



KU LEUVEN

FACULTY OF LAW

Academic year 2018 - 2019

The right to cultural identity of indigenous peoples in Europe

Promotor: prof. dr. K. LEMMENS

Supervisor: L. REYNTJENS

Master's thesis submitted by

Merel VRANCKEN

To graduate in the degree of

MASTER OF LAWS



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“Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attended; the factory, farm or office where he works.”¹

¹ Speech of Eleanor Roosevelt at the presentation of “In your hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights”, March 27, 1958, United Nations, New York. Taken from CARNEGIE COUNCIL, *In your hands: A Guide for Community Action*, www.carnegiecouncil.org/publications/100_for_100/in-your-hands-a-guide-for-community-action (consultation 22 November 2018).

SUMMARY

In this dissertation, the right to cultural identity of indigenous peoples in Europe is researched. Until now, the European Court of Human Rights has only judged on the merits of one case regarding indigenous peoples, even though a number of indigenous peoples exist on the territory of the Council of Europe. Indigenous peoples are a small and relatively invisible minority in Europe, but as human rights are universal, they also apply to them. Because of the low number of (admissible) cases on indigenous peoples' human rights before the ECtHR, an investigation into the effective protection of these rights is an interesting undertaking.

The first part of this research discusses indigenous peoples and who they are, while the second part examines the right to cultural identity. To identify indigenous peoples, in the first part, an investigation is made into who indigenous peoples are. This is done by first giving an overview of the legal scenery. In this, it is first discussed how regional human rights systems have defined indigenous peoples to be in their case law. Next, an investigation is made into what has happened regarding indigenous peoples in the past thirty years in international organisations and third, legal scholars' views are taken into account. Secondly, this information is taken together to design a definition of indigenous peoples in Europe, which is then used to identify some specific groups on the territory of the Council of Europe as indigenous.

The second part examines the right to cultural identity by first discussing the conceptions on cultural identity of three different human rights systems, namely the European system, the Inter-American system and the African system. After this, the concept of cultural identity within the United Nations Declaration on Indigenous Peoples is examined. Second, the right to cultural identity is identified and discussed under the ECHR. To conclude the investigation, a decision is made on the sufficiency of this protection of the right to cultural identity by the ECHR and the ECtHR for indigenous peoples in Europe.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
BIOT	British Indian Ocean Territory
CoE	Council of Europe
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ILO	International Labour Organisation
IO	International organisation
NGO	Non-governmental organisation
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNWGIP	United Nations Working Group on Indigenous Populations
UNWGM	United Nations Working Group on Minorities

INTRODUCTION

1. In a world where there is more and more emphasis on the fundamental rights that belong to each and every human being, infractions on these fundamental rights are still commonplace. Thanks to evolutions in the past, large groups of people are being protected more broadly and more efficiently in their fundamental rights, which were laid down in human rights treaties. Even in this promising evolution in human rights protection, it seems like some groups are still being left behind. All kinds of minorities, whose fundamental rights should theoretically be protected in the same way as majority groups, are slipping through the cracks.
2. As a result of this problem, recently there have been more and more objections to the concept of ‘universal’ human rights and people are calling for specific rights, that are deemed to be opposed to the broader human rights set out in human rights declarations. Through the medium of specific rights, the fundamental rights of vulnerable groups are supposedly better protected. In this context, plenty of declarations have been drawn up about the rights of the child, the rights of women and so on. The United Nations Declaration on the Rights of Indigenous Peoples of 2007 was also drafted in this perception. This declaration does not convey any new rights to indigenous peoples; it only reaffirms those previously conveyed fundamental rights in a specific context.²
3. This master’s thesis recognises the new distinction between universal and specific human rights by investigating a very specific right, namely the right to cultural identity of indigenous peoples, in the context of a very broad and seemingly universal human rights declaration: the European Convention on Human Rights. In this way, this thesis tries to find a way into these two concepts of specific and universal human rights, that seem to be simultaneously contrary and concurring.
4. Indigenous peoples are a specific minority, who are mostly considered in the American and the African continent because of their more pronounced presence there. Within the UN at the same time movements exist to put a spotlight on the lack of protection of the rights of this grouping,³

² E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 395; R. STAVENHAGEN, “Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (147) 151; M. B. TRASK, “Afterword: implementing the Declaration”, in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (327) 329.

³ With the United Nations Working Group on Indigenous Populations (hereinafter: UNWGIP) and later on the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter: UNDRIP). See also Section II of Chapter I, Part I (*infra* 12, marginal 23 et seq. and 19, marginal 33 et seq.).

and to deny this grouping a wide array of rights.⁴ Inside of Europe indigenous peoples are a small but not insignificant minority. A sharper focus on their presence in Europe could mean a substantial rise in their fundamental rights.

5. This master's thesis discusses the right to cultural identity of indigenous peoples in Europe. In this context, 'Europe' refers to the territories of the member states to the Council of Europe, and thus to the area in which the European Court of Human Rights has jurisdiction. More specifically this dissertation investigates the protection of this right under the ECHR, in a normative framework. The central research question of this thesis is: "Is the protection of the rights of minorities as it is laid down in the ECHR and its protocols a sufficient protection of the right to cultural identity of indigenous peoples in Europe?" To investigate this, there will be an assessment in relation to the normative content of the right to cultural identity itself.
6. This investigation will be done in the following way. The first part will focus on indigenous peoples, while the second part investigates their right to cultural identity. Part I consists of three chapters. First and foremost, a virtually exhaustive overview will be given of the various existing conceptions of indigenous peoples in the first Chapter. Next, in Chapter II, a definition of indigenous peoples will be devised. This will enable the determination of the specific groupings within the territory of the Council of Europe that will fall within the scope of the investigation, which is the subject of Chapter III, that concludes the first part of this research. The second part focuses on these indigenous peoples' right to cultural identity. In the first Chapter some different conceptions on the right to cultural identity are looked at and a content is given to this right in the European context. Secondly, Chapter II will then contain an investigation into the content and scope of the relevant articles of the ECHR. This way this Chapter explores which degree of protection is already given to indigenous peoples in the territory of the Council of Europe. Lastly Chapter III contains an investigation into the effective degree of protection provided by the right to cultural identity for indigenous peoples under the ECHR. For this, an evaluation is made of the right based on its normative content, as it was determined in Chapter I. As a conclusion a stance will be taken about the sufficiency of the protection of the right to cultural identity of indigenous peoples under the ECHR.

⁴ The UN has created two separate groups for working on minority rights, one being the UN Working Group on Minorities (hereinafter: UNWGM) and the other being the UNWGIP. Separate Declarations and rights were set up, each applying to only one group and excluding the other. (W. KYMLICKA, "Beyond the Indigenous/Minority Dichotomy?" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 185-187) See also *infra*, 31-32, marginals 46-47.

PART I. INDIGENOUS PEOPLES

“What are indigenous peoples?”

7. As was put forward in the investigative proposal that precedes this master’s thesis, there is no universally accepted definition of indigenous peoples. There seem to be definitions with more and with less authority, like the MARTINEZ COBO definition⁵ or the definition from ILO Convention 169,⁶ but the degree of acceptance of these definitions also seems to differ.⁷ Some authors have defended the point of view that the definition of indigenous peoples should not be a universal one, but that in order to be useful, it should differ regionally, depending on the context of each region.⁸ Because very diverging stances have been taken by different actors and because there has been a clear evolution in the visibility and rights of indigenous peoples in the last thirty years, it seems useful to give a virtually exhaustive overview of what has been said and done by all these different actors. In this way, it is possible to get a clear and structured overview of the evolutions that took place, the case law of the different human rights systems and the opinions of different important legal scholars on this subject.
8. Clarity is what has been missing in much of the definitional debate on indigenous peoples.⁹ Different actors mark various elements as important for their identification of indigenous peoples,

⁵ J.R. MARTINEZ COBO, “Study on the Problem of Discrimination against Indigenous Peoples”, New York, United Nations, 1986, *UN Doc. E/CN.4/Sub.2/1986/7/Add.4*, §379.

⁶ Art. 1 Treaty No. 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989, International Labour Organisation, www.ilo.org.

⁷ For instance J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 250; D.L. HODGSON, “Becoming Indigenous in Africa” in *ASR* 2009, (1) 9-10; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 454; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 34. Additionally, ILO Convention 169 hardly has any binding legal value, as it has only been ratified by 22 countries (23 countries as of 5 June 2019) (INTERNATIONAL LABOUR ORGANIZATION, *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (consultation 28 March 2019).

⁸ M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1022; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 415 and 447; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 57. See also the point of view of the African Commission on Human and Peoples’ Rights (hereinafter: ACHPR), ACHPR and IWGIA, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission’s work on indigenous peoples in Africa*, Copenhagen, Eks/Skolens Trykkeri, 2006, 12.

⁹ See K. LEHMANN, “To Define or Not to Define - The Definitional Debate Revisited” in *Am. Indian L. Rev* 2007, (509) 515. On the lack of clarity on indigenoussness in the African context, see J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 254. On the lack of clarity in the distinction between minorities and indigenous peoples, see W. KYMLICKA, “Beyond the Indigenous/Minority Dichotomy?” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 203; E. PULITANO, “Indigenous

while leaving others behind without mentioning them or explaining why they believe they are not useful. Moreover, confusion exists on the meaning of ‘minorities’ and the concept’s possible relation to indigenous peoples, and this confusion is partly caused by the different usages and different aims in the use of these concepts by various actors.¹⁰ Chapter I aims at solving this problem and at bringing clarity into the debate. After the evolutions and misconceptions have been explained, in Chapter II a definition of indigenous peoples will be constructed, keeping in mind the problems of the past. For this definition, only the aspects that are relevant for Europe will be used, keeping in mind that not everything that was described in the first Chapter affects the European continent in the same way as it does the others. Finally, in Chapter III this definition will be applied to possible indigenous groups on the territory over which the Council of Europe has jurisdiction, in order to identify the concrete peoples that this master’s thesis concerns.

CHAPTER I. INDIGENOUS PEOPLES: AN OVERVIEW

9. This Chapter attempts to provide a virtually exhaustive overview of the evolutions that have occurred in the past thirty years with respect to identifying indigenous peoples, along with the debate among legal scholars and the current case law of the three main regional human rights systems, namely the European system, the Inter-American system and the African system. In what follows there will first be an overview of what the different human rights systems have accepted as the definition of indigenous peoples in their region. Following this, there will be a discussion of the actions international organisations (hereinafter: IOs) have taken in this respect, recognising some peoples as indigenous and not others. Third there will be an overview of the definitions that are accepted as authoritative definitions by most legal scholars and their more modern interpretations. To conclude a definition of indigenous peoples will be set up, considering the different stances on the use and proposed universality of definitions and the concrete political consequences of a definition.

rights and international law: an introduction” in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (1) 12; I. SCHULTE-TENCKHOFF, “Treaties, peoplehood, and self-determination: understanding the language of indigenous rights”, in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (64) 69; E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 394.

¹⁰ For instance the use by indigenous peoples themselves as contrasted to minorities, see also *infra* 31-33, marginals 46-48.

SECTION I. HUMAN RIGHTS SYSTEMS AND ‘INDIGENOUS PEOPLES’

10. When assessing the claims of indigenous peoples that they are different from the mainstream society and that because of it, they have a right to specific rights or a non-discrimination claim, one might assume that the Commissions or the Courts of the human rights systems would first investigate what indigenous peoples are and if the claim that this group is a group of indigenous peoples is correct. In the past, this has not happened in all of the systems. While the Inter-American Court and the African Commission tend to see indigenous peoples as a separate group, with separate and specific claims because of their special situation of vulnerability, the European Court of Human Rights seems to put indigenous peoples alongside all other minorities. Leaving aside for now the question if this may be problematic for the effective enjoyment of their rights, this section will provide an overview of the different systems’ case law and their interpretation of ‘indigenous peoples’.
11. An important thing to note when looking at the systems’ case law is that ‘indigenous people’ as it is currently understood under international law, meaning a specific group of people who have been discriminated in the past, was not always understood in this way. Before the 1980’s – 1990’s, ‘indigenous’ in most (if not all) legal sources just meant ‘original’.¹¹ After the debate on indigenous peoples was instigated, a new meaning of this word took shape, which is the way in which the word is currently understood. This is important for understanding some of the earlier case law of the Commissions and the Courts.¹²

¹¹ J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 250; S. KIRCHNER, “Conceptions of Indigenesness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 175-176.

¹² In the case of the ECtHR this is also useful for understanding the more recent case law, because it tends to confuse terminology in this matter.

§1. The European Court and Commission of Human Rights

12. Indigenous matters have not been at the centre of the cases dealt with at the ECtHR. As a matter of fact, the Court itself has only handled four¹³ cases¹⁴ so far dealing with indigenous peoples¹⁵, of which only one has gotten past the initial stage of determining admissibility.¹⁶ In the few other cases that were admissible before the ECtHR in which the Court mentioned the word ‘indigenous’, it was used as meaning ‘original’ or some derivative hereof.¹⁷ A possible explanation for this is that the current meaning of the word indigenous was only given to it in recent times, as mentioned above, and the fact that indigenous people are such a small group in Europe, with very little activity before the European Court.¹⁸
13. In the cases that actually dealt with indigenous peoples before the Court and the Commission, reference to the word ‘indigenous’ was only seldomly made.¹⁹ In only three cases the word indigenous was used. First, in the case of *Johtti Sappmelaccat Ry and Others v. Finland*, which was about fishing rights, the word ‘indigenous’ was used because the Finnish constitution gives

¹³ This does not include the earlier cases handled by the Commission. The Cases handled by the Commission are not taken into account anywhere in this research, as it investigates the current state of indigenous peoples’ rights under the ECHR and the ECtHR. For this, the Decisions of the Commission are not always reliable sources. For a further explanation of this, see *infra* 86, footnote 446. The Chagos Islanders case is also not counted, because there is no general agreement on the question if the Chagossians (Ilois) are in fact indigenous peoples or not, and they do not fall under the Martinez Cobo definition for lack of being pre-invasion or pre-colonial societies (ECtHR 11 December 2012, No. 35622/04, *Chagos Islanders/United Kingdom* (Admissibility Decision)). In the next two chapters of this part, a definition is set up and the Ilois are examined under this definition, in order to decide if they are indigenous peoples or not. For the purpose of this Chapter, nevertheless, the Ilois do not count as indigenous peoples, for the reasons mentioned earlier.

¹⁴ ECtHR 30 March 2010, No. 39013/04, *Handölsdalen Sami Village and Others/Sweden*; ECtHR 12 January 2006, No. 18584/04, *Hingitaq 53/Denmark* (Admissibility Decision); ECtHR 18 January 2005, No. 42969/98, *Johtti Sappmelaccat Ry and Others/ Finland* (Admissibility Decision); ECtHR 9 January 2001, No. 28222/95, *Muonio Saami Village/Sweden*.

¹⁵ The words ‘indigenous people’ are used here as defined by Martinez Cobo, using a definition that is not very contested for lack of further investigation, which will happen further in on the Chapter.

¹⁶ Refers to the *Handölsdalen* case. The *Muonio Saami Village* case was not declared inadmissible by the court, but was struck out of the list following a friendly settlement (ECtHR 18 January 2005, No. 42969/98, *Muonio Saami Village/Sweden* §13-14).

¹⁷ Meaning original, local population, as contrasted with foreigners, in *Sramek/Austria*, *Abdulaziz, Cabales and Bakandali/United Kingdom* and *Cyprus/Turkey*. Referring to the persons’ origin/ethnicity in *Savenkovas/Lithuania* and *Avsar/Turkey* (ECtHR 18 November 2008, No. 871/02, *Savenkovas/Lithuania*, §108; ECtHR 10 July 2001, No. 25657/94, *Avsar/Turkey*, *Reports of Judgments and Decisions 2001-VII*, §418; ECtHR 10 May 2001, No. 25781/94, *Cyprus/Turkey*, *Reports of Judgments and Decisions 2001-IV*, §346; ECtHR 28 May 1985, No. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Bakandali/United Kingdom*, *Publ. Eur. Court H.R.*, Series A, No. 94, §76; ECtHR 22 October 1984, No. 8790/79, *Sramek/Austria*, *Publ. Eur. Court H.R.*, Series A, No. 84, §15) See also, more broadly S. KIRCHNER, “Conceptions of Indigenusness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 175 - 181.

¹⁸ J. BEQIRAJ, “Indigenous Peoples’ Cultural Identity under EU Law and the ECHR: A Non-trade Interest or a Human Right?” in F. IPPOLITO and S. IGLESIAS SÁNCHEZ (eds.), *Protecting Vulnerable Groups. The European Human Rights Framework*, Oxford, Hart Publishing, 2015, (159) 160.

¹⁹ ECtHR 30 March 2010, No. 39013/04, *Handölsdalen Sami Village and Others/Sweden*; ECtHR 12 January 2006, No. 18584/04, *Hingitaq 53/Denmark* (Admissibility Decision); ECtHR 18 January 2005, No. 42969/98, *Johtti Sappmelaccat Ry and Others/Finland* (Admissibility Decision). See also, more broadly S. KIRCHNER, “Conceptions of Indigenusness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 182-185.

special rights to indigenous peoples. Throughout the decision, the word ‘indigenous’ is used in the sense meant by the Finnish constitution, which is not cleared up by the court because there is no disagreement on the fact that the Sámi²⁰ fall under that concept.²¹ Second, in the case of *Hingitaq 53 v. Denmark*, about the expropriation of the Inuit of Greenland from their original villages, the words ‘indigenous peoples’ are mentioned in the context of the ILO Convention 169, to which Denmark was a party. The reference to indigenous peoples is only made in the context of decisions of the national courts: in no part of the judgment does the ECtHR use the wording ‘indigenous’ or ‘indigenous peoples’ when it is not referring to the earlier national judgments.²² Thus the ECtHR does not give any clarification on the terminology, nor does it become clear if the ECtHR actually accepts ‘indigenous peoples’ as a category. Third, reference to ‘indigenous peoples’ is made in the partly dissenting opinion of judge Ziemele in the *Handölsdalen* case.²³ Throughout the actual judgment, no reference is made to the concept. The *Handölsdalen* case handles the claim of private land owners against the use of their land for herding reindeer by the Sámi. In his opinion, judge Ziemele refers to both ILO Convention 169 and the UNDRIP when considering indigenous peoples.²⁴ Even though it is not clear what judge Ziemele understands exactly by this concept, it is clear that he accepts the concept as being part of the legal order and a useful concept to refer to for this specific group of people.

14. In conclusion, the European Court of Human Rights has not made clear what it believes the concept ‘indigenous peoples’ to mean, or if it even considers the concept to be a relevant concept, that refers to a specific group with specific characteristics that deserve acknowledgement under European human rights law. To date, it seems as if the Court does not care for the concept of ‘indigenous peoples’, and rather investigates claims of these groups under the broader denominator of ‘minorities’.²⁵

Given the partly dissenting opinion of judge Ziemele in the *Handölsdalen* case, there is a possibility that this might change in the future. He explicitly refers to indigenous peoples and the specific legal instruments designed under international law for this group. Maybe in time, the

²⁰ Sámi, Sami, Saami and Sapmi are common terms to refer to the Sámi (or Lapp) indigenous people. Throughout this research, I choose to use the word ‘Sámi’.

²¹ ECtHR 18 January 2005, No. 42969/98, *Johti Sapmelacat Ry and Others/Finland* (Admissibility Decision), 2, 11, 15 and 19.

²² ECtHR 12 January 2006, No. 18584/04, *Hingitaq 53/Denmark* (Admissibility Decision), 6-10.

²³ Partly Dissenting Opinion of Judge Ziemele to ECtHR 30 March 2010, No. 39013/04, *Handölsdalen Sami Village and Others/Sweden*, §§2, 5 and 10.

²⁴ *Ibid.*, §§2-3.

²⁵ Of the same opinion is S. KIRCHNER, “Conceptions of Indigeness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 186-187.

Court will start distinguishing between the different minorities and find added value in acknowledging the existence of the special category of indigenous peoples, and maybe other distinct categories of minorities. For now, however, the Court has no own concept or definition of what ‘indigenous peoples’ are.

§2. The Inter-American Court and Commission of Human Rights

15. In contrast to the ECtHR, the IACtHR has dealt with indigenous issues on numerous occasions and has developed a broad case law with respect to this group. The IACtHR clearly recognises indigenous peoples as a concept different from minorities.²⁶ In its case law, the IACtHR has never given a definition of indigenous peoples as such, but it has pointed out some important characteristics that are shared by indigenous peoples under their jurisdiction.²⁷ In this respect, the Court has emphasised the importance of self-identification of the group and person as indigenous.²⁸ Aside from this, other objective elements have been named, including: people who have “*social, cultural and economic traditions different from other sections of the national community,*”²⁹ people who “[*identify*] themselves with their ancestral territories,”³⁰ or have a spiritual relationship with the land,³¹ people who “[*regulate*] themselves, at least partially, by their own norms and traditions,”³² people who share their land collectively³³ and people to whom the use of this land is central to their traditional social and economic way of life.³⁴
16. Aside from these criteria that the Court has used over the years to identify indigenous peoples, there has been an important evolution regarding the criterion of being ‘indigenous to the region’ as meaning an original inhabitant of that region. In two recent cases, the Court has moved away from the criterion of being ‘indigenous to the region’ to a more flexible conception of

²⁶ This distinction goes as far as it not being clear if indigenous peoples actually fall under minorities or not, see *infra*, 31-33, marginals 46-48.

²⁷ T. ANTKOWIAK, “A Dark Side of Virtue: the Inter-American Court and Reparation for Indigenous Peoples” in *DJCIL* 2014, (1) 17-18.

²⁸ IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §37; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §164.

²⁹ IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §79.

³⁰ *Ibid.*

³¹ C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 134; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 161.

³² IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §79.

³³ C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 134.

³⁴ *Ibid.*

indigenes. ³⁵ In this sense, the Court ruled in both the *Moiwana* and the *Saramaka* cases that indigenous rights applied to these people, who were the descendants of escaped African slaves, even though they were not “*indigenous to the region*,”³⁶ because they had developed a strong connection to the land.³⁷ In the latest judgment, the *Saramaka* case, the Court referred to the UNDRIP as an authoritative instrument for defining who indigenous peoples are.³⁸

17. In sum, the IACtHR has made it clear what it interprets the category of indigenous peoples to be, even without presenting an exhaustive definition. To identify the characteristics of indigenous peoples it has used numerous sources, like referring to habits of the specific indigenous peoples³⁹ and the UNDRIP.⁴⁰ The big difference with the ECtHR is probably explained by the pronounced presence of indigenous peoples and of NGOs and lobbying groups for indigenous persons in the region.⁴¹ For a long time, the American continent has been the territory where indigenous people have been most obviously and visibly present.

³⁵ T. ANTKOWIAK, “A Dark Side of Virtue: the Inter-American Court and Reparation for Indigenous Peoples” in *DJCIL* 2014, (1) 18; C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 134; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 161; G. PENTASSUGLIA, “Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence” in *Int’l Comm. L. Rev.* 2009, (185) 198.

³⁶ IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §79; IACtHR 15 June 2005, *Moiwana Community/Suriname*, *IACHR Series C* No. 124, §§132.

³⁷ IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §79; IACtHR 15 June 2005, *Moiwana Community/Suriname*, *IACHR Series C* No. 124, §§132-133; C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 134; G. PENTASSUGLIA, “Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence” in *Int’l Comm. L. Rev.* 2009, (185) 198 and 203.

³⁸ IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §93.

³⁹ IACtHR 25 November 2015, *Kaliña and Lokono Peoples/Suriname*, *IACHR Series C* No. 309, §152; IACtHR 27 June 2012, *Kichwa Indigenous People of Sarayaku/Ecuador*, *IACHR Series C* No. 245, §219; IACtHR 24 August 2010, *Xákmok Kásek Indigenous Community/Paraguay*, *IACHR Series C* No. 214, §176; IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §123; IACtHR 29 March 2006, *Sawhoyamaya Indigenous Community/Paraguay*, *IACHR Series C* No. 146, §124 and §212; IACtHR 17 June 2005, *Yakye Axa Indigenous Community/Paraguay*, *IACHR Series C* No. 125, §140.

⁴⁰ IACtHR 25 November 2015, *Kaliña and Lokono Peoples/Suriname*, *IACHR Series C* No. 309, §§180, 202 and 221; IACtHR 27 June 2012, *Kichwa Indigenous People of Sarayaku/Ecuador*, *IACHR Series C* No. 245, §§166 and 167, footnotes 217-218, §215; IACtHR 24 August 2010, *Xákmok Kásek Indigenous Community/Paraguay*, *IACHR Series C* No. 214, §18; IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §131.

⁴¹ R. L. BARSH, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?” in *HHRJ* 1994, (33) 72; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 421. See, for instance, the participation of various organisations in the eleventh session of the UNWGIP, Report of the Working Group on Indigenous Populations on its eleventh session (23 August 1993), *UN Doc. E/CN.4/Sub.2/1993/29* (1993), §§8-10.

§3. The African Commission of Human and Peoples' Rights

18. The applicability of the concept of 'indigenous peoples' to Africa has been contested for a long time. The African Charter of Human and Peoples' Rights makes no reference to indigenous peoples and originally the ACHPR denied that any indigenous peoples lived in Africa.⁴² It was said that "*We are all indigenous in Africa,*"⁴³ which undermined the possible application of the concept as referring to specific, marginalized groups.⁴⁴ More recently, there has been a shift in position of the ACHPR on this issue, voiced clearly for the first time in the 2005 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities.⁴⁵ In this, the African Commission moved away from the traditional point of view of 'indigenous peoples' necessarily also meaning 'original inhabitants', which all of the African people are, to interpreting 'indigenous people' more functionally in its own African context.⁴⁶ The new African interpretation of indigenous peoples included an emphasis on the fact that these peoples had experienced "*certain forms of inequalities and suppression*"⁴⁷ in the past. In its new interpretation 'indigenous peoples' refers to "*those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose*

⁴² African Charter on Human and Peoples' Rights (27 June 1981), *OAU Doc. CAB/LEG/67/3 rev.*, 21 I.L.M. 58 (1982); K. N. BOJOSI and G. M. WACHIRA, "Protecting Indigenous Peoples in Africa: An analysis of the Approach of the African Commission on Human and Peoples' Rights" in *AHRLJ* 2006, (382) 390; G. LYNCH, "Becoming Indigenous in the Pursuit of Justice: The African Commission on Human And Peoples' Rights and the Endorois" in *African Affairs* 2012, (24) 37; G. LYNCH, "Kenya's new indigenes: negotiating local identities in a global context" in *Nations and Nationalism* 2011, (148) 152; D. VINDING (ed.), *The Indigenous World 2001/2002*, Copenhagen, IWGIA, 2002, 453.

⁴³ C. BALDWIN and C. MOREL, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 135; D.L. HODGSON, "Becoming Indigenous in Africa" in *ASR* 2009, (1) 2-3; D. INMAN, "The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond" in *IIPJ* 2014, (1) 3.

⁴⁴ C. BALDWIN and C. MOREL, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 135; J. GILBERT, "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights" in *ICLQ* 2011, (245) 249; D.L. HODGSON, "Becoming Indigenous in Africa" in *ASR* 2009, (1) 2-3; D. INMAN, "The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond" in *IIPJ* 2014, (1) 3.

⁴⁵ ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, Copenhagen, Eks/Skolens Trykkeri, 2005, 121 p. See also ACHPR and IWGIA, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on indigenous peoples in Africa*, Copenhagen, Eks/Skolens Trykkeri, 2006, 12.

⁴⁶ J. GILBERT, "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights" in *ICLQ* 2011, (245) 250-251; D. INMAN, "The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond" in *IIPJ* 2014, (1) 4; G. LYNCH, "Becoming Indigenous in the Pursuit of Justice: The African Commission on Human And Peoples' Rights and the Endorois" in *African Affairs* 2012, (24) 26-27; ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, Copenhagen, Eks/Skolens Trykkeri, 2005, 90.

⁴⁷ ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, Copenhagen, Eks/Skolens Trykkeri, 2005, 86.

*very existence is under threat of extinction.*⁴⁸ The main element in the new African understanding of indigenous peoples is thus the marginalisation and suppression of certain groups.⁴⁹

19. Even though this criterion is the central one in the African context, it is certainly not the only one to identify indigenous peoples. In the Report of the IWGIA on Indigenous Populations/Communities, the IWGIA and the ACHPR identified four criteria for indigenesness, which the Commission then repeated in the Endorois case: “*occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; [and] an experience of subjugation, marginalization, dispossession, exclusion or discrimination.*”⁵⁰ This decision in the Endorois case, which was the first one to identify indigenous peoples in Africa, was clearly based on and influenced by the Saramaka case of the IACtHR.⁵¹ The Commission used a very similar reasoning in extending the definition to marginalized groups as the Inter-American Court had in its Saramaka case.
20. Originally, in the Report of 2005, these four elements “*that can be used in the identification of indigenous peoples*”⁵² were only mentioned as “*characteristics [...] useful for the work of this Working Group and for the further deliberations of the African Commission.*”⁵³ In the Endorois case, the Commission did not refer to these elements as ‘characteristics’ anymore, now calling them “*criteria for identifying indigenous peoples,*”⁵⁴ while it also presented some “*shared characteristics of African indigenous groups.*”⁵⁵ This subtle shift in vocabulary indicates a

⁴⁸ ACHPR and IWGIA, *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, Copenhagen, Eks/Skolens Trykkeri, 2005, 87.

⁴⁹ J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 250-251; D. INMAN, “The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond” in *IIPJ* 2014, (1) 4; G. LYNCH, “Becoming Indigenous in the Pursuit of Justice: The African Commission on Human And Peoples’ Rights and the Endorois” in *African Affairs* 2012, (24) 37-39; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 158.

⁵⁰ ACHPR 25 November 2009, No. 276/03, Endorois, §150; ACHPR and IWGIA, *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, Copenhagen, Eks/Skolens Trykkeri, 2005, 93.

