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The right to water for indigenous peoples

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INTRODUCTION

In 2010, the UN General Assembly and subsequently the Human Rights Council adopted two important Resolutions enshrining the right to water and sanitation as a universal, autonomous, and specific human right[1]. This legal recognition at the international level was obtained after years of mobilisation to oppose the processes of privatisation and commodification of water management, a struggle also involving many indigenous representatives. For the latter, in fact, water has a special value, which goes beyond the western concept of mere resource. Indigenous peoples have a spiritual relationship with water and by virtue of this they consider it as a living entity to which attribute a socio-cultural value based on the interconnection between it and the people. Furthermore, in the indigenous value system there is a strong stewardship ethic, which implies, in this context, a willingness to be involved in ensuring the proper functioning and treatment of bodies of water; for example, that rivers flow as they should, that lakes are sustained to fulfil their purpose, and that aquatic living beings are treated with respect. The various ethno-cultural aspects characterising these populations, including the intimate connection they have with natural resources, are an integral part of their legal traditions.

With the beginning of European explorations of territories previously occupied by indigenous peoples and the subsequent colonisation process, in almost all cases these populations underwent a forced assimilation of the autochthonous culture by the descendants of the settlers. Furthermore, significant areas of land belonging to indigenous peoples were gradually ceded to settlers through negotiations that should have guaranteed indigenous peoples enough land to sustain themselves, but instead compelled them to dwell in small reserves unsuitable for their way of life. Over the years, marginalisation at the expense of a form of legal pluralism has led indigenous peoples to claim their ancestral rights to their lands and resources with increasing determination.

The indigenous rights question has been addressed by the United Nations in recent years through various actions aimed at fostering reconciliation with these peoples. The achievement is that today a substantial number of national regimes

[1] Resolution 64/292, UN General Assembly, 3 August 2010, *The Human right to water and sanitation*; Resolution 15/9, HRC, 6 October 2010, *Human rights and access to safe drinking water and sanitation*

and the international order recognise that indigenous peoples are endowed with a set of specific legal rights and that States are under corresponding obligations. However, although there is evidence that States have been well-intentioned in recognising a wide range of entitlements for indigenous peoples pertaining to their traditional lands and terrestrial territories, the situation is quite different when it comes to water areas. Indeed, despite Indigenous representatives' claims to rights to water spaces (including access and associated resources), States have been reluctant to satisfy the demands, with the exception of a few limited circumstances. Moreover, even when governments and national courts have been willing to recognise the legitimacy of indigenous peoples' water rights claims, these have typically been interpreted restrictively. This problem of recognition constitutes a major impediment for indigenous peoples for several factors. Firstly, because it does not consider the uniqueness of these peoples, in fact many have lived from time immemorial in connection with water resources and maintain an intimate association with them that can be fundamental to their "subsistence, economic livelihood, spirituality and cultural identity". Secondly, because it represents the Western privileged view of the environment, which clearly distinguishes between water and land areas, and is dichotomous to the indigenous view, which considers the environment holistically.

Based on this assumption, this work is developed in a cross-cutting and dynamic path. The multidisciplinary approach adopted has allowed me to delve into selected aspects related to indigenous peoples' right to water; a controversial topic that is linked to social, economic, and environmental issues.

In terms of the content profile of the thesis, the first chapter deals with the evolution of the concept of indigenous peoples and the specific rights attributed to them over time in the international framework. It analyses the political and legal consequences of colonisation, which severely limited the political autonomy of these peoples and prompted them to demand recognition of their identity and respect for their traditions, rights and customary norms, relying on the fundamental principles of social equality and distributive justice.

The second chapter focuses on the international legal framework for freshwater. It reviews the evolution of the human right to drinking water and sanitation, starting with an analysis of the international framework, and then moving on to the European one. Finally, it pays particular attention to the provisions in international legal instruments for the protection of indigenous peoples, from which the right to access, use, ownership and management of water can be inferred.

In the third and fourth chapters, a comparative analysis of two distinct contexts, the American and Oceanic continents is carried out. Specifically, the rights of indigenous peoples in relation to water in the jurisdictions of Canada, the United States, Latin America (Chile and Colombia), Australia, and New Zealand. The rationale behind the choice of these countries is the high percentage of

indigenous presence. In the third chapter three issues of particular interest to contemporary indigenous peoples are analysed: water ownership, water rights and commercial rights. It investigates the circumstances and ways in which indigenous peoples have been able to achieve some improvements in terms of legal access to water sources, harvesting of its resources and profit from them in the jurisdictions surveyed.

In the fourth chapter, is analysed another area of interest for indigenous peoples, namely the right to manage water in an era characterised by several problems of pollution and competition. In particular, it investigates the struggle of indigenous peoples against monopolistic management of water resources and witnesses the emergence of innovative co-management models.

The objective is not to evaluate the most effective approach to resolving indigenous water struggles and rights, nor to present a typology as a consolidated basis for an exhaustive comparison of different societies and contexts of water use. The results of the comparison of countries, which are not mutually exclusive, illustrate the diversity of approaches and paths followed and, at the same time, reveal the opportunities, dilemmas and tensions inherent in the quest for recognition, representation and redistribution by State systems of indigenous water rights and governance.

Chapter 1: Indigenous peoples
1.1 Indigenous peoples' rights

In 1945, after the Second World War, the United Nations Charter was adopted, the first international instrument that marked a significant shift towards the enhancement of the rights of human beings, as distinct from those of the State. It reshaped the responsibilities of States towards their citizens, ushering in the so-called "era of human rights"[2]. Its main purpose was to globally defend the self-determination of peoples[3] as well as to promote fundamental freedoms for all[4].
In 1948, the Universal Declaration of Human Rights ('UDHR')[5], a milestone document in the history of human rights was proclaimed by the UN General Assembly as a common standard of achievement for all peoples and nations. It challenged the cultural postulates of the past, notably the assertion of the superiority of one culture, race or ethnicity over another, and declared that all human beings share the same fundamental rights[6]. Spurred on by the same spirit, the UN also adopted the Convention on the Prevention and Punishment of the Crime of Genocide[7], the first international post-war instrument aimed at protecting the rights of groups against genocide, as it defined and outlawed this crime. The Convention's description of "genocide" covers any deliberate act committed for the purpose of exterminating, in whole or in part, a specific national, ethnic, racial or religious group, referring not only to the killing of individuals of the targeted group (Art.2 (a)), but also referring as a genocidal

[2] MAZEL (2009: 142)
[3] The principle of self-determination is referred to in Art.1 (2): "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; Art. 55; and is implied in Chapters XI (declaration regarding non governing territories) and XII (international trusteeship system).
[4]Art.1 (3): "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"; Art. 55(3); Art. 76(3)
[5] Resolution 217 A, UN General Assembly, 10 December 1948, *The Universal Declaration of Human Rights*.
[6] Preamble: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."; Art.1: "All human beings are born free and equal in dignity and rights[…]"; Art. 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs […]".
[7] Resolution 3/260, UN General Assembly, 9 December 1948, *Convention on the Prevention and Punishment of the Crime of Genocide*.

practice the causing of grievous bodily or mental harm (Art.2 (b)), the infliction of a standard of living that results in total or partial physical destruction (Art.2 (c)), the imposition of birth prohibition measures or the forced displacement of children from that group (Art.2 (d, e)). Furthermore, it makes attempts to undertake such a crime or even direct or indirect incitement to commit it punishable[8].

By the time the United Nations was established, several issues loomed on the international agenda, *inter alia*, racism, discrimination, and the process of decolonisation. In the years following the war, many peoples who had been dominated for decades by European elites and deprived of the possibility of self-determination, protested against the colonising regimes, driven by the aspiration to gain independence. The newly anti-racist and pro-self-determination approach of the United Nations[9] often supported their demands for autonomy and local control, facilitating the formation of new independent nations.

Even the indigenous peoples, deeply affected by the Second World War, the Cold War and the post-war development wave, were protagonists of a radical international repositioning. The recognition of the rights and aspirations of tribal societies, however, was not immediate, but the outcome of the convergence of several phenomena, such as: the spread of a new ideology at global level that uniformly condemned the mentality behind the colonisation process; a renovated political atmosphere more sensitive to the rights of groups that could be defined as ethnic minorities and more respectful of their different cultures, values and traditions; and lastly the political mobilisation of Aboriginal organisations. In this climate, questions concerning the status of indigenous peoples slowly overstepped the boundaries of domestic politics and gained the attention of international diplomacy[10].

Between the 1960s and 1970s, the situation in many countries, both regionally and nationally, witnessed the emergence of dozens of indigenous political movements and an equivalent number of organisations committed to demanding more civil rights. Particularly in western industrialised countries, which

[8] Art.3 (c, d)

[9] Art. 73 UN Charter: "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: 1: to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; 2: to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement".

[10] COATES (2004: 231)

eloquently professed the need for greater social justice and equality, the aspirations of the dispossessed and politically marginalised propagated through television and radio communications. In 1977, the first international conference of non-governmental organisations on indigenous issues was held in Geneva[11], followed by another, the Geneva Conference on Indigenous Peoples and the Land in 1981[12]. These conferences helped to raise the profile of Aboriginal rights but, despite this, improvements that could be described as substantial were slow in occurring and indigenous groups were increasingly frustrated by their powerlessness to persuade national governments to undertake decisive action on their behalf. The growing influence of international law, however, benefited indigenous peoples. Through the United Nations and other international agencies, minority groups found themselves with new opportunities to present their cases to non-partisan arbitrators and to seek support for a just resolution of their claims.

The earliest indicator that indigenous rights had emerged as a noteworthy international issue was in 1957 with the International Labour Organisation ('ILO'), a specialised agency of the United Nations. The ILO had already started working on the indigenous issue when it operated under the aegis of the League of Nations, but it had not attracted much attention at the time. It was only after the Second World War that it obtained the necessary support from participating governments to develop a draft protocol. During the General Congress in Geneva, the ILO, following studies and expert meetings that highlighted the vulnerability of indigenous workers, passed Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, which provided guidelines for governments to deal with indigenous peoples to advance economic and social equality[13]. This pioneering document in addressing the specific human rights of indigenous peoples, however, in line with the mindset of the 1950s, advocated largely assimilationist objectives. While placing considerable emphasis on encouraging national governments to provide education, health, and other forms of social assistance to indigenous peoples, it described them as "at a less advanced stage", Art. 1(a)[14]. This perspective, which classified indigenous cultures as lower on the evolutionary scale than their European counterparts and sought to integrate them into the nation-state, was at odds with indigenous demands for recognition of tribal autonomy and, in addition, it failed to protect

[11] Report of the International Indian Treaty Council, 1977, *Report of the International NGO Conference on Discrimination Against indigenous Populations in the Americas September 20-23.*

[12] Report of the Special NGO Committee on Human Rights, 1981, *Report of the International NGO Conference on Indigenous Peoples and the Land 15- 18 September.*

[13] BARSH (1986: 370)

[14] ILO, 26 June 1957, C107, *Indigenous and Tribal Populations Convention*.

the unique characteristics and lifestyles of indigenous peoples[15]. In spite of its shortcomings, however, Convention No. 107 has taken the first major steps towards ensuring the equality of indigenous peoples by deterring forced displacement and acknowledging indigenous rights to land. Articles 1 states: "The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized"; whereas Article 2 further stipulates: "The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations". Convention No. 107 was ratified by only a few countries and was subsequently revised by an expert committee convened by the ILO Governing Body, which concluded "the Convention's integrationist approach is obsolete, and its application is harmful in the modern world"[16].

The revision, carried out between 1988 and 1989, led to the Indigenous and Tribal Peoples Convention No.169, a legally binding international treaty for ratifying states, which is now a global benchmark and is often cited and used by UN bodies, regional human rights bodies, and national courts[17]. Its Preamble recognises "the aspirations of [indigenous] peoples to exercise control over their institutions, ways of life and economic development and to maintain and develop their identities, languages, and religions"[18]. However, Art.1 (3) of the Convention specifies that "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", thereby suggesting that the right of secession is not recognisable[19].

Under international law, indeed, the term "peoples" entails the right to self-determination, which in turn has two facets, internal and external. The former refers to the right of a nation or people to realise its rights, interests, aspirations and sovereignty within the existing state, while the latter may in exceptional cases take the form of secession[20]. For the purposes of the provisions of the Convention No. 169, therefore, the self-determination of the Indigenous peoples should be realised in its internal aspects, avoiding the impairment of the territorial integrity of the State. Convention No. 169 has only been ratified by a

[15] KINGSBURY (1998:424)
[16] ILO (2013: 14)
[17] Ibid. p. 15
[18] ILO, 27 June 1989, C169, *Indigenous and Tribal Peoples Convention.*
[19] SHRINKHAL (2021:77)
[20] External self-determination can also imply the creation of an independent sovereign State with access to full membership in international and regional organisations; the establishment of a sovereign entity in personal union with another State; integration into another State, in a unitary or federal way.

small number of States[21], and although the rights contained in it apply only within the framework of the contracting States, its impact extends beyond them. Indeed, until the adoption of the 2007 UN Declaration it has been the most advanced instrument for the protection of indigenous peoples in the world, and due to its binding character, still represents a pillar of international protection.

A series of international human rights instruments relevant to indigenous peoples followed. Namely, the International Covenant on Civil and Political Rights ('ICCPR'), and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), both adopted in 1966, which do not specifically mention indigenous rights, but equally apply to their needs[22]. Furthermore, the Convention on the Elimination of All Forms of Racial Discrimination ('CERD')[23] is worth a mention, in force since 1969, which does not explicitly refer to indigenous peoples but protects minorities and individuals against racial discrimination within States. Regarding the ICCPR, it has been complemented by an Optional Protocol, which provides a monitoring mechanism to guarantee the rights established in the Covenant. Specifically, the Covenant establishes a Human Rights Committee, whose functions are to assist States Parties in fulfilling their treaty obligations; to examine communications submitted by a State Party against another State Party alleged to have violated its obligations under the Covenant[24]; and to examine individual complaints regarding alleged violations of the Covenant by States Parties to the Protocol. In addition to this, the Committee prepares General Comments outlining its positions on specific issues.

The ICESCR performs similar functions to the ICCPR, it does not provide norms for the protection of indigenous peoples *per se*, but is applicable to different situations relevant for them, in particular the right to self-determination of peoples and the principle of non-discrimination[25]. These and other legal instruments bear particular relevance to indigenous peoples, as they protect rights which are important to them and have tackled crucial issues of disadvantage[26].

Among the major initiatives dedicated to indigenous issues within the UN framework there was the Study on the Problem of Discrimination Against

[21] As of July 2022, 24 States have ratified the Convention.

[22] Resolution 21/2200, UN General Assembly, 16 December 1966, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*; HYMOWITZ, DIKKERS, ANDERSON (2003)

[23] Resolution 20/2106, UN General Assembly, 21 December 1965, *International Convention on the Elimination of All Forms of Racial Discrimination.*

[24] Art. 41

[25] Art.1 (1), Art.2 (1)

[26] MAZEL (2009: 144)

Indigenous Populations[27]. In 1970, the Sub-Commission on Prevention of Discrimination and Protection of the Rights of Minorities decided to deal with the issue of the perpetuated discriminatory treatment of indigenous groups under the auspices of the United Nations. Jose R. Martinez Cobo was appointed as Special Rapporteur and charged with the responsibility of investigating the problem of oppression, marginalisation, and exploitation of indigenous peoples. The process of drafting the final report, consisting of 24 documents, lasted 13 years and its publication contributed significantly to the recognition of indigenous peoples as having an international interest of their own and laid the foundation for the establishment of the Working Group on Indigenous Peoples.

In response to the increased international cooperation among indigenous peoples, through non-governmental organisations such as the World Council of Indigenous Peoples, in 1982, by Resolution 1982/34, the Economic and Social Council authorised the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish an annual Working Group on Indigenous Peoples ('WGIP') with the mandate to review developments related to the promotion, awareness-raising and protection of human rights and fundamental freedoms of indigenous peoples[28]. The WGIP represented the first major international recognition of the legitimacy of indigenous aspirations. It faced two challenges: to develop a definition of "indigenous" so that policy lines could be better delineated; and to develop a list of the legitimate rights and responsibilities of indigenous peoples within the nation state. Among its most famous commitments was the drafting of the Declaration on the Rights of Indigenous Peoples ('DRIP'). In performing its task, the Working Group relied on resources provided by international agencies, the Secretary-General, governments, and non-governmental organisations[29]. During the proceedings, however, issues emerged, particularly from States, concerning certain key provisions of the draft Declaration, namely the right to self-determination of indigenous peoples and control over natural resources on indigenous traditional lands[30]. Indeed, this was precisely the core problem that hindered the consent of the United States, Canada, and other indigenous host countries to accept the DRIP for years.

The need to address these themes led to the creation in 1995 of an open inter-sessional working group in which representatives of indigenous peoples and organisations participated directly to provide information on the problems they

[27] JOSE' R. MARTINEZ COBO, 11 March 1986, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, *Study of the Problem of Discrimination against Indigenous Populations*.

[28] UN Economic and Social Council, 24 June 1998, E/CN.4/Sub.2/AC.4/1998/9, *Standard setting activities: information received from indigenous organizations: note by the secretariat*, p.1; HYMOWITZ, DIKKERS, ANDERSON (2003)

[29] WIESSNER (1999: 47)

[30] SANDERS (1989: 407)

were facing and to express their views on the formulation and content of the document. The initial expectation was to adopt the document as part of the International Decade of the World's Indigenous Peoples (1994-2005)[31]. Although the Decade helped to raise their international profile and was particularly useful in directing attention to the conditions of Aboriginal communities in non-Western countries, it did not culminate in the adoption of the Declaration. For this reason, the mandate of the Working Group was extended by the UN Commission on Human Rights to the second International Decade of the World's Indigenous Peoples (2005-2015)[32]. The most heated discussion focused on the provision in Article 3, which enshrines the right of indigenous communities to "freely determine their political status and freely pursue their economic, social and cultural development". To overcome the impasse that precluded the adoption of the Declaration, after years of intense and controversial negotiations, Article 46 was inserted to partially counterbalance the right to self-determination of indigenous peoples (especially in its external dimension)[33]. Article 46(1), states that:

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

In 2006, the UN overhauled the human rights mechanism by substituting the UN Commission on Human Rights with the UN Human Rights Council, which adopted the DRIP on 29 June 2006. The DRIP was finally adopted by the General Assembly on 13 September 2007 with a majority of 144 states in favour and 4 votes against (Australia, Canada, New Zealand, and the United States).
Among the reasons why these countries, which have a significant percentage of Indigenous peoples in their territories, voted against the adoption of the Declaration, were the clauses relating to land rights. In this regard, a particularly fervent debate centred on the provision of Article 28(1) that states:

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

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[31] Resolution 48/163, UN General Assembly, 18 February 1994, *International Decade of the World's Indigenous People.*
[32] Resolution 59/174, UN General Assembly, 20 December 2004, *International Decade of the World's Indigenous People.*
[33] KOIVUROVA, LENZERINI, WIESSNER (2022: 93)

The recognition of the right of indigenous peoples to compensation for their ancestral lands taken or occupied by others against their will in the past, which may take the form of restitution of the lands in question, and only in the case of an objectively impossible restitution could alternative forms of reparation be considered[34], has provoked strong concern in these States, especially in light of the possible retroactive applicability. For these reasons they initially voted against. But since Article 28, in order to be enforceable, requires that an indigenous community has maintained a continuing cultural connection to the land it has been *de facto* deprived of in the past, which is unlikely to happen; and since Article 28 also argues that, depending on the specific circumstances of each situation, restitution may not be possible and may be replaced by "just and equitable compensation", these States ultimately changed their stance. Between 2009 and 2010, the four countries that had voted against reversed their position and officially approved the Declaration. A decisive role in the adoption of this international instrument was played by countries with a large indigenous presence on their territory, especially Latin American countries, which accompanied this international process with a domestic constitution-making process in favour of indigenous peoples. Today, this document is the most comprehensive international instrument on the rights of indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the world's indigenous peoples and elaborates on existing standards of human rights and fundamental freedoms, applying them to the specific situation of indigenous peoples. The text contains a number of tailor-made collective rights, such as the rights to nationality (Art. 6), self-determination (Art. 3), equality and freedom from discrimination (Art. 2); the rights to culture, spirituality, education, and language (Arts. 12, 15, 16, 31); the rights to land and resources (Arts. 25, 26, 27, 28, 29, 32); the right to enter into treaties and agreements with States (Art. 37); the rights to participate in development and other economic and social rights (Arts. 5, 18).

Although the Declaration refers to "matters of great and lasting importance for which the utmost observance [by UN Member States] is expected"[35], in terms of legal significance the norms it contains are not legally binding. Nevertheless, it constitutes a framework for national courts and international human rights bodies, as well as other tribunals, *inter alia*, the Inter-American Court of Human Rights, the Commission and the African Court on Human and Peoples' Rights. This resulted in a generally accepted *opinio juris*, which has effectively developed its core principles into rules of customary international law[36]. These are, *inter alia*, the norms regarding the right of indigenous peoples to self-

[34] Compensation may consist of land, territories and resources of the same quality, size, and legal status as those lost, or monetary compensation or some other form of reparation.

[35] KOIVUROVA, LENZERINI, WIESSNER (2022: 91)

[36] Ibid. p. 107

government, the right to cultural identity, the right to traditional lands, territories and resources, and the right to redress and reparation for injustices experienced.
In conclusion, in light of these important and recent developments in praxis that attribute particular relevance to the specific need for the protection of indigenous peoples, indigenous peoples have been accorded a special autonomous status with respect to both human rights law and the specific context of minority protection.

1.2 The concept of indigenous

The recognition of the legal status and rights of indigenous peoples within the contemporary human rights framework has developed through the ILO Conventions, the DRIP, and other human rights fora. Many of the elements of this recognition have "matured and crystallised in customary international law" [37] over the years. Nevertheless, a number of contentious issues have continued to challenge the aforementioned instruments. Among these is the debate over the identification and definition of indigenous peoples. The root of the controversy is clear: when we speak of indigenous peoples, we are referring to approximately 470 million people worldwide[38]. It is therefore understandable that it is unfeasible to indicate a single category when dealing with these communities. However, for the purposes of internationalist discipline, it is appropriate to clarify the legal concept of "indigenous peoples".
As is known, in international human rights instruments there is no detailed and unambiguous legal definition of the beneficiaries of collective rights and peoples' rights. The repercussions of this deficiency affect individuals belonging to minorities, indigenous and tribal people, when they seek to benefit from the specific measures available to them in order to counter discrimination and obtain equal rights and dignity.
The difficulty for international bodies to provide a univocal definition of indigenous peoples stems mainly from the manifold identities of each community. In fact, the various indigenous peoples of the world have very different characteristics, often present even among peoples inhabiting the same territory, both culturally or linguistically, as well as economically and in terms of social organisation. Moreover, indigenous communities are constantly

[37] WIESSNER (1999: 53)
[38] ILO (2020: 13)

rethinking and reconstituting their identity, especially in the context of global social and economic transformations. Despite these complexities, by analysing international documents it is possible to infer some recurring criteria among the various conceptualisations advanced to define indigenous peoples.

From a historical perspective, one of the earliest international documents that alludes to the presence and respect of indigenous peoples is the 1920 Covenant of the League of Nations, in which, in Article 22(1), the States Parties affirm their duty to promote the development and welfare of the peoples present in the territories still under their control and in the colonies. This initiative was also echoed by the International Labour Organisation through Convention No. 107, which provided some criteria for the identification of the groups in question (indigenous, tribal, and semi-tribal), although it did not formally define the terms[39]. It merely indicated, as the main characteristic qualifying an indigenous or tribal people, its profound cultural, economic, political, and social difference from the dominant society of the State in which it was located.

For a correct legal framing of the current reality of indigenous and tribal peoples and their recognised human rights, however, it is necessary to refer to ILO Convention No. 169 and the subsequent 2007 DRIP.

The definition proposed by ILO Convention No. 169 echoes what was pointed out by Jose R. Martinez Cobo in 1982, who, as we have seen above, was the special rapporteur of the first working group which attempted a legal definition of the term indigenous within the Sub-Commission on Prevention of Discrimination and Protection of Minorities. For Cobo, developing a precise definition of the term proved to be a difficult task. A workable and globally acceptable definition of "indigenous peoples" would have to include particular cases and avoid clashing with the very different logics of tribal peoples and national governments. Moreover, as the political power of the label "indigenous" intensified, different communities and peoples wanted to gain international political attention, creating difficult situations, as in the case of the demand for the inclusion of the Boers of South Africa. The definition provided by Cobo was therefore formulated with the aim of finding a comprehensive conceptualisation that at the same time differentiated indigenous peoples from "minorities" or other types of groups:

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

[39] ILO (2009: 7)

> continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems"[40].

Concerning the requirement of "historical continuity", it may consist of the continuation over a long period, up to the present, of one or more of these criteria:

> (a) [the physical] occupation of the ancestral lands (or at least part of them);
> (b) common ancestry with the original occupants of these lands;
> (c) the culture in general or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
> (d) 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);
> (e) Residence in certain parts of the country, or in certains regions of the world;
> (f) Other relevant factors[41].

Cobo's definition is the most widely used, yet it has potential and controversial limitations, as Wiessner points out. Firstly, the definition, by focusing on the "historic continuity with pre-invasion and pre-colonial societies" connects being indigenous with a history of suffering due to the phenomenon of European colonisation or invasion, an element that may disregard indigenous peoples from Africa or Asia, where oppression occurred by "equally original inhabitants of neighbouring lands that now have become the dominant groups of their societies"[42]; secondly, having retained one's ancestral lands as a necessary characteristic to be considered indigenous may exclude those who were forcibly removed from their lands and now live in urban areas[43].

In Colombia, for example, there is the situation of two traditional communities whose ancestors were brought to Colombia from Africa as slaves by European colonisers in the 16th century. Subsequently, these communities settled in particular territories and maintained their traditional cultural practices through the generations. These communities claim to possess ancestral lands and rights to natural resources, but they did not actually occupy these lands before the advent of European colonisation. It could be argued that such marginalised communities cannot be classified as indigenous but could instead qualify as "tribal" peoples under ILO Convention No. 169.

In particular, ILO Convention No. 169, in addition to having a more extended time requirement, includes in its legal definition the category of "tribal persons"

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[40] JOSE' R. MARTINEZ COBO, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, *Study of the Problem of Discrimination against Indigenous Populations*, s. 379.
[41] Ibid. s. 380
[42] WIESSNER (1999: 111)
[43] Ibid. p. 55

and “indigenous peoples” and does not distinguish between these two categories in terms of their derived rights and responsibilities. Article 1 contains a complex provision concerning the scope of the Convention.

> 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.

Based on this definition, it can be seen that the terms “tribal” and “indigenous” are used to address and include all those populations whose lands were colonised, whether they are the descendants of the inhabitants of the territory “at the time of the conquest or colonisation”, or the descendants of the people who resided there at the time of the “establishment of the present State borders”.
Article 1.2 continues: “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”.
The importance of ILO Convention No. 169 lies in the fact that it is the first international instrument to identify the concept of self-identification as a fundamental criterion for determining the presence of an indigenous people.
The United Nations Declaration on the Rights of Indigenous Peoples does not provide a definition of indigenous people but, nevertheless, a conceptual understanding of the legal meaning of the term “indigenous peoples” can be derived from the text. There are at least three characteristics of groups that seem to fall within the scope of the Declaration.
The first fundamental criterion is that of self-identification, which can be inferred from Article 33(1): “Indigenous peoples have the right to *determine their own identity* or membership in accordance with their customs and traditions. [...]” (emphasis added). In this regard, for the DRIP, distinctiveness, understood as being different and wanting to be different, is closely linked to the group’s self-identifying characteristics as indigenous. The second indication is found in the sixth clause of the Preamble and refers to the dispossession of land, territories, and resources, through colonisation or other similar events in the past, which today cause the denial of human rights or other forms of injustice. Finally, the third central feature of the conceptualisation implicitly provided by the Declaration is stated in the tenth clause of the Preamble. This is the connection between the land and the group’s cultural identity. The fruit of this synergy for

indigenous peoples is embodied in the traditional economic activities that depend on the natural resources of the area in question[44].

Ultimately, in contemporary international law, at first glance, indigenous peoples evoke the legal notion of a "minority", *i.e.* a group of people who share a religion, language, and traditions distinct from the majority population, but it may be noted that, unlike the latter, indigenous peoples have additional distinguishing features. The first is objective and inherent to the temporal antecedence in the territorial settlement of indigenous peoples, *i.e.* they are characterised by the original inhabitation of the land on which they live. The second criterion is subjective and inherent to the *modus vivendi* of these peoples who recognise in the territorial factor and the relationship with the land and natural resources the maintenance of their cultural identity[45]. For these reasons, indigenous peoples may enjoy both minority rights and other special and specific norms, justified by the rights these peoples have developed over time in the area of natural resources and cultural identity.

Moreover, the qualification of indigenous peoples with the legal concept of "people" rather than "minority" in international human rights law cannot be said to be accidental. Although international practice has configured, since the era of decolonisation, a notion of peoples having a state-territorial character, whereby peoples coincide with the population of a defined territorial unit, rather than a notion of peoples having an ethnically-based character, according to which a people is a group distinguished by specific and particular cultural, linguistic and religious characteristics; the notion of "peoples" and that of "indigenous peoples" cannot be an analogy of an exclusively terminological nature. In fact, minorities are not granted either collective rights or the right to self-determination externally or internally, but from the moment that indigenous peoples are qualified as "peoples" at the legal-diplomatic level, this entails the possibility to push for the recognition of an albeit limited right to self-determination for them, a potential that minorities do not have[46].

Indeed, minorities are only recognised with individual rights, *i.e.* those attributed to a single individual, who can exercise the right independently, in his own name and with his own authority; whereas indigenous peoples are recognised by many countries with corresponding collective rights, *i.e.* those attributed to a group of people, and which can only be invoked by the group and its authorised agents.

Although minorities are only guaranteed individual rights, it is worth noting that within this individualist framework there are also provisions dealing with the collective dimension. For example, Article 27 of the ICCPR states that: "In States where ethnic, religious or linguistic minorities exist, individuals

[44] SCHEINEN (2005: 4)
[45] ALFREDSSON (2005: 9)
[46] MAZZESCHI (2007: 21)

belonging to such minorities shall not be deprived of the right to lead their cultural life, to profess and practise their religion or to use their language, in common with the other members of their group", protects a collective interest from the moment that the individual's right will be exercised in "common with the other members of their group". But there are also other minority rights that can plausibly be conceived as collective rights, such as the right to practise one's religion, the right to use their own language and to enjoy their own culture, all of which cannot be exercised individually.

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, issued by the General Assembly in 1992, shows similar trends. According to Article 2:

> "1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, practise their own religion and use their own language […];
> 2. […] to participate effectively in cultural, religious, social, economic, and public life;
> 3. […] to participate in decision-making at the national and, where appropriate, regional levels […];
> 4. […] to establish and maintain their own associations;
> 5. […] to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States […].

However, as in the case of Article 27 of the ICCPR, the declaration presents these rights in individualistic terms, as they pertain to "persons belonging to minorities".

Therefore, collective rights, such as the right to self-determination, cannot be claimed by minorities unlike indigenous peoples. In fact, Article 3 of the DRIP states that "Indigenous peoples have the right to self-determination", a provision that aims at enabling indigenous people a high degree of autonomous development. However, as we previously mentioned, it is restricted to the internal dimension by Article 4 which states: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as to the ways and means of financing their autonomous functions".

1.3 Indigenous legal tradition and water relationship

The evolutionary structure recounted by European historians in the colonisation period was largely simplistic, but primarily functional to the strengthening of expansive cultures. They divided societies into three levels: at the first level were those still anchored in tribal barbarism, at the second those exploiting the possibilities of agriculture and, at the top of the hierarchy, those with greater social complexity and at the beginnings of industrialisation and innovation[47]. The logical progression that, according to them, every society should have made over the centuries, in conjunction with the development of the economic and social structure, was the "subsistence-agriculture-preindustrial-industrial"[48] path. Indigenous peoples, however, did not follow this path, but continued to make the most efficient use of available resources as in pre-industrial times. This is why they were for a long time regarded by European colonisers as uncivilised and lawless. However, indigenous peoples had rules that governed their relationships within communities, with other peoples and with the world around them.

