Indigenousness as a Protected Ground of Discrimination

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The major international human rights instruments do not explicitly identify being indigenous as a protected ground of discrimination. Notwithstanding, protected grounds common to these instruments, such as 'ethnicity', undoubtedly encapsulate indigenousness. More interesting than whether it is a protected ground of discrimination is therefore the nature indigenousness attains as a such. This is the focus of this chapter.

Indigenousness as a protected ground of discrimination is marked by indigenous peoples having emerged as *sui generis* legal subjects within the international normative order, with rights particular to them. This singularity tests the right to non-discrimination in at least two significant ways. First, as 'peoples' not defined in terms of the aggregate populations of states, but who by contrast make up segments thereof, indigenous peoples by virtue of their mere existence bring the question to the fore whether the right to non-discrimination can attach, in addition to individuals, also to 'peoples'. Second, as indicated, at the base of the international indigenous rights regime is a *factual* recognition of indigenous peoples as distinct, and an attendant *legal* acknowledgment that indigenous rights should therefore focus on allowing indigenous peoples and communities to preserve and develop their unique societies, ways of life and collective identities. From a non-discrimination vantage point, this entails that the aspect of the right that calls for differential treatment becomes salient with respect to indigenous groups. In fact, the aspect calling for alike treatment is potentially counterproductive.

This chapter examines the nature of indigenousness as a protected ground of discrimination against the backdrop of the above. More specifically, it addresses whether the right to non-discrimination or equality principles more broadly attach to indigenous *peoples*, thus entitling them to equal treatment with other peoples, and, if so, what bearing this has on the understanding of their rights as peoples. In addition, the chapter examines under what circumstances indigenous *communities* have the right to differential treatment, and what is meant with 'differential treatment' then. The chapter does not engage with the although from a practical perspective pertinent, from a legal vantage point less challenging, issue of indigenous individuals' as potential victims of discrimination.

1 Briefly on Equality and Discrimination

Non-discrimination and equality are not terms of art. They are defined either by law or theory. With 'discrimination', which is its main focus, the chapter means treatment that recognized sources of international law disallow as discriminatory. This in turn entails that discrimination is in the first instance understood as denial of the equal enjoyment of human and other rights, as this is how the major human rights instruments most commonly define discrimination.[1]

[1] It appears e.g. in the instruments making up the International Bill of Human Rights; the 1948 Universal Declaration on Human Rights article 2, the 1966 International Covenant on Civil and Political Rights ('ICCPR') article 2.1, the 1966 International Covenant on Economic, Social and Cultural Rights ('ICESCR') article 2.2, and in the principal international instrument on discrimination, the 1965 International Convention on the Elimination of all Forms of Racial Discrimination ('ICERD') article1.1. With respect to indigenousness, the 2007 United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') too views

'Equality' then, is here a theoretical concept. Divergent views on what is equality, or justice (and thus on what ought to constitute 'discrimination' under law), reflect tensions within liberal theory between 'liberty' and 'equality'. Put simply, theories sorting under the first tenet focus on the freedom of the individual (defined as liberty from non-interference). Liberal egalitarians also value freedom but seek to combine it with political, social and economic equality. To most, liberty/equality is not an either/or question, but rather a balancing exercise.[2] Hence, defining 'equality' involves value judgements.[3]

Two locations on the liberty-equality scale are most relevant for the present purposes. The first is 'equality of opportunity'. Generally speaking, it holds that an uneven distribution of goods is unjust if it has materialized because those competing for the goods had uneven starting positions.[4] Equality of opportunity theories come in various forms but have in common that they understand 'equal opportunity' as equal opportunity *relative to someone else*. By contrast, the second equality position of particular relevance here maintains that conventional equality tenets, including equality of opportunity theories, embed a flaw in that they (implicitly) take the situation of a particular group as a pre-determined standard, and therefore define as 'discrimination' any dissimilar treatment *compared with that group* and by implication as 'discriminated' those *who are not like that group*. This location has contact points with, but need not be confined to, communitarianism.[5] It thus submits that achieving equality might involve adjusting certain parameters within which conventional non-discrimination law and (liberal) equality theories are articulated.

2 On the Understanding of Non-discrimination

When it was first integrated into the contemporary international legal system, the right to non-discrimination's focus was on the similar treatment of similar situations.[6] Differential treatment was allowed only as rare exceptions to the general rule. Similarly, special measures were reserved for those who were different in the sense of considered as disadvantaged relative to the majority/dominant group, and should thus serve the purpose of lifting those to

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non-discrimination first and foremost in terms of equal enjoyment of rights, see articles 1 and 2.

2 Douglas Rae, *Equality* (Harvard University Press, 1981) 48.

3 'Liberty' and 'equality' are to some degree mutually-exclusive values. Promoting freedom regularly limits the possibility to advance equality, while obtaining equality at times involves intervening in individual liberty, see e.g. Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press, 2002 (2nd ed)) ch 3; Sandra Fredman, *Discrimination Law* (Clarendon Law Series, 2011) 3, 33-35; and Francis Fukuyama, *The End of History and the Last Man* (Free Press, 2006 ed) 346-47.

4 Kymlicka, *Contemporary Political Philosophy* ibid 57-59.

5 With respect to communitarianism, see e.g. Michael Walzer, *Speres of Justice: A Defense of Pluralism and Equality* (Blackwell, 1983).

6 See e.g., Francesco Capotorti, 'Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities', United Nations publications, Sales No E.91.XIV.2) 241.

the level of the majority. Once this aim had been accomplished, special measures were to be discontinued.

By way of example, ICERD articles 1.4 and 2.2 articulate that special measures which serve the purpose of advancing equal enjoyment of human rights are allowed as exceptions to the general requirement of equal treatment of equal situations. A condition is though that such measures do not result in lasting separate rights for racial groups and are discontinued once the purpose for which they were introduced has been achieved. Thus, according to the letter of these provisions, special measures aiming to support those deemed different to preserve their distinctiveness are not allowed. Former member of the Committee on the Elimination of Racial Discrimination ('CERD') Patrick Thornberry has observed that at the time of its adoption the ICERD was 'dedicated to eliminating discrimination rather than recognizing diversity´.[7]

Similarly, when adopted, the right to non-discrimination enshrined in the ICCPR articles 2 and 26 was understood in largely the same manner. These provisions too called for similar treatment of similar situations. While not overtly referring to special measures, it is clear from the *travaux préparatoires* that the ICCPR allowed for largely the same such measures as the ICERD foresaw.[8]

2.1 Acceptance of Differential Treatment

The original understanding of the right to non-discrimination thus focused on similar treatment of similar situations. It viewed differential treatment of those different with suspicion, and with some exceptions prohibited it as discriminatory in itself. With time, however, an apprehension gained traction that similar treatment need not promote equality in all situations.[9] Responding to such concerns, the understanding of discrimination started to evolve. In General Comment No 18 on non-discrimination (1989), the Human Rights Committee ('HRC') posited that the 'enjoyment of rights ... on an equal footing ... does not mean identical treatment in every instance',[10] and further that 'not every differentiation in treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective'.[11] It added that eliminating conditions which perpetuate discrimination may require positive measures to that effect, although adding that such actions should be time-limited and serve

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7 Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford University Press, 1993) 266-68. Compare also Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001) 23.

