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# International Human Rights Law Relevant to Natural Resource Extraction in Indigenous Territories – An Overview

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## **Abstract**

The article surveys the relevance of indigenous peoples' human rights with regard to natural resource extraction in territories traditionally used by them, with a focus on the rights to self-determination, culture, and, in particular, property.

The article articulates how indigenous peoples' right to self-determination may be of relevance to resource extraction in indigenous territories, although uncertainty prevails as to the scope of the right when applied to indigenous peoples. The article further outlines how the right to culture in principle has the potential to halt resource extraction in indigenous territories. Still, the threshold for the right to apply is so high that it will only occasionally allow indigenous peoples to prevent resource extraction. The article concludes that the most relevant right in the context of natural resource extraction in indigenous territories is the right to property. As a general rule, this right allows indigenous communities to offer or withhold their consent to resource extraction in territories traditionally used by them. The exception is when indigenous territories can be legitimately expropriated. Often, however, expropriation may not be an option, due to difficulties associated with meeting the legitimate aim, and, in particular, the proportionality, criteria.

## **1. Introduction**

Recent years have witnessed an ever increasing drive to extract minerals and fossil fuels. Much of what remains of such resources is situated

in territories traditionally used by indigenous peoples. As a consequence, resource extraction is having widespread, most often negative, effects on indigenous peoples' societies, cultures, and livelihoods.<sup>1</sup> Therefore, it is only natural that the issue as to how natural resource extraction relates to the human rights of indigenous peoples have propelled to the forefront of the indigenous rights regime. All three UN institutions that specifically address indigenous rights – the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and, in particular, the Special Rapporteur on the Rights of Indigenous Peoples (SRIP) – have identified the relationship between resource extraction and indigenous rights as a priority area.

What rights then, do indigenous peoples possess with regard to resource extraction in territories traditionally used by them? This article aims to provide an overview over the human rights framework that governs this relationship. It does so by analyzing the position international law has taken towards indigenous land and natural resource rights during three time-periods. First, the article outlines classical (colonial) international law's position on indigenous land rights. The article then surveys contemporary human rights norms relevant to resource extraction in

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<sup>1</sup> Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya; "Extractive Industries and indigenous peoples", A/HRC/24/41, para. 1

indigenous territories, where time-period 2 is international law prior to the emergence of evolved understandings of “peoples” and “equality”, and time-period 3 is the period subsequent to these developments. Although wide spectra of human rights potentially come into play in the context of resource extraction in indigenous territories, the article focuses on the rights to self-determination, culture and property,<sup>2</sup> where the latter right is understood in light of the right to equality.

## 2. The first time-period; the classical international legal system

From its inception in the wake of the Peace of Westphalia (1648), international law came to rest on two perceptions of profound importance to the indigenous rights regime. First, it defined “peoples” not in terms of groups united by common ethnicity and culture. Rather, the aggregate of the individuals that happened to reside within the borders of the states that took form during this era were deemed to constitute peoples, for international legal purposes. Second, state sovereignty became the constitutional principle of international law, replacing natural law theories. As sovereigns, states were free to formulate international norms that served their interests.<sup>3</sup>

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<sup>2</sup> For another analysis of the relationship between resource extraction in indigenous territories and indigenous rights that takes the rights to self-determination, culture and property as points of departure, see Funderud Skogvang, “Legal Questions regarding Mineral Exploration and Exploitation in Indigenous Areas”, in *Michigan State International Law Review*, Vol. 22:1, pp. 321–345.

<sup>3</sup> Lauterpacht, “The Grotian Tradition in International Law”, in *British Year Book of International Law*, 23 (1946), p. 29, Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (Cambridge University Press, 2005), pp. 115–121, and Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004), p. 42

International law largely emerged for the purpose of facilitating European imperialism.<sup>4</sup> The European realms wished to rely on international norms to justify placing other continents under their hegemony and control. Invoking the principle of state sovereignty, the European states declared that under international law, among others indigenous peoples – due to the primitive nature of their societies – had failed to establish both sovereign and proprietary rights over their traditional lands. Therefore, the European realms were legally entitled to occupy such lands. The outlined theory is often referred to as the *terra nullius* doctrine. As indicated, this doctrine has two elements. The first relates to the political status of indigenous peoples, the second to their capacity to establish private rights over land.

As to the first element, classical international law recognized only states as international legal subjects. Indigenous peoples’ societies did not qualify for statehood, since the European realms – and as a consequence international law – declared indigenous peoples’ societies as uncivilized, i.e. as insufficiently “European”.<sup>5</sup> Invoking the principle of state sovereignty, the European states declared that such societies could hold no sovereign rights over territories.

With regard to the second element, the *terra nullius* doctrine professed that indigenous peoples cannot establish proprietary rights over lands and natural resources either.<sup>6</sup> This con-

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<sup>4</sup> Kymlicka, “Beyond the Indigenous/Minority Dichotomy?”, in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Allen and Xanthaki eds. (Studies in International Law Vol. 30, 2011), p. 183, Crawford and Koskenniemi, *International Law* (Cambridge University Press, 2012), p. 15, and Simpson, “International law in diplomatic history”, in Crawford and Koskenniemi, *supra*, p. 27

<sup>5</sup> Gilbert, *Indigenous Peoples’ Land Rights Under International Law: From Victims to Actors* (Transnational Publishers, 2006), pp. 22–23

<sup>6</sup> Gilbert, *supra* note 5, pp. 24–26

clusion followed from indigenous land uses being deemed insufficiently similar to European agrarian practices. Uncultivated land could not constitute property. Legally relevant occupation of land could only occur through European style agriculture.<sup>7</sup> Again, the principle of sovereignty gave the European realms the prerogative to declare this theory law.

In other words, Europe professed a “*dynamic of difference*” to justify placing indigenous territories under their realm of sovereignty.<sup>8</sup> Indigenous peoples were viewed as mere “*ghosts in their own landscapes*”.<sup>9</sup> This position would remain unchanged well into the 1900s. Throughout this time-period, European lawyers understood international law to provide different norms for inter-European relations compared with relations between European states and other, uncivilized, entities.<sup>10</sup>

### 3. The second time-period; contemporary international law prior to evolved understandings of “equality” and “peoples”

#### 3.1 Introduction

Although human rights ideas had circulated earlier, it was only in the post-World War II era that human rights formally became a concern of international law.<sup>11</sup> The UN Charter identifies

promotion of human rights as one objective of the World Organization. Following the adoption of the Universal Declaration on Human Rights (UDHR) (1948), the UN subsequently adopted the Convention on the Elimination of Racial Discrimination (CERD) (1965) and the Covenants on Civil and Political Rights (CCPR) and on Economic, Social and Cultural Rights (CESCR), respectively (1966). CERD is relevant for the present purposes because the fact that an entire convention is dedicated to the right to non-discrimination underscores the centrality of the right to the contemporary human rights system, but also because CERD Article 5 (d) (v) enshrines the right to property. In CCPR and CESCR, common Article 1 on the right to self-determination and CCPR Article 27 on the right to culture are of particular relevance.

