

The Saami traditional dress & beauty pageants:

Indigenous peoples' rights of ownership and self-determination over their cultures

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cultures**

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LIST OF ABBREVIATIONS

ABS	Access and Benefit Sharing
ACHR	American Convention on Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
AfCHPR	African Charter on Human and Peoples' Right
AfCommHPR	African Commission on Human and Peoples' Rights
AGS	African Group of States
CBD	Convention on Biological Diversity
CCPR	International Covenant on Civil and Political Rights
CESC	Committee on Economic, Social and Cultural Rights
CESCR	International Covenant on Economic, Social and Cultural Rights
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of All Forms of Racial Discrimination
Commission HR	Commission on Human Rights
CRC	Convention on the Rights of the Child
CSCE	Conference on Security and Cooperation in Europe
DRIP	United Nations Declaration on the Rights of Indigenous Peoples
EC	European Community
ECHR	European Court on Human Rights
ECHRFF	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECommHR	European Commission on Human Rights
ECOSOC	Economic and Social Council
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
FAO	United Nations Food and Agriculture Organization
GR	Genetic resources
HRC	Human Rights Committee
HR Council	Human Rights Council
IACHR	Inter-American Court on Human Rights
IACommHR	Inter-American Commission on Human Rights
ILA	International Law Association
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
ILO 107	International Labour Organization's Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal populations in Independent Countries
ILO 169	International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries
IP	Intellectual Property
IPR	Intellectual Property Rights
ITPGRFA	International Treaty on Plant Genetic Resources for Foods and Agriculture
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice

Sub-Commission	Sub-Commission on Prevention of Discrimination and Protection of Minorities/Sub-Commission on the Promotion and Protection of Human Rights
TCEs	Traditional Cultural Expressions
TK	Traditional knowledge
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNESCO	United Nations Economic, Social and Cultural Organization
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WGIP	UN Working Group on Indigenous Populations
WGDD	Working Group on the Draft Declaration on the Rights of Indigenous Peoples

1. BACKGROUND AND INTRODUCTION

1.1 *The fact*

On a few occasions Miss Finland has opted to appear in the evening gown event of the Miss Universe pageant wearing the traditional dress of the Saami people¹, indigenous to northern Fenno-Scandinavia and the Kola Peninsula in the Russian Federation. Presumably, it never crossed the beauty misses' mind that their choice of clothing may raise legal issues. They merely wished to add an exotic touch to their appearance. A few of them sought the assistance of young Saami women, wanting to wear the dress properly. Still, the traditional Saami dress does not represent Miss Finland's tradition or culture. Even if Finland is one of the countries within which the Saami reside, Miss Finland did not proclaim to be of Saami origin. In that sense, she held no stronger ties to the Saami culture than the other hopeful beauty princesses.

The above is just one example of use of elements of indigenous peoples' cultures by non-members. Other examples include indigenous peoples' knowledge about flora and fauna being patented by multinationals and utilized without consent or remuneration.² Indigenous arts are being copied onto carpets, clothes and greeting cards and are also otherwise utilized by the tourist industry,³ again most often without compensation being paid.⁴ Often, the appropriator does not make the user aware of whose culture is being exploited. Indigenous handicrafts are copied and sold as authentic.⁵ Music producers fuse native songs with techno-rhythms resulting in million selling "world-music" albums, without the listener knowing who is the real "composer" of the tune, or compensation being awarded.⁶ Indigenous signs, symbols and words are being trade-marketed for commercial purposes.⁷ Their traditional patterns are being used in tattoo-shops, including by famous rock-star Robbie Williams.

¹ E.g. in 2007, 2005 and 1996. See e.g. www.missuniverse.com/delegates/2007/files/FI-photo-costume.html (visited last 20 July 2008).