8 See Bertrand G. Ramcharan, 'Equality and Non-discrimination' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 259-61.

9 For an overview of these considerations and the debate these sparked, see Kymlicka, *Contemporary Political Philosophy* (n 3) ch 8.

10 Para 8.

11 Para 13.

the purposes of ensuring equality with 'the rest of the population'.[12] The HRC has confirmed these positions in subsequent jurisprudence.[13]

Similarly, the Committee on Economic, Social and Cultural Rights ('CteESCR') found that differential treatment does not amount to unlawful discrimination if there are reasonable and objective justifications for the differentiation.[14] CteESCR too has further postulated that states may at times have to adopt special measures to attenuate or suppress conditions perpetuating discrimination, for its part holding that such measures may exceptionally need to be of a permanent nature.[15]

CERD first confirmed that differential treatment need not amount to discrimination as long as the criteria for non-identical treatment fall within the scope of ICERD article 1(4).[16] More recently, it has emphasized that the ICERD is a living instrument, with the capacity to take on new meanings along with evolved understandings of equality and justice,[17] specifying that '[t]he term "non-discrimination" does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment'.[18] CERD added that states are sometimes obliged to introduce special measures to combat discrimination. In contrast to CteESCR, CERD did not foresee the use of permanent such measures. Instead, it emphasized that (temporary) special measures must not be confused with human rights attaching to members of minorities or to indigenous peoples.[19] CERD thus juxtaposed differential treatment and indigenous rights, underscoring that the temporary character of the former does not impact on the existence or permanent nature of the latter.

To conclude, having in the outset considered largely all forms of differential treatment discriminatory, international law evolved to *accept* such non-identical treatments as non-discriminatory that are motivated by objective and reasonable justifications.[20]

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12 Para 10.

13 E.g. *Jacobs v Belgium*, UN Doc CCPR/C/81/D/943/2000 (2004), views adopted on 7 July 2004 9.3; *Süsser v Czech Republic*, UN Doc CCPR/C/92/D/1488/2006, views adopted on 25 March 2008 7.2.

14 General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2 of the International Covenant on Economic, Social and Cultural Rights), E/C12/GC/20 (2009) 13.

15 Ibid., 9.

16 General Recommendation No 14: Definition of Discrimination (Art 1, par1), Forty-eight Session, Supplement No 18 (A/48/18), chapter VIII, sect B 2.

17 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 5.

18 Ibid., 8.

19 General Recommendation No 32 15.

20 For a more extensive overview of the described progression, see Timo Makkonen, *Equality in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Theories in Europe* (Martinus Nijhoff Publishers, 2011) ch 6.

2.2 Call for Differential Treatment

The outlined development has more recently progressed further.

In *Thilmmenos*, the European Court of Human Rights ('ECtHR') first noted how it 'has so far considered the right to [non-discrimination] ... violated when States treat differently persons in analogous situations'. It then postulated 'that this is not the only facet of the [right to non-discrimination. This right] ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situation are significantly different.'[21] While aligning itself with the evolvement articulated above, the ECtHR thus went further. Not only did the Court ascribe that differential treatment *need not* amount to discrimination. Rather, it proclaimed that the failure to treat those differently who are in significantly different situations can, absent reasonable and objective justifications for non-differentiation, *constitute* discrimination. Having revisited *Thlimmenos* on a few occasions, the ECtHR has more recently recapitulated that there is discrimination when a state either i) treats differently 'persons in relatively similar situations' or, ii) 'in certain circumstances' fails 'to treat differently persons whose situations are significantly different'.[22] Apparently, the Court places the two situations on par. It has thus been observed that the call for differential treatment of different situations 'is now part of the Court's well-established case law',[23] but also that the ECtHR is yet to specify what those 'certain circumstances' are that trigger the differential treatment requirement.[24]

CERD's understanding of discrimination has evolved accordingly. The above has already described how the Committee in General Recommendation No 32 took the position that differential treatment need not constitute discrimination if there are objective and reasonable justifications therefore. It then proceeded to postulate that 'to treat in an equal manner ... groups whose situation are objectively different will constitute discrimination in effect ... non-discrimination requires that the characteristics of groups be taken into consideration.'[25] Subsequent CERD jurisprudence confirms that the Committee understands the right to non-discrimination the ICERD enshrines to envelope a state obligation to treat differently those in different situations.[26] CERD has thus not only found differentiation to be *in conformity* with the right to non-discrimination. It has held that the failure to treat differently those whose situations are significantly different may in fact breach that right.[27]

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[21] *Thlimennos v. Greece* [2001] 31 EHRR 411 44.

[22] *Taddeucci and McCall v. Italy*, ruling of 30 June 2016, appl no 51362/09 81.

[23] Pieter Van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2018, 5th ed) 1004-05.

[24] William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015) 566.

[25] Para 8.

[26] Patrick Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016) 133.

[27] See also ibid., and Kristin Henrard, 'Non-discrimination and Full and Effective Equality, in Marc Weller (ed) *Universal Minority Rights* (Oxford University Press, 2007) 89-90.

2.3 Differential Treatment and Indigenous Groups

Regional human rights courts and commissions have applied the right to differential treatment to indigenous groups. In *Saramaka*, the Inter-American Court on Human Rights ('IACtHR') first confirmed that unequal treatment of unequal situations need not constitute discrimination. It then recalled its previous finding that special measures are necessary to ensure the survival of indigenous groups in accordance with their traditions and customs.[28] In *Enderois*, the African Commission on Human and Peoples' Rights ('AfCommHPR') aligned itself with the IACtHR's conclusions in *Saramaka*.[29] Although not explicitly employing the language of required differential treatment, the positions taken by the IACtHR and the AfCommHPR may be understood in such a manner. Both institutions highlight the relevance of differentiation. Further, the measures they call for must necessarily be of a permanent nature. If not, these can hardly serve the stated purpose to ensure the cultural survival of indigenous peoples, in other words, their distinctiveness.