#### 3.2 The right to property, understood in light of the right to equality

An international legal system that rests heavily on the principle of equality cannot reasonably uphold *terra nullius* and other doctrines that profess that indigenous peoples can *per se* hold no or only limited rights over land. Consequently, the incorporation of the right to non-discrimination into the international legal system soon resulted in international and domestic courts rejecting the *terra nullius* doctrine as inherently discriminatory.<sup>12</sup>

The rejection of the *terra nullius* doctrine implied acknowledgement in principle of that indigenous communities’ traditional land uses es-

<sup>7</sup> Locke, *Two Treatises of Government*, pp. 309, and 312–315, and Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995), p. 72

<sup>8</sup> Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law”, in *Harvard International Law Journal* 40 (1999), pp. 24–25

<sup>9</sup> Huff, “Indigenous Land Rights and the New Self-Determination”, in *16 Colo. J. Int’l Envtl. L. Pol’y* 295 (2005), p. 298

<sup>10</sup> Koskenniemi, “International law in the world of ideas”, in Crawford and Koskenniemi, *supra* note 4, p. 54, Simpson, *supra* note 4, pp. 25–45, and, generally, Anghie, *Imperialism*, *supra* note 3

<sup>11</sup> Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, revised ed. (University of Pennsylvania Press, 1996), p. 104

<sup>12</sup> Tully, “The Struggles of Indigenous Peoples for and of Freedoms”, in *Political Theory and the Rights of Indigenous Peoples*, Ivison, Patton and Sanders eds. (Cambridge University Press, 2000), p. 54, Anghie, *Imperialism*, *supra* note 3, p. 111, and Castellino, “The Right to Land, International Law & Indigenous Peoples”, in *International Law and Indigenous Peoples*, Castellino and Walsh eds., (Martinus Nijhoff Publisher, 2005), pp. 92–101

establish property rights.<sup>13</sup> Recognition *in principle* does, however, not necessarily mean acknowledgment of rights *in practice*. Despite formal recognition, indigenous communities continued to struggle when seeking recognition of property rights over lands traditionally used. The reason can be found in (i) the intrinsic connection between the rights to property and non-discrimination, and (ii) how the latter right was understood at the time.

If first addressing the link between the rights to non-discrimination and property, it follows directly from the nature of the latter right. The right to property is not a right to be provided with property. It merely requires that all must be free to acquire property on equal basis with others, and that, once property has been acquired, it is not arbitrarily taken. In other words, at its core, the right to property is a particular aspect of the right to non-discrimination.<sup>14</sup> As a consequence, the understanding of the right to non-discrimination directly impacts on the scope and content of the right to property

As to the understanding of the right to non-discrimination, when the right was first incorporated into the human rights system, it did not oblige states to consider cultural and eth-

nic differences within the state when designing laws and policies. For instance, it was sufficient that the state provided one educational system, based on the values, interests and language of the majority culture, as long as all children, irrespective of ethnic and cultural background, had equal access to such education. In short, equality meant only that equal cases be treated equally.<sup>15</sup> We now start to grasp how the understanding of the right to non-discrimination influence on indigenous communities' possibilities to achieve recognition of property rights over land.

As seen, with the rejection of the *terra nullius* doctrine, it had been established that indigenous communities "traditional use" of land result in property rights. But "traditional use" is not a term of art. Regional and domestic courts must flesh out its more precise content. Although variations occur, generally speaking, most jurisdictions consider a land area "traditionally used" that has been used for a period of time and to a certain degree, i.e. the use must have been sufficiently continuous and intense. To establish ownership rights, the use must, in addition, have been exclusive.

But "intense", "continuous" and "exclusive" are not terms of art either. Rather, such terms are defined by a cultural context. For instance, nomadic Sami reindeer herders surely have different understandings of what amounts to intense and continuous uses, compared with Scandinavian farmers.

Here, the understanding of equality becomes relevant to indigenous communities' possibilities to gain recognition of property rights over lands traditionally used. As seen, the conventional understanding of equality allowed states to provide only one educational system, based on the val-

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<sup>13</sup> Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples", in 41 *Vanderbilt Journal of Transnational Law* (2008), p. 1154, Lenzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples", in *Texas International Law Journal*, Vol. 42 (2006), p. 167, Macklem, "Indigenous Recognition in International Law: Theoretical Observations", in *Michigan Journal of International Law*, Vol. 30 (2008), pp. 184–185, Tully, "The Struggles", *supra* note 12, p. 54, Anghie, *Imperialism*, *supra* note 3, p. 111, and Castellino, *supra* note 12, pp. 92–101

<sup>14</sup> See e.g. the formulation of UDHR Article 17 and CERD Article 5 (d) (v), and further Waldron, *The Right to Private Property* (Clarendon Paperbacks, 1998), pp. 21–24, and Krause, "The Right to Property", in *Economic, Social and Cultural Rights – A textbook*, 2<sup>nd</sup> edn., Eide, Krause and Rosas eds. (Martinus Nijhoff Publishers, 2001), pp. 191–192.

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<sup>15</sup> Makkonen, *Equal in Law, Unequal in Fact: Racial and ethnic discrimination and the legal response thereto in Europe*, doctoral dissertation presented at the Faculty of Law at the University of Helsinki, 5 March 2010, pp. 92–95

ues of the majority culture. The same applied to domestic property right law. The conventional understanding of equality did not oblige states to culturally adjust criteria necessary to fulfil to establish property rights over lands through traditional use. Rather, as understood at the time, the right to non-discrimination accepted domestic legal systems that provided that only land uses common to the majority culture resulted in property rights. It allowed domestic courts etc. to employ the majority people's perception of what amounts to intense, continued and exclusive use, also in cases concerning whether an indigenous community had established property rights over land through land uses common to its culture.

In sum, the above explains why indigenous communities faced great difficulties when seeking recognition of property rights over territories traditionally used, although the right to equality had been incorporated into international law. The rejection of the *terra nullius* doctrine implied formal recognition of indigenous property rights over land. Still, in practice these rights remained elusive. To illustrate, one can return to the Sami example. If, when evaluating whether a nomadic Sami reindeer herding community has established property rights over land, a court applies intensity and continuity criteria derived from Scandinavian style agriculture, it is very difficult for the reindeer herding community to have property rights recognized.

