on Environment and Development recognises that indigenous peoples "have

4 UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Preliminary Report on the Study of the Problem of Discrimination against Indigenous Population in UN doc. E/CN.4/Sub.2/L.566 of 29 June 1972, at para. 34.

5 The UN has adopted a self-identification approach on the definition of indigenous peoples, whereby individuals are members of any indigenous communities when they both identify themselves with such communities and are accepted by them. Moreover, what is shared by indigenous peoples is that a solely legal approach to the definition issue may not be exhaustive. An interdisciplinary approach, ranging from anthropology to history, geography, law etc., would frame the debate better. Furthermore, the substantial complexity of a comprehensive definition including all indigenous peoples as such is further corroborated by the magnitude of the numbers involved. According to some recent UN estimates, nowadays there are more than 370 million people spread across about 70 countries all over the world. These peoples live in regions very different context, and usually physically apart, from one another. That is why even indigenous peoples have recognized that a common definition putting together Maya communities and Sami people would be pointless.

6 Convention on Biological Diversity, signed in Rio de Janeiro on 5 June 1992, 1760 UNTS 79.

a vital role in environmental management and development because of their knowledge and traditional practices” (Maggio, 1997-1998, Heinämäki, 2009).⁷

This special environmental role also stems from the unique relationship that indigenous peoples hold with their territories. As stated in a judgement of the Inter-American Court of Human Rights (hereinafter IACtHR) on the *Awas Tingni v. Nicaragua* case, [f]or 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 generations⁸ Furthermore, according to a recent FAO report, indigenous lands nowadays host approximately 80 per cent of the world’s remaining biodiversity (FAO, 2009). Therefore, the preservation of biodiversity at the global level should start where indigenous peoples live in harmony with nature.

Given the close link between the preservation of indigenous ways of life, traditions, and knowledge and the protection of biological diversity, I therefore maintain that not only does the UNDRIP represent an outstanding step forward towards the recognition of the rights of indigenous peoples, but it can also be used as a powerful instrument to offer an evolutionary interpretation of some of the provisions of the CBD.⁹

In order to illustrate my arguments, this contribution is divided into four main sections. In the first section, I analyse those UNDRIP provisions concerning the rights of indigenous peoples to land and natural resources, traditional knowledge, and environmental protection. While comparing these provisions with the protection granted under the Indigenous and Tribal Peoples Convention of 1989 (Kingsbury, N.d.),¹⁰ this analysis serves a two-fold purpose, namely to provide some basic legal definitions and to clarify the content of the relevant rights. In the same vein, in the second section, I introduce the rationale behind the concept of benefit-sharing in the academic debate. Subsequently, I examine the content of article 8(j) of the CBD, by highlighting its interpretative gaps. Building on the previous analysis, in the third section, I illustrate the argument for applying a UNDRIP lens to the issue of benefit-sharing in the CBD. My main point is that article 31(3)c of the Vienna Convention on the Law of the Treaties¹¹ provides a basis for arguing that the rights to land, natural resources, and

7 Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN doc. A/CONF.151/26 (Vol. I).

8 IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, at para. 149. This concept has been formulated in similar terms in the final report on human rights and the environment, prepared by Mrs. Fatma Ksentini, Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities within the Commission on Human Rights. Para. 74 reads as follows: “‘This we know, the Earth does not belong to man; man belongs to the Earth. This we know, all things are connected, like the blood which unites one family. Whatever befalls the Earth, befalls the sons of the Earth. Man did not weave the thread of life; he is merely a strand in it. Whatever he does to the web he does to himself.’ This letter from Chief Seattle, Patriarch of the Duwamish and Squamish Indians of Puget Sound to United States President Franklin Pierce (1855) underlines the specific relationship of indigenous peoples to the land.”

9 UNDRIP preambular paragraph 10 states: “Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.”

10 Indigenous and Tribal Peoples Convention (hereinafter referred to as ILO Convention 169), signed in Geneva on 27 June 1989, 72 ILO Official Bull. 59. Together with the UNDRIP, this is the only global instrument dealing with the rights of indigenous peoples. Although the Convention has a more modest coverage in terms of signatories (only 22) and the UNDRIP and ILO Convention 169 are different in nature (the first is a Declaration, the second is a binding Treaty), it is worth comparing them since they are two fundamental steps in what Kingsbury defines as the process of “juridification” of the rights of indigenous peoples.