The differences between each indigenous community were and are abysmal both in terms of structure and function, as they are located all over the world and each community lives in a different climatic or environmental condition. There are those who live in arctic or desert areas, and by virtue of this, a concentration of population is likely to quickly overwhelm local resources. To avoid starvation, these societies are mobile and highly reactive. Other peoples, such as the Māori, lead more comfortable lives living in a fertile land such as New Zealand, with low temperature ranges, abundant rainfall, and many rivers, and therefore have a more sedentary lifestyle[49].

Although these peoples, therefore, live in territories with different physical characteristics, what they have in common is a deep and complex relationship with their natural world, which does not presuppose a fundamental superiority over land, plants, and animals. Indigenous peoples live in a symbiotic relationship with the environment and their prosperity is based on their ability to understand available resources, to adapt to the seasons and the movements of animals and fish. They find in plants their medicine and their sustenance in rivers and seas. They have elaborate rituals of thanksgiving and prayers associated with taking animals for food because they believe they share spiritual space with the same creatures that sustain their lives. For example, the Mi'kmaq, a Canadian indigenous community, believe that animals allow themselves to be killed so that humans can survive[50].

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[47] COATES (2004: 43)
[48] Ibid. p. 45
[49] ERUETI (2019: 237)
[50] HAMILTON (2019: 24)

Additionally, land use is typically understood in terms of custody and responsibility, rather than ownership. Land and resources must be used but not destroyed, as logic and spiritual necessity dictate that they must be left in a natural and sustainable state. Water is also part of this vision, as it represents the essential connection between human culture and the natural world and is understood as a subject to which human beings are bound by an extended network of kinship relations. For instance, in Colombia, the people living around the Atrato River are physically and spiritually sustained by the river and have distinct relationships with it not only as an ancestral territory, but also as a "space to reproduce life and recreate culture"[51]. For them, the river constitutes a social, economic, logistical, spiritual and territorial space that forms the core of their distinct cultural identity.

Linked to this theme, a ritual still practised in the United States is of particular interest. Specifically, in Celilo Falls, a tribal fishing area on the Columbia River in Oregon, Native American Indian tribes celebrate the First Salmon Ceremony as thanksgiving to the water that allows the return of spring salmon and marks the end of winter and dry food meals[52]. O'Bryan notes that: "for indigenous people across Australia and around the world, water is an essential part of country, culture and identity"[53].

Having seen that for indigenous peoples there is an inseparable connection between human culture and the environment, it should be said that for them there is also a fundamental nexus between law and the "world of life" from which it derives. When speaking of indigenous rights, in fact, one ought to refer to their set of values, beliefs and knowledge system, since these are closely linked to the political, social and economic system of these communities, which is then structured within States. According to John Borrows, there are five sources from which indigenous law is derived: sacred teachings, naturalistic observations, positivist proclamations, deliberative practices, and local and national customs[54]. These principles are then translated into recorded laws and transmitted through stories and oral narratives, or through rituals and practices. Stories can be understood as "cases" in common law legal systems. The stories relate community norms or examples of correct or incorrect behaviour or even territorial aspects, hence the legal principles from which concrete legal practices can be discerned. In this way, histories codify customary law while articulating normative frameworks that guide future behaviour. To provide a practical example, among indigenous communities in Australia, the Mi'kmaq tell a story entitled "Glooskap, the Giant Killer and the Whales", in which Glooskap, the

[51] Judgment of the Constitutional Court of Colombia, 10 November 2016, Case T-622/16, *Center for Social Justice Studies et al. v Presidency of the Republic et al.*

[52] KIBEL (2021: 381)

[53] O'BRYAN (2012)

[54] BORROWS (2016: 23)

protagonist, is both the creator of everything and a fisherman[55]. The story is simple and tells of the whale hunt, its capture, and the subsequent sharing of the harvest. A story like this, however, simultaneously provides information on where to fish, how to catch a particular species, the distribution and management of the harvest, and the division of individual or group responsibilities. In this way, natives determined access to resources, who could fish what, at what time and where, essentially establishing norms. These laws and patterns of use created over time concepts of ownership that have guided behaviour both within and between indigenous communities[56]. Indigenous law encompasses a "rich diversity of laws and legal traditions"[57], so it would be a mistake to generalise or homogenise them. Nevertheless, it is possible to identify some common features in the laws relating to the management of natural resources and the environment. Prominent among these is the indigenous land tenure system. It is based on the communal regime over land and natural resources, including water.

This concept is linked to indigenous peoples' religious and cultural beliefs of veneration and respect for the Earth. A communal property regime indicates the rights and obligations of a group of individuals to a collectively held resource and may regulate individual rights to use a set of natural resources[58]. It differs both from the concept of open access, where there are no defined property rights and access is not regulated, and from the Western concept of absolute ownership. The latter grants the individual owner the *jus utendi, jus fruendi and jus abutenti, i.e.* the right to sell, consume, transfer, lease, usufruct, use, mortgage and even destroy his property. This is diametrically opposed to the indigenous conception, which sees land and natural resources as something sacred and strongly connected to the identity of the people, to be managed and protected for future populations rather than considered as a commodity. According to the indigenous customary system, land and resources can only be utilised by virtue of usufruct and priority of use, with the collateral obligation to be used in the manner required by ecology and custom. These are the only pillars on which the indigenous community regime is founded as a collective right[59]. The collective rights of indigenous peoples include the recognition of their unique histories, idioms, identities and cultures, the collective right to the lands, territories, and natural resources they have traditionally occupied and used, and the right to their collectively held traditional knowledge. In general, States have always tried to avoid or at least limit the emergence of a concept of collective rights, mainly due to the different interpretation of rights by western doctrine compared to that of indigenous peoples. Yet, as the Letter from 40

[55] HAMILTON (2019: 21); MEAD, NEPTUNE (2015: 13)
[56] HAMILTON (2019: 24)
[57] TATUM (2020: 79)
[58] PARRICIATU, SINDICO (2012: 218)
[59] Ibid. p.219

indigenous peoples' organisations to Tony Blair, pointed out: "Collective rights are essential for the integrity, survival and well-being of our distinct nations and communities. They are inseparably linked to our cultures, spirituality and worldviews. They are also critical to the exercise and enjoyment of the rights of indigenous individuals"[60].

DRIP further recognises in the preamble that: "[..] Indigenous Peoples possess collective rights which are indispensable for their existence, well-being, and integral development as peoples", establishing an inextricable interconnection between indigenous identities and their rights as peoples. In defining and realising the collective rights of indigenous peoples, the international community has therefore reaffirmed that these rights should not be considered in conflict with existing international human rights norms, but complementary. However, the recognition of indigenous customary law and these specific collective rights is based on a fundamental assumption, namely that the State in question is open to the concept of legal pluralism[61], *i.e.* "when a society accepts as legitimate more than one system of rules having different sources, and in some cases in contradiction with each other […]"[62]. To date, the international regime and some states explicitly recognise indigenous customary law as a legitimate source of law and, by virtue of this, are obliged to take it into consideration when undertaking policies that impact on ancestral lands and indigenous resources.

1.4 Historical colonisation and theories of distributive justice

The myth of indigenous peoples as lawless and uncivilised prior to European contact has been definitively disproved. However, this framing as primitive, weak, and passive had tragic political and legal consequences, as indigenous traditional laws, customs and practices, sovereignty and jurisdiction were suppressed during colonial regimes[63].

To limit the political autonomy of indigenous peoples and facilitate the process of colonisation and subsequent assimilation of these peoples, European legal thinkers developed theories known as the "doctrine of discovery". This legal

[60] Report of the UNESCO, 2009, CLT.2009/WS/9, *Investing in cultural diversity and intercultural dialogue*, p.229.
[61] BERMAN (2012: 23)
[62] BILAL, HAQUE, MOORE (2003: XII)
[63] HAMILTON (2019: 19)

fiction was the framework that authorised European explorers to claim legally free lands, labelled as *terra nullius*, in the name of their nation and sovereign. The doctrine held that the first European nation to discover a new territory acquired the rights of sovereignty over it and the power of pre-emption, i.e. the exclusive right to acquire the land from the native inhabitants. To fully establish a claim of "first discovery" and turn it into a full title, a European country had to actually occupy and possess the newly discovered land. However, as is known, many of these lands were not uninhabited, but occupied by native populations. When the legal category of *res nullius* could not be used due to the *de facto* occupation of the territory by native peoples, it meant that their ownership had to be respected. To curb the problem, many States resorted to devious strategies to deprive indigenous people of legal rights. The Iberians, for example, enslaved and expropriated land on the basis of the just war theory[64]; the British ruled that property rights could only be held on land subject to agricultural production, and thus if the land actually owned, occupied, and actively used by the indigenous peoples was not "properly utilised" according to Anglo-Saxon law and culture, it was considered available for the Crown's claims. In this way, indigenous peoples were rapidly reduced to mere occupants of the land, with only the right to occupation and a limited form of internal self-management[65].

The non-recognition of these peoples' rights over land also spilled over into the marine and aquatic spaces. During the 18th century, the debate among jurists of the time was about what kind of jurisdiction could exist in relation to the sea and coastal areas. For many, the sea, given its unlimitedness and the alleged inexhaustibility of its resources, was not susceptible to ownership. Different was the argument for coastal areas. Legal thinkers such as Grotius and Vattel held that a *res* was susceptible to becoming property because it was subject to resource scarcity or because common access was potentially harmful. Vattel, in particular, argued that resources in coastal areas were limited and, by virtue of this, should be under the dominion of the nation with which the territory bordered. The acquisition of territorial sovereignty over the mainland thus became a precondition for the acquisition of sovereignty rights over coastal

[64] At the end of the 16th century, war, but especially conquests, needed theological justification to be declared, and theologians had a crucial task in defining the legitimacy and legality of war. Among the legitimate grounds for a "just and holy" war against the natives were sins against nature. Sepulveda, for example, argued that indigenous customs were contrary to natural law, as they involved sacrifices or anthropophagy practices, therefore it was legitimate to intervene militarily against them. In contrast, Francisco de Vitoria, a Catholic theologian, argued in his *Relectio de Indis* that the legality of conquest was based on the universal right to trade, communicate and reside over the entire globe. He justified the conquest with the right of the Spanish to guarantee this free trade, against the natives who presented themselves as "*perfidi hostes".* For this reason they were dispossessed and reduced to captivity. On this topic see: TOSI (2006)

[65] HAMILTON (2019: 34)

areas. Consequently, since territorial sovereignty was a prerequisite for sovereignty rights over coastal areas, the denial of indigenous territorial sovereignty had the effect of excluding indigenous jurisdiction from marine areas as well.

The history of indigenous dispossession is fundamental to understanding contemporary relations between indigenous and non-indigenous peoples. Indeed, the historical injustice of the non-recognition of these peoples has continued over time with the exclusion of indigenous peoples from policies that regulate the governance, management, and use of resources in most regulatory contexts[66]. In recent centuries, these communities, often lacking financial resources, have been further displaced from their lands and deprived of access to their natural resources, as "collateral damage" from the forces of globalisation and international integration of production and markets. Markets, in order to increase productivity as much as possible, have pursued an idea of development based on efficiency. Efficiency understood in these terms requires that resources are allocated in the best possible way, with value defined in terms of consumer preferences in the case of production for domestic consumption and in terms of earnings in the case of production for export. This development framework, however, has led to worsening inequalities and injustices for the most marginalised sections of society, so States have devised a mechanism to compensate for the negative effects of these injustices. In essence, if State action constitutes an improvement in efficiency, resulting in an excess of gains over expenditures, those who gain can hypothetically fully compensate those who have been harmed, while still having a net gain[67]. Taking a concrete example, if a company wants to realise a project in an area inhabited by indigenous peoples, it can displace them with a simple economic compensation. This mechanism based on financial redress, however, cannot be considered efficient because it is too simplistic, it completely ignores the dimension of social justice, and at the same time it does not protect or incorporate the value of traditional knowledge of the indigenous into new developments; consequently, injustices have continued to increase.

Because of the inefficiency of the model, thinkers began to postulate theories based on a fundamental concept of distributive justice.

From a theoretical point of view, in contemporary times the instance of equality has emerged strongly in the philosophical debate on justice thanks to the complex theory enunciated by John Rawls, the most important political philosopher of the last decades of the last century. In his political philosophy and ethics essay A Theory of Justice (1971) he starts from the premise that: "Every person possesses an inviolability based on justice over which not even

[66] MACPHERSON (2019: 4)
[67] PENZ (1992: 108)

welfare as a whole can prevail. This is why justice denies that the loss of freedom of some can be justified by greater benefits enjoyed by others"[68].

Distributive justice aims both to mitigate and limit the negative impacts on individuals, but also to correct, through international law, which is then shaped by the regulatory framework of individual States, the "colonised" condition of indigenous peoples in both a restorative and anticipatory manner. Namely, at the factual level, indigenous communities that have been dispossessed of their livelihoods, marginalised, or negatively impacted by development decisions, must now be able to participate in development decisions that affect them, and must also see the level of national procedure as meaningfully credible, so that they can believe in the fairness of the governing process[69]. Concerns about equity and justice have become important in debates about indigenous peoples' rights to land and resources. These concerns include issues related to the distribution of costs and benefits, but especially to the recognition and respect of different identities, cultures, and beliefs. Indeed, the recognition of these peoples with all their peculiarities is a prerequisite for effective recognition of their rights. The idea that States must "recognise" indigenous groups and their rights to land and resources has taken centre stage in the international indigenous rights movement. The main claims advocate legal pluralism, *i.e*. that indigenous rights and law exist independently of State law and should be protected by the State.

Several political philosophers have ventured to analyse the relationship between recognition and social justice. At the end of the 18th century, the German philosopher Georg Hegel conceived the fight against injustice as an essential priority for the realisation of individual freedom, to be recognised and respected by others. For Hegel, the injustice of recognition was a kind of subordination resulting from an imbalance that manifests itself through unequal confrontation, in which the more influential subject does not recognise the value and worth of the other. Thus, the non-recognition of fundamental components of a person's cultural identity, such as his beliefs about nature, is a denial of his freedom of thought and freedom to live in accordance with his belief system[70].

For other thinkers, including Fraser, non-recognition is linked to social mechanisms that generate status inequalities that undermine the opportunities of certain social groups. Fraser's study focused on the analysis of social movements that emerged in the 20th century, characterised by emancipatory ambitions and struggles for cultural identity, particularly of indigenous peoples. These struggled not only for a more equitable economic and resource redistribution, but also for dignity and respect and to resolve class injustices. According to the author, the problem of recognition of indigenous peoples is the

[68] RAWLS (1971: 21)
[69] PARLOW (2018: 155)
[70] MARTIN, COOLSAET, CORBERA, DAWSON, FRASER, LEHMAN, RODRIGUEZ (2016: 256)

result of cultural value hierarchies developed by societies that negatively label certain groups of people, subordinating them culturally and preventing them from equal social interaction[71]. These injustices are then also reproduced by formal institutions, for example through property laws that discriminate against indigenous forms of ownership. According to another theory, known as "decolonial thinking", the process of indigenous subjugation would instead be due to the institutionalisation of European culture through education, media, languages and behavioural norms[72]. This policy would have eroded the status and possibility of involvement of indigenous peoples, ignoring local traditions related to authority and territory. Consequently, it would have led to a structural oppression of marginalised sectors of society, whose alternative worldviews were devalued and stigmatised[73].

These and many other political theorists have considered the need to address the current disadvantages of indigenous peoples and ensure social equity. Recognition of cultural identity and difference is indeed an essential human need, now protected as a right by the 1948 Universal Declaration of Human Rights and the 2007 United Nations Declaration on the Rights of Indigenous Peoples. The latter, in particular, states in the Preamble that the parties undertake to recognise: "The right of all peoples to be different, to consider themselves different, and to be respected as such". Protecting the specific rights of indigenous peoples would thus effectively guarantee equal opportunities for all citizens, including minorities. Tully contended that States should accommodate cultural diversity by also allowing indigenous peoples and institutions to speak in their customary languages and ways[74]. However, reality is sometimes distant from the theories advanced by philosophers; in fact, indigenous peoples still face many problems of discriminatory recognition.

The first problem is prejudicial and concerns the very nature of these populations. The legal recognition of who can be considered an indigenous group and who cannot, remains at the discretion of the State that has enveloped them. Moreover, recognition mechanisms require indigenous peoples to provide concrete evidence of their cultural and historical attachment to the territory, evidence that is often difficult for these populations to gather due to displacement, assimilation policies pursued by States and all the other hurdles described above. Having overcome this first fundamental problem, indigenous peoples who succeed in gaining access to specific protection mechanisms face a further set of critical issues. Indeed, a multitude of implications flow from this recognition, including the problem of recognition of specific rights over territory and resources and how these are used. States tend to limit the purposes for which

[71] FRASER (1995: 68)
[72] MARTIN, COOLSAET, CORBERA, DAWSON, FRASER, LEHMAN, RODRIGUEZ (2016: 257)
[73] Ibid. p.258
[74] TULLY (1995: 189)

these rights can be exercised on the basis of indigenous cultural difference. More specifically, in most States, the use of resources by indigenous peoples is limited to personal needs, subsistence and domestic use, or cultural and spiritual purposes, while commercial use is not permitted. However, even when the right to resources to meet personal needs is recognised, a further problem arises: indigenous peoples must demonstrate that their use of the resource is compatible with the Western notion of authentic indigenous culture. In other words, a culturally sustainable use of resources cannot include the use of methods or technologies from modern, western cultures or traditions, because then it would not be recognised. In light of all these problems of recognition and perpetual exclusion, indigenous communities have appealed several times to national and international courts.

Since 2001, for example, the Inter-American Court of Human Rights ('IACtHR')[75] has issued a number of important decisions concerning the rights of indigenous peoples over land and natural resources. One important decision was *Awas Tingni Community v. Nicaragua*. The case concerned a dispute between the indigenous community of Mayagna and the government, which had granted a logging concession to a private company without consulting the community living in the territory; as a result, the community had complained and demanded the demarcation of its territory. The Court ruled that the State had violated the right to judicial protection and the right to property, as established by the American Convention on Human Rights[76]. Accordingly, Article 21 of the IACHR concerning the right to property was reinterpreted in an evolutive way[77] with the Court's recognition that "[…] article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua"[78]. This interpretation

[75] The Inter-American Convention on Human Rights ('IACHR') entered into force in 1978 and operates within the framework of the Organisation of American States ('OAS'). The Convention is enforced by the IACtHR and the Commission. The former has judicial powers while the latter is responsible for referring cases to the IACtHR, appearing before the Court in litigations, requesting advisory opinions on the Convention's interpretation and promoting the observance and protection of human rights in the OAS area.

[76] Judgment of the IACtHR, 31 August 2001, Case No. 79, *Mayagna Sumo Awas Tingni Community v Nicaragua,* s. 25: "[…] the State of Nicaragua has not complied with its obligations under the American Convention on Human Rights. The State of Nicaragua has not demarcated the communal lands of the Awas Tingni Community or other indigenous communities, nor has it taken effective measures to ensure the property rights of the Community on its lands. This omission by the State constitutes a violation of Articles 1, 2 and 21 of the Convention […]"

[77] The principle of evolutive interpretation requires a treaty to be interpreted not only in the light of the circumstances prevailing at the time of its conclusion, but also in the light of subsequent factual and legal developments.

[78] Judgment *Awas Tingni,* s. 148

has been reaffirmed in other cases, such as *Moiwana Community v. Suriname*[79] and *Yakye Axa Indigenous Community v. Paraguay*[80] and is of fundamental importance because it requires States, by extending the concept of property from an individualistic basis to a communal form, to respect the customary law of indigenous peoples regarding their relationship with the environment and to allow them to control their territory without external interference.

In other cases, which we will discuss below, the appeals have led to the development of laws and policies to include indigenous peoples in resource management and governance; while, in other situations, they have led governments to develop legal and policy mechanisms for the recognition, allocation, and reassignment of substantive legal rights for indigenous groups over resources. Indeed, as we shall see, for indigenous peoples the recognition of specific rights over their lands and natural resources, whether it be rights of access, management and use, or free, prior, and informed consent (*i.e.*, the right to give or withhold consent to a project that may impact them or their territories) is fundamental to both their cultural survival and their livelihood. Indeed, indigenous peoples have an intimate relationship with natural resources, most notably water. At the international level, the recognition of an autonomous right to water and the promulgation of specific regulations on the management of freshwater sources have addressed the specific needs of these vulnerable peoples as we will analyse in the following chapter.

[79] Judgment of the IACtHR, 15 June 2005, Case No. 124, *Moiwana Community v Suriname*, s. 135: "In view of the preceding discussion, then, the Court concludes that Suriname violated the right of the Moiwana community members to the communal use and enjoyment of their traditional property. In consequence, the Tribunal holds that the State violated Article 21 of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members"

[80] Judgment of the IACtHR, 8 February 2006, Case No. 146, *Yakye Axa Indigenous Community v Paraguay*, s. 143: "The Court agrees with the State that both the private property of individuals and communal property of the members of the indigenous communities are protected by Article 21 of the American Convention, […]"

Chapter 2: Water law frameworks

2.1 International water law

International water law has evolved in parallel with national water law and its aim is to promote cooperation between States in order to maximise the shared economic and environmental benefits, prevent conflict and protect ecosystems. Although water law is mostly defined on the basis of specific contexts, a trend towards international codification has emerged since the 1950s. The interests of international water law initially reflected the traditional practices of States, yet over time also incorporated scientific and political insights. This process involved the identification and formulation of common principles for freshwater management based on the analysis of local and national traditions. The distinctive elements of international customary water law include:

- The recognition of the limited sovereignty of States and the principle of no-harm (*sic utere tuo ut alienum non laedas*[81]).
- The codification of State practices and the principle of equitable and reasonable utilization.
- Regulations for the drafting of treaties, interpretation, and settlement of disputes in a diplomatic fashion[82].

Common rules on freshwater management have been developed through bilateral and regional negotiations, the adjudication or arbitration of disputes, the process of rule-making by institutions such as the International Law Association ('ILA') and the International Law Commission ('ILC'), but also through various United Nations declarations concerning water and the environment such as the 1972 Stockholm Declaration on the Human Environment, the 1992 Rio Declaration on Environment and Development and the 2002 Johannesburg Declaration on Sustainable Development.

Among the most influential international instruments are the Helsinki Rules on the Water Use of International Rivers, adopted by the ILA in August 1966, which deal with all surface and groundwater and focus on the equitable use of fresh water. Art 4 states: "Each basin State is entitled, within its territory, *to a reasonable and equitable share in the beneficial uses of the waters* of an international drainage basin" (emphasis added).

The document goes on to argue against unlimited sovereignty, symbolised by the "Harmon Doctrine", according to which a State has the unconditional right

[81] According to judicial opinion, the expression that the lawful use of one's property must not constitute a legal wrong to another person.

[82] DELLAPENNA, GUPTA (2008: 440)

to use and dispose of the waters of an international river flowing through its territory. Moreover, it sustains that: "To be worthy of protection a use must be "beneficial", that is to say, it must be economically or socially valuable [..]"[83].
ILA has drafted additional provisions on water-related activities that were not directly or adequately addressed by the Helsinki Rules. These include flood control[84], pollution[85], protection of water facilities during armed conflicts, joint administration[86], flow regulation[87] and groundwater[88].
Based on the guidelines provided by the Helsinki Rules, in 1970 the UN General Assembly asked the ILC to prepare a set of draft articles on non-nautical uses of international waterways modelled on the Helsinki Rules. The draft articles were completed in 1994 and revised by the Sixth Legal Commission of the General Assembly. This step marked another milestone in international water law, as in May 1997 the UN Convention on the Law of the Non-nautical Uses of International Watercourses was approved with 104 votes in favour. This document represented a change in international law that focused on non-nautical uses, as navigation issues seemed relatively settled. At the outset, the Convention states that it does not supersede any previous agreement unless the ratifying parties choose to do so (Art. 3). Again, the key elements of the Convention are the focus on the equitable, reasonable, and sustainable use of water resources (Arts. 5 and 6).
Article 6 deals with the factors and circumstances to be considered when assessing the equitable and reasonable utilisation of an international watercourse, and clarifies that they are to be considered all together for this purpose, among them:

> […] (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) the social and economic needs of the watercourse states concerned; (c) the population dependent on the watercourse in the watercourse state; (d) the effects of the use or uses of the watercourse in one watercourse state on other watercourse states; (e) existing and potential uses of the watercourse; (f) conservation, protection, development and economy of the water resources of the watercourse and the cost of measures taken to that effect; and (g)

[83] Report of the Fifty-Second Conference, ILA, 1967, *Helsinki Rules on the Uses of The Waters of International Rivers*, Art.4.
[84] Report of the Fifty-Fifth Conference, ILA, 1972, *Articles on Flood Control,* and *Articles on Marine Pollution of Continental Origin*.
[85] Report of the Sixtieth Conference, ILA, 1982, *Rules on the Water Pollution in an International Drainage Basin.*
[86] Report of the Fifty-Seventh Conference, ILA, 1976, *Resolution on the Protection of Water Resources and Water Installations in Times of Armed Conflict*, and *Resolution on International Water Resources Administration*.
[87] Conference Report, ILA, 1980, *Regulation of the Flow of Water of International Watercourses*.
[88] Report of the Sixty-Second Conference, ILA, 1986, *Rules on International Groundwaters*.

> the availability of alternatives, of comparable value, to a particular planned or existing use.

The Convention further addresses the principle of no-harm, it requires watercourse States to take all appropriate measures to prevent the causing of significant harm to other watercourse States. There was a protracted debate over the relationship between the principle of equitable and reasonable use and the principle of no harm, as the upper riparian States favoured the former (as it allows them to make greater use of their part of the watercourse for activities that may also impact downstream States), while the lower riparian States preferred the no-harm rule (as it protected them from impacts resulting from activities undertaken by upstream States)[89]. A compromise was reached with the formulation of Article 7 which stipulates that:

> "1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
> 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation".

By requiring the State causing significant harm to undertake measures to eliminate or mitigate that harm in compliance with Articles 5 and 6, it is widely assumed that the Convention has made the obligation not to cause significant harm subordinate to the principle of equitable and reasonable use; in fact, as we have seen above, Articles 5 and 6 are about equitable and reasonable use[90].
After the approval of the Convention, the ILA moved towards a further codification of international customary water law. After a meeting in Rome in 1997, the ILA Water Resources Committee decided to summarise the current state of international customary water law for several reasons. These included the fact that none of the freshwaters most disputed at the international level were covered by an agreement between all the States concerned and, secondly, that the ratification process of the UN Convention was slow. Between 1997 and 2004, the Committee worked on the development of the rules and finally, in August 2004, the Berlin Rules on Water Resources were approved. This document, consisting of 14 chapters, represents a breakthrough in the formulation of international customary law on water resources compared to the Helsinki Rules or the UN Convention. These provisions incorporate the latest

[89] ABU-ZEID (2001: 27)
[90] SALMAN (2007: 634); TANZI (2020)

guidance from environmental law, human rights law and international humanitarian law on war and armed conflicts and apply to all waters, both national and international[91]. Chapter 2, entitled "Principles of International Law Governing the Management of All Waters", outlines the general principles applicable to such waters, including the right of public participation (Art. 4), the obligation to make every effort to achieve joint and integrated water management, and the duties of sustainability and minimisation of environmental damage (Arts. 5, 6, 7, 8, 9).
Chapter 4 deals with the rights of individuals, including the right of access to water, the right to participate in decision-making and information, and the rights of people organised as communities[92].
In conclusion, the 2004 Berlin Rules represent the progressive development of international water law and represent a shift towards a more cooperative management of freshwater. Indeed, a system of coordinated administration of water resources between and within States (which can address both water flow management and pollution levels) has the potential to alleviate pressures generated by water scarcity and prevent water conflicts.

2.2 The evolution of the human right to water and sanitation

Starting from the recognition that two-thirds of the Earth is made up of water, the international community has always seen water as an inexhaustible resource, so much so that it has been exploited and consumed like other natural resources. The availability of water has conditioned the life, settlement and distribution of entire populations, and people have adapted their activities and forms of life to the availability of water in their specific local environment.
Only in recent years it has been realised that fresh water is a natural good fundamental to life on our planet, but in the face of unequal distribution of the resource both geographically and access rights where the resource is available, or because of the lack of infrastructure to draw drinking water, many people do not have access to it. Freshwater is also a scarce resource, often not easily accessible - a large percentage is found in glaciers or aquifers - and particularly vulnerable. There are several factors contributing to the depletion of this resource: climate change that intensifies droughts and expands arid zones; poor

[91] DELLAPENNA (2006)
[92] Report of the Seventy- First Conference, ILA, 2004, *Berlin Rules on Water Resources*.

management of aqueducts and infrastructure that leads to wastage and considerable losses of fresh water; population growth and the doubling of consumption; and groundwater pollution.

It has been estimated that, also considering population growth and climate change, if degradation of the natural environment and unsustainable pressure on global water resources continues at current rates, by 2050, poor and marginalised populations will be disproportionately affected, further exacerbating already growing inequalities[93], as available water resources per capita have declined, and "nearly one-third of the world's population does not have access to safely managed drinking water services"[94]. For these reasons, the international community and States have taken a critical stance against the current development model based on policies of growth and water exploitation and have expressed their desire to transform it into a more sustainable model. Today, many areas of the world suffer from water stress, *i.e*. a situation of severe water scarcity which can take a physical or economic form and can occur in both arid and non-arid areas[95]. Physical scarcity is the insufficient material availability of the resource to meet demand. It can have morphological roots or be artificially created - *e.g*. through excessive use of water infrastructure for irrigation - and produce a decrease in the quantity needed to meet human needs or environmental flows. Economic scarcity occurs when investments in the water sector are low compared to the growing demand for water[96].

As the world's water consumption has increased sixfold in the last 100 years and continues to grow steadily at an annual rate of about 1%, many countries are experiencing widespread water scarcity and are likely to face further decline in water resources[97]. The decline of this precious resource and the inequalities in the supply of drinking water have caused it to take on the characteristics of an elitist good, increasingly amplifying the marginalisation of the vulnerable and disadvantaged.

Because of this growing phenomenon, since the 1970s some international governance regimes have called for the recognition of a human right to water. This was because it became clear that there is a close link between the right of access to water and human rights; in fact, no human right, among civil and political, economic, social, and cultural rights, can be guaranteed without water supply. Access to water has begun to be considered a fundamental prerequisite for the exercise of a range of human rights such as the right to education, food, work and protection from cruel, inhuman or degrading treatment or punishment,

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[93] Report of the UNESCO, 2019, *World Water Development Report 2019 - leaving no one behind*, p.1

[94] Ibid. p. IX

[95] SECKLER, MOLDEN, BARKER (1999:5)

[96] FITZMAURICE (2007: 539)

[97] *supra* footnote 93, p.16.

but also a central element in ensuring gender equality and the elimination of discrimination. Most importantly, the right of access to water has become central to ensuring the right to health and life, as well as an indispensable prerogative for a dignified existence. Indeed, poor water quality affects several aspects of society, from the spread of disease to crop growth and mortality.

It may seem surprising, but compared to other rights, the human right to water was long neglected by the first generation of human rights instruments, namely the so-called International Bill of Human Rights and the European Convention on human rights and fundamental freedoms. This was because the concept was completely remote from the concerns of the time, which focused on the protection of individual rights, understood as civil, political and social rights. The right to water was not explicitly included in the Universal Declaration of Human Rights, the document adopted in 1948 that outlined the fundamental rights of all of us, such as life, freedom from slavery, freedom to marry, etc., nor in the two subsequent Covenants, the ICCPR and ICESCR. However, using a broader canon of interpretation, it is possible to discern an implicit reference to water already in some passages of the Declaration: Article 25, for instance, recites:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

Clearly, there is no mention of water, and the wording itself certainly does not denote a peremptory character, but the reference to an adequate standard of living and food also implies in a certain sense a reference to water, which is necessary to be able to enjoy the right to a "standard of living adequate for health and well-being".

