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The Content and Scope of the Right to Self-Determination When Applied to Indigenous Peoples

6.1 The External Aspect of the Right to Self-Determination

As touched upon in the previous chapter, the right to self-determination has an internal and an external aspect. The latter aspect allows a people to freely determine its political status vis-à-vis other peoples. Sections 2.5.4 and 5.10.2 explain how the right to self-determination has hitherto most concretely, effectively, and visibly been applied in a decolonization context. With regard to territories geographically separated from the colonizing state, the external aspect of the right to self-determination has largely been applied in a manner that entails the aggregate population of a colony to determine whether it should secede and form a state, or, alternatively, seek other political arrangements with it. In the case of already existing states, the external aspect of the right to self-determination has conventionally been understood as a right of the entire population of the state to require that other states recognize its sovereignty, including its territorial integrity.

Clearly, the external aspect of the right to self-determination cannot manifest itself in the described manner when applied to indigenous peoples. Section 5.10.2 articulates how the principle of territorial integrity of states provides that the right to self-determination does not envelope a right of segments of a state to unilaterally secede from it, save in extreme circumstances. The fact that the right to self-determination now applies also to indigenous peoples does not impact on this fundamental principle in international law. Consequently, as a general rule, indigenous peoples must exercise their right to self-determination within existing state borders.

Secession is, however, not the only element embedded in the external aspect of the right to self-determination. A people’s right to freely determine its political status vis-à-vis other peoples also entails a right of the people to represent itself in relation to other peoples. Hence, the external aspect of self-determination awards indigenous peoples a right to represent themselves on the international level, including at the United Nations (UN) and other international institutions. Section 5.7.1 gives a couple of examples as to how this right has been reflected in practice in UN standard setting processes and institutions.
6.2 Generally on the Internal Aspect of the Right to Self-Determination—A Mere Right of Indigenous Individuals to Participate in the Political Life of the State on Equal Footing with Other Citizens?

As seen, the internal aspect of the right to self-determination, as conventionally understood, entails a right of all citizens of the state—regardless of ethnic and cultural background—to participate in the political life of the state on an equal basis. Thus understood, the internal aspect, when applied to indigenous peoples, would imply a right of indigenous individuals to vote and run for election in state democratic processes, without discrimination. Recent developments within the indigenous rights regime, as outlined above, do, however, rule out such a narrow understanding of the internal aspect of the right to self-determination when applied to indigenous peoples.

Chapter 5 describes how, more or less since its inception, the indigenous rights discourse has focused on allowing indigenous peoples to preserve and develop their own distinct societies, to exist side-by-side with the majority society. Indigenous rights aim to advance autonomous functions of indigenous peoples’ societies, rather than to integrate indigenous individuals into the majority society. Chapter 5 further elaborates how international legal sources on indigenous peoples’ right to self-determination reflect this core feature of the indigenous rights regime. These sources envisage that indigenous peoples are to operationalize their right to self-determination through autonomous and self-governing arrangements within states.

For instance, when elaborating on the content and scope of the right to self-determination when applied to indigenous peoples, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) echoes international law’s general approach towards indigenous peoples’ rights. Following UNDRIP Article 3’s general affirmation that indigenous peoples have the right to self-determination, Articles 4 and 5 proceed to articulate how the right should be implemented. Article 4 provides that “[i]ndigenous 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...”. Complementing Article 4, pursuant to Article 5, “[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal... and cultural institutions...”. The provision subsequently proceeds to clarify that indigenous peoples participate in the political... and cultural life of the state’ only to the extent ‘...they so choose...’. Hence it follows explicitly from Articles 4 and 5 that the right to self-determination, when applied to indigenous peoples, is primarily exercised through their own decision-making institutions. Only as a secondary, optional, consideration, do indigenous peoples exercise their right to self-determination through their members’ participation in the political life of the state. As mentioned, this understanding of indigenous peoples’ right to self-determination is backed up by a multitude of other international legal sources.

In summary, indigenous peoples are beneficiaries of an internal aspect of the right to self-determination that goes beyond the conventional understanding of that aspect. Indigenous peoples are entitled to first and foremost exercise the right to self-determination through autonomy and self-government arrangements within the state. The following sections survey how far-reaching this right to autonomy and self-government might be.

6.3 Further on the Internal Aspect of Self-Determination

6.3.1 Introduction

This section aims to survey what is, more precisely, the content and scope of the autonomy and self-government arrangements that indigenous peoples are entitled to under international law, as examined above. This section first responds to claims that when applied to indigenous peoples, the internal aspect of the right to self-determination only embraces elements that are entirely internal to indigenous peoples. The section then proceeds to outline, as far as possible given the limited guidance offered by international legal sources at present, what is the content and scope of this right, when applied in an indigenous context.

6.3.2 Is the scope of the right to self-determination limited to affairs completely internal to an indigenous people?

To establish the more precise content and scope of the internal aspect of self-determination when applied to indigenous peoples is not an entirely easy task at this point. As indicated, international law-makers and legal scholars have, until relatively recently, focused on whether indigenous peoples qualify as legal subjects that are entitled to the right to self-determination. Understandably during the time-period when this issue was subject to debate, far less attention has been paid to the content and scope of the right when applied not to the aggregate population, but to a segment, of the state. Consequently, international legal sources offer limited guidance as to the content and scope of the internal aspect of the right to self-determination, when applied to indigenous peoples.1 Nevertheless, certain conclusions may be drawn.

Although legal sources are scarce, following the adoption of the UNDRIP, there have been certain discussions to as to what is the scope and content of the right to

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1 For a concurring opinion, see Helen Quane, “The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights”, in Stephen Allen and Alexandra Xanthaki (eds.), Reflections on the UN Declaration on the Rights of Indigenous Peoples (Hart
self-determination, when applied to indigenous peoples. In this discussion, some states have suggested that the right has a rather narrow scope. For instance, when the Special Rapporteur on the Rights of Indigenous Peoples gathered information for his report on the situation of the indigenous Sami people, the governments of Finland, Norway, and Sweden suggested that indigenous peoples enjoy a genuine right to self-determination only in affairs entirely internal to them. In other words, the assertion is that when applied to indigenous peoples, the internal aspect of the right to self-determination embraces only such affairs that are of no relevance whatsoever to the majority population or to the state as such. In all matters that are also relevant to society at large, irrespective of whether to a very insignificant degree, indigenous peoples lack genuine decision-making power, these states purported. In such affairs, the argument goes, indigenous peoples' right to self-determination is in fact a mere right to consultation. If consultation leads to no agreement, the position of the state always prevails. This position thus suggests that UNDRIP Article 4's reference to 'internal and local affairs' envelopes only a right to take part in decision-making processes. The assertion is that indigenous peoples never have a right to effectively impact the material outcome of decision-making processes in instances when differences in opinion between the state and the indigenous people cannot be reconciled.

It might prove difficult, however, to substantiate the outlined position on the content and scope of the internal aspect of the right to self-determination, when applied to indigenous peoples. To suggest that the right applies only in cases of no conflict of interest would appear to constitute a contradiction in terms. And to posit that the right to self-determination only amounts to a right to consultation seems to confuse two different rights.

The suggestion that the right to self-determination, when applied to indigenous peoples, is only a genuine right to be self-determining in instances where there are no competing interests whatsoever reduces the applicability of the right to situations where the right lacks any effective meaning. If, for example, there is no conflict of interest, there is simply no situation to regulate. Under such circumstances, the indigenous people will simply organize matters of its own way—irrespective of the right to self-determination or any other right. Therefore, it appears to be a contradiction in terms to claim that a genuine right to self-determination applies only in instances where there is no conflict of interest. A right can—by definition—exist only in a relationship between two or more legal subjects. Consequently, only in situations where there is divergence of opinion between the majority people and the indigenous people can the latter group's right to self-determination come into play. In such instances—and only in such instances—does the right to self-determination offer guidance as to how to settle the conflict. Consequently, to suggest that the right to self-determination applies only in situations where there is no conflict of interest appears to be akin to saying that the right does not exist at all. As Chapter 5 infers, such an understanding of the internal aspect of the right to self-determination must be ruled out.

The second line of the argument, i.e., that the internal aspect of the right to self-determination, when applied to indigenous peoples, is in fact a right to consultation, i.e., only a right to be involved in decision-making processes, but not to determine the outcome of such, can seemingly not be substantiated either. This position appears to contradict the law of treaties as well as reason.

Although there are certain overlaps in their respective contents, at their core the rights to self-determination and consultation differ fundamentally. That indigenous peoples have a right to be consulted in decision-making processes of relevance to them has been well established in international law for decades. The right to consultation is, for instance, a cornerstone of the International Labour Organization (ILO) Convention No 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169). The right to consultation provides that indigenous peoples are allowed to participate in decision-making processes of relevance to them. The right does in no way ensure, however, that indigenous peoples can exercise genuine influence over the material outcome of the decision-making process. Indigenous peoples' right to consultation obliges states to seek, in good faith, indigenous peoples' consent before taking a decision that affects them. In other words, efforts must be made to reach consensus. But if no agreement is reached at the end of the day, the right to consultation is of no use to the indigenous people. The right to consultation always vests ultimate decision-making power with a party other than the indigenous people.

As indicated, the right to self-determination also includes participatory rights elements. As the right to consultation, it requires that indigenous peoples are allowed to be involved in decision-making processes of relevance to them. In that sense, the rights to self-determination and consultation overlap. Notwithstanding, the right to self-determination is, at its core, not a right to participate in decision-making processes. The central element of the right to self-determination is the right to exercise genuine influence over the material outcome of the decision-making process. In other words, while the right to consultation is a right to a process the right to self-determination is, although it also embeds process right elements, first and foremost a material right. In stark contrast to the right to consultation, which offers a process, but no consultation when the process fails, the right to self-determination can materially determine the outcome of a decision-making process in favour of indigenous peoples—also in absence of agreement.

Section 5.10.2 explains how certain states feared that recognition of a right to self-determination of indigenous peoples could spur secession movements and aspirations. It further describes how this fear contributed to certain states being
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This hesitant acceptance that indigenous peoples are indeed beneficiaries of that right. This in turn, was a major factor behind its taking almost a quarter of a century to complete the UNDRIP deliberations. That said, the articulated fundamental difference between the right to consultation, on one hand, and the right to self-determination, on the other, is probably the primary reason why states have only recently acknowledged that the latter right applies to indigenous peoples. This is a more understandable rationale from a legal perspective since, as Section 5.10.2 further explains, the fear of secession is from an international legal point of view unfounded, something that most states, although their rhetoric suggests otherwise, must surely have been aware of. More than with secession, states' hesitance with regard to UNDRIP Article 3 was presumably associated with having to share jurisdiction within the state with indigenous peoples. As the above indicates and the below elaborates, concern over having to share jurisdiction with indigenous peoples makes much more sense from a legal perspective, since this aspect of the right to self-determination when applied to indigenous peoples does reshape the political map of states that host such peoples. This in itself argues against the notion that the right to self-determination enshrined in the UNDRIP amounts to nothing more than a right to consultation. It seems unlikely that states that participated in the UNDRIP negotiations would have found the right to self-determination contentious if it in fact means nothing more than a right that has been well-established in international law for twenty years, is well defined, uncontroversial, and ensures indigenous peoples no influence over the material outcome of decision-making processes. The reasonable conclusion, based on state behaviour, is rather that the content and scope of the right to self-determination enshrined in the UNDRIP goes beyond that of the right to consultation.

That indigenous peoples' right to self-determination cannot be understood as a right to consultation also follows from the law of treaties. Section 4.4 outlines how the law of treaties provides that a provision in an international instrument shall, absent convincing evidence to the contrary, be given a meaning that follows from an ordinary understanding of its wording, in light of the instrument as a whole. As mentioned, pursuant to common Article 1 of the Covenant on Civil and Political Rights (CCPR) and Economic, Social and Cultural Rights (CESCR), respectively, and UNDRIP Article 3 '[a]ll [i]ndigenous peoples have the right to self-determination'. A reasonable interpretation of this language can hardly result in a conclusion that the provisions set forth a right to consultation. The same is true for the wording '[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government... ' in UNDRIP Article 4. Had the intention been to reaffirm the already existing right to consultation, language to that effect would presumably have been opted for in UNDRIP Articles 3 and 4. The ordinary understanding of UNDRIP Article 3, in particular if read in light of Articles 4 and 5, is clear. No evidence supports an interpretation other than that which follows from a normal understanding of the provisions' wording, understood in light of the Declaration as a whole; i.e. that indigenous peoples are entitled to a genuine right to self-determination, to be exercised through autonomy and self-government arrangements within existing state borders.

As indicated, the conclusion that the internal aspect of the right to self-determination, when applied to indigenous peoples, is a right that should be exercised primarily through autonomy and self-government arrangements also finds support in other legal sources as well as the legal doctrine. Recall how James Anaya underscores that self-governance is the key feature of indigenous peoples' right to self-determination, and that this right should be implemented through their own political institutions within existing states. Recall further Will Kymlicka's submission that a right to self-determination of indigenous peoples fundamentally reshapes the understanding of state sovereignty, since autonomy and self-government arrangements of indigenous peoples do include genuine transfer of power, or jurisdiction if one wants, from state institutions to indigenous peoples' decision-making bodies. As explained above, a 'right to self-determination' that is understood to amount to nothing more than a right to be consulted would not transfer any power.

In sum, the suggestion that the internal aspect of the right to self-determination, when applied to indigenous peoples, is only a genuine right to self-determination in affairs without any relevance to the majority people and/or the state, appears to be difficult to substantiate. Neither can one convincingly argue that the right

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6 This conclusion finds further support in the safeguard clause in UNDRIP Article 46.1. If UNDRIP Article 3 were to be understood to proclaim a right to consultation, there would be no need to even discuss a provision that calls for respect for the principle of territorial integrity of states, since there is no link between this principle and the right to consultation.


amounts to a mere right to consultation. Rather, also when applied to indigenous peoples, the right to self-determination must be understood as a genuine material right in instances where an indigenous people's interest conflict with those of society at large. It cannot be a mere right to a process. In other words, the core element of the internal aspect of the right to self-determination is not a right to participate in decision-making processes, but to effectively determine the material outcome of such. That said, the right is obviously not absolute either. When applied to indigenous peoples, the right to self-determination must be accustomed to the fact that it applies to segments, and not to entire populations, of states. Indigenous peoples' right to self-determination must be reconciled with the right to self-determination that applies to peoples in the meaning aggregate populations of states.

This seems to lead to the conclusion that in instances when good faith consultations between states and indigenous peoples fail to produce consensus, the right to self-determination provides that the position of the indigenous people prevails over that of the majority people/the state in certain, but far from all, instances. This conclusion also reflects the general understanding of autonomy in the legal doctrine. For instance, Hurst Hannum and Richard Lillich posit that autonomy amounts to 'independence of action on the internal or domestic level'. But autonomy need not mean unlimited jurisdiction. There is room for cooperative arrangements between the central government of the state and the autonomous people on issues of joint interest. 9 Still, it is inherent in the concept of autonomy that the autonomous people enjoy considerable decision-making powers, albeit within the framework of the state. 10 In affairs concerning both the indigenous people and the majority people, international law calls for shared jurisdiction between the two peoples. 11

What remains then to survey is what this general feature of the internal aspect of the right to self-determination implies for the more precise scope and content of the right, when applied to indigenous peoples.

6.3.3 A proposed principle for establishing the content and scope of the internal aspect of the right to self-determination when applied to indigenous peoples—the sliding scale

The above establishes that indigenous peoples shall first and foremost exercise the internal aspect of the right to self-determination through autonomy and self-government arrangements within existing state borders. In contrast to the right to consultation, which is a right to a process only, the right to self-determination is primarily a material right. It is a right that allows indigenous peoples to exercise genuine influence over the material outcome of decision-making processes. This is far from saying, however, that in all instances where an indigenous people and a majority people disagree, the will of the indigenous people prevail. Rather, indigenous peoples must exercise the right to self-determination with respect for, and their will must therefore occasionally yield to, the right to self-determination enjoyed by peoples in the meaning aggregate populations of states.

This is essentially the guidance existing international legal sources provide us with as to the content and scope of the internal aspect of the right to self-determination, when applied to indigenous peoples. As mentioned, until relatively recently, the indigenous rights discourse focused on whether indigenous peoples are at all beneficiaries of the right to self-determination. Only now have discussions on what is implied in this right commenced in earnest. As a consequence, at present international legal sources that address the more precise scope and content of the internal aspect of the right to self-determination when applied to indigenous peoples are scarce, in fact almost non-existing. Notwithstanding, perhaps the formula suggested below can be argued for.

Arguably, it may make sense to think in terms of a 'sliding scale' when considering whose will should prevail in instances of insoluble differences in opinion between an indigenous people and the majority people/the state. As a strong candidate for a criterion to settle such conflicts one could put forward the relative importance of the issue to the respective people. It perhaps make sense to posit that the more important the issue to the indigenous people's culture, society, and way of life, the greater influence the people should be allowed to exercise over the decision-making process. Conversely, if the matter is of little significance to the indigenous people, but important to the welfare of society at large, indigenous peoples' right to self-determination may only award the indigenous people with limited influence over the decision-making process. Obviously, there are also matters in between. 12 The proposed formula can be illustrated with a few examples.