⁵¹ ACHPR 25 November 2009, No. 276/03, Endorois, §§159-162; D. INMAN, D. CAMBOU and S. SMIS, “Evolving Legal Protection for Indigenous Peoples in Africa: Some Post-UNDRIP Reflections” *Aft. J. Int’l & Comp. L.* 2018, (339) 347; G. LYNCH, “Becoming Indigenous in the Pursuit of Justice: The African Commission on Human And Peoples’ Rights and the Endorois” in *African Affairs* 2012, (24) 37-39.

⁵² ACHPR and IWGIA, *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, Copenhagen, Eks/Skolens Trykkeri, 2005, 93.

⁵³ *Ibid.*, 95.

⁵⁴ ACHPR 25 November 2009, No. 276/03, Endorois, §150.

⁵⁵ *Ibid.*

growing determination of actually keeping these four elements of indigenesness as the main criteria before the ACHPR, and a movement towards an actual definition of indigenous peoples.⁵⁶

21. In conclusion, both the IACtHR and the ACHPR have moved away from ‘indigenous’ meaning ‘original inhabitant’ and moved towards a broad and functional definition of indigenesness, using criteria and characteristics to identify specific groups as being indigenous or not. This sits in stark contrast with the case law of the ECtHR, where the court seems to shy away from using the words and only mentions the broader concept of ‘minorities’.

SECTION II. EVOLUTIONS IN IOS REGARDING ‘INDIGENOUS PEOPLES’

22. International organisations have recently become the main playing field in advocating for indigenous peoples’ human rights. Ever since the start of the UN Working Group on Indigenous Populations in 1982, indigenous peoples have gained visibility in the international field, which they have been sure to keep, through participation in different NGOs and International organisations and through lobbying activities. This Section will discuss three important evolutions that took place with regard to the meaning of indigenous peoples in IOs and in their non-binding documents. Firstly, the participation of different groups of indigenous peoples in the UNWGIP will be discussed. Secondly, the evolution of the meaning of indigenous peoples under the Operational Manual of the World Bank will be examined. This definition of indigenous peoples might well be the broadest definition existing in the international field today. Thirdly, the discussion on the inclusion of a definition to the UNDRIP will be touched upon, along with an analysis of the definitional elements that are hidden within the Declaration.

§1. The representation of indigenous peoples in the UNWGIP

23. The UN Working Group on Indigenous Populations, where the UN Declaration on the Rights of Indigenous Peoples was drafted and accepted, was the first international working space where indigenous peoples were actually involved in drafting a declaration on their own rights. In this way, they also had an influence on who the declaration would apply to, and thus on who would be seen as indigenous peoples. This was a contentious issue, which will be discussed under §3 of this Section (*infra* 19, marginal 32 et seq.). Apart from this, the participation of different groups

⁵⁶ GILBERT actually goes as far as saying that the Endorois case of the ACHPR is “*the first legal decision to tackle this contentious issue [of] defining indigenous peoples in Africa.*” (J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 249-250) I do not agree that the Commission has actually defined ‘indigenous peoples’. It has offered criteria for identifying indigenous peoples, and is thus moving close to a definition, but until now has refrained from actually offering an exhaustive definition of what indigenous peoples are.

contending to be indigenous in the Working Group was also subject to a lot of disagreement. This paragraph will draw the main lines of these disputes and discuss the evolution in participation of indigenous peoples in the Working Group.

24. Originally, the UNWGIP consisted of indigenous peoples who had in common that they were pushed from their territories by white settler colonies. All of the attending indigenous groups were ‘pre-colonial inhabitants’, people that lived in a certain area and were then pushed away violently and marginalized by the colonizers.⁵⁷ This pre-colonial element is also visible in the MARTINEZ-COBO definition, which was used as a guideline for the meaning of indigenous peoples throughout the working period.⁵⁸ Then, in 1989, the first representatives of so-called ‘indigenous peoples’ from the African continent showed up. This was the first time that an African group alleged publicly that they were, indeed, indigenous peoples alike those from the West, and these claims were accepted by the other indigenous groups attending the UNWGIP.⁵⁹ They recognised that these African groups “*shared common histories, grievances, and structural positions within their nation-states.*”⁶⁰ Thus for the attending indigenous groups, shared experiences of marginalization trumped the criterion of colonization, which the African groups had not lived.

However, the acceptance of the African groups was not unequivocally welcomed. M. A. MARTINEZ, who had been appointed as the Special Rapporteur to study the question on treaties between states and indigenous peoples, did not agree. He was of the opinion that “*Asians and Africans were not indigenous and should instead bring their complaints to the newly formed U.N. Working Group on Minorities.*”⁶¹ Martinez’ position was that “*the term ‘indigenous’ should be reserved for cases of ‘organised colonisation, by European powers, of peoples inhabiting, since*

⁵⁷ D. SANDERS, “The UN Working Group on Indigenous Populations” in *HRQ* 1989, (406) 418-419; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 38; D.L. HODGSON, “Becoming Indigenous in Africa” in *ASR* 2009, (1) 1-2.

⁵⁸ D.L. HODGSON, “Becoming Indigenous in Africa” in *ASR* 2009, (1) 9-10; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 34; J.R. MARTINEZ COBO, “Study on the Problem of Discrimination against Indigenous Peoples”, New York, United Nations, 1986, *UN Doc. E/CN.4/Sub.2/1986/7/Add.4*, §379; Report of the Working Group on Indigenous Populations on its twelfth session (17 August 1994), *UN Doc. E/CN.4/Sub.2/1994/30* (1994), §57.

⁵⁹ D.L. HODGSON, “Becoming Indigenous in Africa” in *ASR* 2009, (1) 1-2.

⁶⁰ *Ibid.*, 2.

⁶¹ D.L. HODGSON, “Becoming Indigenous in Africa” in *ASR* 2009, (1) 7-8; Discrimination against indigenous peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous peoples. Second progress reports submitted by Mr. Miguel Alfonso Martinez, Special Rapporteur (31 July 1995), *UN Doc. E/CN.4/Sub.2/1995/27* (1995), §§100-102, 115-116, 118, 121 and 129.

time immemorial, territories on other continents”⁶² Nevertheless, notwithstanding this opinion, African groups were welcome to attend the Working Group.

25. A second upstirring at the Working Group happened in the 1990s, when two new African groups showed up: the Boers⁶³ and the Rehoboth Basters, both groups of European descent (white people) living in Africa. They both claimed to be indigenous groups. These groups were not accepted as easily as the other African indigenous peoples.⁶⁴ They are a mixture between original inhabitants of the region and the settlers.⁶⁵ It is thus possible to trace back the start of the existence of these groups to the 18th century, and even though the importance of a group being ‘pre-colonial’ was left aside, this seemed to be a bridge too far for most indigenous peoples. AUKERMAN has called the claim of these groups to indigenesness “egregiously false”,⁶⁶ while other authors have refrained from making their own judgment.⁶⁷ The reaction to the appearance of unwanted groups at the Working Group was that more attention started to be given to constructing a definition of indigenous peoples.⁶⁸ The groups were accepted as participants to the UNWGIP, which accepted not only the participation of indigenous groups but also of other stakeholders, but their status was

⁶² G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 158; Discrimination against indigenous peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous peoples. Second progress reports submitted by Mr. Miguel Alfonso Martinez, Special Rapporteur (31 July 1995), *UN Doc. E/CN.4/Sub.2/1995/27* (1995), §§100-102, 115-116, 118, 121 and 129.

⁶³ Also referred to as Afrikaners.

⁶⁴ F. M. NDAHINDA, “Marginality, Disempowerment and Contested Discourses on Indigenesness in Africa” in K. HENRARD (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation*, Leiden, Martinus Nijhoff Publishers, 2013, (333) 349. Additionally, the Report of the twelfth session of the working group reports, at §28, states: “During the twelfth session, the secretariat received a petition, signed by 82 indigenous participants, expressing concern about the participation of the Afrikaner Volksfront and the Rehoboth Baster Community because of alleged racist backgrounds.” (Report of the Working Group on Indigenous Populations on its twelfth session (17 August 1994), *UN Doc. E/CN.4/Sub.2/1994/30* (1994), §28).

⁶⁵ F. M. NDAHINDA, “Marginality, Disempowerment and Contested Discourses on Indigenesness in Africa” in K. HENRARD (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation*, Leiden, Martinus Nijhoff Publishers, 2013, (333) 346; R. NIEZEN, *The Origin of Indigenism: Human Rights and the Politics of Identity*, Berkeley, University of California Press, 2003, 21-22.

⁶⁶ M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1017.

⁶⁷ B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 441; F. M. NDAHINDA, “Marginality, Disempowerment and Contested Discourses on Indigenesness in Africa” in K. HENRARD (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation*, Leiden, Martinus Nijhoff Publishers, 2013, (333) 349; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 33.

⁶⁸ F. M. NDAHINDA, “Marginality, Disempowerment and Contested Discourses on Indigenesness in Africa” in K. HENRARD (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation*, Leiden, Martinus Nijhoff Publishers, 2013, (333) 349; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 33.

not very clear: during the subsequent sessions of the Working Group, the groups were alternately listed under ‘indigenous peoples’ and other categories.⁶⁹

26. Lastly, an interesting comment that underscores that there were obvious differences in opinion on the participation of some groups to the Working Group on Indigenous Peoples, is the following – unofficial – comment made by chairperson DAES in the fifteenth session: “*Wishes to clarify a point, particularly of concern to the Russian and African speakers. Says that this Working Group deals only with the subjects related to indigenous peoples and says that the United Nations has created another Working Group on minorities which meets annually. Suggests and kindly advises the groups that if their concerns are related to minorities, they have to attend the other Working Group. Notes that next year, they will be more strict in identifying indigenous groups participating in the session.*”⁷⁰ The exact context in which this comment was made is unclear. It might have been directed at one of a number of previous speakers, including the Nenets,⁷¹ the Evenki⁷² and the Dolgans⁷³ of Russia.⁷⁴

⁶⁹ F. M. NDAHINDA, “Marginality, Disempowerment and Contested Discourses on Indigeness in Africa” in K. HENRARD (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation*, Leiden, Martinus Nijhoff Publishers, 2013, (333) 349, footnote 81. The Rehoboth Basters were listed under ‘indigenous peoples organisations, as well as other nations and groups’ in the eleventh and fourteenth sessions, and under ‘organisations and groups’ in the twelfth and thirteenth sessions. From the fourteenth session on, they were always listed under ‘indigenous peoples organisations, as well as other nations and groups’ (Report of the Working Group on Indigenous Populations on its eleventh session (23 August 1993), *UN Doc. E/CN.4/Sub.2/1993/29* (1993), §9; Report of the Working Group on Indigenous Populations on its twelfth session (17 August 1994), *UN Doc. E/CN.4/Sub.2/1994/30* (1994), §12; Report of the Working Group on Indigenous Populations on its thirteenth session (10 August 1995), *UN Doc. E/CN.4/Sub.2/1995/24* (1995), §10; Report of the Working Group on Indigenous Populations on its fourteenth session (16 August 1996), *UN Doc. E/CN.4/Sub.2/1996/21* (1996), §11; Report of the Working Group on Indigenous Populations on its fifteenth session (13 August 1997), *UN Doc. E/CN.4/Sub.2/1997/14* (1997), §12; Report of the Working Group on Indigenous Populations on its sixteenth session (19 August 1998), *UN Doc. E/CN.4/Sub.2/1998/16* (1998), §10; Report of the Working Group on Indigenous Populations on its seventeenth session (12 August 1999), *UN Doc. E/CN.4/Sub.2/1999/19* (1999), §12; Report of the Working Group on Indigenous Populations on its eighteenth session (17 August 2000), *UN Doc. E/CN.4/Sub.2/2000/24* (2000), annex I; etc.).

⁷⁰ Citation from M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1021. The author cited from a document on the website of the Unrepresented Nations and Peoples Organisation, which has been taken offline since then (See www.unpo.org).

⁷¹ The Nenets are an indigenous people from the northwest of Russia that speaks its own language, Samoyedic. They are divided into two groups: the Tundra Nenets, who are reindeer pastoralists, fishermen and hunters, and the Forest Nenets, who are a much smaller group who dwells in the forests. (EB EDITORS, “Nenets” in *Britannica Academic, Encyclopædia Britannica*, 12 September 2018, www.britannica.com/topic/Nenets-people (consultation 30 April 2019)).

⁷² The Evenki are a scattered group of indigenous people in northern Siberia in Russia. They are partly hunters and reindeer breeders, partly horse and cattle pastoralists. (EB EDITORS, “Evenk” in *Britannica Academic, Encyclopædia Britannica*, 26 December 2013, www.britannica.com/topic/Evenk-people (consultation 30 April 2019)).

⁷³ The Dolgans live above the arctic circle in north-central Russia. They descend from a few Evenki that left their own society to form another one. Their language is Sakha. They are reindeer herders, but they also have vegetable gardens and practice traditional game hunting. (EB EDITORS, “Dolgan” in *Britannica Academic, Encyclopædia Britannica*, 15 February 2016, www.britannica.com/topic/Dolgan (consultation 30 April 2019)).

⁷⁴ M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1021.

27. What all of these examples have demonstrated is that, even in the UNWGIP and among the indigenous peoples themselves, there is no agreement on who should be accepted as an indigenous people and who should not. While the African groups were accepted by the other indigenous groups, there was clear resistance from special rapporteur MARTINEZ to include them. Furthermore, while the definition was easily stretched for the first African groups, a later attempt at participation from other African groups was not welcomed. These events go to the heart of the problem by pointing out the ambiguity in deciding which groups are indigenous and which are not, while also raising important questions as to why some distinctions should or should not be made, why some people should be included and others excluded, and to what degree these distinctions might be arbitrary.

§2. The World Bank

28. In the field of international organisations, two important definitions of indigenous peoples have been set up. The first one is the definition the ILO set up in its ILO Convention 169 of 1989,⁷⁵ which will be discussed later, under ‘authoritative definitions’ (*infra* 21, marginal 36). The other definition is the one set up by the World Bank in its operational policies, which has been edited and updated throughout the years.⁷⁶ This definition does not have any legal effect and was originally only meant as an internal document, but has aroused the interest of various authors and groups because of its broad criteria in defining indigenesness.⁷⁷
29. The World Bank first started taking an interest in indigenous peoples in 1982, around the same time the UNWGIP started its sessions. Already in the first document of 1982, the World Bank was progressive in its viewpoints. In the document ‘Economic Development and Tribal Peoples: Human Ecologic Considerations,’ the Bank *inter alia* determined they would “*not support*

⁷⁵ Art. 1 Treaty No. 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989, International Labour Organisation, www.ilo.org.

⁷⁶ See (old to new) Operational Directive Indigenous Peoples of the World Bank (September 1991), *OD 4.20*, 1, §5; Operational Manual OP 4.10 – Indigenous Peoples of the World Bank (July 2005), *OP 4.10*, 1-2, §§3-4; WORLD BANK, *The World Bank Environmental and Social Framework*, Washington, World Bank, 2016, 77, §§8-9 (current definition).

⁷⁷ M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1015; R. L. BARSH, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?” in *HHRJ* 1994, (33) 81; J. GILBERT and C. DOYLE, “A New Dawn over the Land: Shedding Light on Collective Ownership and Consent,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (289) 293; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 443; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 158; B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 105; P. THORBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 51.

*projects on tribal lands, or that will affect tribal lands, unless the tribal society is in agreement with the objectives of the project, as they affect the tribe.”*⁷⁸ However, the subsequent internal policy directive of the same year did not integrate these principles, turning out a lot weaker than the preceding document.⁷⁹

In 1991 a revision for the internal policy directive was made in the adoption of Operational Directive 4.20 on Indigenous Peoples, which included a very progressive and functional definition of indigenous peoples, placing the vulnerability of the group at the heart of it.⁸⁰ This Operational Directive was subsequently replaced by Operational Manual 4.10, which generally kept this definition and put an emphasis on the fact that indigenous peoples can be referred to by many terms, and that the Manual was intending to include all of those groups, as long as they fit the criteria.⁸¹ Aside from this, another difference between the two definitions⁸² is that the newer version also includes the element of collectiveness, which was lacking from the first one.⁸³

30. Recently, in 2018, the World Bank revised its definition again. The current definition of indigenous peoples used by the World bank is the following:

“[8. T]he term “Indigenous Peoples/SubSaharan African Historically Underserved Traditional Local Communities” (or as they may be referred to in the national context using an alternative terminology) is used in a generic sense to refer exclusively to a distinct social and cultural group possessing the following characteristics in varying degrees:

(a) Self-identification as members of a distinct indigenous social and cultural group and recognition of this identity by others; and

⁷⁸ F. MACKAY, “Universal Rights or a Universe unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples” in *Am. U. Int’l L. Rev.* 2003, (527) 583; R. GOODLAND, *Tribal Peoples and Economic Development: Human Ecologic Considerations*, Washington, International Bank for Reconstruction and Development, 1982, 3.

⁷⁹ F. MACKAY, “Universal Rights or a Universe unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples” in *Am. U. Int’l L. Rev.* 2003, (527) 583-584.

⁸⁰ M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1016; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 443; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 51; Operational Directive Indigenous Peoples of the World Bank (September 1991), *OD 4.20*, 1, §5.

⁸¹ Operational Manual OP 4.10 – Indigenous Peoples of the World Bank (July 2005), *OP 4.10*, 1-2, §§3-4. Compare Operational Directive Indigenous Peoples of the World Bank (September 1991), *OD 4.20*, 1, §5.

⁸² The text of Operational Manual 4.10 explicitly underscores that it is not intended to be a definition of indigenous peoples. Even so, I will call these ‘identification criteria’ definitions (Operational Manual OP 4.10 – Indigenous Peoples of the World Bank (July 2005), *OP 4.10*).

⁸³ Operational Manual OP 4.10 – Indigenous Peoples of the World Bank (July 2005), *OP 4.10*, 1-2, §4. Compare Operational Directive Indigenous Peoples of the World Bank (September 1991), *OD 4.20*, 1, §5.

(b) *Collective attachment to geographically distinct habitats, ancestral territories, or areas of seasonal use or occupation, as well as to the natural resources in these areas; and*

(c) *Customary cultural, economic, social, or political institutions that are distinct or separate from those of the mainstream society or culture; and*

(d) *A distinct language or dialect, often different from the official language or languages of the country or region in which they reside.*

9. *This ESS also applies to communities or groups of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities who, during the lifetime of members of the community or group, have lost collective attachment to distinct habitats or ancestral territories in the project area, because of forced severance, conflict, government resettlement programs, dispossession of their land, natural disasters, or incorporation of such territories into an urban area. This ESS also applies to forest dwellers, hunter-gatherers, pastoralists or other nomadic groups, subject to satisfaction of the criteria in paragraph 8.*⁸⁴

The biggest differences between this definition and the previous one are first, that the current definition also explicitly refers to the possibility that the attachment to the territory is lost and second, that nomadic groups also fall under the definition.

31. In sum, the World Bank never put great emphasis on the criterion of ‘original inhabitants’ in its definition and over the years this criterion has lost its importance entirely. With nomads also falling under this definition, it has become a very broad one, encompassing a whole range of different minority⁸⁵ groups. In developing these extensive definitions, the World Bank has been of great influence in the discussions on identifying who are and who are not indigenous peoples, and has put on the map the question of why we should exclude some groups and include others, when they are all equally marginalized and vulnerable.⁸⁶

⁸⁴ WORLD BANK, *The World Bank Environmental and Social Framework*, Washington, World Bank, 2016, 77, §§8-9.

⁸⁵ But not necessarily minorities in number, as the criteria do not require this.

⁸⁶ See, for instance, M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1015-1016; R. L. BARSH, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?” in *HHRJ* 1994, (33) 81; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 418-419 and 454; A. KUPER, “The Return of the Native” in *Current Anthropology* 2003, (389) 395; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 158; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 51; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 45-46.

§3. Defining indigenous peoples in the UNDRIP

32. As has been briefly touched upon in the first paragraph of this Section, in drafting the UNDRIP the Working Group disagreed on the necessity of including a definition in the Declaration. This discussion was also facilitated by the fact that more and more non-traditional ‘indigenous’ groups started participating in the debate, claiming to be indigenous. Generally, the ‘traditional indigenous groups’ were opposed to including a definition, fearing that this would restrict the possibility of different peoples to claim indigenous status. The ‘non-traditional indigenous groups’ on the other hand favoured the idea of including a definition, reasoning that it would enhance their claims in their own country of being indigenous if they had a UN definition to support them, even if it was not binding.⁸⁷ At some points in time, the traditional indigenous groups also favoured a definition, in order to be able to exclude some groups that they did not regard as indigenous.⁸⁸ In the end, the Declaration was adopted without a definition.
33. Even though the UNDRIP lacks an official definition of indigenous peoples, some legal scholars assert that it is possible to extract ‘definitional elements’ from the declaration, constructing something close to a definition or criteria from the text by using a deductive method.⁸⁹ ANAYA, former UN Special Rapporteur on the Rights of Indigenous Peoples (2008-2014) contends that the common characteristics to be deducted from the Declaration are:
- a. That they have suffered doctrines, policies and practices “*based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences;*”⁹⁰

⁸⁷ E. PULITANO, “Indigenous rights and international law: an introduction” in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (1) 11; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 43; Draft report of the second session of the Working Group established in accordance with the Commission on Human Rights Resolution 1995/32 of 3 March 1995 (1 November 1996), *UN Doc. E/CN.4/1996/WG.15/CRP.7* (1996); M. VRANCKEN, *Onderzoeksvoorstel Masterscriptie Deel I*, 2018, not published, 3, §7.

⁸⁸ F. M. NDAHINDA, “Marginality, Disempowerment and Contested Discourses on Indigeness in Africa” in K. HENRARD (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation*, Leiden, Martinus Nijhoff Publishers, 2013, (333) 349. See also Report of the Working Group on Indigenous Populations on its twelfth session (17 August 1994), *UN Doc. E/CN.4/Sub.2/1994/30* (1994), §28.

⁸⁹ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 29 and 58-60; C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 134.

⁹⁰ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 59. Citation originally from the fourth preambular paragraph of the UN Declaration on the Rights of Indigenous Peoples (13 September 2007), *UN Doc. A/RES/61/295* (2007).

- b. That their right of self-determination has historically been denied,⁹¹ thus implying a claim to self-determination;
- c. That their lands, territories and resources are of crucial importance to them, and that they have a distinctive spiritual relationship to them, which justifies a specific set of land rights;⁹²
- d. Self-identification as indigenous;⁹³ and
- e. That they are “*groups displaying specific features as to their organization, political and economic institutions, culture, beliefs, customs and language, other than those of dominant society*”⁹⁴

He and others argue that the lack of definition of the Declaration should not be seen as a liability but as an asset, seeing that it is rather easy to subtract the common criteria and that by leaving out a definition it is possible to “*afford the flexibility necessary to accommodate the various expressions and characteristics of indigenous peoples worldwide.*”⁹⁵

34. In sum, a lot of evolutions have taken place at the level of international organisations, questioning both the necessity and added value of a definition and the possible reasons for excluding certain groups.

SECTION III. AUTHORITATIVE DEFINITIONS AND COMMON ELEMENTS

35. Throughout the discussion on whether or not to provide for a definition for indigenous peoples, a lot of authors have had their say in what they believe should be the definition to apply to indigenous peoples. Throughout these arguments, two definitions are commonly presented as authoritative definitions, namely the definition of ILO Convention 169 and the MARTINEZ COBO definition. Some authors accept one of these without further consideration, while others provide nuances or add different opinions on the elements. Still other authors argue for not defining indigenous peoples, but instead providing a set of characteristics or more fluid ‘indicia’ for identifying indigenous peoples. In seeking the ‘right’ definition for indigenous peoples, these

⁹¹ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 59.

⁹² *Ibid.*, 62.

⁹³ *Ibid.*, 64.

⁹⁴ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 64.

⁹⁵ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 29; C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 137. Contra: E. PULITANO, “Indigenous rights and international law: an introduction” in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (1) 11.

academic points of view are also important to consider. In this section, first an overview will be given of the authoritative definitions. Secondly and lastly, the common elements that most legal scholars seem to find important will be identified.

§1. Authoritative definitions

A. ILO Convention 169

36. ILO Convention 169 of 1989 defines indigenous peoples in its first article. This definition, which is the only existing internationally binding definition of indigenous peoples,⁹⁶ is accepted by most authors as an important source for the key elements to defining indigenous peoples.⁹⁷ Article 1 of the Convention states the following:

“1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or 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.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”⁹⁸

⁹⁶ Even though the convention does not have a wide reach, since it has only been ratified by 22 countries. Luxemburg will be the 23rd country, with the entry into force of the ratification convention on 5 June 2019. (INTERNATIONAL LABOUR ORGANIZATION, *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (consultation 28 March 2019).

⁹⁷ G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *the ASIL* 1998, (414) 440; B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 105; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 38; S. TORRECUDRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 39.

⁹⁸ Art. 1 Treaty No. 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989, International Labour Organisation, www.ilo.org.

In providing a subjective criterion of self-identification next to the objective criteria of paragraph one, this convention was innovative in its time.⁹⁹ One important element of this definition is that people who fall under this article will be regarded as indigenous, “*irrespective of their legal status.*” With this, the Convention refers to the lack recognition of certain states of indigenous peoples and wishes to avoid this problem in applying the convention.¹⁰⁰ Another interesting element is that this Convention puts cultural distinctiveness at the centre of attention as a relevant criterion for identifying indigenous peoples.¹⁰¹

B. The Martinez Cobo definition

37. At the root of the WGIP lies a document set up by J.R. MARTINEZ COBO, named ‘The Problem of Discrimination against Indigenous Peoples.’¹⁰² In this extensive document MARTINEZ COBO investigated the situation of indigenous peoples around the world, for which he needed to identify the specific characteristics of this particular group.¹⁰³ Therefore, in his study, he came up with a working definition:

“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.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- 1. Occupation of ancestral lands, or at least of part of them;*
- 2. Common ancestry with the original occupants of these lands;*

⁹⁹ B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 440-441; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 39.

¹⁰⁰ B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 443.

¹⁰¹ G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 51.

¹⁰² D. SANDERS, “The UN Working Group on Indigenous Populations” in *HRQ* 1989, (406) 406-407.

¹⁰³ J.R. MARTINEZ COBO, “Study on the Problem of Discrimination against Indigenous Peoples”, New York, United Nations, 1986, *UN Doc. E/CN.4/Sub.2/1986/7/Add.4*.

3. *Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);*
4. *Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);*
5. *Residence on certain parts of the country, or in certain regions of the world;*
6. *Other relevant factors.*

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.”¹⁰⁴

An important emphasis of this definition lies in ‘historical continuity’, meaning that the people are original inhabitants of the region. In this sense, the definition talks about ‘pre-invasion and precolonial societies’. The indigenous peoples that fit this criterion would be described as ‘traditional indigenous peoples’ as opposed to non-traditional indigenous peoples.¹⁰⁵

38. This definition, set up in 1983, was the most generally accepted definition of indigenous peoples for a long time.¹⁰⁶ It still has an authoritative quality, even though most authors regard the ‘pre-invasion and pre-colonial’ element as outdated.¹⁰⁷

¹⁰⁴ J.R. MARTINEZ COBO, “Study on the Problem of Discrimination against Indigenous Peoples”, New York, United Nations, 1986, *UN Doc. E/CN.4/Sub.2/1986/7/Add.4*, §379.

¹⁰⁵ M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1021; W. KYMLICKA, “Beyond the Indigenous/Minority Dichotomy?” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 184.

¹⁰⁶ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 28; F.M. BROOKFIELD (ed.), *Treaties and Indigenous Peoples: The Robb Lectures*, Oxford, Clarendon Press, 1992, 59; J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 250; J. GILBERT, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors*, Ardsley, Transnational Publishers, 2006, xvi; B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 105; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 38; S. TORRECUDRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 41.

¹⁰⁷ J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 250; D.L. HODGSON, “Becoming Indigenous in Africa” in *ASR* 2009, (1) 9-10; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian

§2. Common elements

39. Before analysing the common elements used by different authors in their approaches to defining indigenous peoples, there are two important things to note. The first is that, over the years, the general conception of who is – or who should be – indigenous has changed. Because of a broad international forum for discussion and interactions among legal scholars, for most authors the concept has changed from a focus on ‘who came first’ to a focus on marginalised groups, with an emphasis on protecting those who have suffered discrimination and marginalisation in the past.¹⁰⁸ Therefore, generally, older definitions by legal scholars will not be taken into account, or at least less weight will be given to their references to a ‘degree of nativeness’. Secondly, not all authors actually define indigenous peoples. Some prefer to use characteristics in an attempt not to be too strict in their definition¹⁰⁹ and others still use ‘indicia’ and indicate the degree of relevance of different indicia to identifying indigenous peoples, thus making different categories of ‘characteristics’, each with a different weight.¹¹⁰ Although it is important that authors consider the idea that not all characteristics should be present or be apportioned the same weight, to the present author, making a definition or identifying characteristics is essentially the same. In the first, the outcome is a sentence that identifies relevant criteria for identifying the group in question, of which all or only a number could be essential for the group to fall under the definition. For characteristics the emphasis is somewhere else, namely on the fact that not all characteristics are necessarily applicable to a group in order to be defined as such, but essentially the outcome is equivalent to providing a definition. Therefore, no attention will be given to authors’ distinction in providing for a definition or characteristics of some kind, except for the mention that an author intends all of the criteria to be present or only some.
40. The following elements in the definitions of the different authors keep on reoccurring:

Controversy” in *ASIL* 1998, (414) 454; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 34.

¹⁰⁸ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 33; C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 137; J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 250.

¹⁰⁹ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 33.

¹¹⁰ M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1047; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 415; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 56.

1. Cultural distinctiveness.¹¹¹ Indigenous peoples have cultures that are distinct from mainstream society and are under threat because of their distinctiveness.¹¹² Indigenous peoples want to pass on their culture to next generations, but there is a risk that this culture might be lost;¹¹³
2. A special connection to their land and resources.¹¹⁴ This connection is cultural, social and spiritual but also essential for their physical survival as indigenous peoples;¹¹⁵
3. Experiences of marginalisation and discrimination;¹¹⁶

¹¹¹ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34; C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 133; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 421; S. KIRCHNER, “Conceptions of Indigenousness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 171; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 156; S. P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55; TORRECADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47.

¹¹² S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34; S. KIRCHNER, “Conceptions of Indigenousness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 171.