For its part, in *Rönnbäcken* CERD operationalized the right to differential treatment in an indigenous context. There, the Committee recalled its previous inference[30] that to ignore indigenous groups' 'inherent' land rights amounts to a particular form of discrimination directed against them.[31] It then elaborated on this proclamation, specifying that while, as with property rights in general, infringing on indigenous communities' right to land presupposes proportionality, the proportionality test must be customized to their indigenous background.[32] CERD stressed that indigenous land rights are a particular form of property rights, which differ from property rights in general in that they constitute central elements of indigenous peoples' cultural identity and traditional livelihood.[33] The Committee emphasized that the ICERD requires states to ensure to everyone freedom from discrimination *de facto* and *de jure*.[34] It inferred that this nature of the right to non-discrimination obligated the state party, when applying the proportionality test, to 'strike a balance in fact and not ... in abstracto'.[35] In conclusion, CERD clarified that indigenous communities are in such a significantly different position which requires states to treat them differently. In the situation at hand, this meant customizing the right to property to the community's indigenous identity, including the element of the right which protects against infringements in the lands and resources subject to it.

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28 *Saramaka People v Suriname*, IACtHR Ser C No 172 (2007) 103.

29 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Enderois Welfare Council) v Kenya* (2009) 196.

30 General Recommendation No 23.

31 *Lars-Anders Ågren et al. v Sweden* (*Rönnbäcken*), CERD/C/102/D-54/2013 (decision of 26 November 2020) 6.7.

32 Ibid., 6.10.

33 Ibid., 6.14.

34 Ibid., 6.13.

35 Ibid., 6.20.

2.4 Conclusions: Two Facets of Non-discrimination

Originally, non-discrimination was essentially understood as equal treatment of equal situations. With time, however, it became increasingly apprehended that similar treatment might not always achieve equality. Responding to such understandings, discrimination law first accepted that not all differentiation *need* amount to discrimination. It then progressed further, coming to hold that in certain circumstances, failure to treat those differently who are in significantly different situations can in fact *be* discriminatory. The first and perhaps also the second leg of this development could be viewed as responding to calls for equality in the meaning equality of opportunity as discussed above. The second leg may be appreciated by those who argue that achieving equality might in certain situations require adjusting the parameters of the conventional equality theories, as the chapter returns to below.

The right to non-discrimination has thus evolved to take on a second facet, in addition to the original first, or at least so it is argued here. There is then *prima facie* discrimination if a state either i) treats differently those in relevantly similar situations or, ii) in certain circumstances, fails to treat differently those whose situations are significantly different.[36] The below explores the nature and reach of the second facet of the right to non-discrimination. Doing so, one notes that its scope is partly determined by what those 'certain circumstances' are which invoke the entitlement to differential treatment. Seeking to identify those circumstances in the particular context of indigenous groups, the following sections examine what renders indigenous rights *sui generis*. This, in turn, involves juxtaposing these against minority rights.[37]

3 Indigenous Rights as *Sui Generis* Rights

From the outset, international law came to distinguish between indigenous peoples[38] and minorities and, as a consequence, between indigenous and minority rights. This has never changed.

The locus of the post-Westphalian international normative order was Europe. To the European states (and law makers) now emerging, indigenous peoples were *external* populations they encountered in their colonial aspirations. Minorities, on the other hand, were groups *internal* to Europe with certain characteristics (largely religious or linguistic) that distinguished them from the majority population of the state. These two categories of collectives warranted different legal responses. Put simply, members of (some) minority groups were

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[36] The *prima facie* discrimination is not confirmed if there are reasonable and objective justifications for in instance i) differentiation, and in instance ii) non-differentiation.

[37] The distinction between indigenous and minority rights is one of 'status difference', as distinct from 'status hierarchy'. Compare Daniel Viehoff, 'Power and Equality' in David Sobel, Peter Vallenty and Stephen Wall (eds), *Oxford Studies in Political Philosophy, vol 5*, (Oxford University Press, 2019) 16.

[38] From a legal vantage point, it is anachronistic to refer to 'indigenous peoples' with respect to eras when they were not recognized as such. For reasons of simplicity, this chapter still does so.

awarded the right to exercise said characteristics. Towards indigenous peoples, the legal response was non-recognition.

The international normative order's divide between minorities and indigenous peoples consolidated over the centuries. When the world community commenced addressing the situation of indigenous peoples in earnest in the late twentieth century, international law's take on indigenous and minority rights, respectively, was largely the same as post-Westphalia. In other words, members of minority groups enjoyed certain rights to exercise their culture and religion, while indigenous peoples were not acknowledged as international legal entities and thus lacked the capacity to hold rights. At this juncture, the legal response to indigenous peoples could be basically two. First, the minority rights regime could be applied to indigenous peoples as well. There would then be no indigenous rights per se, "only" minority rights embracing also indigenous individuals. Alternatively, a *sui generis* international indigenous rights framework could be elaborated. The latter option materialized, as seen below.

3.1 Indigenous Peoples and their Rights under Colonial and De-colonial Law

The creation of an international legal system was in large part motivated by a wish to legitimize colonisation.[39] For this purpose, the *terra nullius* doctrine was articulated. It had two, interrelated, components. The first postulated that *societies* of indigenous peoples–as measured against the European yardstick–are not sufficiently "civilized" to qualify for sovereign or other *political rights*.[40] The second proclaimed indigenous *land and resource uses* "uncivilised" too–again relative to the "European standard"–thereby excluding indigenous peoples from *private, i.e. property, rights* to land.[41] In sum, international law came to proclaim (among others) indigenous peoples as (legally) non-existing. It thus justified a colonization which otherwise would have been hard to legally defend, as it is difficult to legitimize colonization of an equal.[42]

Colonial law became entrenched over the centuries, and as far as indigenous peoples were concerned, survived also decolonization. The arguments for

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[39] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination* (n 26) 9-12, with references; Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 183, with references.

[40] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 34; and Martti Koskenniemi, *The Gentle Civilizers of Nations* (Cambridge University Press, 2002).

[41] This component of the *terra nullius* doctrine is heavily associated with the 17th Century philosopher and legal scholar John Locke; see e.g., *Two Treaties of Government* (1689). See also Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 2, 7.

[42] Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination* (n 26) 9-12, with references. As observed, '*[t]he rule of law … is a … more effective means of extending empire than is military force and occupation*", see Laurelyn Whitt, *Science, Colonialism, and Indigenous Peoples: The Cultural Politics of Law and Knowledge* (Cambridge University Press, 2009) 26.

equality between peoples that fueled this process by-passed them. Only peoples in the meaning of aggregate populations of colonial *territories* gained legal recognition and independence during this era.[43] Indigenous peoples continued to be invisible to the international normative order, although some of them now became invisible in newly formed states, instead of in colonies.

3.2 Minorities and Minority Rights under Colonial and De-colonial Law

As indicated, the law of nations from the outset embraced some norms providing *members* of certain linguistic and religious minorities with rights to exercise their religion and to speak their language, as predominantly manifested in bilateral treaties.[44] During the inter-war period, the League of Nations aspired to elaborate a comprehensive international minority rights system. This project imploded, but neither this failure nor the League's initial aspirations impacted on the position that members of religious and linguistic minorities have the right to exercise their faith and to speak their language.[45] Hence, as indigenous rights, minority rights were essentially the same post-World War II as when emerging post-Westphalia.