Decisions on school curricula for their children are normally of significant importance to indigenous peoples. In order for indigenous societies to survive and develop, it is crucial that the children are educated in an environment accustomed to their particular culture. Indigenous peoples themselves are in the best position to take informed decisions as to how school curricula should be designed to suit the cultural background of their children. Conversely, the majority population and the state should have a limited interest in overruling indigenous peoples' aspirations in this regard (lest the state is engaged in nationalist practices). True, states will normally want to ensure that indigenous children acquire a basic knowledge in fundamental subjects such as math, the majority language, and natural and social sciences. But beyond that, states should reasonably have no legitimate issue with indigenous children's school curricula being accustomed to their cultural background. Consequently, perhaps one can make a strong argument for—in cases of conflict between the will of an indigenous people and the state on school curricula
for children that belong to the indigenous group—that the will of the indigenous people should be allowed to prevail.

At the opposite end of the sliding scale, one may find decisions on issues with little or even marginal impact on indigenous peoples' traditional societies, even if such matters might be of relevance to certain indigenous individuals. It is difficult to argue that indigenous peoples' right to self-determination should award them a decisive say in such affairs. For instance, unemployment should normally have no greater impact on indigenous persons compared to persons belonging to the majority population. Therefore, measures to combat unemployment are presumably best designed by decision-making bodies representing the entire population of the state.

In between the two polar examples, but probably closer to the employment policy example, one can probably place decisions pertaining to formulation of healthcare services. It makes sense that the state has the right to decide on the general design of such services. At the same time, it is important, both out of respect for the cultural identity of the individual, and for adequate health care being provided to her or him, that the cultural and genetic background of indigenous patients be taken into consideration. Against this background, one may argue that this motivates that indigenous peoples are provided with the opportunity to determine over measures to be taken that aim to ensure that culturally (and genetically) appropriate health care is provided to members of their respective groups.

Finally, it is pertinent to add a few words on how the envisioned sliding scale could possibly materialize itself in the context of the resource dimension, which is a core element of the right to self-determination, not just for indigenous peoples. Here, it makes sense to distinguish between lands and natural resources traditionally used by indigenous peoples, on the one hand, and natural resources situated on, or perhaps more often under, indigenous peoples' territories, but which the people in question have not used historically, on the other.

With regard to the former category of lands and resources, if accepting the sliding scale argument, indigenous peoples' decision-making power must reasonably be relatively extensive. As emphasized throughout this book, from the very outset the indigenous rights discourse has recognized that indigenous peoples' societies, cultures, and ways of life are intrinsically rooted in lands and natural resources traditionally used. Traditional livelihoods and other culturally-based land uses constitute the basis of indigenous societies and cultures, without which they cannot exist. The above implies that even when applied to indigenous peoples, the right to self-determination is a genuine material right. This leads to the conclusion that in some (but far from all) instances, an indigenous people's position must be allowed to prevail in case of an insoluble conflict of interest with the majority population/the state. The above further suggests that this right is presumably most far-reaching in matters of fundamental importance to indigenous peoples. To the extent that these conclusions are correct, as a general rule, indigenous peoples should reasonably have far-reaching decision-making power in matters that impact on their traditional lands, livelihoods and other forms of culturally-based land uses. This conclusion finds support in UNDRIP Article 32.2, which provides that

's]hail... obtain [indigenous peoples'] free and informed consent prior to the approval of any project affecting their lands and territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The relevance of the argument above is not limited to decisions with a direct impact on indigenous peoples' territories and/or livelihoods. Again, if accepting the sliding scale argument, indigenous peoples must in addition reasonably be allowed to exercise considerable influence over decisions that are not explicitly directed at their lands, natural resources, or livelihoods, but that nonetheless have the capacity to result in negative impacts on such lands and livelihoods. One example of such decisions might be policies for resource extraction in indigenous territories that compete with, and often negatively impact on, indigenous peoples' traditional land uses.

As to natural resources situated on or under territories traditionally used by indigenous peoples, but which have not been used by them historically, indigenous peoples reasonably possess less decision-making power. As these resources do not form part of, and hence are not of vital importance to, indigenous peoples' societies and cultures, it is difficult to argue that indigenous peoples should have a decisive say over such resources. It makes more sense that such natural resources are, at least as a starting point, managed by institutions that represent the entire population of the state. That is particularly so in instances when the natural resource is of great interest to the welfare of society at large, which is often the case with regard to resources such as oil, gas, and minerals. That said, these resources have not conventionally formed part of the majority population's society either. And they are situated on or under the indigenous, and not the majority, people's traditional territory. The argument can therefore be made that indigenous peoples should be entitled to some form of co-management role with regard to non-traditional natural resources, as well as to a share in the proceeds the extraction of such resources generates. Moreover, to the extent such resource extraction negatively impacts on indigenous peoples' traditional livelihoods, and other culturally-based land uses, their right to influence the decision-making process should increase substantially in line with what the above outlines.

Having thus articulated the 'sliding scale argument', it bears repeating that this is only a proposal by the author. As mentioned, at present few international legal sources exist that offer support for any conclusions as to the more precise scope and content of the right to self-determination when applied to indigenous peoples. At this point, the only conclusion one can draw for sure is that this is a right to be exercised, though autonomy and self-government arrangements within existing states that goes beyond a mere right to be consulted. The internal aspect of indigenous peoples' right to self-determination awards them with a right to exercise genuine influence over the material outcome of decision-making processes of relevance to them, sometimes at the expense of the will of the majority people and the state.\footnote{Some might argue that UNDRIP Articles 46.2 and 46.3 suggest a more restrictive understanding of the scope and content of indigenous peoples' right to self-determination than the one that has been presented here. However, to UNDRIP Article 46.2 in implementing the Declaration, "human
6.3.4 Territorial and cultural autonomy

Chapter 5 describes how an intrinsic link to a fairly identifiable traditional territory is the characteristic that most clearly distinguishes indigenous peoples from minority groups. The more precise design of the various indigenous peoples’ autonomy and self-government arrangements will necessarily differ somewhat, depending on regional and national, cultural, geographical, and legal contexts. Still, given that all indigenous peoples—by definition—maintain an intrinsic connection to their traditional territories, their autonomy arrangements will always have a territorial base.

At the same time, relevant international legal sources suggest that indigenous peoples’ autonomy and self-government arrangements need not be purely territorial. Rather, indigenous peoples’ right to self-determination must presumably also often encompass an element of cultural (non-territorial) autonomy, i.e., an autonomy that applies to all members of the people, irrespective of their physical residence. This element of indigenous peoples’ autonomy and self-government arrangements thus applies beyond the borders of their traditional territory. A right of an indigenous people to decide over or at least influence the school curricula also with regard to children that belong to the people, but that reside outside the peoples’ traditional territory, can be mentioned as one example of the exercise of cultural autonomy.

rights of... all should be respected, and the rights the UNDRIP seeks for may be subject to limitations that are non-discriminatory and strictly necessary... for the purpose of securing due... respect for the rights of others... and for meeting the just and most compelling requirements of a democratic society. UNDRIP Article 46.1, on its part, proclaims that UNDRIP shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith. Hence, pursuant to UNDRIP Article 46.2, the right to self-determination must only be limited for the purposes of (i) securing rights of others, and (ii) meeting compelling needs for society at large. As to the first qualifier, recognition of a right to self-determination of indigenous peoples does not presuppose negation of rights on others. Thus, the exercise of this right may to some extent impose limits on human rights of individuals, including of individual members of the indigenous peoples, as Section 5.11 explains. However, as Section 5.11 further states, international law has accepted that individual and collective rights must sometimes be weighed against one another. Thus, the outlined understanding of the right to self-determination does not violate rights of individuals. Neither does it fall to respect compelling needs of society as a whole. As seen, indigenous peoples’ right to self-determination must be balanced against the right to self-determination of peoples in the meaningful aggregate populations of states. As to UNDRIP Article 46.3, the described content and scope of the right to self-determination must all the criteria listed in this provision. True, one can discuss how a right to self-determination of indigenous peoples conforms to the criteria of democracy, equality, and non-discrimination, as those concepts were understood under the Westphalian international legal system. But when international law has evolved to recognize that there can exist more than one polity within a state, the right to self-determination actually advances, rather than threatens, democratic governance. Similarly, in an international legal system that does not equate equality with conformity, a right to self-determination of indigenous peoples promotes equality as well. Regarding the evolved understanding of equality, see Chapter 7.

14 See Marc Weller, Towards a General Comment on Self-Determination and Autonomy: Working Paper Submitted to the Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities, UN Document E/CN.4/Sub.2/AC/2005/NHP 5-7. Weller distinguishes between cultural (non-territorial) and territorial autonomy, where cultural autonomy awards the autonomous people the right to foster the preservation and further development of its cultural identity. Territorial autonomy, on the other hand, as the title suggests, refers to autonomy within a distinct territorial area within the state. 15 See Section 6.4.1

6.4 On the Definition of ‘Indigenous Peoples’

International law does not formally define ‘indigenous peoples’. In one sense, this is only natural, since indigenous peoples have only recently emerged as international legal subjects. When indigenous peoples could not hold rights under international law there was, from a legal perspective, less of a need to define what groups qualify as such peoples (although already at that time indigenous individuals of course derived their individual rights from membership of the group). The situation changes when international law embraces indigenous peoples as legal subjects. Then it is necessary to define what groups can claim rights as indigenous peoples. One can therefore perhaps expect a formal legal definition of indigenous peoples to emerge relatively soon, despite the practical difficulties associated with such an endavour. If states are to recognize, concretize, and realize indigenous peoples’ rights, including the right to self-determination, reasonably they need a clear understanding of what groups are beneficiaries of such rights.

When articulating a formal definition of ‘indigenous peoples’, one need not look far for guidance. As indicated, although no formal definition exists, there is a general understanding of what groups constitute indigenous peoples for international legal purposes. In line with this general understanding, various working-definitions collaborate to paint a relatively clear picture of what groups qualify as indigenous peoples. The working definitions differ in their details, but are coherent in their core elements. The surely most relied upon working-definition is also the original...
of what populations qualify as indigenous peoples. As touched upon, of the elements that define indigenous peoples, the presence of a distinct society that exists parallel to the majority society and an intrinsic connection to a fairly definable territory are clearly at the core. As Sections 5.3 and 5.4 points to, these are also the elements that distinguish indigenous peoples from minority groups.  

A final observation in context of the definition of indigenous peoples may be pertinent. Irrespective of that, as the above has addressed thoroughly, with the exception of indigenous peoples, international law at present only recognizes peoples in the meaning aggregate populations of states (or territories), some attempts have been made to define non-state forming peoples' more generally. Rather naturally, these working definitions do not deviate significantly from those of indigenous peoples. Of the working definitions of 'peoples' understood in terms of common ethnicity/culture, the 'Kirby-definition' is probably the best known.  

The similarity between the working definitions of 'peoples' and 'indigenous peoples' underlines both indigenous peoples' legal status under international law and their distinction from minorities.

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16 See Section 5.3.
17 UN Doc E/CN.4/Sub.2/1986/7 and Add 1–4 379–82.
21 International law does not define minorities either. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities suggested that minorities should be defined as ' [...] group of citizens of a State, constituting a numerical minority and in non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another...'. See UN Doc E/CN.4/Sub.2/1985/31 & Corr 1 (1985). The definition was never adopted, but nonetheless underscores the difference between minority groups and indigenous peoples.
7

The Right to Equality

7.1 Introduction

The previous part demonstrates how indigenous peoples having been recognized as peoples for international legal purposes can be described as nothing less than a paradigm shift in international law. Having examined the international legal status of indigenous peoples and the principal peoples’ right, that of self-determination, this book now turns its attention to a second paradigm shift within the indigenous rights discourse. This chapter surveys how the right to equality has evolved to take on a second facet. This development is of critical importance for the present purposes for three reasons. First, it confirms the development in international law towards recognition of group rights, as presented in Chapter 5. Second, it forms the basis for essentially all human rights that indigenous individuals possess. Third, and arguably most significantly, the expanded understanding of equality underpins recent developments towards recognition of indigenous communities’ property right over lands and natural resources traditionally used (see our further in Chapters 8 and 9).

7.2 The Right to Equality in International Legal Instruments

The right to equality is one of the most central rights in the contemporary human rights system. It was ‘incorporated’ into contemporary international law already through its inclusion in the Universal Declaration on Human Rights (UDHR). UDHR Article 2 proclaims that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race…” Further, pursuant to Article 7, “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.” A number of subsequently adopted human rights treaties also incorporate the right to equality, including the International Covenant on Civil and Political Rights (CCPR) (Articles 2.2 and 26) and the International Covenant on Economic, Social and Cultural Rights (CESCR) (Article 2.2).

In addition, an entire human rights treaty—the Convention on the Elimination of Racial Discrimination (CERD Convention)—is devoted to the right to equality, thereby underscoring the centrality of the right. Pursuant to CERD Article 1.1 “…the term “racial discrimination” shall mean any distinction, exclusion, restriction or
7.3 The Conventional Understanding of the Right to Non-Discrimination—The Requirement that Equal Cases Be Treated Equally

In line with the individual liberal tradition, as conventionally understood, the right to equality is geared towards individuals only. At the time when the right was incorporated into the human rights system, 'special' rights for particular segments of society were perceived as inherently discriminatory. International law of the era obligated states to disregard the fact that its population was not culturally and/or ethnically homogenous when designing their laws and policies. It was sufficient, indeed expected, that the state provided one educational system, one set of healthcare service etc. The only requirement placed on states by the right to equality, as understood at the time, was that all citizens, irrespective of ethnic and cultural background, had equal access to such services. In short, the right to non-discrimination required, and only required, that equal cases be treated equally. This understanding of equality can be illustrated with the following example. It is equality if all children in a country—regardless of their cultural and/or ethnic background—have the same right to access an educational system that provides education in and on the majority language and that is also otherwise accustomed to the majority culture.

True, the CERD Convention incorporates a couple of provisions that may be understood to suggest that already the drafters of the Convention envisaged special measures aiming at protecting and promoting minority cultures. Pursuant to Article 2.1(a), states must not engage in actions that discriminate racial groups. Further, Article 2.2 proclaims that states shall, when circumstances so warrant, take special measures to ensure the protection not only of individuals belonging to a minority group, but also of the racial group as such. At first glance, these provisions may give the impression that the CERD Convention prohibits discrimination not only of individuals, but also of groups. However, Article 2.2 proceeds to underline that special measures must not result in maintenance of separate rights of the group. In the same vein, pursuant to Article 1.4, special measures taken must not result in lasting group rights. Thus, at the time of its adoption, the CERD Convention did not extend any protection to minority cultures. Indeed, the Convention explicitly prohibited the use of special measures to protect and promote the cultural distinctiveness of members of minority groups. At the time, the CERD Convention only allowed special measures that aimed at bringing members of minority cultures up to the same level as the majority population. In other words, the special measures that the drafters of the CERD Convention foresaw should have the purpose of integrating members of minority groups into the majority society. Measures that aspired to preserve such individuals' cultural distinctiveness were not allowed and neither were, obviously, measures aiming at protecting the group as such. As former member of the UN Committee on the Elimination of Racial Discrimination (CERD Committee) Patrick Thornberry observes, at the time of its adoption, the CERD Convention was 'dedicated to eliminating discrimination [as conventionally understood] rather than positively recognizing diversity.' Similarly, Timo Makinen notes that the CERD Convention was a child of its time. For instance, it does not enforce any explicit references to cultural rights, and did not foresee any such rights with a collective or even culturalized nature. This fact is underscored by the wording of CERD Convention, Article 2. The provision only speaks of state's obligations vis-à-vis groups, thereby deliberately avoiding any reference to rights of the latter. Moreover, the core material provision of the CERD Convention, Article 5, only speaks of 'everyone's' right to non-discrimination, indicating its intended applicability to individuals only.

The outlined conventional understanding of the right to equality corresponds well to the traditional interpretation of the right to culture as enshrined in CCPR Article 27. At the time of the adoption of the CERD Convention and the International Convention on Civil and Political Rights (CCPR), both rights were perceived to benefit individuals only, and further expected states to remain neutral between cultures and abstrain from positively promoting cultural diversity. As seen, the wording of CCPR Article 27 suggest that the provision only sets forth a negative right, calling on states not to interfere with individuals' cultural practices. Similarly, under the CERD Convention, only such special measures were accepted that aimed to bring members of minority groups up to the same level of development as the majority population, thereby integrating the minority culture into the majority culture. No measures aspiring to support minority cultures' efforts to continuously...
thrive and develop were envisaged. 5 Indeed, at the time, such measures were deemed inherently discriminatory.

7.4 The Contemporary Understanding of the Right to Equality—Different Cases Be Treated Differently

As understood at the time of their adoption, the right to equality enshrined in the CERD Convention, CCPR, and CESC was clearly of limited relevance to indigenous peoples. But as Section 4.4 explains, understandings of treaties need not be static. In particular, human rights treaties have a capacity to evolve to take on new understandings. Indeed, such treaties are expected to respond to new conceptions of justice. Further, Chapter 5 outlines how, subsequent to the adoption of the CERD Convention, international law came to embrace a minority rights system that calls on states to actively promote and protect the cultural identity of members of minority groups. In addition, we saw how this protection of the cultural identity of individuals also extended an, albeit indirect, protection to the cultural identity of the group as such. This development occurred particularly through the UN Human Rights Committee’s (HRC) application of CCPR Article 27 to indigenous peoples. During roughly the same time period, the understanding of the right to equality came to evolve in a corresponding manner.