The only documents in which the right to water was explicitly mentioned were special conventions: the 1979 ('CEDAW'), which in Article 14(2) requires States to guarantee women the right to enjoy adequate living conditions, including sanitation and "in particular [...] *water supply*" (emphasis added)[98]; the International Convention on the Rights of the Child (CRC) which in Art. 24(2) obliged States to recognise the rights of children to health and to fight disease and malnutrition through (among other things) "the provision of adequate nutritious food and *clean drinking water*" (emphasis added)[99]; and the

[98] Resolution 34/180, UN General Assembly, 18 December 1979, *Convention on the Elimination of All Forms of Discrimination against Women*.

[99] Resolution 44/25, UN General Assembly, 20 November 1989, *Convention on the Rights of the Child*, Art. 24(2)(c): "*To combat disease and malnutrition, including within the framework of*

Convention on the Rights of Persons with Disabilities which in Art. 25(f) mentions:

> "States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:
> […] f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability".

However, as can be guessed, the derivation of a human right to water is broader than the right to equality or children's rights.

At the international level, the explicit recognition of an autonomous human right to water required a 38-year dialogue to become effective.

It all began in 1972 with the United Nations Conference on the Human Environment in Stockholm, where water was identified as one of the most important natural resources to be safeguarded. Principle 2 of the Stockholm Declaration states that "The natural resources of the earth including the air, *water*, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate"[100].

In 1977, five years later, the United Nations organized the Mar del Plata Water Conference in Argentina. The Conference, dedicated exclusively to the discussion of emerging water resource problems, declared that "All peoples, whatever their stage of development and their social and economic conditions, *have the right to have access to drinking water in quantities and of a quality equal to their basic needs*"[101]. (emphasis added)

In addition, it issued the Mar del Plata Plan of Action, designed to address these issues and including a series of recommendations and resolutions covering a wide range of issues. The aforementioned Conference represented a milestone, especially considering the period in which it was held.

In response to the needs identified by the Plan of Action of the Mar del Plata Conference, the World Health Organisation established the International Decade of Drinking Water Supply and Sanitation (1981-1990), which among its various

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primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution".

[100] Report of the Working Group on the Declaration on the Human Environment, UN, 1973, A/CONF.48/14/Rev.1, *Report of the United Nations Conference on the Human Environment*.

[101] Report of the United Nations Water Conference, UN, 1977, E/CONF.70/29, *Mar del Plata Action Plan*, para II(a).

objectives identified the need to improve the health and provision of water services for poor and marginalised groups[102].

In June 1992, the Earth Summit, the first United Nations Conference on Environment and Development, was held in Rio de Janeiro, where Agenda 21 and the Rio Declaration on Environment and Development were adopted. For the first time, fundamental environmental issues were addressed. The issue of alternative energy resources to fossil fuels was addressed and the international community was made aware of the growing scarcity of water. The conference highlighted aspects that had not been addressed until then, namely the close link between the needs of the environment and the development needs of present and future generations. In particular, with regard to Agenda 21, Chapter 18 states that freshwater resources are an essential component of the earth's hydrosphere and an indispensable part of all terrestrial ecosystems. While Principle 22 of the Rio Declaration already attached special importance to the needs of the most environmentally vulnerable, including indigenous peoples.

> "Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development".

The dialogue proceeded in the following years with conferences of equal importance such as the UN Millennium Conference in New York (2000), the International Freshwater Conference in Bonn (2001) and the World Summit on Sustainable Development in Johannesburg (2002)[103].

The outcome of the UN Millennium Summit was the launch in 2002 of the Millennium Development Goals (MDGs) campaign, a set of goals (8) to be achieved to extend the benefits of globalisation to the world's poorest citizens[104]. The topics covered range from food to the environment, from energy to health, from water scarcity to pollution and agriculture. In particular, MDG 7c aimed to halve the population without sustainable access to water and basic sanitation by

[102] Document of the World Health Organization, 1992, WHO/CWS/92.12, *The International Drinking Water Supply and Sanitation Decade. End of decade review*.

[103] World Summit on Sustainable Development, UN, 2002, A/CONF.199/20, *Johannesburg Plan of Implementation*.

[104] The eight millennium development goals are: (1) eradication of extreme poverty and hunger, (2) achievement of universal primary education, (3) promotion of gender equality and empowering women, (4) reducing child mortality, (5) improving maternal health, (6) combating HIV/AIDS, malaria, and other diseases, (7) ensuring environmental sustainability, and (8) developing global partnership for development. It is worth noting that water is central also to the first goal because water is an essential element for growing food for eradicating hunger. Moreover, water is also relevant to the fourth and fifth goals (reducing child mortality and improving maternal health).

2015[105]. The MDGs have been replaced for the period 2016-2030 by the Sustainable Development Goals (SDGs), which include a separate target, SDG 6, on access to water and sanitation. These goals influence national policies, donor funding strategies and development policies[106].
In addition, every three years since 1997, the World Water Council, an international organisation based in Marseille whose mission is to promote awareness, build political commitment and drive action on critical water issues at all levels, has organised international events on water and sanitation that provide a forum for discussion and expert advice to decision-makers[107].
Noteworthy was the 1992 International Conference on Water and Sustainable Development, culminating in the Dublin Declaration, which set out the four guiding principles for water resources management. In Principle 1, freshwater is defined as a finite, vulnerable and essential resource to sustain life, development, and the environment. Since water sustains life, the effective management of water resources requires a holistic approach, linking social and economic development with the protection of natural ecosystems. At the same time, however, Principle 4 states that:

> "It is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources".

Despite affirming the importance of water as an economic and environmental good, the declaration did not recognise it as a social good. In fact, while referring to water as a fundamental right of all human beings, it further complicated the situation by making explicit the possibility of assigning an economic value to the resource. This statement easily found favour with the advocates of privatisation also because, in the content of Principle 4, the economic connotation of water is linked to the eventual recognition of the

[105] Resolution 55/2, UN General Assembly, 18 September 2000, *United Nations Millennium Declaration,* s. 19. "We resolve further: To halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water […]".
[106] WESTSTRATE, DIJKSTRA, ESHUIS (2019: 796)
[107] The First World Water Forum was held in Marrakesh, Morocco in March 1997, followed by The Hague (Netherlands, 2000), Kyōto, Ōsaka, and Shiga (Japan, 2003). Thematic meeting started in 2006 with "Local actions to meet a global challenge", held in Mexico City (Mexico, 2006); "Bridging divides for Water" in Istanbul (Turkey, 2009); "Time for Solutions" in Marseille (France, 2012); "Water for our Future" in Degu (South Korea, 2015); "Sharing" in Brasilia (Brazil, 2018); "Water Security for Peace and Development" in Dakar (Senegal, 2022).

human right to water. In addition, the reference to the idea of an "affordable price" clearly reinforces the link between the right to water and economic value: the problem is that these statements do not explain the concept of "affordability", nor do they suggest the means to determine its content and meaning. In practice, this international declaration, while explicitly mentioning the right to water, has provided further support for privatisation theorists, especially in developing countries where the interference of large international economic institutions has had the greatest impact.

However, it is only since the 2000s that the explicit recognition of the right to water has experienced significant acceleration, even though it has been accompanied by equally significant privatisation practices of the resource in many parts of the world. The moment when the right to water was effectively recognised at the international level coincided with the adoption of General Comment No. 15 in November 2002 by the Committee charged with monitoring the implementation of the ICESCR[108].

ICESCR is a legally binding document, it imposes obligations on States to implement the rights contained therein in a progressive manner (Art. 2 (1)), with their available means and resources, and also provides, since 2013, an optional accountability mechanism for its implementation (previously it was only possible to submit communications on alleged violations). The General Comments, instead, are not binding *per se,* because the Committee has no authority to establish new obligations under the ICESCR, however, they provide a critical mechanism for developing a normative and contextualised understanding of the provisions of the Covenant and carry significant legal weight. In General Comment No. 15, the Committee established that the human right to water is indirectly protected by different rights contained in the ICESCR. For instance, it can be inferred from Article 11(1) on the right to an adequate standard of living.

> "Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living "including adequate food, clothing and housing". The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival"[109].

and is also inextricably linked to Article 12 (1) on the right to the highest attainable standard of physical and mental health. This is because the availability

[108] UN Committee on Economic, Social and Cultural Rights, 20 January 2003, E/C.12/2002/11, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*.
[109] Ibid. s.3

of potable water is one of the necessary conditions for survival. Furthermore, the Committee stated that the right to water is also linked to other rights enshrined in the International Bill of Human Rights, the keystone of international human rights law composed by the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social, and Cultural Rights (1966), namely the right to life and human dignity[110]. In the remainder of the Comment, the issue of the right to water is comprehensively addressed from the point of view of legal bases, national and international obligations (which assume different characteristics if referred to States or other institutional actors), possible violations, as well as how to implement the Convention at the national level. On this occasion, therefore, the fact that water is a human right, necessary for the effective enjoyment of other rights, is explicitly formulated: "Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights"[111].

Regarding the content of this right, General Comment No. 15 states in the paragraph "The legal basis of the right to water" that the right to water confers on all, without discrimination (Art. 2(2)), the right to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use. An adequate quantity of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases, and to meet personal and domestic consumption and hygiene needs. In the section entitled "Normative Content of the Right to Water", the more practical aspects of the right to water are addressed, divided into freedoms and rights. Freedoms include the right to secure and maintain access to existing water supplies necessary for the enjoyment of the right to water and the right to be free from interference, including arbitrary disconnection or intentional contamination of water supplies[112]. States must refrain from hindering, directly or indirectly, the enjoyment of the right to water and are obliged to prevent the actions of third parties that may impair or interrupt the enjoyment of the right to water. Furthermore, they must take concrete measures to assist individuals and communities in the full realisation of the right to water, ensure the accessibility of water and implement integrated strategies and programmes to enable its sufficient use by present and future generations[113].

The publication of this interpretive text represented a major step forward for the recognition of the right to water, but not the last, in fact it contributed to an intense debate on the status and content of the right to water. In 2007, the UN

[110] Ibid.
[111] Ibid. s. 1
[112] Art. 10
[113] Arts. 18, 19, 20, 21, 23, 24, 25, 26, 27, 28

High Commissioner for Human Rights issued a report on the "scope and content of human rights obligations related to equitable access to safe drinking water and sanitation under human rights instruments". The report concluded that:

> "[..] it is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to a sufficient amount of safe drinking water for personal and domestic uses - drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene - to sustain life and health. States should prioritize these personal and domestic uses over other water uses and should take steps to ensure that this sufficient amount is of good quality, affordable for all and can be collected within a reasonable distance from a person's home"[114].

In the three years following the report, the Human Rights Council ('HRC') worked to complete the formal process of developing a substantive interpretation of the right to water.
Finally, in 2010, the existence of an international right to water was proclaimed. Resolution 64/292 issued by the United Nations General Assembly on 28 July 2010 enshrined its existence as an autonomous human right. Resolution 64/292 recognises: "The right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights"[115].

2.3 The constitutive elements of the right to water

Starting from the realisation that the treatment of the right to water as an economic good can lead to affordability problems for some communities, consequently depriving people of access to water, and from the conviction that water is a good, but also a right and a service, the international community has highlighted the need for a legal statute that establishes adequate standards of protection and service. This with the aim of addressing and resolving problems related to the vulnerability of the water resource itself and its importance within

[114] Report of the HRC, 16 August 2007, A/HRC/6/3, *on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments*, s. 66.
[115] Resolution 64/292, UN General Assembly, 3 August 2010, *The Human right to water and sanitation*, s. 1.

a sustainable ecosystem. To this end, in 2010, with Resolution 64/292, the UN General Assembly recognised the right to safe drinking water and sanitation as a human right, essential to the full enjoyment of life and other human rights. The modalities of implementation of this resolution were the subject of another HRC Resolution 15/9[116], which recognised the derived nature of the right, bringing it under the protection of the right to an adequate standard of living and the right to health, as the ICESCR had already done in its General Comment No. 15 of 2002. The most important principle enshrined in this Resolution is found in Section 8:

> "8. Calls upon States:
> (a) To *develop appropriate tools and mechanisms*, which may encompass legislation, comprehensive plans and strategies for the sector, including financial ones, *to achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation*, including in currently unserved and underserved areas;
> (b) *To ensure full transparency* of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein;
> (c) *To pay particular attention to persons belonging to vulnerable and marginalized groups*, including by respecting the principles of non-discrimination and gender equality;
> (d) To integrate human rights into impact assessments throughout the process of ensuring service provision, as appropriate;
> (e) *To adopt and implement effective regulatory frameworks* for all service providers in line with the human rights obligations of States, and to allow public regulatory institutions of sufficient capacity to monitor and enforce those regulations;
> (f) *To ensure effective remedies for human rights violations by putting in place accessible accountability mechanisms at the appropriate level*;" (emphasis added)

This section clarifies the nature and scope of substantive obligations associated with the right to water in various ways, but most importantly requires States Parties to take positive actions on their part, such as developing the tools necessary to achieve the full realization of the right in question and implementing efficient and transparent regulatory frameworks and processes.
Section 6 reiterates that States have the obligation to protect human rights of citizens within their territory. Therefore, even if they delegate the management and distribution of drinking water and sanitation services to third parties, be they private companies or multinational corporations (thus reducing the status of water from a right to a necessity that can be privatised), Section 8 makes it clear that it is still the responsibility of States to create mechanisms to progressively

[116] Resolution 15/9, HRC, 6 October 2010, *Human rights and access to safe drinking water and sanitation.*

achieve the full realisation of the right of access to water and therefore they must commit to introducing and implementing effective regulatory frameworks.
Subsequently, once again, the right to water was reaffirmed in Resolution 68/157[117] entitled "The Human Right to Drinking Water and Sanitation" and finally in Resolution 70/169[118] "The Human Rights to Drinking Water and Sanitation". In the latter resolution, the General Assembly recognised the right to water and the right to sanitation as two distinct rights (by using the noun "rights" in the plural form), although both stemmed from the right to an adequate standard of living. All these acts identified the inalienable characteristics of the human right to water: availability, quality, and accessibility; the latter in turn comprising four dimensions: non-discrimination, affordability, physical accessibility, and access to information.
The guidelines contained in these soft law instruments form the legal basis and contours of this right; however, they are not legally binding *per se*. Therefore, despite the fact that the right to water has been effectively recognised internationally as a universal, autonomous, and specific human right and as a *condicio sine qua non* for the protection of other human rights, access to water is not de facto guaranteed. In fact, to date, it is still difficult to identify the tools and mechanisms for its effective implementation and to make this right in itself justiciable.
In most cases, this right is only justiciable to the extent that the lack of access to the resource has resulted in the impairment of other fundamental rights directly protected by international law, due to insufficient quantity or quality or economically unsustainable costs for the poor. In general, the various rulings of national courts, while following different paths of argument, have nevertheless ended up considering the derivative or subordinate nature of the right in question, which is generally not considered justiciable independently of the other right from which it derives, on a case-by-case basis[119]. For example, Indian jurisprudence has linked it to the right to life and a healthy environment[120], Argentine jurisprudence to the right not to be polluted[121].
Even in States where the right to water has been expressly recognised at the constitutional level[122] or in specific *ad hoc* laws[123], national courts, while

[117] Resolution 68/157, UN General Assembly, 18 December 2013, *The Human Right to Safe Drinking Water and Sanitation*.
[118] Resolution 70/169, UN General Assembly, 17 December 2015, *The Human Rights to Safe Drinking Water and Sanitation*.
[119] LANCIOTTI (2019: 8)
[120] Judgement of the High Court of Kerala, 1 January 1990, 1990 KLT, *Attakoya Thangal vs Union of India*, s. 580; TULLY (2005: 40)
[121] TULLY (2005: 40)
[122] Argentina, Congo, Botswana, South Africa, India, Ethiopia, Gambia, Kenya, Uganda, Zambia, Bolivia, Colombia, Ecuador, Uruguay.
[123] Algeria, Angola, Madagascar, Tanzania, Paraguay, Peru.

providing important clarifications on State obligations relating to this right, have reached different solutions regarding their specific content.
In India, for example, in 1994, the Supreme Court in the case of *Virendra Gaur and others v State of Haryana* ruled that water is a resource that belongs to everyone and is closely related to the right to life and the protection of the environment, therefore government authorities have a duty to ensure that these rights are fully respected[124].

> "Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life, and it would be impossible to live with humane dignity without a human and healthy environment…*there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safe-guard proper environment but also an imperative duty to take adequate measures to promote, protect and improve the environment man-made and the natural environment*"[125]. (emphasis added)

A judgment that received much criticism for its apparent lack of consideration for the situation of the poor and vulnerable was that of the South African Constitutional Court in *Mazibuko v. City of Johannesburg*[126]. In this ruling, the Court stated that although there is a provision for the right to water in the Constitution[127], there is no related constitutional obligation to establish a determined supply of free water by the State. Therefore, the Court stated that the system of paying for water and the interruption of supply due to arrears, once the allocated quota has been used up, are not discriminatory but serve to respect the rights of other citizens. Furthermore, according to the Court, the progressiveness of the realisation of the right to water is such that it also includes the reduction of abusive connections.
In the light of international law, indeed:

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[124] HASHIM (2013: 207)
[125] Judgment of the Supreme Court of India, 24 November 1994, Case 9151/1994, *Virendra Gaur and Others v State of Haryana and Others*.
[126] Judgment of the Constitutional Court, 8 October 2009, Case 39/09, *Mazibuko and Others v City of Johannesburg and Others*; DI LIETO (2013: 327)
[127] Constitution of the Republic of South Africa, Act 108 of 1996, Chapter 2, Section 27 (1)(b) "Everyone has the right to have access to […] sufficient food and water". Section 27 (2) goes on to provide that "The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights".

> "Human rights obligations primarily concern states. When states seek to implement these obligations in national law, it is necessary for them to impose duties on the people under their jurisdiction. The duties to respect the rights of other people and to contribute to the common welfare mean that the state assists and provides for everyone to enjoy their economic, social and cultural rights"[128].

It follows that States have an obligation to adopt implementing measures and to ensure that human rights are exercised without discrimination and in good faith. Indeed, under international human rights law, a State has an obligation to establish a framework of conduct that allows people to enjoy their rights. There are positive and negative obligations. Negative duties oblige the State *to respect* human rights and not to interfere unduly with them. Positive duties oblige the State *to protect* human rights and *to fulfil* them; in both cases, the State must act to fulfil its human rights obligations. The obligation to protect refers to the State's duty to take the necessary measures to prevent or remedy human rights violations by private actors, individuals, private companies. The obligation to fulfil, on the other hand, refers to the duty of a State to implement the general and structural measures necessary to realise human rights and to take positive action to facilitate the enjoyment of human rights.

Several principles have been developed on the aspect of the violation of an obligation: the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986 and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997.

The so-called Maastricht Principles[129] reaffirm in Principle 6 the obligation of States to "respect, protect and fulfil" and the failure of a State Party to fulfil an obligation under international law constitutes a violation of the International Bill of Human Rights. These principles, *inter alia*, distinguish between Principle 14 on "Violations through acts of commission" and Principle 15 on "Violations through acts of omission". The former may take the form of, for example, waiving or suspending legislative measures or denying rights to certain individuals or groups. The latter can occur in the form of failure to adopt appropriate measures to ensure the effectiveness of these rights in accordance with international minimum standards; failure to reform legislation contrary to these rights; failure to implement legislation and policies; failure to regulate the activities of individuals or groups whose behaviour violates these rights; and failure to provide means of monitoring their realisation.

However, in light of the lack of an international jurisprudential practice that explicitly addresses the right to water within regional human rights systems

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[128] EIDE (2001: 35)

[129] United Nations Publications, 2005, HR/P/PT/12, *Economic, social, and cultural rights: handbook for national human rights institutions*, Annex 5: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

(although spaces for the justiciability of this right as an essential condition for the enjoyment of other rights tend to emerge), it is necessary to identify concrete remedies at the national level when the legislative gap poses a serious threat to the enjoyment of this essential right[130].

2.4 European sources

The debate on water resources in the international arena, as we have seen above, began in the 1970s. At the same time, both the Council of Europe and the European Union legislation have also been particularly active in relation to the growing need to protect the environment and human health.

In Europe, the first initiative towards the conceptual framing of the right to water dates back to 6 May 1968 with the promulgation of the European Water Charter by the Council of Europe.

Firstly, in this document, water is considered an "indispensable treasure for every human activity [...] the first need of man, animals, and plants" (Art. 1) and as such must be protected. In pursuit of this goal, it was required to reduce possible pollutants, to pursue an environmentally sustainable use of the resource, and to strive for the creation of effective protection standards[131].

Between 1973 and 1990, the first consistent community references to water regulation were drafted, including Directives 75/440/EEC on surface water quality, 76/160/EEC on bathing, 80/68/EEC on groundwater quality, 75/464/EEC on dangerous substances, 1991/271/EC on urban wastewater treatment and 98/83/EC[132] on drinking water. With reference to the latter, it aims at compliance with quality and health parameters essential to guarantee the purity of water intended for human consumption, in fact, Article 1 (2) states: "The objective of this Directive shall be to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean". Furthermore, in order to ensure safety for human consumption, Article 4 requires Member States to "take the necessary measures to ensure that water intended for human consumption is wholesome and clean", establishing certain minimum requirements for water to be defined as potable.

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[130] JORI (2001: 80)

[131] European Water Charter, CoE, 6 May 1968

[132] Directive of the Council of the European Union, 3 November 1998, 98/83/EC, *The Quality of Water Intended for Human Consumption*

This *corpus* of legislation establishes the first quality requirements that water must possess according to the specific use for which it is intended.
The dissemination of this extensive number of directives takes place in a historical period that witnesses, on the one hand, the process of consolidation of EU legislation and, on the other, the global spread of a strong environmental consciousness. In line with the principles elaborated at the international level in the Stockholm Declaration on the Human Environment of 1972 and the Rio de Janeiro Declaration on Environment and Development of 1992, Title XIX of the Maastricht Treaty of 1992, under the heading 'Environment', expressly states in Article 174(2) that the precautionary principle is one of the cornerstones of the common environmental policy, which in turn has the following objectives:

> "Union policy on the environment shall contribute to pursuit of the following objectives:
> 1. Preserving, protecting, and improving the quality of the environment.
> 2. Protecting human health.
> 3. Prudent and rational utilisation of natural resources.
> 4. Promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change"

As the need to intervene to prevent the deterioration of freshwaters (both quantitatively and qualitatively) and to implement sustainable management of these resources increased, the need for a uniform directive applicable to all freshwaters of the Member States was recognised. In 1995, after the European Environment Agency had drawn up the report "Environment in the European Union"[133], which drew attention to the urgent demand for action to protect the Community's waters, the Council called for a new framework directive establishing the basic principles of sustainable water policy in the European Union. In 2000, Directive 2000/60/EC, also known as the Water Framework Directive ('WFD'), was adopted, with which the European Parliament and the Council established a "framework for Community action in the field of water policy". This directive introduced an innovative approach to European legislation in both environmental and administrative terms. Article 1 states:

> "The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:
> a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;
> (b) promotes sustainable water use based on a long-term protection of available water resources

[133] Report for the Review of the Fifth Environmental Action Programme, EEA, 12 November 1995, *Environment in the European Union.*

(c) aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances;
(d) ensures the progressive reduction of pollution of groundwater and prevents its further pollution, and
(e) contributes to mitigating the effects of floods and droughts".

Furthermore, Articles 6, 7 and 8 deal with the minimum requirements for the identification and monitoring of water bodies used for the abstraction of drinking water and the designation of protected areas covering these water bodies; Article 11 requires Member States to establish programmes of measures, including those for the protection of drinking water abstraction areas.
The objectives listed in the body of the Directive are many, including facilitating the sustainable use of the resource, protecting the environment from pollution, and safeguarding future water resources. Added to this are the obligations that Member States must fulfil in implementing the provisions. These include, for example, ensuring that, through water pricing policies, users are directed towards a more efficient use of water (Art. 9).
Besides these specifics, the salient fact of the directive remains that it brought together and integrated a wide range of sectoral directives adopted in previous years into a single regulatory and policy framework.
In 2007, following one of the most severe droughts (2003) that affected over 100 million people, the European Commission drafted another document on the problem of water scarcity. This document, COM(2007)414, followed exchanges in multilateral fora concerning the impacts of climate change on the environment and humans. Indeed, although Europe is assumed to have adequate water resources, water scarcity and droughts are an increasingly frequent and widespread phenomenon even in the European Union. The communication begins with: "Access to good quality water in sufficient quantity is fundamental to the daily lives of every human being and to most economic activities. But water scarcity and droughts have now emerged as a major challenge – and climate change is expected to make matters worse"[134]. Further on in the document, the European Commission identified a number of policy options (7) to be adopted at regional, national and EU level to address water scarcity in the EU. In detail:

- Putting the right price on water
- Allocate water and water-related funding more efficiently
- Improve drought risk management

[134] Communication of the European Commission, 18 July 2007, COM (2007) 414, *Addressing the challenge of water scarcity and droughts in the European Union*, p.2

- Consider additional water supply infrastructure
- Promote water-efficient technologies and practices
- Foster the emergence of a water-saving culture in Europe
- Improve knowledge and data collection[135]

On 11 December 2019[136], the European Commission unveiled the European Green Deal, a set of policy proposals aimed at achieving climate neutrality by 2050 to counter climate change and environmental deterioration. In line with the ambition to achieve "zero pollution" and a toxic-free environment, on 16 December 2020 the Commission approved the revision of the Drinking Water Directive 98/83/EC in order to strengthen the coverage of human health from the adverse effects of all water contaminants[137]. It should be noted that already in 2014, with its communication "A decent life for all: from vision to collective action" (COM (2014) 335), the Commission had identified water and sanitation services as one of the priority areas of the post-2015 development framework, in line with the sixth Sustainable Development Goal of the 2030 Agenda adopted by the United Nations General Assembly. The revised version of Directive 98/83/EC was also the result of, among other things, the European citizens' awareness-raising campaign "Right2water", which collected more than 1.8 million signatures and was presented to the Commission in December 2013, with the demand that "the EU institutions and Member States should be obliged to ensure that all inhabitants enjoy the right to water and sanitation"[138] and that "the EU should step up its efforts to achieve universal access to water and sanitation"[139]. This request was motivated by the fact that the Right2Water initiative had found that a part of the population, particularly marginalised groups, did not have access to water for human consumption.
The revised Directive, which officially came into force on 12 January 2021, updated existing safety standards and aims to improve access to drinking water in line with the recommendations of the World Health Organisation.
The main pillars of the Directive to date are:

- Ensure the control of drinking water quality through standards based on the latest scientific evidence;

[135] Communication of the European Commission 14 November 2012, COM (2012) 0672, *Review of the European Water Scarcity and Droughts Policy*
[136] Communication of the European Commission, 11 December 2019, COM (2019) 640, *The European Green Deal*
[137] Press Release, European Commission, 16 December 2020, *Commission welcomes final agreement on water quality and access to drinking water*
[138] Press Room, European Parliament, 14 February 2014, *Background note on Right2water European Citizens' Initiative.*
[139] Ibid.

- Ensure efficient and effective monitoring, assessment and enforcement of drinking water quality;
- Provide adequate, timely and appropriate information to consumers;
- Contributing to the broader EU water and health policy;

Within the framework of the EU, the right to water is also indirectly guaranteed in the provisions of the Charter of Fundamental Rights of the European Union: in Article 2, which protects the right to life; in Article 35, in particular where it states that "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities".

2.5 International legal norms concerning the right of indigenous peoples to water

The right of access to water of global indigenous peoples in today's political reality is under constant pressure. There are many reasons for this, including climate change, pollution, diminishing drinking water and groundwater resources due to increasing population and production. But that is not all: very often it is the actions of governments and multinationals that undermine the right of indigenous peoples to access water. Consider, for example, the creation of large construction projects (such as dams) or the expansion of deforestation, or even extraction activities that contaminate and deplete water resources. These and many other initiatives lead to the destruction of resources or to the occupation of the ancestral lands of indigenous peoples and consequently force them to displace. In most cases, therefore, indigenous communities lose not only their land but also access to the water they traditionally used.

Against this background, a *corpus* of legislation for the protection of indigenous peoples has been developed at the international level in recent decades, which we analysed above. Within this framework, it is possible to frame certain provisions from which the right to access and "ownership" of indigenous water can be derived. We refer to hard law and soft law instruments.

Starting with the hard law instruments, the ICCPR, the ICESCR and ILO Convention No. 169 may be mentioned. For each of these treaties, there is an oversight committee that monitors how signatory States fulfil their human rights obligations. The members of these committees vary from 10 to 23 and are composed of international human rights experts.

Concerning the ICCPR, the monitoring body is the Human Rights Committee ('HRC'), which monitors the performance of States Parties in two ways: by

examining complaints from individuals who believe that their rights have been violated and by analysing periodic reports submitted by States (which they are legally obliged to submit) on how they are implementing the treaty. With regard to complaints, the admissibility criteria stipulate that, before reaching the HRC, all domestic remedies must have been exhausted and only then can the communication be considered valid. Finally, as far as the procedures for handling a complaint are concerned, it is foreseen that the competent committee examines the complaint and the observations of the government concerned and then decides on the existence or non-existence of a violation. However, these pronouncements are not binding on governments, although they are usually persuasive.

The relevant provisions contained in the ICCPR for indigenous peoples' right to water are various. The first, contained in both the ICCPR and the ICESCR, is worded identically in Article 1:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice* to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. *In no case may a people be deprived of its own means of subsistence."* [140](emphasis added)

Point 2 is relevant to the indigenous right of access to water. For example, in the case *Angela Poma Poma v Peru*, 27 March 2009, the HRC ruled that the diversion of water by a state-owned company was causing the drying out of the soil and the degradation of the land where the indigenous Aymara people traditionally lived, depriving them of access to groundwater sources. Since water was essential for their traditional activities of grazing and breeding llamas and alpacas, activities on which their subsistence depended, the lack of water seriously compromised their only means of livelihood[141]. Therefore, the derivation of the right of access to water on the basis of Article 1(2) was considered legitimate in this case.

Other provisions that might be relevant for this purpose are Article 6 on the right to life and Article 27 protecting the rights of individuals as members of minorities in relation to their culture.

Article 6 can be invoked when the action of the State endangers the survival of the individual. Thus, if the State undertakes an action that causes the pollution of

[140]Resolution 21/2200, UN General Assembly, 16 December 1966 *International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights*

[141] GOCKE (2010: 339)

a source of drinking water on which a particular indigenous group depends for its survival, the State would violate that people's right to life. But, as indicated in paragraph 26, this is not always the case, because the right to life encounters limits in its realisation:

> "The duty to protect life also implies that States parties should *take appropriate measures to address* the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include [..] *degradation of the environment, deprivation of land, territories and resources of indigenous peoples*. […] The measures called for *addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water*, shelter, healthcare, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions"[142] (emphasis added)

It follows that if the State pollutes a source of water necessary for the survival of the indigenous population, but at the same time provides other sources of drinking water, it has fulfilled its duties and does not violate the right to life. Indeed, for the purposes of this article, no direct link is established between access to drinking water and the source from which it is extracted.

Continuing with Article 27, it states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Although the original wording of the provision is in the negative form, *i.e.* it states that "they shall not be denied" certain rights, and therefore States were simply asked not to interfere with the exercise of their cultural rights[143], the subsequent General Comment No. 23 specified in Section 6 (2) that the State must also support the effective enjoyment of this right by taking positive action[144]. As is well known, indigenous peoples have a special relationship with water, which is an important component of their cultural identity, and therefore the right of access to water could fall under the protection of this article. However, even in this case there are limits to its justiciability, indeed not every state interference with this right can be regarded as a denial of the right within the meaning of Article 27. The HRC specified that only actions taken by the State for "unjustifiable grounds or that have adverse impacts"[145] on

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[142] General Comment No.36, HRC, 30 October 2018, CCPR/C/GC/36, *On article 6 of the International Covenant on Civil and Political Rights, on the right to life.*

[143] YUPSANIS (2013: 365)

[144] General Comment No. 23, HRC, 26 April 1994, CCPR/C/21/Rev.1/Add.5, *on Article 27 (Rights of Minorities)*.