¹¹³ C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 133; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 56; S. TORRECADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47.

¹¹⁴ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34; J. GILBERT and C. DOYLE, “A New Dawn over the Land: Shedding Light on Collective Ownership and Consent,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (289) 289; J. GILBERT, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors*, Ardsley, Transnational Publishers, 2006, xvii; G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 421; S. KIRCHNER, “Conceptions of Indigenousness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 171; E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 394; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55; A. TOMASELLI, “Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change” in *European Yearbook of Minority Issues Online* 2017, (37) 39.

¹¹⁵ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34; J. GILBERT and C. DOYLE, “A New Dawn over the Land: Shedding Light on Collective Ownership and Consent,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (289) 289; E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 394.

¹¹⁶ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34; C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 133 and 137; B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 421; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 156.

4. Self-identification as indigenous.¹¹⁷ This is a dual criterion: the group has to collectively identify as an indigenous people¹¹⁸ and the individual has to identify as part of this group, being indigenous.¹¹⁹

These four elements seem to be core elements mentioned by most authors trying to provide an exhaustive definition. Thus, there seems to be relative consensus between legal scholars that all indigenous peoples fit into at least these four criteria. But, apart from this, different authors mention different characteristics.

41. One of the characteristics mentioned by quite a few authors is that indigenous peoples need to descend from pre-invasion societies.¹²⁰ For most of the authors who mention this element, this is a crucial criterion.¹²¹ Only a few point to this criterion as an optional characteristic.¹²² Other authors, like STAVENHAGEN and GILBERT, explicitly reject the pre-invasion criterion.¹²³

¹¹⁷ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34; M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, 1016; C. BALDWIN and C. MOREL, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 133; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47-48.

¹¹⁸ M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1016; C. BALDWIN and C. MOREL, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 133; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55.

¹¹⁹ M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1016; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47-48.

¹²⁰ J. IGOE, "Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics" in *African Affairs* 2006, (399) 400; G. LYNCH, "Kenya's new indigenes: negotiating local identities in a global context" in *Nations and Nationalism* 2011, (148) 156; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47-48; WIESSNER, "Self-determination, culture, and land," in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (31) 50-51.

¹²¹ J. IGOE, "Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics" in *African Affairs* 2006, (399) 400; G. LYNCH, "Kenya's new indigenes: negotiating local identities in a global context" in *Nations and Nationalism* 2011, (148) 156; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47-48; WIESSNER, "Self-determination, culture, and land," in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (31) 50-51.

¹²² P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55.

¹²³ C. BALDWIN and C. MOREL, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 137; J. GILBERT, "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights" in *ICLQ* 2011, (245) 250; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen of the Commission on Human Rights (16 February 2006), *UN Doc. E/CN.4/2006/78* (2006).

Another characteristic that is mentioned by some authors is historical continuity.¹²⁴ This criterion is similar to the pre-invasion criterion but it is not the same. The most important difference is that ‘historical continuity’ does not imply invasion or colonialism, and thus could apply to groups in, for instance, Africa or Asia, where no invasions took place.¹²⁵ The relevance of this criterion is also contested.¹²⁶

Furthermore, a range of other criteria is listed. In this sense, TORRECUADRADA and KINGSBURY make a reference to elements such as a common language and history.¹²⁷ DAES mentions that indigenous peoples need to be recognised as such by other indigenous groups.¹²⁸ THORNBERRY refers to a communal sense.¹²⁹ ANAYA and KIRCHNER both point to the fact that indigenous peoples are subject to domination and exploitation by the majority.¹³⁰ This element is mentioned as an additional element apart from discrimination and marginalisation. Moreover ANAYA mentions that indigenous peoples often live in inaccessible regions.¹³¹ In addition, DAES and THORNBERRY both refer to the occupation and use of a specific territory by indigenous peoples.¹³² TORRECUADRADA has a different point of view on this matter: she suggests that indigenous peoples can also be nomads or peoples excluded from their original land, as long as there is still a connection to those original lands.¹³³

42. As was demonstrated, although a range of different authors uses a range of different elements or criteria in defining indigenous peoples, there seem to be four criteria on which there is some kind

¹²⁴ B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 455; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55.

¹²⁵ J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 250;

¹²⁶ P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 56.

¹²⁷ B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 421; S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47-48.

¹²⁸ C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 133.

¹²⁹ P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55.

¹³⁰ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34; S. KIRCHNER, “Conceptions of Indigenusness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 171.

¹³¹ S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 34.

¹³² C. BALDWIN and C. MOREL, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (121) 133; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 55; Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes on the Prevention of Discrimination and Protection of Indigenous Peoples and Minorities. Indigenous peoples and their relationship to land by the Commission on Human Rights (11 June 2001), *UN Doc. E/CN.4/Sub.2/2001/21* (2001), §§12-13.

¹³³ S. TORRECUADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 47-48.

of consensus among legal scholars. These criteria are cultural distinctiveness, a special connection to land and resources, experiences of marginalisation and discrimination, and self-identification as indigenous.

CHAPTER II. INDIGENOUS PEOPLES: A DEFINITION

43. After giving an extensive overview of the conception of indigenous peoples in regional human rights systems, of the evolutions regarding indigenous peoples in international law, and of the stances that different legal scholars have taken in respect to the definition of indigenous peoples, now a definition of indigenous peoples is given, taking all of these elements into account. First there will be an explanation of why the choice is made to define indigenous peoples for this work. Secondly, the methodology on how the definition is set up will be explained. Thirdly, a definition will be given. This will be done considering all relevant elements of the previous sections, in which different definitions and conceptions of who indigenous peoples are were discussed.

SECTION I. WHY DEFINE?

44. There is an ongoing discussion on whether a definition of indigenous peoples should exist.¹³⁴ The UNDRIP was passed without including a definition.¹³⁵ On the one hand there is a fear of excluding some groups of possibly indigenous peoples when making a definition that would not include all people identifying as indigenous peoples,¹³⁶ and on the other hand there is a fear of designing a definition that would be too broad and thus include a whole range of groups that would not typically be seen as indigenous.¹³⁷ An important thing to note here is that the African indigenous peoples were originally ‘not typically seen as indigenous’,¹³⁸ but they are now very broadly accepted as indigenous peoples throughout the world.¹³⁹ Conceptions of who is and who is not indigenous can change over time. Another objection to designing a definition of indigenous peoples is that a risk exists that, by defining the characteristics of indigenous peoples, attention is

¹³⁴ S. TORRECUADRADA GARCIA-LOZANO, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 43; Draft report of the second session of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 (1 November 1996), *UN Doc. E/CN.4/1996/WG.15/CRP.7* (1996); M. VRANCKEN, *Onderzoeksvoorstel Masterscriptie Deel I*, 2018, not published, 3, §7.

¹³⁵ UN Declaration on the Rights of Indigenous Peoples (13 September 2007), *UN Doc. A/RES/61/295* (2007).

¹³⁶ Report of the Working Group on Indigenous Populations on its fourteenth session (16 August 1996), *UN Doc. E/CN.4/Sub.2/1996/21* (1996), §28 and §31.

¹³⁷ P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 57-58. See also BARSH on the World Bank definition being too broad: R. L. BARSH, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?” in *HHRJ* 1994, (33) 81.

¹³⁸ African Charter on Human and Peoples’ Rights (27 June 1981), *OAU Doc. CAB/LEG/67/3 rev.*, 21 I.L.M. 58 (1982). K. N. BOJOSI and G. M. WACHIRA, “Protecting Indigenous Peoples in Africa: An analysis of the Approach of the African Commission on Human and Peoples’ Rights” in *AHRLJ* 2006, (382) 390; G. LYNCH, “Becoming Indigenous in the Pursuit of Justice: The African Commission on Human And Peoples’ Rights and the Endorois” in *African Affairs* 2012, (24) 37; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 152; D. VINDING (ed.), *The Indigenous World 2001/2002*, Copenhagen, IWGIA, 2002, 453.

¹³⁹ J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 248-249; D.L. HODGSON, “Becoming Indigenous in Africa” in *ASR* 2009, (1) 1-2.

lost to the fact that indigenous peoples also change over time.¹⁴⁰ Being indigenous does not mean some preservationist form of keeping the culture and all the details exactly as they are: indigenous peoples, too, can be influenced by passing time and modern society. By defining indigenous peoples, some of this “*fluidity and dynamism*”¹⁴¹ could be lost.

45. This dissertation argues that the risks that a definition poses do not outweigh the advantages. On the contrary: the biggest and clearest advantage of defining indigenous peoples is clarity.¹⁴² Currently, the European Court of Human Rights, for instance, does not refer to indigenous peoples as a specific group. The Court has used the word ‘indigenous’ several times, but never in actually referring to indigenous peoples. In the Working Group on Indigenous Populations, several incidents took place regarding indigenous groups that sometimes were, and sometimes were not accepted as indigenous peoples. On the one hand, a clear definition of indigenous peoples would have made these situations of who to accept and who not to accept easier. On the other hand, the lack of definition facilitated a broadening conception of indigenous peoples, moving away from the pre-invasion criterion. The debate of the past thirty years has substantially broadened the conception of indigenous peoples, now including a lot of groups that were excluded in those days. In providing for a definition that is sufficiently broad, it is now possible to answer both the concern that some groups would be excluded, and the concern that the definition might be too rigid and not allow cultural evolutions among indigenous peoples. While the unclarity may have helped the cause of indigenous peoples in the past, it seems that the lack of definition now comes in the way of effectively protecting this widened group of indigenous peoples.¹⁴³ After the broadening of the concept, it is now time to clearly identify who these protected groups are, to ensure they can enjoy

¹⁴⁰ B. KINGSBURY, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy” in *ASIL* 1998, (414) 414.

¹⁴¹ *Ibid.*

¹⁴² See K. LEHMANN, “To Define or Not to Define - The Definitional Debate Revisited” in *Am. Indian L. Rev* 2007, (509) 515. On the lack of clarity on indigenes in the African context, see J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 254. On the lack of clarity in the distinction between minorities and indigenous peoples, see W. KYMLICKA, “Beyond the Indigenous/Minority Dichotomy?” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 203; E. PULITANO, “Indigenous rights and international law: an introduction” in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (1) 12; I. SCHULTE-TENCKHOFF, “Treaties, peoplehood, and self-determination: understanding the language of indigenous rights”, in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (64) 69; E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 394.

¹⁴³ Of a similar opinion are G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 163; Indigenous representatives in Report of the Working Group on Indigenous Populations on its fourteenth session (16 August 1996), *UN Doc. E/CN.4/Sub.2/1996/21* (1996), §34.

the protection that they have advocated for. Without a clear definition of indigenous peoples, these groups may continue to be marginalised by states.¹⁴⁴

46. The lack of definition has also facilitated the lack of clarity in the distinction between minorities and indigenous peoples. A lot of authors contrast these groups with each other, just as the UN system does.¹⁴⁵ That indigenous peoples and minorities would be opposed groups is a misconception, fuelled by the fact that some (predominantly American) indigenous peoples themselves oppose to being called minorities.¹⁴⁶ In this context, AUKERMAN gives a plausible explanation of why this distinction was and is so important. The author states that this has to do with the fact that minorities in the American continent are only entitled to *integrationist*¹⁴⁷ minority rights that focus on adapting to a new culture and that, concerning this group, differentiated treatment in the context of non-discrimination is rejected.¹⁴⁸ Indigenous peoples on the other hand, have struggled and found their way to better and more inclusive rights.¹⁴⁹ While minority rights thus imply rights to effectively integrate into mainstream society and not to maintain a distinctive culture, indigenous peoples' rights on the American continent are exactly

¹⁴⁴ See, in this respect, on the advantage of having a definition, B. KINGSBURY, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" in *ASIL* 1998, (414) 415.

¹⁴⁵ E. STAMATOPOULOU, "Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples," in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 394.

¹⁴⁶ M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1019-1020.

¹⁴⁷ This word was chosen to illustrate the particularities of the typical American minority rights. Integrationist can be understood as opposed to 'pluralist', in which the society not so much wants the new groups to adapt, but will accept the groups as they are, with their differences.

¹⁴⁸ M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1029-1030; G. PENTASSUGLIA, "Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence" in *Int'l Comm. L. Rev.* 2009, (185) 189-190. AUKERMAN explains that the American view is one of assimilation of cultures, focussed on voluntary immigrants who should adapt when intending to live on the continent. In this respect, AUKERMAN states: "Given the perception that immigrants are choosing to join a new culture, high immigration rates have contributed to an integrationist, non-discriminatory approach to minority rights." (M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1029-1030).

¹⁴⁹ D.L. HODGSON, "Becoming Indigenous in Africa" in *ASR* 2009, (1) 7-8; I. SCHULTE-TENCKHOFF, "Treaties, peoplehood, and self-determination: understanding the language of indigenous rights", in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (64) 73. There is thus a fear from the side of indigenous people that including minorities in their plight will have the effect that their rights will be diminished. This is because, as KYMLICKA has explained, "[t]he UN has attempted to create a legal firewall between the rights of indigenous peoples and national minorities. This firewall was needed to get the indigenous track off the ground, but it is at odds with the moral logic of multiculturalism, and is politically unsustainable." In short, the indigenous peoples movement struggled for their rights. (W. KYMLICKA, "Beyond the Indigenous/Minority Dichotomy?" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 207) See also M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1019; E. PULITANO, "Indigenous rights and international law: an introduction" in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (1) 11-12.

this: rights to protect indigenous culture and its distinctions with mainstream society. The minority-indigenous peoples dichotomy is hard to understand from a European perspective. In Europe, minorities enjoy non-discrimination rights with a cultural accentuation that do include the possibility of differentiated treatment,¹⁵⁰ which should theoretically be equally satisfying as indigenous peoples' rights. Moreover, there is no doubt about the reality that minorities are a broader category in which indigenous peoples are one group.¹⁵¹ By making a clear definition regarding indigenous peoples, this misunderstanding can also be abandoned.

47. This discussion also indicates a downside to giving a broad interpretation to the term 'indigenous peoples'. As was pointed out, the reason why indigenous peoples wanted and have safeguarded this distinction is the difference in rights and acknowledgment on the international level for both groups.¹⁵² By defining indigenous peoples in a broad way, there is a risk that groups that are typically seen as (national) 'minorities', will be included in the indigenous peoples' category. As KYMLICKA has pointed out, "*acknowledging an overlap between minorities and indigenous peoples could have unpredictable effects. It could result in the status of minorities in international law being pulled up by the achievements of indigenous peoples. However, it is equally possible that support for the rights of indigenous peoples would be dragged down by international hostility*

¹⁵⁰ M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1022-1023; G. PENTASSUGLIA, "Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence" in *Int'l Comm. L. Rev.* 2009, (185) 201.

¹⁵¹ M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1022-1023.

¹⁵² As has been said (*supra* at 2, footnote 4; at 13, marginal 2424 and at 15, marginal 26), at the UN level, two separate working groups were set up: the UN Working Group on Indigenous Populations and the UN Working Group on Minorities. Since then, the distinction between both groups has been carefully guarded, as has been exemplified by the statements of M.A. MARTINEZ and E. DAES, *supra* 13, marginal 2424 and 15, marginal 26. Minorities could thus not claim indigenous rights, nor could indigenous peoples claim minority rights. Indigenous peoples' rights were far more advanced than minority rights at the UN level. The UNWGIP advanced quickly in the determination of specific rights for indigenous peoples, generally with support from various government. In 2007 the UNDRIP, drafted by the UNWGIP, was signed. The UNWGM, on the other hand, did not progress as well. It started out with a ready-made Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992. This declaration is, however, a less encompassing declaration than the UNDRIP has become. But the UNWGM made slow progress, lacking government support in the development and implementation of minority rights standards. As the possible progress of the UNWGM was blocked, while the progress the UNWGIP made was welcomed, indigenous rights became far more developed and accepted in the UN system, having as a consequence that minorities would rather identify as indigenous peoples than as minorities, and that indigenous peoples continuously claimed that they were not minorities but indigenous peoples. (In a more recent document, the UN has made clear that indigenous peoples now can in fact claim minority rights, although, given the previous explanation, they will probably not be inclined to do so.) (M. J. AUKERMAN, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context" in *HRQ* 2000, (1011) 1019-1020; P. HILPOLD, "UN Standard-Setting in the Field of Minority Rights" in *Int'l J. on Minority & Group Rts.* 2007, (181) 200-202; UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, "Minority Rights: International Standards and Guidance for Implementation", New York, United Nations, 2010, *UN Doc.* HR/PUB/10/3, 4).

to minority rights.”¹⁵³ Further on, he specifies that in his view, “[t]he tendency of national minorities to adopt the label of indigenous peoples is likely to lead to the collapse of the international system of indigenous rights.”¹⁵⁴

48. Even given this downside, the position that a broader definition is the better option is retained, for two reasons. The first is that the current distinction between indigenous peoples and minorities is artificial. As KYMLICKA put it, the “firewall” that was put up between the two categories is “morally suspect” and “conceptually unstable.”¹⁵⁵ There is no good legitimation to be given for this disruptive distinction where there is logically no clear distinction to be made. A lot of groups of people do not clearly fall inside or outside one category or the other.¹⁵⁶ Likewise, there is no legitimate reason to give such different categories of rights to groups that are so alike, even if they might have some different peculiarities and thus some different fundamental rights claims.¹⁵⁷ The second reason is that, in the European context, this problem of a difference in rights between minorities and indigenous peoples is not present. The difference is very clear and present in the UN context, but seemingly it has not seeped through to the regional European context. On the contrary, acknowledged minorities seem to have a better protection of their rights than indigenous peoples.¹⁵⁸ Since the focus has come on the plight of the Roma and their history of discrimination and oppression, their situation has visibly improved.¹⁵⁹ This might also come to be the case for

¹⁵³ W. KYMLICKA, “Beyond the Indigenous/Minority Dichotomy?” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 188.

¹⁵⁴ W. KYMLICKA, “Beyond the Indigenous/Minority Dichotomy?” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 206. LYNCH is of the same opinion, see G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 159.

¹⁵⁵ W. KYMLICKA, “The internationalization of minority rights” in *I•CON* 2008, (1) 12; G. LYNCH, “Kenya’s new indigenes: negotiating local identities in a global context” in *Nations and Nationalism* 2011, (148) 162.

¹⁵⁶ In this respect, Aukerman states that “While it is possible to create definitions of “indigenous people” which would include, say, the Cree, Maori, and Navajo but exclude the Nenets, Evenki, and Dolgan, it is less immediately apparent, given the similarities between the two groups, why the former should have different and possibly greater rights under international law than the latter” (M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1022). Another example of a group on which discussions exist whether they are indigenous peoples is the Ilois, whose situation is discussed below (*infra* 49-51, marginals 72-74).

¹⁵⁷ In the Chagos Islanders case, the claims of the Ilois, who are not typically seen as indigenous peoples and thus denied specific indigenous rights, are very similar to those of the other (‘traditional’) indigenous peoples’ claims (*infra* 89, marginal 127 and 92, marginal 133). See also, of the same opinion, M. J. AUKERMAN, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context” in *HRQ* 2000, (1011) 1022.

¹⁵⁸ Meaning a group specifically identified within the broader category of indigenous peoples v. indigenous peoples as a group that is never mentioned and only dealt with under the broad minority category.

¹⁵⁹ The evolution in the ECtHR’s case law since the Buckley case in 1996 is clear: Roma people have had an unmistakable improvement of the protection of their rights, the Court taking into account more and more the specificities of the Roma Community. For now, this evolution has culminated in the D.H. case, as is explained *infra* 83, marginal 117. (D.H. and Others/Czech Republic, *Reports of Judgments and Decisions* 2007-IV; ECtHR 25 September 1996, No. 20348/92, Buckley/United Kingdom, *Reports* 1996-IV). See also T. MCGONAGLE, *Minority Rights, Freedom of Expression and the Media: Dynamics and Dilemmas*, Cambridge, Intersentia, 2011, 61; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 63 and W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 582.

indigenous peoples, if they were to be acknowledged as a specific category of minorities with specific problems and grievances under the European system.

49. In sum, devising a clear definition of who indigenous peoples are will reduce the vagueness and ambiguity that surround the term, will illustrate the real relationship between minorities and indigenous peoples and will make the identification of these peoples clearer and more straightforward for the bestowment of their rights.

SECTION II. METHODOLOGY

50. As was discussed, the European Court of Human Rights does not appear to have a concept of who indigenous peoples are. The Court's view would have been the most fitting perspective for designing a definition within this research, but it is not possible to base the definition on its position. Therefore, the points of view of both the IACtHR and the ACHPR will be taken into account. As human rights organs, the case law of both of them reflects the problems, positions and circumstances that are present in their own society. Because the American and African societies are in many ways very different from the European society, many of their grievances and particularities will not be present in the European society, which makes some of their case law unserviceable for Europe. On the other hand, there are some clear similarities. One might think of the fact that indigenous peoples have been marginalised and the lack of official land titles of these peoples, whilst they have been living on their lands for a great period of time. Moreover, recently the ECtHR has begun to refer more and more to the IACtHR in its case law.¹⁶⁰ It seems that in several issues, the European Court has begun to see an advantage in referring to the case

¹⁶⁰ ECtHR, *Research Report. References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights*, Strasbourg (France), CoE, 2016, 49 p. The Report lists 59 cases before the Court from as early as 1996 in which the ECtHR referred to the case law or instruments of the Inter-American Court/Commission of Human Rights. In a few cases, the ECtHR has also tentatively begun to refer to the African Charter on Human and Peoples' Rights and to the African Commission on Human and Peoples' Rights. For example, in the case of *Sitaropoulos and Giakoumopoulos v. Greece*, the Court referred to the African Charter on Human and Peoples' Rights, among other international and regional treaties, to illustrate that "voting rights for persons temporarily or permanently absent from the state of which they are nationals [do not] extend so far as to require the State concerned to make arrangements for their exercise abroad" (ECtHR 15 March 2012, No. 42202/07, *Sitaropoulos and Giakoumopoulos/Greece, Reports of Judgments and Decisions 2012*, §72). Another example in which the ECtHR referred to the case law of the ACHPR is the case of *Chiragov and others v. Armenia*, in which it uses the ACHPR case law to support its finding that "violations of human rights create situations where a persecuted group becomes entitled to create its own statehood" (ECtHR 16 June 2015, No. 13216/05, *Chiragov and others/Armenia, Reports of Judgments and Decisions 2015*, §23). In sum, the European Court has in recent times begun to refer to the ACHPR, but always in combination with referrals to other documents or decisions from different organs. Therefore it seems to begin giving some weight to the African Commissions' decisions, but not nearly as much as it gives to the decisions of the IAC(t)HR.

law of another human rights system.¹⁶¹ In effect, the world has become more and more globalised, and human rights grievances of peoples of different continents might be very similar. In this respect it could be useful to refer to different organs handling the same problems in similar circumstances and to draw inspiration from their approaches.

Most weight will be given to the approach of the IACtHR, because the ECtHR has shown that it is open to referring to this Court's case law in cases that have similar circumstances. The case law of the ACHPR will only have relevance by way of example.

51. Furthermore, the evolutions in IOs have shown an international community opening up to the idea of a broader concept of who indigenous peoples are. Therefore, some inspiration will also be drawn from these organisations' approaches. Over the years, the World Bank has developed a very broad perspective on who indigenous peoples are. Even though their operational manuals may have influence in the way actors around the world think about indigenous peoples, they have no legal value, as they are only meant as internal documents. The World Bank definitions thus cannot be used in drafting a definition of indigenous peoples, but they have already proven their worth in the influence they have had around the world. The UNWGIP, on the other hand, has produced useful documents for defining indigenous peoples. From the beginning, the Working Group included many different indigenous peoples, including indigenous peoples from Europe. They accepted other groups in their midst and in this it has become apparent that there are no clear lines in determining who is indigenous and who is not. One just has to think about the case of the Rehoboth Basters, about whom no clear consensus was reached on whether or not they are indigenous peoples and who were, year after year, alternately listed under indigenous peoples and under other categories (*supra* 14, marginal 25).

¹⁶¹ See, for instance, the case of *Akdivar and Others v. Turkey* on the exhaustion of domestic remedies; the case of *Mamatkulov and Askarov v. Turkey* on the importance and purpose of interim measures; the case of *Öcalan v. Turkey* on the death penalty; the case of *Ergin v. Turkey* on the exclusion of civilians from the jurisdiction of military courts; the case of *Khoroshenko v. Russia* on prisoners' right to an acceptable or reasonably good level of contact with their families; the case of *Baka v. Hungary* on the standards on the interdependence of the judiciary and the procedural safeguards applicable in cases of removal of judges. This enumeration shows that the European Court refers to the Inter-American charter and case law for a whole range of diverging situations and rights. Indigenous issues have not yet been a part of this, but the fact that the ECtHR does refer and seem to give some weight to IACtHR decisions is a positive sign that this may possibly happen sometime in the future. (ECtHR 23 June 2016, No. 20261/12, *Baka/Hungary*, *Reports of Judgments and Decisions 2016*, §§114, 121 and 172; ECtHR 30 June 2015, No. 41418/04, *Khoroshenko/Russia*, *Reports of Judgments and Decisions 2015*, §143; ECtHR 4 May 2006, No. 47533/99, *Ergin/Turkey* (No. 6), *Reports of Judgments and Decisions 2006-VI* (extracts), §45; ECtHR 12 May 2005, No. 46221/99, *Öcalan/Turkey*, *Reports of Judgments and Decisions 2005-IV*, §166; ECtHR 4 February 2005, Nos. 46827/99 and 46951/99, *Mamatkulov and Askarov/Turkey*, *Reports of Judgments and Decisions 2005-I*, §116; ECtHR 16 September 1996, No. 21893, *Akdivar and Others/Turkey*, *Reports 1998-II*, §68).

52. Together, all of the participants of the UNWGIP ended up drafting the UNDRIP. This was a first in the international field, where declarations are usually drafted by states and not the groups involved. This makes the UNDRIP an extremely valuable instrument.¹⁶² The UNDRIP thus reflects the common problems and struggles of indigenous peoples around the world, including those of European indigenous peoples. This being the case, the Declaration is a very useful document in devising a definition of indigenous peoples.
53. Moreover, there are the authoritative definitions. First of all, as was described, the MARTINEZ COBO definition has had a lot of influence but is now regarded as outdated. Secondly there is the definition from ILO convention 169. The first difficulty with this definition is the low degree of ratification. Having only been ratified by 23 countries over the last thirty years, this international convention can hardly be described as universal. As only European indigenous peoples are of importance for this research, this might not be problematic. Nevertheless, of the European countries that are typically known to have indigenous peoples on their territories, the Convention has only been ratified by Norway and Denmark. Neither Finland, Sweden, nor Russia have ratified it. This being the case, the convention does not have enough reach on the European continent to be used as a source for a definition of indigenous peoples. Besides, the Convention dates from 1989 and hence has not been adapted to important evolutions that have happened in the last thirty years. Neither one of the classic authoritative definitions is thus very useful for the exercise of defining indigenous peoples in Europe.
54. Lastly, the common elements used by different authors in their approaches to defining indigenous peoples were discussed. The authors discussed were mostly leading voices in the legal debates on indigenous peoples from around the world. In legal scholarship, the discussion on indigenous peoples is a global one, encompassing and ignoring boundaries of countries and continents. Almost every author envisaged giving a general, universal definition of indigenous peoples, therefore including European indigenous peoples. Because of these elements, these voices are both useful and less useful in designing a definition. On the one hand, this sort of ‘one size fits all approach’ is trying to fit all the different indigenous peoples around the world into one definition. This may blur some differences between indigenous peoples that make them unique. On the other hand, this approach does envisage the criteria to be useful for all indigenous peoples, and thus

¹⁶² R. STAVENHAGEN, “Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (147) 149-150; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 35; M. B. TRASK, “Afterword: implementing the Declaration”, in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (327) 328.

should also be useful for indigenous peoples in Europe. In conclusion, the common elements raised by the authors can be used, keeping this important assessment in mind.

SECTION III. A DEFINITION

55. In this section, a definition of indigenous peoples will be designed. This definition will focus on European indigenous peoples, as these peoples are the object of this research. In this way, this dissertation aims not to use a ‘one size fits all’-approach too much. By recognising that characteristics of indigenous peoples may vary across regions, it may be easier to come up with the right definition, while not being too broad. The intended approach for devising this definition is that of core criteria and secondary criteria: some elements are indispensable for a group to be able to call themselves ‘indigenous peoples’, and others are only secondary, meaning that only one or two of a list of possible criteria may be required to be applicable to the group. By using this approach, a great amount of flexibility is still possible, thus lowering the chance that the definition might be too rigid. In applying this approach, this research adheres to THORNBERRY, who did the same in his definitional effort.¹⁶³

§1. Identification of definitional elements

56. As was set out above, the instrument that may be most useful for defining indigenous peoples in Europe is the UNDRIP. Even though this instrument does not contain a definition, ANAYA took the effort of identifying ‘definitional elements’ in the Declaration. Three of the five definitional elements from the Declaration are also common elements mentioned by most authors. These are the self-identification requirement, the fact that indigenous peoples have typically been marginalised and discriminated and that a special connection to their lands exists.¹⁶⁴ Of these three criteria, two are also used by the Inter-American court in identifying indigenous peoples, namely the self-identification requirement and the existence of a special connection to their lands.¹⁶⁵ The IACtHR does not use the discrimination and marginalisation criterion to identify indigenous peoples, but it does acknowledge that these groups have in effect typically been marginalised and discriminated.¹⁶⁶ A possible explanation for this, is that marginalisation and

¹⁶³ P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 56. Other authors have also used a similar approach to afford some flexibility to their definition. As was said *supra* in 24, marginal 39, some authors use characteristics and others still use ‘indicia’.

¹⁶⁴ See *supra* 19, marginal 33 and 24, marginal 40.

¹⁶⁵ See *supra* 8, marginal 15.

¹⁶⁶ E.g. IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §274; IACtHR 29 March 2006, Sawhoyamaya Indigenous Community/Paraguay, *IACHR Series C* No. 146, §168; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125, §50.15.

discrimination cannot really be ascribed to a group as *characteristics*, as they actually are *consequences* of being indigenous peoples. Nonetheless, this criterion is used by a great number of actors, as has become clear in the first Chapter of this work.¹⁶⁷ Even though it is a consequence, the marginalisation and discrimination requirement is very useful because it illustrates exactly why these groups need protection. By characterising them by this consequence of who they are, one immediately understands a great part of this group's predicaments, thus already justifying the need for an effective legal protection.