In tandem with its progressive interpretation of the right to culture as enshrined in CCPR Article 27, the HRC contributed to an evolved understanding of the equality provisions in the Convention as well. In 2004, the Committee opined that CCPR Article 26 embraces a positive duty on states to prevent discrimination. 6 The HRC has subsequently applied and elaborated on this understanding of equality, thereby confirming that CCPR Article 26 embraces states to take relatively serious positive measures to prevent discrimination. 7 The HRC has since repeatedly held that the right to equality need not mean identical treatment of persons with different cultural backgrounds in every instance. The Committee has stressed that differential treatment does not amount to discrimination as long as the criteria for differentiation are reasonable and objective. 8 In other words, the HRC has not gone as far as to call for differential treatment. It has, however, legitimised such action. In a similar vein, the UN Committee on Economic, Social and Cultural Rights (CESCR) has inferred that combating discrimination requires paying sufficient attention to systemic discrimination of groups of individuals which suffer from historic and persistent discrimination. Further, according to CESCR, pursuant to CESC Article 2.2, states are obligated to take special measures to halt such forms of discrimination when warranted. 9

In a manner corresponding to the practices of its sister treaty bodies, the CERD Committee has progressively interpreted the right to equality set forth in the CERD Convention. The Committee has underlined that the Convention is a living instrument that must be interpreted in light of evolved understandings of justice. 10 The way in which the CERD Committee has gradually developed its understanding of equality, as articulated below, should be understood against the backdrop of this general principle.

As an initial step, the CERD Committee—also observed that differential treatment need not amount to discrimination provided that the criteria for differentiation are legitimate. 11 The Committee then inferred that the CERD Convention Article 2.2 embraces an obligation on states to take affirmative action to prevent discrimination of members of vulnerable groups when the circumstances so warrant. 12 In General Recommendation No 20, the CERD Committee then proceeded by clarifying that states are positively obliged to intervene and prevent discrimination caused by private entities. 13 Finally, in 2009 the CERD Committee summarized its previous findings, and reaffirmed that the CERD Convention includes a positive obligation on states to take special measures to ensure equality not only in law, but also in practice.

More importantly for the present purposes, however, in General Recommendation No 32, the CERD Committee firmly and repeatedly underscores that it is of critical importance to draw a clear distinction between temporary special measures targeting vulnerable groups that do not result in permanent rights, on the one hand, and permanent rights of among others indigenous peoples and individuals to maintain and develop their distinct cultural identities, on the other. The CERD Committee further reiterates that "[t]o treat in an equal manner persons or groups whose situation are objectively different will constitute discrimination in effect and further that '[t]he Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.' 14 In other words, the CERD Committee takes the position that rights of groups such as indigenous peoples and their members are embedded in the CERD Convention, and further that under the Convention, states have a positive duty to promote among others indigenous peoples and their members in their

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5 Will Kimlicka contests that the right enshrined in CCPR, 27, as understood at the time of its adoption, essentially equalled the conventional understanding of the right to equality. See Kimlicka, Multicultural Odyssey—Navigating the New International Politics of Diversity (Oxford University Press, 2007) 34–35.
8 Communication (Hogan v Australia), Comm No 26/2002, UN Doc. A/58/18, Annex III, Sec. A, 7.2.
10 See e.g. Concluding Observations on Uruguay, CERD/C/URU/CO/3, 15.
11 See also Mahkannov, Equal to Less Equal, in Equal or Less Equal, P 20.03.120.
13 See General Comment No 20: Non-Discriminatory Implementation of Rights and Freedoms (Art. 5) 15/03/96.
efforts to maintain their cultural distinctiveness. Clearly, such a positive duty on states to respect and promote the cultural identity not only of indigenous individuals but also of indigenous peoples is a quite different duty, compared with the special measures envisioned at the time of the adoption of the Convention. As articulated above, the latter measures had the opposite intention. They aimed at integrating indigenous individuals into the majority society, thus also resulting in the destruction of the group as such. In stark contrast to this position, the Committee now seemingly hold the position that the right to equality calls on states to take positive measures that actually protect and promote indigenous individuals—as well as indigenous peoples—permanent right to preserve their cultural identities.

On a regional level, the European Court of Human Rights (ECtHR) first noted an emerging international consensus that states are positively obligated to protect the lifestyles and cultural identities of minorities, although on the merits, the Court did not find the norm to be sufficiently clear to find a violation of the right in the particular instance. In the same vein, the European Court of Justice (ECJ) acknowledged that treating instances differently that are significantly different need not amount to discrimination. The ECtHR has subsequently taken an even further step. It has not stopped at the conclusion that different cases differently need not amount to discrimination. Rather, in Tłı̨ch˘ınno, the ECtHR held that the right to non-discrimination does not only entail that equal cases must be treated equally. Rather, according to the Court, in addition different cases shall be treated differently. Having initially noted that "[t]he Court has so far considered the right to non-discrimination... violated when States treat differently persons in analogous situations without providing an objective and reasonable justification" (i.e. the conventional understanding of equality), the ECtHR proceeded and declared that it "...now considers that this is not only the right to non-discrimination. It is also a right not to be discriminated against... and is also violated when States without an objective and reasonable justification fail to respect differently persons whose situations are significantly different." Recent interpretations of the European Social Charter confirm that European law embraces a second face of the right to equality according to which different situations call for differential treatment.16


7.4 The Contemporary Understanding of the Right to Equality

In summary, the ECtHR and other European institutions have proclaimed that the right to non-discrimination no longer merely entails that equal cases be treated equally. European law has come to acknowledge that the right to equality in addition embraces a right of individuals that are significantly different compared with the majority population to be treated differently. This position corresponds to recent developments in the findings of the UN treaty bodies that have been established to authoritatively interpret the right of equality. The HRC and the CESC have not explicitly required that states treat differently those that are culturally different. But these UN expert bodies have affirmed that differential treatment of such individuals whose cultural background is different compared with the majority population is a legitimate aspect of the right to equality, and have encouraged such state action. Moreover, CESC has opined that states must take measures to eliminate systemic discrimination of groups in a manner that recognizes their cultural differences, a position that resembles a call for a positive duty to treat different those that are culturally different. The CERD Committee, the principal UN expert body on the right to equality, has taken a step further. First, it has concurred with the ECtHR when proclaiming that a correct understanding of the right to equality requires states to respect cultural differences, and to treat those differently that have a different cultural background compared with the majority population. Second, the CERD Committee has taken the position that the right to equality the CERD Convention entails has a collective dimension, when proclaiming that the right requires that states take the characteristics of groups into account when operationalizing the right.

To infer, international legal sources sing the same hymn when positing that the right to non-discrimination no longer merely entails that equal cases be treated equally, but rather in addition calls for differential treatment of those that are culturally different. This position is in line with the recently emerged new understanding of justice within political theory. More importantly, there is little evidence that it does not have the acceptance of states. In conclusion, one must reasonably infer that the second face of the right to equality that entails that different cases be treated differently has crystallized into a customary international norm. As Hurst Hannum notes, "[a] fundamental state obligation under international human rights norm is to eliminate discrimination, not to destroy all differences." As touched upon, this conclusion finds further support in what has been inferred in Sections 5.4 and 5.5 on the contemporary understanding of the right to culture. Recall how these sections conclude that international customary law now provides that the right to culture requires a state to positively support members of minority cultures' endeavours to maintain and develop their distinct cultural identities and further that the right to culture also extends an, albeit indirect, protection to the


19 Cases 3.6-9.8.
20 In this context, recall how Chapter 4 explains that treaty body jurisprudence continues such subsequent practice that the Vienna Convention on the Law of Treaties prescribes can result in evolved understandings of treaty provisions and that regional human rights courts, such as the ECtHR, can also contribute to such developments.
cultural identity of the group to which the individual belong. In other words, the scope and content of the right to equality as articulated above appears to—for all practical purposes—essentially match a contemporary understanding of the 'collectivized' right to culture. These common features of the rights to culture and equality, respectively, entail that the conclusions drawn in Sections 5.4 and 5.5 find support in the above and vice versa.

The second facet of the right to equality is, as touched upon in the introductory Section 7.1, highly relevant to the indigenous (and minority) rights discourse. If returning to the language example above, on the individual level the second facet of the right to non-discrimination implies that it is no longer equality if all children in a country—regardless of cultural and/or ethnic background—have the same right to education in and on the majority language. Today, it is equality if children belonging to minority cultures have the same opportunity to access education in and on their own mother tongue, as children belonging to the majority population do. The right to equality further requires that education is also otherwise accustomed to the cultural background of children belonging to indigenous (and minority) cultures.

7.5 A Formal Collective Right of Indigenous Peoples to Equality?

The section above explains how the CERD Committee in General Recommendation No 32 observe[s] that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.' Some might want to interpret this statement as the CERD Committee acknowledging a right to equality that not only indirectly, but formally, extends protection to minority groups as such. This is, however, probably to stretch the position the CERD Committee has taken on the applicability of the right to equality too far.

First, the CERD Committee does not talk about a right of minority groups to equality. It 'merely' underlines that states shall take the characteristics of such groups into account in an equality context. In addition, the Committee does so through referring to the 'principle', and not the 'right', to non-discrimination. Presumably, this is a conscious choice of wording. In summary, there seems to be insufficient evidence to support a conclusion that the CERD Committee has gone as far as suggesting that the CERD Convention enshrines a formal collective right to equality. This conclusion also finds firm support in the general features of the indigenous and minority rights discourses, respectively. As Sections 5.3–5.5 elaborate, international law has drawn a clear distinction between minority and indigenous rights, where only the latter embrace collective rights. To interpret General Recommendation No 32 as acknowledging a collective right to equality of minority groups would thus violate a fundamental international norm. That the CERD Committee should reach such a conclusion therefore appears far-fetched. With regard to indigenous peoples, on the other hand, no formal objections preclude the possibility that such peoples could be beneficiaries of the right to equality.

In General Recommendation No 23 that specifically targets indigenous peoples, the CERD Committee interprets the right to equality the CERD Convention enshrines as applying not only indirectly, but also formally, to indigenous peoples as such. The opening paragraph of General Recommendation No 23 proclaims that 'discrimination against indigenous peoples falls under the scope of the [CERD] Convention...'. (emphasis added) Thus understood the right to equality is not only a right of indigenous individuals to have all human rights applied to them on an equal basis with other individuals; it is also a right of indigenous peoples to enjoy peoples' rights on an equal basis with other peoples. As seen, such a similar conclusion follows from UNDRIP Article 2.25

As touched upon, however, parts of the subsequent General Recommendation No 32 also explicitly address the situation of indigenous peoples. Still, as further discussed above, General Recommendation No 32 notably refrains from echoing General Recommendation No 23's proclamation that the right to equality applies not only indirectly, but also formally, to indigenous peoples.24 Rather, as seen, the CERD Committee explicitly distinguishes between collective human rights and the right to equality. Albeit affirming that the latter right can only be effectively implemented in an indigenous (and minority) context if the characteristics of the group are being considered, the Committee stops short of repeating the suggestion that indigenous peoples have a formal right to equality.

Neither are there other international legal sources that suggest that the right to equality formally applies to indigenous peoples, with the possible exception of the mentioned UNDRIP Article 2. As seen, UNDRIP Article 2 proclaims that indigenous peoples are equal to other peoples. Certainly, one might interpret UNDRIP Article 2 as a reflection of the right to equality as enshrined e.g. in the CERD Convention. But other interpretations are also plausible. As Section 5.7.3 leans towards, UNDRIP Article 2 can, and probably should, be understood more as a general and principal affirmation of indigenous peoples status as 'peoples' for international legal purposes than as an explicit reference to the right to equality as presently understood in international law. True, having emerged as 'peoples' for international legal purposes, it is only natural that indigenous peoples are treated equally with other peoples, as Section 5.7.3 concludes. But that is not the same thing as to say that the right to equality as articulated in the CERD Convention applies to indigenous peoples. As follows, from the above, the right is not understood to attach to peoples in the meaning aggregate populations of states either, although also such peoples have legitimate expectations to be treated on par with one another. In other words, a right to equal treatment of collectives does not necessarily correspond to the right to equality formally applying to them. In any event, without more support in other international legal sources, one can hardly draw the conclusion simply from


23 Section 5.7.3.

24 Compare Makkonen, Equal in Law, Unequal in Fact (n 2) 95.
7.6 Right to Equality to the Indigenous Rights Discourse

As already described, the evolved understanding of the right to equality is paramount to the indigenous rights discourse for three reasons, where the first two are clearly interrelated.

As to the first reason, the outlined evolved understanding of equality affirms the conclusions drawn in Chapter 5, i.e. that international law has come to recognize a collective right to culture that extends an, albeit indirect, protection also to indigenous peoples as such. This is of profound importance, as, particularly when understood in light of one another, the evolved understandings of the rights to culture and equality entail a break with the state-individual dichotomy present in the international legal system since its inception. The strict reliance on this dichotomy implied that until recently, the human rights system was of limited relevance to indigenous peoples. This has now changed, as the rights to

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UNDRIP Article 2 that a formal right to equality of indigenous peoples has crystallized into a customary international norm. The legal doctrine seems largely to concur with this assessment. To conclude, it appears doubtful that the right to equality has evolved to such an extent as to apply also formally to indigenous peoples. As a final observation in this context, one can note that this conclusion further highlights the corresponding nature between the rights to equality and culture. As seen, the latter right has not been understood to formally apply to indigenous peoples either, but nonetheless protects them.

The comparison with the right to culture also reminds us that one should probably be careful not to overestimate the practical implications of the conclusion that the right to equality does not formally apply to indigenous peoples. Whether such is the case might be a largely academic question. As seen, the second face of the right to non-discrimination implies that those individuals that are culturally different are entitled to differential treatment. As touched upon, this entails, for all practical purposes, that the right also protects groups as such. On the collective level, the formal right to differential treatment on the individual level corresponds to an informal right of the group to receive protection for its cultural characteristics. If all members of an indigenous people receive education, health care, social services etc. that are respectful of and promote their cultural identities then this will further the cultural identity also of the group. Thus understood, the right to equality protects the cultural identity of indigenous peoples as such, and it becomes a less relevant question whether the right applies formally to such peoples.

The articulated conclusion finds broad support in the legal doctrine. It is also in line with Dimitrina Petrova's and Bhikhu Parekh's observations that racial discrimination—by definition—presupposes the existence of ethnic and/or racial groups in society. Even if an individual might be the victim of racial discrimination,

25 For instance, Timo Makonen, in his doctoral dissertation on the right to non-discrimination, concludes that the right to equality, irrespective of recent developments, formally remains individual in nature. See Equal in Law, Unequal in Fact (n. 2) 178–79.

equality and culture extend protection also to the cultural identity of indigenous
collectives as such.

As to the second reason, as the language-education example above illustrates, the
evolved understanding of the right to equality underpins essentially all rights of re-
levance to indigenous individuals. As seen, the second facet of the right to equality
can be invoked to require that essentially all forms of societal services be accu-
tomed to the cultural background of indigenous individuals. As has already been
demonstrated, the evolved understanding of non-discrimination demands that
indigenous children receive education in and on their mother tongue. Health care
services must also be accustomed to indigenous patients' cultural and ethnic back-
ground. In a similar vein, a contemporary understanding of the right to equality
requires that services for indigenous elders are accustomed to their cultural back-
ground. There must be personnel that speak their language and at least attempts
must be made to adapt food services etc. to their traditional nutrition. The
examples go on and on and can be chosen from essentially all spheres of human
activity.

Finally, Chapter 8 elaborates on how the evolved understanding of the right to
equality has been of cardinal importance to international law's position on to what
extent indigenous communities have established property rights over lands and
natural resources through traditional use. That is so, since the right to property
especially is a particular aspect of the right to equality. As a consequence, as
Chapter 8 explains, the fact that the right to equality now requires that domestic
laws and policies take cultural differences into account within all aspects of society
has profound effects within the sphere of property rights over territories. But before
returning to this matter, a few additional final observations shall be offered with
regard to the right to equality.

7.7 The Closing of a Circle

Having established what is the contemporary understanding of equality, it is inter-
esting to briefly revisit the Permanent Court of International Justice's (PCIJ) inter-
pretation of the right in Minority Schools in Albania. Recall how Section 2.4
explains how in this case, decided about a century ago, the PCIJ's opted that
"equality in fact may involve the necessity of different treatment in order to attain a
result which establishes equilibrium between different situations" and further that
"the idea underlying the treaties for the protection of minorities is to secure for
certain elements incorporated in a State, the population of which differs from them
in race... the possibility of... preserving the characteristics which distinguish
them from the majority, and satisfying the ensuing special needs." The resemblance
between these statements by the PCIJ and the position international law returned
to more than three quarters of a century later is certainly striking. In a similar vein,
recall further how the PCIJ in Minority Schools in Albania noted the simila-
rities between the individual right to equality and the cultural rights of groups. As the
above elaborates, this comparison could have been taken from a legal

source of today. In short, after almost a century adrift, international law is back at
the position taken by the PCIJ in Minority Schools in Albania.

7.8 Briefly on the Relationship between the Right
to Equality and the Principle of Universality
of Human Rights

Human rights are generally understood to be universal. The principle of universal-
ity of human rights provides that such rights apply equally to all individuals around
the globe. It is hardly surprising, therefore, that it has been argued that the recent
recognition that indigenous peoples and communities are beneficiaries of rights
particular to them, and that individuals belonging to ethnic and cultural groups
that significantly differ from the majority are entitled to differential treatment, viol-
ate the principle of universality of human rights. Because if human rights are in fact
universal, it is not a paradox to suggest that they apply differently depending on cul-
tural context. As Dominic McGoldrick puts it, while international human rights is
a universal doctrine, multiculturalism can appear to be a localising doctrine.28
Given the weight that has conventionally been given to the principle of universality
of human rights, it may be pertinent to briefly respond to this assertion.