### 3.3 The right to self-determination

As mentioned, during this the second time-period, the right to self-determination became part of international law, as reflected in the UN Charters' reference to the "principle" of self-determination of peoples,<sup>16</sup> and CCPR and CESCR common Article 1's proclamation that "[all] peoples have the right to self-determination". At the time, however,

<sup>16</sup> Articles 1 (2) and 55

both the UN Charter and the 1966 Covenants were understood to refer to "peoples" only in the meaning the aggregate populations of states or territories.<sup>17</sup> In other words, classical international law's position that what groups constitute peoples is a matter of citizenship, not of ethnicity or culture, was confirmed. Consequently, indigenous peoples continued to enjoy no peoples' rights under international law.

### 3.4 The right to culture

CCPR Article 27 provides that persons belonging to minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture. The wording suggests a limited relevance to indigenous peoples. The phrase "*shall not be denied the right*" indicates that states are supposed to remain neutral and not actively protect any particular culture within the state. In addition, it suggests a very high threshold for the provision to apply. Only actions that completely deny enjoyment of culture are outlawed. Finally, nothing in CCPR Article 27 submits that the provision covers culture in the meaning livelihoods and other land uses. The UN Human Rights Committee (HRC) has, however, contributed to an evolved understanding of Article 27 that renders the provision relevant to the relationship between indigenous rights and resource extraction in indigenous territories.

In the *Kitok Case*, the HRC confirmed that although CCPR 27 does not refer to indigenous peoples, the provision nonetheless applies to

<sup>17</sup> See UN GAOR, 6<sup>th</sup> session, Third Committee, 366<sup>th</sup> meeting, para. 29, and 397<sup>th</sup> meeting, paras. 5–6, and E/CN.4/Sub.2/L.625, paras. 77 and 80. See also Alston, *Peoples' Rights*, Alston ed. (Oxford University Press, 2005), pp. 260–261, Cassese, *Self-determination of Peoples: a Legal Reappraisal* (Cambridge University Press, 1995), pp. 14–23, 47–52 and 61–62 and 39–42, Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> edn. (Clarendon Press, 2006), pp. 112–114, and Hannum, *supra* note 11, pp. 41–42.

such groups.<sup>18</sup> It clarified that in the context of indigenous peoples, the right to culture the provision enshrines embraces traditional livelihoods.<sup>19</sup> In *Ominayak v. Canada*, the HRC affirmed its principal conclusions in *Kitok* and held that resource extraction in the aboriginal Lubicon Lake Band's traditional territory amounted to a violation of CCPR Article 27, as these activities effectively destroyed the community's traditional hunting and fishing grounds.<sup>20</sup> In other words, the HRC established that resource extraction that prevents an indigenous community from pursuing traditional livelihoods is forbidden.

In the two *Länsman Cases*,<sup>21</sup> the Committee nuanced the picture when CCPR Article 27 forbids resource extraction in indigenous territories. The HRC held that not only resource extraction that completely prevents continued exercise of traditional livelihoods and other culturally based land uses is unlawful. CCPR Article 27 also forbids competing activities that effectively denies indigenous communities' continuous engagement in such land uses. The HRC declared that

"Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amounts to a denial of the right will not be compatible with the obligations under article 27 ... measures that have a certain limited impact on the way of life of persons

belonging to a minority will not necessarily amount to a denial of the right under article 27".<sup>22</sup>

Hence, the threshold before a violation of the right to culture occurred was still high, although marginally lowered compared with the wording ("denied") of CCPR Article 27. Resource extraction that effectively prevented an indigenous group from pursuing its traditional livelihoods or other culturally based land uses was now forbidden. Once that threshold was met, resource extraction was absolutely forbidden, irrespective of potential benefits of the project to society as a whole.<sup>23</sup>

### 3.5 Conclusion

By the end of the second time-period, the right to self-determination was yet to apply to indigenous peoples. Consequently, there was no link between this right and resource extraction in indigenous territories. It had been formally acknowledged that indigenous communities' traditional use of land results in property rights. But since such rights were, largely speaking, not recognized in practice, also the right to property had little impact on resource extraction in indigenous territories. The right to culture could potentially deny industrial activities access to indigenous traditional territories, but only in rare cases.

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<sup>18</sup> Formally, CCPR Article 27 applies to individuals only. Notwithstanding, the provision indirectly protects also the cultural identity of the group as such. See further Åhrén, *The Saami Traditional Dress & Beauty Pageants* (Tromsø, 2010), pp. 77–80.

<sup>19</sup> *Ivan Kitok v. Sweden*, Comm. No. 197/1985, views adopted 27 July 1988

<sup>20</sup> *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Comm. No. 167/1984, views adopted 26 March 1990

<sup>21</sup> *Ilmari Länsman et al v. Finland*, Comm. No. 511/1992, views adopted 26 October 1994, and *Jouni E. Länsman et al v. Finland* Comm. No. 671/1995, views adopted 30 October 1996

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<sup>22</sup> *Jouni Länsman II*, *supra* note 21, para. 9.4

<sup>23</sup> For an in depth outline of the content of CCPR Article 27 up and until the *Länsman Cases*, see Scheinin, "The Right to Self-Determination under the Covenant on Civil and Political Rights", in *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Aikio and Scheinin eds. (Åbo Akademi University, 2000), pp. 193–207.

#### 4. The third time-period; contemporary international law subsequent to evolved understandings of “equality” and “peoples”

##### 4.1 The right to property, understood in light of the right to equality

Section 3.2 explains how the right to non-discrimination, when it was incorporated into the contemporary human rights system, merely required that equal cases be treated equally. With time, however, it was increasingly recognized that *formal equality*, in the sense that states refrain from actively promoting the majority culture, does not necessarily result in *equality in practice*.<sup>24</sup> Rather, also states that claim to be formally neutral between cultures tend to adopt legislation and policies based on the values and interests of the majority culture. For instance, only the majority language can in most instances be officially used, and the majority culture is regularly promoted by the educational system. The majority’s views and cultural assumptions are likely to become the norm.<sup>25</sup> In sum, also in formally neutral states, all cultures do not enjoy the same chance to prosper, or even to survive.

The new understanding of equality generated a paradigm shift in international law. The right to non-discrimination evolved to take on a second facet. The European Court on Human Rights’ (ECHR) ruling in *Thilmmenos v. Greece* il-

lustrates this development well. Here, the ECHR 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”.