3.3 Minorities and Minority Rights under Contemporary Law

Minority rights were incorporated into the contemporary international human rights system soon after it emerged, as encapsulated in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) ('Minority Declaration'). It identifies 'minorities' as smaller groups in states with common religious, cultural and/or linguistic traits.[46] As to rights, the Minority Declaration provides that the individual members of such collectives have the right to exercise their religion and culture and to speak their language (article 2.1), to non-discrimination (articles 3 and 4.1) and to certain participatory rights (article 2.3). Thus, present day minority rights are not all that different compared with those of post-Westphalia.

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43 Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 1996 (rev ed)) 36; and David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International, 2002) 209.

44 Capotorti (n 6) 5, 7-15; Khenikor Lamarr, 'Jurisprudence of Minority Rights: The Changing Contours of Minority rights' [2018] *8th International Research Association for Interdisciplinary Studies* 166-68.

45 David Wippman, 'The Evolution and Implementation of Minority Rights' [1997] 66 *Fordham Law Rev* 597 600; Patrick Macklem, 'Minority Rights in International Law' [2008] *International Journal of Constitutional Law*, Vol 6, Issue 3-4, 547; and Capotorti (n 6) 19.

46 Legally speaking, not all individuals with less common traits hence belong to minorities. The UN Special Rapporteur on Minority Issues' working definition of minorities identifies as such 'ethnic, religious or linguistic … group[s] of persons that constitute less than half of the population … of a State whose members share common characteristics of culture, religion or language, or any combination of these,' see Report of the Special Rapporteur on minority issues: Education, language and the human rights of minorities, A/HRC/43/47 70.

3.4 Indigenous Peoples and their Rights under Contemporary Law

As mentioned, when in the late 1970s seeking to include indigenous peoples in the international normative order, the United Nations and its member states could have opted for conflating them with minority groups, closing the door to an international indigenous *corpus juris*. This alternative did, however, not materialize. Instead, a *sui generis* international indigenous normative framework took form. It had as a starting point recognition of indigenous peoples as collectives with distinct traits, the safeguard of which requires distinct rights.

In many ways, the 'Cobo-report', an unusually ambitious UN study on the discrimination of indigenous peoples drafted during the latter part of the 1970s and the first half of the 1980s, could be considered the foundational document of the indigenous rights regime. This report sparked developments which have formed and are forming this legal framework. It also includes a working definition of indigenous peoples, still the most authoritative and cited of its kind.[47] The Cobo-definition identifies as a core trait among indigenous peoples a determination 'to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples'.[48] It thus places on par identity *and* land as prerequisites for indigenous peoples to be able to remain as distinct peoples. Loss of *either* is assumed to preclude their continued being.

The Cobo-report's identification of indigenous peoples as populations inherently and hence inalienably interwoven with their traditionally used lands has been constantly reiterated. For instance, in the seminal *Awas Tingni* the IACtHR postulated that the 'close ties of Indigenous peoples with the land must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and … survival. For Indigenous communities … land is ... a material and spiritual element, which they must fully enjoy … to preserve their cultural legacy and transmit it to future generations'.[49] The Court has underscored and elaborated on this basic conclusion repeatedly. By way of example, it emphasized in *Sawhoyamaxa* that the 'culture of ... indigenous communities reflects a particular way of life ... the starting point of which is their close relationship with their traditional lands and natural resources, not only because they are the main means of survival, but also because they form part of ... their cultural identity.'[50] In *Endorois* the AfCommHPR aligned itself with these conclusions.[51] Similarly, the CteESCR has held states' recognition of land rights imperative 'to prevent the degradation of [indigenous peoples'] particular

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47 Mauro Barelli, *Seeking Justice in International Law: The significance and implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge, 2016) 5-6; and Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press, 2015) 152-53.

48 UN Doc E/CN/Sub2/1986/, Add. 1-4, add 4 379-80.

49 *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Ser C No 79 (21 August 2001) 149.

50 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs), IACtHR Ser C No 146 (29 March, 2006)118; see also e.g., *Yakey Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs), Ser C No 125 (17 June 2005) 125; and *Kichwa Indigenous People of Sarayka v. Ecuador*, Judgement, Ser C, No 4 (2012).

51 *Enderois* (n 29) 174-238.

way of life ... and, ultimately, their cultural identity'.[52] This norm is also enshrined in UNDRIP article 25, which explicitly articulates that indigenous peoples have the right to maintain and strengthen their spiritual relationship with traditionally used lands, territories and resources, and to uphold their responsibilities towards future generations in this respect. *Overtly* enunciated is thus that indigenous peoples are entitled to strengthen their spiritual relationship with their lands. In this postulation one may read in an *indirect*, broader, sentiment affirming that i) indigenous peoples are groups who are inherently tied to historically used lands, not "only" spiritually but also from the perspectives of their societies, cultures, ways of life and identities,[53] and ii) that this connection is vital to their continued existence as indigenous peoples.

An additional identified core trait among indigenous peoples, attendant to the first, has also served as a basis for the international indigenous rights regime. Indigenous peoples have, it has been recognized, as a natural consequence of their attachment to their respective historically used lands, established societies on these, of which at least key features remain, as reflected e.g. in ILO Convention No 169 on Indigenous and Tribal Peoples in Independent Countries ('ILO 169') article 1 (b), UNDRIP article 3, and in a rich treaty body jurisprudence.[54] In other words, international law came to identify as distinct collectives, as 'indigenous' peoples', populations which, in addition to being inherently and inalienably tied to historically used lands, have formed traditional societies on these territories of which they have carried at least some key institutions into the present day.[55]

As indicated, the international indigenous rights regime's response to the *de facto* recognition that indigenous peoples are collectives whose cultures, societies, ways of life and ultimately identities are inherently and inalienably interwoven with their historically used lands, has been the acknowledgment that indigenous peoples are then also *de jure* tied to such lands. For instance, having

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52 General Comment No 21 36.

53 For a similar view, see Claire Charters, 'Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 410-11. Charters e.g. notes that an UNDRIP preambular paragraph enunciates that indigenous peoples' control over their lands and resources 'will enable them to maintain and strengthen their … cultures and traditions', lending support to the expressed understanding of article 25.

54 As to the HRC, see e.g., UN Doc CCPR/C/79/Add/105 8 and A55/40 498-528 and former member of the HRC, Martin Scheinin 'Indigenous Peoples Rights under the International Covenant on Civil and Political Rights' in Joshua Castellino and Niamh Walsh (eds), *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers, 2005) 3, 10-11. As to CteESCR, see e.g., UN Doc E/C12/1/Add94/ 11 and 39. As to CERD, see e.g., CERD/C/SUR/CO/12 18, and also Thornberry, *The Convention on the Elimination of all Forms of Racial Discrimination* (n 26) 334-36; and Federico Lenzirini, 'The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law' in Federico Lenzirini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 73-116.