James Anaya responds to the articulated concerns by simply noting that if it is a
paradox that universally applicable rights can extend particular protection to cer-
tain groups and individuals, as has been argued, then contemporary human rights
law has embraced this paradox.29 It is easy to accept this argument. As this book
underlines throughout, international law, and in particular human rights law, is not
cast in stone. Rather, it has the capacity to constantly evolve. Chapter 5 and this
chapter survey such developments within the fields of peoples rights and the right
to equality, respectively. Provided that the conclusions in these chapters are correct,
it is of little use to suggest that these developments contradict a human rights prin-
ciple as it has been conventionally understood. As Anaya observes, if the notion of
universality of human rights cannot be reconciled with indigenous peoples' rights
and the right to differential treatment, then international law has simply opted for
the latter. As the above has further addressed in depth, international law has done
so exactly due to increased recognition that a human rights system that focuses
solely on the universality of individual human rights is prone not to adequately pro-
tect the interest, concerns, and needs of ethnic and cultural groups—as well as of
their members. Indeed, we have seen that an international legal system that relies
solely on universal individual human rights runs the risk of erasing cultural
diversity. As James Crawford seemingly notes, accepting the universality of human

28 Dominic McGoldrick, 'Multiculturalism and its Discontents', in Nazila Ghianae and Alexandra
Xanthaki (eds.), Minorities, People and Self-Determination—Essays in Honour of Patrick Thornberry
29 Anaya, Indigenous Peoples in International Law (n. 26) 139.
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Rights without accommodating for cultural differences can be viewed as akin to accepting that human rights do not protect against assimilation. Taking this line of argument one step further, Sandra Fredman posits that the conventional understanding of the right to equality is based on an assumption of conformity to a given norm, and therefore of assimilation. A human rights norm that provides that equal cases be treated equally, but nothing more, asserts, she points out, that she or he who seeks non-discrimination protection must agree to be considered to be 'like' the standard model, i.e. like members of the majority population.

The notion that human rights apply to individuals only—and in the same manner to all individuals—may seem to be incompatible with the notion of peoples' rights and differential treatment. Notwithstanding, this and the previous chapters demonstrate how recently international law has simply evolved. It has come to embrace rights of indigenous peoples' as such and has come to hold that individuals belonging to ethnic and culturally distinct groups, such as indigenous peoples, are entitled to differential treatment.

As a final note in this context, it is underscored that acceptance of indigenous peoples' rights and of differential treatment need not necessarily be understood to contradict the principle of universal human rights—in the sense that human rights no longer apply equally to all.

The right to equality might very well still be understood to have universal applicability. The only thing that has changed is an acknowledgment that when the universally applicable right to equality is being implemented, this need not result in mainstreaming, i.e. only in equality in law. Rather, the right should be implemented in a manner that takes different cultural contexts into account in the form of differential treatment that caters for the preservation of distinct ethnic and/or cultural identities, i.e. equality in fact. In other words, the right to equality still applies universally. But that is no longer to say that the right must necessarily materialize itself in the same manner in every context. As Willem van Genugten observes, "[u]niversal of human rights standards is not necessarily uniformity as to the ways to realize them."

As far as indigenous rights as peoples' rights are concerned, one can simply note that peoples' rights have been well established in the international legal system for decades without any questions being raised as to their compatibility with the principle of universality of human rights. This can hardly change simply because indigenous peoples have now been recognized as 'peoples' as well.

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8

Indigenous Communities' Property Rights over Lands and Natural Resources Traditionally Used

8.1 Introduction

Albeit perhaps not in so many words, Section 5.5.2 explains how in its early years the indigenous rights discourse essentially couched indigenous peoples' rights over lands and natural resources in terms of cultural rights. Land and resource rights were essentially defined as rights that should allow indigenous communities (although formally speaking the beneficiaries of the right are indigenous individuals) to preserve and develop their distinct cultures, including culturally-based land and natural resource uses. But the above also indicates how more recently indigenous peoples' rights over territories traditionally used have increasingly come to be viewed through the prism of property rights. As further touched upon, and as elaborated below, the right to property is intrinsically connected to the right to equality.

Section 8.2 outlines some key features of property rights theory of particular relevance to the present purposes and also identifies what understanding of the right international law has accepted. Examining the nature of the right to property assists us in understanding precisely why the right is so heavily rooted in the right to equality. The subsequent sections then proceed to survey how the evolved understanding of the right to equality has impacted on to what extent indigenous communities have established rights over lands and natural resources traditionally used. This chapter's focus is mostly on territories traditionally and continuously used, but Section 8.8 on the right to restitution does address what property rights interests indigenous communities may still hold in territories traditionally used, but subsequently taken without their consent. Chapter 9 investigates the more precise content and scope of indigenous land and resource rights, when understood as property rights.

8.2 The Basic Nature of the Right to Property

8.2.1 Property rights theory

For the present purposes, it is not necessary to embark on a lengthy expose over the rather extensive discussions within property rights theory. But it is pertinent to

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to equality does not allow states to continuously rely on doctrines that provide that indigenous land uses by definition do not result in property rights. The legal doctrine concurs that international law has firmly rejected the *terra nullius* doctrine.  

8.4 The Right to Property When Rooted in the Conventional Understanding of the Right to Equality

Perhaps contrary to what some had expected, the rejection of the *terra nullius* doctrine did not open up the floodgates to extensive domestic recognition of property rights of indigenous communities over territories traditionally used. Formal recognition is not necessarily the same thing as acknowledgment of rights in practice. Although the *terra nullius* doctrine had been formally rejected, most states with indigenous communities continued to rely on the legacy of the doctrine. State laws and policies tended to continuously treat indigenous communities' traditional territories as the property of the state, often without offering any justification for this position. Rather, states tended to hide behind a veil of ignorance, simply ignoring the questionable legal basis for its claims to rights over indigenous territories. In other words, although the *terra nullius* doctrine and other doctrines with similar effects had been rejected as inherently discriminatory, most states did little to address the remnants of such regimes.

For some time, the articulated position of states was not necessarily problematic under international law. When the right to property was viewed against the backdrop of the conventional understanding of the right to equality, it allowed states to rely on the legacy of *terra nullius* and other similar doctrines when formulating their
time at the High Court of Australia held that Aboriginal communities' traditional land uses can result in property rights, the Court further indicated that Australia's sovereign rights allow it to extinguish Aboriginal communities' property rights in existence in land. Moreover, although the ruling in *Mabo* rejected the *terra nullius* doctrine, the land rights the High Court of Australia awarded to the Aboriginal community is one hand to establish. In order to have property rights over land recognized under the norm established in *Mabo*, Aboriginal communities not only have to prove that at the time of colonization, their own customary laws conferred them with rights to land. In addition, the communities must demonstrate that those customary laws are still intact today. See Kent McNeill, *Judicial Treatment of Aboriginal Land Rights in the Common Law World*, in John V. Ciolfi and Peter Zanabas (eds.), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Harvard University Press, 2009) 36; Lindsey Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford University Press, 2005) 144.

8.4 Conventional Understanding of the Right to Equality and Property

law and policy on indigenous property rights over territories traditionally used or perhaps rather lack thereof. As seen, at the time the right to property was viewed through the prism of a right to non-discrimination that merely required states to treat equal cases equally. In such a legal environment, it proved extremely difficult in practice for indigenous communities to establish property rights over land in courts of law, irrespective of that domestic jurisdiction formally recognized that indigenous communities' traditional land uses could result in property rights. These difficulties followed from what sorts of land uses where deemed to result in property rights.

Clearly, not just any form of haphazard land use can reasonably result in the establishment of property rights. As seen, international law provides that a land area shall have been 'traditionally used' for a property right to crystallize. That a territory shall have been 'traditionally used' indicates that a certain amount of continuity and pattern in the utilization is required. How such criteria are formulated more precisely naturally vary from jurisdiction to jurisdiction, and this is something international law accepts, within certain boundaries of course. Generally speaking, domestic legal systems tend to require that three objective criteria be fulfilled in order to establish property rights over lands and natural resources through traditional use. To establish a property right in the form of usufruct right, it is normally expected that the use has been sufficiently (i) intense and (ii) continuous. For an ownership right to materialize, the use must in addition have been sufficiently (iii) dominating (or exclusive).

When the right to property was understood against the backdrop of a right to non-discrimination that merely required that equal cases be treated equally, the way in which the intensity, continuity, and exclusivity criteria were applied rendered it difficult for indigenous communities to establish property rights over land in practice. Criteria such as 'intensity', 'continuity', and 'exclusivity' are not terms of art. They are not, and cannot be, objectively defined. What is considered intense, continuous, and exclusive use is determined by a cultural context. For instance, a nomadic Sami reindeer herder naturally has a very different conception of what amounts to intense, continuous, and exclusive use, compared with a Scandinavian farmer that keep cattle stationary within fences.

Chapter 7 explains how the conventional understanding of the right to equality does not require states to take cultural differences into account in their respective laws and policies. That chapter illustrates this understanding of the right with an example from the sphere of education. Recall how according to the conventional understanding of the right to equality, it is sufficient (indeed expected) that a state provides one educational system—based on the majority culture. The right to equality, as conventionally understood, only requires that all children, irrespective of cultural background, have the same right to access that one educational system. The above outlines how the right to property is essentially a particular aspect of the


19 In addition to objective criteria, some jurisdictions demand that a subjective good faith criterion be fulfilled. The good faith criterion prescribes that a user must not only objectively have used a land use to a sufficient degree. The user must in addition have done so based on a subjective belief that it has a right to do so.
right to equality. Hopefully, the reader now starts to see how fundamentally relevant the link between the rights to property and equality is for indigenous communities' possibility to establish rights over lands and natural resources through traditional use.

As seen, the conventional understanding of the right to equality does not oblige states to culturally adjust education to the cultural background of children belonging to among others indigenous groups. Neither does, in a comparable manner, the conventional understanding of the right to equality require states to culturally adjust the criteria one needs to fulfill in order to establish property rights over territories through traditional use—i.e., the intensity, continuity, and exclusivity criteria—to indigenous cultures, even in disputes that concern their right to land. A 'translation' of the educational example above to the sphere of land rights could read as follows: It is equality (under the conventional understanding of the right to equality) if a Sami reindeer herder has the same opportunity as a Scandinavian farmer to establish property rights over land through purchasing a cow, building a fence around a plot of land, and placing the cow within the confines of the fence. In other words, a right to non-discrimination that merely requires states to treat equal cases equally accepts a domestic legal system that provides that only land uses with the same sort of continuity, intensity etc. as land uses common to the majority culture results in property rights. Thus, indigenous communities can establish property rights over land by adapting to the majority people's way of life (and if in doing so, the right to equality obliges the state to acknowledge the community's property right irrespective of its different cultural background), but the community cannot establish property right over land if continuously pursuing land uses that do not meet the majority culture's understanding of what amounts to intense, continuous etc. use. To conclude, the conventional understanding of the right to equality allows states to employ only one understanding of what constitutes intense, continued, and dominating use, an understanding derived from standards set by the majority culture in the same manner it allows the state to provide only one educational system rooted in the majority culture and language.

For the articulated reasons, irrespective of that in the second time-period, international law formally recognized that indigenous communities could establish property rights over land and natural resources through traditional use, such communities nonetheless faced great difficulties when seeking to have such rights recognized in practice. Indigenous communities were often unable to gain acknowledgement that their land use had been sufficiently intense etc. when measured against standards set by land utilization common to the majority culture. The lingering problem can again be illustrated by building on the Sami example above. Under the conventional understanding of the right to equality, when examining whether Sami nomadic reindeer herding communities had established property rights over land through traditional use, Scandinavian courts applied standards as to what amounts to intense, continued, and dominating land uses derived from land utilizations common to Scandinavian style stationary agriculture. Naturally, under such circumstances Sami reindeer herding communities were rarely, if ever, successful when seeking to have rights to land recognized. The same were true for other indigenous cultures as well.

8.5 The Right to Property When Rooted in the Evolved Understanding of the Right to Equality

Chapter 7 explains how the right to non-discrimination has evolved to require not only that equal cases be treated equally, but also that different cases be treated differently. Formal equality is no longer sufficient. There must also be equality in practice. As further seen, although the right to equality does not formally apply to collectives, for all practical purposes, the evolved understanding of the right does indirectly extend a protection also to the cultural distinctiveness and identity of indigenous group as such.

In addition, Section 8.2.2 explains how the right to property, at its core, essentially is a particular aspect of the right to equality. Therefore, an evolved understanding of the latter right should reasonably directly impact on how we understand the content and scope of the former. Section 7.4 illustrates how the evolved understanding of the right to equality compares with the conventional one by using an example from the sphere of education. It explains that under the evolved understanding of equality, it is no longer non-discrimination if indigenous children have the right to equal access to education and on the majority language. Rather, the right to equality now requires that states provide an educational system that offers indigenous children the same right to access education in and on their mother tongue compared with children belonging to the majority culture. As with regard to the conventional understanding of equality, the example derived from the sphere of education is translatable to the area of land and natural resource rights.

Viewed through the prism of the evolved understanding of the right to equality, it is no longer sufficient that domestic property law is formally neutral between cultures. It must also be non-discriminatory in practice. To the extent domestic law and policy generally provides that private entities can hold property rights over lands and natural resources, the fact that different spheres of society use lands in different manners must be taken into account. Purportedly neutral property right laws and policies are discriminatory if nonetheless indirectly favouring land uses typical to the majority culture.24 In other words, a domestic property rights regime is discriminatory if it accepts that property rights over land arise as a result of land uses common to the majority culture at the same time as land uses customary to an indigenous culture are held to fail to meet the criteria necessary to fulfill in order to establish property rights over land.

To illustrate how the recent developments within the sphere of equality must impact on how we understand the right to property, it may be useful to return to the example of Sami reindeer herding as contrasted against Scandinavian style agriculture. The above shows how a right to non-discrimination that merely requires states to treat equal cases equally accepts a property right law that is designed so that

24 As James Anya notes, the fundamental norm of non-discrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, in addition to the property regimes created by dominant society. See Indigenous Peoples in International Law (n 5) 142.
property rights over lands can in practice only be established through agricultural practices common to the Scandinavian culture. According to the evolved understanding of the right to equality, on the other hand, it is equality if Sami reindeer herders have the same opportunity to establish property rights over land through land use common to their culture, i.e. through herding reindeer over mountains and through forests, as Scandinavian farmers have through agriculture. To be more specific, the contemporary understanding of the right to equality requires domestic legal systems, and those that apply the law, to adjust the intensity, continuity, and exclusivity criteria to the culture of the people whose property rights over lands and natural resources are being examined. For instance, if a domestic court surveys whether an indigenous community has established property rights over land through traditional use, the evolved understanding of equality prescribes that the court should evaluate whether the use has been sufficiently intense, continued, and, if an ownership right is at stake, dominating, based on what constitutes intense, continued (and dominating) use according to that indigenous culture. Again turning to the Sami for illustration, if a Sami reindeer herding community seeks to have property rights over its traditional territory recognized, the domestic court must evaluate whether the reindeer herding pursued has been sufficiently intense, continued, and dominating based on what is common to the Sami nomadic reindeer herding culture. The right to equality provides that the court must not apply standards on what amounts to intense, continued, and dominating use set by Scandinavian style agriculture or other forms of stationary land uses.

In summary, at least in theory, recent developments as to how we understand the right to equality suggest that indigenous communities should be able to realize property rights over territories traditionally used also in practice. What remains to survey is to what extent this theoretical conclusion is reflected in legal sources.

8.6 International Legal Sources on Indigenous Land Rights

8.6.1 International Labour Organization’s (ILO) Convention No 169 on Indigenous and Tribal Peoples in Independent Countries

The adoption of the International Labour Organization’s (ILO) Convention No 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169) was indicative of a development towards recognition that indigenous communities hold property rights over territories traditionally used. Pursuant to ILO 169 Article 14.1, "[t]he right to ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."

The wording of the provision thus submits that indigenous peoples hold property rights in the form of ownership rights over lands they occupy by means of traditional use. (Again, in the term ‘traditional’ one must read in that the use has been sufficiently intense and continuous.) The first sentence of Article 14.1 does not explicitly require that the use has been dominant. But that follows from the second sentence, which speaks of territories indigenous peoples today share with the majority population. This makes it clear that the first sentence only addresses such territories where the indigenous land use has been, and continues to be, dominant, resulting in ownership rights. The second sentence of ILO 169 Article 14.1, on the other hand, is not explicit as to what kind of right it addresses. But as the first sentence clearly proclaims a property right, one can safely assume that the second sentence does so as well. To conclude, pursuant to ILO 169 Article 14.1, indigenous peoples hold property rights in the form of usufruct rights over territories traditionally used, but which they today share with the majority population. Insofar as the land area is not shared but rather the use still dominant, the right held is one of ownership.