The UNDRIP mentions another criterion that seems to reappear in different forms in the common elements and the case law of the IACtHR, namely that the group displays "*specific features different from dominant society regarding their organization, political and economic institutions, culture, beliefs, customs and language.*"¹⁶⁸ In the common elements, there is a reference to cultures that are distinct from mainstream society¹⁶⁹ and in its case law, the IACtHR mentions "*social, cultural and economic traditions different from other sections of the national community.*"¹⁷⁰ Hence this criterion of cultural distinctiveness from dominant society, which may be expressed in the way of differences in culture, beliefs, customs, language or in a different organisation of their society or political and economic institutions, also appears to be very meaningful.

The last criterion that the Declaration mentions is that of a claim to self-determination.¹⁷¹ This claim is, however, not mentioned as a criterion by any of the legal scholars discussed in this work, nor has it been used by the IACtHR. Thus, even though this might be true for some or most indigenous peoples, it does not seem to be given as much weight by the court and legal scholars as it was given by the indigenous peoples drafting the declaration themselves.

57. All the elements taken from the Declaration and the common views of the legal scholars have now been discussed, as the authors' common elements coincidentally coincided with four of the five criteria taken from the Declaration. This means only the elements from the Inter-American Court remain to be analysed, in which the following strategy will be used. If the criteria mentioned

¹⁶⁷ See, for the African Commission *supra* 10, marginal 18; for the World Bank *supra* 17, marginal 30; for the common elements of legal scholars, *supra* 24, marginal 40.

¹⁶⁸ *Supra* 19, marginal 33; S. J. ANAYA, *International Human Rights and Indigenous Peoples*, New York, Aspen Publishers, 2009, 64.

¹⁶⁹ *Supra* 24, marginal 40, point 1. See also footnote 111.

¹⁷⁰ *Supra* 8, marginal 15; IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §79.

¹⁷¹ *Supra* 20, marginal 33.b. See also footnote 91.

by the IAC(t)HR have also been mentioned as criteria to identify indigenous peoples by some of the legal scholars, they will be considered as possible criteria with secondary importance. If not, they will be left aside, as there is no indication available that they might also be useful for Europe.¹⁷²

58. The first element that the IACtHR mentions and that has not been discussed here yet, is that indigenous peoples “*identify themselves with their ancestral territories.*”¹⁷³ This element is not mentioned by any legal scholar, even though a ‘special relationship’ is mentioned very often.¹⁷⁴ Another characteristic given to indigenous peoples by the IACtHR is that they “*regulate themselves, at least partially, by their own norms and traditions.*”¹⁷⁵ Even though this criterion has not explicitly been mentioned, it can be read into the cultural distinctiveness requirement that has already been discussed *supra* 38, in marginal 56 and will be included in the definition. A third element used by the Court is that indigenous peoples share their land collectively.¹⁷⁶ Although an emphasis is put on the special relationship to the lands by most authors, none of them explicitly refer to a collective usage of these lands.¹⁷⁷ Perhaps this could be because they believe that a special relationship of the indigenous people as a people implies such a collective use of the land, but this remains unclear. A last element that the court finds important is that the use of their land is central to their traditional social and economic way of life.¹⁷⁸ Again, this criterion is not mentioned by any of the authors. Even though DAES and THORNBERRY both refer to the occupation and use of a specific territory,¹⁷⁹ no author points to a central importance of these lands to the social and economic way of life. Again, this might be implied in the criterion of a special connection to their lands, but this is not necessarily the case.

§2. The definition

59. In sum, the intention was to design a definition with criteria both of primary importance, which would be crucial for the possible identification as an indigenous people, and of secondary importance, which would help with identifying indigenous peoples but of which not every criterion would have needed to be present. Contrary to the original plan, because of the used

¹⁷² While the common elements mentioned by the authors *may* be useful for Europe, as most of them contend to have a *universal* definition for indigenous peoples.

¹⁷³ *Supra* 8, marginal 15; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §79.

¹⁷⁴ *Supra* 24, marginal 40. see also footnote 111.

¹⁷⁵ *Supra* 8, marginal 15; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §79.

¹⁷⁶ *Supra* 8, marginal 15; see also footnote 33.

¹⁷⁷ See *supra* 24, marginal 40.

¹⁷⁸ *Supra* 8, marginal 15, see also footnote 34.

¹⁷⁹ *Supra* 27, marginal 41, see also footnote 132.

methodology, this dissertation has only been able to identify common criteria of primary importance for the identification of indigenous peoples in Europe. It has become clear that the presence of four criteria is crucial, while the indigenous peoples themselves appear to attach importance to a fifth criterion that is not used by any other source. Because of this, the following definition is set up:

In the European context, indigenous peoples are a group of people who:

1. self-identify as such, both as a group and as individuals within the group;
2. have a special connection to their traditional lands;
3. have historically been marginalised and discriminated, and continue to be so;
4. are culturally distinct from dominant society; and
5. may have a claim to self-determination.

60. As is clear from the definition, the first four elements are essential and need to be cumulatively applicable, while the fifth is not a necessary criterion. To explain the full meaning of this definition, some clarifications are in order with respect to the second and the fourth criterion.

Regarding the second criterion of a special connection to their traditional lands, it is important to underscore that this does not necessarily imply the current inhabitation of those traditional lands, or of any specific territory for that matter. It just means a *special connection*, which can be historical, cultural, spiritual or of any other quality.

In addition, regarding the fourth criterion of cultural distinctiveness, it is useful to clarify to what extent this *cultural distinctiveness* could be understood. In this respect, the cultural distinctiveness may be expressed in the way of differences in culture, beliefs, customs, language or in a different organisation of their society or political and economic institutions. It thus implies a whole range of possibilities for the indigenous peoples to show that they are distinct, where on a case by case basis it should be determined if the distinctive features of the group are enough to characterise them as a group that is ‘culturally distinct from dominant society’.

61. Finally, because of the focus on Europe, the definition given above is most useful in the *regional context*¹⁸⁰ of the territory of the Council of Europe and does not contend to be universal. However,

¹⁸⁰ The idea of making a regionally applicable definition was taken from the case law of the ACHPR, where the Commission stresses the fact that indigenous peoples are not the same all over the world, as the African indigenous peoples do not share the history of the American indigenous peoples. The African Commission uses this argument to move away from the pre-invasion requirement towards the criterion of discrimination and marginalisation.

because the definition was based on documents and points of view that at least claim to be universal, it is possible that this definition, with some changes in emphasis or maybe some added secondary criteria,¹⁸¹ could also be useful in a global context.

¹⁸¹ For instance the additional criteria used by the IACtHR.

CHAPTER III. INDIGENOUS PEOPLES IN EUROPE

62. In this Chapter, an overview will be given of which indigenous peoples have been mentioned by legal scholars. After this, a few of these mentioned indigenous people will be examined in light of the definition set up in the previous Chapter, to investigate if these traditionally mentioned indigenous peoples also qualify as such under the definition of this research. This Chapter does not aspire to hand an exhaustive overview of all indigenous peoples in Europe: other indigenous groups that are not mentioned here probably exist, and in the future things such as self-identification might shift, leading other groups towards the category of indigenous peoples.

§1. Indigenous peoples as mentioned by legal scholars

63. There are a few regions that fall under the jurisdiction of the ECHR that have traditionally been seen to house indigenous peoples. These are Greenland, Scandinavia,¹⁸² Russia, the French overseas territories¹⁸³ and the British Indian Ocean Territory (hereinafter: BIOT).¹⁸⁴ The indigenous peoples that are most often mentioned to live on these territories are the Inuit of Greenland,¹⁸⁵ the Sámi of Norway, Sweden, Finland and Russia,¹⁸⁶ and some forty indigenous

¹⁸² Meant as the geographical area of Norway, Sweden and Finland.

¹⁸³ See S. KIRCHNER, “Conceptions of Indigenousness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int'l & Comp. L. Rev.* 2016, (169) 170; D. NEWMANN, E. RUOZZI and S. KIRCHNER, “Legal Protection of Sacred Natural Sites Within Human Rights Jurisprudence: Sápmi and Beyond” in L. HEINÄMÄKI and T. M. HERRMANN (eds.), *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples. The Sacred Arctic*, Cham, Springer International Publishing, 2017, (11) 16; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 22, 28, 39, 240 and 247.

¹⁸⁴ G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3.

¹⁸⁵ G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3; T. KOIVUROVA, “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects” in *Int'l J. on Minority & Group Rts.* 2011, (1) 3; D. NEWMANN et al., “Legal Protection of Sacred Natural Sites Within Human Rights Jurisprudence: Sápmi and Beyond” in L. HEINÄMÄKI and T. M. HERRMANN (eds.), *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples. The Sacred Arctic*, Cham, Springer International Publishing, 2017, (11) 16; A. TOMASELLI, “Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change” in *European Yearbook of Minority Issues Online* 2017, (37) 45; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 22.

¹⁸⁶ G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3 and 43; S. KIRCHNER, “Conceptions of Indigenousness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int'l & Comp. L. Rev.* 2016, (169) 170; T. KOIVUROVA, “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects” in *Int'l J. on Minority & Group Rts.* 2011, (1) 3; P. KOVÁCS, “Indigenous Issues under the European Convention of Human Rights, Reflected in an Inter-American Mirror” in *The Geo. Wash. Int'l L. Rev.* 2016, (781) 785; D. NEWMANN et al., “Legal Protection of Sacred Natural Sites Within Human Rights Jurisprudence: Sápmi and Beyond” in L. HEINÄMÄKI and T. M. HERRMANN (eds.), *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples. The Sacred Arctic*, Cham, Springer International Publishing, 2017, (11) 16; A. TOMASELLI, “Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change” in *European Yearbook of Minority Issues Online* 2017, (37) 45; S. TORRECADRADA, *Los pueblos indígenas en el orden internacional*, Madrid, Dykinson S.L., 2001, 117; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 29.

peoples in Russia,¹⁸⁷ which are identified by Russian law. The list of the forty indigenous peoples is included in this law, which has its own definition of indigenous peoples.¹⁸⁸ TOMASELLI has voiced concerns about this law not including all Russian indigenous peoples, as it sets a maximum number of 50,000 on the amount of individuals an indigenous people can consist of.¹⁸⁹ Furthermore, there are a good amount of peoples on the French overseas territories, among whom are the Mā'ohi of French Polynesia,¹⁹⁰ the Kanak of New Caledonia,¹⁹¹ the six indigenous peoples of Guyana,¹⁹² the Mahorais of Mayotte,¹⁹³ and the Pacific Islanders of Wallis and Futuna.¹⁹⁴ Lastly, the BIOT, formerly known as the Chagos Islands, used to house the Ilois.¹⁹⁵

64. Altogether, even though they are small in number, according to these sources a good number of indigenous peoples live on the territory of the Council of Europe (hereinafter: CoE). Nevertheless, the method of identification of all these different groups as indigenous peoples varies from source to source. Thus, the different authors handle different criteria or definitions for identifying indigenous peoples, not always explicitly illustrating their methods. Because the definition set up

¹⁸⁷ G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3; T. KOIVUROVA, “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects” in *Int'l J. on Minority & Group Rts.* 2011, (1) 3; D. NEWMANN et al., “Legal Protection of Sacred Natural Sites Within Human Rights Jurisprudence: Sápmi and Beyond” in L. HEINÄMÄKI and T. M. HERRMANN (eds.), *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples. The Sacred Arctic*, Cham, Springer International Publishing, 2017, (11) 16; A. TOMASELLI, “Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change” in *European Yearbook of Minority Issues Online* 2017, (37) 39; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 40.

¹⁸⁸ M. RIEKKINEN, “Participatory Rights of Russia’s Indigenous Peoples Regarding Land Issues” in *Issues of Business and Law* 2011, (110) 111; A. TOMASELLI, “Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change” in *European Yearbook of Minority Issues Online* 2017, (37) 45-46, footnote 51.

¹⁸⁹ A. TOMASELLI, “Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change” in *European Yearbook of Minority Issues Online* 2017, (37) 45-46, footnote 51.

¹⁹⁰ N. GAGNÉ, “Brave New Words: The Complexities and Possibilities of an “Indigenous” Identity in French Polynesia and New Caledonia” in *Contemp. Pac.* 2015, (371) 372; L. MU SI YAN and B. SAURA, “Decolonization, Language, and Identity: The Francophone Islands of the Pacific” in *Contemp. Pac.* 2015, (325) 325; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 250.

¹⁹¹ N. GAGNÉ, “Brave New Words: The Complexities and Possibilities of an “Indigenous” Identity in French Polynesia and New Caledonia” in *Contemp. Pac.* 2015, (371) 372; L. MU SI YAN and B. SAURA, “Decolonization, Language, and Identity: The Francophone Islands of the Pacific” in *Contemp. Pac.* 2015, (325) 325; J. UTIMONEN, “The Personal Status in French Law: With Special Focus on Overseas Territories” in *Int'l J. on Minority & Group Rts.* 2014, (451) 455; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 241.

¹⁹² N. GAGNÉ, “Brave New Words: The Complexities and Possibilities of an “Indigenous” Identity in French Polynesia and New Caledonia” in *Contemp. Pac.* 2015, (371) 372; D. NEWMANN et al., “Legal Protection of Sacred Natural Sites Within Human Rights Jurisprudence: Sápmi and Beyond” in L. HEINÄMÄKI and T. M. HERRMANN (eds.), *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples. The Sacred Arctic*, Cham, Springer International Publishing, 2017, (11) 16. According to NEWMAN et al., the six indigenous peoples of French Guyana are the Kali’na, the Lokowo, the Pajikweneh, the Teko, the Wayana and the Wayapi (footnote 2).

¹⁹³ N. GAGNÉ, “Brave New Words: The Complexities and Possibilities of an “Indigenous” Identity in French Polynesia and New Caledonia” in *Contemp. Pac.* 2015, (371) 372.

¹⁹⁴ *Ibid.*

¹⁹⁵ Also known as Chagos Islanders or Chagossians. S. ALLEN, *The Chagos Islanders and International Law*, Oxford, Hart Publishing, 2014, 276; G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 3 and 42.

in the previous Chapter is rather broad, one may assume that many of these mentioned indigenous peoples also fall under it. In the next paragraph, a number of indigenous peoples will be examined under the definition set up in this research, to check if they actually are indigenous peoples under its meaning.

§2. Indigenous peoples under the definition

65. Because a whole range of possible indigenous peoples has been identified, it is not possible to examine all of these peoples under the definition that was set up. To examine all the peoples mentioned would take this research too far away from its scope and purpose. For this reason, only three indigenous peoples will be examined under the definition. This will be the Sámi for Scandinavia, the Inuit for Greenland and the Ilois for the BIOT. These peoples were chosen because they have one important thing in common: in the past, they have already lodged at least one complaint and tried to start a case before the ECtHR.
66. In looking at these indigenous peoples in light of the definition, one aspect will be left aside. In the definition, the self-identification as an indigenous people requires an individual and a collective element, having both the group and the concerned individual(s) identifying as indigenous. In examining these peoples under the definition, it is however not possible to investigate the individual self-identification aspect, as this will be different for each individual within the group. This part of the self-identification requirement is thus left behind in this identification exercise, leaving its investigation for when specific circumstances regarding an indigenous people arise.

A. The Sámi

67. The Sámi are a people who live in the far north of Norway, Sweden, Finland and Russia.¹⁹⁶ Their presence in the Nordic countries can be traced back to the first centuries after Christ.¹⁹⁷ They used to inhabit larger areas of the Scandinavian peninsula, but were drawn back by European settlers

¹⁹⁶ M. JONES, *The Sami of Lapland*, London, Minority Rights Group, 1982, 5; EB EDITORS, “Sami” in *Britannica Academic, Encyclopædia Britannica*, 18 July 2018, <https://academic.eb.com/levels/collegiate/article/Sami/47172> (consultation 9 April 2019).

¹⁹⁷ JONES dates them back to at least 250 A.D., while the *Encyclopædia Britannica* dates them back to at least 100 A.D. (M. JONES, *The Sami of Lapland*, London, Minority Rights Group, 1982, 6; EB EDITORS, “Sami” in *Britannica Academic, Encyclopædia Britannica*, 18 July 2018, <https://academic.eb.com/levels/collegiate/article/Sami/47172> (consultation 9 April 2019)).

over the years.¹⁹⁸ The countries that formed divided the Sámi land by borders that made no sense to them.¹⁹⁹ Their lifestyle has changed over the years, adapting to changing circumstances and the consequences of oppression, but it essentially consists of hunting – now herding – reindeer, fishing, small-scale agriculture and berry-picking.²⁰⁰ Alongside this, they also used to have their own specific religion, which largely disappeared when it was violently suppressed by the settlers, and they have their own language.²⁰¹ They live in faraway regions where some Sámi still follow the migratory routes of their reindeer herds throughout the year, and others have jobs in mainstream society.²⁰²

68. When this description is compared to the definition, it becomes clear that the second, third and fourth criteria, namely those of a special connection to their lands, a history of marginalisation and discrimination and a distinct culture, are present for the Sámi. They have lived on their lands for a very long time, following the migratory routes of the animals. They were driven away and made to suppress their religion by the settlers, and they have their own specific language and lifestyle. Alongside this, in the UNWGIP, the Sámi have identified as an indigenous people²⁰³ and have fought and argued for a right to self-determination,²⁰⁴ which also fulfils the first and the

¹⁹⁸ M. JONES, *The Sami of Lapland*, London, Minority Rights Group, 1982, 6; EB EDITORS, “Sami” in *Britannica Academic, Encyclopædia Britannica*, 18 July 2018, <https://academic.eb.com/levels/collegiate/article/Sami/47172> (consultation 9 April 2019).

¹⁹⁹ M. JONES, *The Sami of Lapland*, London, Minority Rights Group, 1982, 6.

²⁰⁰ D. BUNIKOWSKI and P. DILLON, “Arguments from Cultural Ecology and Legal Pluralism for Recognising Indigenous Customary Law in the Arctic” in L. HEINÄMÄKI and T. M. HERRMANN (eds.), *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples. The Sacred Arctic*, Cham, Springer International Publishing, 2017, (37) 46; G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 43; M. JONES, *The Sami of Lapland*, London, Minority Rights Group, 1982, 6-8; EB EDITORS, “Sami” in *Britannica Academic, Encyclopædia Britannica*, 18 July 2018, <https://academic.eb.com/levels/collegiate/article/Sami/47172> (consultation 9 April 2019).

²⁰¹ M. JONES, *The Sami of Lapland*, London, Minority Rights Group, 1982, 7 and 10.

²⁰² M. JONES, *The Sami of Lapland*, London, Minority Rights Group, 1982, 8-9; EB EDITORS, “Sami” in *Britannica Academic, Encyclopædia Britannica*, 18 July 2018, <https://academic.eb.com/levels/collegiate/article/Sami/47172> (consultation 9 April 2019).

²⁰³ The Nordic Sami Council used to be an active member of the World Council of Indigenous Peoples, thus identifying the Sámi People as an indigenous people. Furthermore, the Sámi were actively represented in the UNWGIP as an indigenous people. (D. SANDERS, “The UN Working Group on Indigenous Populations” in *HRQ* 1989, (406) 419; Report of the Working Group on Indigenous Populations on its eleventh session (23 August 1993), *UN Doc. E/CN.4/Sub.2/1993/29* (1993), §8; Report of the Working Group on Indigenous Populations on its twelfth session (17 August 1994), *UN Doc. E/CN.4/Sub.2/1994/30* (1994), §10; Report of the Working Group on Indigenous Populations on its fourteenth session (16 August 1996), *UN Doc. E/CN.4/Sub.2/1996/21* (1996), §10; Report of the Working Group on Indigenous Populations on its twenty-first session (11 August 2003), *UN Doc. E/CN.4/Sub.2/2003/22* (2003), annex I; etc.).

²⁰⁴ See Report of the Working Group on Indigenous Populations on its eleventh session (23 August 1993), *UN Doc. E/CN.4/Sub.2/1993/29* (1993), §57-58.

fifth criteria. The Sámi can thus be identified as indigenous people under the definition set up in this work.

B. The Inuit

69. Although they are generally taken as a whole and they have unified themselves across regions in the Inuit Circumpolar Council,²⁰⁵ the Inuit of Greenland do not identify as one indigenous people. On the contrary, they identify as different, smaller groups of indigenous peoples, including the Inughuit of Thule in the north-west of Greenland, the Tunumiit of eastern Greenland and the Kalaallit of western Greenland.²⁰⁶ Nonetheless, for this effort of identification, the Inuit of Greenland will be taken as a whole. Of the 56,000 inhabitants of Greenland, some 50,000 are Inuit.²⁰⁷ Presence of the Inuit in Greenland has been recorded since the 13th century and they are the oldest ethnic group in Greenland.²⁰⁸ Originally, these peoples survived mainly on hunting caribou, seal, walrus and whales, using kayaks and harpoons to catch and kill them.²⁰⁹ The Inuit people were completely adapted to an extremely cold environment and used to live in igloos or similar housing in winter, while travelling and living in animal-skin tents in summer.²¹⁰ In contrast, the Inuit's current culture encompasses subsistence hunting of animals such as whales and seals,²¹¹ but also other animals, and commercial fisheries and tourism.²¹² Over the years, they

²⁰⁵ This Council consists of four regional councils, namely the Inuit Circumpolar Councils of Canada, Alaska, Chukotka and Greenland. (Article 1, §8 of the Charter of the Inuit Circumpolar Council of Nuuk of 1 July 2010, <http://inuit.org/icc-greenland/charter/>).

²⁰⁶ B.O.G. MORTENSEN and U. BARTEN, "The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?" in *The Yearbook of Polar Law* 2016, (103) 119 and 122; S. PAX LEONARD, "The need to 'belong': social connectedness and spatial attachment in Polar Eskimo settlements" in *Polar Record* 2014, (138) 138; A. TOMASELLI, "Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change" in *European Yearbook of Minority Issues Online* 2017, (37) 52; Resolution 03-02 Recognising the Inughuit as a Distinct Indigenous People of Greenland and their Right to Return to their Traditional Lands of the Inuit Circumpolar Council Executive Council (26-27 June 2003), <http://inuit.org/icc-greenland/icc-executive-council/recognizing-the-inughuit-as-a-distinct-indigenous-people-of-greenland-and-their-right-to-return-to-their-traditional-lands/>, (2003).

²⁰⁷ P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 22; EB EDITORS, "Eskimo" in *Britannica Academic, Encyclopædia Britannica*, 10 January 2019, <https://academic.eb.com/levels/collegiate/article/Eskimo/33011> (consultation 10 April 2019).

²⁰⁸ B.O.G. MORTENSEN and U. BARTEN, "The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?" in *The Yearbook of Polar Law* 2016, (103) 112. SØRENSEN and GULLØV record migration from the Thule region to the north in the fifteenth century (M. SØRENSEN and H. C. GULLØV, "The Prehistory of Inuit in Northeast Greenland" in *Arctic Anthropology* 2012, (88) 100).

²⁰⁹ M. SØRENSEN and H. C. GULLØV, "The Prehistory of Inuit in Northeast Greenland" in *Arctic Anthropology* 2012, (88) 100; EB EDITORS, "Eskimo" in *Britannica Academic, Encyclopædia Britannica*, 10 January 2019, <https://academic.eb.com/levels/collegiate/article/Eskimo/33011> (consultation 10 April 2019).

²¹⁰ EB EDITORS, "Eskimo" in *Britannica Academic, Encyclopædia Britannica*, 10 January 2019, <https://academic.eb.com/levels/collegiate/article/Eskimo/33011> (consultation 10 April 2019).

²¹¹ In this respect, TOMASELLI reports that in recent times and due to climate change, seal hunting has become more difficult for several people among the Inuit, who have now turned primarily to cod fishing instead. (A. TOMASELLI, "Indigenous Peoples in Europe and Their International Protection vis-à-vis the Threat of Climate Change" in *European Yearbook of Minority Issues Online* 2017, (37) 52).

²¹² P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 22.

have redefined themselves, while adapting to changing circumstances and modern influences.²¹³ Some of these adaptations are the driving of snowmobiles where they originally used dog-sleds and the usage of rifles instead of harpoons.²¹⁴ They generally do not have a nomadic lifestyle anymore but instead live in towns and cities.²¹⁵ In very remote communities, the traditional lifestyle is still more present.²¹⁶ In general, the Inuit still live and travel on the ice and depend on the cold weather for their subsistence.²¹⁷

70. Greenland was colonised by Denmark in the 18th century, establishing the Danish language, culture and institutions for the Inuit communities living in the region.²¹⁸ The colonisation mission was a religious one, imposing Christian religion and culture on the indigenous peoples.²¹⁹ Even though the Danish colonisation of Greenland was not as bloody and violent as many other colonisation histories, they did in fact try to reshape the lives of the indigenous peoples towards their views and ideals, trying to balance the maintenance of traditional culture with colonist views of civilizing the native people.²²⁰ In this way, the Inuit of Greenland were gradually forced and persuaded to change their behaviour, thus slowly making indigenous culture disappear.²²¹ Nonetheless, recently, this approach has changed. In 2009, the Self-Government Act was enacted and the right to self-determination of the people of Greenland was acknowledged.²²² Furthermore

²¹³ Comment by K. OMURA to A. KUPER, “The Return of the Native” in *Current Anthropology* 2003, (389) 396; B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 120.

²¹⁴ Comment by K. OMURA to A. KUPER, “The Return of the Native” in *Current Anthropology* 2003, (389) 396; EB EDITORS, “Eskimo” in *Britannica Academic, Encyclopædia Britannica*, 10 January 2019, <https://academic.eb.com/levels/collegiate/article/Eskimo/33011> (consultation 10 April 2019).

²¹⁵ EB EDITORS, “Eskimo” in *Britannica Academic, Encyclopædia Britannica*, 10 January 2019, <https://academic.eb.com/levels/collegiate/article/Eskimo/33011> (consultation 10 April 2019).

²¹⁶ B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 120; S. PAX LEONARD, “The need to ‘belong’: social connectedness and spatial attachment in Polar Eskimo settlements” in *Polar Record* 2014, (138) 138.

²¹⁷ S. PAX LEONARD, “The need to ‘belong’: social connectedness and spatial attachment in Polar Eskimo settlements” in *Polar Record* 2014, (138) 139.

²¹⁸ C. L. MCLISKY, “The History and Legacy of Popular Narratives about Early Colonial Missions to Greenland and Australia” in *Journal of Social History* 2017, (534) 535; B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 114 and 119; R. SØREN, *Colonialism in Greenland. Tradition, Governance and Legacy*, Cambridge, Palgrave Macmillan, 2017, 172 p.

²¹⁹ C. L. MCLISKY, “The History and Legacy of Popular Narratives about Early Colonial Missions to Greenland and Australia” in *Journal of Social History* 2017, (534) 535.

²²⁰ R. SØREN, *Colonialism in Greenland. Tradition, Governance and Legacy*, Cambridge, Palgrave Macmillan, 2017, 33-36.

²²¹ *Ibid.*, 36-37.

²²² B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 113; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 22.

the Act recognises one of the Inuit languages, Greenlandic,²²³ as an official language of Greenland.²²⁴ The Inuit as a group have represented themselves as being indigenous peoples in the UNWGIP,²²⁵ and the Inuit Circumpolar Council (hereinafter: ICC) refers to itself as an ‘international indigenous organisation’.²²⁶

71. When all these aspects are investigated under the definition, it first becomes clear that they self-identify as indigenous peoples, which is apparent through the presence at the UNWGIP and their unison in the ICC. Next, they have a special connection to their lands in the sense that they depend on them for their subsistence, they have always lived in the extremely cold arctic regions of Greenland and they depend on the presence of certain animals, such as seals and whales, to keep their ways of life intact. Third, they have a history of marginalisation and discrimination, having been colonised by the Danes. Even though this colonisation was not bloody, it resulted in a loss of Inuit culture and way of life, and Inuit have been known to be evicted from their traditional lands.²²⁷ The fourth criterion is that of being culturally distinct from dominant society. Originally, this was true without any doubt. But ever since the colonisation, they have adapted and part of the Inuit have become a real part of Greenlandic society, leaving their original culture behind. Some Inuit communities still very much live according to their original customs, but others have integrated into modern Greenlandic society. For the Inuit as a whole, it is thus debatable if they have a culture distinct from dominant society. However, one could argue that this is actually the case. On the one hand, there has to be some space for adaptation to modernity, also for indigenous peoples. On the other hand, Greenlandic society, which is comprised of Inuit people for almost

²²³ Greenlandic can refer to any of the indigenous languages. In practice, Kalaallisut, the language of the Kalaallit of western Greenland, is recognised. (B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 113).

²²⁴ B.O.G. MORTENSEN and U. BARTEN, “The Greenland Self-Government Act: The Pitfall for the Inuit in Greenland to Remain and Indigenous People?” in *The Yearbook of Polar Law* 2016, (103) 113; P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 22.

²²⁵ UNWGIP: Report of the Working Group on Indigenous Populations on its eleventh session (23 August 1993), *UN Doc. E/CN.4/Sub.2/1993/29* (1993), §9; Report of the Working Group on Indigenous Populations on its twelfth session (17 August 1994), *UN Doc. E/CN.4/Sub.2/1994/30* (1994), §10; Report of the Working Group on Indigenous Populations on its fourteenth session (16 August 1996), *UN Doc. E/CN.4/Sub.2/1996/21* (1996), §10; Report of the Working Group on Indigenous Populations on its twenty-first session (11 August 2003), *UN Doc. E/CN.4/Sub.2/2003/22* (2003), annex I; etc;

²²⁶ Preamble and article 1, §6 Charter of the Inuit Circumpolar Council of Nuuk of 1 July 2010, <http://inuit.org/icc-greenland/charter/>; D. SANDERS, “The UN Working Group on Indigenous Populations” in *HRQ* 1989, (406) 418.