² Chander and Sunder, *The Romance of the Public Domain*, p. 1348, and von Lewinski, *Indigenous Heritage and Intellectual Property II*, pp. 1-2

³ Carpenter, *Intellectual Property Law and Indigenous Peoples*, pp. 64-66

⁴ Lucas-Schloetter, *Folklore*, p. 341

⁵ von Lewinski, *Indigenous Heritage and Intellectual Property II*, p. 1

⁶ Brown, *Can Culture Be Copyrighted?*, p. 203, and Lucas-Schloetter, *Folklore*, p. 342

⁷ Mezey, *The Paradox of Cultural Property*, and Lucas-Schloetter, *Folklore*, p. 341

1.2 *Does the appropriation of indigenous peoples' cultures constitute a problem?*

1.2.1 Indigenous peoples' perspective

Indigenous peoples have objected to the unauthorized utilization of elements of their cultures by non-members. They protest against these practices for several reasons. To provide an overview of the arguments, it is helpful to divide these into assertions based on (i) cultural, and (ii) economic rationales.

If starting with the economic justifications, indigenous peoples point to that whatever monetary value vests in elements springing from their respective cultures, such value is a result of the creativity and efforts of them. Consequently, the proceeds from utilization should benefit the indigenous people from which the element originates, and not someone who had little to do with the creation. It is not fair that pharmaceutical corporations, bioprospectors, the tourist industry etc. free-ride on indigenous peoples' creativity, they submit. This argument gains increased strength, indigenous peoples assert, from the fact that many indigenous peoples are financially disadvantaged, and live in poverty and marginalization. Increased control over the proceeds from commercialization of their cultures could contribute to alleviating indigenous peoples from poverty.⁸

Still, improved standard of living is normally not the principal reason for indigenous peoples calling for increased protection over elements of their cultures. Rather, the rationale behind them demanding increased control over their collective creativity is more often a desire to protect their distinct cultures, societies, and ways of life. Indigenous peoples' concern is in most instances their cultural identities, rather than money.⁹ For this reason, they react particularly strongly against unauthorized use of their cultural elements that are offensive, derogatory or in other ways culturally insensitive or inappropriate. In addition, indigenous

⁸ The proceeds from utilization of indigenous cultures are huge. In 2004, it was estimated that artisan handicraft only generated global profits of around USD 30 billion. See Fowler, Preventing Counterfeit Craft Design. Compare also Correa, Traditional Knowledge and Intellectual Property, p. 3. Not all of these handicrafts of course spring from indigenous cultures, but a vast majority presumably do. Only in Australia, aboriginal art is estimated to generate incomes of AUD 200 million annually. See Lucas-Schloetter, Folklore, p. 340. In 1999, calculations had the world market for traditional/herbal medicines at USD 43 billion. As Carpenter, Katyal and Riley have noted, for many indigenous peoples their intangible property may be the greatest commodifiable good they still possess. See In Defence of Property, p. 1103.

⁹ Taubman and Leistner, Analysis of Different Areas of Indigenous Resources, p. 62, and Lucas-Schloetter, Folklore, pp. 343-344

peoples may find the idea that their cultures vest with humankind as a whole, or equally bad, with their host state, offensive as such. Indigenous peoples underscore that the notion that their cultural heritage is free to use by anyone – or to use intellectual property language, is in the so called public domain - is a legal precept created by others, and something they have never accepted. They point to that a substantial part of the collective creativity perceived by conventional IP-law to be in the public domain has been placed there without the indigenous people's authorization.¹⁰ Indigenous peoples maintain that this notion fails to take into account private domains established by indigenous peoples' own legal systems, often customary in nature. In other words, indigenous peoples denounce the idea that their cultures are, to use a metaphor borrowed from the sphere of land and natural resource law, *terra nullius*.

Further, the mere concept of claiming property rights over culture is alien to many indigenous peoples. Indigenous peoples normally perceive their cultural heritage to vest in the people as such. The notion that an individual can monopolize culture run counter to their spiritual beliefs and cosmo-visions, and attempts to do so are hence often viewed as inappropriate in themselves. Obviously, that might be particularly so if the appropriator of the right is a non-member, and the motivation commercial gain.