55 Compare Will Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (Oxford University Press, Oxford, 2007) 272-93; and Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' [2008] *Michigan Journal of International Law* Vol. 30 (1) 208.

noted that indigenous peoples' identities etc. are factually interwoven with their lands, the IACtHR has proceeded to infer that indigenous communities must then also hold rights to such lands. By way of example, in *Sawhoyamaxa* the Court held 'that the close ties [indigenous peoples] have with their lands … must be secured [by rights]'.[56] For its part, CteESCR has observed that indigenous land rights are motivated by a need to 'prevent the degradation of [indigenous peoples'] particular way of life, including their means of subsistence … and, ultimately, their cultural identity.'[57] CERD has pointedly noted that indigenous land rights are unique in that the right identifies its holder.[58] The UNDRIP encapsulates this norm. Following the mentioned recognition in article 25 of indigenous peoples' *sui generis de facto* relation with traditionally used lands, article 26.1 postulates *de jure* that indigenous peoples 'have the right to the lands, territories and resources which they have traditionally ... used'. Similarly, the *de facto* recognition that indigenous peoples are collectives who have established societies on their traditional territories of which at least core features are extant, has prompted the *de jure* acknowledgment that indigenous peoples must then hold rights to such societies, as reflected e.g. in the UNDRIP articles 3-5 and the other sources referred to above.

3.5 Conclusions

An international indigenous *corpus juris* has replaced the colonial law's non-recognition of indigenous peoples. This normative order is founded on two, interrelated, core components. The first acknowledges *de facto* that indigenous peoples' societies, cultures, ways of life, and ultimately their very identities, are inherently and thus inalienably interwoven with their historically used lands, and infers *de jure* that this factual connection bestow indigenous communities with rights to these lands. The second recognizes *de facto* that through their involvement with said territories, indigenous peoples have established societies on these, of which at least salient institutions remain, and proclaims *de jure* that indigenous peoples therefore have the right to continuously maintain and develop such traditional societies.

From this foundation grow the concrete rights that make up the nucleus of the international indigenous rights regime. These provide i) that as 'peoples', indigenous peoples are beneficiaries of the (political) right to self-determination, and ii) that as traditional users, indigenous communities hold (civil) rights to lands and natural resources historically used.[59]

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[56] *Sawhoyamaxa* (n 50) 118.

[57] General Comment No 21 36.

[58] Decision 2 (54), A/54/18, 5-7 4. See also e.g., CERD/C/LAO/CO/16-18 16, where the Committee observed that lands are integral to the identity of indigenous groups.

[59] *International Law Association, The Hague Conference (2010)*, 'Rights of Indigenous Peoples' Interim Report 8, 15, 22-23, 38; S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) 141-48; Barelli (n 47) 15, 29, 53; Charters (n 53) 397, 410-14; Marc Weller, 'Self-Determination of Indigenous Peoples' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018); Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University

It is noteworthy that the same traits that under colonial law disqualified indigenous peoples from legal recognition, i.e. their "uncivilized" i) societies and ii) relationships with their lands and resources, under contemporary international law underpin the very foundation of the indigenous rights regime, which is also what makes indigenous rights *sui generis*. The rest of this chapter examines the relevance of the outlined nature of the international indigenous legal framework for the understanding of indigenousness as a protected ground of discrimination.

4 The Nature of Indigenousness as a Protected Ground of Discrimination

Sections 4.1-3 examine the nature and reach of the right to non-discrimination as it attaches to indigenous *communities*, from a principled viewpoint. Section 4.4 subsequently tests how the conclusions drawn play out in the concrete context of indigenous communities' property rights to lands and resources historically used. Section 4.5 then addresses the relevance of the right to non-discrimination and/or of the principles underpinning that right to indigenous *peoples*, with a specific focus on the right to self-determination.

4.1 Indigenous Communities as Beneficiaries of the Right to Non-discrimination

International human rights are conventionally understood to be individual and universal. Hence, all individuals are thought to be equally entitled to all human rights "simply" in their capacity as humans, in other words irrespective of their ethnic and cultural backgrounds or other traits.[60] The correlation between the comprehension of human rights as universal and the first facet of the right to non-discrimination is clear.

Indigenous rights challenge the understanding of human rights as individual in nature, as articulations of these respond to the collective dimension salient in indigenous cultures.[61] This is e.g. reflected in the UNDRIP's identification of subjects of the right to non-discrimination. Article 1 provides that '[i]ndigenous peoples have the right to the full enjoyment ... of all human rights', while pursuant to article 2 '[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of

Press, 2007) part II; Mattias Åhrén, 'Recognition of indigenous peoples' rights to lands, territories and resources' in *State of the World's Indigenous Peoples (5th Vol): Rights to Lands, Territories and Resources*, UN Department of Economic and Social Affairs (2021); and Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, 2016) ch 9, with references.

60 See Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2014 (3rd ed)) chapter 4. Section 4.5 elaborates how the right to self-determination and potential other peoples' rights constitute rare exceptions to the notion that human rights attach to individuals only, but also how this anomaly until recently has been more theoretical than real.

61 See generally Anaya (n 59); and Charters (n 53).

discrimination, in the exercise of their rights'. Consonant therewith, in General Recommendation No 23 on indigenous peoples, CERD pronounces indigenous 'peoples' beneficiaries of the right to non-discrimination.

Attaching human rights hitherto associated only with individuals to indigenous groups, also *strictu sensu*, is thus congruent with and respectful towards indigenous cultures, and could be viewed as a consequence of the *sui generis* nature of the indigenous rights regime, which as seen has as a point of departure indigenous peoples' core traits. More broadly, human rights evolving to embrace groups is in line with the emergence of the second facet of the right to non-discrimination. These arguments could carry enough weight to have broken through the bastion maintaining that human rights are (almost) only individual in nature. The chapter refrains from taking a position on the matter, mainly because it apprehends the practical consequences to be limited, at least in the context of the right to non-discrimination.

Section 4.5 explains how the emergence of indigenous *peoples* as 'peoples' need not cause friction with the understanding of human rights as predominantly individual. As to indigenous *communities*, a pragmatic approach suggests that these being beneficiaries of human rights need not be incompatible with a preference for such as individual in nature either. International and regional human rights institutions examining complaints by indigenous communities that their rights have been breached have not dwelled on their standing as subjects of human rights. Instead, such institutions have either not problematized the community as a complainant or understood the complainant(s) to be the leader of the community on behalf of it/the members of the community. [62] Either way, for all practical purposes indigenous communities have been accepted as legal subjects. Based on this premise, i.e. that indigenous communities have at least *in fact* been accepted as subjects of the right to non-discrimination, the below discusses the form the right attains with respect to them.