²²⁷ The eviction of the Inughuit of Thule from their lands in 1953 for the construction of a USA Thule Air Base. For the resistance of the indigenous people on this issue, see ECtHR 12 January 2006, No. 18584/04, *Hingitaq 53/Denmark* (Admissibility Decision); Resolution 03-02 Recognising the Inughuit as a Distinct Indigenous People of Greenland and their Right to Return to their Traditional Lands of the Inuit Circumpolar Council Executive Council (26-27 June 2003), <http://inuit.org/icc-greenland/icc-executive-council/recognizing-the-inughuit-as-a-distinct-indigenous-people-of-greenland-and-their-right-to-return-to-their-traditional-lands/>, (2003).

90%,²²⁸ is distinct from Danish society and of general European society, which can in this case be viewed as ‘dominant society’. Lastly, from this explanation, it has become clear that their right to self-determination has already been recognised by Denmark, also fulfilling the fifth criterion. In conclusion, even though it is debatable, this dissertation concludes that the Inuit as a whole are an indigenous people under the definition set up in this research. This means that all the separate Inuit communities automatically also qualify as indigenous. However, it might still be useful to separately identify different groups of Inuit as indigenous people in specific cases if they fit the criteria more easily, so as to reinforce their status as an indigenous people.

C. The Ilois

72. Of all the peoples mentioned under the first paragraph of this Chapter, the Ilois are the only people who are not mentioned as an indigenous people in “The Indigenous World”, a work by the International Work Group for Indigenous Affairs (hereinafter: IWGIA) that claims to “*give a comprehensive yearly overview of the developments indigenous peoples have experienced*”²²⁹ The Ilois are thus not on IWGIAs radar. This group of people has an atypical history for a group claiming to be indigenous. Keeping the developments of the last thirty years in mind, however, this does not necessarily mean that they cannot be qualified as indigenous peoples.
73. The islands of the Chagos Archipelago were uninhabited for a long period of time.²³⁰ It was only in the late 18th century that the islands started to be inhabited, by French citizens who brought slaves to work on the plantations that they started there.²³¹ Over the next 200 years, these slaves would eventually form a distinct community and call themselves ‘Ilois’, which means

²²⁸ As 50,000 of the 56,000 inhabitants of Greenland are Inuit.

²²⁹ P. JACQUELIN-ANDERSEN (ed.), *The Indigenous World 2018*, Copenhagen, IWGIA, 2018, 19.

²³⁰ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §4; R. GIFFORD and R. P. DUNNE, “A Dispossessed People: the Depopulation of the Chagos Archipelago 1965-1973” in *Population, Space and Place* 2014, (37) 38; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26; EB EDITORS, “British Indian Ocean Territory (BIOT)” in *Britannica Academic, Encyclopædia Britannica*, 25 March 2019, <https://academic.eb.com/levels/collegiate/article/British-Indian-Ocean-Territory/16523#342433.toc> (consultation 11 April 2019).

²³¹ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §4; M. CARTER, “Towards a worker’s history of the Chagos archipelago” in *JIOR* 2017, (213) 216; R. GIFFORD and R. P. DUNNE, “A Dispossessed People: the Depopulation of the Chagos Archipelago 1965-1973” in *Population, Space and Place* 2014, (37) 38; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26; EB EDITORS, “British Indian Ocean Territory (BIOT)” in *Britannica Academic, Encyclopædia Britannica*, 25 March 2019, <https://academic.eb.com/levels/collegiate/article/British-Indian-Ocean-Territory/16523#342433.toc> (consultation 11 April 2019).

‘Islanders’.²³² These people are a mixture of African descendants and Indians and they speak a Creole dialect.²³³ They have always lived under bad circumstances: first as slaves, next as underpaid workers.²³⁴ They developed a culture of culinary traditions, specific festivities and games.²³⁵ Furthermore, they lived in their own typical cottages thatched with palm leaves from the coconut trees.²³⁶ Over these 200 years, several generations stayed and lived on these lands and paid respects to the graves of ancestors.²³⁷ Nevertheless, the event that has formed their shared identity the most and has put a spotlight on this people, was their forced removal from the islands by the British government between 1967 and 1973.²³⁸ The place would hold a major British-U.S.

²³² M. CARTER, “Towards a worker’s history of the Chagos archipelago” in *JIOR* 2017, (213) 223; C. MONAGHAN, “An Imperfect Legacy: The Significance of the *Bancoult* Litigation on the Development of Domestic Constitutional Jurisprudence” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (111) 113; A. SCHWEBEL, “International Law and Indigenous Peoples’ Rights: What Next for the Chagossians” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (319) 324; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26.

²³³ A. SCHWEBEL, “International Law and Indigenous Peoples’ Rights: What Next for the Chagossians” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (319) 324; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26.

²³⁴ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §4; M. CARTER, “Towards a worker’s history of the Chagos archipelago” in *JIOR* 2017, (213) 216; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26.

²³⁵ A. SCHWEBEL, “International Law and Indigenous Peoples’ Rights: What Next for the Chagossians” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (319) 324.

²³⁶ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §4; M. CARTER, “Towards a worker’s history of the Chagos archipelago” in *JIOR* 2017, (213) 223.

²³⁷ A. SCHWEBEL, “International Law and Indigenous Peoples’ Rights: What Next for the Chagossians” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (319) 325; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 27.

²³⁸ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §8; C. MONAGHAN, “An Imperfect Legacy: The Significance of the *Bancoult* Litigation on the Development of Domestic Constitutional Jurisprudence” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (111) 112; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26; EB EDITORS, “British Indian Ocean Territory (BIOT)” in *Britannica Academic, Encyclopædia Britannica*, 25 March 2019, <https://academic.eb.com/levels/collegiate/article/British-Indian-Ocean-Territory/16523#342433.toc> (consultation 11 April 2019).

military facility and therefore all the inhabitants²³⁹ had to leave.²⁴⁰ For lack of a resettlement plan, the Ilois were then dispersed over various regions, including the Seychelles, Mauritius and the UK.²⁴¹ No resources or help was given to them to help rebuild their lives in these new communities.²⁴² Ever since then, they have tried as a community to regain access to their original lands²⁴³ and have identified as indigenous peoples.²⁴⁴

74. When this description is examined, keeping in mind the definition of indigenous peoples, it is clear that the first criterion, that of self-identification as indigenous, is met. Secondly, a special connection to their traditional lands is required. Even though this special connection is less present than in more traditional indigenous societies, because of the Ilois being paid workers and not relying on their specific lands for subsistence, it may be argued that there is a special connection. This connection exists because they have lived on these lands for generations and the graves of their ancestors lie there. In addition, this connection has become stronger because of their forced

²³⁹ Sources vary on the amount of Ilois that were forcibly removed from their lands. Between 1,000 and 2,000 people were expelled from the territory. (some 1,500 people according to GIFFORD, less than a thousand people according to the facts from the ECtHR Chagos Islanders case and 2,000 people according to VINE. See R. GIFFORD, “How Public Law Has Not Been Able to Provide the Chagossians with a Remedy” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (55) 56; ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom ((Admissibility Decision), §4; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26).

²⁴⁰ R. GIFFORD, “How Public Law Has Not Been Able to Provide the Chagossians with a Remedy” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (55) 56; EB EDITORS, “British Indian Ocean Territory (BIOT)” in *Britannica Academic, Encyclopædia Britannica*, 25 March 2019, <https://academic.eb.com/levels/collegiate/article/British-Indian-Ocean-Territory/16523#342433.toc> (consultation 11 April 2019).

²⁴¹ R. GIFFORD, “How Public Law Has Not Been Able to Provide the Chagossians with a Remedy” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (55) 56; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26; EB EDITORS, “British Indian Ocean Territory (BIOT)” in *Britannica Academic, Encyclopædia Britannica*, 25 March 2019, <https://academic.eb.com/levels/collegiate/article/British-Indian-Ocean-Territory/16523#342433.toc> (consultation 11 April 2019).

²⁴² ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §11; R. GIFFORD, “How Public Law Has Not Been Able to Provide the Chagossians with a Remedy” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (55) 56; D. VINE, “Comment: Decolonizing Britain in the 21st Century? Chagos Islanders challenge the Crown, House of Lords, 30 June-3 July 2008” in *Anthropology Today* 2008, (26) 26.

²⁴³ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §§12-31; A. SCHWEBEL, “International Law and Indigenous Peoples’ Rights: What Next for the Chagossians” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (319) 324-325.

²⁴⁴ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §31 and §56; A. SCHWEBEL, “International Law and Indigenous Peoples’ Rights: What Next for the Chagossians” in S. ALLEN and C. MONAGHAN (eds.), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives*, Cham, Springer International Publishing, 2018, (319) 324; Report of the Working Group on Indigenous Populations on its fourteenth session (16 August 1996), *UN Doc. E/CN.4/Sub.2/1996/21* (1996), §11; Report of the Working Group on Indigenous Populations on its twenty-first session (11 August 2003), *UN Doc. E/CN.4/Sub.2/2003/22* (2003), annex I; etc.

removal from these lands. In having to leave their homes behind, the connection to them became greater.²⁴⁵ The third criterion, a history of marginalisation and discrimination, is visibly present. These peoples started out as slaves, became underpaid workers and were then forced to leave their homes without a proper resettlement plan. The fourth criterion is that of being culturally distinct from dominant society. In having their own language or dialect, their own distinctive houses and their own cultural traditions, it is clear that they do have a distinctive culture. This culture is distinct from that of the French land owners, who used to lead the society on the island. The Ilois sense of cultural distinctiveness was also magnified by the expulsion from their lands, which according to some authors, created a ‘romanticised’ image of who they used to be as a community.²⁴⁶ Lastly, the Ilois do not seem to have a claim to self-determination. In the definition, this is only an indicative criterion, leaving the possibility for a people to be an indigenous people even without this claim. In conclusion, even though for the last fifty years they have not been able to live according to their traditions or even live together as a community, the Ilois classify as an indigenous people under the definition.

§3. Conclusion

75. In sum, all the three groups investigated qualify as indigenous peoples under the definition, even though it is clearer for some and debatable for others. This effort has also highlighted that the identification criteria used by the different authors and the definition set up in this research are not exactly the same, as this definition includes the Ilois, while many authors typically do not. It is thus necessary to reassess if some people qualify as indigenous, particularly the groups that have typically fallen out of the scope of the earlier definitions, as the new definition handles broad criteria and leaves behind the pre-invasion requirement.

²⁴⁵ See M. CARTER, “Towards a worker’s history of the Chagos archipelago” in *JIOR* 2017, (213) 228 and L. JEFFERY, “Forced Displacement, Onward Migration and Reformulations of ‘Home’ by Chagossians in Crawley, UK” in *JEMS* 2010, (1099) 1104. Both authors claim that this has happened both with their connection to their lands and with their common identity, having ‘romanticised’ their lives before the forced removal.

²⁴⁶ *Ibid.*

PART II. THE RIGHT TO CULTURAL IDENTITY

“Is the right to cultural identity of indigenous peoples sufficiently protected in Europe?”

76. Part II of this dissertation concerns the right to cultural identity. In this part, first the possible existence of this right is investigated and the content of this right is defined in the context of indigenous peoples. This is the subject of the first Chapter. In Chapter II, it is first examined which articles under the ECHR are relevant for the protection of this right. Next, when they have been defined, the content and scope of the relevant articles is discussed. Finally, the last Chapter evaluates if this protection of the right to cultural identity under the ECHR is a sufficient protection for indigenous peoples in Europe.

CHAPTER I. CONCEPTIONS OF THE RIGHT TO CULTURAL IDENTITY

“What is meant by the right to cultural identity?”

77. This part of the research will investigate the existence and content of a right to cultural identity for indigenous peoples. The possible existence of such a right will first be looked at in a broader context, without a focus on indigenous peoples. When it is discovered that such a right actually exists, the investigation will proceed by looking at this right in the context of the ECHR, discussing the question of what the European Court believes this right to entail and what ‘sub-rights’ are necessary for the effective enjoyment of a right to cultural identity. The investigation of the content of the right will thus start with an analysis of ECtHR case law. An investigation is made into the use of the concept of ‘cultural identity’ by the European Court and into what the Court believes it to mean.

After this general introduction into a right to cultural identity, the focus will be shifted to indigenous peoples. For this, the ECtHR case law will briefly be looked at, but since the Court has not handled many cases regarding indigenous peoples, it is also useful to look at different Courts’ decisions. For this, the jurisprudence of the IAC(t)HR and the ACHPR on the right to cultural identity of indigenous peoples will be used. Even though this dissertation focuses on European indigenous peoples, it could be useful to look at the position of these two courts regarding the groups on their territories. There are two reasons for this use of these Courts’ jurisprudence. On the one hand, even though the definition given to indigenous peoples was designed specifically for European indigenous peoples, concepts were used that were intended to apply to indigenous peoples globally. So even though the definitions for indigenous peoples in

other regions might differ from the definition used in this research, the differences will not be very sharp. Secondly, it has to be kept in mind that every single indigenous people is different, and thus the right might differ regarding every single group. Therefore, the right to cultural identity should be a flexible one and illustrations of it can be sought in conditions that are not entirely the same as in Europe. After taking a look at the approaches of the IACHR and the ACHPR, the UNDRIP will be considered. Taking inspiration from the Inter-American Court and the African Commission's approaches, the Declaration will be searched for a right to cultural identity. Lastly, an interpretation of indigenous peoples' right to cultural identity will be made.

SECTION I. THE CONCEPT OF CULTURAL IDENTITY BEFORE THE ECTHR

78. The *Research Report on Cultural Rights* of the Council of Europe entails a section on 'the right to cultural identity'.²⁴⁷ It states that "[t]he right to cultural identity has been indirectly protected by the Court under various Articles of the Convention, namely: Article 8 and the right to lead one's life in accordance with a cultural identity and the right to choose freely a cultural identity; Article 9 and the right to a religious identity; Article 11 and the freedom of association with a cultural purpose."²⁴⁸

The Court thus accepts the concept of cultural identity and safeguards it. The concept is not protected as a separate right, but rather enjoys protection under the heading of three different convention rights, namely Article 8, Article 9 and Article 11 ECHR.²⁴⁹ A short overview of the rights already acknowledged to fall under 'cultural identity' within the scope of the ECHR is in order. Firstly, under Article 8 of the Convention, the "right to lead one's life in accordance with a cultural identity"²⁵⁰ and the "right to choose freely a cultural identity"²⁵¹ have been acknowledged. Under the right to lead one's life in accordance with a cultural identity, certain aspects of the gypsy lifestyle are protected. In this respect, the Court observed that "there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security,

²⁴⁷ ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 14-22.

²⁴⁸ *Ibid.*, 14, §32.

²⁴⁹ *Ibid.*, 14, §32.

²⁵⁰ ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §73; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 14, §33. See also ECtHR 24 April 2012, No. 25446/06, Yordanova and others/Bulgaria and ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France.

²⁵¹ ECtHR 27 April 2010, No. 27138/04, Ciubotaru/Moldova; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 17, §43.

identity and lifestyle...., not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community."²⁵² The Court also "recognised that Article 8 entails positive obligations for the State to facilitate the Gypsy way of life"²⁵³ The ECtHR has thus determined that the occupation of a caravan²⁵⁴ and the cultural dimensions of gypsy marriage²⁵⁵ fall under the right to cultural identity for the gypsy community and in some cases necessitate positive state action.²⁵⁶ Furthermore, there is the right to choose freely a cultural identity, which entails several aspects such as the choice of an ethnic identity based on objective grounds²⁵⁷ or the change of name.²⁵⁸

79. Secondly, under Article 9 of the Convention, the right to religious identity is recognized.²⁵⁹ Lastly, Article 11 specifically protects the right to freedom of association with a cultural purpose. In this respect, associations with an aim to promote minority culture should be allowed.²⁶⁰ In addition, everyone is entitled to the right to express their beliefs about their ethnic identity²⁶¹ and persons belonging to minorities have the right to hold peaceful meetings.²⁶²

²⁵² ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §93; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 15, §35.

²⁵³ ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §122 and §128; ECtHR 24 April 2012, No. 25446/06, Yordanova and others/Bulgaria, §131; ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §96; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 15, §35.

²⁵⁴ ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 15, §§35-36. See also ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*; ECtHR 24 April 2012, No. 25446/06, Yordanova and others/Bulgaria; ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France; ECtHR 11 October 2016, No. 19841/06, Bagdonavicius and others/Russia.

²⁵⁵ ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 15-16, §§37-38. See also ECtHR 8 December 2009, No. 49151/07, Muñoz Díaz/Spain, *Reports of Judgments and Decisions 2009*; ECtHR 31 July 2012, No. 40020/03, M. and others/Italy and Bulgaria.

²⁵⁶ ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §96; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 15, §35.

²⁵⁷ ECtHR 27 April 2010, No. 27138/04, Ciubotaru/Moldova; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 17-18, §43.

²⁵⁸ ECtHR 5 December 2013, No. 32265/10, Henry Kismoun/France; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 18, §44.

²⁵⁹ ECtHR 2 February 2010, No. 21924/05, Sinan Işık/Turkey, *Reports of Judgments and Decisions 2010*; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 18, §45.

²⁶⁰ ECtHR 10 July 1998, No. 26695/95, Sidiropoulos and others/Greece, *Reports 1998-IV*; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 21, §53.

²⁶¹ ECtHR 27 March 2008, No. 26698/05, Tourkiki Enosi Xanthis and others/Greece, §56; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 22, §55.

²⁶² ECtHR 2 October 2001, Nos. 29221/95 and 29225/95, Stankov and the United Macedonian Organisation Ilinden/Bulgaria, *Reports of Judgments and Decisions 2001-IX*; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 22, §56.

80. These varying aspects under three different convention rights have been accepted to be a part of cultural identity and to deserve protection in this quality. In one of the cases under Article 8, namely the Muñoz Díaz case on marital rights, the Court also found a violation of the woman's property rights under the first Protocol to the ECHR,²⁶³ but in the *Research Report on Cultural Rights* this was not mentioned as a possible part of cultural identity.²⁶⁴ In addition, even though according to the report, linguistic rights are part of cultural rights, they do not seem to fall under 'cultural identity' for the ECHR.²⁶⁵ The report considers linguistic rights to be a different 'area' of cultural right than the right to cultural identity. Other 'areas' of cultural rights discussed in the report are artistic expression, access to culture, education, cultural and natural heritage, historical truth and academic freedom.²⁶⁶ The report does specify that "[t]hese areas are interconnected and it is sometimes difficult to separate one from the other."²⁶⁷ There is thus no clear-cut distinction between the different areas of cultural rights that fall within the protection of the ECHR.
81. In sum, the ECtHR protects the concept of cultural identity, and it does this within the scope of three convention rights, namely Articles 8, 9 and 11. In its protection, it focuses mostly on minorities and their right to cultural identity. The cases tried by the Court regarding cultural identity have concerned Roma and travellers' groups²⁶⁸ and ethnic minorities in different countries, such as the Romanians in Moldova.²⁶⁹ As a consequence, the concept of cultural identity has not been applied to indigenous peoples by the ECtHR. To investigate further the concept of cultural identity with regard to indigenous peoples and the (sub-)rights it should entail for the protection of this group, additional sources will need to be consulted.

SECTION II. CULTURAL IDENTITY AND INDIGENOUS PEOPLES

82. To investigate the right to cultural identity of indigenous peoples, first the case law of the IACtHR and the ACHPR will be looked at. It can be useful to look at what they believe the right to cultural

²⁶³ ECtHR 8 December 2009, No. 49151/07, Muñoz Díaz/Spain, *Reports of Judgments and Decisions 2009*, §71.

²⁶⁴ ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 16, §37.

²⁶⁵ *Ibid.*, 3.

²⁶⁶ *Ibid.*, 4, §2.

²⁶⁷ *Ibid.*, 4, §2.

²⁶⁸ See ECtHR 11 October 2016, No. 19841/06, Bagdonavicius and others/Russia; ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France; ECtHR 31 July 2012, No. 40020/03, M. and others/Italy and Bulgaria; ECtHR 24 April 2012, No. 25446/06, Yordanova and others/Bulgaria; ECtHR 8 December 2009, No. 49151/07, Muñoz Díaz/Spain, *Reports of Judgments and Decisions 2009*; ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*.

²⁶⁹ ECtHR 27 April 2010, No. 27138/04, Ciubotaru/Moldova.

identity of indigenous peoples to be, for a better comprehension of the concept in the indigenous context. Next, the UN Declaration on the Rights of Indigenous Peoples will be discussed. Given its drafting history, this Declaration is bound to contain the relevant aspects for the protection of cultural identity for indigenous peoples. After investigating the IACtHR and ACHPR jurisprudence, it will be easier to identify relevant elements for the right to cultural identity in this Declaration, as ‘cultural identity’ is not mentioned in the document. The UNDRIP will then serve as the main basis for interpreting the right to cultural identity of indigenous peoples.

§1. Human rights systems

83. Until now the only case regarding indigenous peoples on which the ECtHR has ever decided on the merits has been the Handölsdalen case. Since the admissible part of the case was only about access to court, this case is not very useful with respect to cultural identity. Apart from this, another indigenous case was mentioned in the Research Report on Cultural Rights, namely the Hingitaq 53 case, regarding the peaceful enjoyment of possessions.²⁷⁰ This case, however, was declared inadmissible before the Court because of the complaint being manifestly ill-founded.²⁷¹ In short, there is no case law of the ECtHR available on the subject of the right to cultural identity of indigenous peoples. For this reason, it could be useful to take a look at the case law regarding the right to cultural identity of indigenous peoples of the IAC(t)HR and the ACHPR.

A. IAC(t)HR

84. In a number of cases regarding indigenous peoples, the Inter-American Court has recognised the fundamental importance of these peoples’ cultural identity.²⁷² In this context, the Court has repeatedly stated the following: “*The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their*

²⁷⁰ ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 33, §84.

²⁷¹ They had been compensated for their eviction; ECtHR 12 January 2006, No. 18584/04, Hingitaq 53/Denmark (Admissibility Decision).

²⁷² IACtHR 25 November 2015, Kaliña and Lokono Peoples/Suriname, *IACHR Series C* No. 309; IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125. For a somewhat outdated but still relevant extensive overview, see Y. M. DONDERS, *Towards a Right to Cultural Identity?*, Antwerpen, Intersentia, 2002, 231 et seq.

religiousness, and consequently, of their cultural identity.”²⁷³ Furthermore, in several cases, the Court recognised that “[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 generations.”²⁷⁴ In the Awas Tigni case, right before stating this, the Court recognised that “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.”²⁷⁵ The Awas Tigni case dates from 2001 and was the first important indigenous case before the Inter-American Court. In this early case on indigenous rights, the court did not yet explicitly refer to the concept of cultural identity, even though its reasoning regarding land rights already seemed to touch very closely with the concept of cultural identity. In the later cases, the Court did in effect start to use and recognise this concept,²⁷⁶ as the Commission had done before it.²⁷⁷ Later on, in the Kichwa case, the IACtHR expressly recognised the right to cultural identity as a fundamental right: “The Court considers that the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society. This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization.”²⁷⁸

²⁷³ IACtHR 25 November 2015, Kaliña and Lokono Peoples/Suriname, *IACHR Series C* No. 309, §130; IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §159; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §174; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §120; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146, §118; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125, §135.

²⁷⁴ IACtHR 25 November 2015, Kaliña and Lokono Peoples/Suriname, *IACHR Series C* No. 309, §130; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §175; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146, §87 and §118; IACtHR 31 August 2001, Mayagna (Sumo) Awas Tigni Community/Nicaragua, *IACHR Series C* No. 79, §149. For an analysis, see also J. GILBERT, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, Ardsley, Transnational Publishers, 2006, 133 et seq.; A. SCHETTINI, “Toward a new paradigm of human rights protection for indigenous peoples: a critical analysis of the parameters established by the Inter-American Court of Human Rights” in *IJHR* 2012, (59) 67 et seq.; WIESSNER, “Self-determination, culture, and land,” in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (31) 54 et seq.

²⁷⁵ IACtHR 31 August 2001, Mayagna (Sumo) Awas Tigni Community/Nicaragua, *IACHR Series C* No. 79, §149.

²⁷⁶ IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §146; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §174; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §120; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146, §118; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125, §135.

²⁷⁷ IACHR 5 March 1985, No. 7615, Comunidad Yanomami/Brasil, *OAS Doc. OEA/Ser.L/V/II.66 doc. 10 rev. 1*, Consideraciones, §7 and §9; Y. M. DONDEERS, *Towards a Right to Cultural Identity?*, Antwerpen, Intersentia, 2002, 240.

²⁷⁸ IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §217.

85. From these statements it becomes evident that the IACtHR recognises indigenous peoples' relationships to the land as an essential part of their fundamental right to cultural identity. Furthermore, cultural identity seems to enshrine their particular worldview and their religion. Additionally, the Court has acknowledged the importance of their cultural and social life as another aspect of their cultural identity,²⁷⁹ sometimes with a specific mention of their language,²⁸⁰ and has stated that indigenous peoples' cultural identity "*has a unique content owing to the collective perception they have as a group.*"²⁸¹ In each case, the Court further identifies the specific characteristics of the group regarding their cultural identity, looking for elements that are "*essential for their cosmovision and particular way of life.*"²⁸² The protection of cultural identity by the IACtHR usually deals with a violation of property rights. This can be explained by the fact that the land is such an important element for these indigenous peoples that a violation of their property rights affects their cultural identity.²⁸³ Regarding property rights, specific importance is given to the right to previous consultation in the Inter-American context.²⁸⁴ Additionally, the right to life is also regularly seen to fall under the concept of cultural identity.²⁸⁵ Because of a broad interpretation of this right, as including "*not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access*

²⁷⁹ IACtHR 25 November 2015, Kaliña and Lokono Peoples/Suriname, *IACHR Series C* No. 309, §164; IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §217.

²⁸⁰ IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §179.

²⁸¹ IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §216; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §175.

²⁸² IACtHR 25 November 2015, Kaliña and Lokono Peoples/Suriname, *IACHR Series C* No. 309, §152; IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §219; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §176; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §123; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146, §124 and §212; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125, §140.

²⁸³ IACtHR 25 November 2015, Kaliña and Lokono Peoples/Suriname, *IACHR Series C* No. 309, §130 and §142; IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §232; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §177 and §182; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §120 and §185; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146, §118 and §144; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125, §137 and §156; IACtHR 31 August 2001, Mayagna (Sumo) Awas Tigni Community/Nicaragua, *IACHR Series C* No. 79, §149 and §155.

²⁸⁴ IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §220.

²⁸⁵ IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §189 and §215-216; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §120 and §168; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146, §156 and §164; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125, §161.

to a decent existence should not be generated,²⁸⁶ the Court occasionally finds a violation of it in the context of the right to cultural identity.²⁸⁷

86. In its interpretation of the property rights of indigenous peoples, the IACtHR often draws on the UNDRIP.²⁸⁸ In this way, the right to freely enjoy their property and resources²⁸⁹ and the right to previous consultation²⁹⁰ are expressly acknowledged in the Declaration and subsequently became more important in the IACtHR case law on indigenous peoples.²⁹¹ This demonstrates the importance of the UNDRIP for the interpretation of indigenous peoples' rights in the Inter-American context. Another important element is that the Court does not establish these property rights basing itself on official titles, but they are recognised on the basis of "*indigenous peoples' customary law*".²⁹² In this respect, the Court in the *Awas Tigni* case stated that: "*As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration;*"²⁹³ Later, first in the *Yakye Axa* case and reiterated throughout the later indigenous case law, the IACtHR stated more broadly: "*As regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and*

²⁸⁶ IACtHR 17 June 2005, *Yakye Axa Indigenous Community/Paraguay*, *IACHR Series C* No. 125, §161; IACtHR 2 September 2004, *Juvenile Reeducation Institute/Paraguay*, *IACHR Series C* No. 112, §156; IACtHR 8 July 2004, *Gómez-Paquiyaqui Brothers/Peru*, *IACHR Series C* No. 110, §128; IACtHR 25 November 2003, *Myrna Mack Chang/Guatemala*, *IACHR Series C* No. 101, §152; IACtHR 19 November 1999, *Street Children (Villagran-Morales et al.)/Guatemala*, *IACHR Series C* No. 63, §144.

²⁸⁷ IACtHR 24 August 2010, *Xákmok Kásek Indigenous Community/Paraguay*, *IACHR Series C* No. 214, §217; IACtHR 29 March 2006, *Sawhoyamaya Indigenous Community/Paraguay*, *IACHR Series C* No. 146, §178. No violation in the *Yakye Axa* case (IACtHR 17 June 2005, *Yakye Axa Indigenous Community/Paraguay*, *IACHR Series C* No. 125, §178).

²⁸⁸ IACtHR 25 November 2015, *Kaliña and Lokono Peoples/Suriname*, *IACHR Series C* No. 309, §§180, 202 and 221; IACtHR 27 June 2012, *Kichwa Indigenous People of Sarayaku/Ecuador*, *IACHR Series C* No. 245, §§166 and 167, footnotes 217-218, §215; IACtHR 24 August 2010, *Xákmok Kásek Indigenous Community/Paraguay*, *IACHR Series C* No. 214, §18; IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §131.

²⁸⁹ Articles 25, 26, 27, 29 and 32 UNDRIP.

²⁹⁰ Article 32 UNDRIP.

²⁹¹ IACtHR 25 November 2015, *Kaliña and Lokono Peoples/Suriname*, *IACHR Series C* No. 309, §§180, 202, 221 and 230; IACtHR 27 June 2012, *Kichwa Indigenous People of Sarayaku/Ecuador*, *IACHR Series C* No. 245, §145, §§166 and 167, §232; IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §131 and §146. See also A. SCHETTINI, "Toward a new paradigm of human rights protection for indigenous peoples: a critical analysis of the parameters established by the Inter-American Court of Human Rights" in *IJHR* 2012, (59) 67.

²⁹² IACtHR 28 November 2007, *Saramaka People/Suriname*, *IACHR Series C* No. 172, §119; IACtHR 31 August 2001, *Mayagna (Sumo) Awas Tigni Community/Nicaragua*, *IACHR Series C* No. 79, §151; A. SCHETTINI, "Toward a new paradigm of human rights protection for indigenous peoples: a critical analysis of the parameters established by the Inter-American Court of Human Rights" in *IJHR* 2012, (59) 68; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, 352.