11 Vienna Convention on the Law of the Treaties, signed in Vienna on 23 May 1969, 1115 UNTS 331.

traditional knowledge under the UNDRIP should serve as interpretative tools in order to operationalize article 8(j) of the CBD when it comes to State-to-community benefit-sharing (Morgera and Tsioumani, 2010). This is in line with the so-called rights-based approach, according to which objectives of the protection of nature must be balanced against human rights (Greiber et al., 2009). The relevance of systemic interpretation is compounded by a wealth of national and international case law that I partially report of in this contribution. In the fourth section, I go beyond the interpretative role of the UNDRIP to address the issue of whether or not and through what means the practical implementation of the UNDRIP can be ensured. Two main options are identified, namely the operationalization of the UNDRIP in the jurisprudence of national and international courts, and a State-led implementation of the UNDRIP with a particular focus on the procedural mechanisms established by the Declaration.

2. A FOCUSED ANALYSIS OF UNDRIP PROVISIONS

The UNDRIP owes its novelty not only to its content as a benchmark instrument for the protection of indigenous peoples, but also to the special design of its provisions. UNDRIP articles are not a mere enunciation of rights. In contrast, they are addressed in a very explicit way to those actors that need to ensure the implementation of the rights of indigenous peoples. Just to make an example of this special feature, article 21 of the UNDRIP, establishing the right of indigenous peoples “to the improvement of their economic conditions,” in its paragraph 2 requires States to “take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions.”

Even though this construction can appear to be a standard way of conceiving binding instruments, such as treaties, this is certainly not a common feature when it comes to soft law instruments in the field of human rights. It is sufficient to consider the Universal Declaration of Human Rights where rights are enunciated without any explicit reference to State action. Furthermore, the structure of the UNDRIP must be read in light of its article 38, according to which “States...shall take the appropriate measures...to achieve the ends of this Declaration.” This suggests that those States that have adopted the UNDRIP look at the Declaration more as an operational instrument, rather than as a mere catalogue of rights.¹²

If this is true for the Declaration as a whole, it is necessary to verify if the same analysis extends to the rights that are of interest for the present contribution, namely the rights to land, natural resources, preservation of traditional knowledge, and protection of the environment.

The starting point in the field of land rights is the special emphasis that the UNDRIP places on the link between land and the very existence of indigenous peoples. In this respect, article 8, introducing a prohibition to assimilate or destroy indigenous culture, in its paragraph 2(j) requires States to prevent “any action which has the aim or effect of dispossessing them [indigenous peoples] of their lands,

¹² Article 38 can also be read in conjunction with the last preambular paragraph of the UNDRIP, which defines the Declaration as “a standard of achievement”. The locution “standard of achievement” can corroborate the interpretation according to which the UNDRIP is more than a catalogue of rights. Article 43 further confirms this interpretation, when it states that: “The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples”, meaning that States may design a stronger protection.

territories and resources.” Therefore, indigenous land is seen as an essential prerequisite for the preservation of the specificity and culture of any indigenous people (Gilbert and Doyle, 2011).¹³

The core of land rights is further provided by articles 25-28, 30 and 32, the provisions of which are designed as collective rights.¹⁴ This means that the rights to land and natural resources pertain to the indigenous peoples as a group. The dimension of collective rights, as stated in paragraph 22 of the UNDRIP’s Preamble, is indispensable for the very existence of indigenous peoples (Gilbert, 2006).

Against this backdrop, while article 25 highlights the “spiritual relationship” between indigenous peoples and land, article 26 describes the content of this right. Although more emphasis is placed on traditional land, this right refers explicitly both to the land that is traditionally owned or occupied and to the territories that are “otherwise used or acquired”. Compared to ILO Convention 169, which in its article 14 refers only to lands “traditionally occupied”, the UNDRIP coverage is therefore much more extensive.

Concerning how concretely the right to land is articulated, again article 26 adopts a broader approach than the ILO Convention,¹⁵ because it states that indigenous peoples “have the right to own, use, develop and control” lands and natural resources, thus avoiding taking a stand on the definition of land rights as property rights or mere rights to use. Furthermore, the right to land can be exercised on the “lands, territories and resources that they possess.” Therefore, the requisite of actual possession allows the UNDRIP not to address the difficult issue of the adjudication of traditional lands that have been historically dispossessed (Gilbert and Doyle, 2011).

Another important element that emerges from reading article 26 in conjunction with article 32 is that the right to land is void if it is not coupled with the right to own, use, and control the natural resources located in the territories of indigenous peoples. According to article 32, land and natural resources are essential declarations of the right to development that is granted to indigenous peoples. In particular, if States want to approve “any project affecting their lands or territories or other resources”, they need to obtain the prior consent of indigenous communities.

Moreover, the UNDRIP places special emphasis on the issue of the subsistence of indigenous peoples. In this respect, article 20 states that indigenous peoples “have the right...to be secure in the enjoyment of their own means of subsistence”, whose deprivation entitles them “to just and fair redress.” The rights to land and resources are therefore mutually interwoven, since the very existence and survival of indigenous peoples is dependent on both of them.