But sometimes, indigenous peoples' interest in preventing unauthorized uses of their collective creativity is not guided by any particular spiritual or cultural reason. Many indigenous peoples are engaged in a constant battle not to be engulfed by the majority culture. Members of fragile cultures are often wrestling with their cultural identity. They do not always find it easy to be proud of, or even secure in, their distinct cultural identities. In such a sensitive environment, derogatory use of the indigenous people's culture might not only be offensive. It can constitute a direct threat to the cultural identity of the members of the indigenous community, and, indirectly, to the identity of the group as such, indigenous peoples posit. Insensitive uses of elements of indigenous culture by non-members can spur members of the indigenous group to hide their cultural background, and give up their traditional way of life. With time, this might result in assimilation.

¹⁰ Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 337

But indigenous representatives further maintain that utilization of the creativity of an indigenous people need not necessarily be derogatory to negatively impact on the cultural identity of the people. In present society, the border between the majority culture and the indigenous culture is often not as clear-cut as it used to be. Populations have often mixed by migration, inter-marriages and by indigenous persons taking up “ordinary” jobs. Indigenous peoples’ representatives admit that in these instances, they have to a certain degree voluntarily exposed themselves to other cultures. Yet they maintain that by doing so, they have not surrendered their right to their distinct cultural identity. On the contrary, they posit that in a world of blurring cultures, indigenous peoples are in particular need of protection of cultural elements remaining distinctly theirs. It is exactly when populations blend, indigenous peoples argue, that the need to shield the core of their cultures is at its greatest.

1.2.2 Arguments for continued access to indigenous peoples’ cultures

The outlined arguments submitted by indigenous representatives have not been uncontested. Both the economic and cultural rationales have been challenged, by different interests and for varying reasons. With regard to the financial rationales, it has been submitted that allowing indigenous peoples greater control over their collective creativity has financially negative impacts for society as a whole, but also for indigenous peoples themselves. The arguments calling for increased respect for indigenous peoples’ cultural identities, values and practices have met resistance essentially for three, broadly defined, reasons. First, it has been asserted that increased protection of indigenous peoples’ cultures hampers cultural life and development of humankind as a whole. Others add that since cultures are generally allowed to borrow from and interact with each other, it makes little sense to specifically protect indigenous cultures. Finally, some are concerned that increased shielding of indigenous cultures is harmful to vulnerable individual members of the group. These lines of arguments are further outlined below.

If again starting with the economic aspects, some proponents of continued access by non-members to indigenous peoples’ collective creativity might agree that increased control by indigenous peoples over their distinct cultures might be financially advantageous *for them*. But, it is maintained, limited access to indigenous cultures is economically unsound for *society as a whole*. Subjects ranging from individual artists to multinational conglomerates submit that awarding indigenous peoples rights to control access to their cultures hampers the

economy. Allowing pharmaceuticals and bio-prospectors to build on indigenous peoples' traditional knowledge (TK) about flora and fauna benefits humankind, it is pointed to. In the same vein, it is asserted that the wealth generated by allowing artists, corporations etc. to incorporate indigenous peoples' traditional cultural expressions (TCEs) such as songs and handicrafts into their products, greatly exceeds the proceeds indigenous peoples could generate if exploiting these TCEs themselves. And, it is further argued, this benefits also the indigenous peoples themselves, since parts of the wealth generated will in the end reach also the indigenous people that created the cultural element. As indicated, some bioprospectors, pharmaceuticals etc. add to this line of argument that industrial demand for *in situ* TK is not that high anymore. Rather, the industry is increasingly moving towards utilizing *ex situ* compilations of genetic resources (GR), designed therapeutic modules and synthetic chemistry. For this reason, it is submitted, increased regulation of TK might in fact be financially disadvantageous also to the indigenous peoples themselves, since it might push industrial demand further towards therapeutic modules and synthetic chemistry, depriving indigenous peoples of opportunities for benefit-sharing arrangements that exist today.¹¹