The Court then proceeded to declare that it

“now considers that this is not the only facet of the [right to non-discrimination]. The right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.<sup>26</sup>

The position taken by the ECHR has been echoed in a large number of other international legal sources.<sup>27</sup> It would appear that this evolved understanding of equality, or justice if one wants, has been largely accepted by states and beyond. This suggests that an international customary norm has crystalized that provides that the right to non-discrimination no longer merely entails that equal cases be treated equally. In addition, the right to equality now obliges states to treat different situations differently. This second facet of the right to non-discrimination is highly relevant to the indigenous rights regime. From it logically follows that it is no longer equality if a

<sup>24</sup> Koskenniemi, *From Apology to Utopia*, *supra* note 3, pp. 5–6, Walker, “Plural Cultures, Contested Territories: a Critique of Kymlicka”, in *Canadian Journal of Political Science*, Vol. 30, No. 2 (1997), pp. 215–216, and Shachar, *Multicultural Jurisdictions – Cultural Differences and Women’s Rights* (Cambridge University Press, 2001), pp. 23 and 73

<sup>25</sup> Mancini and de Witte, “Language Rights and Cultural Rights: A European Perspective”, in *Cultural Human Rights*, Francioni and Scheinin eds. (Martinus Nijhoff Publishers, 2008), p. 251, and Young, “Together in Difference: Transforming the Logic of Group Political Conflict”, in *The Rights of Minority Cultures*, Kymlicka ed. (Oxford University Press, 1995), p. 163

<sup>26</sup> *Thilmmenos v. Greece*, Appl. No. 34369/97, Judgement of 6 April 2000

<sup>27</sup> To mention just a few, see e.g. HRC General Comment No. 18: Non-discrimination, A/45/40, Annex VI/A, paras. 7 and 8, UN Committee on Economic, Social and Cultural Rights General Comment No. 20, Non-discrimination in economic, social and cultural rights (article 2, para. 2), E/C.12/GC/20, paras. 8–9, 12, 36 and 39, and the Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/32.

state provides education, social services etc. accustomed to the majority culture, irrespective of whether all citizens – regardless of cultural and ethnic background – have equal access to such services. Rather, states must offer education, social services etc. accustomed to indigenous individuals' cultural background. For instance, it would appear that indigenous children are entitled to the same access to education in and on their mother tongue, as children belonging to the majority population are to education in their language. But the logical implications of the evolved understanding of equality do not end at the spheres of education, social services etc. The very nature of the evolved understanding of equality suggests that it is also profoundly important to indigenous rights over lands and natural resources, due to the articulated intrinsic connection between the rights to non-discrimination and property.

To the extent the outlined evolved understanding of equality has crystalized into a customary international norm, it would seemingly follow that the right no longer allows domestic property laws that are based solely on land uses common to the majority culture. Rather, domestic laws should acknowledge that different spheres of society use lands in different ways. It would be discriminatory to design – or maintain – domestic legal systems that provide that property rights over land arise as a result of land uses common to the majority culture, but not as a result of more fluctuating land uses customary to indigenous peoples. As James Anaya notes, “*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*”.<sup>28</sup>

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<sup>28</sup> Anaya, *Indigenous Peoples in International Law*, 2<sup>nd</sup> ed. (Oxford University Press, 2004), p. 142

More precisely, the contemporary understanding of the right to equality obliges domestic courts to adjust intensity, continuity and exclusivity criteria to the culture of the people whose property rights over lands and natural resources are being examined. If a domestic court surveys whether an indigenous community has established property rights over land through traditional use, the court should evaluate whether the use has been sufficiently intense, continuous and exclusive based on what constitutes intense, continuous and exclusive use in that indigenous culture. For instance, if a Sami reindeer herding community seeks recognition of property rights over its traditional territory, the domestic court should evaluate whether the reindeer herding pursued has been sufficiently intense and continuous based on what is common to the Sami nomadic reindeer herding culture. The court should not apply standards set by Scandinavian style agriculture. Accordingly, in theory, the evolved understanding of equality should result in acknowledgment also in practice of indigenous communities holding property rights over territories traditionally used. And indeed, international legal sources have responded in the way the articulated theory predicts.

The Inter-American Court and the Inter-American Commission on Human Rights have in a rich jurisprudence confirmed that against the backdrop of recent developments in international law, in particular in light of the right to equality, the right to property must now be understood to apply also to lands and natural resources traditionally used by indigenous communities. These institutions have affirmed that indigenous communities hold property rights over territories traditionally used also in absence of title or other forms of formal state recognition.<sup>29</sup> For instance,

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<sup>29</sup> See e.g. *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Judgement of 31 August 2001, Inter-Am. Ct.

in the *Sawhoyamaxa Case*, the Inter-American Court held that “*traditional possession of their lands by indigenous peoples has equivalent effect to those of state-granted full property title*” and further that “*traditional possession entitles ... to ... official recognition and registration of property title*”.<sup>30</sup> The Inter-American human rights institutions have underscored that indigenous communities’ property rights over territories traditionally used are not confined to the Americas. On the contrary, these institutions infer, such rights follow from globally applicable international customary law.<sup>31</sup>

Although to a lesser degree, regional human rights institutions outside the Americas have also reached the conclusion that indigenous communities hold property rights over territories traditionally used. In the *Endorois Case*, the African Commission on Human and Peoples’ Rights echoed the conclusions drawn by the Inter-American jurisprudence, and held that indigenous communities have established property rights over territories traditionally used.<sup>32</sup> In Eu-

rope, the ECHR have accepted that indigenous communities’ traditional use of land results in property rights.<sup>33</sup> An increasingly growing body of domestic jurisprudence confirms the conclusions drawn by regional human rights institutions.<sup>34</sup>

UN treaty body jurisprudence concurs that it follows from a correct understanding of equality that indigenous communities hold property rights over territories traditionally used. The Committee on the Elimination of Racial Discrimination (CERD Committee) has called on states to “*recognize and protect the rights of indigenous peoples to own ... [and] control*” their lands and natural resources.<sup>35</sup> In other words, the Committee has underlined that the general right to property enshrined in CERD Convention Article 5 (d) (v) applies also to lands traditionally used by indigenous communities. The CERD Committee jurisprudence has been matched by similar conclusions by the Committee on Economic, Social and Cultural Rights (CESC). CESC has also called on states to respect the rights of indigenous peoples to own and control lands and natural resources traditionally used.<sup>36</sup>

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H.R. (Ser. C) No. 79 (2001), paras. 149 and 151, *Mary and Carrie Dann v. United States*, Case No. 11.140, decision on December 27, 2002, paras. 130–131, *Maya indigenous communities of the Toledo District. v. Belize*, Case 12.053, decision on October 12, 2004, and *Yakey Axa Indigenous Community v. Paraguay*, IACHR judgement of 1 February 2006, Series C No. 141. On the jurisprudence that has emanated out of the Inter-American human rights institutions, see also Anaya, “Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction”, in *Arizona Journal of International and Comparative Law* Vol. 22, No.1 (2005), p. 14, Campbell and Anaya, “The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land rights”, in *Human Rights Law Review* 8:2 (2008), p. 394, and Rodríguez-Pinero, “The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement”, in Allen and Xanthaki, note 4 *supra*, pp. 462–463.