13 The spiritual link indigenous peoples have with land is also recognized in the jurisprudence of the IACtHR. See, for instance, Judgement of 17 June 2005, *Comunidad Indígena Yakye Axa v. Paraguay*, at para. 154: “land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values.”

14 The analysis of articles 28, 29(2) and 32(2) has been purposely excluded from this section. This is due to the fact that some of the provisions related to land rights are directly addressed to States. Therefore, the prescriptions of such articles are connected more to the implementation than to the substantial content of the rights to land, natural resources, traditional knowledge, and protection of the environment. This is why they will be covered separately in section 4.

15 Article 15 of ILO Convention 169 reads as follows: “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 content of this article appears to be less extensive than article 26 of UNDRIP which refers to direct control instead of mere participation.

Resources, in addition, are seen by the Declaration in relation to the right of indigenous peoples to health. Article 24 affirms the right “to the conservation of their [indigenous peoples] vital medicinal plants, animals and minerals.”

Furthermore, natural resources are referred to in article 31, which deals with the protection of traditional knowledge as an expression of the cultural heritage of indigenous peoples.¹⁶ Tradition and customs appear in this context as profoundly entrenched with the indigenous ways of life practised within traditional lands.

As a final point, article 29 marks the recognition of the “right to the conservation of the environment and the productive capacity of their [indigenous peoples’] lands or territories and resources.”¹⁷ This may be read both in conjunction with article 20, protecting indigenous means of subsistence, and with article 32 granting a full right to development, that is the right to decide autonomously their priorities in the management of their lands and resources.

As an internal element of coherence, therefore, the UNDRIP suggests a close link between the physical preservation of indigenous lands and the fulfilment of indigenous culture.

3. BENEFIT-SHARING IN CBD ARTICLE 8(J)

Indigenous peoples’ concerns have been treated as a specific human rights issue by the United Nations. However, indigenous-related provisions are contained in a number of other international instruments that are not primarily concerned with human rights, including the Convention on Biological Diversity (CBD).¹⁸

The CBD has to be framed within the global movement towards sustainable development that started in the early 1970s. In line with this, the Convention pursues three main objectives, namely “the conservation of biological diversity, the sustainable use of its components and the equitable sharing of the benefits arising out of the utilization of genetic resources.”¹⁹

Although any treaty aims, by definition, to regulate the mutual relationships among its contracting parties, some CBD provisions include a reference to the position of indigenous peoples and local communities. In the Preamble, State parties recognise “the desirability of sharing equitably benefits” with indigenous peoples. Furthermore, article 8(j) of the Convention touches upon the issue of benefit-sharing when indigenous peoples are concerned in the context of in-situ conservation.

This article has been defined as providing “a qualitatively different concept of benefit-sharing as a State-to-community contribution to sustainable development,” which needs to be distinguished from inter-State benefit-sharing (Morgera and Tsioumani, 2010: 150). While the latter concept is conceived as a way of balancing the interests of the States that provide the resources with the interests of the

16 UNDRIP article 31: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, ... including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora.”

17 Concerning the relation between indigenous peoples and the environment, the UNDRIP has failed to explicitly address the issue of the potential conflict between environmental protection goals and the rights of indigenous peoples. This could be the case, for instance, when a protected area is established and indigenous peoples are disposed of their lands. This case could fall, however, under the provision of article 32(2), which will be analysed in section 4 of this contribution.

18 This aspect is also acknowledged by preambular paragraph 8 of the UNDRIP, which recognises “the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties.”

19 See article 1 of the CBD.

States that accede to them,²⁰ State-to-community benefit-sharing recognises indigenous peoples and local populations as desirable recipients of the benefits deriving from the use of genetic resources. According to this interpretation, therefore, benefit-sharing can contribute in many ways to the livelihood of local communities by ensuring the welfare of indigenous peoples and local communities any time traditional knowledge is concerned.