²⁹³ IACtHR 31 August 2001, *Mayagna (Sumo) Awas Tigni Community/Nicaragua*, *IACHR Series C* No. 79, §151.

social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs.”²⁹⁴

87. In sum, the jurisprudence of the Inter-American Court provides ample protection for indigenous peoples and pays special attention to indigenous peoples’ right to cultural identity, which it has expressly recognised as a fundamental right. The protection of the right to cultural identity is broad, encompassing property rights that are thoroughly reinterpreted to fit the concept of property for indigenous peoples, cultural rights – including language rights, religious rights and the right to life – and possibly much more.

B. ACHPR

88. In the Endorois case, the African Commission also seems to have recognised the right to cultural identity for indigenous peoples.²⁹⁵ In this case, the Endorois community claimed that the land was part of the “*cultural integrity of the community*”²⁹⁶ and that the government actions with regard to their land were jeopardising this cultural integrity.²⁹⁷ In this case, the Commission concluded that “*Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands*”²⁹⁸ and that “*without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights.*”²⁹⁹ Further on in its decision, the Commission states that it is “*of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands.*”³⁰⁰ Finally, the African Commission stated that “[i]t has also understood

²⁹⁴ IACtHR 25 November 2015, Kaliña and Lokono Peoples/Suriname, *IACHR Series C* No. 309, §251, 4; IACtHR 27 June 2012, Kichwa Indigenous People of Sarayaku/Ecuador, *IACHR Series C* No. 245, §264; IACtHR 24 August 2010, Xákmok Kásek Indigenous Community/Paraguay, *IACHR Series C* No. 214, §270; IACtHR 28 November 2007, Saramaka People/Suriname, *IACHR Series C* No. 172, §178; IACtHR 29 March 2006, Sawhoyamaxa Indigenous Community/Paraguay, *IACHR Series C* No. 146, §83; IACtHR 17 June 2005, Yakye Axa Indigenous Community/Paraguay, *IACHR Series C* No. 125, §63.

²⁹⁵ ACHPR 25 November 2009, No. 276/03, Endorois; J. GILBERT, “Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights” in *ICLQ* 2011, (245) 258. In contrast to this, in a judgment of 2017 on the Ogiek peoples and their being expelled from their ancestral lands, the African Court on Human and Peoples’ Rights (hereinafter: ACtHPR) did not mention indigenous peoples’ cultural identity, even though it did conclude a violation of the peoples’ rights to land, religion, culture, development and non-discrimination. The interpretations of the African Court and Commission of indigenous peoples’ rights are thus not entirely the same. On the other hand, this shows that a peoples’ cultural identity (as explained by the African Commission in the Endorois case) can be effectively protected without any mention of the concept of cultural identity. (ACtHPR 26 May 2017, No. 006/2012, ACHPR/Kenya).

²⁹⁶ ACHPR 25 November 2009, No. 276/03, Endorois, §16.

²⁹⁷ *Ibid.*, §19 and §117.

²⁹⁸ *Ibid.*, §156.

²⁹⁹ *Ibid.*, §156.

³⁰⁰ *Ibid.*, §162.

cultural identity to encompass a group's religion, language, and other defining characteristics."³⁰¹

In other words, even though in this case the African Commission does not copy the terminology used by the Endorois community, which claims a violation of their cultural *integrity*, the Commission does acknowledge a violation of the Endorois' cultural *identity*, which it seems to regard as essentially the same thing. In acknowledging this, the Commission clarifies that it believes cultural identity to encompass "*a group's religion, language, and other defining characteristics.*"³⁰² Throughout the decision, it becomes very clear that the identification with ancestral lands is, for the Endorois community, an important 'other defining characteristic'.³⁰³ From the Endorois case, it has thus become apparent that the African Commission understands cultural identity to encompass religion, language, and, when this is a defining characteristic for an indigenous people, the identification with ancestral lands.

C. Conclusion

89. In conclusion, both the African Commission and the Inter-American court have a clear conception of what they believe the right to cultural identity of indigenous peoples to be. Even though the Inter-American Court has dealt with many more indigenous cases and has developed a much broader theory on indigenous peoples' cultural identity, both systems seem to agree on a number of elements. Firstly, both systems believe culture and religion to be important in cultural identity. Secondly, both systems have underlined the importance of indigenous peoples' lands in their cultural identity. Even though these human rights systems function on different continents than the European system and thus rule on different situations, some value can be given to their interpretation of indigenous peoples' right to cultural identity. This is the case because the definition used for indigenous peoples in this research was set up by using sources claiming to be universal. At the very least, this jurisprudence can be an example of what indigenous peoples' cultural identity could mean, how it could be interpreted using existing rights and in what way it can effectively be enforced.

³⁰¹ ACHPR 25 November 2009, No. 276/03, Endorois, §241.

³⁰² *Ibid.*

³⁰³ *Ibid.*, §156 and §162.

§2. UNDRIP: an interpretation of cultural identity

A. The UNDRIP

90. Having previously discussed different concepts of cultural identity and indigenous peoples' cultural identity, it is useful to look at the UNDRIP: a declaration drafted by indigenous groups from all over the world, including European indigenous peoples. A possible concept of cultural identity in this Declaration could be very useful for understanding European indigenous peoples' right to cultural identity.
91. The UNDRIP itself does not make any mention of the concept of 'cultural identity'. But even though the concept is not mentioned, cultural identity is very much present in the declaration, which among others states in its preamble:

“Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources

(...)

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples”³⁰⁴

Furthermore, Article 43 of the UNDRIP states: *“The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”³⁰⁵* Given the different interpretations of cultural identity already mentioned, the statements of the preamble obviously point to indigenous peoples' cultural identity. This shows that the Declaration was drafted mainly to protect indigenous peoples and their culture, and thus contains the rights that should be safeguarded for ensuring an effective protection of their right to cultural identity.³⁰⁶

³⁰⁴ Considerations 6 and 21, preamble to the UNDRIP.

³⁰⁵ Article 43 UNDRIP.

³⁰⁶ See, of a similar opinion ODELLO, saying that “[t]he UNDRIP mentions cultural elements which are considered indispensable in the protection of indigenous rights” and “[t]he preservation of cultural identity of indigenous peoples can be based on existing fundamental rights recognised to minorities” (M. ODELLO, “Indigenous peoples' rights and cultural identity in the inter-American context” in *IJHR* 2012, (25) 32 and 33). SAMSON, too, is of the opinion that the UNDRIP “contains standards for states on the maintenance of indigenous cultural continuity” (C. SAMSON, “Indigenous

92. In its 46 articles, the UNDRIP contains a whole range of rights encompassing different fields. The following is a non-exhaustive overview of the declaration's rights.³⁰⁷ The UNDRIP holds the right to equal treatment or non-discrimination,³⁰⁸ the right to distinct political, legal, economic, social and cultural institutions,³⁰⁹ the rights to life and integrity,³¹⁰ the right not to be subjected to forced assimilation or destruction of their culture,³¹¹ the right to belong to an indigenous community,³¹² the right not to be forcibly removed from their lands,³¹³ the right to practice and revitalize cultural traditions and customs,³¹⁴ the right to manifest, develop and teach their spiritual and religious traditions,³¹⁵ the right to revitalise and use their histories and languages,³¹⁶ the right to education and to establish their own educational systems,³¹⁷ the right to dignity and diversity of their cultures,³¹⁸ the right to establish their own media,³¹⁹ the right to development,³²⁰ the right to their traditional medicines and to maintain their health practices,³²¹ the right to the spiritual relationship with their lands,³²² the right to their lands and resources,³²³ the right to the conservation and protection of their environment,³²⁴ the right to their cultural heritage,³²⁵ the right to choose what to do with their lands and resources,³²⁶ the right to determine their own identity

peoples' rights: anthropology and the right to culture in R. MORGAN and B. S. TURNER (eds.), *Interpreting Human Rights: Social science perspectives*, Abingdon, Routledge, 2009, (68) 82). In addition, STAMATOPOULOU also describes the UNDRIP as encompassing rights related to culture and identity. (E. STAMATOPOULOU, "Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples," in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 388-389). KYMLICKA, too, believes the Declaration to be about cultural identity (W. KYMLICKA, "Beyond the Indigenous/Minority Dichotomy?" in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 190).

³⁰⁷ Not all rights are included, as on the one hand some of the rights refer to self-determination and its corollaries, and on the other hand some rights are of equal treatment within indigenous peoples, which also fall outside of the scope of this research.

³⁰⁸ Article 2 UNDRIP.

³⁰⁹ Article 5 UNDRIP.

³¹⁰ Article 7 UNDRIP

³¹¹ Article 8 UNDRIP.

³¹² Article 9 UNDRIP.

³¹³ Article 10 UNDRIP.

³¹⁴ Article 11 UNDRIP.

³¹⁵ Article 12 UNDRIP.

³¹⁶ Article 13 UNDRIP.

³¹⁷ Article 14 UNDRIP.

³¹⁸ Article 15 UNDRIP.

³¹⁹ Article 16 UNDRIP.

³²⁰ Article 23 UNDRIP.

³²¹ Article 24 UNDRIP.

³²² Article 25 UNDRIP.

³²³ Article 26 UNDRIP.

³²⁴ Article 29 UNDRIP.

³²⁵ Article 31 UNDRIP.

³²⁶ Article 32 UNDRIP.

or membership,³²⁷ and the right to promote, develop and maintain their distinctive customs and traditions.³²⁸

B. An interpretation

93. As has already been demonstrated, the right to cultural identity does not expressly necessitate the recognition of a specific right but can effectively be protected by already existing human rights, that in this context can be named ‘sub-rights’ of the right to cultural identity. It is possible to identify some categories of more generic human rights within the specific rights that were accorded to indigenous peoples in the declaration. In this sense, the rights to culture,³²⁹ to property,³³⁰ to freedom of education,³³¹ to life,³³² to freedom of association,³³³ to freedom of speech,³³⁴ to freedom of religion³³⁵ and to non-discrimination³³⁶ can be recognised. There is only one specific right that was mentioned when summing up the rights recognised by the Declaration that hasn’t yet been mentioned here: the right to development. This fairly new human right is still very contested,³³⁷ but according to the UNDRIP it is a human right necessary for the protection of indigenous peoples.
94. When comparing this to the IACtHR and the ACHPR’s conceptions of cultural identity, all concepts seem to be similar and headed in the same direction. For one, the Declaration’s protection is very broad and encompasses a lot of rights. Secondly, the IACtHR has a broad concept of the right to cultural identity and has already recognised cultural rights, religious rights, the right to property and the right to life to be a part of it. Finally, when looking at the interpretation of the ACHPR it is possible to argue that all of the protections of the rights previously mentioned can be categorised as ‘other defining characteristics’ in specific cases for indigenous peoples.
95. Thus, by interpreting the Declaration and categorizing the relevant specific rights into categories of more generic human rights, the right to cultural identity of indigenous peoples has taken shape.

³²⁷ Article 33 UNDRIP.

³²⁸ Article 34 UNDRIP.

³²⁹ Articles 8, 9, 11, 12, 13, 15, 24, 25, 31, 33 and 34 UNDRIP.

³³⁰ Articles 10, 26, 29, 32 UNDRIP.

³³¹ Articles 12 and 14 UNDRIP.

³³² Article 7 UNDRIP.

³³³ Articles 5, 16 and 33 UNDRIP.

³³⁴ Articles 11, 12, 16 and 33 UNDRIP.

³³⁵ Articles 12 and 25 UNDRIP.

³³⁶ Article 2 UNDRIP.

³³⁷ For an elaborate discussion on where the right originated and why it is contested, see I.D. BUNN, *The right to development and international economic law: legal and moral dimensions*, Oxford, Hart Publishing, 2012, 360 p.

The jurisprudence of the IACtHR and the ACHPR has shown that *a priori* no specific or explicit right to cultural identity needs to exist for an efficient protection of indigenous peoples' right to cultural identity. By analysing the UNDRIP, it has become clear that indigenous peoples themselves, and among them European indigenous peoples, wish for the satisfactory protection of a number of rights that can be translated into generic human rights. In conclusion, based on the UNDRIP, the protection of indigenous peoples' right to cultural identity consists of an effective protection of the rights to culture, to property, to life, to non-discrimination, to development, to freedom of education, to freedom of association, to freedom of speech and to freedom of religion, or of any combination of some of these rights, depending on the specific context and indigenous people at hand.

CHAPTER II. THE EC(T)HR AND THE RIGHT TO CULTURAL IDENTITY OF INDIGENOUS PEOPLES

“Which articles of the ECHR protect the right to cultural identity of indigenous peoples?”

“What is the content and scope of these ECHR articles?”

96. In its Research Report on Cultural Rights, the ECtHR included a specific section on ‘cultural identity’, that encompasses Articles 8, 9 and 11 ECHR:³³⁸ the right to respect for private and family life, the right to freedom of thought, conscience and religion, and the right to freedom of assembly and association. As has become clear in Chapter I of this part, however, the right to cultural identity is broader than only that. According to the previous Chapter, the right to cultural identity encompasses the rights to culture, to property, to life, to non-discrimination, to development, to freedom of education, to freedom of association, to freedom of speech and to freedom of religion, which, if translated into Articles of the ECHR, means a protection of articles 2, 8, 9, 10, 11 and 14 of the ECHR, articles 1 and 2 of Protocol No. 1 and of article 1 of Protocol No. 12 to the ECHR. This only leaves out the right to development, which is not a part of the rights protected by the ECHR. Because the right to development is a new right, which has not yet been universally acknowledged and is not recognised by the ECHR, it will be left out of the investigation.³³⁹
97. Earlier in this research, the ECtHR case law on articles 8, 9 and 11 regarding cultural identity has already been discussed (*supra* 54-56, Section I. The concept of cultural identity before the ECtHR, marginal 78-81). In one of the cases on cultural identity, the right to property was even mentioned. This investigation was an investigation of the right to cultural identity in general, and not regarding indigenous peoples. As the ECtHR does not make use of the concept of indigenous peoples and only of the more general concept of ‘minorities’, its case law will be investigated in this way.

³³⁸ ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 14, §32.

³³⁹ I.D. BUNN, *The right to development and international economic law: legal and moral dimensions*, Oxford, Hart Publishing, 2012, 1. The right to development is not acknowledged under the ECHR; the Convention only protects ‘the right to personal development and autonomy’ under Article 8 ECHR. (ECtHR, *Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence*, Strasbourg, Council of Europe, 2018, §185).

SECTION I. GENERAL SCOPE

98. All ECHR articles are binding on all the 47 member states of the Council of Europe.³⁴⁰ The territory on which the ECtHR has jurisdiction is thus broader than the typical geographical area of ‘Europe’. When using ‘Europe’ in its research questions, this investigation does not refer to the geographical area of Europe but to the territory of the Council of Europe, where the ECHR applies. All Member States of the CoE “*shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*”³⁴¹ This implies both a negative obligation of non-interference with the rights and a positive obligation of effective protection.³⁴²
99. The Protocols to the Convention are binding on the member states in the same way as the ECHR, to the extent that a state has ratified them.³⁴³ Protocol No. 1 has been ratified by 45 states, leaving only Monaco and Switzerland without a ratification of the Protocol.³⁴⁴ Protocol No. 12, on the other hand, has only been ratified by twenty states. The territorial scope of this last Protocol is thus fairly limited. Regarding territories of states where this dissertation has identified indigenous peoples, only Finland has ratified the Protocol, it not being applicable in Denmark, France, Norway, Russia, Sweden and the UK.³⁴⁵
100. All of the articles that were identified as protecting cultural identity under the ECHR are autonomous. This means that they do not require a breach of another substantive provision in order to breach that Article.³⁴⁶ Article 14, however, has an accessory character, which is why

³⁴⁰ Article 1 ECHR; D.J. HARRIS, M. O’BOYLE, E.P. BATES and C. BUCKLEY, *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 21; K. LEMMENS, “General Survey of the Convention” in P. VAN DIJK, F. VAN HOOFF, A. VAN RIJN and L. ZWAAK (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (1) 11; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 84 and 88.

³⁴¹ Article 1 ECHR.

³⁴² D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 21-22; K. LEMMENS, “General Survey of the Convention” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (1) 11; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 91.

³⁴³ E.g. Article 5 of Protocol No. 1; Article 3 of Protocol No. 12. See also K. LEMMENS, “General Survey of the Convention” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (1) 11; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 1038.

³⁴⁴ W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 1040; COUNCIL OF EUROPE, *Chart of signatures and ratifications of Treaty 009: Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Status as of 23/04/2019*, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=ikSSlzbK (consultation 23 April 2019).

³⁴⁵ COUNCIL OF EUROPE, *Chart of signatures and ratifications of Treaty 177: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Status as of 23/04/2019*, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=ikSSlzbK (consultation 23 April 2019).

³⁴⁶ T. MCGONAGLE, *Minority Rights, Freedom of Expression and the Media: Dynamics and Dilemmas*, Cambridge, Intersentia, 2011, 61; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford

some authors have called it a ‘parasitic’ provision.³⁴⁷ Article 14 can only apply if the facts of the case fall ‘within the ambit’ of one of the substantive provisions.³⁴⁸ A violation of Article 14 is thus only possible in conjunction with a substantive right.³⁴⁹ However, it is neither necessary that the substantive article in itself has been breached, nor does the issue in question need to fall within the actual scope of a substantive right under the ECHR.³⁵⁰ An objective connection with the substance of the provision is enough.³⁵¹ Article 1 of Protocol 12, on the other hand, is an independent provision and does not rely on the other substantive provisions for its application.³⁵²

SECTION II. CONTENT AND SCOPE OF THE ARTICLES

101. This section will investigate the content and scope of each of the articles protecting cultural identity within the ECHR. For this, the relevant articles will be discussed in the order in which they appear in the Convention. Sometimes the scope of articles partly overlaps and issues can be dealt with under several articles. Because the scope of articles 9, 10 and 11 ECHR are so narrowly intertwined, these articles will be handled under one and the same paragraph.

University Press, 2015, 562; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 144, No. 141.

³⁴⁷ D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 784.

³⁴⁸ J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 999. D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 787; B. RAINEY, E. WICKS and C. OVEY, *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 660; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 562; FRA, *Handbook on European non-discrimination law. 2018 edition*, Luxembourg, Publications Office of the European Union, 2018, 29.

³⁴⁹ T. MCGONAGLE, *Minority Rights, Freedom of Expression and the Media: Dynamics and Dilemmas*, Cambridge, Intersentia, 2011, 61; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 634; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 144, No. 141; FRA, *Handbook on European non-discrimination law. 2018 edition*, Luxembourg, Publications Office of the European Union, 2018, 29.

³⁵⁰ ECtHR 22 June 2004, No. 69949/01, *Aziz/Cyprus*, *Reports of Judgments and Decisions 2004-V*, §35; ECtHR 9 February 1967, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Belgian Linguistics Case (merits)*, *Publ. Eur. Court H.R. Series A No. 6*, §32; J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 999-1000; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 562-563; FRA, *Handbook on European non-discrimination law. 2018 edition*, Luxembourg, Publications Office of the European Union, 2018, 30.

³⁵¹ J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 1000; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 563.

³⁵² J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 999.

§1. Article 2 ECHR: Right to life

102. Article 2 of the Convention charges the state with both the negative obligation of the prohibition to take life and the positive obligation of protecting the right to life.³⁵³ This positive obligation entails a very literal protection of life, meaning an obligation to ‘safeguard life’.³⁵⁴ One aspect of this positive obligation is that there is a “*primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.*”³⁵⁵ In addition to this, the State sometimes has an obligation to take action in order to avert an identified risk to a specific individual’s life.³⁵⁶ The Court has defined this as a narrow obligation, arising only in certain specific circumstances.³⁵⁷ Generally speaking, the scope of the positive obligations on the State depends on a consideration and weighing of three aspects: what can reasonably be expected of the State, what is known of the risks to the individual’s lives and what are the available resources.³⁵⁸
103. What is not protected under article 2, is the right to a certain quality of living.³⁵⁹ The right to life of article 2 does not entail a right to a *decent* life, even though this right to a decent life is in part

³⁵³ Article 2, §1 ECHR; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 203; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 161; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 122.

³⁵⁴ ECtHR 9 June 1998, No. 23413/94, L.C.B./United Kingdom, *Reports 1998-III*, §36; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 204; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 161.

³⁵⁵ ECtHR 19 December 2006, No. 4415/02, Osman/Turkey, §115; ECtHR 30 November 2004, No. 48939/99, Öneriyıldiz/Turkey, *Reports of Judgments and Decisions 2004-XII*, §89; ECtHR 14 March 2002, No. 46477/99, Paul and Audrey Edwards/United Kingdom, *Reports of Judgments and Decisions 2002-II*, §54; ECtHR 27 June 2000, No. 22277/93, İlhan/Turkey, *Reports of Judgments and Decisions 2000-VII*, §91; ECtHR 28 March 2000, No. 22535/93, Mahmut Kaya/Turkey, *Reports of Judgments and Decisions 2000-III*, §85; ECtHR 28 March 2000, No. 22492/93, Kiliç/Turkey, *Reports of Judgments and Decisions 2000-III*, §62; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 161.

³⁵⁶ B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 162. See, for example, ECtHR 24 March 2011, No. 23458/02, Giuliani and Gaggio/Italy, *Reports of Judgments and Decisions 2011 (extracts)*.

³⁵⁷ B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 162.

³⁵⁸ J. GERARDS, “Right to Life” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (353) 374.

³⁵⁹ W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 127; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 213-214, No. 224.

protected by Article 8 (*infra* 71, marginal 104).³⁶⁰ However, if the conditions of life are so grave that they may bring about the death of a person, this does fall within the scope of article 2.³⁶¹

§2. Article 8 ECHR: Right to respect for private and family life

104. Article 8 ECHR protects the rights to private life, family life and home. Within the concept of ‘private life’, the Court has included the right to a person’s identity, specifically including ethnic³⁶² and cultural identity,³⁶³ and a person’s desired appearance.³⁶⁴ Furthermore, under private life, the quality of life is also protected.³⁶⁵ Additionally, within the concept of ‘home’, the ECtHR has included the rights to be protected against evictions and forced removal from their home and the protection against nuisance.³⁶⁶ The Court has an autonomous notion of ‘home’, determining one’s home on the basis of “*the existence of sufficient and continuous links with a specific place.*”³⁶⁷ This is a factual interpretation of the notion, which “*does not depend on classification under domestic law.*”³⁶⁸ Because of this autonomous interpretation, it is possible to get a

³⁶⁰ ECtHR 29 April 2002, No. 2346/02, *Pretty/United Kingdom*, *Reports of Judgments and Decisions 2002-III*, §65; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 127.

³⁶¹ J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 214, No. 224.

³⁶² ECtHR 27 April 2010, No. 27138/04, *Ciubotaru/Moldova*, §53; ECtHR 4 December 2008, Nos. 30562/04 and 30566/04, *S. and Marper/United Kingdom*, *Reports of Judgments and Decisions 2008*, §66; ECtHR 18 January 2001, No. 27238/95, *Chapman/United Kingdom*, *Reports of Judgments and Decisions 2001-I*, §73.

³⁶³ ECtHR 8 December 2009, No. 49151/07, *Muñoz Díaz/Spain*, *Reports of Judgments and Decisions 2009*, §77. In addition, in the case of *Sargsyan v. Azerbaijan*, the applicant was denied the right to access to his home and property. In this case, the Court considered that “*the applicant’s cultural and religious attachment with his late relatives’ graves in Gulistan may also fall within the notion of “private and family life.”*” (ECtHR 16 June 2015, No. 40167/06, *Sargsyan/Azerbaijan*, *Reports of Judgments and Decisions 2015*, §257; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 13, §27).

³⁶⁴ K. DE VRIES, “Right to Respect for Private and Family Life” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (667) 680; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 375-376.

³⁶⁵ ECtHR 29 April 2002, No. 2346/02, *Pretty/United Kingdom*, *Reports of Judgments and Decisions 2002-III*, §65; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 366.

³⁶⁶ K. DE VRIES, “Right to Respect for Private and Family Life” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (667) 725. See, for example, ECtHR 16 June 2015, No. 13216/05, *Chiragov and Others/Armenia*, *Reports of Judgments and Decisions 2015*; ECtHR 10 May 2001, No. 25781/94, *Cyprus/Turkey*, *Reports of Judgments and Decisions 2001-IV* and ECtHR 16 September 1996, No. 21893, *Akdivar and Others/Turkey*, *Reports 1998-II*.

³⁶⁷ ECtHR 18 July 2013, No. 7177/10, *Brežec/Croatia*, §35; ECtHR 18 November 2004, No. 58255/00, *Prokopovich/Russia*, *Reports of Judgments and Decisions 2004-XI (extracts)*, §36; ECtHR 25 September 1996, No. 20348/92, *Buckley/United Kingdom*, *Reports 1996-IV*, §§52-54; ECtHR 24 November 1986, No. 9063/80, *Gillow/United Kingdom*, *Publ. Eur. Court H.R. Series A No. 109*, §46.

³⁶⁸ ECtHR 18 July 2013, No. 7177/10, *Brežec/Croatia*, §35; K. DE VRIES, “Right to Respect for Private and Family Life” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (667) 726.

protection for a ‘home’ that is not one’s property³⁶⁹ or in situations where the right to live in a specific place is contested.³⁷⁰

105. Under the notion of private life, the Court has also acknowledged that regarding travellers, “*the occupation of a caravan is an integral part of the identity of travellers, even where they no longer live a wholly nomadic existence, and that measures affecting the stationing of caravans affect their ability to maintain their identity and to lead a private and family life in accordance with that tradition.*”³⁷¹ In this case, the specificities of a minority lifestyle and their ability to maintain their identity are thus protected under private life and these elements are taken into account when determining if there is an interference with their right under Article 8.³⁷² After deciding on the existence of an interference, the Court also investigates the legitimacy of that interference. In this respect, in both the Chapman and Winterstein cases, the Court reviewed the specificities of the Gypsy lifestyle while deciding on the necessity of the interference.³⁷³ Furthermore, in Yordanova and Others v. Bulgaria and in the Winterstein case, the Court underlined the importance of the applicants being an outcast community and a vulnerable minority while deciding on the necessity of the interference.³⁷⁴ However, the Court only found a lack of proportionality of the measures

³⁶⁹ When the ‘home’ is the applicant’s property, an investigation will usually be made by the Court under Article 1 of Protocol 1 instead of Article 8 ECHR (*infra* 85, marginal 122). (B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 403).

³⁷⁰ K. DE VRIES, “Right to Respect for Private and Family Life” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (667) 726; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 528-529; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 424; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 399; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 687, No. 678. For example, Winterstein and others v France, where the applicants were travellers who had lived on lands for amounts of time reaching up to thirty years, but the French authorities contested the lawfulness of the occupation of their lands. The Court held that the lawfulness of that occupation was irrelevant, and that the French authorities had breached Article 8 because of a violation of their home. (ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §§141 and 167).

³⁷¹ ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §142; ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §73; K. DE VRIES, “Right to Respect for Private and Family Life” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (667) 729; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 426; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 15, §34.

³⁷² ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 14, §34.

³⁷³ ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §142; ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §§93-98.

³⁷⁴ ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §160; ECtHR 24 April 2012, No. 25446/06, Yordanova and others/Bulgaria, §129.

and thus a breach of Article 8 ECHR in the Winterstein case.³⁷⁵ In general, when applying the necessity test, the Court underlines that there is a wide margin of appreciation for the States, but that this margin will be more narrow when “*the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights*”³⁷⁶ and that the State needs to take into account the vulnerability of the community³⁷⁷ and the fact that a particular lifestyle may be part of a minority identity.³⁷⁸

106. Regarding language rights, the Convention does not contain any right to linguistic freedom.³⁷⁹ Possible protections of the use of language are thus spread along the different Convention Articles, of which Article 8 is an important one, but Articles 10 ECHR and 2 Protocol No. 1 also play a meaningful role. The general rule is that the member states are at liberty to impose restrictions and obligations on the use of the official language in the public sphere, for the purposes of linguistic unity.³⁸⁰ The private use of languages of choice, on the other hand, is protected by Article 8.³⁸¹ Furthermore, having a name in a minority language falls inside the scope

³⁷⁵ ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §169; ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §116; ECtHR 24 April 2012, No. 25446/06, Yordanova and others/Bulgaria, §144 (provisionally no breach because of lack of enforcement). In this respect, HARRIS and others explain that “[b]y way of counterbalance to the Court’s generous approach to applicability, while the scope of what falls within the four interests protected by Article 8 continues to increase, the second step of the Article 8 analysis – the justification for an interference or the existence of specific positive obligations – still presents a significant hurdle for applicants seeking redress for alleged violations.” (D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 531).

³⁷⁶ ECtHR 27 May 2004, No. 66746/01, Connors/United Kingdom, §82; ECtHR 24 November 1986, No. 9063/80, Gillow/United Kingdom, *Publ. Eur. Court H.R. Series A No. 109*, §55; ECtHR 22 October 1981, No. 7525/76, Dudgeon/United Kingdom, *Publ. Eur. Court H.R. Series A No. 45*, §52. For example, “[t]he loss of one’s home is a most extreme form of interference with the right to respect for the home,” which narrows the margin of appreciation to the necessity of an independent tribunal to decide on the proportionality of the measures. (ECtHR 13 May 2008, No. 19009/04, McCann/United Kingdom, *Reports of Judgments and Decisions 2008*, §50; ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §142; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 581).

³⁷⁷ ECtHR 24 April 2012, No. 25446/06, Yordanova and others/Bulgaria, §129; ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §160.

³⁷⁸ ECtHR 18 January 2001, No. 27238/95, Chapman/United Kingdom, *Reports of Judgments and Decisions 2001-I*, §§93-98; ECtHR 17 October 2013, No. 27013/07, Winterstein and others/France, §148, δ; K. DE VRIES, “Right to Respect for Private and Family Life” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (667) 729; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 426; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 15, §35.

³⁷⁹ D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 615; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 78, No. 81-3; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 23, §58.

³⁸⁰ ECtHR 9 February 1967, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, Belgian Linguistics Case (merits), *Publ. Eur. Court H.R. Series A No. 6*; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 23, §58.