4.2 The Understanding of Discrimination of Indigenous Communities

Those falling under a protected ground are thus victims of discrimination *either* i) if treated differently in a similar situation, in absence of reasonable and objective justifications for the differentiation, *or* ii) if treated similarly in a different situation, in absence of reasonable and objective reasons for non-differentiation. Both facets may be relevant to all protected grounds, but their relative impact surely varies. Indigenous peoples' core traits and the unique rights framework that has crystalized in response to these advise that the right to differential treatment is particularly relevant to indigenousness as a protected ground. Indeed, the prominence of the second facet might be such that it brings to the fore what section 1 points to some have identified as a flaw embedded in the conventional understanding of discrimination.

It has been observed that the analogous situations test inherent in the first facet of the right to non-discrimination, i.e., that identifying discrimination involves establishing whether someone has been treated differently *relative to*

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[62] See, for illustration, the CERD, IACtHR and AfCommHPR jurisprudence referred to above, and with respect to the HRC, by way of example, *Ángela Poma v Peru*, CCPR/C/95/D/1457/2006 (27 March 2009).

"someone else", is deceptive as it rests on a false narrative of a comparator *in abstracto*, when in reality the comparator is always the majority/dominant. The analogous situation test uncritically accepts then the majority/dominant as the standard; the position that is to be achieved. In other words, the non-discrimination formula is engaged only at a point when it has already been established that the situation/traits of the majority/dominant is the normal. By implication, victims of discrimination are defined as those who are not treated like/are not like the majority/dominant. Consequently, to no longer be victims of discrimination, they need to accommodate so to behave/become like the majority/dominant. The majority/dominant never needs to accommodate.[63]

Seemingly therefore, the first facet of the right to non-discrimination is of limited relevance to those who do not aspire to be like the majority/dominant, nor to be treated like it. Indigenous communities with their distinct traits seemingly epitomize this situation. To them, the arrival of the second facet of the right to non-discrimination with its call for differential treatment could address the shortcomings embedded in the first, at least/in particular *if* the second facet need not encompass an analogous situation test. In other words, to be really relevant to indigenous communities, the differential treatment the right to non-discrimination requires should be differentiation because of being different in the meaning being in a unique situation, in contrast to being different in the meaning compared with "someone else". Thus understood, the right to non-discrimination which applies to indigenous communities is a right to be treated in ways accommodating to their *sui generis* situation, without there being a need (or possibility) to compare with the situation of others. This apprehension appears reasonable, as inferring otherwise would generate the implausible outcome that while the right to non-discrimination embraces a right of those different to be treated differently (as is presumed here), this right does not embed those who are too different.

The extrapolated understanding of the right to non-discrimination is consonant with the observation made that there is a strong link between the prohibition of discrimination and respect for human dignity.[64] What amounts to affronts to dignity must reasonably in the outset be identified subjectively rather than objectively, as presumably only such actions affront dignity which the receptor perceives negatively. Hence, respect for dignity calls for treatment customized to the background of the receiver. It has thus been noted that identifying what respects dignity is particularly pertinent to understanding the role of equality in situations where there is no relevant comparator.[65]

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63 Compare Sophia Moreau, 'Discrimination and Subordination' in David Sobel et al. (eds), *Oxford Studies in Political Philosophy, Volume 5* (Oxford University Press, 2019) 119-20; and Fredman (n 3) 10-11.

64 Evadné Grant, 'Dignity and Equality' [2007] Human Rights Law Review 7:2; Fredman (n 3) 19-25; and Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination* (n 26) 82-83.

65 Fredman (n 3) 22.

4.3 Conclusions: The Two Facets of the Right to Non-discrimination

The first facet of the right to non-discrimination not only embeds a comparison with the majority/dominant group but defines non-discrimination in terms of likeness with that group. This renders this aspect of the right of questionable relevance to indigenous communities, who aspire to preserve and develop their distinctiveness and seek attendant treatment. The second facet of the right to non-discrimination, understood as a right to differential treatment in the meaning treatment customized to indigenous communities' unique situation, as distinct from in the meaning relative to the situation of someone else, addresses the shortcoming inherent in the first aspect.

Notably, this understanding of discrimination excludes the possibility of *factual* discrimination, i.e. situations where an indigenous community would have been considered de facto disadvantaged relative to another group, as the definition of discrimination precludes such situations. Instead, the understanding highlights what the above has identified as the nucleus of the right to non-discrimination, i.e. *legal* discrimination; situations where an indigenous community has been disadvantaged in terms of unequal enjoyment of human and other rights.

Finally, it is recalled that the second facet of the right to non-discrimination applies to 'certain circumstances'. It is argued here that it is axiomatic that such circumstances embrace situations where a group aspires to remain distinct compared with the majority/dominant, and cannot be meaningfully compared with the same.

4.4 The Right to Non-discrimination in the Context of Rights to Lands and Resources

The above thus infers that indigenous communities are entitled to a right to non-discrimination that embeds a right to equal enjoyment of human and other rights, where the understandings of these rights are to be customized to their distinct indigenous identity. This section surveys how this right materializes in the context of indigenous communities' property rights to lands and resources.

The right to property known to international law has two basic components. The first provides that all must have equal opportunities to establish property rights. According to the second, property rights thus established must enjoy equal protection against infringements.

4.4.1 The First Component of Indigenous Communities' Property Rights to Lands and Resources

Even if domestic laws providing that protracted uses establish property rights to lands and resources do not *formally* exclude indigenous communities from becoming holders of such rights, they might do so *in practice* if designed so that land uses common to the indigenous culture do not result in rights, while those common to the majority culture do. There need not be an intent to exclude indigenous communities from property rights. The law can have been formulated with only the majority culture in mind out of ignorance. The effect is the same

though; indigenous communities are excluded from being holders of property rights established by protracted use. The below outlines how that above infers that domestic property laws thus articulated are suspicious with respect to the element of the second facet of the right to discrimination calling for equal enjoyment of rights.

As seen, the right to non-discrimination entitles not only to alike treatment in similar situations, but also, in 'certain circumstances', to differential treatment in different situations. The uniqueness of indigenous communities and their resolve to preserve this distinctiveness entail that they are in such a certain circumstance which engages the right to differential treatment, and also that the differential treatment they are entitled to is differentiation because of being different in the meaning being in a unique situation, as distinct from being different in the meaning compared with "someone else".