There are several rationales behind State-to-community benefit-sharing. First, the fair and equitable sharing of the benefits stemming from access to indigenous peoples' resources and their traditional knowledge can be regarded as a compensation for removing those resources from local communities' direct control and exploitation. In the same vein, benefit-sharing aims to compensate indigenous peoples for the environmental or societal damages they suffer due to the deprivation of their resources or the way the appropriation by external actors has been carried out. Second, benefit-sharing can be interpreted as a reward that indigenous peoples should receive for their fundamental role in preserving biodiversity within their territories. Finally, benefit-sharing is a necessary instrument to safeguard the very existence of indigenous peoples, through the protection of their traditional knowledge, their ways of life, and their practices. Indeed, benefit-sharing goes beyond any "reward for the use of such [traditional] knowledge". Instead, it extends to any incentives to "contribute to the further preservation of traditional knowledge" (Morgera, 2012b).²¹

While this is the general framework to which State-to-community benefit-sharing must be traced back, the concrete interpretation of article 8(j) has posed a number of problems that have stopped it from becoming operational. The formulation of article 8(j) is too weak to suggest an obligation for CBD contracting parties to ensure an equitable and fair sharing of benefits with indigenous peoples. Indeed, this provision is conditioned to the test of the contracting parties' compliance with relevant national legislation. Therefore, national provisions take precedence over the content of article 8(j). Furthermore, States shall only "encourage" the practice of benefit-sharing with indigenous peoples.²²

Although the CBD recognises the role of traditional knowledge in the sustainable management of biodiversity,²³ article 8(j) fails to provide a clear indication of how the valorisation of traditional knowledge should be pursued by the contracting parties. The option of benefit-sharing with indigenous peoples is indicated in article 8(j) but it is subject to a series of limitations. The stalemate in the

20 According to Morgera and Tsionami, inter-State benefit-sharing addresses not only conservation concerns, but also development issues of the State that owns the genetic resources accessed by another State.

21 On this point, see also MORGERA, E. 2012b. No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law. Edinburgh School of Law Research Paper Series, 15., at 12: "According to the ecosystem approach, benefit-sharing is expected to target stakeholders responsible for the production and management of the benefits flowing from the multiple functions provided by biodiversity at the ecosystem level... This is based on the understanding that where those who control land use do not receive benefits from maintaining natural ecosystems and processes, they are likely to initiate unsustainable practices for short-term gains."

22 CBD, article 8(j): "Each contracting party shall, as far as possible and as appropriate, ...subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote the wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

23 CBD, article 10(c): "Each contracting party shall, as far as possible and as appropriate...protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."

implementation of State-to-community benefit-sharing, however, is not acceptable, since it impinges both on the very survival of indigenous peoples and on their capacity to contribute to the sustainable management of biological diversity. In the following sections, it will be argued that article 8(j) of the CBD must be read in light of the recent developments in terms of the human rights of indigenous peoples.

4. A NEW INTERPRETATION OF STATE-TO-COMMUNITY BENEFIT-SHARING

The main point I put forward in this contribution is an evolutionary interpretation of article 8(j) of the CBD. The UNDRIP is the cornerstone of this evolutionary interpretation on the premise that operationalizing article 8(j) is not only functional to the objectives of the CBD, such as the sustainable use of natural resources and the fair and equitable sharing of the benefits arising out of their use, but it is also instrumental to the protection of indigenous peoples' rights and ways of life. The UNDRIP is used as an interpretative tool serving a two-fold purpose, namely to clarify the content of article 8(j) and to suggest a way to implement it. While this section sets forth the first part of the proposed argument, that is reinterpreting the content of article 8(j), the following section deals with the issue of implementation.

It has been said that the UNDRIP is not a legally binding instrument per se. However, some elements such as the lengthy negotiations leading to its adoption, as well as the Declaration's structure and the numerous provisions formulating obligations for States ("States shall...") suggest that there is room for the UNDRIP to be applied by States.²⁴ Apart from its unquestioned role in the path towards the recognition of the rights of indigenous peoples, the UNDRIP can be used to support an interpretation of article 8(j) of the CBD, where the requirement of ensuring the sharing of benefits with indigenous peoples is reinforced by the existence of the rights contained in the UNDRIP. Is this interpretation justifiable? What legal criteria can be used?

From a hermeneutical point of view, the rules of interpretation provided by article 31 of the Vienna Convention on the Law of the Treaties are at hand. As a general rule, when interpreting a treaty, particular attention must be paid to the context, including "any instrument which was made by one or more parties in connection with the conclusion of the treaty."

In 2010 the Conference of the Parties of the CBD²⁵ adopted the Nagoya Protocol on access and benefit-sharing. It is important to note that even though this instrument has not yet come into force, it has imposed an obligation on parties to adopt "legislative, administrative or political measures, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms."²⁶ The protocol, therefore, constitutes a fundamental reference for the interpretation of the requirement of benefit-sharing, as stated in the CBD.

24 Although this goes far beyond the purposes of this contribution, it must be mentioned here that some authors contend that the rights affirmed in the UNDRIP are binding on States by virtue of their status of customary rules, independently from the legal nature of the UNDRIP. E. g. see ANAYA, S. J. & WIESSNER, S. 3 October 2007. The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment. JURIST.