<sup>30</sup> *Sawhoyamaxa Indigenous Community v Paraguay*, IACHR judgement of 29 March 2006, Series C No. 125 (2005), para. 128

<sup>31</sup> *Supra*, notes 29 and 30

<sup>32</sup> *Endorois People v Kenya Case. Centre for Minority Rights Development (Kenya) and Minority Rights Group Interna-*

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*tional on behalf of Endorois Welfare Council v Kenya*, Comm. 276/2003 (2010), paras. 214–215

<sup>33</sup> *Handölsdalen Sami Village and Others v. Sweden*, Appl. No. 39013/04, Judgement of 30 March 2010

<sup>34</sup> See e.g. *Te Runanga o Wharekuari Rekkohu Inc. v. Attorney-General* [1993] 2 N.Z.L.R (New Zealand), *Alexkor Ltd. & Another v. Richtersveld Cmty. & Others*, 2003 (5) SA 460 (CC) (S. Afr.) (South Africa), *Kalahari Game Reserve Case Misc. No. 52 of 2002*, of 13 December 2006 (Botswana), *Cal and Others & v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claims Nos. 171 and 172 of 2007, Judgement of 18 October 2007 (Belize), the *Selbu Case*, Rt 2001 s.769 (Norway), and the *Nordmaling Case*, NJA 2011 s. 109 (Sweden).

<sup>35</sup> See General Recommendation No. 23, and also e.g. A/56/18(SUPP) (Sri Lanka), para 335, CERD/C/64/CO/9 (Suriname), para. 11, CERD/C/MEX/CO 15 (Mexico), A/51/18/ (SUPP) (Botswana), paras. 304–305, Decision 1 (66), CERD/C/DEC/NZL/1.27/04/2005 (New Zealand) and Decision 1 (68), CERD/USA/DEC/1 (United States).

<sup>36</sup> General Comment No. 21, para. 36

Indigenous communities' property rights over lands and natural resources are also reflected in international instruments on indigenous rights. UNDRIP Article 26 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 [and] have the right to own, use, develop and control the lands, territories and resources that they possess by reason of ... traditional occupation or use...”.

Furthermore, ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169) Article 14 proclaims that indigenous peoples hold property rights over territories traditionally used. Previously, it has been stated that despite its unambiguous wording, ILO 169 does not require states to acknowledge ownership rights of indigenous communities over lands. However, against the backdrop of the outlined recent developments in international law, this assertion can presumably no longer be maintained, if it ever could.<sup>37</sup>

In sum, international legal sources have responded in the expected way to what follows logically from the evolved understanding of equality. Given how coherent these sources are, and given how rapidly domestic courts have picked up on this development, it appears safe to conclude that a customary international norm has emerged which provides that indigenous communities hold property rights over territories traditionally used.

It is worth adding in passing that who, more precisely, is the holder of indigenous property rights over land follows from the legal founda-

tion that underpins the right. Since the legal foundation is traditional use, the property right holder must – by definition – be the traditional user. According to most indigenous cultures, that means indigenous communities within an indigenous people, rather than the people as such,<sup>38</sup> something the jurisprudence outlined above also reflects.

#### 4.2 The relevance of the right to property to resource extraction in indigenous territories

A core element of property rights over land is the right to grant or deny access to third parties seeking to enter the land. If, as the above concludes, indigenous property rights over land established through traditional use have equal legal status with property rights held by others, that element should reasonably apply also to indigenous property rights. The opposite seems discriminatory. And again, international legal sources reflect the conclusion that follows from logic.

The CERD Committee has repeatedly underlined that indigenous communities' have the right to offer or withhold their consent to resource extraction on their traditional territories. For instance, the CERD Committee has called on Peru to “*obtain [indigenous peoples] consent before plans to extract natural resources are implemented*”,<sup>39</sup> on Ecuador to “*obtain consent [of the indigenous people concerned] in advance of the implementation of projects for the extraction of natural resources*”,<sup>40</sup> and, with reference to the UNDRIP, on Guatemala to “*obtain [indigenous peoples] consent before executing projects involving the extraction of natu-*

<sup>37</sup> Ulfstein, “Indigenous Peoples' Right to Land”, in Max Planck UNYB 8 (2004), pp. 21–23, and Gilbert, *supra* note 5, p. 103

<sup>38</sup> Webber, “The Public-Law Dimension of Indigenous Property Rights”, in *The Proposed Nordic Saami Convention; National and International Dimensions of Indigenous Property Rights*, Bankes and Koivurova eds. (Hart Publishing, 2013), pp. 85–87

<sup>39</sup> CERD/C/PER/CO/14-17, para. 14

<sup>40</sup> CERD/C/ECU/CO/19, para. 16

ral resources".<sup>41</sup> Patrick Thornberry, member of the CERD Committee, observes that the consent formula is now "standard", wherefore the Committee, as a general rule, requires that consent has been obtained prior to resource extraction occurs in indigenous territories. He distinguishes between situations that (i) pertain to all citizens of the country, and (ii) concern an indigenous community directly. In the former situation, Thornberry submits that indigenous peoples have mere participatory rights. But in the latter scenario, he asserts that indigenous communities' property rights award them with a right to veto industrial activities that seek access to their traditional territories.<sup>42</sup> In a similar vein, the CESC has held that indigenous communities are entitled to withhold consent to resource extraction in their traditional territories.<sup>43</sup>

The SRIP has echoed the conclusions by the UN treaty bodies outlined above. According to him, "*international legal sources of authority*", such as the UNDRIP, "*lead to the general rule that extractive activities should not take place within the territories of indigenous peoples without their ... consent*".<sup>44</sup> The wording suggests that the SRIP addresses a wider array of rights, and not just the right to property. The fact that he subsequently proceeds to discuss expropriation criteria<sup>45</sup> demonstrates, however, that his primary concern is with the latter right. This further supports the

conclusion that the right to property UNDRIP Article 26 enshrines embraces a right of indigenous communities to withhold or offer consent to resource extraction in their traditional territories.

Jurisprudence emanating out of the Inter-American human rights system concurs with the position taken by globally applicable legal sources. For instance, in the *Belize Case*, the Inter-American Commission held 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...*".<sup>46</sup>

In sum, the conclusions seems to be that the right to property, understood in light of the right to equality, awards an indigenous community with the right to offer or withhold consent to resource extraction projects that seek access to territories traditionally used by the community. The question is then whether there are exceptions to the general rule.