[145] ENYEW (2019: 55)

the lifestyle of the indigenous communities in question are considered a denial of the right to culture. The gravity of the impact of State measures must be determined on a case-by-case basis. For example in *Jouni E Länsman et al v Finland*, the HRC concluded that: "The effect of logging carried out in […] areas have not been *shown to be serious enough* as to amount to a denial of the authors' right to enjoy their own culture […] under article 27"[146]. In contrast, in *Angela Poma Poma v Peru*, the HRC found that the water diversion "*has substantively compromised* the way of life and culture of the […] community"[147]. Moreover, General Comment No. 23 on Article 27 specifies that the right to water can only be claimed for cultural purposes; if these peoples wish to claim the right to water for drinking purposes, this does not fall within the scope of the provision[148]; secondly, it specifies that water utilisation and practices must have traditional cultural value; and finally, that the negative impact on cultural practices must be substantial and significant[149]. In addition, the provision does not set any standards for water quality and does not oblige States to actively ensure the implementation of the right to water.

In analysing the ICESCR, we begin with Article 15(a), which contains similar wording to Article 27 of the ICCPR, albeit more vague, namely: "The States Parties to the present Covenant recognise the right of everyone: To take part in cultural life". Initially, there was much debate about the meaning of the concept of participation in the cultural life of the community, until General Comment No. 21 provided a more detailed description. Among the various definitions provided by the document, paragraph 15 (b) explains that the right of access to cultural life includes, *inter alia*, the right to "[...] *follow the life associated with the use of cultural goods and resources such as land, water, biodiversity*, language or specific institutions" (emphasis added) and to this end States are required to "adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions)". This provision could guarantee indigenous peoples access to and protection of their water resources, especially if a water body is considered a sacred place by the community.

Other provisions by which the right of access to water is implicitly protected by the ICESCR are Article 11 and Article 12, from which the Committee on Economic, Social and Cultural Rights in 2002, in its General Comment No. 15,

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[146] HRC Communication, 30 October 1996, No. 671/1995, *Jouni E Länsman et al v Finland*, s. 10(1)

[147] HRC Communication, 27 March 2009, No. 1457/2006, *Angela Poma Poma v Peru*, s. 7(2,3)

[148] *supra* footnote 144 at s. 7: "With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law".

[149] MISIEDJAN, GUPTA (2014: 81)

drew the right to water that we have analysed above. In relation to indigenous peoples, however, the Committee in General Comment No. 15 made specific points for them, including:

> "7. [..] Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not "be deprived of its means of subsistence", States parties should ensure that there is *adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples*.
>
> 16. Whereas the right to water applies to everyone, States parties should give *special attention to those individuals and groups who have traditionally faced difficulties in exercising this right*, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners, and detainees.
> (d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water" (emphasis added).

It is clear that this recognition includes not only water for drinking purposes, but also water for subsistence agriculture. It also requires States to refrain from actions that may adversely affect the exercise of this right by indigenous peoples, to ensure that indigenous peoples can enjoy this right without discrimination, and to involve indigenous peoples in the decision-making process when the formulation and implementation of national water strategies and action plans have an impact on their access to water (Art. 12(3) and Art. 48).
Turning to the analysis of ILO Convention No. 169, the first thing to say is that the number of contracting States is not high and most of them are in Latin America[150]. The Convention contains rules mainly concerning the involvement (participation and consultation) of indigenous peoples in the decision-making process concerning natural resources, including water. In particular Articles 6, 7 and 15. Article 6 demands governments to consult the Indigenous peoples concerned "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures".
Article 7 (1): "[…] [Indigenous peoples] shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly".
Article 15 (1): "The rights of the [Indigenous] peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management, and conservation of these resources".

[150] As of July 2022, 24 States have ratified the Convention No. 169.

The right to consultation is an essential procedural right that requires the State to be open to listen, to be influenced, and to be ready to modify or abandon the proposed measures, based on the views of the affected indigenous community. These consultations must be in good faith, thus not purely symbolic, and in some cases require the free, prior, and informed consent ('FPIC'), such as when the proposed measure involves the removal of indigenous peoples from their traditional land, or when the measure impacts the group's health or the environment in which they live. From these provisions, it is clear that what is required of States is the consultation of these populations on projects or in general on actions that will have an impact on their resources, including water, rather than seeking and obtaining effective consent; in fact, the latter is required only in some specific circumstances and when it concerns "matters of fundamental importance for their rights, survival, dignity and well-being"[151], in the other cases it constitutes more of a "moral obligation"[152].

However, the Convention is also important for indigenous peoples, "for […] indigenous cultural self-determination […] and indigenous peoples' rights to their traditional lands and territories"[153]. Indeed, there are also other articles, particularly Article 13 and Article 23, which specifically address the importance of indigenous peoples' traditional water-related activities and emphasize the need to protect and recognize them as part of their cultural rights.

Article 13 obliges the States to "respect the special importance for the cultures and spiritual values of the [Indigenous] peoples concerned of their relationship with their lands and territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship". This article should be read in conjunction with Article 23(1) which provides that

> "Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted".

The reading of these two provisions confirms that hunting and fishing practices for these communities constitute the basis of their economic subsistence and are essential for the preservation and further development of their cultures. Indeed for the purpose of Article 13 the meaning of "land" should be interpreted

[151] Report of the Expert Mechanism on the Rights of Indigenous Peoples, 26 May 2011, A/HRC/EMRIP/2011/2, *Final Study on Indigenous Peoples and the Right to Participate in Decision-Making*, p. 22

[152] MISIEDJAN, GUPTA (2014: 83)

[153] MAGALLANES (1999: 241)

broadly[154] to include aquatic areas as they have been traditionally occupied or otherwise used by the indigenous peoples concerned and regarded as traditional lands by them as well as spaces where they "satisfy their subsistence needs, or conduct their spiritual, customary and traditional activities"[155].

Although ILO Convention no. 169 is a legally binding document, the provisions of the Convention do not provide for international legal redress, lacking a complaints mechanism for both individuals and communities. In fact, the Convention only provides protection through national implementation of the provisions by States themselves.

Analysing soft law instruments instead, we find the UNDRIP, Agenda 21 and the Berlin Rules.

UNDRIP contains a series of tailor-made collective rights, which recognise general principles relating to land, resources, and territories. In relation to water, the Convention emphasises the traditional ownership of indigenous peoples over the waters they have used, and which are connected to the land they occupy[156]. Moreover it recognises the right to culture in all its manifestations and the right to natural resources as integral part of their culture in Articles 11[157], 12[158], 15[159], 25[160] and 31[161]. It also recalls the principle of consultation in good faith already expressed in ILO Convention No. 169 "with a view to obtaining their free and informed consent prior to the approval of any project affecting their lands or territories"[162].

Agenda 21 does not specifically mention water but incorporates it in the macro-category of natural resources. Chapter 26 is dedicated to indigenous peoples, considered key actors in environmental protection, and calls on governments to cooperate with them to ensure that indigenous lands remain protected from

[154] Art. 13 (2): "The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use".

[155] ENYEW (2019: 58)

[156] Art. 26 (2)

[157] Art. 11 (1): "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs […]".

[158] Art. 12 (1): "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; […]".

[159] Art. 15 (1): "Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations […]".

[160] Art. 25: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard".

[161] Art. 31 (1): "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions […]".

[162] Art. 32(2); Art. 19

environmental misconduct and other activities that indigenous peoples consider culturally or socially inappropriate[163].
Concerning the Berlin Rules, this is a non-legally binding document drafted to summarise customary international water law and promote standards that courts, or other judicial bodies should consider when ruling on water management issues. Chapter 4 deals specifically with the rights of individuals, including the right of access to water, the right to participate in decision-making and information, and the rights of people organised in communities, including indigenous peoples[164].
Article 17 cite:

> "1. Every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs.
> 2. States shall ensure the implementation of the right of access to water on a non-discriminatory basis.
> 3. States shall progressively realize the right of access to water by:
> a. Refraining from interfering directly or indirectly with the enjoyment of the right;
> b. Preventing third parties from interfering with the enjoyment of the right;
> c. Taking measures to facilitate individuals access to water, such as defining and enforcing appropriate legal rights of access to and use of water; and
> d. Providing water or the means for obtaining water when individuals are unable, through reasons beyond their control, to access water through their own efforts."

Article 18:

> "1. In the management of waters, States shall assure that persons subject to the State's jurisdiction and likely to be affected by water management decisions are able to participate, directly or indirectly, in processes by which those decisions are made and have a reasonable opportunity to express their views on programs, plans, projects, or activities relating to waters.
> 2. In order to enable such participation, States shall provide access to information relevant to the management of waters without unreasonable difficulty or unreasonable charges."

Article 20:

> "States shall take all appropriate steps to protect the rights, interests, and special needs of communities and of indigenous peoples or other particularly vulnerable groups likely to be affected by the management of waters, even while developing the waters for the benefit of the entire State or group of States".

[163] MISIEDJAN, GUPTA (2014: 85)
[164] *supra* footnote 92

Article 21: “States shall compensate persons or communities displaced by a water program, plan, project, or activity and shall assure that adequate provisions are made for the preservation of the livelihoods and culture of displaced persons or communities”.
Other provisions relating to the recognition of the right of access to water for indigenous peoples in the context of environmental management are found in the Rio Declaration in Principles 10[165] and 22; in the Convention on Biological Diversity in Article 8(j)[166].
In conclusion, for indigenous peoples, the concept of the right to water has more nuances than the human right to water. Indigenous peoples can claim the right to use water for cultural reasons, for subsistence agriculture and livelihoods, for environmental reasons and for land rights. Each of these rights, however, refers to different rules contained in different treaties and not all of them legally binding. To date, indigenous peoples have the possibility to claim the right to access to water through international law in various ways if they exhaust all national remedies. However, the lack of a comprehensive framework on the subject and the absence of complaint mechanisms are often serious obstacles. To date, the two most effective instruments are the ICCPR and the ICESCR, although the latter requires the ratification of the First Optional Protocol by the State Party to activate the complaint mechanism.
In conclusion, since the Universal Declaration of Human Rights in 1948, there have been many developments in relation to the right to water at the international level. In the 1960s, we witnessed a gradual shift from the conceptualisation of water as an economic good to an all-encompassing view of water resources, which prioritises water management from a conservation perspective. Today, the right to water is recognised as a human right, but an examination of international practice shows that the space for the justiciability of this right is still limited. For this reason, current jurisprudence tends to recognise the justiciability of the right to water on a case-by-case basis. Over the next two chapters we will look at the rights of indigenous peoples in relation to water in the jurisdictions of Canada, the United States, Latin America (Chile and Colombia), Australia and New Zealand. The aim is to understand what measures these countries have taken to guarantee this right to indigenous peoples and what impact these measures have had. In the following chapter we will look

[165] “[...]each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision-making processes. [...] effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.
[166] “[Each Contracting Party shall] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge [...]”.

specifically at the issue of the allocation of water rights to indigenous peoples in these countries, as such allocation is an essential prerogative for the exercise of other specific indigenous rights. These include the right to harvest, the right to fish and the right to exercise cultural practices, all of which constitute an integral part of the right to physical and spiritual livelihood.

Chapter 3: The problem of unequal harvest distribution

Indigenous peoples around the world struggle for political, economic and socio-cultural self-determination and seek to preserve or, in some cases, restore their authority to govern their traditional territories and their rights associated with the use and protection of lands and natural resources, including water. These struggles are particularly complex in former colonial contexts, as colonising States and their institutions have appropriated indigenous natural resources over time, in many cases depriving them of access and often also causing significant and widespread environmental degradation through their actions.

Some States have introduced recognition mechanisms to address indigenous claims to land and resources. However, the problem is that these mechanisms often tend to reduce indigenous rights in essential terms, confining them to traditional, pre-colonial or subsistence uses, as opposed to modern, commercial or market uses, as we will see.

As we have already analysed, water has a crucial value for indigenous peoples, as it supports their well-being, as well as their physical, spiritual and identity livelihoods. Although there are significant differences between the traditions and customs of each indigenous group, some themes remain similar, such as the relationship and mutual dependence they have with water. Indeed, they regard water as a relative, a sacred object and a living being, essentially interconnected with their obligations to the environment and to present and future generations. Colonialism, the subsequent dispossession and displacement from ancestral lands and lastly the progressive development that has transformed the water landscapes of indigenous territories have led to a disparity in terms of the right of access to water between indigenous and non-indigenous peoples.

The loss of access to water for indigenous peoples has consequently generated problems in terms of physical and spiritual subsistence, but it has also interfered with their ways of life and traditions that were based on water culture, to the extent of nearly destroying their social institutions and political strength to influence subsequent resource allocations. Current indigenous claims on water often emphasise the desire for access to or ownership of water for a range of purposes, from the management and use of water for livelihood, cultural, spiritual and environmental purposes, to commercial ends.

To date, the exclusion of indigenous peoples from laws and policies that regulate the governance, management and use of water is double: first, indigenous peoples are typically excluded from laws that establish processes to manage or govern the use of water; second, they are excluded from legal frameworks that authorise the substantial use of water. This second type of exclusion has prompted governments, in response to the claims of indigenous communities, to devise legal and policy mechanisms for the recognition, allocation and re-allocation of substantive legal rights for indigenous groups to take and use water

and associated resources. One issue that remains problematic is that although the right to water for cultural or livelihood purposes for indigenous peoples has been recognised in a number of cases in the jurisdictions reviewed, the use of this right for commercial and productive purposes tends to be recognised in tightly defined circumstances[167]. This is because indigenous peoples' rights to land and resources are based precisely on the cultural diversity of these peoples, which is why the right often tends to be limited to cultural practices.

Some authors, such as Webber[168], suggest leaving internal administration as much as possible to the indigenous peoples themselves, without prescribing the content of the right to water or its conditions. Indeed, since indigenous peoples are potentially beneficiaries of the right to internal self-determination, they should be guaranteed to "freely dispose of their natural wealth" and thus use their natural resources as they wish and apply their own laws and customs in the regulation of their water bodies.

In this section, we will discuss how the jurisdictions of Canada, the United States, Chile, Australia, and New Zealand have addressed the claims of indigenous communities regarding the recognition, allocation, and reassignment of substantive legal rights to harvest and use water and associated resources. These countries were chosen based on the high percentage of indigenous peoples within them.

[167] One case is *Tsilhqot'in Nation v British Columbia*, where the Supreme Court held at s. 73: "Aboriginal title confers ownership rights similar to those associated with fee simple, including: *the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land*"; and, at s. 75: "[…] Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably *the right to control how the land is used*. However, *these uses are not confined to the uses and customs of pre-sovereignty times*; like other landowners, A*boriginal title holders of modern times can use their land in modern ways, if that is their choice*". (Emphasis added). Judgment of the Supreme Court of Canada, 26 June 2014, case No. 32986, *Tsilhqot'in Nation v. British Columbia*

[168] WEBBER (2000: 84 - 86)

3.1 The allocation of access rights to water in civil and common law countries

Claiming a right to water first requires an understanding of the right in question and consideration of its context. The right to water for indigenous peoples may refer to use for subsistence or sanitation purposes, or to the right to physically occupy waterways for various purposes, including trade or cultural activities. The principles and legal doctrines that form the basis of any type of water right in relation to indigenous peoples vary according to local and national laws. Therefore, variations exist between countries and within national subdivisions in discussing and recognising these rights.

The first step is to determine what the water rights allocation system is, *i.e.* the set of legal and policy instruments that determine which users can use water resources, both surface and groundwater, in what quantity and for what purpose. There are two main approaches to determine water rights. In common law countries, water is allocated primarily on the basis of the riparian doctrine. This doctrine links water uses to land ownership[169]; in other words, this legal doctrine implies that landowners are entitled to the ordinary use of water flowing through or adjacent to their property. The permitted use of water is not quantified but is subject to reasonable use that does not interfere with the rights of other riparian users. The use of public water, *i.e.* water located adjacent to public lands, is considered a common good. A subset of common law States follows regulated riparianism, in which the State has some ability to manage water supplies through the permitting process and State water planning. Disputes over water use are handled by the State permitting agency, usually following a system based on the priority of reasonable water use[170].

The other approach for the allocation of water rights is the doctrine of prior appropriation, used mainly in western States, including the United States[171]. This doctrine assigns superior permits for water rights to first period users for beneficial use. In these States, the right to water is not tied to land ownership and the administrative procedures for its allocation are detailed and the legal documents establishing the permit system typically specify the amount of water, point of withdrawal, location and priority date[172]. In addition, water permits are negotiable (sale, exchange or lease) if certain conditions are met, such as beneficial use, maintenance of the point of diversion and the quantity diverted, and maintenance of flows in the river, to ensure that previous users enjoy their allocations without affecting the needs of subsequent users. Should the availability of water diminish, however, senior right holders have exclusive rights, *i.e.* they can use the total amount of water specified in the permit,

[169] LACHMAN, RESETAR, KALRA, SCHAEFER, CURTRIGHT (2016: 131)
[170] Ibid.
[171] BROOKSHIRE, COLBY, GARDENTON, EWERS, STEWART (2004: 14)
[172] CHAMBER, STEPHENS (2016: 1533)

regardless of the effects on downstream users. State laws determine how water rights are determined, quantified, and transferred. In western States, if the standards for beneficial use are not met or if there is a lack of use, water rights may lapse; in eastern States, water permits may be revoked[173]. A properly implemented water allocation regime prevents uncontrolled extraction and thus reduces the risk of water conflicts, over-extraction and environmental depletion.
In the countries we will analyse, namely Canada, Chile, Colombia, the United States, New Zealand and Australia, there are considerable legal, political, institutional, and social differences. Water regulatory regimes also differ, as do responses to indigenous concerns about access to water.
In Australia, the United States, Canada and Chile, market mechanisms are used for water regulation, and it is possible to trade water rights independently of land in water markets. In these countries, water rights tend to be held mainly by industries and the agricultural sector, so indigenous demands mainly concern a redistribution of access rights. In New Zealand and Colombia, on the other hand, water continues to be allocated through administrative concessions by central and local governments and water cannot be owned, therefore only the right to use is available. In these two countries, in response to indigenous claims on access to aquatic resources, there is a tendency to recognise rivers as having legal personality. Indeed, in New Zealand the Whanganui River was recognised in 2017 as a legal person in the context of a political agreement between the government and the Māori, while in Colombia the Rio Atrato was recognised in November 2016 as a legal person by the Constitutional Court of Colombia to protect indigenous and Afro-descendant communities, as it shall be seen in next chapter.

3.2 The American context

3.2.1 The Constitutional protection system in Canada

Canada is a western liberal democracy, inhabited by an English-speaking majority, with legal and constitutional dispositions structured on inherited English common law. Indigenous rights are an integral part of the constitutional framework; indeed, they are expressed in various provisions of the Constitution Act and are also enshrined in various agreements with States on territorial claims and self-government, in formal and informal agreements on local governance. In

[173] LACHMAN, RESETAR, KALRA, SCHAEFER, CURTRIGHT (2016: 132)

this section, we will review indigenous rights over resources and water areas, based on treaty rights, Aboriginal rights, and finally Aboriginal title, respectively.

From a historical perspective, the British Crown acquired sovereignty over Canadian territory over the centuries through the occupation and colonisation of British North American colonies. Of these, four colonies formed the Confederation of Canada in 1867[174], which later expanded with the accession of other colonies[175]. The initial policy of the Crown was to negotiate treaties, known as "Treaties of Peace and Friendship"[176], with the indigenous peoples of British North America. The first of these treaties was negotiated between 1722 and 1786 with the Mi'kmaq and Wuastukwiuk nations of the east coast[177]. In 1763, the British Crown issued the Royal Proclamation, a document that recognised Aboriginal title to land during the European colonisation of Canada and stated that ownership of Canadian territory rested with the Crown and that Aboriginal title could only be extinguished through a treaty with the Crown. The Proclamation also specified that Aboriginal land could only be sold or ceded to the Crown and not directly to settlers[178]. Subsequently, eleven more treaties, known as "Numbered Treaties", were negotiated as settlements moved westward until 1920. These treaties provided for, on the one hand, the cession of land from First Nations to the Crown and, on the other, established agreements on the nature and limits of Aboriginal rights. The negotiation of these treaties was interpreted by representatives of the Crown as a total extinguishment of Aboriginal title[179]. Since then, there has been much debate, in and out of courts, as to whether or not these agreements extinguished such title. Many have argued that at the time the treaties were negotiated, the Aboriginal signatories did not intend to limit or extinguish their Aboriginal rights[180] and title[181].

In British Columbia, the eastern Arctic, the Labrador coast and much of Quebec, however, no treaties were negotiated (with the exception of the fourteen Douglas Treaties on Vancouver Island, negotiated between 1850 and 1854, the Treaty 8 area in the Peace River region and other modern agreements)[182].

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[174] Ontario, Quebec, Nova Scotia, New Brunswick.

[175] British Columbia in 1871, Prince Edward Island in 1873, Newfoundland and Labrador in 1949.

[176] WICKEN (1994: 44)

[177] BANKES (2019: 150)

[178] SLATTERY (2015: 22)

[179] MCNEIL (2002: 301)

[180] In *Simon v The Queen*, the Supreme Court declared: "The Treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as *to recognize and confirm the existing hunting and fishing rights* of the Micmac […]". (emphasis added) s. 401

[181] See *infra* at p.69: *Calder v Attorney General of British Columbia*

[182] SPRAGUE (1995: 346)

After these historical treaties, the process of treaty-making began again in the mid-1970s in the form of modern land claim agreements, concluded mainly in areas where negotiations had not yet been done or, if done, had not been implemented.

Many of the Treaties of Peace and Friendship and Numbered Treaties, although different, still guaranteed Aboriginal peoples: reserve lands, rents, the right to education, the right to continue hunting and finally guaranteed the continuation of fishing activities in both freshwater rivers and lakes and marine areas[183]. But not all of them, for example Treaties 1 and 2 concluded in 1871 did not specify that First Nation signatories retained the right to hunt and fish in the treaty area[184]. On the other hand, positive examples can be found in the 1752 treaty between the Governor of Nova Scotia and the Mi'kmaq, which provided in Article 4E that the latter could continue to have "free liberty of hunting and fishing as usual"[185], and also in other Douglas treaties concluded between a number of First Nations on Vancouver Island, in which they were assured that they could "carry on their fisheries as formerly"[186].

One of the most important decisions based on a treaty right to fish was that of the Supreme Court of Canada in *R v Marshall*[187], a case involving the interpretation of a 1760-61 treaty of peace and friendship between the Mi'kmaq and representatives of the Crown. The text of the treaty contained a commerce clause that was interpreted differently by the trial judge and the Court of Appeal. The text of the treaty officially reads: "[…] I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia […]"[188]. The trial judge held in the first instance that, although this commerce clause was worded in negative terms as a restriction on the Mi'kmaq's ability to trade with non-government individuals, it reflected the grant to them of the positive right to bring the products of hunting, fishing and gathering to a commercial lodge[189]. In contrast, the Court of Appeal took a

[183] BANKES (2019: 151)
[184] Canada.ca, 13 May 2020, *The numbered Treaties (1871-1921)*
[185] Judgement of the Supreme Court of Canada, 21 November 1985, Case No. 17006, *Simon v The Queen*, s. 393
[186] In *Claxton v Saanichton Marina Ltd*, the Court of Appeal interpreted the right to "fisheries as formerly" in the Douglas Treaties as providing substantial protection for traditional fishing territories, in fact Justices Lambert and Locke concluded that "while the right does not amount to a proprietary interest in the sea bed nor a contractual right to a fishing ground, it does protect the Indians against infringement of their right to carry on the fishery, as they have done for centuries […]". British Columbia Court of Appeal, 30 March 1989, *Claxton v Saanichton Marina Ltd,* s. 93
[187] Judgment of the Supreme Court of Canada, 17 September 1999, Case No. 26014, *R v Marshall*
[188] Ibid. s. 458
[189] Ibid. s. 507

different view and concluded that the commerce clause did not grant the Mi'kmaq any rights, but was a mechanism imposed on them to help ensure a lasting peace between them and the British. It was therefore not a right to trade in general for economic gain, but rather a right to trade in essential goods. The concept of "necessities" was understood to be equivalent to what in *R. v. Van der Peet* was described by the Court as "moderate sustenance". The latter includes basic necessities such as "food, clothing and shelter, supplemented by certain services, but not the accumulation of wealth [...]. It addresses day-to-day needs"[190]. In *R v Marshall*, therefore, the Court concluded that although the Mi'kmaq treaty right to fish took priority over the harvesting rights of non-indigenous communities, it constituted a "right to trade for necessaries"[191] or for "moderate livelihood" and not a "right to trade for economic gain"[192]. This is because the Crown has always feared that the recognition of a constitutional right to the commercial exploitation of resources could lead to uncontrollable and excessive exploitation of those resources by Aboriginal peoples; whereas hunting and fishing for food limits the quantities to the needs of those entitled to share the harvest[193].

Concerning Aboriginal rights, these are collective rights that derive from the customary use and occupation of certain areas by Aboriginal peoples. These are inherent rights that Aboriginal peoples have exercised since before European contact. Although these specific rights may vary from one Aboriginal group to another, in general they include the right to land, the right to resources and livelihood activities, the right to self-determination and self-government, and the right to practise their own culture and customs, including language and religion. Yet, some of these rights have not been recognised by the Crown. Many Aboriginal leaders and activists have tried to assert them by bringing their concerns before the Canadian government. Finding effective recognition and redress has been a long and difficult process, especially since the 1927 Indian Act contained discriminatory clauses that made it illegal for Aboriginal people to organise politically or hire legal counsel to promote territorial claims or collect or receive money for this purpose[194]. It was not until 1951 that these

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[190] Judgment *R v Marshall*, s. 459

[191] The distinction between a commercial right and a right to trade for necessaries or sustenance was discussed in *R v Gladstone* 2 SCR 723

[192] BANKES (2019: 152)

[193] This theme was dealt with in *R v Gladstone* at ss. 57-63, in *Van der Peet* ss. 192 and 279, *R v N.T.C. Smokehouse Ltd.*, s. 47.

[194] Indian Act, R.S.C, 1927, Section 141 provides: "Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from an Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction

discriminatory laws were repealed, which finally allowed Indigenous peoples to begin asserting their Aboriginal (and treaty) rights with some regularity in Canadian courts and to pursue their legal and political interests in ways that were previously only available to non-Aboriginal people.
To fill the inherent gap in the protection of Aboriginal rights, in 1982 the federal government included Aboriginal rights in Section 35 of the Canadian Constitution and in Section 25 of the Charter of Rights and Freedoms ensured that Charter rights could not "abrogate or derogate" Aboriginal rights.
Section 35 of the Constitution reads:

> "1. *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*
> 2. In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> 3. For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. […]" (emphasis added)

The Constitution, however, does not specifically define what these rights are, as the government decided that they would be defined by the courts on a case-by-case basis. Since then, there have been several court cases that have helped define them, articulating a series of tests to determine when an indigenous practice, custom or tradition qualifies for constitutional protection. The Court has paid particular attention to the question of whether the right to harvest based on a traditional practice is a right limited to harvesting for food and/or cultural and/or ceremonial purposes, or whether it extends to harvesting for commercial purposes and, if so, what the limits of such commercial harvesting are[195].
A prominent case was *R v Van der Peet*, in which Dorothy Van der Peet of the Stó:lō First Nation was accused of illegally selling salmon caught with a fishing licence restricted to personal consumption and ceremonial use, as required by the Fisheries Act. The defendant argued that she was exempt from certain fishing regulations as an indigenous person and was entitled to these aboriginal rights under Section 35(1) of the Constitution. However, the judges ruled that Section 35(1) did not consider commercial sales, but only upheld the protection of customs and traditions that conformed to the State's "pre-contact" and "distinctive" standards[196]. However, this case introduced a new method for determining the scope of the Constitution's protection of Aboriginal rights: the Van der Peet Test or Integral to a Distinctive Culture Test.

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for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months".
[195] BANKES (2019: 153)
[196] KENT (2012: 22)

In its latest decision in 2011, in *Lax Kw'alaams Indian Band v Canada (Attorney-General)*[197], the Supreme Court articulated a step-by-step process that a judge must follow to adjudicate fishing claims based on Aboriginal rights[198]. The appeal concerned the Lax Kw'alaam indigenous people's claims regarding the harvesting and commercial sale of "all species of fish" in their traditional waters, arguing that this Aboriginal fishing activity fell within the protection of Section 35(1) of the Constitution. Indeed, the basis of their distinctive culture and pre-contact subsistence economy was fishing and some trade. The problem is that not all fish products were considered part of the distinctive culture of the pre-contact society; in fact, the Lax Kw'alaam fished all species but did not significantly trade in species or fish products other than eulachon. Consequently, granting them a right to generalised commercial fishing would represent a qualitatively different outcome from pre-contact activity[199].

The multi-step process articulated in this case involves first determining whether the community has demonstrated the existence of a pre-contact practice, tradition, or custom in support of the claimed rights; determining whether the modern claim has a reasonable degree of continuity with the pre-contact practice; and finally, if the Court concludes that the demonstrated Aboriginal right includes the right to trade, the Court must also consider the interests of non-indigenous Canadians in order to reach a negotiated settlement between the parties[200]. As a result, although Aboriginal rights may also include the right to trade, barter or sell the harvest, these rights must be recognised and asserted in court or in negotiations. Another issue remains: the courts have ruled that governments may restrict Aboriginal harvesting rights for reasons of conservation, public health and public safety.

Having analysed the context of water rights claims, the next question is Aboriginal title claims to water resources. The first thing on the record is that until 1970, the debate was still about whether or not Aboriginal title existed in Canadian law and whether or not it should be extinguished. A seminal case in

[197] Judgment of the Supreme Court of Canada, 10 November 2011, Case No. 33581, *Lax Kw'alaams Indian Band v Canada (Attorney-General)*

[198] BANKES (2019: 154)

[199] Judgment *Lax Kw'alaams* s. 538: "In this case, the attempt to build a modern commercial fishery on the narrow support of a limited ancestral trade in eulachon grease lacks sufficient continuity and proportionality. While an Aboriginal right is subject to evolution both in terms of the subject matter and the method of its exercise, the claim in this case to a general commercial fishery would create a right qualitatively and quantitatively different from the pre-contact trade in eulachon grease. Qualitatively, trade in fish and fish products other than eulachon grease was peripheral to the pre-contact society. It is not enough to show that some element of trade was part of the pre-contact way of life if it was not distinctive or integral to that way of life […]".

[200] BANKES (2019: 154)

this regard was *Calder v Attorney General of British Columbia* in 1973[201]. In this case, for the first time, the Canadian legal system recognised the existence of Aboriginal title to land and that such title existed outside colonial law and was not simply derived from it. The Supreme Court ruled that the determination of the persistence of Aboriginal title would be the responsibility of the Crown, even though the burden of proof of the "exclusive occupation"[202] of the land prior to the assertion of British sovereignty rested entirely with First Nations.

A leading case in determining the nature and extent of Aboriginal title was *Delgamuukv v British Columbia*. In this case, the Supreme Court indicated that title includes the exclusive right to use land for a variety of purposes that do not necessarily have to be Aboriginal rights *per se*, but at the same time have to be reconcilable with the Aboriginal group's attachment to the land.

While there have been cases where Aboriginal title to land has been recognised, the assertion of Aboriginal title to water territories has not been as successful. In fact, it has always been rejected by the Crown for several reasons. Firstly, because Aboriginal title, when granted, gives indigenous peoples the authority to choose who may or may not enter their territory, as it is an exclusive title; secondly, because in light of this exclusivity, it has been said that the application of Aboriginal title over watercourses is incompatible with the common right of navigation. Aboriginal title to water thus becomes subject to "justified infringement" [203], because the public right of navigation takes precedence.