25 For the list of signatories, see <http://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml> (last accessed on 18 August 2013).

As a further example in the context of the CBD, it is interesting to note that the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, adopted by the Conference of the Parties to the CBD (Morgera and Tsioumani, 2010),²⁷ insist on the importance of benefit-sharing with indigenous peoples, thus going beyond the scope of a restrictive interpretation of article 8(j).²⁸ Practical principle 4(a) of these guidelines, read in conjunction with its rationale, explains that indigenous peoples and their traditional knowledge can be an invaluable factor in halting the loss of biodiversity and ensuring an “adaptive management”. In addition, the operational guidelines related to Principle 4 specify that the benefits generated by adaptive management plans should “go to indigenous and local communities...to support sustainable implementation.” Even more importantly, the rationale of Principle 2 (empowerment of local users) explains that sustainability is generally enhanced if Governments recognize and respect the “rights” or “stewardship” authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities. Finally, Principle 12 explicitly refers to the fact that the equitable distribution of benefits should be related to the use of indigenous peoples’ resources.²⁹ The Conference of the Parties, therefore, seems to favour an understanding of benefit-sharing as a reward for indigenous peoples who contribute to sustainable practices in terms of biodiversity management.

Notwithstanding this CBD context, the rules on the interpretation of treaties under the Vienna Convention also provide the basis for an interpretation of article 8(j) of the CBD in light of the UNDRIP. Indeed, the so-called principle of systemic integration under article 31(3)c fills in interpretative gaps by taking into account “any relevant rules of international law applicable in the relations between the parties”. Although the overriding priority must be given to the textual and in-context interpretation, article 31(3)c of the Vienna Convention allows for a broader interpretation that comprises those international rules related to the provision to be interpreted. Nonetheless, the integrative rule, as Sands puts it, “is to be interpreted into a conventional norm, not applied instead of it” (Sands, 2001: 49). Therefore, it is necessary to assess whether or not the rights listed in the UNDRIP can be used to interpret the text of article 8(j) by filling its interpretative gaps.

26 See article 5, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, adopted in Nagoya on 29 October 2010, Doc. UNEP/CBD/COP/DEC/X/1.

27 See CBD COP Decision VII/12, Annex II.

28 As a general premise, the guidelines at paragraph A(g) specify that: “In considering individual guidelines provided below, it is necessary to refer to and apply the provisions of Article 8(j), Article 10(c) and other related provisions and their development in relevant decisions of the Conference of the Parties in all matters that relate to indigenous and local communities.” Other important soft law instruments to be considered when looking at the CBD context are: The Akwé Kon Voluntary Guidelines, CBD COP Decision VII/16, where particular emphasis is put on indigenous peoples’ right to participation and on the FPIC requirement; Secretariat of the Convention on Biological Diversity, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilisation, as relevant to the implementation of Article 8 (j) (2002), which are voluntary guidelines prepared by the CBD Secretariat to assist the contracting parties in the implementation of the provisions on benefit-sharing.

29 Practical principle 12: “The needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources.” For the purposes of this principle, the resources of indigenous peoples are intended as those resources the use of which can affect indigenous peoples’ lives.

To understand why an environmental treaty should be interpreted in light of a human rights instrument, purely legal, hermeneutical arguments need to be complemented by broader considerations. As a recent IUCN publication has illustrated (Greiber et al., 2009), conservation objectives and the respect for human rights are interconnected by means of numerous chains of causation. The quality of the environment can affect human rights in a number of ways, going from the enjoyment of human rights, to their reinforcement, or their impairment. Conversely, the violation of human rights can have a very negative impact on the conservation of the environment, fostering its destruction.

The recognition of this multiple chain of causation between the environment and human rights is translated into the rights-based approach. This approach aims to balance the different interests at stake when dealing with conservation issues by taking into account the rights of all stakeholders, with a particular attention to the environmental and human rights components. This approach is certainly invaluable for policy makers or management authorities.³⁰ A further use, however, can be envisaged when it comes to the interpretation of rules.

In the specific case of article 8(j) of the CBD, indigenous peoples are not only beneficiaries of the rule established therein, but, in the broader context of the relevant international law, they must also be considered as holders of human rights, stemming from other international regimes. These rights are listed in the UNDRIP and should be integrated in the interpretation of article 8(j) of the CBD for a correct balance of the rights of the actors involved.

It has been illustrated that benefit-sharing can be framed as an instrument to preserve the traditional knowledge of indigenous peoples. Furthermore, the close link between indigenous knowledge and traditional practices has also been underlined. These practices belong to the lands that have made them possible. Therefore, when benefit-sharing options are to be discussed, indigenous peoples' right to land must be taken into due consideration.