As mentioned, also indigenous peoples' arguments rooted in respect for their cultures and cultural identities have been unconvincing to many. Some critics posit that not only the economical affairs of the society, but also its cultural life is enriched by composers, artists etc. being free to be inspired by and borrow from the creativity of all cultures, including those of indigenous peoples. It is argued that awarding indigenous peoples increased rights over their collective creativity would remove a very large body of cultural elements from the public domain, with a negative impact on the culture of humankind as a result. This camp maintains that a vast public domain is good for everyone, wherefore increased protection would harm society.¹²

Section 1.2.1 described how indigenous peoples argue that their cultures being increasingly exposed to foreign cultures and the culture of the majority population warrant increased cultural protection. Others draw the opposite conclusion from indigenous societies blending with other cultures. They point to that cultures have always borrowed from each other, and

¹¹ Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Background Note by the UNCTAD Secretariat (2000). See also Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 330 and 337-338.

¹² Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 335-336

do so at accelerating speed.¹³ Consequently, it is asserted, in the epoch of globalization, there can be no such thing as distinct cultures. It is increasingly difficult to attribute a particular cultural object to a specific culture.¹⁴ Benhabib submits that the notion that every human group has its own culture rests on the faulty presumptions that cultures are clearly definable wholes, a non-controversial definition of a culture of a human group is possible, and even if both cultures and groups blur to some degree, this constitutes no problem for law and policy.¹⁵ The conclusion is that if indigenous peoples – as other cultures – find themselves in a blur of cultural elements of varying origin, why should their cultures be specifically protected? The posed question is particularly relevant, it is added, when indigenous peoples themselves voluntarily approach and benefit from foreign cultures. Why, it is asserted, should indigenous peoples be allowed to “cherry-pick”; enjoying Italian opera, French wine and Japanese sushi, at the same time as demanding that their particular cultures be shielded?¹⁶

Other critics of increased shielding of indigenous cultures are predominantly concerned with the welfare of individual members of indigenous groups. They argue that protection of minority cultures tends to result in a group within the group, typically a male elite, oppressing weaker segments of the population. Therefore, indigenous cultures should not be further isolated. Rather, the claim is, members of indigenous groups shall be encouraged to take part in the cultural life of society as a whole. Indigenous individuals should be given the opportunity to freely choose between their own culture and other cultures, or any mix thereof. If the result is the disappearance of the indigenous culture, this is the result of individuals being free to lead the life they wish, this line of argument concludes.

¹³ Cohen, referring to a number of other authors, underlines that creativity being inspired by previous works is no new phenomenon. She elaborates that this was true also for classical masters within fields such as music, visual arts and literature. Around the turn of the 20th Century, Paris-based painters were heavily inspired by Japanese prints, so called Renaissance painting borrowed its views on perspective from Roman architecture and the “African novel” drew from the culture of the Colonial West. Cohen illustrates by pointing to that the third movement of Mahler’s first symphony builds on a French children’s song. Further, Spanish painter Velasquez served as a great source of inspiration for the impressionist school. And Shakespeare’s *A Midsummer Night’s Dream* draws heavily from the tragedy *Pyramus and Thisbe*. As a more recent example of cultures blending, Cohen mentions film director Quentin Tarantino being frank about *Kill Bill’s* debt to Japanese anime and spaghetti westerns. See Copyright, Commodification, and Culture, pp. 143-145 and 153. Underlining the time-span during which cultural exchanges have occurred, Appiah adds that the Silk Road influenced elite dresses in Italy and that bagpipes, so identified with Scotland, were actually originally brought there by the Romans from Egypt. See Cosmopolitanism, pp. 112-113.