Ultimately, to date, Canadian practice requires that indigenous peoples negotiate and enter into a treaty in exchange for limited rights to water and land, which will still remain subject to federal and provincial laws; or that they prove the existence of Aboriginal title or Aboriginal rights to water in an often costly and lengthy court process[204].

In light of this review, it is possible to conclude that Aboriginal peoples in Canada have been able to assert their treaty rights and Aboriginal rights to water and harvesting resources primarily for subsistence and cultural purposes in

[201]In 1967, Frank Calder and other Nisga'a elders sued the provincial government of British Columbia, claiming that the title to their lands had never been legally extinguished through treaty or other means. While both the Supreme Court of British Columbia and the Court of Appeal rejected the claim, the Nisga'a appealed to the Supreme Court of Canada to have their Aboriginal title to their traditional, ancestral lands recognised. Although the Nisga'a did not win the case and the ruling did not resolve their land issue, it paved the way for the federal government's comprehensive land claims process for Aboriginal groups to claim title to their lands.

[202] In *R v Marshall*, the Court specified that "exclusive occupation" meant the effective control of land so that the Aboriginal group could have excluded others had it chosen to do so.

[203] The government may violate a constitutionally protected right, thus a treaty right, an Aboriginal right and an Aboriginal title, if it can justify it. Therefore, the government must show that the infringed regulatory scheme has a legitimate purpose, such as regulation for the conservation and management of a resource.

[204] WILSON (2019: 104)

litigation; the enforcement of such rights for commercial purposes, however, is not readily available in the Canadian legal system because it first requires the presentation of abundant evidence to the judiciary of the exercise of such rights since pre-colonial times and, in any event, even if such a commercial right were granted, it would be tempered by current circumstances, *i.e.*, the interests of other holders of commercial fishing rights. Claiming aboriginal title over water bodies also faces many difficulties, as claiming exclusivity over a watercourse is incompatible with navigation law.
Since Canadian law is still far from recognising Aboriginal title to water spaces, the approaches of other jurisdictions become important. For example, in the United States, Aboriginal rights derive directly from Aboriginal title and may include property rights, harvesting rights and management rights.

3.2.2 The US Reserved treaty rights

Canada and the United States have followed markedly different paths in the recognition of indigenous peoples' water rights, reflecting the political differences between the two States regarding their relationship with indigenous peoples. The United States has long recognised indigenous peoples as "dependent domestic nations"[205] with limited sovereignty, and the recognised reserves under the jurisdiction of native Indian tribes are substantially larger than those in Canada. Moreover, since the Winters Doctrine, reserves comprise sufficient reserved water rights to meet the water rights needs of indigenous peoples to a greater extent than Canada.
For the purposes of this section, some sources of domestic law that protect indigenous rights to water and its associated resources will be analysed. Starting with the constitutional framing of the status of indigenous peoples, we will see the principal clauses of the so-called "Steven Treaties" entered into between indigenous peoples and settlers that relate to water rights within and outside the reserves they created. We will also see how, since the Winter case, there has been a series of court rulings protecting indigenous rights reserved for different purposes, such as irrigation, subsistence and protection of agricultural resources.
The three major decisions concerning the status of Indian tribes in the constitutional structure of the United States, aboriginal title and Indian

[205] Judgment of the Supreme Court of the United States, 1831, 30 US 5 Pet. 1, *Cherokee Nation v Georgia*

sovereignty were issued in the 1820s and 1830s by the United States Supreme Court and are: *Johnson v M'Intosh* (1823), *Cherokee Nation v Georgia* (1831) and *Worcester v Georgia* (1832).

The first case, *Johnson v M'Intosh*[206], centred on the question of whether individuals had the power to acquire lands held by natives through aboriginal title or whether that power was the exclusive prerogative of the sovereign. The Supreme Court ruled that only the federal government has the power to acquire aboriginal lands under the doctrine of discovery. Under that doctrine, the claim of legal title to Indian lands rested with the sovereign whose subjects or agents had discovered the land, while Aboriginal people held a recognisable equitable interest. In its judgment, the Court stated that this interest was a mere occupation arising from possession and was therefore not compatible with the transfer of absolute title to others[207].

The second major US ruling on the title to Aboriginal lands occurred in the case of *Cherokee Nation v Georgia* in 1831. The Supreme Court ruled that Indian tribes are not foreign nations as stated in the US Constitution[208], but rather "dependent domestic nations". Because of the dependent status of the Indian tribes, the Court held that the relationship between them and the federal government was one of guardianship and protection (the government thus became the trustee of the tribes).

In the third case, *Worcester v Georgia*[209] in 1832, the Supreme Court ruled that only the federal government has the power to exercise sovereignty over Indian lands and that State laws cannot be applied to Indian or Aboriginal reservations without the consent of the federal government[210].

When settlers arrived in what is now the United States, between the 16th and 17th centuries, native Indians occupied much of North America. Settlements were often at the expense of the tribes, and many were forced to negotiate agreements in which they gave up much of their land in exchange for smaller reservations. In the 1850s, American settlers began moving towards the Northwest, into territories populated by numerous Indian tribes whose subsistence and trade was based on salmon fishing in both the rivers and marine areas of the region[211]. The settlers, to encourage territorial settlement and avoid

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[206] Judgment of the Supreme Court of the United States, 1823, 21 US 8 Wheat. 543, *Johnson v M'Intosh*

[207] ERICKSON (1984: 109)

[208] In 1789, the Constitution was adopted, which gave Congress the exclusive power to "regulate Commerce with foreign nations, among the several States, and with the Indian tribes". United States Constitution, Art 1, s 8, cl.3

[209] Judgment of the Supreme Court of the United States, 1832, 31 US 6 Pet. 515, *Worcester v Georgia*

[210] The supremacy of federal laws over state laws is ensured by the Constitution's supremacy clause Art.4 cl.2

[211] BLUMM, JAMIN (2019: 293)

conflict situations, negotiated a series of treaties, known as the Stevens Treaties, named after territorial governor Isaac Stevens, who negotiated them on behalf of the federal government.

Under the Stevens Treaties, Indian tribes granted large tracts of land to the federal government in exchange for reservations, schools, farm implements and the "right of taking fish at all usual and accustomed fishing grounds in common with [settlers]"[212]. Although the natives were guaranteed to continue fishing as they had always done, within a few decades the technological advances of the non-Indian settlers led to an increase in the harvesting and marketing of salmon by the latter[213]. Over time, tribes often asserted their reserved fishing rights in the courts[214], which repeatedly confirmed that these rights could not be denied by State regulations, licence fees or concepts of property rights[215].

Among the most important rulings concerning the reserved water rights of Indian tribes are: *United States v Winans* in 1905 and the 1908 case of *Winters v United States*. The *Winans* case[216] concerned fishing rights outside the Yakama Tribe's reservation. The US Supreme Court held that the Indian tribe, through the treaty provision that provided for the "right of fishing at all usual and accustomed places"[217], had implicitly reserved the right to cross private property to reach such fishing grounds[218].

The *Winters* case[219] involved a dispute between non-Indian irrigators from Montana and the United States on behalf of a downstream Indian tribe. After the reservation was created, the non-Indians began appropriating water from nearby lands that the tribe had ceded. When the tribe attempted to irrigate the reservation's land a few years later, the water left in the streams was insufficient and the United States, as trustee, filed a lawsuit on behalf of the tribe to prevent the non-Indians from diverting the water[220]. In its decision, the Supreme Court stated that when reservations were established for Indian tribes, water was reserved for the Indians to make those reservations productive, regardless of whether the Indians actually used the water[221]. Although under State prior

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[212] The right of "taking fish at usual and accustomed [places]" is sometimes referred to as an "off-reservation fishing right" or even "aboriginal fishing rights", since it does not restrict fishing to places within the reserve land.

[213] BLUMM, JAMIN (2019: 293)

[214] *Seufert Brothers Company v United States*; *United States v Earnest Cramer and E.R. Cramer*

[215] KIBEL (2021: 391-396)

[216] Judgment of the Supreme Court of the United States, 1905, 198 US 371, *United States v Winans*,

[217] Ibid. s. 381

[218] CRUZ GUIAO (2012: 287)

[219] Judgment of the Supreme Court of the United States, 1908, 207 US 564, *Winters v United States*

[220] CHAMBER, STEPHENS (2016: 1534)

[221] Ibid. p.1533

appropriation law non-Indians would have prevailed by virtue of their prior actual uses, the Supreme Court in Winters inhibited non-Indian appropriators, holding that at the time the reservation was created, the tribe had implicitly reserved a federally protected prior right to the water needed for its reservation. Thus, the Winters Doctrine holds that because the Indians' reserved rights to water are protected by federal law, they prevail over the rights of non-Indians under State law[222]; and that, in creating reservations for Indian tribes, the federal government also implicitly reserved sufficient water to support the purposes of the reservation[223].

The question of quantifying the amount of "sufficient" water remained open after the Winters case, as the Court did not set standards for quantifying Winters' rights, but merely stated that sufficient water had been reserved to support the purposes of the reservation. For reservations with agricultural purposes, the Supreme Court's 1963 case *Arizona v California* provided an initial quantification, also known as the Practicably Irrigable Acreage ('PIA')[224] standard, stating that Indian tribes with reservations on the lower Colorado River had the right to use sufficient water "to irrigate all practically irrigable acres on their reservation". Furthermore, the importance of this decision was also that it defined water as "essential to the life of the Indian people"[225].

The issue of quantifying the amount of water was later taken up and expanded upon in other court cases, including the *United States v Adair* case[226]. In the *Adair* litigation, the issue was the right to water from the Williamson River for the Klamath Indian tribe. The Court held that since the main purpose of the treaty was to give the Klamath the right to continue traditional salmon fishing[227], the water had to be sufficient to support the survival of the salmon in the river[228]. Thus, Adair also recognised the "implied upstream water rights" for non-consumptive uses by the Indian tribes.

Since 1971, many States have attempted to definitively quantify the water rights reserved for Indians within their borders, relying on a federal statute known as the McCarran Amendment, which authorises State courts to undertake a quantitative assessment of the water rights of all users (subject to review by the

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[222] Judgment *Winters*, s. 577: "The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied and could not be […]".

[223] ibid s. 575

[224] CRUZ GUIAO (2012: 288)

[225] Judgment of the Supreme Court of the United States, 373 U.S. 546, *Arizona v California*, s. 546

[226] United States Court of Appeals for the Ninth Circuit, 1983, 723 F.2d 1394, *United States v Adair*

[227] As the 1864 treaty included the exclusive reserved right to "hunt, fish and gather exclusively in their reserve", Judgment *Adair* s. 108

[228] Ibid. s. 1415; KIBEL (2021: 394)

US Supreme Court)[229]. About 30[230] agreements have been concluded between tribes, States, and non-Indian water users. The typical pattern of these agreements is to quantify the Indians' water rights and provide federally funded infrastructure to supply water to reservations for irrigation and domestic, municipal, commercial and industrial ('DCMI') uses, in exchange for the tribes' agreement to also protect non-Indian water uses that are legally related to the tribes' water rights[231]. To date, due to the high cost of importing water (many reservations are far from water sources), many tribes have not been able to obtain agreements. The administration and management of tribal flow rights and the quantification of water rights remain complex issues to be defined; in most cases, several legal regimes and even different levels of government are involved.

3.2.3 Chile and the Indigenous Law

Chile was colonised by Spain in the 16th century under the doctrine of discovery. The Spanish Crown declared for itself the rights of pre-emption and ownership over all land and resources in Chile. The Crown recognised that the indigenous peoples held only limited residual rights, amounting to temporary rights to occupy the land.
The recognition of indigenous rights over land and resources followed different paths between the north and the south. In the south, only the Mapuche had managed to maintain control over their lands since the arrival of the Spanish conquistadores thanks to a pact with the Crown known as the *Parlamento de Quilin* of 1642; nevertheless, by the mid-19th century, this pact had been curtailed by moving these populations within small reserves (*reducciones*) over which they held the only title to possession (*titulos de merced*). The situation for the northern tribes was even worse; in fact, the northern lands were declared State lands (*tierre fiscal*) from the end of the 19th century onwards[232], and the land rights prior to the sovereignty of the northern indigenous groups were not recognised, while usufruct rights were granted for their use from which the

[229] KIBEL (2021: 392)
[230] CHAMBER, STEPHENS (2016: 1536)
[231] Ibid.
[232] Between 1879 and 1833 there was the annexation of the north by Peru and Bolivia with the end of the Pacific War.

government collected taxes. These land usurpations were culturally and economically devastating for Chile's indigenous peoples.

Between 1960 and 1970, the Directorate of Indian Affairs and the Institute for Indigenous Development were established with the aim of returning land to legally recognised indigenous communities. Unfortunately, this initiative was halted by the military dictatorship of 1973-1990. In 1979, the military government, eager to promote market development, issued Decree 2,568, which made thousands of indigenous territories available for allocation and privatisation and extended concessions, subsidies, tax breaks and favourable investment conditions to logging companies. The land law reform gave indigenous families the right to own a maximum of six hectares of land and simultaneously prohibited traditional forms of common land use[233]. Furthermore, among the most radical neo-liberal reforms devised and implemented in Chile, the water law, known as the "Water Code", was reformed in 1981, redesigning it according to free market principles. While the Water Code established in 1951 stipulated that water rights could be acquired through an administrative concession and could not be separated from land ownership, the result of the 1981 reform was a law that introduced a system of private water rights that could be traded in the free market with almost no government regulation and could therefore be transferred and sold at will regardless of land ownership[234]. This new approach to water regulation merely distinguished between water rights for consumption or not, without requiring the intended use of the water. It is clear that indigenous groups, in order to legally access and use water, also had to have a regularised water right. Obtaining a regular water right, however, required a complicated administrative and judicial process. For example, from an administrative point of view for the regularisation of a right to water, Decree-Law 2,603 of 1979 requires the applicant to prove that he or she has made uninterrupted and effective use of the resource in the five years prior to the approval of the code[235]; but since access to the resource has often been prevented to indigenous peoples by other users, such proof is not easily demonstrable. From the judicial point of view, the applicant had to obtain legal representation, a passage often too costly for Chile's indigenous peoples, who are among the poorest of the population[236]. This resulted in the non-regularisation of indigenous peoples' water rights, which consequently compromised the productive potential of their lands and hindered their economic development.

It was only after the end of the dictatorship, in the 1990s, that indigenous communities began to reassert their rights to land and resources, including

[233] RODRIGUEZ, CARRUTHERS (2008: 4)
[234] LOVERA-PARMO (2017: 84)
[235] MACPHERSON (2019: 190)
[236] Ibid. p. 176

water. With the inauguration of President Patricio Aylwin Azocar and his transitional government in 1990, a social justice project was undertaken[237]. By Decree 30, the Chilean government established the Special Commission for Indigenous Peoples (*Comisiòn especial de Pueblos Indigenas*) ('CEPI') composed of a mix of government appointees and indigenous organisations[238], whose main task was, according to Article 2 of Decree 30, to promote the right to land and water resources:

> (a) To formulate a diagnosis of the reality, problems, needs and aspirations of indigenous peoples and their members;
> b) To study and propose plans and projects aimed at achieving the integral, economic, social and cultural development and progress of indigenous peoples and their members. In particular, it should be concerned to propose initiatives on the preservation and dissemination of the customs, values and ways of life of indigenous peoples; the promotion of handicrafts and other cultural and artistic expressions and the protection of the historical heritage of indigenous peoples; the integration and full participation of indigenous peoples in the different areas of national life and the elimination of discriminatory practices and other obstacles that limit or hinder them; the promotion of basic, secondary, technical and vocational education for indigenous peoples; technical assistance, vocational training and credit assistance to indigenous peoples and indigenous communities, for the development of individual, cooperative or other economic activities; the protection of the environment; the flora and fauna of the places where indigenous communities live, and other matters determined by the President of the Republic.

On these conceptual foundations, the CEPI undertook the preparation of the Indigenous Law, which was passed in 1993[239]. The main objective of the law is the development of indigenous peoples in line with the lack of constitutional recognition. The law has nine titles and eighty articles. Of these, Title 1 outlines the general principles of the law, including the identification and recognition of indigenous peoples as ethnic groups; Title 2 outlines and defines indigenous lands and provides for the creation of a fund for indigenous lands and waters; Title 6 provides for the creation of an executive agency to implement its provisions, the *Corporación Nacional de Desarrollo Indigena* ('CONADI').
Article 20 of Title 2 provides for a land and water fund (*Fondo de Tierras y Aguas*) for: (a) the acquisition and transfer of land to indigenous communities, to be administered by CONADI; (b) "finance mechanisms to solve land problems [...]"; (c) "finance the creation, regularisation or acquisition of water rights or finance works to obtain this resource".
Title 8 contains special provisions for the Mapuche, Aimaras and Atacameños; however, Article 62 specifies that these provisions are not limited to them but

[237] MACPHERSON (2019: 167)
[238] Ministerio Secretarìa General De Gobierno, 17 May 1990, *Decreto 30 Crea Comisión Especial de Pueblos Indígenas*, para 6 of the preamble.
[239] Ministry of Planning and Cooperation of Chile, 5 October 1993, *Ley Indigena No 19.253*

also apply to the other indigenous communities of the North. Article 64 states that:

> "The waters of the communities of Aimara and Atacameño shall be protected in a special way. The waters found in the lands of the community, such as rivers, canals, ditches and springs, *shall be considered as the property and use of the Indigenous Community established by this law*, without prejudice to the rights that third parties may have registered in accordance with the General Water Code.
> No new water rights shall be granted over lakes, pools, springs, rivers and other aquifers supplying water owned by different Indigenous Communities established by this Act without first ensuring the normal supply of water to the communities concerned". (emphasis added)

It follows from this provision that the right to water for indigenous communities would only apply to the indigenous land on which they have registered title, and, furthermore, the priority mechanism in Article 64, "without prejudice to rights that third parties may have registered in accordance with the [Code]", would significantly hinder the potential recognition of indigenous water rights.
However, since 2009, the Chilean Court of Appeal and Supreme Court have produced interesting jurisprudence on indigenous rights to water.
The most relevant case was *Agua Mineral Chusmiza v Comunidad Indígena de Chusmiza y Usmagama*[240]. In this case (hereinafter *Chusmiza* case), the Aymara indigenous community of Chusmiza y Usmagama claimed the right to use the water of the Chusmiza spring under Article 64 of the aforementioned indigenous law and challenged Agua Mineral Chusmiza's right to bottle and sell the water of that spring as it was located under their ancestral lands. The defendant argued the priority of its right to use the water based on Articles 20.1 and 121 of the Water Code and argued that the Chusmiza spring was not located in the plaintiffs' territories and therefore should not be subject to the guarantee of Article 64. The Supreme Court specified that regarding the site of the spring:

> "[…] the expression "community lands", referring to those lands which, despite being the domain of others, have been used ancestrally by indigenous peoples, is the only one that makes it possible to fulfil the duty of society in general and of the State in particular, to respect, protect and promote the development of indigenous peoples,[…][241]"

The Supreme Court therefore confirmed that the application of Article 64 also applies to territories where the community does not hold registered rights, since these resources have been used ancestrally by indigenous peoples. This conclusion was also based on consideration of Convention No. 169, in particular, the Court stated that:

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[240] Supreme Court of Chile, 25 November 2009, Case no. 2840/2009, *Agua Mineral Chusmiza v Comunidad Indígena de Chusmiza y Usmagama*
[241] Ibid. s. 7

> "[…] when determining the correct application of the aforementioned Article 64, it is also orientative to consider Convention No. 169, […] Article 15, No. 1, of which provides that: 'The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially protected', a provision which must be related to Article 13, N° 2°, of the same Convention, when it states: 'The use of the term 'lands' in Articles 15 and 16 shall include the concept of territories, which covers the totality of the habitat of the regions which the peoples concerned occupy or otherwise use'."[242]

According to the Supreme Court decision, the provisions of Article 64 of the Indigenous Law therefore also apply to territories that Chilean indigenous peoples "occupy or otherwise use" and these waters "shall be considered as property". However, in ruling in favour of the plaintiffs, the Court held that the failure of the indigenous community to register a customary right to water does not imply its non-existence, but simply amounts to a failure to formalise it, and thus that ancestral right exists and is recognised by Indigenous Law. The Court therefore ruled that water rights are constitutionally guaranteed, stating that Article 19.24 of the Chilean Constitution covers all water rights established by law, thus including Indigenous Law and customary use of water. The Supreme Court added that the indigenous community had been using water since time immemorial and that therefore its right corresponded to an "ancestral right"[243] as it preceded any constitution and, above all, any resolution granting the use of water[244]. The decision was welcomed by some as a triumph of indigenous water rights against water rights held by non-indigenous parties, while others criticised the decision because it penalises holders of legally valid water rights and because it creates legal uncertainty over the ownership of water rights[245]. However, the *Chusmiza* case remains unresolved as the indigenous communities in question were unable to effectively exercise their water rights recognised by the Supreme Court because the water rights registered by the company were never declared null and void. In 2013, the communities presented their water rights claims to the IACtHR, which, through its Executive Secretariat, visited

[242] Ibid.

[243] Ibid. s. 5: "[…] it is necessary to remember that in this trial what has been regularised corresponds to the ancestral rights of the applicant indigenous community, whose members have since time immemorial made uninterrupted use of the water that they need to normalise for human, animal and irrigation consumption. It follows that the water use right recognised to the respective Aimara community is therefore prior to any original constitution by act of authority of water use rights in favour of third parties and as a corollary of this, it is prior to the origin of the registered rights of the appellant company […]".

[244] TOMASELLI, HOFMANN, LENZERINI (2016: 7)

[245] MACPHERSON (2010: 200)

Chile on 29 January 2018, with the aim of facilitating negotiations in amicable settlement processes[246].

This case illustrates the difficulty of recognising the ancestral water rights of indigenous groups in the presence of other rights assigned to other holders during the period of entry into force of the Water Code.

In conclusion, Chilean indigenous peoples have been excluded from the water regulatory framework since the acquisition of Spanish sovereignty in terms of substantive rights to water use. They have only enjoyed partial recognition of their territorial rights to land and water in later times, and often only via permission to remain on their ancestral lands as occupants or possessors. Until the end of the 20th century, however, there was no specific recognition of the right to use water. In 1993, with the promulgation of the Indigenous Law, indigenous Chileans were able to regularise their aboriginal right to water use as a formal right. This right is not limited to traditional or cultural uses (as is the case in Australia). When the Indigenous Law was introduced in 1993, a large part of water rights had already been allocated to other users following the introduction of water markets in 1980 (which had released water rights from land ownership). To solve this problem, the Indigenous Law established an Indigenous Land and Water Fund to support the redistribution of water rights to indigenous communities through markets. Since 2009, the Chilean Court of Appeal and Supreme Court have produced an interesting jurisprudence on indigenous rights to land and water. At the end of 2009, the Chilean Supreme Court recognised the "ancestral rights to water" of the Aymara Chusmiza y Usmagama indigenous community, basing its arguments on Articles 13.2 and 15.1 of ILO Convention 169.

[246] Press release, OAS, 28 March 2022, No. 064/22, *CIDH (IACHR) celebra jornada de trabajo virtual para la facilitación de procesos de solución amistosa*

3.3 The Oceanic context

3.3.1 The Native Title Act in Australia

Australia was colonised by the British Crown from 1788 onwards on the basis of the doctrine of *terra nullius* (land belonging to no one) and the process of colonisation proceeded without the conclusion of any treaty with the local indigenous peoples, also known as Aborigines and Torres Strait Islanders, but through violence and the forcible displacement of these peoples within reserves[247]. When it acquired sovereignty over the territory now known as Australia, the British Crown acquired title to all the land and water on the continent and Australia inherited the riparian system of water regulation. Australia's indigenous peoples were not granted title to the land and, consequently, did not have the right to use riparian water as a consequence of land ownership[248]. During the 19th century, on the assumption that Australia was an arid country with a high demand for water, it abandoned the riparian system and adopted an integrated market system for water regulation in order to cope with the strong pressures from developing sectors (irrigation, urbanisation, industry). This system involved the implementation of a legal system of water licences and concessions to authorise the consumptive use of water, which was still linked to land ownership. According to this new State water regime, a right to water was necessary in order to be able to harvest and use it for consumption purposes; otherwise, landowners only had a limited right to use water for domestic and livestock purposes without having to obtain a licence or concession[249]. Indigenous peoples did not have land title, so they could not access legal rights to use water as an incident of land ownership and could not, therefore, legally use water in their traditional or adjacent territories. The political and economic subjugation of Aboriginal peoples continued throughout the 20th century with repressive and paternalistic legislative measures. An increasing number of Aborigines were relocated to government reserves and settlements and subjected to government intentions of assimilation[250]. This profoundly reduced the ability of Aborigines to manage and use their own land and water territories. This subjugation continued through the late 20th century. Until that time, in fact, the Australian government continued to grant indigenous peoples neither rights nor title to traditional lands, territories and waters. It was only after the 1960s, following the emergence of the indigenous movement internationally, that the situation for Aboriginal Australians began to change and slowly the Australian government began to recognise and grant indigenous groups title to land.

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[247] GODDEN (2019: 125)
[248] MACPHERSON (2019: 52)
[249] Ibid. pp. 54-56
[250] JACKSON, WOODS, HOOPER (2021: 8)

The doctrine of native title in Australia developed in the late 20th century following the Supreme Court rulings in *Mabo v Queensland*.

Mabo (No.1)[251] was a case initiated following the enactment in 1985 of discriminatory legislation by the conservative Queensland government on the Torres Strait Islanders, also known as the *Queensland Coast Islands Declaratory Act 1985*. This Act stated that all rights of Torres Strait Islanders to the mainland after the claim of sovereignty in 1879 were extinguished without compensation[252]. With this declaration, the law intended to extinguish any rights and interests the Meriam people might have had under their traditional law, moreover retroactively and without compensation. The plaintiffs argued that this act denied them equality before the law and arbitrarily deprived them of their property. The High Court's decision in Mabo (No.1) was that the Act was discriminatory and in conflict with the Commonwealth Racial Discrimination Act of 1975[253].

A subsequent landmark decision came with *Mabo (No.2)* [254]. In that ruling, the Australian High Court recognised the traditional rights of the Meriam people to their islands in the eastern Torres Strait. It also ruled that native title had existed for all indigenous peoples in Australia since before the creation of the British colony and that such title continues to exist today in any portion of land where it has not been legally extinguished. The High Court decision was swiftly followed by the Native Title Act of 1993 (Cth) ('NTA'), which sought to codify the implications of the decision and to establish a legislative regime under which Australia's indigenous peoples could seek recognition of their native property rights. When the High Court of Australia, in Mabo (No. 2), recognised the potential continuity of Native title to land and water, it also introduced the idea that Native property rights could only be recognised if a group could demonstrate that it had continued to practise traditional laws or observe traditional customs that formed the basis of those rights from before the acquisition of sovereignty.

This idea of continuity is reflected in Section 223 of the NTA. Section 223(1) of the Act states that native title means rights in relation to land and water where:

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[251] Judgment of the High Court of Australia, 8 December 1988, 166 CLR 186, *Mabo v Queensland (No.1)*

[252] *Queensland Coast Islands Declaratory Act 1985,* s. 5 on the Claims to Compensation recites: "No compensation was or is payable to any person: (a) by reason of the annexation of the islands to Queensland; (b) in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands to Queensland or in respect of any right, interest or claim alleged to derive from such a right, interest or claim […]".

[253] GODDEN (2019: 126)

[254] Judgment of the High Court of Australia, 3 June 1992, 175 CLR 1, *Mabo v Queensland (No.2)*

> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

The fact that section 223(a) requires that native rights and interests in the land or waters are "possessed under traditional laws and customs recognised and observed by Aboriginal or Torres Strait Islander peoples" has given rise to two problems of continuity in Australian jurisprudence.

The first is whether traditional laws and customs had to be recognised or observed uninterruptedly from the time before sovereignty, or whether some break in the chain of continuity was permitted; the second is whether laws and customs could adapt or change from the time of sovereignty and still be considered "traditional"[255].

The Supreme Court of Australia in *Members of the Yorta Yorta Aboriginal Community v State of Victoria and Others*[256] specified that, according to Section 223, an applicant for native title in order to obtain it must prove that traditional laws and customs must have been observed "substantially uninterruptedly from the time [of the acquisition] of sovereignty"[257]. Such evidence is in many cases difficult to prove because, on the one hand, indigenous history and culture is based on oral rather than written tradition, and, on the other hand, the traditional lives of Aboriginal Australians changed substantially after the arrival of European settlers, which in most cases resulted in the loss of language, cultural practices and land.

This argument is even more problematic if one wants to prove the continuity of traditional laws and customs authorising water use, because until the late 20th century, water rights were linked to land ownership. But as we have already

[255] MACPHERSON (2019: 64)

[256] Judgment of the High Court of Australia, 12 December 2002, 214 CLR 422, *Members of the Yorta Yorta Aboriginal Community v Victoria*

[257] Ibid. s. 87: "For exactly the same reasons, acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society".

mentioned, since indigenous peoples did not hold title to land adjacent to water resources and their access was prevented by the rights of adjacent landowners, it is often impossible to prove that they were able to carry on traditional laws or observe traditional water customs [258].

Demonstration issues aside, if native title to water is recognised, it must be exercised in accordance with traditional laws and customs.

Courts have ruled that native title is a "bundle of rights"[259]. The various rights may include the right of access, fishing and hunting, the visitation and protection of places of cultural and spiritual importance, and the preservation of traditional knowledge. However, ownership rights to water, understood in Australian law as "a legal right to have and dispose of the possession and enjoyment of the object"[260], cannot be part of the bundle of rights. This is because section 223(1)(c) of the NTA states that native rights and interests must be "recognised by common law in Australia" and common law does not permit ownership of water in its natural state. Further, the courts have ruled that native title to water cannot be exclusive, as exclusive rights would contravene the Act giving the Crown the right to control and use water and would also contravene the existence of a public right to fish[261]. In relation to water, therefore, it appears that the most that can be claimed is not a full property right, rather the right to water in the exercise of native title rights. In 2000, in the case of *Mark Anderson on behalf of the Spinifex people v State of Western Australia*[262], the Federal Court of Australia ruled that such native title rights may be exercised for the specific purpose of meeting personal, domestic, social, cultural, religious, spiritual or community needs of a non-commercial nature, including the observance of traditional laws and customs[263]. Similarly, in the more recent 2005

[258] In *Commonwealth v Yarmirr*, the first decision concerning native title to water, the High Court recognised that native title could exist over marine areas when traditional laws and customs demonstrate a connection to land or water.

[259] The High Court clarified in the *Yanner v Eaton* case that although there is no unambiguous definition of property, property rights are a 'description of a legal relationship with a thing' as well as being usually referred to as a 'bundle of rights', which comprises rights such as the right to use and enjoy and the right to exclude or control access. Judgment of the High Court of Australia, 7 October 1999, 201 CLR 351, *Yanner v Eaton*, ss. 17-31

[260] MACPHERSON (2019: 62)

[261] DURETTE (2008: 12)

[262] Judgment of the Federal Court of Australia, 28 November 2000, FCA 1717, *Mark Anderson on behalf of the Spinifex People v State of Western Australia*

[263] Ibid. s. 14: "The proposed order sets out the nature of the native title rights and interests in relation to the determination area. Subject to some overriding matters that are specified in the agreement, the nature and extent of those native title rights and interests in the land are: (a) a right to possess, occupy, use and enjoy the land, including the right to live on the land; (b) a right to make decisions about the use and enjoyment of the land; (c) a right to hunt and gather (including ochre), and to take water for the purposes of satisfying their personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs. The enjoyment and use of the land extends to the observance of traditional laws and customs; (d) a right to maintain and protect sites

case *Gumana v Northern Territory of Australia*[264], the Court ruled that native title holders have the exclusive right to control access to inland waters in certain areas, but this does not mean that the rights of native title holders go beyond the right of access and use and that the right is not equivalent to ownership of the waters[265].
Therefore, to the extent that native title to waters may exist, based on current Australian jurisprudence, it is not equivalent to full ownership and any associated rights will be limited by the customary approach and the rights of the Crown which, under the NTA, has ultimate ownership over natural resources and the ability to control and regulate the flow of water, as well as public access to and enjoyment of watercourses, beds, banks and embankments of watercourses.