As the Report of James Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, holds, according to the international normative consensus, the right of indigenous peoples to lands, territories and natural resources originates in their own customary law, values, habits and customs and, therefore, is prior to and independent of State recognition in the form of an official property title.³¹

The question of whether this right consists of a right to own or simply to use traditional or owned lands is a difficult one. The UNDRIP does not give a definite response to this dilemma. Article 27 of the UNDRIP, however, prescribes that States, "in conjunction with indigenous peoples concerned," should start a process of adjudication of indigenous territories.³² Although the process of adjudication is currently at an uneven stage of development in those States where indigenous peoples live, national and

³⁰ This is also true in those cases decided by international courts. Reading treaty obligations in light of the other obligations also in force between the parties is not just an interpretive principle, but also a method of decision. See Article 38, Statute of the International Court of Justice, adopted on 26 June 1945, 33 UNTS 993.

³¹ Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya in UN doc. A/HRC/15/37 of 19 July 2010, at para. 54.

³² UNDRIP, article 27: "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

international case law represents a useful indicator of the practice of law in the field of indigenous property rights.

Furthermore, national and international jurisprudence is paramount since it has pointed out the interpretative role of the UNDRIP.³³ Two cases, in particular, stand out due to the arguments used and the practical consequences of the decisions taken. In the case of the *Saramaka Peoples v. Suriname*, decided by the IACtHR in 2007,³⁴ the Court invoked article 32(2) of the UNDRIP establishing the requisite of the free, prior and informed consent of indigenous peoples,³⁵ to reinforce the argument that indigenous peoples should be consulted prior to any State action that potentially affects their rights. In a similar case, the Supreme Court of Belize went as far as qualifying the obligations contained in the UNDRIP as customary international law and general principles of international law. In particular, the Court gives article 26 of the UNDRIP, that establishes indigenous land rights, “special resonance... reflecting...the growing consensus and the general principles of international law on indigenous peoples and their lands and resources.”³⁶

Although these are just cases, they should be framed in a bigger trend of case law that commenced before the UNDRIP was adopted. The jurisprudence of the IACtHR is particularly relevant in this respect (Rodríguez-Pinero, 2011).³⁷ Therefore, it is very likely that the UNDRIP will reinforce this trend toward the affirmation and recognition of the rights of indigenous peoples. In this respect, the rights established in the Declaration can serve either as a reinforcing argument to redress the rights of

33 See the case law of bodies such as the Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination. For more details on those cases, see KINGSBURY, B. *Indigenous Peoples*. Max Planck Encyclopedia of Public International Law., at 5.

34 IACtHR, *Saramaka Peoples v. Suriname*, Judgment of 28 November 2007.

35 The FPIC requisite in the context of UNDRIP will be given in-depth consideration in the following section.

36 Supreme Court of Belize, consolidated cases *Cal v. Attorney General*, Judgment of 18 October 2007, at para. 131. Significantly, the whole text of para. 131 reads as follows: “Also, importantly in this regard is the recent Declaration on the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations on 13 September 2007. Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them. This Declaration—GA Res 61/295, was adopted by an overwhelming number of 143 states in favour with only four States against with eleven abstentions. It is of some signal importance, in my view, that Belize voted in favour of this Declaration. And I find its Article 26 of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources.” Para. 132: “I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. In Article 42 of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and states, are enjoined to promote respect for and full application of the Declaration’s provision and to follow up its effectiveness” (emphasis is added).

37 Even before the UNDRIP was adopted, the IACtHR has proposed an evolutionary interpretation of the right to property (article 21) under the ACHR (American Convention on Human Rights, signed in San José on 22 November 1969, 1144 UNTS 123). In case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, the Court affirmed that the right to property of indigenous peoples takes the form of a “communal property”, since the ownership is centred on the communities rather than on the individual. This interpretation was successfully confirmed in case *Moywana Village v. Suriname*, Judgment of 15 June 2005: “their [Moywana community’s] concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole” (para. 133).

indigenous peoples or as an interpretative tool to suggest an evolutionary interpretation of international or national rules affecting indigenous rights that is more favourable to indigenous peoples.

5. IMPLEMENTATION OF UNDRIP RIGHTS

Notwithstanding the role of the judiciary, the rights of indigenous peoples can be safeguarded by three main kinds of actors, namely UN bodies, specialised NGOs, and States (Kingsbury, Burger, 2009).³⁸ Article 42 calls upon the UN Permanent Forum on Indigenous Issues and specialised agencies, as well as States, to “promote respect for and full application of the provisions” of the Declaration. In addition, article 42 highlights the role that the UN system can have in “the realization of the provisions” of the Declaration. In the remaining part of this section, I choose to focus on the role of States since, from an international law perspective, State authorities are responsible for enforcing the rights of indigenous peoples even against the wrongful acts of non-State actors.