³⁸¹ P. THORNBERRY and M. A. MARTIN ESTÉBANEZ, *Minority rights in Europe*, Strasbourg, Council of Europe Publishing, 2004, 60.

of Article 8, even though the effective protection is weak, given that the states have a wide margin of appreciation in this respect.³⁸² In some instances, the ban of the use of a language can give rise to a violation of the freedom of expression of Article 10 ECHR. In this respect, the bans of both a Kurdish production of a play and a Kurdish language newspaper in the prisons in Turkey amounted to a violation of Article 10.³⁸³ Moreover, the Court has stated that “*Article 10 encompasses the freedom to receive and impart information and ideas in any language which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.*”³⁸⁴

Because of contradicting ECtHR case law under Article 2 of Protocol No. 1, it is unclear if ‘philosophical convictions’ include the use of language.³⁸⁵ Some sources state that the Court has, up until now, excluded the possibility to obtain education in the language of one’s choice from the ambit of Article 1 Protocol No. 1,³⁸⁶ while others claim that the Court has opened this possibility ever since its decision in *Catan and Others v Moldova and Russia*.³⁸⁷

§3. Articles 9, 10 and 11 ECHR: Freedoms of thought, expression and association

107. The freedoms guaranteed in Articles 9, 10 and 11 are closely related to each other and the cases regarding these rights frequently overlap.³⁸⁸ In the past, the Court has on occasion even treated

³⁸² ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 23, §58.

³⁸³ ECtHR 20 January 2015, Nos. 14946/08, 21030/08, 24309/08, 24505/08, 26964/08, 26966/08, 27088/08, 27090//08, 27092/08, 38752/08, 38778/08 and 38807/08, *Mesut Yurtsever and Others/Turkey*, §111; ECtHR 3 May 2007, No. 34797/03, *Ulusoy and Others/Turkey*, §55; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 24, §60.

³⁸⁴ ECtHR 25 September 2012, No. 20641/05, *Eğitim Ve Bilim Emekçileri Sendikası/Turkey*, *Report of Judgments and Decisions 2012 (extracts)*, §71; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 25, §61.

³⁸⁵ While in the *Belgian Linguistics Case*, the Court held explicitly that it does not, in the more recent case of *Catan and Others v. Moldova and Russia*, the Court concluded that the measure of forced closure of schools because of the language they used, “*amounted to an interference with the applicant parents’ rights to ensure their children’s education and teaching in accordance with their philosophical convictions.*” (ECtHR 19 October 2012, Nos. 43370/04, 8252/05 and 18454/06, *Catan and Others/Moldova and Russia*, *Reports of Judgments and Decisions 2012 (extracts)*, §143; ECtHR 9 February 1967, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Belgian Linguistics Case (merits)*, *Publ. Eur. Court H.R. Series A No. 6*, “*Interpretation adopted by the Court*”, §6 and §11; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 580).

³⁸⁶ J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 79-80, No. 81-4 and 793, No. 785; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 25, §62.

³⁸⁷ D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 913; B. VERMEULEN and M. VAN ROOSMALEN, “*Right to Education*” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (889) 904-905.

³⁸⁸ B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 456 and 483; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 452 and 495.

the freedoms of thought, conscience and religion and of expression of Articles 9 and 10 as elements of the freedom of assembly and association of Article 11.³⁸⁹

108. Firstly, with respect to article 9, the Court has often held that “*the freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.*”³⁹⁰ According to the Court’s case law, the internal freedom of thought, conscience and religion is absolute and unconditional; restrictions are only allowed with respect to external manifestations hereof.³⁹¹ In order to count as an external manifestation, “*the act in question must be intimately linked to the religion or belief.*”³⁹² Furthermore, the Court has stated that “*the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case.*”³⁹³

³⁸⁹ ECtHR 26 April 1991, No. 11800/85, Ezelin/France, *Publ. Eur. Court H.R.* Series A No. 202, §37; ECtHR 13 August 1981, Nos. 7601/76 and 7806/77, Young, James and Webster/United Kingdom, *Publ. Eur. Court H.R.* Series A No. 44, §57; H. BROEKSTEEG, “Freedom of Assembly and Association” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (813) 815.

³⁹⁰ ECtHR 7 July 2011, No. 23459/03, Bayatyan/Armenia, *Reports of Judgments and Decisions 2011*, §118; ECtHR 10 November 2005, No. 44774/98, Leyla Şahin/Turkey, *Reports of Judgments and Decisions 2005-XI*, §104; ECtHR 18 February 1999, No. 24645/94, Buscarini and Others/San Marino, *Reports of Judgments and Decisions 1999-I*, §34; ECtHR 25 May 1993, No. 14307/88, Kokkinakis/Greece, *Publ. Eur. Court H.R.* Series A No. 260-A, §31; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 456; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 421; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 718, No. 714; B. VERMEULEN and M. VAN ROOSMALEN, “Freedom of Thought, Conscience and Religion” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (735) 736.

³⁹¹ ECtHR 25 May 1993, No. 14307/88, Kokkinakis/Greece, *Publ. Eur. Court H.R.* Series A No. 260-A, §33; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 594; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 718, No. 714; B. VERMEULEN and M. VAN ROOSMALEN, “Freedom of Thought, Conscience and Religion” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (735) 736.

³⁹² ECtHR 15 January 2013, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, Eweida and Others/United Kingdom, *Reports of Judgments and Decisions 2013 (extracts)*, §82; B. VERMEULEN and M. VAN ROOSMALEN, “Freedom of Thought, Conscience and Religion” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (735) 737.

³⁹³ ECtHR 15 January 2013, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, Eweida and Others/United Kingdom, *Reports of Judgments and Decisions 2013 (extracts)*, §82; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 603; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 459; B. VERMEULEN and M. VAN ROOSMALEN, “Freedom of Thought, Conscience and Religion” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (735) 746.

This approach thus takes into account the self-identification of a person and the particular ways people may manifest their religion or beliefs.

109. Secondly, regarding Article 10, it is settled case law that, as a principle characterising a democratic society, the freedom of expression “*is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.*”³⁹⁴ Just as it does regarding Article 9, the Court clearly emphasises the importance of freedom of expression in guaranteeing a democratic society through pluralism, broadmindedness and tolerance. This freedom of expression is interpreted very broadly: all forms of expression through any medium are included.³⁹⁵ Furthermore, in some cases there is a positive obligation on the state to maintain pluralism in the media sector,³⁹⁶ as freedom of expression is a prerequisite for pluralism.³⁹⁷
110. Regarding the freedom of religion, the manifestation of religious beliefs is something that can be done individually, but also in community with others.³⁹⁸ Here, the freedom of assembly and association of Article 11 ECHR also comes into view. In effect, the freedom of assembly and association generally presupposes having specific opinions and wanting to express them, thereby also establishing a clear link with the freedom of expression.³⁹⁹ The freedom of assembly protects

³⁹⁴ ECtHR 7 December 1976, No. 5493/72, *Handyside/United Kingdom*, *Publ. Eur. Court H.R.* Series A No. 24, §49; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 614; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 451; A. VAN RIJN, “Freedom of Expression” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (765) 766-767.

³⁹⁵ B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 484. See also the wording of Article 9, §2 ECHR.

³⁹⁶ ECtHR 17 September 2009, No. 13936/02, *Manole and Others/Moldova*, *Reports of Judgments and Decisions 2009 (extracts)*, §99. ECtHR 24 November 1993, Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, *Informationsverein Lentia and Others/Austria*, *Publ. Eur. Court H.R.* Series A No. 276, §39; T. MCGONAGLE, *Minority Rights, Freedom of Expression and the Media: Dynamics and Dilemmas*, Cambridge, Intersentia, 2011, 452-454.

³⁹⁷ T. MCGONAGLE, *Minority Rights, Freedom of Expression and the Media: Dynamics and Dilemmas*, Cambridge, Intersentia, 2011, 496.

³⁹⁸ P. THORNBERRY and M. A. MARTIN ESTÉBANEZ, *Minority rights in Europe*, Strasbourg, Council of Europe Publishing, 2004, 66.

³⁹⁹ H. BROEKSTEEG, “Freedom of Assembly and Association” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (813) 814. When Article 10 and Article 11 are read together, the freedom of assembly protects an assembly that “*may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote.*” (ECtHR 21 October 2010, Nos. 4916/07, 25924/08 and 14599/09, *Alekseyev/Russia*, §73; ECtHR 2 October 2001, Nos. 29221/95 and 29225/95, *Stankov and the United Macedonian Organisation Ilinden/Bulgaria*, *Reports of Judgments and Decisions 2001-IX*, §85-86; ECtHR 21 June 1988, No. 10126/82, *Plattform “Ärztze für das Leben”/Austria*, *Publ. Eur. Court H.R.* Series A No. 139, §32; D.J. HARRIS et

the right to peaceful protest, while the freedom of association concerns the protection of political parties, the protection of trade unions and the protection of other associations.⁴⁰⁰ Associations can be set up that assert a minority consciousness.⁴⁰¹ In the Gorzelik case, the ECtHR acknowledged that:

*“The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, “a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity”. Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights.”*⁴⁰²

There are also limits to the freedom of association: in the Vona case, the Court stated that *“the State is also entitled to take preventive measures to protect democracy vis-à-vis such non-party entities if a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions.”*⁴⁰³

§4. Article 14 ECHR and Article 1 Protocol No. 12: Prohibition of discrimination

111. Article 14 ECHR holds a prohibition of discrimination when the facts of a case fall within the ambit of one of the substantive provisions. Article 1 of Protocol No. 12 holds a similar prohibition of discrimination, although this prohibition is independent and applies to *“any right set forth by law”*.⁴⁰⁴ This prohibition could be a lot stronger, notwithstanding the fact that only twenty states

al., Harris, O'Boyle & Warbrick. *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 711).

⁴⁰⁰ Article 11 ECHR; D.J. HARRIS et al., Harris, O'Boyle & Warbrick. *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 710; B. RAINEY et al., Jacobs, White, and Ovey. *The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 517.

⁴⁰¹ ECtHR 10 July 1998, No. 26695/95, Sidiropoulos and others/Greece, *Reports 1998-IV*, §44; D.J. HARRIS et al., Harris, O'Boyle & Warbrick. *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 732; J. VELU and R. ERGEC, *Convention européenne des droits de l'homme*, Brussel, Bruylant, 2014, 82, No. 81-5; ECtHR RESEARCH DIVISION, *Cultural rights in the case-law of the European Court of Human Rights*, Strasbourg, Council of Europe, 2017, 21, §53.

⁴⁰² ECtHR 17 February 2004, No. 44158/98, Gorzelik and Others/Poland, *Reports of Judgments and Decisions 2004-I*, §93. See also W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 491.

⁴⁰³ ECtHR 9 July 2013, No. 35943/10, Vona/Hungary, *Reports of Judgments and Decisions 2013*, §57; B. RAINEY et al., Jacobs, White, and Ovey. *The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 535.

⁴⁰⁴ Article 1 Protocol No. 12.

have ratified Protocol No. 12 (*supra* 68, marginal 99). Regarding Article 1 of Protocol No. 12, it is not yet clear whether this provision can apply to rights laid down in international treaties to which the State is bound.⁴⁰⁵ Regarding Article 14 ECHR, when a case can be solved under a substantive provision, the Court usually leaves the question of discrimination open.⁴⁰⁶ The question of discrimination will thus only be reviewed if there is no breach of a substantive provision, if the discrimination is a fundamental aspect of the case or if the discrimination clearly relates to a different aspect of the case than the complaint made under the substantive provisions.⁴⁰⁷

112. In deciding when a difference in treatment is justified, the Court has some ‘suspect grounds’ of discrimination: grounds for discrimination that need to be substantiated by ‘very weighty reasons’ in order for the difference in treatment to be justified.⁴⁰⁸ These grounds are race and ethnicity, nationality, birth or origin, sexual orientation, disability, gender and religion.⁴⁰⁹ Regarding the ground of race and ethnicity, the Court has given a broad interpretation to these concepts. It stated that: “*Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and*

⁴⁰⁵ J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 1003; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 820.

⁴⁰⁶ Which has been criticized by several authors, including D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 784 and T. MCGONAGLE, *Minority Rights, Freedom of Expression and the Media: Dynamics and Dilemmas*, Cambridge, Intersentia, 2011, 61.

⁴⁰⁷ ECtHR 22 June 2004, No. 69949/01, *Aziz/Cyprus*, *Reports of Judgments and Decisions 2004-V*, §35; ECtHR 29 April 1999, Nos. 25088/94, 28331/95 and 28443/95, *Chassagnou and Others/France*, *Reports of Judgments and Decisions 1999-III*, §89; ECtHR 22 October 1981, No. 7525/76, *Dudgeon/United Kingdom*, *Publ. Eur. Court H.R. Series A No. 45*, §67; J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 1001; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 784; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 146, No. 144; FRA, *Handbook on European non-discrimination law. 2018 edition*, Luxembourg, Publications Office of the European Union, 2018, 29.

⁴⁰⁸ J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 1014; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 796; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 647; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 578.

⁴⁰⁹ J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 1020; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 786; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 647.

backgrounds.”⁴¹⁰ Furthermore, the Court has affirmed that there is no distinction between discrimination on the basis of race or ethnicity, as “[d]iscrimination on account of one’s actual or perceived ethnicity is a form of racial discrimination.”⁴¹¹ In contrast, when the difference in treatment is based on another criterion, such as measures of economic or social strategy, the margin of appreciation of the State is a wide one.⁴¹²

113. Jurisprudence of discrimination of minorities has broadened in recent times, including several cases on discrimination regarding education and ethnic identity.⁴¹³ The Court has accepted the existence of indirect discrimination and the use of statistical evidence for proof of discrimination.⁴¹⁴ Additionally, the Court acknowledged the legitimacy and necessity of affirmative action, saying that “Article 14 does not prohibit a member state from treating groups differently in order to correct ‘factual inequalities’ between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.”⁴¹⁵ Furthermore, the State not only has a negative duty not to

⁴¹⁰ ECtHR 13 December 2005, Nos. 55762/00 and 55974/00, *Timishev/Russia*, *Reports of Judgments and Decisions 2005-XII*, §55; J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 1021; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 650.

⁴¹¹ ECtHR 22 December 2009, Nos. 27996/06 and 34836/06, *Sejdić and Finci/Bosnia and Herzegovina*, *Reports of Judgments and Decisions 2009*, §43; ECtHR 13 December 2005, Nos. 55762/00 and 55974/00, *Timishev/Russia*, *Reports of Judgments and Decisions 2005-XII*, §56; J. GERARDS, “Prohibition of Discrimination” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (997) 1021; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 650; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 578.

⁴¹² ECtHR 6 November 2012, No. 22341/09, *Hode and Abdi/United Kingdom*, §52; ECtHR 27 September 2011, No. 56328/07, *Bah/United Kingdom*, *Reports of Judgments and Decisions 2011*, §37; ECtHR 12 April 2006, Nos. 65731/01 and 65900/01, *Stec and Others/United Kingdom*, *Reports of Judgments and Decisions 2006-VI*, §52; ECtHR 23 October 1997, Nos. 21319/93, 21449/93 and 21675/93, *National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society/United Kingdom*, *Reports 1997-VII*, §80; ECtHR 21 February 1986, No. 8793/79, *James and Others/United Kingdom*, *Publ. Eur. Court H.R. Series A*, No. 98, §46; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 654.

⁴¹³ D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 785; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 655.

⁴¹⁴ ECtHR 13 November 2007, No. 57325/00, *D.H. and Others/Czech Republic*, *Reports of Judgments and Decisions 2007-IV*, §§184 and 188; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 785; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 77, No. 81-2.

⁴¹⁵ ECtHR 13 November 2007, No. 57325/00, *D.H. and Others/Czech Republic*, *Reports of Judgments and Decisions 2007-IV*, §175; ECtHR 12 April 2006, Nos. 65731/01 and 65900/01, *Stec and Others/United Kingdom*, *Reports of Judgments and Decisions 2006-VI*, §51; ECtHR 6 April 2000, No. 34369/97, *Thlimmenos/Greece*, *Reports of Judgments and Decisions 2000-IV*, §44; ECtHR 9 February 1967, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Belgian Linguistics Case (merits)*, *Publ. Eur. Court H.R. Series A* No. 6, §10; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 786.

discriminate, it also has the positive duty to protect against private discrimination.⁴¹⁶ In the D.H. case, the Chamber looked at a number of cases on Roma children in special schools separately and found no discrimination.⁴¹⁷ Following this, the Grand Chamber handled them together and found that there was an indirect discrimination of the members of the Roma Community.⁴¹⁸ This collective approach may suggest the possibility in the future of raising systemic problems of discrimination regarding minorities.⁴¹⁹ These fairly recent evolutions in the case law may provide for a new approach to dealing with discrimination affecting minorities before the court.

§5. Article 1 Protocol No. 1: Protection of property

114. The protection of property of Article 1 of the First Protocol to the convention consists of three parts: first, the principle of peaceful enjoyment of possessions and second, two possibilities of interference with this right: a prohibition of the deprivation of possessions and a paragraph on the control of the use of property by the State.⁴²⁰ The meaning of “possessions” under the protocol is interpreted autonomously by the ECtHR, whereby it investigates “*whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1.*”⁴²¹ This ‘substantive (proprietary) interest’ must “*have a sufficient basis in national law.*”⁴²² In this respect, in past cases, the Court has accepted fishing rights to be

⁴¹⁶ ECtHR 3 May 2007, No. 71156/01, 97 Members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others/Georgia, §§140-141; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 786.

⁴¹⁷ ECtHR 7 February 2006, No. 57325/00, D.H. and Others/Czech Republic (Chamber).

⁴¹⁸ ECtHR 13 November 2007, No. 57325/00, D.H. and Others/Czech Republic, *Reports of Judgments and Decisions 2007-IV*, §195 and §§208-210; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 656.

⁴¹⁹ ECtHR 13 November 2007, No. 57325/00, D.H. and Others/Czech Republic, *Reports of Judgments and Decisions 2007-IV*; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 656; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 160, No. 160.

⁴²⁰ Article 1 Protocol No. 1; M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 852; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 548; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 967.

⁴²¹ ECtHR 27 May 2010, No. 18768/05, Saghinadze and Others/Georgia, §103; ECtHR 29 March 2010, No. 34044/02, Depalle/France, *Reports of Judgments and Decisions 2010*, §62; ECtHR 11 January 2007, No. 73049/01, Anheuser-Busch Inc./Portugal, *Reports of Judgments and Decisions 2007-I*, §63; ECtHR 30 November 2004, No. 48939/99, Öneriyildiz/Turkey, *Reports of Judgments and Decisions 2004-XII*, §124; ECtHR 19 June 2001, No. 34049/96, Zwierzyński/Poland, *Reports of Judgments and Decisions 2001-VI*, §63; M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 853; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 865; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 971.

⁴²² ECtHR 7 July 2009, No. 22279/04, Plechanow/Poland, §83; ECtHR 19 April 2007, No. 63235/00, Vilho Eskelinen and Others/Finland, *Reports of Judgments and Decisions 2007-II*, §94; ECtHR 11 January 2007, No. 73049/01, Anheuser-Busch Inc./Portugal, *Reports of Judgments and Decisions 2007-I*, §65; ECtHR 28 September 2004, No. 44912/98,

a possession.⁴²³ Furthermore, the Court has accepted that a house built on unlawfully occupied land could give rise to a property interest on the house itself, although there could be no property interest in the land.⁴²⁴

115. The right to peaceful enjoyment of the property implies a possibility to use⁴²⁵ and access⁴²⁶ the property.⁴²⁷ In order to decide if the interference with the property was justified, the Court uses a fair balance test, in which it determines “*whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.*”⁴²⁸ The margin of appreciation for the State is usually wide.⁴²⁹ In addition to the protection of the peaceful enjoyment of property, Article 1 Protocol No. 1 allows for a number of State interferences.⁴³⁰ Interferences into the enjoyment of property call for an appropriate compensation,⁴³¹ as “*the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference under Article 1 of Protocol No. 1.*”⁴³²

Kopecký/Slovakia, *Reports of Judgments and Decisions 2004-IX*, §52; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 865; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 971.

⁴²³ ECtHR 23 September 2014, No. 46154/11, Valle Pierimpiè Società Agricola S.P.A./Italy, §63; ECtHR 28 July 2005, No. 33538/96, Alatulkkila and Others/Finland, §66; ECtHR 24 September 2002, No. 27824/95, Posti and Rahko/Finland, *Reports of Judgments and Decisions 2002-VII*, §76; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 552.

⁴²⁴ ECtHR 30 November 2004, No. 48939/99, Öneriyildiz/Turkey, *Reports of Judgments and Decisions 2004-XII*, §§127-129; M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 856; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 864; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 552.

⁴²⁵ Restrictions on the possibility to build on land can lead to a lack of possibility to use, see ECtHR 23 September 1982, Nos. 7151/75 and 7152/75, Sporrang and Lönnroth/Sweden, *Publ. Eur. Court H.R. Series A*, No. 52, §103.

⁴²⁶ For instance denial of access to property, see ECtHR 18 December 1996, No. 15318/89, Loizidou/Turkey, *Reports 1996-VI*, §60-61.

⁴²⁷ M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 861.

⁴²⁸ ECtHR 23 September 1982, Nos. 7151/75 and 7152/75, Sporrang and Lönnroth/Sweden, *Publ. Eur. Court H.R. Series A*, No. 52, §69; M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 864.

⁴²⁹ M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 864.

⁴³⁰ Article 1, §1, second sentence and Article 1, §2 Protocol No. 1; M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 853; D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 903; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 560.

⁴³¹ ECtHR 19 February 2009, No. 2334/03, Kozacıoğlu/Turkey, §§71-72 and §82; M. BEELER-SIGRON, “Protection of Property” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (851) 874.

⁴³² ECtHR 15 January 2013, No. 30206/06, Arsovski/The Former Yugoslav Republic of Macedonia, §56; ECtHR 19 February 2009, No. 2334/03, Kozacıoğlu/Turkey, §82; ECtHR 23 November 2000, No. 25701/94, The Former King of

§6. Article 2 Protocol No. 1: Right to education

116. Article 2 of Protocol No. 1 guarantees both the right to education and an obligation for the state to “respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”⁴³³ The right to education is formulated in a negative way, meaning that the State is under no obligation to “set up or subsidise particular educational establishments,”⁴³⁴ but it is under an obligation to “afford effective access” to “educational institutions existing at a given time.”⁴³⁵ States are thus not required to establish or subsidise schools in which there is education in one’s own or a minority language,⁴³⁶ nor do they have to guarantee the availability of schools which conform to the parent’s religious or philosophical convictions.⁴³⁷ The obligation for the state to respect the right of the parents to ensure such education and teaching in conformity with their own religious and philosophical convictions does, on the other hand, amount to a positive obligation, which demands respect for minority views.⁴³⁸

Greece and Others/Greece, *Reports of Judgments and Decisions 2000-XII*, §89; ECtHR 9 December 1994, Nos. 13092/87 and 13984/88, *The Holy Monasteries/Greece*, *Publ. Eur. Court H.R. Series A*, No. 301-A, §71; ECtHR 21 February 1986, No. 8793/79, *James and Others/United Kingdom*, *Publ. Eur. Court H.R. Series A*, No. 98, §54.

⁴³³ Article 2 Protocol No. 1; B. VERMEULEN and M. VAN ROOSMALEN, “Right to Education” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (889) 890.

⁴³⁴ ECtHR 21 June 2011, No. 5335/05, *Ponomaryovi/Bulgaria*, *Reports of Judgments and Decisions 2011*, §49; ECtHR 10 November 2005, No. 44774/98, *Leyla Şahin/Turkey*, *Reports of Judgments and Decisions 2005-XI*, §137; ECtHR 9 February 1967, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Belgian Linguistics Case (merits)*, *Publ. Eur. Court H.R. Series A* No. 6, §3-4.

⁴³⁵ ECtHR 21 June 2011, No. 5335/05, *Ponomaryovi/Bulgaria*, *Reports of Judgments and Decisions 2011*, §49; ECtHR 16 March 2010, No. 15766/03, *Oršuš and Others/Croatia*, *Reports of Judgments and Decisions 2010*, §146; ECtHR 3 March 2009, No. 36458/02, *İrfan Temel and Others/Turkey*, §39; ECtHR 7 February 2006, No. 60856/00, *Mürsel Eren/Turkey*, *Reports of Judgments and Decisions 2006-II*, §41; ECtHR 10 November 2005, No. 44774/98, *Leyla Şahin/Turkey*, *Reports of Judgments and Decisions 2005-XI*, §§134-142; ECtHR 7 December 1976, Nos. 5095/71, 5920/72, 5926/72, *Kjeldsen, Busk Madsen and Pedersen/Denmark*, *Publ. Eur. Court H.R. Series A* No. 23, §52; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 580; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 995-996; J. VELU and R. ERGEC, *Convention européenne des droits de l’homme*, Brussel, Bruylant, 2014, 780, No. 775; B. VERMEULEN and M. VAN ROOSMALEN, “Right to Education” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (889) 891.

⁴³⁶ Although it does guarantee a right to education in a national language; ECtHR 19 October 2012, Nos. 43370/04, 8252/05 and 18454/06, *Catan and Others/Moldova and Russia*, *Reports of Judgments and Decisions 2012 (extracts)*, §137; ECtHR 9 February 1967, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Belgian Linguistics Case (merits)*, *Publ. Eur. Court H.R. Series A* No. 6, §3; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 999.

⁴³⁷ ECtHR 9 February 1967, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, *Belgian Linguistics Case (merits)*, *Publ. Eur. Court H.R. Series A* No. 6, §7; B. VERMEULEN and M. VAN ROOSMALEN, “Right to Education” in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (889) 894.

⁴³⁸ ECtHR 18 December 1996, No. 24095/94, *Efstathiou/Greece*, *Reports 1996-VI*, §28; ECtHR 18 December 1996, No. 21787/93, *Valsamis/Greece*, *Reports 1996-VI*, §27; ECtHR 25 February 1982, Nos. 7511/76 and 7743/76, *Campbell and Cosans/United Kingdom*, *Publ. Eur. Court H.R. Series A* No. 48, §37(a); ECtHR 7 December 1976, Nos. 5095/71,

117. A lot of claims have been made under Article 2 Protocol No. 1 by minority groups.⁴³⁹ In the area of minority discrimination regarding education, the ruling in *D.H. and Others v. the Czech Republic* was a of paramount importance (*supra* 79, marginal 113). Since then, the Court has ruled in a number of other cases that the fact that the applicants were members of the Roma minority were important elements that could not be ignored, and that additional measures were necessary for the effective protection of their right to education.⁴⁴⁰

5920/72, 5926/72, Kjeldsen, Busk Madsen and Pedersen/Denmark, *Publ. Eur. Court H.R.* Series A No. 23, §51; D.J. HARRIS et al., *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 912; B. VERMEULEN and M. VAN ROOSMALEN, "Right to Education" in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (889) 900.

⁴³⁹ Among others: ECtHR 29 January 2013, No. 11146/11, Horváth and Kiss/Hungary; ECtHR 11 December 2012, No. 59608/09, Sampani and Others/Greece; ECtHR 30 May 2013, No. 7973/10, Lavidia and Others/Greece; ECtHR 16 March 2010, No. 15766/03, Oršuš and Others/Croatia, *Reports of Judgments and Decisions 2010*; ECtHR 13 November 2007, No. 57325/00, *D.H. and Others/Czech Republic*, *Reports of Judgments and Decisions 2007-IV*; ECtHR 18 January 2001, No. 25154/94, Jane Smith/United Kingdom; ECtHR 18 January 2001, No. 24876/94, Coster/United Kingdom; ECtHR 18 January 2001, No. 25289/94, Lee/United Kingdom (J. VELU and R. ERGEC, *Convention européenne des droits de l'homme*, Brussel, Bruylant, 2014, 784, No. 778-1; B. VERMEULEN and M. VAN ROOSMALEN, "Right to Education" in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (889) 895).

⁴⁴⁰ ECtHR 30 May 2013, No. 7973/10, Lavidia and Others/Greece, §62; ECtHR 29 January 2013, No. 11146/11, Horváth and Kiss/Hungary, §104; ECtHR 11 December 2012, No. 59608/09, Sampani and Others/Greece, §76; ECtHR 16 March 2010, No. 15766/03, Oršuš and Others/Croatia, *Reports of Judgments and Decisions 2010*, §147 and §177; B. RAINEY et al., *Jacobs, White, and Ovey. The European Convention on Human Rights: Seventh Edition*, Oxford, Oxford University Press, 2017, 588-589; W. A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, Oxford University Press, 2015, 1004; B. VERMEULEN and M. VAN ROOSMALEN, "Right to Education" in P. VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights. Fifth edition*, Cambridge, Intersentia, 2018, (889) 896.

CHAPTER III. A SUFFICIENT PROTECTION?

“Is the protection of the rights of minorities as it is laid down in the ECHR and its protocols a sufficient protection of the right to cultural identity of indigenous peoples in Europe?”

118. So far, this dissertation has identified who European indigenous peoples are, what the content of their right to cultural identity is, which of these rights are protected by the ECHR and the ECtHR and what the content of these rights and the scope of their protection are. The question that will now be investigated is if this protection is sufficient.
119. The UNDRIP was signed in 2007, at a moment in time when all the more generic ‘sub-rights’ of the right to cultural identity, that have been identified above (*supra*, 67, Chapter II), already existed and had universal application. Theoretically speaking, they thus also applied to indigenous peoples in the same way as they applied to everyone else. But the indigenous movement considered the protection they provided insufficient for indigenous peoples and pushed for the drafting of specific rights for them. Even though the only beneficiaries of the UNDRIP are indigenous peoples, the rights laid down in it are mostly reaffirmations of already existing, generic and universal human rights.⁴⁴¹ An important question that can thus be raised is *why* the declaration was drafted, if these rights already existed and belonged to indigenous peoples. The answer continuously given to this question is that these generic and universal rights are not enough.⁴⁴² Because of their history of marginalisation, indigenous peoples need more. There needs to be a compensation, an acknowledgment of their specificities and thus the particular issues and difficulties they have and have had in the past.⁴⁴³

⁴⁴¹ E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 395; R. STAVENHAGEN, “Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (147) 151; M. B. TRASK, “Afterword: implementing the Declaration”, in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (327) 329.