3.3.2 Aotearoa/New Zealand and the Fisheries Act – Takutai Moana Act

New Zealand is rich in natural resources and with an abundant average water supply, which remained a British dominion until 1931, when the Statute of Westminster was enacted granting independence from the United Kingdom. Before the British assumed sovereignty, the island was historically occupied by the Māori, who exercised their sovereignty according to an intricate system of traditional laws and customs, also known as *tikanga Māori*[266]. The colonisation process began at the end of the 18th century, but it was not until 1840, with the Treaty of Waitangi, that the end of Māori sovereignty was realised, and the way was paved for the total ethno-legal and cultural colonisation of the native population by the British crown. This Treaty, which had controversial differences between the Māori version and the English translation, consisted of three basic principles: in Article 1, the Māori chiefs recognised British sovereignty, or *kawanatanga* (government) to the Crown; in Article 2, it was guaranteed "the full exclusive and undisturbed possession of their Lands and

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of significance to the common law holders under the traditional laws and customs; and (e) a right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners.

[264] Judgment of the Federal Court of Australia, 7 February 2005, FCA 50, *Gumana v Northern Territory of Australia*

[265] DURETTE (2008: 11)

[266] *Tikanga* Māori stipulates that traditional resource management and decision-making processes are underpinned by the core value of whanaungatanga (kinship); that one has obligations to ancestors, future generations and current members of society.

Estates Forests Fisheries and other properties which they may collectively or individually possess", but with a right of pre-emption, in the event of sale, for the British Crown (there was no right of pre-emption for the Māori); in Article 3 the Māori would have enjoyed the same rights as British citizens. The Treaty of Waitangi is still the key document for the determination of Māori water rights.

In 1847, the Supreme Court recognised in *R v Symonds* the doctrine of Aboriginal title as part of New Zealand law and continued to uphold the government's right of pre-emption for the acquisition of Māori land. Unfortunately, however, the legal principles set out in *R v Symonds* were not upheld by the New Zealand courts in the following years[267].

Although until the 1860s the Māori still owned most of the North Island, there was a significant increase in the number of settlers in the following years, and as a consequence, in 1862, the Native Lands Act was passed, which established the Native Lands Court that allowed for the conversion of traditional native land holdings into individual titles. This Act abolished the doctrine of Crown pre-emption, which meant that from then on settlers could purchase land directly from Māori owners. In 1863, the New Zealand Settlement Act confiscated large tracts of land from Māori deemed to be "engaged in open rebellion against His Majesty's authority"[268] without compensation[269].

In 1877, in the case of *Wi Parata v Bishop of Wellington*, the Chief Justice ruled that the Treaty of Waitangi was "worthless" and a "simple nullity"[270] and ruled that courts could not consider claims based on Aboriginal or native title (thus overturning the 1847 *Symonds* case)[271]. In light of this, Māori society began a long and inevitable process of disintegration.

In 1960, in the wake of the international movement for indigenous rights, New Zealand embarked on a substantial restorative justice process[272]. In 1976, the Treaty of Waitangi Act established the Waitangi Tribunal, an advisory body that has since then been tasked with investigating all indigenous claims relating to the non-respect of Māori rights under the Treaty of Waitangi. However, it was not until 1985, through an amendment to the Act that extended the Tribunal's historical jurisdiction back to 1840 for acts or proposed acts omitted or committed by the Crown, that substantial financial redress was obtained for

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[267] MCHUGH (1984: 245)

[268] New Zealand Settlement Act, 3 December 1863, preamble

[269] In addition to the confiscations, other land belonging to the Māori was converted into ordinary land by the Māori Land Court and subsequently alienated.

[270] Judgment of the Supreme Court of New Zealand, 17 October 1877, 3 (NS) 72 (SC), *Wi Parata v The Bishop of Wellington*, s. 78: "The existence of the pact known as the 'Treaty of Waitangi' […] must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty not could the thing itself exist".

[271] Ibid. s. 80

[272] MACPHERSON (2019: 106)

lands unjustly confiscated in the past[273]. The Tribunal operates through recommendations to the government that carry considerable weight and often lead to settlements involving monetary compensation, cultural redress and procedural rights (such as consultation).

With regard to water, the Māori have been excluded from the legal framework governing its management and use since the acquisition of British sovereignty[274]. Today, in the context of growing concerns about the health of the marine environment, public access to coastlines, fishing and corporate demands to exploit natural resources with minimal regulatory control, Māori claim their interests and rights in relation to water[275]. These interests can receive legal recognition either through the courts, with the recognition of Aboriginal title, or in the form of agreements. The first approach is pretty complex: besides the need to provide evidence of the continuity of their traditional practices in relation to water (which we will discuss below in the Foreshore and Seabed Act section), such recognition is incompatible with the New Zealand concept that "no one can own water"[276]. Indeed, early resource statutes imported the idea of Crown ownership over resources. For example, the Water Power Act of 1903, in section 2(1), gives the government the "exclusive right to use the water of lakes, falls, rivers or streams" to generate electricity. Similarly, in 1967, the Water and Soil Conservation Act gave the Crown the "exclusive right to dam any river or stream or to divert or take natural water, or to discharge natural water or waste into any natural water"[277].

These statutes therefore vested the Crown with the right of ownership over water resources and therefore it is not surprising that the most effective way to achieve substantive recognition of water rights in New Zealand is through agreements. However, even in the agreements of the 1990s, the Crown maintained the idea that indigenous claims should focus on the use, cultural and spiritual values of natural resources rather than ownership.

One of the first statutory agreements reached in the marine area was the Sealord Deal of 1992. The first thing to point out is that the customary fishing rights of the Māori had been secured and guaranteed by Article 2 of the 1840 Treaty of

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[273] The Court investigates Māori complaints of violation of treaty principles and recommends compensation from the crown, which may consist of the transfer of money and property. Compensation claims may relate to the loss of land and resources, but also to contemporary issues such as education, health care, culture, language and economic disadvantage.

[274] In 1903, the New Zealand government introduced the Coal Mines Amendment Act and the Water Power Act, which confirmed that all water resources were vested in the Crown. The Crown's control over water regulation was further intensified with the Water and Soil Conservation Act of 1967, which in Section 21 states that water resources are the property of the Crown and that the Crown has the exclusive right to regulate and allocate water.

[275] ERUETI (2019: 237)

[276] MACPHERSON (2019: 108)

[277] Water and Soil Conservation Act, 24 November 1967, (1967 No.135), s 21(1)

Waitangi. However, the Māori had been excluded from the fishing industry as a result of the Fish Protection Act of 1877, which had established that fishing is a public right subject to regulation and that the Crown has the right to establish exclusive commercial fishing rights[278]. Between 1960 and 1970, the fishing industry experienced significant growth and to cope with the pressures, the Fisheries Act ('FA') was introduced in 1983, which privatised and regulated commercial operators. The FA initiated the quota management system ('QMS') for New Zealand's offshore and inshore fisheries. The QMS controls the total commercial catch within the Exclusive Economic Zone ('EEZ') and allows quota holders to buy, sell and lease their catch rights. The total possible catch is defined within the FA and corresponds to the amount that can be caught annually for each type of fish by both commercial and non-commercial fishers (such as Māori)[279]. To improve management, the government proposed an additional regulation in the Fisheries Amendment Act of 1986, under which Māori would have no quota because, as small-scale operators, their catch history was below the proposed state minimum threshold. This exclusion of Māori from their fishing activities has led them to protest in search of a more equitable system that recognised their interests.

Subsequent rulings by the Waitangi Tribunal[280] and the courts[281] prompted the Crown to enter into negotiations with the Māori to resolve fisheries claims based on the Fisheries Act. In 1989, the Crown and Māori negotiators agreed on an interim arrangement, which was given effect by the Māori Fisheries Act 1989. The commercial fishing claims were finally settled with the signing of a Settlement Act (the Sealord Deal) in September 1992, which was made effective by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. With the Settlement, the Crown recognised the full extent of the Māori's customary rights to fishing and fisheries.

The agreement provides that: in return for Māori agreeing to waive its legal claims, the Crown provided Māori with funds to purchase a 50 per cent stake in Sealord Products Limited, which was a major owner of fishing shares; commitment to provide Māori with 20% of the commercial fishing quotas for all new species introduced into the QMS; recognition of traditional and customary fishing areas that have special value to the Māori, both as places of harvest and supply of fish products, and for spiritual and cultural reasons. These areas, also known as Mataitai reserves, can only be claimed in traditional fishing grounds and must be areas of special importance. The Māori can establish regulations for the reserves, which may restrict or prohibit the catching of a particular species

[278] ERUETI (2019: 240)
[279] STRAKER, KERR, HENDY (2002: 2)
[280] Waitangi Tribunal, 1992, *Ngai Tahu Sea Fisheries Report*, 27
[281] Judgement of the High Court, 2 November 1987, CP 559 87, *Ngai Tahu Māori Trust Board v Attorney General*

within the reserve. The process of establishing the reserves and the regulations themselves are closely monitored by the Minister of Fisheries[282].

Claiming Aboriginal title to the water, as we mentioned, is not simple.

In the 2002 judgment *Ngati Apa v Attorney General*[283] the Court of Appeal recognised Māori customary rights over the foreshore and seabed, ruling that the legislation had not extinguished any customary title[284], thus paving the way for Māori to obtain customary rights under both Māori Land Court[285] and High Court jurisdiction. In response to this ruling, in 2004 the government enacted an Act, the Foreshore and Seabed Act ('FSA'), in order to manage Māori claims and ensure public access to the coastline, while allocating the foreshore and seabed to the Crown[286]. Under this new regime, the Māori, instead of receiving property titles, could apply to the courts for a "customary rights order"[287] or a "territorial customary rights order"[288] (this only from the High Court), which did not confer property interests, but only the right to engage in particular traditional activities. The territorial customary rights order could lead to the creation of a foreshore and seabed reserve, upon which the protection of indigenous peoples was recognised even if the land was "held for the common benefit of the New Zealand people"[289].

The FSA imposed onerous requirements of proof, including the requirement of continuous and exclusive occupation, for the issuance of the court order. The Māori immediately opposed the FSA by appealing to the Waitangi Tribunal, which issued a report urging the government to negotiate with the Māori, a recommendation that was not followed. The Māori then turned to the CERD[290].

The reason they approached CERD was because they argued that while such legislation extinguished Māori property rights and replaced them with customary rights prescribed by law, it left freehold titles untouched[291]. CERD argued that this difference in treatment between Māori property interests and the treatment of non-Māori property rights "appeared" discriminatory and thus violated the provisions of the Convention. On the other hand, the government always

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[282] ERUETI (2019: 240-242)

[283] Court of Appeal of New Zealand, 19 June 2003, NZCA 117, *Ngati Apa v Attorney- General*

[284] Ibid. ss. 13, 102, 139, 183

[285] The Māori Land Court has jurisdiction under the Te Ture Whenua Māori Act 1993 to determine whether land is Māori land and to issue status orders to that end. The Māori Land Court has exclusive jurisdiction to investigate the title to Māori customary land and to issue an order granting fee simple title to those found to be entitled to it.

[286] ERUETI (2019: 244)

[287] Foreshore and Seabed Act 2004, 24 November 2004, (2004 No 93), ss. 48-51, 73-75

[288] Ibid. s. 13

[289] Ibid. s. 40

[290] UN Committee on the Elimination of Racial Discrimination, 27 April 2005, CERD/C/DEC/NZL/1, *Decision 1 (66) New Zealand Foreshore and Seabed Act 2004*

[291] CHARTERS, ERUETI (2005: 265)

stressed that the legislative intervention was justified and non-discriminatory. In fact, according to New Zealand domestic law, the right to freedom from discrimination under the New Zealand Bill of Rights can be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[292]. The CERD concluded:

> "6. Bearing in mind the complexity of the issues involved, the legislation *appears* to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party's obligations under articles 5 and 6 of the Convention.
> 7. The Committee acknowledges with appreciation the State party's tradition of negotiation with the Māori on all matters concerning them, and urges the State party, in a spirit of goodwill and in accordance with the ideals of the Waitangi Treaty, to resume dialogue with the Māori community with regard to the legislation, in order to seek ways of mitigating its discriminatory effects, including through legislative amendment, where necessary" (emphasis added)

In 2011, the FSA was repealed and replaced by the Marine and Coastal Area Takutai Moana Act 2011 (hereinafter Takutai Moana Act). The new law declared that the foreshore and seabed cannot be owned by anyone and simultaneously preserves recreational fishing rights, navigation rights and all other existing uses, including legal public access. Despite this, there continue to be difficult probative standards of continuity and exclusivity for each type of right, and titles do not confer the exclusive occupancy and use rights normally associated with titles. However, there are several significant changes.

If Māori applying for an order meet the evidentiary tests, including "[use and occupation of the area] exclusively from 1840 to the present day without substantial interruption"[293], they obtain a range of procedural rights that may include: permit rights (granting Māori the right to refuse to approve certain activities in the title area)[294] or conservation-specific activities (such as the declaration or extension of marine reserves) [295], although in the latter case there is an exception for any project that the Crown considers "nationally significant"[296]. Furthermore, a group of customary marine owners may also exclude public access to sites of spiritual importance, known as *Wahi Tapu*[297].

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[292] New Zealand Bill of Rights 1990, 28 August 1990, (1990 No 109), s.5
[293] Marine and Coastal Area Takutai Moana Act 2011, 31 March 2011, (2011 No 3), s. 58
[294] Ibid. s. 62
[295] Ibid. ss. 71-75
[296] ERUETI (2019: 245)
[297] Marine and Coastal Area Takutai Moana Act 2011, 31 March 2011, (2011 No 3), s. 79

In conclusion, in this chapter we have analysed five different countries to understand how institutions have responded to indigenous water claims. In particular, we analysed the issues of water ownership, water rights and commercial water rights. We saw that in common law countries, *i.e.* Canada, the United States, Australia and New Zealand, there is a tendency to recognise indigenous peoples' title to water arising from their traditions, customs and ancestral presence in the territory. What emerges from the comparison between these countries is that this title is often limited by the government that retains ultimate control over the resource. In fact, during the colonisation process, early governments sought to attribute to themselves, through treaties or laws, all ownership rights over the resource.

Chile, on the other hand, a country with a civil law system, followed a different path in the allocation of water rights, according to market principles. Also in this country, indigenous peoples were excluded from the substantial allocation of water rights until 1993, when with the promulgation of the Indigenous Law, it was possible to start a process of claiming rights to land and resources, which once obtained are not limited to traditional uses and are equivalent to property rights.

Returning to native title, the source and content of native title varies in each jurisdiction. In general: in the United States, much depends on the interpretation given during the court hearings on the significance of the treaty that created the reserve; in Canada, the Supreme Court does not limit native title to traditional practices and may even include exclusive indigenous use and occupation; in New Zealand, recognition of title does not confer exclusivity but provides significant power to indigenous peoples to control and regulate water resources within the reserve; while Australia is much less likely to expand the content of native title beyond traditional pre-contact uses.

Although property rights to water can only derive from native title, water rights can derive both from native title and from treaties, constitutional rights, and modern agreements; consequently, there are also considerable differences between the various jurisdictions with regard to the content of the water right. Finally, there are also considerable differences in the level of protection given to these rights. Canada and Chile, for example, have enshrined the rights of indigenous peoples to their natural resources in their constitutions; in both Canada and the United States, the federal government has an obligation to act in the best interests of indigenous peoples, as this is its fiduciary duty. In both the US and Canada, the judiciary has recognised that traditional rights, such as fishing, can evolve in a commercial sense. In Australia, by contrast, water policies have so far focused exclusively on protecting traditional indigenous values. In the next chapter we will look at another area of concern for indigenous peoples, namely the right to participate in water management.

Chapter 4: The right to water for indigenous peoples as a vehicle for environmental conservation

For Aboriginal peoples, the right to water is not limited to mere access to drinking water. The rights to fish, hunt, gather and trap for food, medicine or livelihood are all included in the concept of the right to water. To guarantee the right to water, it is necessary to ensure the right to a healthy environment which means the right of access to uncontaminated natural resources that enable survival, as well as the right to refuse development and the specific environmental rights of indigenous peoples.

Today, indigenous communities find themselves at the centre of numerous conflicts between development and sustainability, industrialisation and conservation, commodification and subsistence, and in this context, they seek to give voice and assert their own worldview. Indigenous knowledge requires a relational understanding of the role that water plays in our lives and in the sustainability of the ecosystems that surround our communities.

Development based on the exploitation of natural resources often takes place in or near traditional indigenous areas. Although this development model delivers substantial economic returns and improved living standards to other sectors of the population, indigenous peoples in resource-rich areas tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation. This is particularly true for water, which is much more vulnerable to pollution, depletion and diversion than other natural resources.

Water is intrinsically linked to the distinctiveness of indigenous peoples, for this reason the right to water in all its forms is fundamental to their cultural and material survival. In the case of these communities, protecting the right to water also means respecting existing traditional patterns of use and management.

Indigenous peoples see the possibility to consent or not to an activity on their traditional land, to determine their own future and, by extension, that of their land, as an extension of their right to self-determination. This is why they constantly claim their right to prior and informed consent in the context of development based on the exploitation of natural resources. On the other hand, States and private companies tend to be reluctant to endorse a version of FPIC that might imply an indigenous veto on extractive activities, preferring a "more diluted"[298] version of FPIC which amounts to a simple right of participation that translates into a procedural obligation to seek consensus through an often-symbolic consultation rather than a substantive obligation to recognise the

[298] PAPILLON, RODON (2019: 319)

decision-making authority of indigenous peoples and their representative institutions[299].

On this issue, CERD has issued a number of statements, focusing in particular on the right to participate in decision-making regarding the use of natural resources. In General Recommendation XXIII[300], the Committee urged States Parties to establish concrete mechanisms to implement the right to consultation in a manner that respects the free, prior and informed consent of affected populations and communities and to ensure that such consultations are conducted systematically and in good faith, anticipating what would be formulated as the right to FPIC under DRIP[301].

Public participation in the field of water resources management has always been a valuable tool for improving decision-making processes: it ensures that decisions are soundly based on shared knowledge, experience and scientific evidence, and that they are influenced by the opinions and experiences of stakeholders in order to increase public awareness of environmental issues, stimulate public participation and support for decision-making processes, reduce misunderstandings and ensure more transparent decision-making processes.

The right of indigenous peoples to actively participate in the conservation and protection of water resources for present and future generations thus becomes crucial both for the protection of their traditions, customs and customary values and for the optimisation of public resource management. In the countries surveyed, control of water and its resources has traditionally been the responsibility of governments. More recently, there has been a progressive trend towards co-management approaches that incorporate and value both Western science and indigenous traditional knowledge. The legal basis of these co-management strategies can vary from the recognition of rights in common law to legislative regimes that oblige governments to involve indigenous peoples in the management of natural resources. However, as will be shown in this chapter, the involvement or non-involvement of indigenous peoples in the management of water resources is still largely a matter of discretion on the part of governments.

[299] Ibid.

[300] General Recommendation XXIII, CERD, 18 August 1997, U.N. Doc. A/52/18, annex V at 122 *General Recommendation No.23: Indigenous Peoples*

[301] Art. 10, 19, 28, 29

4.1 Substantive profiles of pollution

The sustainability of environmental components, such as water, is essential for the survival of all living organisms and for the future of the Earth. Each organism in the ecosystem is connected to one another by a vital link; therefore, deterioration that occurs in one part of the system affects the whole system over time. Water is the most important source of life, it serves, among other things, for food production, economic development and general well-being, but above all it is not replaceable; therefore, it must be preserved and protected from all pollutants, both in terms of quality and quantity.

Natural processes and human activities inevitably affect the quality of surface water and groundwater: domestic use, forestry practices, agricultural production, soil fertilisation, inadequate treatment and disposal of industrial residues, dumping of non-solid wastes, are just some of the many anthropogenic factors that can alter the chemical, physical and biological characteristics of water, thus threatening the integrity of the ecosystem[302]. The main emissions that alter the quality status of water resources are attributable to industrial[303], urban[304], agricultural[305] and hydrocarbon pollution[306].

Pollution can affect surface freshwater, *i.e.* all inland watercourses, such as lakes, rivers, streams and ponds, which are home to many species of plants and animals that depend not only on the quantity but also on the quality of the water to survive; groundwater, *i.e.* water stored below the surface in aquifers that feed rivers and oceans; or it can affect salty or brackish water, *i.e.* seawater. The former type of pollution, which concerns fresh water, tends to spill into the latter in various ways, for example through discharges from houses, offices and facilities in various urban centres, which end up directly in fresh water without undergoing any purification process. Since freshwater and saltwater are intrinsically linked, discharges of organic material and harmful substances into the former automatically lead to pollution of the latter.

Pollution sources can be divided into point and non-point sources[307]. The former are those that have an identifiable direct source, such as a leak from the pipes of an industrial plant or an oil spill from an oil tanker; the latter are those that do

[302] SINGH, GUPTA (2016: 1)

[303] It concerns the pollution caused by the discharge into the soil, rivers and seas of toxic, often non-biodegradable substances released daily by industries.

[304] This category includes not only water from the sewage of homes, offices, and other facilities, but also municipal waste that is not disposed of properly.

[305] It results from the introduction of nutrients and chemical fertilizers into watercourses and soil, which, being water-soluble substances, easily reach groundwater.

[306] It is caused by accidents on oil platforms and oil transport ships, but also by the discharge into the sea of water used to wash the tanks of oil tankers.

[307] SINGH, GUPTA (2016: 2)

not have an identifiable source, such as radioactive waste crossing the oceans from nuclear reprocessing plants[308].

The degradation of the water ecosystem due to water pollution has immediate repercussions on the entire ecosystem and particularly affects human livelihoods, from drinking water to fishing to agricultural production. The people most affected are obviously those who live near contaminated waterways and have no access to alternative sources of freshwater, such as many indigenous peoples.

To prevent industrial, domestic and agricultural water pollution, the international community has been developing several guiding principles and strategies to address water quality over the past years, based on prevention, reduction and elimination of waste at source; meanwhile, many countries have adopted increasingly restrictive regulations that oblige companies and public administrations to pay more attention to the prevention, control and reduction of water pollution.

The principle of prevention is expressed in numerous soft law acts, including Principle 7 of the Stockholm Declaration on marine pollution, Principles 14[309] and 15[310] of the Rio Declaration and paragraphs 25(d,e)[311] and 34[312] of the Johannesburg Plan of Action adopted at the World Summit on Sustainable Development. The principle of prevention also emerges from a number of international treaties, including the United Nations Convention on the Law of the Sea (Art. 192 and 194), as we shall see in the next section.

[308] This phenomenon is also known as transboundary pollution.

[309] "States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health".

[310] "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

[311] "(d) Intensify water pollution prevention to reduce health hazards and protect ecosystems by introducing technologies for affordable sanitation and industrial and domestic wastewater treatment, by mitigating the effects of groundwater contamination and by establishing, at the national level, monitoring systems and effective legal frameworks; (e) Adopt prevent ion and protection measures to promote sustainable water use and to address water shortages".

[312] "Enhance maritime safety and protection of the marine environment from pollution by actions at all levels".

4.2 International sources concerning the prevention of water pollution and the protection of the marine ecosystem

The severe problems generated by the massive development of industrial society, from the numerous forms of pollution to the depletion of natural resources, have long placed environmental protection at the centre of the international community's interests. At the same time, this subject, which in the past had a predominantly scientific connotation, has become increasingly important in the social sciences, especially with regard to the legal dimension and related regulatory interventions both within states and at the international level. These interventions concern preventive and repressive protection needs. Although these interventions were initially sectorial, *i.e*. linked to the protection of specific resources, over time they have taken on a broader scope in the international sphere, leading today to a unitary conception of the environment understood as a synthesis of factors that allow and favour the life of living beings, which guarantee a healthy life, individual and collective human wellbeing and sustainable development, *i.e.* such as to preserve the environment also for future generations. An important moment in the evolutionary process of international environmental law occurred following the creation of the United Nations and its specialised agencies, a historical juncture from which emerged the opportunity for coordinated international action to establish a rational approach to the management of natural resources. Although the United Nations Charter contains no explicit reference to environmental protection, it can be said that the foundations of contemporary legal science on the subject are to be found in the structure assumed by the organised international community after the events of the war and, indeed, in the birth of the United Nations Organisation. Among the Charter's objectives is

> "Achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; international cooperation in solving international problems of a humanitarian, economic, social and cultural nature"[313].

These core principles have inspired the progressive inclusion of environmental issues and sustainable development among the tasks of the United Nations, while at the same time increasing the sensitivity of the entire international community.
The moment environmental issues were actually included in the United Nations' sphere of competence was on 28 March 1947, when the United Nations

[313] Charter of the United Nations, Art.1(3)

Economic and Social Council ('ECOSOC'), at its fourth session from 28 February to 29 March 1947, through Resolution No. 32 (IV) on the Conservation and Use of Resources, recognised the importance of the Earth's natural resources[314]. This resolution led to the United Nations Scientific Conference on the Conservation and Use of Resources, which, while lacking an effective operational mandate, is remembered for being the first to hint at the links between resource conservation and the development of the human environment, testifying the beginning of a new approach by the international community in addressing environmental issues: no longer just in a fragmented and sectorial way, but through a broader and more integrated vision[315].
In the following years, the attention of the international community and the work of the UN General Assembly focused on the conservation of flora and fauna and, in particular, on the potentially disastrous effects of nuclear testing and oil production on the environment, especially the marine environment.
Between February and 6 March 1948, the Geneva Conference was held, during which the Convention establishing the Intergovernmental Maritime Consultative Organisation ('IMCO'), whose name was changed to the International Maritime Organisation ('IMO') in 1982, was adopted. Article 1 of the founding Convention summarised the main objectives of the IMO:

> "To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships; and to deal with legal matters related to the purposes set out in this article".

By the mid-1950s, the delay in ratifying the IMO Convention was a cause for concern and new maritime problems, including oil pollution, were beginning to emerge. This led to the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, also known as OILPOL, which marked the first serious attempt by the international community to address the growing scale of

[314] Resolution ECOSOC, 28 March 1947, E/404 32(IV), preamble: "*Recognizing* the importance of the world's natural resources, particularly due to the drain of the war on such resources, and their importance to the reconstruction of devastated areas, and recognizing further the need for continuous development and widespread application of the techniques of resource conservation and utilization, *Decides* to call a United Nations Scientific Conference on the Conservation and Utilization of Resources for the purpose of exchanging information on techniques in this field, their economic costs and benefits, and their interrelations; such conference to be held not earlier than 1948".
[315] AULL, GABBARD, TIMMONS (1950: 111)

marine pollution[316]; the United Nations Conference on the Law of the Sea, held in Geneva from 24 February to 27 April 1958, and the subsequent adoption on 29 April 1958 of four separate conventions and an optional protocol, namely the Convention on the Territorial Sea and Contiguous Zone ('CTS')[317], the Convention on the High Seas ('CHS')[318], the Convention on Fishing and Conservation of the Living Resources of the High Seas ('CFCLR')[319], the Convention on the Continental Shelf ('CCS')[320] and the Optional Protocol on the Compulsory Settlement of Disputes ('OPSD')[321] and finally the Treaty Banning Nuclear Weapons in the Atmosphere, in Outer space and Underwater, signed in Moscow on 5 August 1963.

The boom in economic development in the 1960s, coupled with the occurrence of ecological catastrophes, contributed to a growing awareness in the scientific world and civil society of the side effects linked to the industrialisation process and the perception of the risks connected to the progressive pollution of the elements that make life possible for human beings, first and foremost water and air. In fact, since the late 1960s, there has been a growing involvement of the most important international organisations on a regional and global level, whose intervention has been accompanied by the stipulation of specific bilateral and multilateral conventions[322]. Thus, for instance, in 1968 the European Water Charter was born within the Council of Europe. It enshrines the need to preserve this element and, although it does not mention a specific right of every human being to access to water, it recognises its centrality - first and foremost to enable the survival of all living beings - considering it a "common heritage"[323].

In the same historical framework, at the international level, began the process that led to the convening of the United Nations Conference on the Human Environment, promoted by the United Nations Assembly on 3 December 1968 and subsequently held in Stockholm in July 1972; in the same year, from 30 October to 10 November, followed the London Conference, which constituted a milestone in the prevention of marine pollution[324]; while a third conference, held

[316] BOYLE (1985: 347)
[317] entered into force on 10 September 1964.
[318] entered into force on 30 September 1962.
[319] entered into force on 20 March 1966.
[320] entered into force on 10 June 1964.
[321] entered into force on 30 September 1962.
[322] BOYLE (1985: 349)
[323] European Water Charter, CoE, 6 May 1968, s. X
[324] With regard to the definition of marine pollution, it refers to the direct or indirect anthropogenic introduction of substances or energy into the marine environment, where this results in harmful effects on living resources, risks to human health, hindrance to maritime activities, including fishing, alteration of the quality of the sea from the point of view of its uses and degradation of its amenities.

from 1973 to 1982, led to the adoption of the United Nations Convention on the Law of the Sea, which replaced the four conventions adopted in 1958.
The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, also known as the London Convention, entered into force in 1975 and was one of the first global conventions aimed at protecting the marine environment from the impact of human activities. This instrument recognised the fundamental importance that the marine environment and the organisms that inhabit it have for mankind and required the international community to ensure that the environment is utilised in a manner that does not alter its characteristics and resources, as the capacity of the sea to assimilate waste and make it less harmful and its capacity to regenerate natural resources are not unlimited[325]. With this Convention, the Contracting Parties committed themselves to improving the protection of the marine environment from sources of pollution, defining the limits and scope of environmental policy to be applied to this end in various ways[326]. Moreover, the Convention also contributed to the international control and prevention of marine pollution by prohibiting the practice of dumping[327] certain hazardous materials (Articles 1 and 2).
On 24 March 2006, the London Protocol to the Convention (adopted in 1996) entered into force. It represented a major change in approach to the question of how to regulate the use of the sea as a repository for waste materials, thus applying a precautionary approach as a general obligation (Art. 3(1)). Rather than merely indicating which materials may not be discharged, the Protocol prohibits all discharges, except for the possibly acceptable wastes listed in a special annex (Art. 4). The Convention has been administered by the IMO since 1977.
Also fundamental to the prevention of pollution at sea is the International Convention for the Prevention of Pollution from Ships, also known as the MARPOL Convention. It concerns the prevention of pollution of the marine environment by ships from operational or accidental causes and was adopted on 2 November 1973 by the IMO but officially entered into force on 2 October

[325] Convention IMO, 29 December 1972, 11 I.L.M. 1294, *on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, Preamble.
[326] The Preamble specifies that although States: "in accordance with the Charter of the United Nations and the principles of international law, [have] the sovereign right to exploit their own resources pursuant to their own environmental policies, [they have at the same time] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".
[327] Concerning dumping, Article 3 explains that this is any deliberate discharge into the sea of wastes and other materials from ships, aircraft, platforms and other works at sea as well as any deliberate disposal of wrecks of ships, aircraft, platforms or other works located therein. In addition, the annexes list wastes that may not be discharged into the sea and others for which a special permit is required.

1983. It was established with the objective of minimising pollution of the sea by marine litter, oil and gas and comprises six technical annexes[328].

After the conclusion of these general multilateral conventions, the work of the Third United Nations Conference on the Law of the Sea began in 1973. Despite the existence of regulations relating to pollution management at the sectoral level, the existing legal regime lacked a single framework of commonly accepted legal principles capable of addressing the full range of marine pollution problems and of comprehensively and precisely defining the powers and duties of States in all matters relating to the protection of the marine environment[329].