As affirmed in the UNDRIP Preamble, States are encouraged to “comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments.”³⁹

However, this element alone does not say very much about the implementation issue. In this context, the main problem is clearly that the UNDRIP, due to its very nature, does not have a binding character for the States that have adopted it; States are merely encouraged to comply with its provisions.⁴⁰

Once again, it is necessary to go beyond a literal interpretation of the Declaration. Indeed, the “obligatory” language used in many provisions of the UNDRIP, together with the long process culminating in the UNDRIP’s adoption, suggest at least a certain degree of political will by the States endorsing the Declaration to respect the rights of indigenous peoples. Furthermore, the rights announced in the Declaration may have a binding nature on States insofar as they merely replicate other, already existing obligations.

When it comes to the actual implementation of the UNDRIP, States, according to article 38 of the UNDRIP, “shall take the appropriate measures, including legislative measures, to achieve the ends of” the Declaration. A case in point is that of Bolivia, given that it has recently incorporated the UNDRIP into domestic law (Clavero, 2009).⁴¹ Although this example undoubtedly reveals the firm commitment

38 Concerning the role of the UN, the UNPFII and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people can exercise their powers and utilize their - albeit limited - resources both to monitor the situation of the human rights pertaining to indigenous peoples and to promote a dialogue with the countries that violate those rights. An example of more proactive actions could come from outside the UN system. The IUCN’s model for making the rights of indigenous peoples more effective relates to the possibility of co-management of protected areas between indigenous people and State or local government authorities. On this, see BORRINI, G., KOTHARI, A. & OVIEDO, G. 2004. *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation: Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas*, Gland, Switzerland; Cambridge: IUCN-The World Conservation Union.

39 UNDRIP, preambular para. 15.

40 According to some authors, the UNDRIP “reflects pre-existing customary law”. E. g. see WIESSNER, S. 2008. *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*. *Vanderbilt Journal of Transnational Law*, 41, 1141-1176., at 1165.

41 This happened only a few months after the UNDRIP was adopted. Bartolomé Clavero also highlights that the transposition of the UNDRIP into domestic law was at the same rank as the Constitution. Furthermore, other Latin American States have made constitutional reforms following on from the UNDRIP adoption. On this see WIESSNER, S. 2009. *United Nations Declaration on the Rights of Indigenous Peoples.*, available at http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-

of some States to the Declaration and the implementation of the rights of indigenous peoples contained therein, initiatives from States in this sense remain rare. Therefore, the reconstruction of the will of States to implement the UNDRIP within their national systems is still tentative.

The lack of actual implementation by States, however, does not diminish the importance of the rights granted by the UNDRIP. As anticipated from the very beginning, some articles are directly addressed to States and contain quite detailed action in the form of obligations. An example of this aspect in the field of land rights is provided by article 27 which prescribes that States “shall establish...a...process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure system.” Another example, related to the protection of the environment, is article 29(2), which prohibits States from discharging any hazardous materials into indigenous lands. A final example could be that of article 30 which, while establishing under certain conditions a general ban on military activities within the territories of indigenous peoples,⁴² obliges States to consult with indigenous peoples “prior to using their lands”. Therefore, the content and even the wording of the rights established by the UNDRIP could serve as a model to inspire the national legislator in the future.

Procedural mechanisms, finally, are fundamental tools to ensure that the rights of indigenous peoples are duly protected. In this respect, the UNDRIP foresees the requirement of free prior informed consent (FPIC), which has been described by many scholars as a crucial mechanism for indigenous peoples to exercise the right to self-determination over their lands and resources (Carmen, 2010, Gilbert and Doyle, 2011).

The Declaration requires FPIC to be carried out in three main cases. First, under article 10, the relocation of indigenous peoples can only take place if indigenous peoples have given their consent. Second, under article 29, the storage or disposal of hazardous materials in indigenous territories is subjected to the consent of indigenous peoples. Third, under article 32 the FPIC is conceived as an unavoidable requisite to be met before “any project affecting their [indigenous peoples’] lands or territories or resources” can be approved. In this context, article 28 provides the remedy in case the provisions on FPIC are not observed and result in the damage, occupation, or confiscation of the lands and resources belonging to indigenous peoples.

Therefore, the FPIC as framed by the UNDRIP constitutes a *condicio sine qua non* for protecting the rights of indigenous peoples to land and natural resources. Consequently, States should respect the requirement of FPIC whenever they engage in projects involving indigenous lands, natural resources, or traditional knowledge. This means, in concrete terms, that national authorities are responsible for designing a process, whereby States, local governments, or even private actors can interact with indigenous peoples whenever the rights of the latter are involved.