¹⁴ Appiah, *Cosmopolitanism*, pp. 113 and 118-122

¹⁵ Benhabib, *The Claims of Culture*, pp. 7-8

¹⁶ A variation of this line of argument adds that building fences between cultures poses the threat of stifling and stagnating them, depriving the cultures of their hybridity. It is submitted that interaction between cultures keeps the cultures living and meaningful. See e.g. Appiah, *Cosmopolitanism*, pp. 128-130, Mezey, *The Paradox of Cultural Property*, p. 10, and Carpenter, Katyal and Riley, *In Defence of Property*, pp. 1042-1043

1.3 *The aim of the doctoral thesis*

1.3.1 **The specific aim – surveying what rights indigenous peoples’ hold over their collective creativity**

The purpose of these sections above has been to introduce and illustrate the topic at hand, as well as to underline the need for research in the area. The doctoral thesis will not further concern itself with positions on why indigenous peoples’ collective creativity should or should not enjoy protection. Below, arguments for and against protection are only relevant to the extent they are couched in terms of law. In other words, the thesis is essentially only concerned with establishing what constitutes law today. With one notable exception, the thesis is not interested in what the law *will* look like in the future, i.e. with norms that are about to emerge. As indicated, of even less interest is what the law *should* look like.

The specific aim of the doctoral thesis is hence to answer which of two counter positions outlined above has support in international law. In other words, the thesis aspires to establish to what extent international law awards indigenous peoples the right to own and/or determine over their respective distinct collective creativity. To answer the posed question, the thesis analyzes human rights law that broadly speaking can be divided into two sub-categories, namely (i) rights to culture/self-determination, and (ii) property rights. As an underlying right, the right to non-discrimination is of relevance, and hence surveyed, in the context of both categories of rights. With regard to the right to property, a substantial part of the analysis consists of a comparative study of recent developments within the sphere of indigenous peoples’ property rights to lands and territories.

In addition, as part of investigating whether indigenous peoples hold rights to their distinct collective creativity under the human right to property, the doctoral thesis describes, admittedly in very general terms, the applicability of conventional intellectual property rights (IPRs) to indigenous cultures. And, following the conclusions as to what extent indigenous peoples hold human rights to their creativity, the thesis also surveys whether these rights have been matched by recent developments within the sphere of intellectual property (IP)-neighbouring rights. In this context, the thesis also further analyzes the relationship and interplay between the human right to property and IPRs, hoping that doing so will offer even

greater clarity as to the more precise scope and content of indigenous peoples' rights to their collective creativity.

1.3.2 The general aim – clarifying and systemizing the legal status and principal rights of indigenous peoples under international law

As clear from Section 1.3.1, seeking to establish what rights indigenous peoples hold to their collective creativity, the doctoral thesis will have to survey essentially all spheres of law most central to the indigenous rights discourse. The Section further indicated how an important element of these analyses is a survey of the relevance of the interaction and interplay between the various relevant areas of law. In addition, what specific rights indigenous peoples hold to their cultures is to a large degree contingent upon certain underlying criteria, most notably what legal status indigenous peoples enjoy under the contemporary international legal system. Whether indigenous peoples constitute peoples proper under international law or not is obviously of cardinal importance when establishing what rights they hold to their collective creativity. Further, if indigenous peoples do constitute peoples for legal purposes, does it follow from this status that they enjoy the general right to self-determination applicable to all peoples? Naturally, the answers to these underlying questions make up central parts of the thesis.

The doctoral thesis spanning over areas of law at the core of the indigenous rights discourse, and addressing some of the most fundamental underpinning questions to that discourse, offer the opportunity to go beyond merely answering the specific question set out in Section 1.3.1. Hence, in addition to its specific aim, the thesis also has a more general ambition. The broader aim of the thesis is to establish what legal status indigenous peoples have in the international legal system and to describe the general nature of and systemize the most fundamental of indigenous peoples' rights in international law. In other words, addressing the specific question whether indigenous peoples enjoy rights to their creativeness indirectly results in an in depth survey of the core of the international legal human rights system, as it pertain to indigenous peoples.