Section 4.4 describes how pursuant to the Vienna Convention on the Law of Treaties (VCLT) Article 31.1, a treaty provision shall, in absence of overwhelming evidence to the contrary, be given a meaning that follows from an ordinary understanding of its wording. As seen, the wording of ILO 169 Article 14.1 is straightforward, including its proclamation that indigenous peoples hold ownership rights to land areas traditionally and exclusively used. Against the backdrop of this accepted rule for treaty interpretation, it is puzzling that both states and experts have been eager to declare that despite its wording, ILO 169 Article 14.1 does in fact not require states to recognize ownership rights over land of indigenous peoples. In fact, since the adoption of ILO 169 and until at least recently, there seems to have been more or less agreement that the first sentence of ILO 169 Article 14.1 merely expects states to acknowledge that indigenous peoples enjoy a right to secured continued use of land. Recognition of formal ownership rights is not, it has been asserted, necessary. Even the ILO’s Committee of Experts, which has been authorized to authoritatively oversee the implementation of ILO 169, has submitted that "[i]t does not consider that the Convention requires title to be recognized in all cases in which indigenous... peoples have rights to lands traditionally occupied by them..." Irrespective of Article 14.1's unambiguous formulation, the preferred understanding of the provision has thus been that it enshrines a right more akin to a cultural right. Such an interpretation obligates states to ensure that indigenous communities can continuously pursue traditional livelihoods and other culturally-based land uses. But states need not recognize that an indigenous community hold an ownership right to any specific land area. How is it that both states and legal scholars appear to have taken for granted that ILO 169 Article 14.1 does not set forth an ownership right, in direct violation of the wording of the provision and accepted norms for treaty interpretation? One

23. CRAG, 1995/6th Session.
24. Compare Section 5.5.2.
plausible explanation might be that at the time of the adoption of ILO 169 (in 1989), indigenous land rights were, as Section 5.5 briefly discusses, largely thought of in terms of cultural rights. Thus, despite the unambiguous wording of Article 14.1, it might have been far fetched for many that the provision actually calls for recognition of property rights, and in particular property rights in the form of ownership rights. As further described, this reluctance can in turn probably partly be explained by lingering influences of the terra nullius doctrine. The fact that for centuries it had been taken for granted that indigenous land uses could not establish property rights to territories might have impacted on how states and others read ILO 169 Article 14 at the time.

However, whatever interpretations of ILO 169 Article 14.1 have been put forward in the past, these can hardly be substantiated today. As seen, contemporary international law is crystal clear that indigenous communities hold property rights to territories traditionally used, including ownership rights provided that the use has been and is sufficiently dominant. Against the backdrop of these developments, and bearing VCLT Article 31.1 in mind, the contemporary understanding of Article 14.1 must reasonably be the one which follows naturally from the wording of the provision as articulated above.25

8.6.2 Treaty body jurisprudence

As touched upon, the CERD Committee infers that to deprive indigenous peoples of their traditional lands constitutes a specific form of discrimination directed against them. The Committee calls on states to “recognize and protect the rights of indigenous peoples to own . . . [and] control” their lands and natural resources. In other words, the CERD Committee underlines that the general right to property enshrined in CEDR Convention Article 5(d)(v) applies to lands traditionally and collectively used by indigenous peoples. The Committee has reaffirmed this interpretation of Article 5(d)(v) in numerous country-specific observations.26 As Section 9.2 elaborates, the CERD Committee has in addition indirectly confirmed that indigenous peoples hold property rights over territories traditionally used through repeatedly underscoring that they have the right to withhold or offer their consent to competing interests that seek access to their territories.

The CERD Committee’s jurisprudence has been matched by similar conclusions by its sister expert body the Committee on Economic, Social and Cultural Rights (CESCR). CESCR also recognizes the right of indigenous peoples to own and control lands and natural resources traditionally occupied and/or used. The Committee explicitly clarifies that the right that it acknowledges is a right to property by adding that natural resources need not be culturally significant for the right of the people to offer or withhold consent to those that seek access to the territory to apply.27

In summary, the two UN treaty bodies that are in a position to authoritatively offer their opinion on indigenous property rights (as seen, the CERD Convention embraces the right to property in general, while the International Covenant on Economic, Social and Cultural Rights (CESCR) addresses property rights over creativity (Article 15)) have both inferred that such rights, including in the form of ownership rights, emerge as a result of indigenous communities’ traditional use of a particular land area.28

8.6.3 The UN Declaration on the Rights of Indigenous Peoples (UNDPRP)

UNDPRP Article 26.1 proclaims that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” While Article 26.1 speaks about “rights” in generic terms, Article 26.2 proceeds to explicitly confirm that the rights indigenous peoples have established over land through traditional use are property rights. The provision provides that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of . . . traditional occupation or use . . . .” Hence, pursuant to Article 26.2, indigenous peoples hold ownership rights over lands and natural resources traditionally occupied or used, irrespective of whether the lands or resources are culturally important to the people in question. In addition, the right applies regardless of whether the state has officially acknowledged the existence of the right, as long as the people continuously ‘possess’ the territory.29

There is no universally applicable definition of ‘possess’ or ‘possession’. Perhaps, however, Black’s Law Dictionary view is fairly representative. According to Black, ‘to possess’ something is to have in one’s actual control; to have possession of a subject matter ‘Possession’ then is: (i) the fact of having or holding property in one’s power, the exercise of dominion over property; and (ii) the right under which one may exercise control over something to the exclusion of others.

Some may argue that indigenous land utilization has not been and is not sufficiently dominant and intense to qualify as ‘possession’. This objection may in particular be raised against nomadic or semi-nomadic indigenous land uses, and against land uses that in other ways fluctuate in ways not common to

26 See e.g. A/56/18(SUPP) (Sri Lanka) 335; CERD/C/64/CO/9 (Sustheme); 11; Early Warning & Urgent Action Procedure initiated against New Zealand, Decision 1 (66), CERD/C/DEC/NZL/1/27/ 04/2005; the United States of America, DECISION 1 (58), CERD/USA/DEC/1.
27 CESCR General Comment No 21 36.
28 As Section 5.5 elaborates, the third of the most central treaty bodies, the HRC, examines indigenous land rights through the prism of cultural rights. The CCPR does not contain any property right provisions.
29 In interpretative statements delivered in connection with the UN General Assembly’s adoption of the UNDRP, the United States, Canada, New Zealand, and Nigeria expressed dissatisfaction with the land and resource rights provisions in the Declaration. Still, as Section 5.7.4 explains, negative comments delivered by a few states in connection with its adoption cannot reasonably impact on the overall understanding of the Declaration. For a similar opinion, see Wissner, ‘Indigenous Sovereignty’ (n 19) 1162. Also, the aforementioned states have three of the aforementioned states have subsequently reversed their previous position and now officially endorse the UNDRP.
non-indigenous cultures. A careful analysis suggests, however, that the reference 'possession' in UNDRIP Article 26.2 can hardly be ascribed to such a restrictive meaning. To do so would essentially take the indigenous land rights regime back to the terra nullius doctrine era.

The above describes how international law has recently reinterpreted the concept of property rights to avoid discrimination against land and natural resource uses common to indigenous cultures. The term 'possession' in UNDRIP Article 26.2 must reasonably be understood against the backdrop of this development. It seemingly makes little sense to first recognize that indigenous peoples' traditional use of land result in property rights, only to immediately thereafter make such rights contingent upon that indigenous peoples' 'possession' land in the conventional understanding of the term. As indicated, such a reading of Article 26.2 would leave the provision largely without meaning. This is an implausible interpretation, in particular in light of the articulated recent developments within the equality and property discourses.

There is a clear proximity between the concepts 'property rights' and 'possession'. If comparing Black's definition of 'possession' with the definition of 'property right' discussed in Section 8.2, one notes a clear resemblance between the two. This is not natural. A property right, once established, is essentially a right to legal protection of what one possesses. As seen, the understanding of what is required for indigenous communities to establish property rights over territories traditionally used has recently evolved. Reasonably, therefore, the understanding of what is required of indigenous peoples to legally 'possession' land must have evolved in a corresponding manner. To the extent this conclusion is correct, UNDRIP Article 26.2's reference to 'possession' must be understood as referring to what amounts to possession in the culture of the relevant indigenous people. It follows that pursuant to UNDRIP Article 26.2, indigenous peoples possess, and hold property rights over, territories that they use and inhabit in manners common to their respective cultures, provided that they have done so for a sufficient time-period. It bears repeating that this is irrespective of how disparate and irregular these land uses may appear to members of the majority population. This interpretation of UNDRIP Article 26.2 finds support in jurisprudence and the legal doctrine.53

UNDPR Article 26.2 does not employ ILO 169 Article 14's explicit distinction between territories where the indigenous land use still dominate, to which as a consequence ownership rights apply, and territories today shared with the majority population, that are subject to usufruct rights. Still, the former provision does refer to both rights to own and use. One can thus perhaps read the distinction between lands exclusively used and lands today shared with the majority population into the UNDRIP as well. That is particularly so since such a conclusion is in line with the position taken by international legal sources in general.

In summary, it is inferred that pursuant to UNDRIP Article 26.2, indigenous peoples hold ownership rights over territories traditionally used, and where their land use is still dominating. As to lands traditionally and continuously used, but which indigenous peoples today share with the majority population, usufruct rights apply.53

8.6.4 Regional legal sources—the Inter-American human rights institutions

In the ground-breaking Awa Tzintz Case (2001), the Inter-American Court on Human Rights (IACHR) parted with the previous practice to evaluate indigenous land rights solely in the light of the right to culture. Instead, the Court applied the general right to property contained in the Inter-American human rights instruments to indigenous traditional land uses. The IACHR held that against the backdrop of recent developments in international law, the right to property must be understood to protect indigenous communities' traditional communal occupation and use of lands and natural resources. The Court underlined that such property

53 Kent McNeil underlines that 'possession' in the context of indigenous peoples must be understood to mean 'possession in fact'. This results in a presumption that the community also has 'possession in law'. See Kent McNeil, 'Emerging Jurisprudence in Canada and Australia (University of Saskatchewan, Native Law Centre, 2003) 141. Similarly, in Delgamuukh v British Columbia (1997) 3 SCR 1010, Alexandra Xanchialí, notes that indigenous peoples' own customary tenure systems result in 'possession' under the UNDRIP—see Xanchialí, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) Melbourne Journal of International Law 10 (1). In a similar vein, Javial Rehan posits that the UNDRIP's land rights provisions are reflective of customary international law—see Rehan 'Between the Devil and the Deep Blue Sea: Indigenous Peoples as the Penguins in the US 'War on Terror' and the ILO's 169' in Stephen Alten and Alexandra Xanchialí (eds.), Reflections on the UN Declaration on the Rights of Indigenous Peoples (Hart Publishing, 2013) 561-62. James Anaya made an observation in a similar tone back in 2005 with regard to the then draft
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rights are not contingent upon formal deed, title, or other forms of official state recognition. It is worth underlining that in reaching its conclusion, the IACHR opined that indigenous communities' property rights over territories traditionally used are not confined to the Americans. On the contrary, the Court inferred that such rights have been accepted by international law in general. In other words, the IACHR held that international customary law has evolved to embrace a right to property of indigenous communities over territories traditionally used.

In the subsequent Dann Sisters, the Inter-American Commission on Human Rights (IACHR) affirmed the IACHR's conclusions in Awas Tingni. The Commission elaborated that 'general international legal principles applicable to indigenous human rights encompass a right for indigenous peoples of recognition of their property and ownership right with respect to lands, territories and resources they have traditionally occupied.' The IACHR highlighted that indigenous peoples must only be deprived of their ancestral lands with their consent. It bears underlining that the IACHR emphasized the connection between the right to equality and indigenous peoples' property rights over land. The Committee reaffirmed that indigenous property rights are worthy of a protection equal to that protection which applies to conventional property rights held by non-indigenous individuals. The IACHR further echoed the IACHR's observation in Awas Tingni that indigenous communities' property rights over lands are not unique to the Inter-American human rights system. Rather, the Commission held, customary international law provides that indigenous peoples have the right to '... recognition of their property and ownership right with respect to lands, territories and resources they have historically occupied....' In the Belize Case, the IACHR reaffirmed the basic findings in Awas Tingni and Dann Sisters, and found that Maya communities in Belize had established property rights to land through

8.6 International Legal Sources on Indigenous Land Rights

A similar approach is reflected in the Inter-American human rights instruments and in the general interpretation of international law. In cases such as the Enxet people in Paraguay—the Yekay Aasa—and Sáhauyomana Cases, the Court elaborated that 'traditional possession of their lands by indigenous peoples has equivalent effect to those of state-granted full property title', and that 'traditional possession entitles indigenous peoples to demand official recognition and registration of property title.'

The IACHR's and the IACHR's application of the general right to property enshrined in the Inter-American human rights instruments represents another example of how treaty provisions, through subsequent rulings by international tribunals, can evolve to take on expanded understandings. In a similar fashion as UN treaty bodies, the Inter-American human rights institutions have inferred that the right to property the Inter-American human rights instruments set forth applies to indigenous communities' traditional territories. They have reached this conclusion mindful that such a protection was not envisioned at the time of the adoption of the Inter-American human rights instruments, and that such an understanding of the right cannot be read out of the wording of these instruments either. The articulated conclusions find support in the legal doctrine. Maia Campbell and James Anaya concur that the Inter-American human rights system affirms that indigenous communities' land and resource rights are to be viewed through the prism of the right to equality. Robert A Williams infers that the Inter-American human rights institutions have held that the Inter-American human rights instruments call for respect for indigenous communities' property rights, including ownership rights, over territories traditionally occupied or used for the pursuit of their traditional livelihoods. Nigel Bankes notes that the Inter-American human rights system requires states to accord the same degree of protection to indigenous communities' property rights over land as they do with regard to rights of members of the non-indigenous population. Indigenous communities' traditional possession of land thus has equivalent legal effect as state-granted title, he maintains. In the same vein, Andrew Huff concludes that Inter-American human rights law obliges states to recognize indigenous peoples' property rights over lands and natural resources traditionally used, to the same extent as it acknowledges other forms of property rights over lands and resources. Jo Pasquale concurs that jurisprudence emanating out of the Inter-American human rights institutions provides that

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53 See Awas Tingni (n 55) 151; also Anaya, Indigenous Peoples in International Law (n 1) 146; Anaya, ‘Indigenous Peoples’ Participation Rights in Relation to Decisions About Natural Resource Extraction’ (2005) Arizona Journal of International and Comparative Law Vol 22, No 2: 12-14.

54 Mary and Carrie Dunn v United States, Case No 11:140 (United States); Inter-Am CHR Report No 75/02 (merits decision of December 27 2002) 29-37.

55 See Awas Tingni (n 55) 151; also Anaya, Indigenous Peoples in International Law (n 1) 146; Rodríguez-Pintor, ‘The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples’ (n 33) 463.

56 See Mary and Carrie Dunn v United States (n 55) 153; also Anaya, Indigenous Peoples in International Law (n 1) 147-48; Rodríguez-Pintor, ‘The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples’ (n 33) 463.


59 See Sáhauyomana Indigenous Community v Paraguay, IACHR, Judgment of 29 March 2006, Series C No 146 (2006) 128. Yekay Aasa and Sáhauyomana are in addition highly relevant in the context of a right to restriction of lands that indigenous peoples have traditionally used but which have subsequently been taken without consent. See further Section 8.8.


61 Robert A Williams, Like a Loaded Weapon (University of Minnesota Press, 2005) 144-55.


indigenous peoples hold property rights over territories traditionally used, with equivalent legal status as state granted title.\textsuperscript{44}

8.6.5 Regional legal sources outside the Americas

The extensive jurisprudence on indigenous communities’ property rights over territories traditionally used that has emanated out of the Inter-American human rights system has not been matched by other regions. This is only natural. The American Continent is unique in that the vast majority of the American states both host indigenous peoples and recognize these groups as such. Still, judicial bodies outside the Americas have reached conclusions that correspond to those of the Inter-American institutions, albeit admittedly at a lesser degree.

In Endoros, the African Commission on Human and Peoples’ Rights (ACommHPR) allowed itself to be heavily guided by the jurisprudence emanating out of the Inter-American human rights system in general and by Saramaka in particular. The African Commission thus inferred that the Endoros have established property rights over their traditional territory through traditional use.\textsuperscript{45} It is worth adding that already prior to Endoros, the ACommHPR’s Working Group of Experts on Indigenous Populations/Communities had interpreted the ACHR to extend property rights protection to territories traditionally used by indigenous communities. The Working Group inferred that dispossession of indigenous communities from their traditional lands amounts to a violation of the African Charter’s property rights provisions.\textsuperscript{46}

In Europe, the European Commission on Human Rights (ECommHR) and the European Court of Human Rights (ECHR) have held that, in principle, indigenous communities’ traditional land use results in rights protected as property rights under Article 1 of Additional Protocol 1 to the ECHR.\textsuperscript{47}

As mentioned, the Asian region has only recently commenced cooperating within the field of human rights. This may explain why no jurisprudence similar to that of Europe, Africa, and, in particular, the Americas, has emanated out of that region.


\textsuperscript{47} See Khambade and 38 other Sani Viligees v Sweden App No 27/03/95/ECHR and Handihdale Sami Village AO v Sweden App No 39093/04 (ECHR, 30 March 2010). For an outline of the former case, see Tina Koivurova, ‘Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospects and Prospects’ [2011] International Journal on Minority and Group Rights 18 17–28. See also Patrick Thornberry, Indigenous Peoples and Human Rights (Manchester University Press, 2002) 363–65, where he notes that the former case ‘recognizes that such specific indigenous rights fall within the ambit of [Additional Protocol 1 to the ECHR].’