States may legitimately place certain limitations on the exercise of most human rights, including on the right to property.<sup>47</sup> States may limit – i.e. expropriate – property rights, provided that certain criteria are fulfilled. The limitation must serve a legitimate social aim.<sup>48</sup> It must be prescribed by law, i.e. be foreseeable to the property right holder.<sup>49</sup> Finally, the limitation must be proportionate, i.e. "*strike a fair balance between the demands of the general interest of [society as a whole] and the requirements of the protection of ... fundamental rights [of the property right holder]*", without leaving her with a "*disproportionate and*

<sup>41</sup> See CERD/C/GTM/CO/12-13, para. 11 (a). For further similar conclusions, see e.g. CERD/C/SUR/CO/12 (Suriname), CERD/C/PHL/CO (Philippines), paras. 22 and 24, CERD/C/KHM/CO/8-13 (Cambodia), para.16, and CERD/C/SLV//CO/14-15 (El Salvador), para. 19.

<sup>42</sup> Thornberry, "The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Decent-based Discrimination", in Castellino and Walsh, *supra* note 12, pp. 33–34 and "Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD practice", in Allen and Xanthaki, *supra* note 4, pp. 77–78

<sup>43</sup> E/C.12/1/add.100, para. 12 (Ecuador), and E/EC.12/Add.74, para. 12 (Columbia)

<sup>44</sup> *Supra* note 1, para. 27

<sup>45</sup> See further below.

<sup>46</sup> See the *Belize Case*, *supra* note 29, and Anaya, "Indigenous Peoples' Participatory Rights", *supra* note 29, p. 13.

<sup>47</sup> Only the most fundamental human rights, such as the rights to be free from slavery and torture, are absolute.

<sup>48</sup> Article 1 of the Additional Protocol 1 to the European Convention on Human Rights.

<sup>49</sup> ECHR's ruling in *Carbonara and Ventura v. Italy*, Appl. No. 24638/94 (30 May 2000), para. 64.

*excessive burden*” as a result of the limitation.<sup>50</sup> Of these criteria, the “prescribed by law” criterion is normally fulfilled by a state governed by the rule of law. More relevant to the present purposes are the “legitimate aim” and, in particular, the “proportionality” criteria.

With regard to the former, the SRIP “cautions that [a legitimate social need] 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”.<sup>51</sup> Others may argue, however, that at least large-scale resource extraction meets a legitimate aim, e.g. because it provides society as a whole with needed resources and creates jobs. If it can be established that the industrial project serves a legitimate social need, the question becomes whether the limitation is proportionate.

In non-indigenous contexts, the proportionality criterion largely boils down to whether the property right holder receives market value compensation for damages caused by the infringement.<sup>52</sup> But if one assumes that indigenous communities do not primarily value their traditional territories in monetary terms, but rather because such territories are fundamentally important to their cultures, identities and ways of life, it appears unreasonably to conclude that the proportionality criterion is met simply because market value compensation is provided. Seemingly it is more relevant to consider the impact of the infringement on the indigenous community’s traditional livelihoods and other culturally based land uses. The SRIP concurs with this line of argument. He infers that “[the proportionality criterion] will generally be difficult to meet for extractive

*industries that are carried out within the territories of indigenous peoples without their consent*”.<sup>53</sup> In a similar vein, according to the CERD Committee, states should “ensure that the protection of the rights of indigenous peoples prevails over commercial and economic interests”.<sup>54</sup>

The positions taken by the SRIP and the CERD Committee reflect that resource extraction of scale normally has considerable negative impacts on indigenous communities’ territories. Therefore, and since continued access to such lands, generally speaking, are of cardinal importance to indigenous communities’ very existence, the conclusion may often be that such resource extraction places an excessive burden on the community, also measured against the interest of society as a whole. Consequently, it fails to meet the proportionality criterion.

In sum, to the extent the argument above is correct, as a general rule, it might not be possible to expropriate indigenous communities’ traditional territories. Large-scale resource extraction in indigenous territories may sometimes meet the legitimate societal need criterion, although the SRIP cautions otherwise. Still, if such large-scale resource extraction considerably damages an indigenous community’s territory, it assumingly fails to meet the proportionality criterion, given the fundamental importance of lands and natural resources to indigenous communities’ cultures, livelihoods and ways of life. Conversely, small-scale resource extraction may cause limited harm to indigenous territories, wherefore the proportionality criterion is met. But then the legitimate societal need criterion comes into question, since small-scale resource extraction may not generate substantial benefits to society as a whole. This would lead to the conclusion that only in instances where it can be established

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<sup>50</sup> ECHR’s rulings in *Draon v. France*, Appl. No. 1513/03, para. 78, and *Evaldsson and Others v. Sweden*, Appl. No. 75252/01, para. 55

<sup>51</sup> *Supra* note 1, para. 35

<sup>52</sup> ECHR’s ruling in *James and Others v. United Kingdom*, Appl. No. 8793/79, paras. 54 and 55

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<sup>53</sup> *Supra* note 1, para. 36

<sup>54</sup> CERD/C/CHL/CO/15-18, paras. 22 and 23

that resource extraction in a territory traditionally used by an indigenous community does not substantially negatively impact on the community, at the same time as it genuinely brings considerable benefits to society as a whole, is expropriation an option.<sup>55</sup>

As the SRIP indicates, if the expropriation criteria are not fulfilled, an agreement with the relevant indigenous community might be an option to the resource extractor.

### 4.3 The right to self-determination

Section 3.3 describes how the beneficiaries of the right to self-determination were initially understood to be peoples in the meaning aggregate populations of states (or territories). As the below elaborates, however, from the 1990s and onwards, it has been increasingly argued that the right to self-determination applies also to peoples in the meaning groups united by common ethnicity and culture, at least in the context of indigenous peoples.

Since the late 1990s, the HRC has systematically applied the right to self-determination to indigenous peoples in country reports on states that recognize the existence of indigenous peoples within their borders. For instance, the Committee has, with reference to the indigenous peoples in Canada, emphasized that *“the right to self-determination requires ... that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their*

*own means of subsistence”*.<sup>56</sup> By considering indigenous peoples in the context of CCPR Article 1, the Committee takes the position that the right to self-determination applies to indigenous groups that qualify as peoples under international law. Martin Scheinin, former member of the HRC, agrees that some indigenous groups constitute peoples for the purposes of common Article 1 of the 1966 Covenants.<sup>57</sup> The CESCR has applied CESCR Article 1 to indigenous peoples as well.<sup>58</sup> In sum, the UN treaty bodies mandated to authoritatively interpret the cardinal self-determination provision in international treaty law have both inferred that the right applies also to indigenous peoples.