1.4 *Outline of the doctoral thesis*

1.4.1 **Chapters 2 and 3: Early international law and political philosophy**

Chapters 2 and 3 set the stage for subsequent legal analyses. Chapter 2 describes the origin of the international legal system, as well as outlines the philosophical thoughts underpinning the basic structure of conventional international law. The Chapter explains how classical liberal theories and the international legal system emerged in tandem in Europe in the wake of the Peace of Westphalia. It outlines how the liberal legal system became founded on the notion that the sovereign pre-dates the law and that consequently, no law can exist above the sovereign. The Chapter further describes how these precepts resulted in “peoples” for international legal purposes being defined as the aggregate of the population living within the sovereign’s sphere of power, and, subsequently, as the population of the “nation-state”. Chapter 2 also explains how with time, ideas of rights of the individual vis-à-vis the state were formulated, constituting the embryo to the modern human rights system. In this human rights system, there was no room for group rights. Finally, Chapter 2 demonstrates how the United Nations essentially endorsed these basic features of the classical international legal system when embarking on crafting a contemporary legal order in the aftermaths of World War II.

Chapter 2 serves the main purpose of underlining that some keystones of the international legal system evolved early, and have been entrenched during more than 300 years. It is important for the doctoral thesis to be mindful of this background, since it would take a considerable effort - a paradigm shift – to change at least some of these fundamental principles of the international legal system relevant to the thesis. Indigenous peoples having the right to own and/or determining over their collective creativity might require fundamentally new understandings of key legal concepts such as “peoples”, “human rights”, “self-determination”, “non-discrimination”, and, possibly, “states”. To properly evaluate what rights, if any, indigenous peoples hold today, one must understand how sceptical classical international law was towards peoples’ rights proper.

Chapter 3 initially outlines in somewhat more depth the liberal political theory underpinning the conventional international legal system. The Chapter further notes how the more modern versions of liberalism incorporated the ideal of democracy, but how – in line with the liberal tradition - these theories rested on the assumption that the polity within which democracy is to be exercised – i.e. the state – has been created prior to any democratic theory. Chapter 3 then proceeds to describes how some of the key features of conventional individual liberalism have recently been challenged. The Chapter outlines how contemporary political theorists have increasingly questioned the classical liberal presumptions that the state pre-dates any political theory of justice, can always be neutral between cultures, and that individuals are not significantly defined by their cultural background. Chapter 3 concludes with demonstrating how theorists critical of conventional liberalism have become a dominating voice within political philosophy and how they have inferred that the society shall award group rights to e.g. indigenous peoples.

It is underscored that the doctoral thesis is not concerned with philosophy as such. At the same time, it is mindful of that law does not evolve in isolation. The law responds to new and changed believes, ideals and perceptions of justice in society. As Koskenniemi has noted, “[I]t is neither useful nor ultimately possible to work with international law in abstraction from descriptive theories about the character of social life among States and normative views about the principles of justice...”¹⁷ Similarly, the International Court of Justice (ICJ) has observed that “Law exists, it is said, to serve a social need”.¹⁸ Hence, the doctoral thesis outlines recent trends within political philosophy because these pose the question: If the underlying rationale behind key elements of the international legal system has been challenged, what does this imply for the law as such?

1.4.2 Chapters 4-6: Survey of relevant international legal sources

Following the introduction provided by Chapters 2 and 3, Chapters 4-6 commence the legal analyses of the doctoral thesis. These Chapters introduce the international legal sources relevant to an analysis of to what extent indigenous peoples have the right to own and/or determine over their culture.