8.6.6 Some domestic examples of application of the evolved understanding of the right to equality

Canada

In Delgamuukw, the Canadian Supreme Court held that ‘aboriginal title . . . arises from the prior occupation of Canada by Aboriginal peoples’. As to the scope and content of such title, the Court elaborated that it ‘encompasses the right to exclusive use and occupation of the land held pursuant to the title for a variety of purposes, which need not be aspects of those aboriginal practices . . . which are integral to distinctive aboriginal cultures; [but] those protected uses must not be irreconcilable with the nature of the group’s attachment to that land’.\textsuperscript{48} In other words, under Canadian law, in conformity with international law, Canadian aboriginal communities hold property rights over lands exclusively occupied. According to the Supreme Court, such rights embrace not only natural resources traditionally used, but also resources such as standing timber and oil and gas. But the right is limited in the sense that Aboriginal communities may not use non-traditional natural resources in manners that prevent communities’ traditional land-based activities, such as hunting and fishing.\textsuperscript{50} Aboriginal title does not entitle the community to sell its land to any other entity than the Canadian state.\textsuperscript{51}

Aboriginal title is not the only form of Aboriginal land and resource rights in Canada. Under Canadian law, an Aboriginal community’s traditional use of particular natural resources, such as fish and game, results in usufruct rights to such resources, irrespective of whether the use of the particular land area has been exclusive or not. Such usufruct rights are, however, contingent upon that the resources were integral to the culture of the Aboriginal community at the time of European arrival. The content and scope of these usufruct rights are determined by practices and customs integral to the community at the time of first contact with the Europeans.\textsuperscript{52}

South Africa

In Richersveld, the South African Supreme Court of Appeal stated that it is ‘racially discriminatory’ to fail to recognize that an indigenous community that has occupied its traditional territory since time immemorial has established ownership

\textsuperscript{48} See e.g. New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641; and T Benvenuto v Whakatane Rehoboth Inc v Attorney-General [1992] 2 NZLR 301.

\textsuperscript{49} Delgamuukw (n 31) 114, 117.

\textsuperscript{50} Compare Section 2.4.

\textsuperscript{51} See e.g. E v Vond der Poel [1996] 2 SCR 507; and B v Supper and Gray [2006] 2 SCR 686; and also McNeill, Judicial Treatment’ (n 16) 7–8, 13–15, 36.

\textsuperscript{52} See also McNeill, Judicial Treatment’ (n 16) 8, 16.
8.6 International Legal Sources on Indigenous Land Rights

rights over lands are by nature different from regular property rights and by not accommodating for that difference, Belize discriminated against the Maya communities.57 One may note that these conclusions were in line with previous rulings by the Court (and international law), where it had underlined that ‘true justice does not give the same to all but to each due; it consists not only in treating like things alike, but unlike things as unlike.’58 In other words, Cal explicitly affirms the principal conclusion of this Chapter, i.e. that the evolved understanding of the right to equality directly impacts on Indigenous communities’ property rights over territories traditionally used.

As to the material scope of the property right held by the Maya communities, the Belize Supreme Court inferred that the content of the right must be determined in light of traditional customs observed by the communities.59 The Court underlined that the right are communal in nature. Thus, the holders of the right were the communities as such, while individual members of the communities are beneficiaries of derivative rights to the particular land patches they use within the larger community according to Mayan custom. The Court referred to the right awarded as ‘usufructuary’ in nature.60 Still, Maia Campbell and James Anaya maintain that the ruling may be understood to award the communities inalienable communal title over land.61

As a final point, it is worth underlining that as the Inter-American human rights institutions in the cases referred to above, the Belize Supreme Court relied on international law in general when reaching its conclusion. The Court held that ‘customary international law… require[s] that Belize respects the rights of its indigenous people to their lands and resources’. The Court in particular relied on the UNDRIP. The Belize Supreme Court declared that the ‘Declaration import[s]… significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned.’ The Court also cited ILO 169, although Belize is not party to the Convention, thus lending support to the conclusion that the right ILO 169 Article 14.1 articulates forms part of customary international law.62 Campbell and Anaya posit that by drawing from international law when reaching its conclusions, the Belize Supreme Court contributes to the consolidation of a global standard protecting the rights of indigenous peoples to their traditional lands and resources. ‘They note that Cal confirms that the UNDRIP’s land rights provisions reflect customary international law. Campbell and Anaya infer that since property rights law and policy is similarly designed in most domestic jurisdictions, Cal sets an important precedent for how Indigenous peoples’ property rights over lands and natural resources shall be understood also in other jurisdictions.’63 In

55 See Richtershofen v Osborn v Ackker Ltd & Another (CCT/19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 December 2003) 8, 9, 23, 27, 62, 96, 99, 100, 105; also Gilbert, Indigenous People’s Land Rights (n 12) 67, 111–12.
56 Richtershofen, in Kadosa v Government of Belize, the High Court of Belize held that the Court had found that the communities had been denied property rights over the land. See Kadosa v Government of Belize, Case Memo No 52 of 2002, of 15 December 2006.
57 Cal (n 58) 101 and 136.
58 Cal (n 58) 68 and 136.
59 Cal (n 58) 384 (quote from this page) and 398–99.
60 Campbell and Anaya, ‘The Case of the Maya Villages of Belize’ (n 41) 379.
61 Campbell and Anaya, ‘The Case of the Maya Villages of Belize’ (n 41) 379.
62 Campbell and Anaya, ‘The Case of the Maya Villages of Belize’ (n 41) 384 (quote from this page) and 398–99.
Indigenous Communities’ Property Rights over Lands

summary, Cal affirms that indigenous communities hold property rights over territories traditionally used under international law. In addition, it serves as an important precedent globally as to how such rights are to be understood by, and implemented in, domestic jurisdictions.

Sweden

In Nordmaling, the Swedish Supreme Court affirmed that Sami reindeer herding communities’ hold property rights in the form of usufruct rights over land areas traditionally used, but which they today share with the majority population. It is worth underscoring that the Swedish Supreme Court, like its counterpart in Belize, reached this conclusion irrespective of that Sweden has not ratified ILO 169, thus further indicating that the norm enshrined in ILO 169 Article 14.1 (and other international legal sources) forms part of customary international law.

The Supreme Court elaborated that when determining whether reindeer herding rights in the form of property rights have been established, one must take the particularities of Sami reindeer herding culture into account. The Court held that the continuity and intensity criteria must be accustomed to the manner in which Sami reindeer herding is actually pursued. For instance, property rights to reserve pasture areas, i.e. pasture areas that are used only in years when regular pasture areas are not suitable for pasture, can be established through relatively infrequent and irregular use, the Court held. The Swedish Supreme Court further noted that Sami reindeer herding requires large areas and that varying weather conditions etc. may result in different pasture patterns from year to year. Therefore, the Court concluded, an intensity criteria accustomed to the particularities of Sami reindeer herding can be met even if the pasture area is not used on a regular basis, but rather to varying degrees from year to year, and with occasional longer periods of non-use.

In conclusion, Nordmaling confirms that indigenous communities’ traditional land and resource use results in property rights. Moreover, Nordmaling underscores that when evaluating whether traditional land utilization has resulted in property rights, the intensity and continuity criteria must be accustomed to the cultural particularities of the indigenous community concerned, reflecting the evolved understanding of the right to equality as articulated above.

8.6.7 The compatibility between indigenous land rights and the practice of extinguishment

As indicated, some states have sought to rely on extinguishment or similar practices when asserting that indigenous communities hold no, or limited, proprietary rights over their traditional territories. A state that invokes the practice of extinguishment

acknowledges that indigenous communities did hold historic rights over their traditional lands and, more importantly, that these rights could potentially carry legal relevance still today. At the same time, however, the state maintains that be that as it may, any potential right has been extinguished through a subsequent decree, act of parliament, or other similar measure. That is so, the state may submit, irrespective of whether the indigenous community is still inhabiting the land area in dispute. Alternatively, a state may not rely on a past act of extinguishment, but wish to extinguish the indigenous community’s right over its territory today through a unilateral act to that effect.63 The question is then whether extinguishment or other similar practices are compatible with indigenous communities’ property rights over lands and natural resources under international law.

When assessing the legal relevance of the practice of extinguishment, it is again important to be mindful of the distinction between sovereign and property rights over lands. Section 8.2 explains how, from a property rights perspective, a state is sovereign to determine to what extent private entities can establish title over lands and natural resources within its jurisdiction. A state is free to use its sovereignty to determine that no private rights apply to lands and natural resources. In such instances, indigenous communities too cannot claim rights over territories based on the right to property, given the close proximity between this right and the right to equality.64 But almost no states have exercised their sovereignty in such a manner. Domestic jurisdictions generally recognize that private entities can acquire property rights over land. Under such circumstances, as underlined repeatedly above, states must recognize that this right applies equally to all segments of society including to indigenous peoples. To put it differently, a state must not exercise its sovereign rights over its territory to a larger degree vis-à-vis certain segments of society, compared with others. As Jeremy Webber points out, indigenous communities’ rights over territories traditionally used are proprietary rights that survive the non-indigenous government’s assertion of sovereignty. Webber adds that under the general rule in international law... property rights are not erased by a change of sovereignty but should, in principle, be recognized by the new sovereign.65

From these basic features of the right to property, it follows that attempts to extinguish indigenous communities’ rights over their traditional territories violates

63 This Section 8.6.7 on extinguishment should be understood in conjunction with Section 8.8 on reservation. This section addresses to what extent states can legally extinguish indigenous communities’ property rights over lands and natural resources today, or alternatively, whether past such acts are valid, when the indigenous community continuously use the land area in dispute. Section 8.8 then surveys the legality of past takings of indigenous lands, which may have occurred through the practice of extinguishment, but also through other means, but when the land area is no longer in the indigenous community’s possession.

64 Another matter is that from a self-determination perspective, indigenous peoples can still hold rights over lands and natural resources also in countries that do not acknowledge private title to land. In addition, in Section 5.3.2 briefly outlines, also in states that do not recognize private property rights over land, indigenous peoples, and communities (or formally speaking indigenous individuals) can hold rights over lands and natural resources based on the right to culture.

international law. True, human rights, including the right to property, are, as a general rule, not absolute.63 A state is free to exercise its sovereignty in a manner that limits the right to property. In order for such a limitation to be legitimate—rather than to constitute an illegal infringement in the right—certain criteria must, however, be met. First, the limitation must fulfil a legitimate aim, i.e. it must meet a great social need.64 Second, it must be prescribed by law, i.e. it must not be arbitrary but rather foreseeable to the property right holder.65 Finally, the limitation must be proportionate, i.e. it must 'strike a fair balance between the demands of the general interest of society as a whole and the requirements of the protection of the individual's fundamental rights'. There must be 'a reasonable relation... between the means employed and the aim sought to be realized by any measures applied by the state'.66 What is decisive is whether the property right holder is left with a disproportionate and excessive burden as a result of the limitation.67 For a limitation to be deemed proportionate, it is further of cardinal importance that it is applied in a non-discriminatory manner. The state must not arbitrarily, without objective reason, infringe upon one property right while at the same time leaving a comparable property right untouched.68

Attempts to extinguish indigenous peoples' property rights over territories traditionally used fail to meet the outlined criteria. Some might claim that extinguishment under certain circumstances meet a legitimate aim. That may for instance be the case if the purpose is to promote development projects of substantial value to society as a whole. But one can hardly argue that extinguishment strikes a fair balance between the interest of society as a whole and the rights of indigenous communities. As Section 9.2.2 elaborates, expropriation of a smaller and targeted part of an indigenous community's territory for the purposes of e.g. development might strike such a balance. But extinguishment is not a targeting practice. On the contrary, it seeks to sweepingly nullify indigenous property rights in general. To make matters worse, the practice of extinguishment is explicitly directed at the property of a particular ethnic, cultural, and racial group. No similar practice is attempted at land rights held by members of the majority population. The practice is therefore clearly discriminatory, both in effect and intent. As a consequence, such a practice can hardly be said to represent a reasonable relation between the means employed and the aim sought to be realized. Rather, it leaves indigenous peoples with a disproportionate and excessive burden.69

63 Exceptions are the most fundamental human rights such as the right to life and the rights to be free from slavery and torture.
64 See e.g. Article 1 of the Additional Protocol 1 to the ECHR, and also the ECHR's ruling in James and others v United Kingdom (1986) 8 EHRR 123.
65 See e.g. Larned v Greece (1999) 30 EHRR 97 62.
66 See e.g. the ECHR's ruling in Kudin v Russia (2005) 42 EHRR 78; and in Pfanner-Czapka v Poland (2006) 45 EHRR 52 167.
67 James (n 70) 54–65.
68 See e.g. the ECHR's ruling in Willis v The United Kingdom (2002) 35 EHRR 547.
69 See e.g. the ECHR's ruling in Willis v The United Kingdom (2002) 35 EHRR 547.

Against the backdrop of the arguments outlined above, it is no surprise that international legal sources have repeatedly rejected state attempts to extinguish indigenous communities' property rights over territories, holding that such practices constitute extreme forms of discrimination. For instance, the CERD Committee has in two early warning and urgent action procedures directed against the United States and New Zealand, respectively, affirmed that attempts to extinguish indigenous communities' traditional territories is racially discriminatory.70 In a similar vein, the UN Human Rights Committee (HRC) has expressed concern over that property rights of indigenous communities over 'lands held by reason of long possession and use... can be extinguished on the basis of plenary authority of [the United States] Congress...'. The Committee called on the State party 'to grant [the tribe] the same degree of judicial protection [over their property rights to land] that is available to the non-indigenous population.71 Thus, the CERD Committee has affirmed (i) that indigenous communities' traditional use of land results in property rights, (ii) that such property rights enjoy the same legal status as conventional property rights held by others, and finally (iii) that, as a consequence, acts that seek to specifically extinguish indigenous communities' property rights over lands and natural resources while leaving non-indigenous property rights intact are discriminatory. In this context, it is also worth referring to Delgamuukw, discussed in Section 8.6.6, above. Here, the Canadian Supreme Court ruled that the Canadian provinces lack authority to extinguish Aboriginal title. The Court undeniably that if a province wish to limit Aboriginal communities' rights over land, the province must go through the same expropriation processes that applies to property rights in general.72

It thus appears clear that states are not allowed to extinguish indigenous communities' property rights over territories that have survived to the present day. But what about the legal relevance of past such practices? Rather than seeking to extinguish property rights of Indigenous communities today, states may wish to rely on historic acts with such aspirations to claim that indigenous communities hold no, or limited, rights over territories traditionally used. The answer as to whether such historic acts are lawful might not be as clear-cut as with regard to attempts to extinguish indigenous communities' property rights over land today. Still, a number of good reasons suggest that states may not be allowed to rely on past acts of extinguish.
First, one must be mindful that if the extinguishment occurred temporally long ago, the indigenous community might have, by continuously using the land area irrespective of the act of extinguishment, re-established a property right through traditional use. Conversely, if an extinguishment attempt occurred recently, it might be reasonable to take the same position towards such an effort with regard to attempts to extinguishment attempts in the present day.

Second, as the above touches upon, one cannot consider the practice of extinguishment in isolation. It must be understood in light of the right to restitution. Section 8.8 infers that a right to restitution that provides that territories taken from indigenous communities in the past without their consent should be returned or that alternatively compensation be provided for the land lost is at least about to crystallize into an international customary norm. To the extent this conclusion is correct, and indigenous communities thus retain property rights interests in lands traditionally used but not longer in their possession, it would appear illogical to simultaneously conclude that indigenous communities hold no property rights interests in lands they have traditionally used and still possess.

The third argument is possibly the most compelling one. As seen, the practice of extinguishment has been widely recognized as blatantly discriminatory. The above has addressed another historical practice directed at indigenous peoples with the purpose of denying them rights to land which has also been deemed inherently discriminatory, namely the invocation of the *terra nullius* and other similar doctrines. As seen, international law has firmly established that states may not rely on previous invocations of the *terra nullius* and similar doctrines to deny indigenous communities rights over land today. True, the *terra nullius* doctrine differs from the practice of extinguishment in that the former professes that indigenous communities never held rights over their traditional territories as they are incapable of doing so. In contrast, a state that engages in the practice of extinguishment has initially recognized indigenous communities as possessors of rights over land, but now wishes to ‘change its mind’. Notwithstanding, from a discrimination point of view, it is difficult to argue that it is more morally just to first recognize a right only to subsequently unilaterally terminate it, than to never recognize the right in the first place. It therefore appears that relying on past practices of extinguishment is as discriminatory as relying on previous invocations of the *terra nullius* doctrine. If so, the conclusion should be that if international law prohibits states from relying on past invocations of the *terra nullius* doctrine, it should reasonably take the same position towards past practices of extinguishment.

International legal sources seem to concur with the just inferred. In *Dawn Sisters*, the United States sought to rebut claims that the Western Shoshone holds property rights over its traditional territory by invoking a historic act intending to extinguish such rights. The IACOMHHR's response was that ‘while the State has suggested that the extinguishment of Western Shoshone title was justified by the need to encourage settlement and agricultural developments in the western United States, the Commission does not consider that this can justify the broad manner in which

the State has purported to extinguish indigenous claims...’ The Commission underlined that any act of extinguishment must conform with the rights to equality and property. The findings of the IACOMHHR in *Dawn Sisters* conforms to the conclusions above. While expropriation of a specific, smaller, part of an indigenous community's territory might not amount to a violation of the right to property, attempts to sweepingly extinguish indigenous communities' property rights over land are discriminatory and, as a consequence, violate the right to property.