⁴⁴² I. SCHULTE-TENCKHOFF, “Treaties, peoplehood, and self-determination: understanding the language of indigenous rights”, in E. PULITANO (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge, Cambridge University Press, 2012, (64) 69 and 73; E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 388.

⁴⁴³ W. KYMLICKA, “Beyond the Indigenous/Minority Dichotomy?” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (184) 190; E. STAMATOPOULOU, “Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples,” in S. ALLEN and A. XANTHAKI (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, Hart Publishing, 2011, (387) 388.

120. This Chapter seeks to investigate the truth of these statements. By answering the question if the provisions laid down in the ECHR relating to cultural identity provide a sufficient protection for the right to cultural identity of indigenous peoples, it will be possible to take a stance on the question if specific rights really are necessary for the protection of the rights of indigenous peoples. In Section I, first the standard of evaluation is explained. Next, in Section II, an investigation is made into the level of protection that is provided by the ECHR. Section III then concludes with an evaluation of the sufficiency of this protection.

SECTION I. STANDARD OF EVALUATION

121. The standard of evaluation used to decide if the protection provided by the ECHR is sufficient, is the right to cultural identity itself, as it was identified in Chapter I of this part. In that Chapter, relevant evolutions in the case law of the ACHPR and the IACtHR were investigated and showed an acceptance of the right to cultural identity and a broad interpretation hereof. Next, the content of the right to cultural identity of indigenous peoples was set up, based on the essence of the UN Declaration on the Rights of Indigenous Peoples, thus attaching primary importance to what indigenous peoples themselves aspire to have protected. In conclusion, the right to cultural identity of indigenous peoples was described as the protection of the rights to culture, to property, to life, to non-discrimination, to development, to freedom of education, to freedom of association, to freedom of speech and to freedom of religion, or of any combination of some of these rights, depending on the specific context and indigenous people at hand (*supra* 65-65, marginals 93-95).
122. Importance should also be given to the last part of this sentence, stating that the rights to be protected will in each case depend on the specific context and indigenous people at hand. The protection of the right to cultural identity will thus not ask for a protection of every aspect of every right mentioned, but only specific parts of a right will be relevant for indigenous peoples. For example, when asking for the protection of the right to life, the circumstances in which deprivation of life may be justified under Article 2 ECHR⁴⁴⁴ are irrelevant for the specific situation of

⁴⁴⁴ See, on the fact that “the circumstances in which the deprivation of life may be justified, must be strictly construed”: ECtHR 20 December 2004, No. 50385/99, Makaratzis/Greece, *Reports of Judgments and Decisions 2004-XI*, §56; ECtHR 27 June 2000, No. 21986/93, Salman/Turkey, *Reports of Judgments and Decisions 2000-VII*, §97. On capital punishment: ECtHR 12 May 2005, No. 46221/99, Öcalan/Turkey, *Reports of Judgments and Decisions 2005-IV*, §162-166; ECtHR 7 July 1989, No. 14038/88, Soering/United Kingdom, *Publ. Eur. Court H.R. Series A No. 161*, §§102-103. On deaths resulting from the use of force for permitted purposes: ECtHR 20 December 2011, Nos. 18299/03 and 27311/03, Finogenov and Others/Russia, *Reports of Judgments and Decisions 2011 (extracts)*, §210-211; ECtHR 27 September 1995, No. 18984/91, McCann and Others/United Kingdom, *Publ. Eur. Court H.R. Series A No. 324*, §148 (D.J. HARRIS et al., *Harris, O’Boyle & Warbrick. Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 225-233).

indigenous peoples. Although they may be affected by such situations, they will not be affected more because of their identification as indigenous peoples. Furthermore, the general context of indigenous peoples and who they are explains the context in which these rights are to be protected. Because this dissertation is a theoretical work, without any specific case at hand, the general context of the situation of indigenous peoples will be taken into account, based on previous case law before the ECtHR.

SECTION II. ECTHR INDIGENOUS CASE LAW

123. Only five⁴⁴⁵ cases concerning indigenous peoples have reached the European Court of Human Rights until this date.⁴⁴⁶ One of these was a judgment striking the case out of the list, as a solution was reached through a friendly settlement.⁴⁴⁷ Of the other four, only one was declared partly admissible, the other three being inadmissible.⁴⁴⁸ What follows is a chronological overview of the facts and judgments in these cases, highlighting the aspects of importance for their right to cultural identity, while paying little or no attention to other issues falling outside the scope of indigenous peoples' right to cultural identity.
124. Firstly, in the case of *Johtti Sappmelacat Ry and Others* of 1998, the applicants' complaint concerned an amendment of the Fishing Act, that introduced public fishing rights on state-owned property. Up until then, there were only fishing rights for Sámi people on that state-owned property, which was based on custom since time immemorial.⁴⁴⁹ The Sámi people claimed that the new public fishing rights on land where up until then only they could fish, were an interference with their right to property under Article 1 Protocol No. 1. Moreover, they complained that these

⁴⁴⁵ This was already mentioned *supra* 6, marginal 12. In that marginal, however, only four indigenous cases were counted before the Court, as the Chagos Islanders case was not counted. Now it has become clear that under the definition of this dissertation, the Chagos Islanders are in fact indigenous peoples, and this case can thus be counted as indigenous case law.

⁴⁴⁶ The cases that were reviewed by only the Commission when it still existed are not reviewed. The reason for this is that the Court has not always followed the Commissions decisions in its case law and these decisions are thus not always a reliable source on the view of the Court. Where the questions of law the Commission decided on were judged in the same way by the Court, more recent judgments now exist, although not specifically concerning indigenous peoples. For instance, the Commission held in *G and E v. Norway* that "*under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being "private life", "family life" or "home".*" This has now been confirmed in a number of cases, for which a reference to *supra* 72, marginal 105 can be made. (EComHR 3 October 1983, Nos. 9278/81 and 9415/81, *G and E/Norway*, *Decisions and Reports* 35, (30) 35).

⁴⁴⁷ ECtHR 9 January 2001, No. 28222/95, *Muonio Saami Village/Sweden*.

⁴⁴⁸ ECtHR 11 December 2012, No. 35622/04, *Chagos Islanders/United Kingdom* (Admissibility Decision); ECtHR 30 March 2010, No. 39013/04, *Handölsdalen Sami Village and Others/Sweden*; ECtHR 12 January 2006, No. 18584/04, *Hingitaq 53/Denmark* (Admissibility Decision); ECtHR 18 January 2005, No. 42969/98, *Johtti Sappmelacat Ry and Others/ Finland* (Admissibility Decision).

⁴⁴⁹ ECtHR 18 January 2005, No. 42969/98, *Johtti Sappmelacat Ry and Others/ Finland* (Admissibility Decision), 2-3.

public fishing rights constituted an interference with their right to respect for their minority lifestyle and thus with private and family life under Article 8 ECHR. Finally, they complained that they had been “discriminated against on the basis of their race and their association with a national minority,”⁴⁵⁰ under Article 14 ECHR, read in conjunction with Articles 6 and 8 ECHR and Article 1 Protocol No. 1.⁴⁵¹ The Court declared the application inadmissible because of being manifestly ill-founded, stating that “[t]he applicants have not appreciably shown the adverse impact of the 1997 amendment of the Fishing Act on their concrete possibilities to exercise their traditional fishing rights.”⁴⁵² It held that the only alteration to the Fishing Act was “that these rights [...] now applied to the Sámi Home District as a whole and not only to the municipality of residence” and that that could “hardly imply a “weakening” of the applicants’ legal status.”⁴⁵³

125. Second, the Hingitaq 53 case of 2006 concerned a complaint of the Inughuit people of Greenland who had lived in the Thule region since time immemorial. Because in 1946 an American air base was built on the territory on which they traditionally hunted and close to where they lived, their “access to hunting and fishing was increasingly restricted and [...] the activities at the base eventually had a detrimental effect on the wildlife in the area.”⁴⁵⁴ In May 1953, they were evicted from their lands because of an expansion of the air base. After their eviction, in September 1953, they received substitute housing, facilities for a new village and groceries.⁴⁵⁵ After a series of complaints and appeals before different national courts, the Inughuit people finally received a compensation of 500,000 Danish Kroner and each individual received a smaller, personal amount.⁴⁵⁶ The Inughuit people filed a complaint before the ECtHR regarding their property rights under Article 1 Protocol No. 1, stating that they had been the rightful owners of the region and that they had been deprived of the peaceful enjoyment of their lands. Furthermore, they complained that there had been a breach of Article 8 ECHR, “because their family houses in Uummannaq had been burned down and the old church had been removed without prior consultation of the Hunters’ Council, the parish or the parish council”⁴⁵⁷ and that they had not been given any compensation for these facts. The Court considered that the Convention and Protocol No.1 had only started to apply to Denmark on 3 September 1953 and 18 May 1954

⁴⁵⁰ ECtHR 18 January 2005, No. 42969/98, Johti Sappelacat Ry and Others/ Finland (Admissibility Decision), 11, §5.

⁴⁵¹ *Ibid.*, 10-11.

⁴⁵² *Ibid.*, 18.

⁴⁵³ *Ibid.*, 18.

⁴⁵⁴ *Ibid.*, 2.

⁴⁵⁵ *Ibid.*, 3.

⁴⁵⁶ *Ibid.*, 11-12.

⁴⁵⁷ ECtHR 12 January 2006, No. 18584/04, Hingitaq 53/Denmark (Admissibility Decision), 16, §§1-2.

respectively, leaving the Court without jurisdiction on the complaints regarding interferences with their rights under the Convention before these dates.⁴⁵⁸ The application was therefore declared inadmissible.⁴⁵⁹

126. The third case, *Handölsdalen Sami Village and Others v. Sweden*, has been the only indigenous case before the ECtHR to be declared (partially) admissible. In this case of 2010, four Sámi villages complained that a Court of Appeal judgment imposed an unjustified limitation on their property rights under Article 1 of Protocol 1, regarding the right to use land for winter grazing.⁴⁶⁰ The original case before the national courts regarded a dispute between the villages and private land owners: while the Sámi villages had the right to use land for winter-grazing under the Reindeer Husbandry Act of 1971, the borders of these grazing lands were controversial. In 1990, a number of private land owners started proceedings against five Sámi villages, seeking a declaratory judgment that the Sámi had no right to use their lands without their permission.⁴⁶¹ In the case before the national courts, the Sámi villages had to prove the use of those lands since time immemorial, which required proof of actual use of those lands for at least the past 90 years.⁴⁶² The Sámi villages failed to do so under the existing laws on proof and lost the case before the subsequent courts. After a Court of Appeal judgment that once again confirmed this, the Sámi villages complained before the ECtHR that this judgment effectively interfered with their property rights, as the consequence of the judgment was the necessity of contracts with private land owners for the use of parts of their winter grazing lands.⁴⁶³ They also lodged complaints under Article 6 ECHR regarding the division of the costs, length of the proceedings and the matter of “*an insurmountable burden and standard of proof.*”⁴⁶⁴ The Court declared the complaints partly inadmissible, stating that the claim under Article 1 Protocol No. 1 was incompatible *ratione materiae* with the provisions of the Convention, since the reindeer grazing rights in the specific area under dispute were not ‘possessions’, as the Reindeer Husbandry Act was unclear on the boundaries of the winter grazing land and the national courts had decided that it was not. The Court considered their potential grazing rights in the area under dispute to be a mere ‘claim’ before the national courts, that could neither be considered an ‘existing possession’, nor an

⁴⁵⁸ ECtHR 12 January 2006, No. 18584/04, *Hingitaq 53/Denmark* (Admissibility Decision), 18.

⁴⁵⁹ *Ibid.*, 21.

⁴⁶⁰ ECtHR 17 February 2009, No. 39013/04, *Handölsdalen Sami Village and Others/Sweden* (Admissibility Decision), §40.

⁴⁶¹ *Ibid.*, §§3-4.

⁴⁶² *Ibid.*, §13.

⁴⁶³ *Ibid.*, §40.

⁴⁶⁴ *Ibid.*, §41.

‘asset’.⁴⁶⁵ As the national courts had rejected the claims and their decisions had no appearance of arbitrariness, the ECtHR declared the claim regarding Article 1 Protocol No. 1 inadmissible. The other part of the claim, under Article 6 ECtHR, was declared admissible and decided upon in the 2010 judgment, the Court finding a violation of Article 6.⁴⁶⁶

127. Lastly, the Chagos Islanders case of 2012 was again declared inadmissible by the ECtHR, this time because of an incompatibility *ratione loci*. The Ilois living on the Chagos Archipelago of the British Indian Ocean Territory were removed from their homes between 1967 and 1973 and relocated to other areas because the UK had given the US use of the islands “for defence purposes.”⁴⁶⁷ The Ilois were initially denied any right to compensation, as the UK regarded the islands “as having no “permanent population”.”⁴⁶⁸ Finally, in 1977, they received monetary compensation.⁴⁶⁹ After this, various former inhabitants of the Chagos Islands started lodging complaints before the national courts challenging their evacuation from the islands and wishing to return.⁴⁷⁰ In 2002, a group of Ilois started a group litigation asking for compensation and a declaration of their right to return to their home land.⁴⁷¹ After losing the case before the national courts and the House of Lords, the applicants filed a complaint before the ECtHR.⁴⁷² In its decision, the Court assessed that, even though the Chagos Archipelago had been a part of Mauritius, for which the UK had made a declaration under Article 56 (then Article 63) ECHR, in becoming the BIOT in 1966 it ceased to be a part of Mauritius and thus the declaration ceased to apply to it. The UK never made a declaration under Article 56 ECHR for the BIOT, so the Convention does not apply there.⁴⁷³ The applicants had also alleged possible extraterritorial application, using the theories of either effective control over an area, “exercising all or some of the public powers normally to be exercised by that Government,”⁴⁷⁴ or state-agents exerting authority and control.⁴⁷⁵ The Court dismissed these arguments in just two sentences, stating that

⁴⁶⁵ ECtHR 17 February 2009, No. 39013/04, Handölsdalen Sami Village and Others/Sweden (Admissibility Decision), §§48-56.

⁴⁶⁶ ECtHR 30 March 2010, No. 39013/04, Handölsdalen Sami Village and Others/Sweden, §66.

⁴⁶⁷ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §7-8.

⁴⁶⁸ *Ibid.*, §7.

⁴⁶⁹ *Ibid.*, §11.

⁴⁷⁰ *Ibid.*, §§12-13.

⁴⁷¹ *Ibid.*, §18.

⁴⁷² *Ibid.*, §§18-30.

⁴⁷³ *Ibid.*, §§61-62.

⁴⁷⁴ ECtHR 7 July 2011, No. 55721/07, Al-Skeini and Others/United Kingdom, *Reports of Judgments and Decisions 2011*, §134.

⁴⁷⁵ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §§48-50; ECtHR 7 July 2011, No. 55721/07, Al-Skeini and Others/United Kingdom, *Reports of Judgments and Decisions 2011*, §§134-135; G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 35.

extraterritoriality could not apply as the BIOT was “*part of metropolitan United Kingdom*”.⁴⁷⁶ The remainder of the complaints, regarding proceedings before the UK’s national courts, were declared manifestly ill-founded.⁴⁷⁷

128. In conclusion, the ECtHR has not yet issued a judgment on the substance of any of the sub-rights contained in the right to cultural identity of indigenous peoples. The only judgment it has made on the merits in a case regarding indigenous peoples has been on access to court, under Article 6 ECHR.

SECTION III. PROTECTION OF THE RIGHT TO CULTURAL IDENTITY

129. Because until now no substantial issues on any of the sub-rights of cultural identity regarding indigenous peoples have been judged by the ECtHR, it is not possible to make a statement on the way the Court has effectively protected indigenous peoples’ right to cultural identity. A lot of criticism exists on the fact that none of the indigenous cases before the Court have yet gotten past the admissibility stage,⁴⁷⁸ the exception being a case that was only partly admissible, starting out with claims under Article 1 Protocol No. 1 and Article 6 ECHR, and only being admissible regarding Article 6 ECHR.⁴⁷⁹ However, as was said earlier, these cases will only be used as a *context* for the actual issues incurred by indigenous peoples in Europe,⁴⁸⁰ so as to be able to evaluate the protection of the right to cultural identity by the ECtHR.

⁴⁷⁶ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §64. GISMONDI extensively criticised this approach of the ECtHR, stating that “*the Court never thoroughly analyzed the issue of extraterritoriality under Article 1*” and giving her own critical assessment of the possibility of extraterritorial application in the Chagos Islanders case, concluding that following the Al-Skeini case, extraterritorial jurisdiction on the basis of state-agent authority should have been a possible approach for jurisdiction *ratione loci*. (G. GISMONDI, “Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1” in *YHRDLJ* 2017, (1) 35-39).

⁴⁷⁷ ECtHR 11 December 2012, No. 35622/04, Chagos Islanders/United Kingdom (Admissibility Decision), §87.

⁴⁷⁸ The fact that all of these cases have been declared (partially) inadmissible raises questions on the effectiveness of the right to access to court for indigenous peoples. Although this is an interesting question that needs further investigation, studying this would fall outside of the scope of this research. Up until now, this question has been raised by Judge Ziemele in her dissenting opinion in the Handölsdalen case, by KOIVUROVA, by KIRCHNER, by LUNDMARK, and by BEQIRAJ (Partly Dissenting Opinion of Judge Ziemele to ECtHR 30 March 2010, No. 39013/04, Handölsdalen Sami Village and Others/Sweden, §10; J. BEQIRAJ, “Indigenous Peoples’ Cultural Identity under EU Law and the ECHR: A Non-trade Interest or a Human Right?” in F. IPPOLITO and S. IGLESIAS SÁNCHEZ (eds.), *Protecting Vulnerable Groups. The European Human Rights Framework*, Oxford, Hart Publishing, 2015, (159) 166-167; S. KIRCHNER, “Conceptions of Indigenousness in the Case Law of the European Court of Human Rights” in *Loy. L.A. Int’l & Comp. L. Rev.* 2016, (169) 184-185; T. KOIVUROVA, “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects” in *Int’l J. on Minority & Group Rts.* 2011, (1) 20; M. LUNDMARK, “The European Court of Human Rights and the Protection of Arctic Indigenous Peoples Rights” in *the Yearbook of Polar Law* 2017, (24) 33-35).

⁴⁷⁹ ECtHR 17 February 2009, No. 39013/04, Handölsdalen Sami Village and Others/Sweden (Admissibility Decision), §§40-44, §56, §66, §70 and §78.

⁴⁸⁰ I am aware that not nearly all of the problems that indigenous peoples in Europe have or have had are reflected in these four cases. Some of the problems will have been solved in the national courts, while other indigenous peoples never even go to court with the complaints they have about their treatment. These four cases are, however, good examples of real issues of indigenous peoples in the past, and will thus give some image of their plight, even though it is not at all complete.

§1. A sufficient protection: investigation

130. A first issue that regularly came up were property rights. The problems incurred by the indigenous peoples are that they usually do not own the property they use, and instead it is owned by the state or even private parties. As the ECtHR has an autonomous interpretation of the meaning of possessions under the Convention, it is possible that this would not be a great hurdle for indigenous peoples. However, such a proprietary interest must have a sufficient basis in national law (*supra* 80, marginal 114). Regarding the fishing rights in the Johtti case, these were considered possessions by the ECtHR. However, the Court decided that there was no interference with this possession, as in its opinion there was hardly a weakening of the applicants' legal status (*supra* 86, marginal 124). It is hard to estimate whether the assessment made by the Court here would still be the same today. On the one hand, the Court has increasingly taken the specific, vulnerable position of minorities into account, particularly protecting minority lifestyle and identity (*supra* 71-72, marginals 104-105). On the other hand, however, the Court might still decide that the fact that the applicants have to share their waters for fishing with others is not an interference, depending on the way in which private permits are handed out and the actual facts of the case. The same observations can be made about a possible breach of Article 8 ECHR: even though minorities have a right to a minority lifestyle and identity, the Court will not decide that there is a breach of any right, when it does not believe there is any interference.
131. In the Hingitaq case, the Inughuit were expropriated from the lands where they had lived since time immemorial. As has become clear from the Court's case law, the proof of these facts is regulated under national law, where the Court only interferes if the national judgment is an arbitrary one. If proof can be given of this, the Court will accept that the lands are a party's possession. It is thus safe to assume that the expropriation of this tribe from lands they do not own under their national law will be treated in the same way as a case of actual owners. A next important issue is if the compensation provided for under the convention, namely a pecuniary compensation, is an acceptable compensation for the expropriation of indigenous peoples. Because of their special connection with their lands, clear preference must be given to the possibility of return to their lands of indigenous peoples. This special connection with their lands also needs to be considered by ECtHR when applying its fair balance test, as the Court should attach sufficient weight to the interest of these people in staying where they are. It is not certain whether the Court will do this. The current trend of attaching special importance to the minority status of certain groups may suggest that this could happen, but it also requires the Court to be familiar with the specific plights of indigenous peoples, of which there is not yet any indication.

It remains to be seen what the Court will decide in such a case. Regarding a possible breach of Article 8 because of the burning down of their houses, the removal of a church and possible other interference, a breach will also surely be found by the Court. In this respect, its case law has evolved tremendously over the past years, taking into account more and more the specificities of a minority lifestyle. The Court will without doubt recognise the specific importance that some sites, that may have been violated, have to the people and award appropriate compensations.

132. In the Handölsdalen case, the Court judged winter grazing rights on a specific territory not to be a possession, as they were contested before the national courts, who decided that the right to the use of that specific territory belonged to private parties. Dating only from 2010, this case is fairly recent and the case law regarding property has not changed much since then. When looking at this case from the point of view of an efficient protection of indigenous peoples right to cultural identity, there are some possible predicaments. Under the national law, it was hard for the applicants to prove the use of the lands since time immemorial. Even though this law, requiring sufficient documentation for 90 years, is applicable to all Swedish nationals, indigenous peoples will probably be affected a lot more than others by this extensive burden of proof. Additionally, this proof was only necessary because the law establishing their rights in the first place was unclear as to its territorial application. The ECtHR did not look into these issues, and instead just ruled that the *“the courts’ application of national law and their findings in regard to evidence were fair.”*⁴⁸¹ This is in line with its current case law, as *“[...] the Convention does not lay down any rules on the admissibility or probative value of evidence or on the burden of proof, which are essentially a matter for domestic law.”*⁴⁸²

133. In the last case, the Chagos Islanders case, the Ilois did own their land and were expropriated. If this case would have been admissible before the Court, one could easily argue that the Court would not find the government to have struck a fair balance between the relevant interests in this case, even though the Ilois did receive a pecuniary compensation. This is research argues that this is a convincing interpretation firstly because of the circumstances in which the expropriation happened and secondly because of the attitude of the UK government towards the people. The

⁴⁸¹ ECtHR 17 February 2009, No. 39013/04, Handölsdalen Sami Village and Others/Sweden (Admissibility Decision), §65.

⁴⁸² ECtHR 17 February 2009, No. 39013/04, Handölsdalen Sami Village and Others/Sweden (Admissibility Decision), §65; ECtHR 14 December 2006, No. 1398/03, Markovic and Others/Italy, *Reports of Judgments and Decisions 2006-XIV*, §§107-108; ECtHR 12 July 2001, No. 42527/98, Prince Hans-Adam II of Liechtenstein/Germany, *Reports of Judgments and Decisions 2001-VIII*, §§49-50; ECtHR 27 April 2000, Nos. 47457/99 and 47458/99, Tiemann/France and Germany (Admissibility Decision), *Reports of Judgments and Decisions 2000-IV*, 14, §2; ECtHR 21 January 1999, No. 30544/96, García Ruiz/Spain, *Reports of Judgments and Decisions 1999-I*, §28.

same question as with the expropriation of the Inughuit nonetheless rises: will the Court take the special connection of indigenous peoples with their lands and thus their greater interest in the possibility of return into account? Again, this remains to be seen. In this case, along with a claim for property, a claim under the right to private and family life would most certainly succeed. Because of their eviction without clear resettlement plans, people became dispersed and had no way of continuing their community lives with the other Ilois. Furthermore, they lost the graves of their ancestors and other possibly important sites. Additionally, they lost their home. Considering the ample case law on this subject and its sensitivity for the plight of minorities, one would imagine there to be a sufficient protection of this right in this case.

§2. A sufficient protection: conclusion

134. All of these cases were only investigated under two of the sub-rights of the right to cultural identity, the right to property and the right to respect for private and family life, as those rights were the ones that were most strongly linked to the issues raised in these cases. Depending on the facts of other cases that may arise, the other rights may also come into play in the future. Regarding the two articles discussed, a few objections were raised as to the sufficiency of their protection. In this respect, there is little doubt on the matter that Article 8 ECHR provides a sufficient protection for the right to cultural identity in these cases. This Article has evolved into a very minority-sensitive Article, protecting specific identities and lifestyles.
135. Next, on the protection of Article 1 Protocol No; 1, it is unclear how the Court will handle the fair balance test when deciding on the possible justification of an interference into the right to property and in deciding on a fair compensation. In order to provide a sufficient protection for indigenous peoples' right to cultural identity, it should consider the weight of the special connection to their land in this respect. Nonetheless, the Handölsdalen case raised substantial issues regarding the protection of indigenous peoples' right to cultural identity. Under the Court's current case law, the state had a fair margin of appreciation in deciding on the proof it requires in deciding whether use of land has been 'since time immemorial'. When this burden of proof is a very high one, this will result in high procedural costs and a lack of recognition of a property right under the Convention, as was the case in Handölsdalen. Furthermore, this substantive burden of proof will have a substantially bigger impact on the rights of indigenous peoples than on others, as they make use of usage 'since time immemorial' a lot more than others. The fact that the Court keeps away from these issues, leaving them to the margin of appreciation of the state, shows that there

is a lot of room for improvement if the protection of property under the ECHR is to be a sufficient protection.

136. In conclusion, even though Articles 2, 9, 10, 11 and 14 ECHR, Article 2 Protocol No. 1 and Article 1 Protocol No. 12 have not been assessed in order to discover if they provide a sufficient protection of indigenous peoples' right to cultural identity, it has become clear that Article 1 Protocol No. 1 falls short in its protection, thus facilitating one to say that the protection of the right to cultural identity of indigenous people under the ECHR is insufficient. Where in some cases their plights and specificities will be taken into account in a good way, as in most cases under Article 8, in others the generic protection that the Convention provides will prove insufficient. In this respect, it is possible to conclude that, even though the ECHR, with its generic and universal human rights protection, can provide a satisfactory protection of indigenous peoples right to cultural protection in some cases, it will evidently fall short in others. This is the case because the specificities of the group are not taken into account sufficiently, which, among others, allows for indirect discriminations to continue to exist.

CONCLUSION

137. This master's thesis has investigated the right to cultural identity of indigenous peoples in Europe. The aim of this investigation was to answer the question if the protection of the rights of minorities as it is laid down in the ECHR and its protocols provides a sufficient protection of the right to cultural identity of indigenous peoples in Europe. In order to answer this, three different sub-questions were raised.
138. The first question that was examined, was "What are indigenous peoples?" Because of a complete lack of clarity regarding the definition of indigenous peoples in the international community and in relevant doctrine, this question was dealt with in an extensive way, comprising all of the first part of this research. In returning to the authoritative sources on the definition of indigenous peoples and keeping in mind the evolutions that have happened in the past thirty years, a definition was set up based on a set of more recent sources. This definition is the following: "In the European context, indigenous peoples are a group of people who:
1. self-identify as such, both as a group and as individuals within the group;
 2. have a special connection to their traditional lands;
 3. have historically been marginalised and discriminated, and continue to be so;
 4. are culturally distinct from dominant society; and
 5. may have a claim to self-determination."

After constructing this definition, it was used to identify three relevant communities within Europe as indigenous peoples, namely the Sámi, the Inuit and the Ilois.

139. Part II of this research answered the other two questions. First, it was concluded that "what is meant by the right to cultural identity" is, specifically for indigenous peoples, "an effective protection of the rights to culture, to property, to life, to non-discrimination, to development, to freedom of education, to freedom of association, to freedom of speech and to freedom of religion, or of any combination of some of these rights, depending on the specific context and indigenous people at hand."

The next question was a double one, namely "Which articles of the ECHR protect the right to cultural identity of indigenous peoples?" and "What is the content and scope of these ECHR articles?" The relevant Articles of the ECHR for the protection of indigenous peoples' right to cultural identity were identified as being articles 2, 8, 9, 10, 11 and 14 of the ECHR, articles 1 and 2 of Protocol No. 1 and article 1 of Protocol No. 12 to the ECHR, leaving the right to

development outside the scope of the investigation. For a discussion of their content and scope, the reader is referred back to Section II of Chapter II, as a recapitulation of this would be undue.

140. Finally, the central research question was discussed in the last Chapter. This question was: “Is the protection of the rights of minorities as it is laid down in the ECHR and its protocols a sufficient protection of the right to cultural identity of indigenous peoples in Europe?” The answer to this is that the ECHR does not provide a sufficient protection. In investigating this question in the context of previous indigenous cases before the ECtHR and with the right to cultural identity as defined by the second research question as a standard of evaluation, it was concluded that the ECtHR falls short regarding the protection of indigenous peoples’ right to property.

The message, however, is not all negative: the Court does have a sensitivity towards minority groups and in past years its case law has evolved towards granting them a more effective protection. Thanks to the Court’s and the international community’s specific focus on the problems of the Roma community, the ECtHR case law became more minority-sensitive. The D.H. case was a landmark achievement in this respect and could possibly be meaningful for European indigenous peoples. The ECtHR case law is, however, primarily focused on the Roma, gypsies and travellers and their specificities. As of yet, there is no sensitivity for the specificity of indigenous peoples and their issues, which the Handölsdalen case illustrates. For this reason, it is possible to find some merit in the approach of the indigenous movement in pushing for specific rights. This movement makes sure the peculiarities of specific minority groups are put into the spotlight, as it also happened with the Roma community. On the other hand, this research has shown that there are also opportunities for an effective protection of specific groups within generic human rights. It is thus argued that, even though the drafting of specific human rights has been very useful for the improvement of the sensitivity towards issues that are specific to some groups and not others, there is no need for actual treaties regarding specific indigenous peoples’ human rights. Instead, this dissertation advocates for a minority-sensitive approach towards generic and universal human rights, taking into account the specificities of the different groups.

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