Applied to the establishment of property rights to lands and resources, the outlined norm provides that indigenous communities are equally entitled to benefit from those domestic property laws determining that protracted use of lands and resources establish property rights. Moreover, the right is to be customized to the indigenous communities' particular situations. This entails that domestic property laws must not be designed so as to provide that while land uses common to the majority culture establish property rights, those common to indigenous cultures do not. Arguments that the right to non-discrimination is nonetheless not breached, because indigenous communities' land and resource uses are singular to the extent that these have not been discriminated relative to someone else, are irrelevant. Rather, with differential treatment is meant treatment customized to indigenous communities' *sui generis* situation, irrespective of whether this situation is so unique that no meaningful analogous situation test can be performed. Finally, there are no reasonable and objective justifications for non-differentiation, for largely the same reasons that the 'certain circumstances' criterion is met.

This conclusion is not impacted by a view that relevant comparators are in fact present (for instance in the form of other property right holders), and an analogous situation test therefore possible. Then, indigenous communities are instead subject to almost archetypal indirect discrimination.[66]

4.4.2 The Second Component of Indigenous Communities' Property Rights to Lands and Resources

To an extent, property holders must tolerate infringements in their rights, provided that certain criteria as established by law are met. Salient among these is that of proportionality. It requires that the societal need that motivates the infringement outweighs the harm caused to the property right holder.[67] Similar as with respect to the establishment of rights, domestic property laws on under

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[66] 'Indirect discrimination' occurs when an apparently neutral law, practice etc. nonetheless has a discriminatory (i.e., by comparison) effect on a certain group in society, see e.g., Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2019 (3rd ed)) 722-23.

[67] Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination* (n 26) 346-50.

what circumstances property rights may be limited may *formally* apply equally to property rights held by indigenous communities and by others, but may also because of having been designed with the majority culture in mind not provide equal protection against infringements *in practice*.

Conventional property right laws measure proportionality in monetary terms,[68] meaning that an infringement in a property right is proportional if compensation reasonably related to the value of the property is provided. Monetary remuneration is unlikely to compensate indigenous communities for the loss of land though, since, as seen, their cultures, ways of life and identities are inherently tied to it. Also here, the inappropriate appraisal of the value of the land to indigenous communities needs not be intentional. Still, even if the reason is again ignorance the effect too is the same; indigenous communities are denied the enjoyment of their human right to property. The below elaborates this point, with reference to the norm articulated above providing that the facet of the right to non-discrimination which entitles to differential treatment in different situations embraces indigenous communities, and where with differential treatment is understood differentiation because of being different in the meaning being in a unique situation, as distinct from being different in the meaning compared with "someone else".

Applied to infringements in property rights to lands and resources, this norm provides that indigenous communities are equally entitled to the aspect of the right to property which provides that such infringements require proportionality, but where the proportionality test is to be customized to indigenous communities' particular situation. Consequently, domestic property laws must not be designed so that because monetary compensation is held to accomplish proportionality with respect to non-indigenous property right holders, it is presumed that it does so also with respect to indigenous communities. Arguments that the right to non-discrimination has nonetheless not been breached, because the way in which indigenous communities value lands and resources are singular to the extent that these have not been discriminated relative to someone else, are irrelevant. Rather, with differential treatment is understood treatment customized to indigenous communities' *sui generis* situation, irrespective of whether this situation is so unique that no meaningful analogous situation test can be performed. Finally, here too the 'reasonable and objective justification' and 'certain circumstances' tests essentially conflate. To avoid being discriminatory, proportionality tests embedded in domestic property right laws should thus be adjusted so that when applied to indigenous communities, lands and resources are appreciated not in monetary terms, but based on that indigenous communities' cultures, ways of life and ultimately identities are inherently and inalienably interwoven with them.

Here too the conclusion would not be impacted by a view that relevant comparators are in fact present (for instance in the form of other property right holders), and an analogous situation test therefore possible. Again, indigenous communities are then instead apparent victims of indirect discrimination.

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[68] See e.g., the ECtHR's ruling in *James AO v United Kingdom* (1986) 8 EHRR 123 54-55.

4.5 Indigenous Peoples' Right to Non-discrimination (in the Context of the Right to Self-determination)

As illustrated above, the contemporary international indigenous rights regime's immediate recognition of that indigenous peoples are entitled to preserve and develop their distinct societies, subsequently translated into acknowledgement of that they are bestowed with the right to self-determination. International legal sources say less about what this right entails when exercised by indigenous peoples, making up segments of populations of states, and not the aggregate thereof. In the absence of such guidance, there has been some doctrinal debate as to what the right to self-determination means when exercised by indigenous peoples.[69] This chapter does not engage in this discussion in a general manner. Rather, its focus is on whether the right to non-discrimination might provide some insight as to the nature and reach of the right to self-determination as it applies to indigenous peoples.

4.5.1 The Applicability of the Right to Non-discrimination

As seen, human rights are conventionally understood to attach to individuals only, with the right to self-determination and possible other peoples' rights making up rare exceptions. As further noted, the emergence of indigenous rights could be viewed as challenging this understanding of the nature of human rights. However, the above suggests that this need not be the case with respect to indigenous *communities* and also alludes to that the emergence of indigenous *peoples* as international legal subjects need not test the notion of human rights as essentially individual either. That peoples' human rights exist is undisputed (at least with respect to the right to self-determination). Indigenous peoples acquiring peoples' status only means that there are more beneficiaries of those peoples' rights there are. It does not impact on the understanding of human rights as largely individual. What would challenge the conventional understanding of the nature of the human rights system is if indigenous peoples were to be recognized as beneficiaries not only of peoples', but also of individual, rights. Again, this chapter refrains from exploring this matter, finding it to be of less practical relevance with respect to the right to non-discrimination (and equality).

The reason why the right to non-discrimination has until now not been associated with peoples need not be principled, or at least not exclusively so. The right to self-determination (and other peoples' rights) has been an anomaly in the human rights system *in theory* more than *in practice* because when peoples were understood only as the aggregate populations of states (i.e. prior to the emergence of indigenous 'peoples'), no peoples really operationalized the right to self-determination (or other peoples' rights) in their own capacity. Rather, although peoples were the *formal* holders of the right, it was *in practice* exercised by states as their proxies.[70] Then, nothing necessitated considering the right to non-discrimination in the context of peoples. With the emergence of

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[69] For an overview see Weller (n 60); and Åhrén, *Indigenous Peoples Status in the International Legal System* (n 59) ch 6.

[70] E.g., Ian Brownlie, 'The Rights of Peoples in Modern International Law' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press, 1988) 4-16.

'peoples' without state proxies (i.e. indigenous peoples), however, the question whether the right to non-discrimination can be a peoples' right and/or whether the principles underpinning that right might be relevant for the understanding of the right to self-determination, becomes relevant.