The conclusions of the treaty bodies is reflected in UNDRIP Article 3, which proclaims that *“[i]ndigenous peoples have the right to self-determination.”* As UN General Assembly declarations in general, the UNDRIP is as such not a legally binding instrument. Still, UN Declaration provisions can nonetheless be indicative of interna-

<sup>55</sup> To be absolutely clear, the argument here is not that indigenous communities' property rights over land enjoy stronger protection than other property rights. The argument is simply that different elements become relevant to the evaluation of whether the proportionality criterion necessary to fulfil to lawfully expropriate land is indeed met, depending on in what ways the property right holder values the land. One could say that as other elements relevant to indigenous property rights over land, also the proportionality criterion should be culturally adjusted.

<sup>56</sup> See CCPR/C/79/Add.105. Similarly, the HRC has called on Australia to allow indigenous peoples a stronger role in decision-making over their traditional lands and natural resources. See A/55/40, paras. 498–528. Other instances where the Committee has addressed the right to self-determination in the context of indigenous peoples include CCPR/CO/74/SWE, CCPR/C/79/Add.109, CCPR/C/CAN/CO/5, CCPR/C/NOR/CO/5, CCPR/C/79/Add.112, CCPR/CO/82/FIN, and CCPR/CO/75/NZL.

<sup>57</sup> Scheinin, “Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights”, in Castellino and Walsh, *supra* note 4, p. 3 and “What are Indigenous Peoples?”, in *Minorities, Peoples and Self-Determination – Essays in honour of Patrick Thornberry*, Ghana and Xanthaki eds. (Martinus Nijhoff Publishers, 2005), p. 6

<sup>58</sup> See e.g. UN Doc. E/C.12/1/Add.94, paras. 11 and 39. The CESCR has in addition confirmed that indigenous peoples are peoples for international legal purposes in the context of right to culture. See General Comment No. 17, paras. 2, 7, 10, 12 and 32, and General Comment No. 21, paras. 7, 9, 36, 55 (e), as has the CERD Committee in the context of land and resource rights. See General Recommendation No. 23.

tional customary law.<sup>59</sup> If an UNDRIP provision sufficiently mirrors for instance treaty law, this suggests that the provision reflects an international customary norm.<sup>60</sup> As seen, UNDRIP Article 3 reflects treaty law, as it essentially clones common Article 1 of the 1966 Covenants. Since the adoption of the UNDRIP, several UN institutions have endorsed the Declaration, thereby pointing to its conformity with international law. For instance, the SRIP observes that “[UNDRIP] represents an authoritative common understanding... of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law”.<sup>61</sup> The CESCR and the CERD Committee also allows themselves to be guided by the UNDRIP when interpreting the CESCR and the CERD, respectively.<sup>62</sup> The UN Global Compact, the UN’s strategic policy initiative to influence corporate behaviour, has underlined the legal relevance of the instrument by producing a guide to the UNDRIP.<sup>63</sup> Importantly, the adoption of the UNDRIP’s self-determination provisions have accelerated the establishment of autonomy and self-government arrangements for indigenous peoples within states. Today, largely all Western countries with indigenous peoples have introduced various forms of such self-government and autonomy arrangements,

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<sup>59</sup> *Nuclear Test Case*. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J., Reports 1996, p. 226, Brownlie, *Principles of Public International Law* (Oxford University Press, 2003), pp. 14–15 and 663, and Shelton, “Law, Non-Law and the Problem of Soft “Law””, in *Commitment and Compliance: The Role of Non-Binding Norms in The International Legal System*, Shelton ed. (Oxford University Press, 2007), p. 1

<sup>60</sup> Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 213

<sup>61</sup> A/HRC/9/9 (11 August 2008), para. 85

<sup>62</sup> E/C.12/NIC/CO/4, para. 35, CERD/C/USA/CO/6, para. 29, CERD/C/FJI/CO/17, para. 13 and CERD/C/CAN/CO/18, para. 27

<sup>63</sup> UN Global Compact, “UN Declaration on the Rights of Indigenous Peoples; A Business Reference Guide”, December 2013

as has most Latin America countries while others are moving in the same direction.<sup>64</sup>

In sum, today discussions as to whether indigenous peoples are entitled to the right to self-determination appear essentially to have silenced. The conclusion seems to be that indigenous peoples are indeed beneficiaries of this right.<sup>65</sup> The question is then what is entailed in the right to self-determination, when applied not to the aggregate population, but rather to sub-segments, of states, such as indigenous peoples.

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<sup>64</sup> Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (Oxford University Press, 2007), pp. 80–81, 103–104, 108 and 249

<sup>65</sup> For concurring opinions see e.g. Anaya, *Indigenous Peoples in International Law*, *supra* note 28, p. 150, Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples”, in *International and Comparative Law Quarterly*, Vol. 58 (2009), pp. 966–969, Xanthaki, “Indigenous Rights in International Law over the Last 10 Years and Future Developments”, in *Melbourne Journal of International Law*, 10 (1) (2009), Rehman, “Between the Devil and the Deep Blue Sea: Indigenous Peoples as the Pawns in the US “War on Terror” and the Jihad of Osama Bin Laden”, in Allen and Xanthaki, *supra* note 4, p. 561, Fromherz, “Indigenous Peoples Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples”, in *University of Pennsylvania Law Review*, Vol. 156 (2008), p. 1344, Baldwin and Morel, “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation”, in Allen and Xanthaki, *supra* note 4, pp. 123–124, Koivurova, “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospects and Prospects”, in *International Journal on Minority and Group Rights*, 18 (2011), p. 32, Weller, “Settling Self-Determination Conflicts: Recent Developments”, in *European Journal of International Law*, Vol. 20, no. 1, 2009, Tomuschat, “Secession and Self-Determination”, in *Secession*, Kohen ed. (Cambridge University Press, 2006) pp. 23–45, and Voyakis, “Voting in the General Assembly as Evidence of Customary International Law” in Allen and Xanthaki, *supra* note 4, pp. 222–223

#### 4.4 The right to self-determination, specifically on the relevance for resource extraction in indigenous territories

Although the scope and content of the right to self-determination when applied to indigenous peoples is somewhat unclear, the below aims to establish certain parameters. First, indigenous peoples have to exercise the right within existing state borders. Absent extreme circumstances, the principle of territorial integrity of states precludes unilateral secession by sub-segments of states.<sup>66</sup> Second, as the above concludes, within states, indigenous peoples' may first and foremost exercise their right to self-determination through autonomy and self-governing arrangements. Third, for the reasons articulated below, as to the scope of these arrangements, one should distinguish between the rights to consultation and self-determination.