The protection of the sea from the many forms of pollution has been regulated by the United Nations Convention on the Law of the Sea, also known as the 1982 Montego Bay Convention. This Convention comprises 320 articles and nine annexes regulating all aspects of ocean space, such as delimitation, environmental control, pollution, marine scientific research, economic and commercial activities, technology transfer and ocean dispute settlement. It defines the theme of protection and preservation of the marine environment in Part XII, consisting of 45 articles, and represents the first attempt to establish a general framework for a legal regime that establishes on a global and conventional basis the obligations, responsibilities and powers of states in all matters relating to the protection of the marine environment. Articles 192 and 194 impose upon States the fundamental duty to protect and preserve the marine environment and the obligation to take all necessary measures to prevent, reduce and control marine pollution and to ensure that activities under their jurisdiction or control do not cause pollution damage to other States or otherwise spread beyond the seas in which they exercise sovereign rights. In addition, they are obliged to cooperate globally and regionally to formulate rules and standards (Art. 197), to notify imminent or actual damage (Art. 198), to control, prevent and minimise the effects of pollution (Art. 199), and to provide technical and scientific assistance to developing States (Arts. 202-203).

In conclusion, we have seen that over time, since the creation of the United Nations, various international conventions have included new obligations for management activities regulating the uses of the oceans, the prevention and minimisation of the effects of pollution, and the protection of the characteristics of marine ecosystems. With regard to the last-mentioned topic, the most important convention for the protection of marine ecosystems is the 1992

[328] Annex 1 Regulations for the Prevention of Pollution by Oil; Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk; Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form; Annex IV Prevention of Pollution by Sewage from Ships (entered into force 23 September 2003); Annex V Prevention of Pollution by Garbage from Ships (entered into force 31 December 1988); Annex VI Prevention of Air Pollution from Ships (entered into force 19 May 2005)

[329] BOYLE (1985: 348)

Convention on Biological Diversity ('CBD'), which in addition to being legally binding was also one of the first documents requiring participating states to work with indigenous and local peoples to promote, preserve and maintain their local knowledge and traditional systems[330]. In fact, Article 8(j) states that:

> "[Each Contracting Party shall] subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

4.3 The American context

4.3.1 Comprehensive land claims agreements and Self-Government Agreements in Canada

Canadian law and policy governing reserves and water is a complex and multifaceted subject. In particular, the law governing water rights held by indigenous peoples is even more complex, as it involves Aboriginal rights and treaties that interact with laws governing surrounding municipalities, natural resource management, industry, agriculture, forestry, mining and environmental protection, among others.

To date, in areas where First Nations' rights or title have not been regulated by a historic treaty or other legal instrument, land claim and self-government agreements can be negotiated jointly between a First Nation, the Canadian federal government, and provincial and territorial governments; these agreements provide mechanisms that establish ownership and exclusive rights, or management and consultation powers related to water resource protection[331].

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[330] Report of the UNESCO, 2021, SC-2021/WS/2, *The United Nations world water development report 2021: valuing water*, p.110

[331] On the issue of consultation in Canada, the Supreme Court has ruled that all Aboriginal peoples have the right to be consulted when resource development projects impact, or potentially impact, constitutionally protected Aboriginal and treaty rights. This right to consultation is not limited to the mere process but can be extended to require Aboriginal consent ('FPIC'), although it does not imply a right to veto government decision-making. The extent of the government's obligations depends on the nature of the project and its potential impact on Aboriginal people. This approach has created a high degree of uncertainty, as there are few criteria to clearly establish the level of consultation and compliance measures required. In 2021, the Supreme Court of British Columbia,

With this in mind, in this section we will examine Comprehensive Land Claim Agreements and Self-Government Agreements as vehicles for Canadian Aboriginal peoples to regain control over water resource management.

In 1973, the Comprehensive Land Claims Policy set out how the government intended to negotiate and resolve indigenous peoples' claims to Aboriginal rights and title; these agreements are also known as "modern treaties".

The document reviewed and clarified the government's policies on claims, dividing them into two broad categories: specific and global. Specific claims, asserted by First Nations against Canada, relate to the administration of land and other indigenous assets or non-compliance with historical treaties. Global land claims are based on the assertion of traditional aboriginal rights and/or title over the use and occupation of land and natural resources by indigenous people; such claims usually involve an indigenous community within a specific geographic area and are global in scope, as they include land, rights to hunt, fish and capture, and other economic and social benefits[332].

This policy was amended in 1986 by introducing the possibility of negotiating a broader range of self-government issues. However, it explicitly provided that self-government agreements negotiated through claims settlements would not receive constitutional protection without a constitutional amendment to that effect. This meant that the government preferred to negotiate self-government agreements separately from other issues, in order to avoid the imposition of Act 35(3) of the Constitution Act 1982, which states that the recognition and affirmation of existing aboriginal and treaty rights under subsection 35(1) includes "[…] rights that now exist by way of land claims agreements or may be so acquired"[333].

Today, modern treaties form the basis of relations between indigenous communities and provincial, territorial and federal governments and have guaranteed, among other things, capital transfers, protection of traditional ways of life, access to resource development opportunities, participation in land and resource management decisions, and rights to self-government and related political recognition[334].

For what concerns the Self-Government Agreements, their origins are in the 1980s, when the issue of indigenous self-government and self-determination was raised in various forums by Aboriginal organisations. In 1982, a House of

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in *Yahey v British Columbia*, recognised that the government, in authorising industrial development, must consider the "cumulative impacts" that projects have on traditional way of life and Aboriginal treaty rights, and that if such impacts "significantly diminish" (s.1884) the exercise of those Indigenous rights, the government will be prohibited from authorising further industrial activities on traditional Indigenous land. See: AMATULLI (2022); HAMILTON, ETTINGER (2021).

[332] Report of the Indian and Northern Affairs Canada, 1982, *Outstanding Business: A Native Claims Policy, Specific Claims*, p. 174

[333] WHERRETT (1999)

[334] Canada.ca, 30 July 2020, *Treaties and Agreements*, available *online*

Commons Special Committee on Indian Self-Government was appointed to examine legal and institutional issues relating to the status, development and responsibilities of band governments on reserves. In 1983, the Committee published the Penner Report, which recommended that the federal government recognise First Nations as a distinct governmental entity within the Canadian federation and proposed the constitutional consolidation of self-government and the introduction of legislation to facilitate it.

Following the Report and the growing political engagement of Aboriginal organisations, in 1985 the federal government announced the policy of Community-Based Self-Government with the aim of negotiating self-government agreements with First Nations that would delegate a number of powers on reserves to them. However, although Community-Based Self-Government had a high rate of participation, few accords were concluded due to the delegated nature of legislative powers[335].

In 1995, the federal government recognised the right to self-government as an existing Aboriginal right under Section 35 of the Constitution Act 1982 with the adoption of the Inherent Rights Policy ('IRP'). The underlying objectives of the IRP are to build a new partnership with Aboriginal peoples and to strengthen Aboriginal communities by supporting their governments[336].

Self-governance agreements establish the ways in which Aboriginal groups can govern their own internal affairs and take greater responsibility and control over decision-making processes that affect their communities. In fact, they recognise First Nations as governments rather than bands under the Indian Act of 1985 granting them "extensive province like powers"[337]. Self-government allows Aboriginal governments to work in partnership with other governments and the private sector to promote economic development and improve social conditions. According to the IRP, self-government agreements can be negotiated simultaneously with land and resources as part of comprehensive land claim agreements[338]; in addition, they give indigenous peoples greater control and legislative authority over a range of jurisdictions, including governance, social and economic development, education, health, land, water and more[339].

By entering into the Comprehensive Land Claims Agreements and Self-Government Agreements, the signatories commit to a series of obligations that advance the objectives of all parties, including "enhancing the social well-being and economic prosperity of Aboriginal peoples, developing healthier and more sustainable communities, and promoting the participation of Aboriginal

[335] ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (2015)
[336] Ibid. p.2.
[337] WILSON (2019: 103).
[338] Ibid.
[339] Ibid.

Canadians in Canada's political, social and economic environment for the benefit of all Canadians"[340].

Water governance in Canada today is based on two pillars: on the one hand, water laws enacted by the government, and on the other, land claim and self-governance agreements between territorial, federal and First Nations governments. For the most part, the water rights of indigenous groups are discussed and enumerated in these agreements that form a patchwork of jurisdictions across Canada. Not all of the agreements contain provisions with a water component, but there are at least eight that address some important issues in this regard, namely: the link between indigenous peoples and water space; governance rights in the legislative process and the inherent co-management of indigenous marine spaces (which are never exclusive); harvesting rights [341].

Without venturing to analyse all the agreements, I will mention by way of example the Nunavut Agreement ('NA'), *i.e.* the agreement signed by the Inuit, who represent Canada's indigenous communities most present in the coastal sites, and the Crown on 23 May 1993, and subsequently the Umbrella Final Act of 1993 ('UFA'), *i.e.* the framework that allowed for the negotiation of eleven agreements in the Yukon Territory.

The NA preamble states that the Inuit of Nunavut have aboriginal title to the Nunavut Settlement Area ('NSA') "based on their traditional and current use and occupation of the lands, waters, and land-fast ice therein in accordance with their own customs and usages"[342]. The preamble further defines that the Agreement was designed "to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including in the offshore"[343].

The Government of Nunavut has legislative powers, including the power to make laws regarding property, civil rights and wildlife[344].

Although it has law-making power, this is limited in three ways: first, by the federal government's exclusive legislative authority over a number of marine-related powers, including fisheries, navigation and shipping[345]; second, by the fact that the federal government has retained administration and control over publicly owned lands and resources within Nunavut[346]; finally, by the fact that federal laws always override inconsistent territorial laws[347].

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[340] ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (2015: 6).

[341] BANKES (2019: 158)

[342] Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada, 23 May 1993, preamble

[343] Ibid.

[344] The geographical scope of these powers is well defined by the agreement in Article 3.

[345] Constitution Act, 29 March 1867, Art. 91 (10, 12)

[346] BANKES (2019: 162)

[347] Ibid.

For these reasons, the NA favours a co-management approach to land and marine areas and creates several co-management bodies, the most important of which is the Nunavut Wildlife Management Board ('NWMB'). Article 5 of the NA deals with Inuit rights in relation to wildlife[348] and the co-management responsibilities of the NWMB. The Board consists of 9 members, 4 of whom are appointed by Inuit organisations, 4 by the federal government and 1 by the territorial government. Among the NWMB's responsibilities is to determine the total allowable harvest, if necessary for conservation purposes, and the designation of threatened or endangered species. However, the government has the ultimate responsibility for wildlife management, and as a result, NWMB decisions can be overruled by the relevant federal or territorial minister (stating the reasons)[349]. Article 15 of the NA also states that co-management organisations may "advise and make recommendations" to the government and agencies regarding marine areas.[350] In 2010, based on the changes affecting marine areas in the Arctic[351], the Nunavut Marine Council ('NMC') was established to take a strategic and holistic approach (incorporating Inuit principles of *Qaujimajatuqangit*, *i.e.* traditional Inuit values, knowledge, behaviours, perceptions, and expectations) to address relevant issues.

Eleven agreements were also negotiated with the Umbrella Final Act ('UFA') in the Yukon Territory. These agreements give First Nations legislative authority in three main areas: the internal management and administration of rights recognised in land claim agreements (*e.g.* Chapter 14 water rights); the provision of programmes and services to their citizens; and legislation on matters of a local or private nature in the Settlement Lands[352]. With regard to the latter issue, federal laws continue to apply in the settlement lands and, in case of conflict with First Nations' legislation, the latter prevail; whereas in case of conflict between First Nations' legislation and territorial legislation, the First Nations prevail.

The expansion of powers under the Agreements has created an opportunity to implement new approaches to water governance, in particular the possibility of

[348] Wildlife corresponds to "all terrestrial, acquatic, avian and amphibian flora and fauna ferae naturae, and all parts and products thereof". Nunavut Agreement 1993, Art.1, s.1.1.1

[349] Ibid. Art.5, s.5.3.11: "Where the Minister decides to disallow a decision of the NWMB: (a) the Minister must do so within 30 days of the date upon which the Minister received the decision or within such further period as may be agreed upon by the Minister and the NWMB; and (b) the Minister shall give the NWMB reasons in writing for deciding to disallow the decision".

[350] Ibid. Art. 15, s.15.4.1

[351] Including: the depletion of Arctic Sea ice; increased navigation in Arctic waters for shipping, resource development, tourism and other forms of commercial shipping; oil and gas exploration in Arctic waters off Greenland and in the Beaufort Sea and the proposed seismic repositioning in Lancaster; increased fishing activities; and military and security activities to support and enforce Canadian sovereignty.

[352] WILSON (2019: 104)

creating Chapter 14 legislation is of great interest with regard to the protection of water quality and the rate of water flow on or near Settlement Lands. Water legislation established by First Nations would in fact override the territorial law governing water resources, the Yukon Waters Act and Regulations of 2003[353].
In conclusion, land claim and self-government agreements have facilitated First Nations' involvement in resource management and governance. Typically, this is done through co-management agreements rather than through direct application of Indigenous law (indeed, to date, none of the Yukon First Nations signatory to the UFA have enacted their own Chapter 14-based legislation).
One of the main challenges associated with establishing co-management regimes in the water sector remains the fact that such regimes attempt to integrate different interests. Thus, while territorial, provincial, or federal forms of government focus on domestic, industrial and agricultural interests, indigenous peoples may pursue other interests, such as the recognition of rights and responsibilities arising from their legal systems, spiritual and cultural norms and protocols. Supposedly, co-management is engaged in by the government and indigenous nations as equals. However, researchers criticise the results of co-management approaches in Canada by arguing that the equal authority of indigenous peoples in co-management institutions is greatly compromised due to the fact that many boards or committees that assume co-management responsibilities exist under the ministries of colonial institutions[354].
However, it must be acknowledged that the proliferation of co-management schemes in Canada has provided a new avenue for the defence and governance (albeit still limited) of water and related resources for the benefit of Aboriginal peoples.

4.3.2 The US Clean Water Act

In the United States, largely due to the development of environmental protection legislation, water management and protection have been framed under the concept of "cooperative federalism"[355], under which the federal government sets minimum standards that are then implemented by the States.

[353] Ibid. p. 105
[354] MOORE, VON DER PORTEN, CASTLEDEN (2017: 8)
[355] PIFHER (1997: 34)

This dual system of federal and State governments has over time granted significant rights to indigenous peoples over water use and development, especially in light of the recognition of indigenous peoples as sovereign entities whose governments have specific rights and duties to protect and manage natural resources. In this section, we will discuss how this sovereign role in the effective management of water resources has been affirmed in statutes, court rulings and modern cooperative resource management agreements.
Through various statutes enacted between the 1970s and 1980s, Congress established uniform and comprehensive standards in several areas: air and water quality, solid waste discharge, toxic pollutants, drinking water quality, and protection of the human environment. The Federal Water Pollution Control Act, also known as the Clean Water Act ('CWA') is one of these federal statutes. It makes clear that despite the broad federal role in overseeing water pollution control

> "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources"[356].

It specifies in Section 518 (a) that the: "[…] Indian Tribes shall be treated as States […]"[357] and appointed the Environmental Protection Agency ('EPA') as the environmental regulatory authority for any subject matter covered by the statute[358]. Recognition of indigenous peoples as sovereign States in resource management programmes grants them several rights, including the right to set stricter standards than federal laws or to regulate pollution if the source is located on the reservation; however, this recognition is limited to federally recognised tribes that meet certain administrative criteria to obtain "Tribe as State" ('TAS') status from the EPA[359]. Section 518(e) of the CWA specifies that to qualify as a TAS, the tribe must:

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[356] Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., s.101 (g)
[357] Ibid. s. 518 (e): "The Administrator is authorized to treat an Indian tribe as a State for purposes of title II [Grants for Construction of Treatment Works] and sections 104 [Research Investigation, Training and Information], 106 [Grants for Pollution Control Programs], 303 [Water Quality Standards and Implementation Plans], 305 [Water Quality Inventory], 308 [Inspections, Monitoring and Entry], 309 [Federal Enforcement], 314 [Clean Lakes], 319 [Nonpoint Source Management Programs], 401 [Certification], 402 [National Pollutant Discharge Elimination System], 404 [Ocean Discharge Criteria], and 406 [Coastal Recreation Water Quality Monitoring and Notification] of this Act to the degree necessary to carry out the objectives of this section".
[358] Ibid. s.101 (d).
[359] HOFFMAN (2019: 386).

> "(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and of all applicable regulations".

Thus, for some water management activities under the CWA, Indian tribes that qualify as TAS can assume primary responsibility in the same way as States, and this is particularly crucial for determining water quality. An example of this is the case of the Pueblo of Isleta, an Indian tribe in the city of Albuquerque, New Mexico, which obtained TAS status and adopted water quality standards stricter than those of the State. Albuquerque challenged the EPA's approval and subsequent enforcement of these standards, but the court upheld the EPA's enforcement of the tribe's standards, expressly stating that the Pueblo of Isleta's right to adopt water quality standards more stringent than those of an upstream state was rooted not only in the CWA, but also in the tribe's own "inherent sovereignty"[360].

Among the programmes under the CWA is the ability of Indian tribes, under Section 402, to regulate water pollution if the source is on the reservation[361]. Regulation can occur through the granting of discharge permits and the establishment of restrictions necessary to meet water quality standards. If the Indian tribe is deemed unable to regulate a particular activity or pollutant by the EPA, the EPA will issue discharge permits for point sources within the reservation, however, the tribe may still provide input on whether the permits meet the tribe's water quality standards[362]. There are also provisions that allow tribes to identify sources of pollution outside the reservation, such as agricultural and urban runoff, if these outside sources impact the quality of tribal water supplies[363]. The range of programmes available to tribes under the CWA therefore offers significant opportunities to protect water quality on reservations.

[360] GOODMAN (2000: 206)
[361] According to the Clean Water Act regulatory scheme, water pollution comes from two types of sources: point sources and non-point sources. Point source pollution refers to easily identifiable discharges of pollutants, *e.g.* industrial sources, wastewater treatment plants and municipal stormwater control systems that directly discharge pollutants into coastal waters or rivers, lakes, and streams. See: CRAIG, MILLER (2022)
[362] ROYSTER, FAUSETT (1989: 629)
[363] GOODMAN (2000: 191)

The courts have also granted tribal groups in the United States significant rights in resource management. As seen in the previous chapter, Indian tribes have legally protected rights to certain quantities of water to support their federally reserved rights, both on and off the reservation's waterways. In addition, tribes have the right to secure and protect the water quality necessary to protect their members and their reserved fishing rights, and the right to prevent environmental degradation. These rights, although derived from different legal sources, have at their core the right of tribes to actively act as autonomous governments to protect the economic security, political integrity, health and welfare of their people. Several lower court rulings have recognised the right to habitat protection for tribal fisheries.

However, judicial processes are not the most effective means of obtaining resource management rights in the United States, partly because they often involve lengthy and costly processes. For this reason, there is a tendency to solve resource management problems by involving indigenous peoples in co-management agreements in the early stages of project implementation. These co-management frameworks provide opportunities for collaboration, adaptation and cross-jurisdictional understanding in environmental policies and practices.

An example of this is the Klamath Basin Restoration Agreement ('KBRA') and the Klamath Hydroelectric Settlement Agreement ('KHSA') of 18 February 2010. These Agreements have involved more than fifty organisations, including federal, tribal, State and local governments, conservation organisations, and irrigation and ranching groups, all of which are eager to utilise the limited water resources of the over-allocated Klamath Basin. Of the four federally recognised tribes: the Klamath Tribe, the Hoopa Valley Tribe, the Karuk Tribe and the Yurok Tribe, all but the Hoopa have signed the Agreements.

The Klamath basin is divided into an upper and a lower basin. The upper basin contains much of the land used for agricultural purposes, while the lower basin contains salmonid habitat, which in turn supports commercial and recreational fishing, as well as being the main source of livelihood for the Karuk, Yoruk and Hoopa tribes[364]. In 1905, the Bureau of Reclamation authorised the Klamath project that started the construction of dams and canals in the upper reaches, triggering a 100-year controversy. Throughout the dispute, the various parties used different methods, such as lawsuits, the political process, and collaborative processes, to reach a solution in the Klamath Basin. One particular collaborative group of stakeholders in the Klamath Basin emerged as a result of the Federal Energy Regulatory Commission's PacifiCorp hydroelectric project ('FERC').

This group included Klamath Basin tribes, irrigators, commercial and sport fishermen, state and local governments who came together and in a five-year collaborative working process drafted the KHSA and KBRA. These two

[364] CRUZ GUIAO (2012:301)

agreements describe the removal of the four dams, a planning to balance water use in the basin to ensure economic stability for all the different rural economies in the area[365].
In conclusion, US environmental legislation has, over time, granted extensive rights to indigenous peoples in the management and protection of water resources. Tribes recognised as TAS have been granted several rights under CLA management programmes, including the ability to set water quality standards and to regulate pollution on and off reservations (if this impacts water supplies within the reservation). In addition, co-management agreements for natural resource management have been developed, which have provided many opportunities for indigenous peoples to collaborate on environmental policies and practices, as, for example, the Klamath Basin tribes have done by participating in the KBRA and KHSA multilateral agreements.

4.3.3 Colombia, the Atrato River case

In Colombia, indigenous peoples have suffered disenfranchisement and dispossession, including the loss of traditional territories and the interruption of access to water resources, since the time of Spanish colonisation. In 1810, Colombia became independent from Spain and with the *l'Acta de la Federación de las Provincias Unidas de Nueva Granada* del 1811, a large area of land was classified as terra nullius[366]. However, the Act specified that this did not mean that the indigenous peoples in those territories could be eliminated, but that they should be "respected as legitimate and ancient owners"[367].
Over time, indigenous peoples have been confined to *resguardos*, territorial units comprising common and inalienable lands administered by indigenous authorities in collective ownership within which they can produce laws for self-government[368]. Today, Colombia has the largest indigenous territories in the world and the *resguardos* are protected by Articles 329 and 330 of the Colombian Constitution[369].

[365] Ibid. p. 307
[366] Acta de la Federación de las Provincias Unidas de Nueva Granada, 27 November 1811, Art. 23
[367] Ibid. Art.24.
[368] MACPHERSON (2021: 136).
[369] Constitución Política de Colombia, 27 October 1991, Art 329: "[...] The resguardos are collective property and cannot be alienated. The law shall define the relations and coordination of these entities with those of which they form part. Art. 330: "In accordance with the Constitution

With regard to the exploitation of natural resources in indigenous territories, the Constitution requires that it should be carried out "without detriment to the cultural, social and economic integrity of the Indigenous communities" and "in decisions that are adopted with respect to said exploitation, the Government will promote the participation of the representatives of the respective communities"[370]. Despite this, there is no priority provision in Colombia's water laws for indigenous peoples to use water on their territories [371]; nor the possibility, when creating or expanding a reservoir, of implementing changes to the legal regime for water use[372]. Faced with limited regulatory tools within the existing water laws to protect indigenous water rights, indigenous activists have turned to the environmental and human rights protections enshrined in the Colombian Constitution to protect their territorial rights, including the right to water.

Colombia is rich in mineral wealth, especially gold, collected in the most important rivers, such as the Rio Atrato in the Chocó region. Today, the country is divided into five different hydrographic areas and water is unevenly distributed and used throughout the country[373]. Water resources are subject to increasing demand from agriculture, industry and urbanisation and pressure on supply due to contamination.

In Colombia, the regulations that form the core of the water law are based on the Political Constitution of 1991[374] and five structural laws[375]. The Constitution,

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and the law, the indigenous territories shall be governed by councils formed and regulated according to the uses and customs of their communities and shall exercise the following functions: 1) To oversee the application of the legal norms on land use and settlement of their territories; 2) Design policies and plans and programmes for economic and social development within their territory, in harmony with the National Development Plan; 3) Promote public investment in their territories and ensure that it is duly implemented; 4) Receive and distribute their resources; 5) to ensure the preservation of natural resources; 6) Coordinate the programmes and projects promoted by the different communities in their territory; 7) Collaborate with the maintenance of public order within their territory in accordance with the instructions and provisions of the National Government; 8) represent the territories before the National Government and other entities to which they belong; […]".

[370] Ibid. Art. 330.

[371] MACPHERSON (2019: 136)

[372] Decree-law 2164, 7 December 1995, art.24

[373] GARCIA (2017: 23)

[374] In the Constitution, the provisions relating to the environment apply directly to water resources.

[375] These laws are: Law 23 of 1973 (by which extraordinary powers were granted to the President of the Republic to issue the Code of Natural Resources and Environmental Protection; Decree Law 2811 of 1974 (by which the National Code of Renewable Natural Resources and Environmental Protection was issued); Law 9 of 1979 (which issued sanitary measures); Law 99 of 1993 (which created the Ministry of the Environment, reorganised the public sector in charge of the management and conservation of the environment and renewable natural resources, organised the National Environmental System); and Law 1333 of 2009 (which established the environmental sanctions procedure). See: GARCIA (2017: 32)

also known as the *Constitución Ecológica*[376], contains a series of more than thirty provisions aimed at protecting environmental interests.
Articles 79 and 80 recognise the collective right of all people to a healthy environment and the responsibility of the State to: protect the diversity and integrity of the environment; conserve areas of special ecological importance; plan the management and use of natural resources to ensure their sustainable development, conservation, restoration or replacement; prevent and control the deterioration of the environment; and provide that the law guarantees community participation in decisions that may affect the community. The latter mandate is consistent with the participatory philosophy defined in the preamble of the Constitution and the fundamental principle of the same text ordering the participation of all in decisions that may affect them in Article 2[377].
In this context, the Tierra Digna decision on the Atrato River has opened up new scenarios on how governments can re-establish relations with indigenous groups regarding water access and management.
The Atrato River, the third longest and most navigable river in Colombia, is located in the poorest and most disadvantaged region of Colombia: El Chocó, situated on the Pacific coast. The Chocó is rich in natural resources and biodiversity; it is also home to many indigenous and Afro-Colombian communities living in *resguardos* and *consejos mayores* respectively. Both have lived virtually unchanged for centuries in isolation from the dominant Colombian culture, relying on artisanal gold and silver mining, traditional agriculture, hunting and fishing. The Chocó people living along the Atrato River depend on the river for their physical, economic and spiritual sustenance and it constitutes the core of their cultural identity. Since the 1990s, mining activities have led to the extreme degradation of the Atrato River, destroying the natural course of the river and flooding the rainforest in many areas; in addition, the river has been contaminated with dangerous chemicals that have killed fish and vegetation. As a result, the traditional subsistence practices of local communities were compromised, and many villages were displaced. All this happened under a complacent central government and regional and local authorities that were unwilling or unable to respond to the environmental and humanitarian consequences, despite the plight of the river communities[378].

[376] Judgment of the Constitutional Court of Colombia, 12 April 2000, C-431/00, "The defence of the environment constitutes an objective of principle within the current structure of our Social State under the rule of law. Insofar as it forms part of man's living environment, indispensable for his survival and that of future generations, the environment is protected by what jurisprudence has called the 'Ecological Constitution', made up of the set of superior provisions that establish the premises on the basis of which the community's relations with nature must be regulated and which, to a large extent, advocate its conservation and protection".
[377] GARCIA (2017: 41)
[378] MACPHERSON (2019: 144)

The lawsuit[379] that prompted the Constitutional Court to recognise the Río Atrato as a subject of rights was filed by the Centre of Studies for Social Justice 'Tierra Digna', representing a number of indigenous, Afro-descendant and peasant communities in the Chocó, in the Constitutional Court of Colombia against the President of the Republic, the Ministry of the Environment and Sustainable Development and others regarding the Río Atrato.

The communities argued that the miners' activities in the Chocó violated their fundamental human rights and demanded a series of orders and measures to allow structural solutions to respond to the serious health, socio-environmental, ecological and humanitarian crisis in the river basin, its tributaries and adjacent territories[380].

In its decision, the Court ruled that the government had violated the fundamental rights to life, health, water, food security, a healthy environment, culture and territory of the plaintiff communities through its failure to control and eradicate illegal mining activities in the Chocó.

The Court held that under Article 8 of the Constitution, the government and society have a fundamental obligation to protect natural and cultural riches and to protect the environment in order to prevent and control the factors that cause deterioration of the environment, seeking to conserve, restore and develop it in a sustainable manner.

The Court also recognised the Atrato River, its basin and tributaries as an entity subject to rights, which entails its protection, conservation and preservation[381].

The Court issued several prescriptive orders to implement its decision and entrusted the government, together with the communities living in the Atrato region, with the legal representation of the river. To this end, the ruling mandates each party to select a representative. These, in turn, are instructed to form a commission of guardians, consisting of these representatives and an advisory group, including environmental organisations[382].

This ruling is a milestone in the country's constitutional system, as the Court not only protected the plaintiffs' human rights enshrined in the Constitution of 1991, but also expanded the boundaries of constitutional law by recognising, for the first time, a non-human natural entity as a subject of rights and introducing the concept of biocultural rights of indigenous and Afro-descendant communities[383].

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[379] This complaint was an "acciòn de tutela" under Article 86 of the Constitution. Article 86 allows all Colombians to apply to any judge or Constitutional Court for an order to protect their fundamental rights when they are made vulnerable or threatened by an action or omission of a public or private authority.

[380] CHAVES, RODRIGUEZ, CUMBE-FIGUEROA, MORA-GARZÒN (2019:24)

[381] Judgment of the Constitutional Court of Colombia, 10 November 2016, Case T-622/16, *Center for Social Justice Studies "Tierra Digna" et al. v Presidency of the Republic et al.*, ss. 43, 44, 46, 47; CHAVES, RODRIGUEZ, CUMBE-FIGUEROA, MORA-GARZÒN (2019:26)

[382] Ibid. s. 143, 161, 162

[383] WESCHE (2021:539)

The Court explained the concept of biocultural rights:

> "In their simplest definition, [biocultural rights] refer to the rights of ethnic communities to autonomously administer and protect their territories – in accordance with their own laws and customs – as well as the natural resources that constitute their habitat, where their culture, traditions and way of life are developed based on their special relationship with the environment and biodiversity. In effect, these rights result from the recognition of the profound and intrinsic connection that exists between nature, its resources and the culture of ethnic communities […], which are interdependent and cannot be understood in isolation"[384].

This formulation does not imply the creation of new rights for indigenous and Afro-descendent communities, but rather seeks to integrate their pre-existing constitutional rights to natural resources and their culture into a single framework. The Court recognises that "the multiple forms of life expressed as cultural diversity [such as different ancestral cultures] are intrinsically linked to the diversity of ecosystems and territories" and that these relationships "actively contribute to biodiversity"[385].

Consequently, the relevance of biocultural rights lies primarily in the recognition that the protection of cultural diversity necessarily implies the protection of biological diversity and conversely[386].

This formulation also has important implications for environmental governance, in the sense that public policies for the protection of the environment must "recognise the link and interrelationship between culture and nature, extend the participation of ethnic communities in the definition of [...] frameworks, and ensure favourable conditions for the generation, preservation and renewal of their knowledge systems"[387].

The creation of a protection body has led to a more coordinated and participatory formulation of public policies to enforce the river's rights to protection, conservation, maintenance, and restoration, as well as the related biocultural rights of local communities. Communities residing in the Atrato region have been given a much stronger voice in policymaking in their role as custodians of the community[388]. In this context, the legal recognition of the river has led to important symbolic achievements in terms of indigenous involvement in natural resource management.

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[384] Judgment *Tierra Digna,* s. 47f
[385] Ibid. s.48, 51
[386] WESCHE (2021: 540)
[387] Judgment *Tierra Digna,* s.155
[388] WESCHE (2021: 548)

4.4 The Oceanic context

4.4.1 Australia, the Murray Darling Basin

Historically, indigenous peoples have been excluded from water management in Australia. Colonisation led to the destruction of Aboriginal peoples through the introduction of disease, violence and state-sanctioned acts of dispossession and marginalisation. The expansion of settlements along waterways has put intense pressure on traditional land uses, radically altering the country, and competition for land, particularly water, has triggered conflicts[389]. Government efforts to stimulate agricultural production in the late 19th and 20th centuries, along with coercive legislation and policies towards Aboriginal peoples, further eroded the security of access to traditional land and water. Over time, colonial authorities-imposed laws that did not consider the customary uses of land and water by Aboriginal peoples or their systems of governance[390]. This subjugation was exacerbated by the fact that indigenous peoples had a low level of knowledge of water institutions, technical information, and regulations, resulting in almost no involvement of indigenous peoples in consultation processes at state, territorial and national levels in the development of water policy[391].