Similarly, in *Richtersveld*, discussed in Section 8.6.6, the South African Supreme Court of Appeal held that the indigenous community's right over land had survived, i.e. was not extinguished by, annexation by the British Crown. The Court inferred that the South African Restitution Act, which claimed differently, was discriminatory. In the same vein, in *Cal v the Belize Supreme Court* held that neither the British Crown's assertion of sovereignty over the area, nor present day unilateral governmental acts, had extinguished the Maya communities' right over land. The Court concluded that although the state of Belize holds ultimate sovereign title over the land, that title was 'burdened by the pre-existing rights to and interest of the [Maya communities] in the land'. The ruling in *Cal* reminds us how cardinal it is to distinguish between sovereign rights over territory on one hand, and private rights to the same subject matter, on the other, when analyzing what rights indigenous communities possess over lands and natural resources traditionally used under international law.

The conclusions above find further support in the legal doctrine. Jérémie Gilbert asserts that, generally speaking, extinguishment practices are too broadly designed to meet human rights standards. He notes that extinguishment constitutes total and absolute confiscation of land, in stark contrast to international law's increased recognition of indigenous land rights. Former National Chief of the Assembly of First Nations in Canada, Matthew Coon Come, aptly points out that 'extinguishment is simply *terra nullius* applied after the fact.' Coon: Coon thus shares the opinion articulated above that there is little rationale to conclude that relying on past practices of extinguishment is more morally justifiable than resorting to invocations of the *terra nullius* doctrine. In a similar vein, Blake Watson notes that if international norms of the 19th century are no longer accepted, legal doctrines based on such norms must be reconsidered. Kent McNeil observes that extinguishment specifically targets indigenous lands even in jurisdictions where the constitution protects property rights. He dryly concludes that such practices seemingly are driven by political, rather than legal, considerations.

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8.7 Conclusions

During the last two decades or so, there has been a paradigm shift in how international law understands the right to equality. As conventionally understood, the right merely called for formal non-discrimination. It only required states to treat equal situations equally. In their laws, policies, and practices, states did not need to consider different ethnic and/or cultural backgrounds among the population of the state. The right to non-discrimination has, however, recently evolved to take on a second facet. Formal equality is no longer sufficient. There must also be equality in practice. This entails that it is no longer sufficient that the state treats equal cases equally. Individuals whose ethnic and/or cultural background is significantly different compared with the majority population are entitled to differential treatment. In other words, states' laws, policies, and practices must take cultural differences into account in order to be non-discriminatory. The state may no longer offer education, health care services, etc., based only on the language, customs, and priorities of the majority population. Members of minority groups are entitled to social services accustomed to their particular cultural background.

The described development has resulted in the right to equality extending protection, if not formally at least indirectly, also to groups as such. When among others, indigenous individuals' cultural background is respected in the educational systems etc., this also protects the cultural identity of the group as such.

Some decades ago, international law rejected the *tumult multilis* and similar doctrines. It came to acknowledge that indigenous communities' historic use of their respective traditional territories result in property rights over such areas. Notwithstanding, indigenous communities have until very recently faced great difficulties when seeking recognition of such rights in practice. That has been so since domestic courts continued to apply understandings of what amounts to intense, continuous, and dominant use of land derived from land uses common to the majority cultures also in cases where indigenous communities were seeking acknowledgment of property rights over lands and natural resources traditionally used.

The right to property constitutes a particular aspect of the right to equality. The right to property known to international law is a right to acquire property on equal footing with others and not to be arbitrarily deprived of property thus acquired. As a result, when the right to equality evolves to require not only that equal cases be treated equally but also that different cases be treated differently, this development should directly impact on the understanding of the right to property. If this assumption is correct, the result is an amended understanding of to what extent indigenous communities have established property rights over their respective territories through traditional use. Under such circumstances, the evolved understanding of the right to equality requires domestic courts, when ruling on whether an indigenous community's traditional use of land has resulted in property rights, to evaluate whether the land utilization has been intense, continuous, and dominant, based on what is understood as intense, continuous, and dominant use in the indigenous community's, and not the majority people's, culture. In other words, if the community has traditionally used a land area and natural resources there in manners customary to its culture, it has established a property right to the area.

Property rights theory thus provides that the evolved understanding of the right to equality should result not only in formal recognition that indigenous communities hold property rights to territories traditionally used, but also in acknowledgement of such rights in practice. And legal sources have responded in the manner property rights theory predicts. International, regional, and domestic legal sources have in a coherent manner come to affirm that indigenous communities' historic use of land in accordance with their own customs establishes property rights. International law further provides that states may not avoid the conclusions articulated above by seeking to extinguish indigenous property rights over lands and natural resources. It further appears that neither may states rely on past such practices. To do so would violate the fundamental right to equality.

The outlined conclusions find support in the legal doctrine. Eric Dannenmayer infers that read in light of one another, contemporary international legal sources establish that indigenous communities hold property rights over territories traditionally used. James Anaya draws the same conclusion, placing particular relevance on the jurisprudence emanating out of the Inter-American human rights system. Andrew Huff underscores that this development does not represent a radical departure from previous international legal norms. Rather, he observes—thereby aligning himself with the line of argument this book pursues—it merely represents a logical application of the right to equality in an indigenous context.

Jérémie Gilbert sings from a similar hymn book. He notes that the recent general trend has been for national jurisdictions to recognize indigenous communities' property rights over territories traditionally used. Recall also how the immediately above outlines how the legal doctrine in addition largely agrees that once established, such property rights of indigenous communities cannot be legally extinguished.

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89. Gilbert, Indigenous Peoples' Land Rights (n 12) 119.
As seen, the Inter-American and African human rights institutions' progressive interpretation of the right to property is a result of these bodies allowing themselves to be influenced by general developments in international law. In line with what Chapter 4 infers, the fact that the findings of these institutions mirrors conclusions drawn by UN treaty bodies, as well as UNDRIP Article 26, others, and other relevant treaties, indicates that customary international law provates that indigenous communities hold property rights over territories traditionally used.

To conclude, one can safely infer that under contemporary international law, indigenous communities hold property rights to lands and natural resources traditionally used. What remains to be survey then is what is enshrined in such a right. This is the topic of the next chapter. But before turning to what more precise rights indigenous communities possess over territories traditionally and continuously used, this chapter shall take a look at whether such communities may in addition retain at least some property rights interests also in territories traditionally used, but which subsequently were taken from them without consent.

8.8 The Right to Restitution

8.8.1 Introduction

Territories that indigenous communities still possess only make up parts, not seldom minor parts, of the entire traditional territory of most indigenous peoples. Many indigenous peoples have over time been deprived of considerable parts of their respective traditional territories through colonization, industrialization (or 'development' if one wishes), and other similar processes and practices. This section surveys to what extent the evolved understanding of the right to equality has resulted in acknowledgment that indigenous communities hold proprietary rights interests also in territories that during the course of history have been taken from them without their consent.

The above explains how domestic legal systems are responding to the new conception of equality through recognizing that indigenous communities hold property rights over territories traditionally and continuously used. Domestic legal systems are, however, largely yet to accept that indigenous communities in addition retain rights in lands once traditionally used, but which were subsequently taken from them without consent. States may defend this position by resorting to formal legal positivism. A state might concede that terra nullius and other similar doctrines are difficult to defend from a moral perspective. At the same time, however, the state can perhaps be expected to maintain that be that as it may, such doctrines nonetheless resulted in law. Such law, irrespective of perhaps perceived as morally questionable if judged by today standards, valid until substituted by new law.

81 Compare Anaya, 'Divergent Discourses' (n 296) 244-45. This Section should be read in conjunction with Section 8.6.7, on the practice of extinguishment. Section 8.6.7 addresses to what extent states can legally extinguish indigenous communities' property rights over land at present, as well as whether states may rely on past attempts to do so, where the indigenous peoples still the land area in dispute. This section, on the other hand, surveys the legality of past takings of indigenous lands, e.g. through the practice of extinguishment, which have resulted in indigenous peoples being dispossessed of the land area in question and thus no longer use or occupy it.

82 See Tometi and Swepson (n 23) 51; also Gilbert, Indigenous Peoples’ Land Rights (n 12) 162-63. Gilbert maintains that ILO 169 seeks to establish a balance between historical wrongs and the present day situation, and submits that the Convention does not apply to land areas from which indigenous peoples were dispossessed a long time ago, and so to which they lack a present day connection. In this context, James Anaya asserts that viewed in light of ILO 169 Article 15, 'a sufficient present connection with the lands may be established by a continuing cultural attachment to them ...'. See Indigenous Peoples in International Law (n 1) 144.

83 ILO 169 Article 16.3 might at first glance seem to set forth a right to restitution, as the provision proclaims that indigenous peoples, as a general rule, have a right to have lands taken without consent returned. On a closer reading, however, it is clear that the applicability of Articles 16.3-4 is limited to situations where indigenous peoples have been forcefully removed from their traditional territories pursuant to Article 16.2, as an exception to the general prohibition of forcible relocation set forth by Article 16.1. In other words, the right to restitution Articles 16.3-4 entitles apply only to lands that have been taken in accordance with Article 16.2, subsequent to a state party's ratification of ILO 169. The provision lacks retroactive effect.
consent.... to take steps to return those lands and territories.' According to the CERD Committee, when restitution in the form of return of lands taken is not feasible, compensation should be awarded, whenever possible in the form of alternate lands.\(^{94}\) The Committee hence asserts that the right to property, viewed through the lens of the right to equality, requires states not only to recognize that indigenous communities hold property rights over territories traditionally and continuously used. In addition, the right to property obliges states to address past injustices by acknowledging that indigenous communities retain property rights interests in lands taken from them in the past without consent. The CERD Committee has subsequently elaborated on this general observation, e.g. expressing concern that 'the absence of an effective system for... restitution of land rights prevents indigenous communities from gaining access to their ancestral lands.' The Committee called on the State party to 'adopt the necessary reforms... for bringing about restitution of [indigenous communities'] lands.'\(^{95}\)

The CESCR has echoed the observations of the CERD Committee. It has proclaimed that when indigenous territories have become settled or otherwise used by the non-indigenous population without consent, states shall 'take steps to return these lands and territories'\.\(^{96}\) In a similar vein, the HRC has, with reference to a state party, stated that 'it regrets that it has not been possible to adopt legislation designed to guarantee the full enjoyment of all [indigenous communities'] rights under the Covenant, including the restitution of communal lands...'. In sum, the three UN treaty bodies most relevant to the indigenous rights discourse have all inferred that indigenous communities' rights over territories embrace a right to restitution with regard to lands taken without consent.

When adopted, the UNDRIP reaffirmed the position taken by the UN treaty bodies. Pursuant to its Article 28.1, '[i]ndigenous peoples have the right to... restitution or, when this is not possible, just, fair and equitable compensation. For the lands, territories and resources which they have traditionally... occupied or used, and which have been... taken... without their free, prior and informed consent'. As with UNDRIP Article 26.2, the key criterion is traditional use and/or occupation, rather than formal state recognition of rights. The phrase 'traditional use and occupation' must reasonably have the same meaning in UNDRIP Article 28.1 as in 26.2.\(^{98}\) Thus, the provision should be understood in the cultural context of the particular indigenous people. Consequently, pursuant to UNDRIP Article 28.1, a territory that an indigenous community has historically used and/or occupied in a manner common to its culture, but which has subsequently been taken without its

\(^{94}\) CERD Committee General Recommendation No 235.
\(^{95}\) See CERD/C/PRT/CO/1-3 15 and 16. As Section 8.6.3, immediately below, elaborates, the IACHR has in \textit{Yekuare} (n 39) and \textit{Sa’ahoyomass} (n 40) explicitly called on the state party to facilitate the restitution of these communities' traditional lands. In Concluding Observations, the CERD Committee expressed particular concern that these communities' lands had not been returned. See para. 17.
\(^{96}\) CESCR General Comment No 21 36.
\(^{97}\) CCPR/CO/72/GTM 29. Article 27 is of course a cultural rights provision. Notwithstanding, it is noteworthy that the HRC has recognized the principle of a right to restitution of indigenous communities, although this right is normally framed as a property right.

8.8 The Right to Restitution

8.8.3 Regional legal sources

Recall in Section 8.6.4 the explanation of how the Inter-American human rights instruments do not explicitly recognize a property right of indigenous communities with regard to territories traditionally and continuously used, but also how the Inter-American human rights institutions have read such a right into these instruments nonetheless. The same is true with regard to territories that indigenous communities have traditionally used, but which have subsequently been taken without consent.

In \textit{Sa’ahoyomass} the IACHR held that 'members of indigenous peoples who have unwillingly left their lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title unless the lands have been lawfully transferred to third parties in good faith'. The Court thus distinguishes between two situations. If no third party right applies to the land taken without consent the indigenous community is entitled to full restitution. If, on the other hand, third party rights apply, the IACHR elaborates that when '[lands which an indigenous community has unwillingly lost possession of] have been lawfully transferred to innocent third parties, [the community is] entitled to... obtain other lands of equal extension and quality'.\(^{99}\) In other words, with regard to land previously taken but which today is burdened with third party rights, compensation in other forms than the full return of the specific land lost might suffice.

Similarly, in \textit{Yekuare} the IACHR noted that 'if indigenous communities should be able to preserve their cultural identity, it might be necessary to restrict private ownership over lands that conflict with their communal rights. The Court added, however, that this does not mean that indigenous communities have an absolute right to have land returned in every instance where there is a conflict between indigenous communal rights and third party rights. Rather, the Court declared that when restitution is not a feasible option, the state should provide indigenous communities with alternate land, chosen by them by means of consensus.'\(^{100}\)

Similar to ILO 169 Article 16, according to its wording, the right to restitution that ACHPR Article 21 enshrines is limited to lands taken subsequent to the ratification of the Convention. Notwithstanding, in \textit{Endorvis} the ACHPR confirmed that indigenous communities' property rights over lands embrace a right to restitution. Echoing the words of the ACHR in \textit{Sa’ahoyomass}, the African Commission held that indigenous peoples that have unwillingly left their traditional lands retain property rights interests unless the area has been 'lawfully' transferred to third parties in good faith. In such instances, the Commission inferred, and when full restitution is not feasible, indigenous communities have a right to be

\(^{99}\) \textit{Sa’ahoyomass} (n 40) 128.
\(^{100}\) \textit{Yekuare} (n 39) 148, 149, 217.
8.8.4 Conclusions

International legal sources on the right to restitution are relatively scarce, compared with legal sources pertaining to indigenous territories traditionally and continuously used. Still, the legal sources that exist paint a coherent picture. UN treaty bodies concur that indigenous communities retain property rights interests in territories traditionally used but which have subsequently been taken without their consent. States have supported this conclusion by adopting UNDRIP Article 28. Regional human rights institutions that have opined on the matter have concurred that a right to restitution of indigenous communities has crystallized into an international customary norm.

Lands traditionally used but subsequently taken do, however, from an international legal perspective differ from territories traditionally and continuously used in one significant manner. As mentioned, domestic courts have been quick to pick up the global trend that indigenous communities hold property rights over the latter category of land. By contrast, domestic jurisdictions and legal systems have been reluctant to accept that indigenous communities retain property rights interests in territories traditionally used but subsequently taken.

In line with the conclusions in Chapter 4, the lack of support in state practice strongly suggest that international law has yet to embrace a right to restitution of indigenous communities. On the other hand, international legal sources, albeit relatively limited in number, are coherent and clear. Moreover, states have lent their support to the norm these sources reflect when adopting the UNDRIP, including its Article 28. In addition, Section 8.6.7 explains how states appear not to be allowed to rely on past practices of extinguishment to maintain that indigenous communities hold no rights over territories traditionally and continuously used. It seems that in such instances, states are obliged to 're-establish' rights of indigenous communities over land. Restitution can also be said to be a form of re-establishment of rights. The major difference between the two situations seems to be that—beyond the fact that in the case of restitution the indigenous community is

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101 Enderis (n 46) 204, 209, 232.
103 Compare Banks, ‘Recognising the Property Rights Interests of Indigenous Peoples’ (n 78) 42.
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The Content and Scope of Indigenous Communities' Property Rights over Lands and Natural Resources Traditionally Used

9.1 Briefly on the Relevant Legal Subject with Regard to Indigenous Property Rights over Lands

Human rights instruments on indigenous peoples' rights—such as the United Nations (UN) Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization's Convention No 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169)—normally refer to 'indigenous peoples' as beneficiaries of rights to among other things lands and natural resources. This practice may be taken to suggest that it is indigenous peoples as a whole, rather than segments within the people, that are the holders of property rights over territories. That is, however, not necessarily the case. In fact, it is probably rare that the relevant legal subject in the context of indigenous territorial rights are indigenous peoples as such.

As the above elaborates upon in depth, what results in, or in other words is the legal ground for, indigenous property rights over lands and natural resources is traditional use. In addition to establishing the right, the legal ground also identifies the relevant legal subject. If the legal ground is traditional use, the legal subject is—by definition—the traditional user.

As indicated, it is probably unusual that an indigenous people as such use all its traditional territory as a collective. It is presumably considerably more common that indigenous peoples' societies consists of communities within the people, where the indigenous people's own customary legal system provides that the various communities have particular rights to the respective land areas they have traditionally used within the indigenous people's aggregate territory. As Jeremy Webber notes, '[i]t is very rare that indigenous peoples, by indigenous law, hold their entire territory in equal and undivided co-ownership. On the contrary, land is generally held by individuals, families and kinship groups.' As a consequence, Webber elaborates,
the kinship group, rather than the people as a whole, is more often the primary societal unit in indigenous peoples' societies. Thus normally, property rights over lands and natural resources vest with local communities within the indigenous people, rather than with the people as such. As Webber further notes, within an indigenous people, 'if the traditional owners cannot be determined unless one knows, by that [indigenous people's own customary law], who is entitled to exercise authority over the [respective] lands'. He infers that one must normally not conclude that land is owned collectively by an indigenous people as such. Much more often, it is local communities within an indigenous people that have established property rights over land based on traditional use.