A fortiori evidence suggests that at least non-discrimination/equality principles are relevant to the understanding of the right to self-determination, as it applies to indigenous peoples. The state sovereignty principle proclaims not only that states are sovereigns, but also that they are *equals*, as manifested in the maxim *par in parem non habet imperium*.[71] Although *strictu sensu* concerned with the relationships between states, the constitutional character of that principle suggests that one might draw on it for guidance as to how international law views equality between international polities more broadly, particularly given the law of nations' ambivalence as to how distinguishable 'states' and 'peoples' are, not least in a self-determination context. This came to the fore in the decolonization process, where, as mentioned, equality between peoples arguments were salient.[72] What transpires is; as 'peoples', how could indigenous peoples not be equal with other peoples? As the *par in parem non habet imperium* maxim has been found essentially axiomatic with respect to both states and individuals, why should peoples be different?

In line therewith, CERD has highlighted how the right to non-discrimination is relevant to the understanding of peoples' right to self-determination, thereby positing that the former right presupposes equality not only between individuals, but also between peoples. The Committee has particularly expressed concern over state failure to comply with indigenous peoples' right to self-determination,[73] thus again underscoring the connection between that right and that of non-discrimination but also signaling that this connection might be especially relevant in the context of indigenous peoples. Similarly, former Special Rapporteur on the Rights of Indigenous Peoples James Anaya has observed that the UNDRIP acknowledges that 'indigenous peoples have the same right of self-determination enjoyed by other peoples'.[74]

In conclusion, there is strong support for that as peoples, indigenous peoples are equal with other peoples. Consequently, they are equally entitled to peoples' rights. Whether this entitlement follows from the right to non-discrimination attaching to indigenous peoples *strictu sensu* appears secondary, at least from a

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71 Compare James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2019 (9th ed)) 433.

72 See e.g., CERD General Recommendation No 21, The right to self-determination, UN Doc A/51/18, annex VIII at 125 (1996). Here, the CERD highlights how the rights to non-discrimination and equality support operationalizing the right to self-determination through decolonization, e.g., through echoing the languages of the Colonial (General Assembly Resolution 1514(XV)) and Friendly Relations (General Assembly Resolution 2625(XXV)) declarations. See also Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination* (n 26) 334-35.

73 CERD/C/SUR/CO/12 18.

74 James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009) 185.

practical perspective.[75] Regardless, equality and non-discrimination principles are relevant to understanding the nature of the right to self-determination, as it applies to indigenous peoples.

4.5.2 The Nature of the Right to Self-determination when Exercised by Indigenous Peoples, as Advised by the Right to Non-discrimination

The right to self-determination is generally considered to have two aspects, of which the external is heavily associated with secession and the formation of new states. Because of space constraints, it is not dealt with here.[76] The internal aspect of the right to self-determination is a right of peoples to 'freely pursue their economic, social and cultural development.'[77] Exercised by peoples in the meaning of aggregate populations of states, this essentially means a right of all citizens to a government that represents them and to participate in the political life of the state on an equal basis with others. In democracies, the latter part translates into equal rights to vote and stand for election. Should the internal aspect of the right to self-determination attain this meaning when applied to indigenous peoples, it thus entitles individual members of such peoples to (in their capacities as citizens) participate in the political life of the state on par with other citizens. These are rights they already possess (e.g. based on their individual rights to non-discrimination). Already because of rendering the right duplicative, absolved of independent meaning, such an apprehension appears less plausible. In addition, it contradicts the aspects of the non-discrimination and equality principles requiring differential treatment.

The above infers i) that when applied to indigenous groups, the right to non-discrimination encompasses a right to equal enjoyment of human rights in the sense that the meaning of such rights must be customized to indigenous groups' unique situation, without there being a need for comparison with the situation of "someone else", and ii) that non-discrimination and equality principles are relevant to the understanding of the internal aspect of the right to self-determination, when exercised by indigenous peoples. It follows that indigenous peoples are entitled to a right to self-determination with a nature and scope customized to their particular situation. As to the scope of the right, indigenous peoples are in other words allowed to 'freely determine their economic, social and cultural development' in manners where they define what such development is. With respect to the nature, the entitlement to differentiation provides that indigenous peoples make these determinations themselves, as distinct from jointly with the rest of the population of the state.

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[75] Compare Martin Scheinin and Mattias Åhrén, 'Relationship to Human Rights, and Related' in Jessie Hohmann and Marc Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 76-79.

[76] For a discussion on the relevance of non-discrimination and equality arguments to the external aspect of the right to self-determination as it applies to indigenous peoples', see Scheinin and Åhrén, ibid. 70-73.

[77] ICCPR and ICESCR articles 1.1, second sentence; and UNDRIP article 3, second sentence.

4.5.3 The Right to Self-determination as Distinct from Process

It bears highlighting that the scope and nature of the internal aspect of indigenous peoples' right to self-determination as informed by non-discrimination and equality principles contrast with the present debate on the matter. The latter has a strong focus on whether indigenous peoples' right to self-determination is a right i) to consent (or in the lingua in fashion, to 'free, prior and informed consent'), or ii) to consultation. It is argued here that this (bivariate) discourse reduces indigenous peoples' *material right* to self-determination, i.e., their right 'to freely pursue their economic, social and cultural development', to a *process*.[78] By contrast, as seen, approaching indigenous peoples' right to self-determination from a non-discrimination and equality perspective confirms its status as a material right. That a process can facilitate the implementation of the right is another matter. Which process (consent, consultation, something else) is non-material as long as it delivers the material right, i.e., indigenous peoples' right to freely pursue their economic, social and cultural development.[79]

5 Final Observations: The Right to Remain Distinct

For centuries, the law of nations ignored indigenous peoples. When embraced by international law, indigenous peoples emerged as 'peoples', albeit not defined in the conventional, technical, manner, but in terms of who they are. Their keystone rights correspond to these core traits. These rights–first and foremost the political right to self-determination and private rights to historically used lands and resources–are consequently *sui generis* to them; not *per se* but in how they manifest. The nexus of this manifestation is the aim to allow indigenous peoples to remain as distinct polities, societies and cultures.

These singularities of indigenous peoples and their rights can be expected to be, and, this chapter has inferred is, reflected in how indigenousness has materialized as a protected ground of discrimination. This is particularly manifested in that when applied to indigenous peoples and communities, non-discrimination and equality in the meaning of a right to be treated differently (as opposed to the same), where differential treatment does not translate to different relative to someone else but to treatment customized to their uniqueness, is salient. This entails that achieving equality for indigenous peoples and communities involves adjusting some of the parameters conventionally associated with non-discrimination law and (most) equality theories. Non-discrimination understood as sameness is likely to prove detrimental to indigenous peoples and communities.

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[78] For an elaboration on the "consultation-consent dichotomy" in the indigenous rights discourse, see Mattias Åhrén, 'Indigenous Resource Rights at Their Core (And What These Are Not)' in Dwight Newman (ed), *Research Handbook on the International Law of Indigenous Rights* (Edward Elgar Publishing, 2022).

[79] Compare *International Law Association* (n 59) 13.