The Australian Government has ratified a number of international human rights instruments (ICCPR, ICESCR, CERD) and consequently has an obligation towards its citizens, including indigenous peoples, to respect, protect and fulfil the rights contained therein. Despite international obligations to protect the distinct rights of indigenous peoples to land, territories, water and natural resources, including the right to participate in decisions affecting the exercise of their rights and to determine and formulate strategies for their development and use, there has been no meaningful implementation of these rights in Australian domestic legislation[392].

From the 1970s, Australian national policy began to address the issue of land rights, towards greater recognition of Aboriginal land rights. Since the 1980s, some States began to pursue land repatriation strategies and gradually Basin governments began to consult with Aboriginal peoples in the area of heritage management, such as the protection of cultural sites[393].

Despite the existence of legal rights to land under State law and the Native Title Act[394], however, it was not until 2004 that national water policy addressed

[389] JACKSON, WOODS, HOOPER (2021: 7)
[390] Ibid. p. 8
[391] ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER (2009: 205)
[392] GODDEN (2019: 134)
[393] HARTWIG, JACKSON, MARKHAM, OSBORNE (2022: 36)
[394] Since the Mabo No.2 decision there has been recognition of Native title and later, in other litigation, of specific Aboriginal rights, such as hunting, gathering and fishing rights for the personal, domestic and non-commercial needs of Aboriginal people; nevertheless, there remained

Aboriginal rights and norms in relation to water and recognised their interest in a policy framework[395]. In this section we will examine the right to be involved in the management of Indigenous peoples' water resources in the Australian system based on national water legislation and the Murray Darling Basin Multilateral Agreement.

Water management and regulation in Australia to date is extremely complicated. Water resources are regulated by water or natural resource management legislation at national, state, regional and local levels and ultimate ownership over water is vested in the Crown[396]. Historically, water users were authorised to extract water as a right of usufruct, and while there were no volumetric limits on water extraction before the 1970s, volumetric licences were gradually introduced between the 1960s and 1980s, until a cap on extraction was introduced in 1995 to limit total water extractions[397]. The 1980s and 1990s were a period of major economic reforms in Australia. The water policy reforms aimed to address over-extraction of water and environmental degradation, reflecting the economic orientation of the time and the "market to environmentalism" approach[398].

Indeed, water markets have been considered the most cost-effective way to reallocate water from irrigation to the environment. This process started in 1994 with the unbundling of land titles and water rights and continued in 2004 with the creation of tradable water rights under the National Water Initiative[399].

In 1994, the Council of Australian Governments ('COAG') developed a water reform framework to achieve an efficient and sustainable Australian water industry in response to growing evidence that unsustainable water abstraction was contributing to widespread environmental degradation and compromising the quality and quantity of available water resources. As the environmental and production consequences of over-exploitation of the Murray-Darling Basin became apparent[400], the importance of developing environmental water management policies and strategies to protect high value environmental resources became increasingly important in all parts of Australia[401].

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the inherent problem of limitations for the recognition of Native title rights, based on the question of continuity with the pre-contact era.

[395] HEMMING, RIGNEY D., MULLER, RIGNEY G., CAMPBELL (2017: 1)

[396] MACPHERSON (2019: 55)

[397] DAVIES, MARSHALL, RIDGES (2017: 2)

[398] HEMMING, RIGNEY D., MULLER, RIGNEY G., CAMPBELL (2017: 2)

[399] DAVIES, MARSHALL, RIDGES (2017: 6)

[400] The Murray Darling Basin is the catchment for Australia's largest river system. Since the 1960s, overextraction of water for irrigation has led to severe environmental degradation. The construction of large dams and storages in parts of the Basin to enable the delivery of irrigation water has led to significant reductions in flow variability.

[401] NATIONAL WATER COMMISSION (2014: 11)

To this end, the National Water Initiative ('NWI') was developed in 2004[402], within which social and environmental objectives in water management were recognised for the first time.
It stipulated for the first time that water rights and planning frameworks should recognise, *inter alia*, the needs of indigenous peoples "in relation to access and management"[403].
The NWI is currently the main instrument in Australia for recognising the relationship of indigenous peoples to water. The main clauses of the NWI relating to indigenous interests are clauses 52, 53 and 54 which state:

> "52: The Parties will provide for indigenous access to water resources, in accordance with relevant commonwealth, state and territory legislation, trough planning processes that ensure:
> (i) inclusion of indigenous representation in water planning *wherever possible*; and
> (ii) water plans will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives and strategies for achieving these objectives *wherever they can be developed*. (emphasis added)
> 53: Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth Native Title Act 7 993.
> 54. Water allocated to native title holders for traditional cultural purposes will be accounted for".

Aboriginal peoples must be involved in water planning processes and water plans must incorporate their objectives, but as the text makes clear, only native title rights will be accounted for. In reality, although these clauses are designed to improve access and involvement of indigenous peoples, they remain based on government discretion and interpretations of native title[404]. Discretion is indicated by formulations such as "wherever possible" and "wherever they can be developed", and while this offers some flexibility to accommodate a wide range of circumstances, impediments and competing priorities may hinder the extent to which indigenous goals are addressed[405].
Notwithstanding this, the NWI contains other clauses relevant to indigenous interests, including: it states that provisions to address indigenous water issues must be implemented in all water plans and that they must provide a regulatory

[402] By 2006, all states and territories agreed to implement NWI, including a number of specific actions aimed at achieving better environmental outcomes.
[403] COAG, 25 June 2004, National Water Initiative, s.25(ix)
[404] JACKSON, WOODS, HOOPER (2021: 30)
[405] JACKSON, MORRISON (2007: 23)

basis for the achievement of "environmental and other public benefits"[406], which include "indigenous and cultural values"[407]; and it includes as a principle to guide the creation of commercial water rules the protection of certain indigenous heritage values[408].

However, it does not provide specific guidelines on how to implement indigenous water rights, gives low priority to the needs of indigenous peoples in over-allocated watersheds, and its objectives are also undermined by the difficulties and delays in determining native title[409].

In light of the increasing degradation of river basins, the Water Act 2007, which came into force on 3 March 2008, was enacted to help implement many elements of the NWI, including the water market and trade for the Murray Darling basin. Its objectives include: the return to environmentally sustainable levels of abstraction; the protection and restoration of the basin's ecological values and ecosystem services; and the creation of a new framework for collaboration between the basin states and the Commonwealth to manage the basin's water resources[410]; the establishment of an independent authority to prepare a basin plan, the Murray Darling Basin Authority ('MDBA'); the establishment of the Commonwealth Environmental Water Holder ('CEWH') to allocate water rights for environmental purposes[411]; compliance with relevant international agreements[412], including the Ramsar Convention, the CBD and the DRIP (which calls for strengthening the involvement of indigenous groups in the management of natural resources); and the establishment of a Basin Advisory Committee that must include "at least 2 indigenous people with expertise in indigenous issues relevant to the basin's water resources"[413].

The Water Act 2007 requires the MDBA to "involve the indigenous community in the use and management of the Basin's water resources"[414]; to take their social, spiritual and cultural values into account when preparing a Water Resources Plan ('WRP')[415]; and to restrict water abstraction or diversion if it impacts on indigenous, cultural or spiritual characteristics of importance[416].

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[406] COAG, 25 June 2004, National Water Initiative, s.25

[407] ibid, Schedule B (ii)

[408] Restrictions on the abstraction, diversion or use of water resulting from an exchange can take place to manage "features of major indigenous, cultural heritage or spiritual significance". Ibid. Schedule G (v)

[409] TSATSAROS, WELLMAN, BOHNET, BRODIE, VALENTINE (2018: 6)

[410] Water Act 2007 (Cth), 1 September 2021, s.3 (a)

[411] HEMMING, RIGNEY D., MULLER, RIGNEY G., CAMPBELL (2017: 3)

[412] Water Act 2007 (Cth), 1 September 2021, s.3 (b)

[413] Ibid. s. 204 (3)(a)

[414] Ibid. s.172 (ia)

[415] Ibid. s.22 (ca)

[416] Ibid. Clause 4(e)

Based on this national legislative framework for water management, the Murray Darling Basin Plan ('MDBP') was enacted in 2012.

The Murray Darling watersheds collectively cover an area of 1.06 million km2 and extend into the Australian Capital Territory and parts of Queensland, New South Wales, Victoria and South Australia, as well as many portions of Aboriginal Nations territory[417]. The basin's Aboriginal peoples have for millennia based their livelihoods on this basin, which provided them with food, medicine and other resources. Its waterways have always been important gathering places, for social, economic, religious, and recreational purposes. Over time, the over-allocation and unsustainable distribution of water between agriculture, urbanisation and industrialisation have put a strain on the basin's environment, which for the indigenous peoples plays an important cultural and religious role. With the MDBP, an attempt has been made to implement an environmental recovery and to restore the basin to sustainable levels, involving the Aboriginal peoples in this process[418].

Under the MDBP, States are required to develop WRPs in consultation with indigenous groups[419], identifying their goals and outcomes and considering their social, spiritual and cultural values, water uses[420] and views on cultural flows[421]; however, the authority to develop such plans remains with State governments[422].

The terminology "cultural flows" is open to many interpretations. Currently, cultural flows are defined as a flow of water to meet cultural needs, where cultural needs mean specific sites of cultural value, *e.g.* ceremonial or sacred sites[423]. However, Aboriginal peoples identify this expression as the cultural governance of water that entitles Aboriginal nations to use water according to their own rules and regulations. The Murray Lower Darling Rivers Indigenous Nation ('MLDRIN') has defined cultural flows as that right which empowers Aboriginal nations to use water according to a separate category of use.

This concept is articulated in the Echuca Declaration: "Cultural Flows" are water entitlements that are legally and *beneficially owned* by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right."[424] (emphasis added)

Beneficial ownership refers to water owned by Aboriginal groups that can be managed in accordance with cultural law to achieve Aboriginal water objectives.

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[417] JACKSON, WOODS, HOOPER (2021: 1)
[418] NATIONAL WATER COMMISSION (2014: 14)
[419] Water Act 2007 (Cth), 1 September 2021, s.172 (ia); Murray Darling Bain Plan 2012, 5 August 2021, Ch.10, p.14
[420] Murray Darling Bain Plan 2012, 5 August 2021, s.10.52, Art.1(a,b) and Art.2 (a,b)
[421] Ibid. s. 10.54
[422] Ibid.
[423] DAVIES, RIDGES, MARSHALL (2017: 6)
[424] MLDRIN, Echuca Declaration 2007, Art.1

Nevertheless, to date, environmental irrigation priorities for Commonwealth-owned waters continue to be determined by the MDBA and environmental water management decision-making by CEWH. Although both agencies have established mechanisms for Aboriginal involvement in planning and priority setting, this involvement still remains discretionary and advisory. Australian Aboriginal peoples, therefore, have no decision-making or management power in the allocation of environmental or other water flows.
Indigenous groups have expressed a desire to reverse the past injustices of water dispossession through the development of genuine water management partnerships for access to indigenous-specific water allocations, but in Australia, indigenous interests are believed to be limited to cultural values or heritage management.

4.4.2 The Resource Management Act in Aotearoa/New Zealand and the Whanganui River case

New Zealand's water resources are under numerous pressures from agriculture, industry, urbanisation, and climate change, which compromise their quality and quantity. In this context, Māori claim their rights to fresh water as *Kaitiaki* (custodians). Underlying these claims is the inextricable link between the health and well-being of water and the health and well-being of Māori communities. The Māori relationship with water has been considered in the planning processes under the 1991 Act ('RMA') and is reflected in the recognition of Māori cultural relationships or values and involvement in water governance through consultation or co-management, in accordance with the fundamental principle that "no one can own water". The RMA is New Zealand's regulatory regime for natural resource management and is based on the general principle of "sustainable management"[425].

[425] New Zealand Government, 1 October 1991, *Resource Management Act*, s. 5 on the Purpose and principles of the Act states: "(1) The purpose of this Act is to promote the sustainable management of natural and physical resources. (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment".

Although the RMA does not specifically recognise Māori rights to water, there are a number of protections of environmental and cultural value that have often been used in the management of the use, development, and protection of natural and physical resources and which recognise and guarantee certain rights to Māori. These include obligations on local authorities to recognise and guarantee: "the relationship of Māori, their culture and traditions to their ancestral lands, water, sites, *wahi tapu* and other *taonga* (treasures)"[426]; and to have special regard for *kaitiakitanga* (protection and conservation)[427]. These requirements must be incorporated at all stages of the planning processes, but do not amount to an indigenous right of veto[428].
The RMA also provides for a number of collaborative governance mechanisms, including joint management agreements between local authorities and Māori on natural resources; in addition, Article 199 allows anyone to apply to the Minister of the Environment for a water conservation order for:

> "(2) […] (a) the preservation as far as possible in its natural state of any water body that is considered to be outstanding:
> (b) the protection of characteristics which any water body has or contributes to, and which are considered to be outstanding:
> (i) as a habitat for terrestrial or aquatic organisms:
> (ii) as a fishery:
> (iii) for its wild, scenic, or other natural characteristics:
> (iv) for scientific and ecological values:
> (v) for recreational, historical, spiritual, or cultural purposes:
> (c) the protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with *tikanga* Māori".

On the basis of this provision, an ad hoc order was issued in 2011 for Te Waihora, a shallow coastal lake whose condition has deteriorated considerably in recent decades due to deforestation, wetland drainage, urbanisation, and intensive agricultural practices in the catchment area; this required increased efforts to improve water quality and protect the lake's biodiversity. To this end, an order, known as the National Water Conservation (Te Waihora/Lake Ellesmere) Amendment Order 2011, was issued to protect its extreme natural, historical, cultural, economic, and recreational importance to many people, as well as its exceptional cultural and spiritual significance to the indigenous Ngai Tahu community, as the main source of *mahinga kai* (food gathering) and an

[426] Ibid. s.6 (e)
[427] Ibid. s. 7(a); The principle of *kaitiakitanga* and the need to involve Māori as partners in national efforts to improve legislation on freshwater use and to foster recognition of Māori rights, values and practices have increasingly been reflected in environmental legislation.
[428] MACPHERSON (2019: 108)

important source of *mana* (prestige). The Order states that Te Waihora: "has or contributes to the following outstanding amenity or intrinsic values which warrant protection: (a) habitat for wildlife, indigenous wetland vegetation and fish; and (b) significance in accordance with *tikanga* Māori in respect of *Ngai Tahu* history, *mahinga kai* and customary fisheries"[429].

Initiatives to give effect to Māori cultural values in environmental governance have also included a series of policy documents incorporating the principles of the Treaty of Waitangi, including reciprocity in partnership, shared decision-making, Māori rights to self-determination, and reconnecting and rebuilding relationships between local Māori communities and local government[430]. Under the RMA, the overarching national policy framework for water resources management is the 2014 National Freshwater Policy Statement, which was amended in 2017 and replaced by a new version in 2020. Efforts to incorporate Māori values into this broad freshwater reform were included in the preamble and opening section of the 2017 document on "National Freshwater Significance and Te Mana o te Wai":

> "Upholding Te Mana o te Wai acknowledges and protects the mauri (life force) of the water. This requires that in using water you must also provide for Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people). Te Mana o te Wai incorporates the values of tangata whenua (people of the land/ Māori indigenous peoples) and the wider community in relation to each water body. The engagement promoted by Te Mana o te Wai will help the community, including tangata whenua, and regional councils develop tailored responses to freshwater management that work within their region."

But it is in Section D that Māori roles and interests are specifically framed:

> "Objective D1: To provide for the involvement of iwi and hapū [[431]], and to ensure that tangata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.
> Policy D1: Local authorities shall take reasonable steps to:
> a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region;
> b) work with iwi and hapū to identify tangata whenua values and interests in fresh water and freshwater ecosystems in the region; and

[429] National Water Conservation (Te Waihora / Lake Ellesmere) Amendment Order 2011, 22 August 2011, s.6
[430] STEWART-HARAWIRA (2020: 8)
[431] An iwi, or Māori tribe, is one of the largest kinship groupings and is generally made up of several hapū that are all descended from a common ancestor.

> c) reflect tangata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region".

These provisions highlight the fact that Māori rights, customs and cultural and management interests are increasingly finding expression in legislation and resource management policy, even if the way they are interpreted varies between local authorities.

The 2020 version has a more peremptory tone regarding the involvement of local Māori authorities in the management of freshwater resources. Indeed, Section 3.4 "Tangata Whenua Involvement" states in Article 1 that: "*Every local authority must actively involve tangata whenua* (to the extent they wish to be involved) in freshwater management (including decision-making processes)". (emphasis added)

Outside of the Resource Management Act, a series of Treaty Agreements have provided for cultural compensation for Māori in relation to water with regard to access, governance and management of water bodies. These Settlement Acts have as their main objective the full recognition by the Crown of the treasure status of water, as promised in the Treaty of Waitangi, and the related customary rights of the Māori, while also giving recognition to other stakeholders. Another key objective is to establish effective co-management approaches to protect and restore the well-being of water bodies and to frame these goals and aspirations within Māori knowledge, values and tikanga or customs[432].

The first major river settlement dates back to 2009 and concerns the Waikato River, one of New Zealand's longest rivers, which, besides being one of Auckland's main drinking water suppliers, also flows within the traditional territories of several indigenous tribes that have special relationships with it (notably Waikato-Tainui and Rukawa Iwi)[433]. With the Waikato-Tainui Raupatu (Waikato River) Settlement Act of 2010, it was recognised as a living ancestor with its own life force[434], albeit without the conferral of a legal personality.

The preamble to the Act recognises the Te Mana Whakahaere, the authority that Waikato-Tainui and other river tribes have established over many generations to exercise control, access and management of the Waikato River and its resources in accordance with tikanga values, ethics and standards of conduct.

The most ground-breaking decision on river management came in 2017 with the Te Awa Tupua Act, which enshrined the decision to grant personhood rights to the Whanganui River. This river has been the focus of conflict between indigenous peoples and the Crown for decades. Initially, indigenous concerns and claims concerned access rights for food harvesting, sacred sites and navigation, but later, from the 1950s, they also protested against the impacts of

[432] STEWART-HARAWIRA (2020: 9)
[433] MACPHERSON (2019: 112)
[434] Waikato-Tainui Raupatu (Waikato River) Settlement Act 2010, s1, 1.1

tourism, resource extraction and environmental degradation. Agreement was only reached in 2017 with the Whanganui River Claims Settlement Act 2017 (Te Awa Tupua Act), which established a regime for the management of the river. Section 12 of the Te Awa Tupua Act recognises the Whanganui River as "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements"[435].

The law therefore gives a legal personality, with recognised rights and values, to the entire Whanganui River[436]. Since the river needs human representation to enforce its rights, the parties agreed to establish the office of Te Pou Tupua and to appoint two guardians (Pou), one from the Crown and the other from the river's iwi[437], who will act on behalf of the river and protect its status and health according to the directions of Subpart 3 of the Act.

Section 41(1) gives Te Awa Tupua freehold title to the parts of the Whanganui Riverbed owned by the Crown.

However, section 46 makes it clear that this assignment does not involve the creation or transfer of a proprietary interest in the waters of the river[438] or in wildlife, fish, aquatic life, algae or plants (except in relation to plants attached to the Whanganui Riverbed)[439]. Further, this assignment does not relate to:

> "46(2): (a) existing public use of, and access to and across, the Whanganui River, including navigation rights; and
> (b) existing private property rights, including customary rights and title; and
> (c) the existing rights of State-owned enterprises and mixed ownership model companies; and
> (d) existing resource consents and other existing statutory authorisations; and
> (e) fishing rights recognised under (i) the Conservation Act 1987; (ii) the Fisheries Act 1996; (iii) the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; and
> (f) the existing ownership of, and consents for, lawful structures in or on any part of the Whanganui River, and any existing lawful rights to use, access, occupy, maintain, remove, repair, or demolish those structures; and
> (g) the statutory functions, powers, and duties of the relevant local authorities, except as otherwise provided in this Act; […]".

Such specifications aimed at preserving and protecting the property rights of pre-existing third parties obviously interfere with Te Pou Tupua's role as

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[435] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ), 20 March 2017, s. 12.
[436] Ibid. s. 14(1)
[437] Ibid. s. 10(c), 14(2): "The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of, and in the name of, Te Awa Tupua, in the manner provided for in this Part and in Ruruku Whakatupua—Te Mana o Te Awa Tupua".
[438] Ibid. s. 46(1)
[439] Ibid. s. 46(2)

custodian of the river, limiting his rights, including the right to consent to the use of water from the river or its tributaries. Despite these limitations, however, it can be argued that the recognition of deep spiritual and ontological relationships and values in the Te Awa Tupua law and the attribution of personhood rights to the Whanganui River represent a critical shift in the understanding of the profound relationship between humans and freshwater ecosystems. Therefore, the recognition of the Whanganui River as a legal person by the Crown was the catalyst for two important initiatives: on the one hand the value of freshwater and the need to restore and protect it, and on the other the important role of Māori knowledge, values and tikanga in this regard.

In conclusion, in the context of water resource management in New Zealand, the rights of Māori to actively participate in such management based on their spiritual and cultural values are recognised both in national legislation, the RMA, and in more recent treaty legislation, such as the Waikato River Settlement Act 2010 and the Whanganui River Claims Settlement Act 2017 (Te Awa Tupua Act).

Concluding Remarks

In order to guarantee the right to water in all its forms such as fishing, hunting, physical and spiritual sustenance, it is necessary to ensure the right to a healthy environment and therefore to uncontaminated aquatic resources. Indigenous peoples besides securing this right, seek to participate in the management, custody and protection of the environment and its resources on the basis of their customary traditions, practices, knowledge, and customs. They consider themselves interconnected with water and the environment and this relational value is the basis of their strong stewardship ethic. At the international level, the DRIP, ILO Convention no. 169 and other human rights instruments, recognise the right to participation in the management of resources, further instruments require consultation with these populations at the planning stage and sometimes even FPIC; finally, international instruments designed to protect the aquatic ecosystem from sources of pollution also require working with indigenous and local populations to promote, preserve and maintain their local knowledge and traditional systems.

From the analysis made of the jurisdictions presented here, it has emerged that, with obvious differences between one country and another on the level of protection and legal guarantee provided to the right of participation in decision-making and planning processes, this right is almost integrated into national instruments concerning the management of natural resources. While this is true,

it is not always the case that such participation and consultation can result in a right of veto.

The countries where such protection is most widely provided and there is significant recognition of the role of indigenous peoples in management structures are Canada and the United States. In Canada, the Land Claims and Self-Government Agreements grant tribes broad governance powers in their internal affairs, for example, the Nunavut Agreement gives the Inuit legislative powers (albeit restrictable by the federal government) and establishes a co-managed body to protect the environment in the Nunavut Settlement Area.

In the United States, the federal water quality protection statute, the Clean Water Act, grants extensive powers to Tribes recognised as TAS, including the authority to set minimum water quality standards and to regulate sources of pollution on and off reservations. In Colombia, the right to participation in the management of resources is constitutionally guaranteed, but there are no priority provisions for indigenous people in water laws. Despite this, however, following the 2016 Constitutional Court decision in Tierra Digna, the existence of indigenous "biocultural rights" was recognised. This formulation is a revolutionary step and implies the need for public policies to recognise the interrelationship between culture and nature and extend the participation of ethnic communities in the definition of future regulatory frameworks.

In New Zealand, it is possible to negotiate co-management agreements, as in the case of the Waikato River Agreement negotiated in 2010, or to protect valuable sites through water conservation orders. The decision to give the Whanganui River the status of a legal entity, approaching the Māori conception of the river as an ancestor and sentient living entity sought to recognise relational values and Māori ontologies. This has partially ameliorated the weak form of recognition afforded by the Resource Management Act, in which decision-makers simply have to have some level of consideration at the planning stage for Māori concerns.

In Australia, Aboriginal people have no decision-making or management powers in the allocation of environmental flows and under the water regulatory regime, the National Water Initiative, the inclusion of their values and interests at the planning stage remains discretionary.

Conclusions

This thesis was structured on two levels. On the one hand, it has analysed the evolution of the international legislation on the protection of indigenous peoples' rights and the protection of freshwater and marine ecosystems, with a focus on the various international norms applicable in the context of the protection of indigenous peoples' right to water, in order to place the research in the broader global context; on the other hand, it has sought to analyse how this set of rights interacts with or is affected by the statutory systems of States. The thesis was organised around four themes of particular interest to contemporary indigenous peoples, namely water ownership, water rights, commercial rights and management rights, and subdivided at the country level. The final objective was to understand the impact of measures taken by international and national institutions to ensure indigenous peoples' access to water and associated resources.

We have seen that, although the most desirable outcome for these populations is to obtain full ownership and title to water, this goal is inconsistent with the national statutes of the common law countries studied, which give governments ultimate ownership of the resource. The situation is different in Chile, where, following the enactment of the Indigenous Law, it is possible to obtain water rights equivalent to property rights.

Beyond this, there is a whole range of interests related to the use of water. From access, fishing, hunting, harvesting and trapping to obtain food for subsistence or trade, to the use of water for spiritual, ceremonial and cultural purposes, such interests are all included in the concept of the right to water for indigenous peoples. Not only that, these interests are also stated in international treaties that aim to protect these peoples, particularly in the UNDRIP, which is not legally binding on States and does not impose legal obligations on governments, but like all human rights instruments, has great moral force.

At the national level, the scenario is rather complex. The sources and content of each right vary from jurisdiction to jurisdiction.

In Canada, the rights of indigenous people are constitutionally protected and derive mainly from treaty rights. In the course of several lawsuits, courts have ruled that the right to water for indigenous peoples is guaranteed for cultural, ceremonial, spiritual and harvesting purposes. More recently, the possibility of harvesting aquatic resources for commercial purposes has also been recognised, on the condition that this practice has been continuous since pre-contact times.

In the United States, there is an equivalent derivation of treaty rights and constitutional protection. Furthermore, since the *Winters* case, it has been established that the reserved treaty rights of Indians prevail over the rights of non-Indians and that they have sovereign rights within their reservations, whereby State laws do not apply. Compared to the other countries examined,

American Indians are the only ones who are framed as "dependent domestic nations" in the constitutional structure, but more recently also in Canada, through the stipulation of Land Claims and Self-Government Agreements, indigenous peoples can exercise broad governing powers in their internal affairs. This places the indigenous peoples of Canada and the United States in a relatively advantageous position compared to the indigenous peoples of the other countries analysed.

Australia is the country least likely to expand the content of indigenous water rights beyond traditional values and forms. In fact, so far it has not granted anything more than customary rights to indigenous title. According to the NTA, the claimant group must prove that it has had an uninterrupted connection since before the European contact with the land or water that confers the right, a demonstration that is often impossible to provide. Moreover, although the legislation provides some protection for the right to water, it can easily and legally be overridden by governments with minimal liability.

The same problem of Aboriginal title recognition also arises in New Zealand, but unlike Australia, it is possible for indigenous New Zealanders to obtain substantial recognition of water rights through modern agreements. However, even in the agreements of the 1990s, the Crown maintained the idea that indigenous claims should focus on the use, cultural and spiritual values of natural resources rather than ownership.

With regard to the right to water management, the situation is markedly different. In all the countries surveyed, it was found that, although there are clear differences between countries in the level of protection and legal guarantees provided to the right to participate in decision-making and planning processes, this right is substantially integrated into national instruments relating to natural resource management, although in most cases it does not imply a right of veto.

Again, the leading countries are Canada and the United States, which respectively through the Land Claims and Self-Government Agreements and the Clean Water Act, which grants broad powers to tribes recognised as TAS, provide significant recognition of the role of indigenous peoples in resource management structures. These include the authority to set minimum water quality standards and to regulate sources of pollution within reservations.

In Colombia, the right to participation in resource management is constitutionally guaranteed, but there are no priority provisions for indigenous peoples in water laws. Recently, however, the existence of indigenous "biocultural rights" has been recognised in the Tierra Digna case, which implies that in the future public policies will have to recognise the interrelation between culture and nature and extend the participation of ethnic communities in the definition of water regulatory frameworks.

In New Zealand, it is possible to enter into co-management agreements or protect valuable sites through water conservation orders. Recently, the

recognition of the Whanganui River as a legal entity has sought to acknowledge the values and relational ontologies of the Māori, qualifying them as its custodians. Finally, in Australia, Aboriginal peoples have no decision-making or management power within the water regulatory regime and the inclusion of their values and interests in the planning stage remains discretionary.

In light of what has been analysed, it appears that to date, although there have been discrete improvements in the protection of the right to water for indigenous peoples in these countries, there is still no model that simultaneously grants indigenous peoples: the authority or jurisdiction to make or influence decisions about water; the autonomy to maintain physical and cultural livelihood systems as they consider desirable in accordance with their laws and customs; that the cultural, environmental and commercial interests they have in water are recognised and provided for by law; and the ownership or possession of an equitable share of water rights, proportional to their territory or population. However, in studying the countries included in this thesis, we have seen glimmers in this direction, suggesting that the situation may evolve positively in the future. This consideration is based on the observation that in all the countries analysed, government forces are paying increasing attention to the issue of the right to water for indigenous peoples, considering it as a matter to be addressed and resolved.

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Acronyms and Abbreviations

CBD: Convention on Biological Diversity
CCS: Convention on the Continental Shelf
CEDAW: Convention on the Elimination of All Forms of Discrimination against Women
CEPI: Comisiòn especial de Pueblos Indigenas
CERD: Convention on the Elimination of All Forms of Racial Discrimination
CEWH: Commonwealth Environmental Water Holder
CFCLR: Convention on Fishing and Conservation of the Living Resources of the High Seas
CHS: Convention on the High Seas
CLA: Clean Water Act
COAG: Council of Australian Governments
CoE: Council of Europe
CONADI: Corporación Nacional de Desarrollo Indigena
CRC: International Convention on the Rights of the Child
CTS: Convention on the Territorial Sea and Contiguous Zone
DCMI: domestic, municipal, commercial and industrial uses
DRIP: Declaration on the Rights of Indigenous Peoples
ECOSOC: United Nations Economic and Social Council
EEZ: Exclusive Economic Zone
EPA: Environmental Protection Agency
FA: Fisheries Act
FERC: Federal Energy Regulatory Commission
FPIC: free, prior, and informed consent
FSA: Foreshore and Seabed Act
HRC: Human Rights Council
IACHR: Inter-American Convention on Human Rights
IACtHR: Inter-American Court of Human Rights
ICCPR: International Covenant on Civil and Political Rights
ICESCR: International Covenant on Economic, Social and Cultural Rights
ILA: International Law Association
ILC: International Law Commission
ILO: International Labour Organisation
IMCO: Intergovernmental Maritime Consultative Organisation
IMO: International Maritime Organisation
KBRA: Klamath Basin Restoration Agreement
KHSA: Klamath Hydroelectic Settlement Agreement

MARPOL: International Convention for the Prevention of Pollution from Ships
MDBA: Murray Darling Basin Authority
MDBP: Murray Darling Basin Plan
MDG: Millennium Development Goal
MLDRIN: Murray Lower Darling Rivers Indigenous Nation
NA: Nunavut Agreement
NMC: Nunavut Marine Council
NSA: Nunavut Settlement Area
NTA: Native Title Act (Cth)
NWI: National Water Initiative
NWMB: Nunavut Wildlife Management Board
OAS: Organisation of American States
OILPOL: International Convention for the Prevention of Pollution of the Sea by Oil
OPSD: Optional Protocol on the Compulsory Settlement of Disputes
PIA: Practicably Irrigable Acreage
QMS: Quota management system
RMA: Resource Management Act
SDG: Sustainable Development Goal
TAS: Tribe as State
UDHR: Universal Declaration of Human Rights
UFA: Umbrella Final Act
WFD: Water Framework Directive
WGIP: Working Group on Indigenous Peoples
WRP: Water resource plan