The right to consultation is a right to *participate* in decision-making processes. It does not ensure influence over the *material outcome* of such processes. The right vests ultimate decision-making power with an entity other than the indigenous people. It took almost 25 years to conclude the negotiations on the UNDRIP, mainly due to hesitance among states to accept that the right to self-determination applies to indigenous peoples. Indigenous peoples' right to consultation, on the other hand, has been well established in international law for decades.<sup>67</sup> It would appear to make little sense that states would find the right to self-determination contentious if it meant nothing more than an already existing right. Rather, the reasonable conclusion is that the scope of the right to self-determination goes beyond that of consultation.

This conclusion finds support in the Vienna Convention on the Law of Treaties (VCLT) Article 31.1, which provides that a treaty provision shall, absent convincing evidence to the contrary, be given a meaning that follows from a normal understanding of its wording.<sup>68</sup> A normal understanding of the phrases “[i]ndigenous peoples have the right to self-determination” (UNDRIP Article 3) and “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government...” (UNDRIP Article 4) is that indigenous peoples are beneficiaries of a right to self-determination to be exercised through autonomy and self-government arrangements within states. No evidence supports an interpretation other than that which follows from a regular understanding of the provision's wording. Nothing in the wording of UNDRIP Articles 4 and 5 supports an interpretation that provides that the provisions merely reaffirms the existing right to consultation.

It follows from the above that the right to self-determination is something “more” than a right to *participate* in decision-making processes. That “more” must reasonably be a right to *exercise influence over the material outcome* such processes. While the right to consultation is a *process right*, the right to self-determination is primarily a *material right* that can determine the outcome of decision-making processes in favour of indigenous peoples, also in absence of agreement.<sup>69</sup> That said, the right must be exercised with respect for the right to self-determination that applies to peoples in the meaning aggregate populations of states. This suggests that the right to self-determination that indigenous peoples

<sup>66</sup> Crawford, *supra* note 17, pp. 383–418, and Cassese, *supra* note 17, pp. 124, 167, 283, 334 and 349

<sup>67</sup> Tomei and Swepston, *Indigenous and Tribal Peoples: a guide to ILO 169* (ILO, 1996), p. 8

<sup>68</sup> VCLT Article 31.1 must reasonably analogously apply also to UN declarations that are drafted in the style of a treaty, such as the UNDRIP. See further Åhren, *supra* note 18, pp. 204–205.

<sup>69</sup> Compare EMRIP Expert Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making, paras. 2, 20, 21 and 34.

exercise through autonomy and self-governing arrangements awards them a right to materially determine the outcome of decision-making processes in some, but not all, instances.<sup>70</sup> At present, international legal sources do not offer much information as to what those instances are.

One may argue, however, that it makes sense to identify the instances when the position of indigenous peoples prevails over that of the majority people/state – also in cases of no agreement – by the relative importance of the matter to the respective people. If an affair is, relatively speaking, of much greater concern to an indigenous people compared with the majority people, it might be considered reasonable that the former people's right to self-determination encompasses a right to determine the outcome of the decision-making process. Resource extraction projects in their territories are assumingly essentially always of great concern to indigenous peoples. Such projects may, however, often also be of significant interest to majority peoples. Still, resource extraction tends to impact on the foundation of indigenous peoples' societies, cultures and ways of life in manners that cannot be said to apply to the majority people. This argues for that relatively speaking, resource extraction is often of far greater relevance to indigenous peoples compared with majority peoples. One may argue that this suggests that indigenous peoples' right to self-determination is far-reaching with regard to decision-making that pertains to resource extraction in their territories.<sup>71</sup>

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<sup>70</sup> For concurring opinions, see Anaya, *Indigenous Peoples in International Law*, *supra* note 28, p. 150, Scheinin, "Indigenous Peoples'...", *supra* note 57, pp. 4 and 11, Xanthaki, *supra* note 65, Weller, "Towards a General Comment on Self-Determination and Autonomy", UN Document E/CN.4/Sub.2/AC.5/2005/WP.5, pp. 5–6, 12 and 16, Kymlicka, *Multicultural Odysseys*, *supra* note 64, pp. 3–5, 33 and 206–211, and Tully, *supra* note 12, p. 53.

<sup>71</sup> To be clear, one must distinguish between the right to self-determination outlined here, and the right to

#### 4.5 The right to culture

As a final step in progressing the understanding of CCPR Article 27, the HRC has stated that an activity with "substantive negative impacts" on culturally based land uses must be discontinued absent free, prior and informed consent of the affected indigenous community.<sup>72</sup> This lowers the threshold for the applicability of the right to culture somewhat further. Now, not only resource extraction that effectively prevents, but also extraction that substantially negatively impacts on, indigenous communities' traditional livelihoods and other culturally based land uses is forbidden.

#### 4.6 Conclusions

Although it is clear that indigenous peoples are beneficiaries of the right to self-determination, at present, international legal sources offer limited guidance as to what, more precisely, is entailed in this right when applied to sub-segments of states such as indigenous peoples. The content and scope of the right to self-determination when applied to indigenous peoples will only become clearer as states and indigenous peoples proceed to establish and progressively evolve constructive autonomy and self-government arrangements on the domestic level, and when international judicial bodies offer their view on such arrangements. At present, it is difficult to pin down how far-reaching indigenous peoples'

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property that Sections 4.1. and 4.2 articulate. True, if the future proves the argument as to the scope and content of the former right to be correct, the exercise of the two rights may lead to similar results (acceptance or not of resource extraction in indigenous territories). Still, the legal foundation of the two rights are different, as is the legal subject. As seen, the holders of the right to property are indigenous communities within a people (or other traditional users) whereas the right to self-determination attaches to indigenous peoples as such.

<sup>72</sup> *Ángela Poma Poma v. Peru*, Comm. No. 1457/2006, para. 7

right to self-determination is in the context of resource extraction in their traditional territories.

The right to culture can be invoked to halt resource extraction in indigenous territories. The threshold for the right to apply is, however, high. Only resource extraction that significantly negatively impacts on an indigenous community's possibility to pursue traditional livelihoods or other culturally based land uses is outlawed.

The right to property is the most relevant of the rights examined in this article in the context of resource extraction in indigenous territories. As a general rule, the right to property entitles indigenous communities to withhold or offer their consent to resource extraction in territories traditionally used by them. The exception is when such lands can be expropriated. Existing legal sources suggest, however, that the room for lawful expropriation of indigenous territories is narrow. Alternatively, the resource extractor can seek an agreement with the relevant indigenous community, through which the extractor gain access to the community's territory.