Covering in detail what such a process should entail goes far beyond the scope of this contribution. However, one last point should be made. The FPIC implies at least three kinds of procedural guarantees. First, indigenous peoples should be heard before a project in their lands is initiated. Second, the consent of indigenous peoples should be obtained by respecting their true will. Finally, indigenous peoples should be able to negotiate the conditions under which any project is carried out.

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42 UNDRIP, article 30: “Military activities shall not take place...unless justified by a relevant public interest or otherwise freely agreed with or requested by.”

In this context, the share of benefits deriving from the use of indigenous resources could be included in any development project as a condition for indigenous peoples' resources to be lawfully utilised. The FPIC, thus, may be the missing link connecting the indigenous peoples' right to lands, natural resources, and traditional knowledge with the requirement of benefit-sharing foreseen in article 8(j) of the CBD.

6. CONCLUSIONS

The enthusiasm associated with the adoption of the UNDRIP has immediately been followed by legitimate concerns over its impact. The non-binding nature of the declaration has led scholars and practitioners to engage in a fruitful debate on the real possibilities of its implementation and the potential results in terms of the protection of the rights of indigenous peoples.

This contribution has shown that the UNDRIP can serve as a powerful interpretative tool in order to import the rights of indigenous peoples into other bodies of law. Particularly relevant in this sense is the international regime on the protection of biodiversity.

The connection between indigenous peoples and their lands comprises at least two fundamental dimensions. The first one, which I define as the internal nexus between indigenous peoples and traditional lands, implies both that most indigenous peoples rely on the natural resources available in their lands for their survival and also that the cultural identity of indigenous peoples, as an expression of their identity as a community, flourishes only in conjunction with traditional lands. Therefore, the territories of indigenous peoples are the only space in which their very existence can be preserved. Furthermore, the nexus between indigenous peoples and traditional lands may have another dimension, which I define as external since the link between indigenous peoples and their lands is instrumental to the conservation of biodiversity rather than the survival of indigenous peoples and their customs per se. Indeed, the traditional practices and ways of life of indigenous peoples appear to be in line with a sustainable use of natural resources, as prescribed by numerous international regimes and in particular by the CBD.

In this contribution, therefore, I interpreted benefit-sharing as a means to ensure the survival of indigenous peoples, while encouraging them to continue to pursue sustainable practices in the management of natural resources for the benefit of global biodiversity. This interpretation fits with a more comprehensive reading of article 8(j) of the CBD. The stalemate in the implementation of this provision can be overcome through the integration of the rights established under the UNDRIP into the obligations of the CBD State-parties.

It has been shown that rights to land, resources, traditional knowledge, and protection of the environment have characteristics that are extremely innovative for a non-binding human rights instrument like the UNDRIP. The Declaration, in fact, is structured in such a way as to suggest that the rights of indigenous peoples have a strong operative element. The enunciation of indigenous rights is coupled with provisions that articulate States' obligations and offer solutions whenever indigenous peoples' rights are violated. Moreover, the free, prior, informed consent is presented as a central procedural mechanism to ensure that the rights of indigenous peoples are taken into account both by government authorities, at central or local levels, and by non-state actors.

This implies that when States have plans or projects that may affect indigenous peoples' territories they need to consider the rights of the indigenous peoples associated with those lands. In this context, the

adjudication process of lands described by the UNDRIP is vital. However, the link between indigenous peoples and territories is not dependent on the formal recognition of States and can be redressed through the judiciary, either at the national or international level.

In practical terms, therefore, States should recognise that the use of genetic resources pertaining to traditional lands must be subject to the free, prior, informed consent of indigenous peoples. Through this mechanism indigenous peoples should first be able to form their consent in an autonomous way and, only after they have been provided with all the necessary information, they should also be granted - on mutually agreed terms - an equitable and fair share of the benefits arising from the utilization of the resources on which they depend. This interpretation is in line with the objectives of the CBD, in so far as it contributes to the conservation of biodiversity. Even though no case has been decided by courts concerning the interpretation of article 8(j) of the CBD, the interpretative role of the UNDRIP has been recently confirmed by national and international case law and can come to a hand in solving the stalemate in the implementation of article 8(j).

In conclusion, it is very likely that the UNDRIP will have a considerable impact on the respect for the fundamental rights of indigenous peoples. This will have important consequences not only for the preservation of indigenous communities per se but also for attaining fundamental biodiversity conservation goals, on which the existence of every form of life on Earth crucially depends.

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