Irrespective of what term opted for in international legal instruments on indigenous rights as touched upon above, Jeremy Webber's conclusions do find support in the major bulk of international legal sources on indigenous rights. In essentially all jurisprudence discussed in Section 8.6, it is indigenous communities within an indigenous people—rather than the people as such—that have claimed and been awarded property rights over lands and natural resources through rulings and decisions by regional human rights courts and other institutions as well as by domestic courts. In other words, when indigenous property rights over land are being implemented on the local level, it is essentially always indigenous communities that receive recognition of such rights, irrespective of the terminology used in globally applicable human rights instruments. As mentioned, this is a reflection of the fact that with few exceptions, it is indigenous communities, rather than peoples, that are the traditional users of their particular land areas. Respectful towards the position of international law, this book refers to indigenous communities as relevant legal subjects when discussing indigenous property rights over lands and natural resources.

9.2 Indigenous Communities' Right to Withhold or Offer their Consent to Third Parties that Seek Access to their Traditional Territories

9.2.1 The general rule; consent

One core element of the right to property is the right to determine who can access land. This is especially true with regard to indigenous communities. Indeed, this element of the right is probably most often the principal reason that motivates an indigenous community to seek recognition that it holds a property right over its traditional territory. Property rights over land are attractive to indigenous communities precisely because they may allow them to prevent industrial and other competing activities from entering their territories. Alternatively, property rights may ensure that the competing activities enter the community's territory only on its own terms.

Section 8.6 describes how indigenous communities' property rights over territories traditionally used have the same legal status as state granted title. As a consequence, indigenous communities must have the same right as others to withhold or offer their consent to third parties that seek access to their lands. Anything else would be discriminatory. If one holds a property right over a land area, as a general rule, she or he has the right to say no to third parties that wish to enter the land. She or he need not offer any justification for the denied access. The right to property encompasses a right to say no to access for no other reason than that the property right holder is entitled to determine over the property. This aspect of the right must necessarily apply also to indigenous communities. That hold property rights over territories traditionally used. And indeed, international legal sources do affirm that indigenous communities' property rights over territories bestow them with a right to deny third parties access to such lands. In fact, when applied to an indigenous context, human rights courts and institutions have in particular focused on this element of the right to property, thereby signalling its importance to indigenous communities.

The UN Committee on the Elimination of Racial Discrimination (CERD Committee) has, in a rich jurisprudence, affirmed that states must ensure that indigenous communities' consent is not only sought but obtained before third parties enter their traditional territories. The Committee has in particular emphasized that natural resource extraction must not occur in indigenous communities' traditional territories absent consent. The CERD Committee has for instance, with reference to Canada, confirmed that states must '[l]evel in good faith the right to... free prior and informed consent of [indigenous] peoples whenever their rights may be affected by projects carried out on their land'...

In the particular context of resource extraction, the Committee has called on Peru to 'obtain [indigenous peoples'] consent before plans to extract natural resources [on their lands] are implemented' and on Chile to 'obtain [indigenous peoples'] consent prior to implementation of projects for the extraction of natural resources' and further to ensure that the protection of the rights of indigenous peoples prevails over commercial and economic interests. The CERD Committee has further requested Ecuador to 'obtain consent of [the indigenous people concerned] in advance of the implementation of projects for the extraction of natural resources,' and Guatemala—with an explicit reference to the UNDRIP, thereby confirming that the norm enshrined in UNDRIP Article 26 reflects customary international legal norms.

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2 Ibid., 89.
3 Ibid., 85 for a concurring opinion. Jeremy Webber points out that domestic courts and states have acknowledged that the internal allocation of lands within an indigenous people should be governed by the indigenous people's own customary normative system.
4 CERD/C/GAN/CO/19-22, 9 March 2012 20 (a). For examples of similar observations, see e.g. CERD Concluding observations on Suriname, UN Doc CERD/C/SUR/CO/12, 3 March 2009; Philippines, CERD/C/PHL/CO/23 September 2009 22 and 24; Cambodia, CERD/C/KHM/CO/8–13, 1 April 2010 16; El Salvador, CERD/C/SLV/CO/14–15, 14 September 2010 19.
5 CERD/C/PER/CO/14–17, 3 September 2009 14.
6 CERD/C/CHL/CO/15–16, 7 September 2009 22, 23.
7 CERD/C/ECU/CO/19, 22 September 2008 16.
explains how UNDRIP Article 32.2 is more of a self-determination than a property rights provision. Still it lends certain support to the general idea that third party access to indigenous territories presupposes approval.

Jérémie Gilbert concurs with this conclusion. He submits that the property right UNDRIP Article 26 enshrines enshrines a right of indigenous communities to say no to competing activities that directly impact on them. According to him, UNDRIP requires states to obtain the consent from an affected indigenous community prior to undertaking, or allowing, any development project that impacts on the community's right over its traditional territory. 13

The position globally applicable international legal sources have taken has been matched on a regional level. In Dawn Sisters, the Inter-American Commission on Human and Peoples Rights (IACtHR) inferred that indigenous communities' property rights over land entails that the land cannot be taken from them without consent. 14 A position the Commission repeated in the Belice Case. Here, the IACtHR confirmed that 'one of the most central elements to the protection of indigenous peoples' property rights is the requirement that states . . . ensure a process of fully informed consent on the part of the indigenous community as a whole'. 15 In addition, even though perhaps not explicitly addressed, that indigenous communities' property rights over territories traditionally used encompass a right to withhold consent to resource extraction in such territories appears to be implicit in most of the cases Section 8.6.4 addresses. James Anaya concurs. He infers that the Inter-American human rights bodies have concluded that states must obtain indigenous peoples' consent when contemplating actions that may affect such peoples' property rights over lands and natural resources, including when such rights have been established through historical use. 16

In summary, indigenous communities' property rights over territories traditionally used or allowed them with a right to withhold or offer their consent to competing activities that seek access to their territories. As a consequence, for instance resource extractors may only enter an indigenous community's territory if either (i) reaching an agreement with the community to that effect, or (ii) managing to convince the state to expropriate the area in question. Given the ever accelerating interest in extracting natural resources in indigenous territories, 17 under what circumstances indigenous lands can be subject to expropriation should reasonably be at the forefront of the indigenous rights regime. Against this background, it is puzzling that this issue has been subject to such limited debate. The next section explores, based on the relatively limited sources available, to what extent territories traditionally used by indigenous communities can be subject to expropriation.

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8 CERD/C/GTM/CO/12-13, 19 May 2010 (c).
11 See e.g. Concluding Observations on Colombia, UN Doc E/C12/CO/78
13 See Gilbert, 'Indigenous Rights in the Making' (n. 10).
expopriation criteria are fulfilled. For expropriation to be lawful, it must be (i) prescribed by law, i.e., foreseeable to the individual, (ii) motivated by a legitimate aim, and (iii) proportionate, i.e., it must not place a disproportionate and excessive burden on the property right holder.\(^{20}\)

Section 8.6.7 touches upon that the prescribed by law criterion is normally unproblematic. It is usually met as long as the state has enacted an expropriation act or comparable legislation that is sufficiently precise and accessible, thus allowing the property right holder to foresee the instances when an expropriation may occur.\(^{21}\) As further touched upon, of greater relevance are the legitimate aim and, perhaps in particular, proportionality criteria. It is normally those that require careful evaluation when analyzing whether an intrusion into an indigenous communities’ territory amounts to a violation of the right to property.

9.2.3 Generally on the legitimate aim and proportionality criteria

As mentioned, for the legitimate aim criterion to be fulfilled, an infringement in a property right must be motivated by a legitimate aim, i.e., a substantial social need.\(^{22}\) In non-indigenous contexts, this criterion has been relatively uncontroversial. If a state maintains that expropriation is motivated by a vital societal need, the state’s position is normally accepted without much second guessing. Exceptions may be when it is apparent that the expropriation decision was taken arbitrarily, or when it is evident that expropriation is motivated by an aim other than the one officially stated.\(^{23}\)

Turning to the proportionality criterion, according to the European Court of Human Rights (ECtHR), an infringement is proportionate if it ‘strike[s] a fair balance between the demands of the general interest of [society as a whole] and the requirement of the protection of . . . fundamental rights.’ There must further be ‘a reasonable relation . . . between the means employed and the aim sought to be realized by any measures applied by the state.’\(^{24}\) The infringement must not leave the property right holder with a ‘disproportionate’ and ‘excessive burden.’\(^{25}\) In other words, it is not sufficient that expropriation is motivated by a legitimate aim, i.e., that it greatly benefits society at large. There are limitations on the sacrifices a state can require that individuals make for the benefit of society as a whole. The proportionality test thus aims to strike a fair balance between the interests of the larger society, and the interest of the individual property right holder.

In non-Indigenous contexts, whether the proportionality test is met normally largely boils down to whether market value compensation is provided for the property taken. For instance, in James, the ECtHR held that ‘compensation terms are material to the assessment whether the contested legislation respects a fair balance

\[^{10}\] See e.g., Sarangkuma People v Sarinrate, Judgement of November 28, 2007, Inter-Am Ct HR (Ser C) No. 172 (2007) 127.

\[^{20}\] See e.g., James and others v United Kingdom (1986) 8 EHRR 123.


\[^{22}\] See e.g., James (n 21) 54–55.

\[^{23}\] James (n 21) 54–55.
between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the [property rights holders] . . . . [T]he taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable . . . .

9.2.4 On the legitimate aim criterion when applied in an indigenous context

As mentioned, it is normally left to states to identify what constitute legitimate societal needs within their respective jurisdictions, without exaggerated in-depth outside scrutiny. Relying on the general rule, states will likely claim that at least resource extraction of scale in indigenous territories meets the legitimate aim criterion. Large-scale extraction projects are, the argument may go, important to the welfare of society as a whole. But the former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya cautioned otherwise. The Special Rapporteur asserts that a legitimate aim is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain. The Inter-American Court on Human Rights (IACHR) has also held that one cannot simply assume that resource extraction in indigenous territories meets the legitimate aim criterion, albeit perhaps in somewhat more lenient wording compared with the Special Rapporteur. The IACHR accepts that indigenous communities’ property rights over territories can be restricted, provided that such restrictions are geared towards satisfying an imperative public interest. A mere useful or opportune purpose is not sufficient, according to the court.

Beyond those just mentioned, as indicated, international legal sources offer limited guidance as to when the legitimate aim criterion is fulfilled in the context of resource extraction or other activities in territories traditionally used by indigenous communities. As a consequence, it is at this point difficult to establish with any certainty when such is the case. A case may, however, perhaps be made for the position articulated below.

Obviously, one must be mindful that states are normally given substantial leeway when it comes to identifying pressing societal needs within the state. Against this background, at least when a resource extraction or another type of industrial enterprise generates substantial proceeds to the state, either because the state is the extractor, or because it has secured itself a substantial cut of the proceeds from the extraction through a royalty or similar scheme, one may perhaps assume that the legitimate aim criterion is, including when the activity will occur in an indigenous territory. This conclusion seems to conform with the ruling by the IACHR, and is

26 Ibid.
27 "Extractive Industries and Indigenous Peoples" (2017) 35.

also in line with the position taken by the UN Special Rapporteur on the Rights of Indigenous Peoples.

The situation may be more complex, however, when the resource extractor or other form of industrial operator is a private entity, and the state receives little or no income from the industrial project. As seen, the Special Rapporteur on the Rights of Indigenous Peoples takes the position that in such instances, the legitimate aim criterion is unlikely to be met. To this assertion states may resort, however, that large scale extraction projects may carry substantial benefits to society at large beyond monetary proceeds. For instance, such enterprises may generate a substantial number of work opportunities. States are likely to argue that job creation is a legitimate aim, in particular in areas riddled by high unemployment. Another legitimate aim that governments may put forward is that a large scale industrial plan—even if privately operated—may result in the construction of infrastructure in the form of, for instance, roads, railroads, and electric power grids that, if fully or partly privately financed, generate considerable benefits to society at large. Presumably, the list of potential legitimate aims can be made longer.

Based on the limited guidance existing legal sources offer, it is difficult to rule out that domestic courts and regional and international human rights institutions may find themselves persuaded that for instance large scale job creation constitutes such a legitimate aim that can justify expropriation of indigenous territories. That is particularly so in light of the leeway normally given to states when it comes to identifying pressing legitimate societal needs within their jurisdictions. Such a conclusion seems also to gain support from the ruling by the IACHR in Yakey Awa. Assuming however, and further in line with Yakey Awa, it is a prerequisite that the extraction project genuinely generates substantial benefits to society. A project for private gain that does not generate a large number of jobs or bring other substantial benefits to society as a whole, presumably fails to meet the legitimate aim criterion.

In instances when one can establish that a resource extraction enterprise or other industrial activity is of such a scale that it does serve a legitimate social need, the question becomes whether the infringement is proportionate.

9.2.5 On the proportionality criterion when applied in an indigenous context

As seen, in non-indigenous contexts, the proportionality test most often largely boils down to whether the state provides market value compensation for the property taken. A property right holder must normally accept expropriation if fully compensated in monetary terms. To some, this might come across as unfair. The rationale is, however, probably to be found in what some might argue is a somewhat stereotypical approach towards what terms individuals value property.

Certainly, some individuals attach emotional value, surely sometimes considerable, to a particular land area, also outside an indigenous context. This might for instance be the case with regard to a property that has been in a family's possession
highlighting the dynamic of differences, one may add that indigenous communities opposed to resource extraction, generally speaking, have a much larger stake in the outcome of such expropriation processes compared with the extractor and the state, given the fundamental importance of land to them. To this effect, it is worth recalling that for an infringement in the right to property to be proportionate, it must be applied in a non-discriminatory manner. A state must not arbitrarily, without objective justification, limit one property right while at the same time leave a comparable property right untouched.

To sum up, while in non-indigenous contexts the assumption that market value compensation fulfills the proportionality test may conform to international law, the same appears not to be true with regard to indigenous communities. On the contrary, given how significantly different many indigenous communities value land, compared with non-indigenous peoples, the right to equality seemingly requires that the market value formula is not employed when it comes to expropriation of indigenous territories. As Michael Walker, among others, notes, justice criteria vary depending on the different values peoples assign to various things. Similarly, Isabelle Anguelovski observes, with reference to Schlosberg, that to provide indigenous communities with market value compensation for their traditional lands is akin to not recognizing the unique values of their respective cultures. In this context, one must be mindful that ‘market value’ compensation is always understood to be a value set by a market based on preferences within the majority, and not the indigenous, society. In line with the argument above, to impose foreign understandings as to how various properties should be valued on indigenous peoples violates the evolved understanding of equality.

In summary, a case has been built that since indigenous communities, generally speaking, do not value land in the same way that non-indigenous peoples do, such valuations need to be recognized in law.

The different ways in which non-indigenous peoples and indigenous communities value land, at least if generalizing, is a result of cultural differences. Section 7.4 explains how a contemporary understanding of the right to property requires states to recognize cultural differences when designing domestic property laws and policies. This obligation must reasonably extend to legislation that regulates under what circumstances property can be subject to expropriation. After all, expropriation regulation is one factor that determines the scope and content of property rights and thus forms an integral part of the property rights regime. Further

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9.3 Natural Resources Traditionally Used

If large-scale resource extraction projects can at times meet the legitimate aim criterion, they may find it harder to pass the proportionality test. Large scale resource extraction is likely to consume significant parts of, and inflict considerable damage to, the affected indigenous community’s territory. If so, there is an apparent risk that the project fails to meet the proportionality criterion, given the fundamental importance of lands and natural resources traditionally used to indigenous communities’ cultures, livelihoods, and ways of life, in other words to their very identities as indigenous communities. Irrespective of whether the extraction project would generate great wealth to society as a whole, it can hardly be considered proportionate if it leaves a great scar on the society and culture of the indigenous community. If examining the relative importance, the very basis of indigenous communities’ societies cannot reasonably be outweighed by monetary gain and job creation. To do so would seem to constitute a typical example of sacrificing a few for the benefit of society at large, to an extent that appears to go beyond what the proportionality test allows.

To sum up, as far as resource extraction in and other forms of intrusion into indigenous territories are concerned, projects that do not consume significant parts of an indigenous community’s traditional territory, and do not in other ways substantially negatively impact the community, at the same time as it genuinely generate considerable benefits to society as a whole, seems to have the best shot at meeting the legitimate aim and proportionality criteria simultaneously. Any other combination might find it harder to meet both the legitimate aim and the proportionality tests at the same time.

9.2.6 Conclusions

As seen, to lawfully expropriate an indigenous community’s traditional territory, the resource extraction project must simultaneously meet the legitimate aim and proportionality criteria. To do so might prove to be a challenge.

Even large-scale resource extraction projects may fail to meet the legitimate aim criterion, if motivated by private gain. Publicly operated large scale resource extraction will, however, presumably normally fulfill a legitimate and pressing societal need. And based on existing legal sources, one cannot rule out that also projects motivated by private gain may be considered to meet the legitimate aim criterion, to the extent they deliver substantial benefits of other sorts to society at large, such as mass employment. But in any event, in all likelihood only natural resource extraction projects of considerable scale will be held to fulfill a substantial and therefore legitimate societal need. Resource extraction projects of lesser scale, and hence of lesser importance, will presumably find it difficult to pass the legitimate aim test.

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