¹⁷ Koskenniemi, *From Apology to Utopia*, pp. 1 and 4

¹⁸ *South West Africa, Second Phase, Judgement*, I.C.J. Reports 1966 (*South West Africa Case*), p. 6, at, pp. 34-35

Chapter 4 jointly addresses international legal sources (i) establishing protection for indigenous peoples' cultures, cultural practices and cultural identity, and (ii) awarding indigenous peoples rights to determine over their distinct societies, including their cultural heritage. Schematically, these rights could be divided into (i) cultural rights, and (ii) the right to self-determination. But as mentioned, the rights are surveyed together and the Chapter makes no clear distinction between the two. The structure opted for reveals a hypothesis holding that the rights to culture and self-determination interlink and overlap, and have evolved in tandem. In other words, it is probable that international law has *either* acknowledged both that indigenous peoples constitutes peoples for the purposes of the right to self-determination, and enjoy collective rights to culture, or, alternative, that *neither* right has been recognized. Combinations are unlikely.

But before embarking on a survey of indigenous peoples' rights proper, the Chapter initially addresses two sets of rights that, albeit not constituting peoples' rights, are still relevant to the doctoral thesis. First, Sections 4.4 and 4.5 outline the minority rights system developed essentially during the 1990s. The Sections particularly demonstrate how minority rights, formally individual in nature, have nonetheless been interpreted as enveloping a collective dimension. That is particularly so when applied in an indigenous context. The Sections label these rights "collectivized individual rights". They show how these extend an indirect protection also to the culture of the group as such, and not only to the individual members thereof. Second, Section 4.6 addresses rights of indigenous populations, enshrined first and foremost in the International Labour Organization's (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries¹⁹ (ILO 169).²⁰ The Section notes that ILO 169 proclaims certain collective rights, including some within the sphere of culture rights. Section 4.6 further notes, however, how ILO 169 explicitly underlines that the rights it enshrines do not constitute peoples' rights.

Chapter 4 takes the collectivized individual rights/rights of indigenous populations as points of departure when embarking on its main purpose, namely to survey indigenous peoples rights proper. Section 4.7 outlines a wealth of international legal sources suggesting that indigenous peoples constitutes "peoples", for international legal purposes, enjoying collective rights in

¹⁹ Adopted by the ILO's 76th Conference on June 27, 1989

²⁰ Section 4.6 should be read in conjunction with Section 4.3, outlining some basic features of the indigenous rights discourse, present since its inception.

general and the right to self-determination in particular. Subsequently, Section 4.8 outlines recent developments in the context of the right to non-discrimination. The Section notes how the right was – in perfect conformity with classical liberalism – conventionally understood as a right of individuals to be treated equally, with no obligations on states to promote equality in fact. Section 4.8 observes how the right to non-discrimination has undoubtedly evolved, however, to embrace an obligation on states to actively combat inequalities. The Chapter notes that this aspect of the right corresponds well with the collectivized individual rights surveyed in Sections 4.4 and 4.5. Section 4.8 then proceeds to investigate sources suggesting that the right to non-discrimination has entered an additional third phase. These sources submit that the right has evolved to entail not only that equal cases be treated equally, but also that different cases be treated differently, and further that the right applies also to indigenous peoples as such. Such an understanding of the right to non-discrimination seems to match the collective right to culture surveyed in Section 4.7, obviously provided that the rights have crystallized into law. Chapter 4 draws no definitive conclusions as to whether international law has firmly established rights proper of indigenous peoples, albeit Section 4.9 observes that international legal sources seem to speak to that effect. Rather, the final conclusions are saved for Chapters 8 and 12. Section 4.9 further infers that although the doctoral thesis at that point cannot definitively conclude what peoples' rights have been established, if any, it is clear that international law on rights to (i) culture, (ii) self-determination, and (iii) non-discrimination have evolved in parallel. The conclusions drawn with regard to all three rights are hence mutually supportive.

Chapter 5 turns the doctoral thesis' attention to the human right to property. Initially, it outlines the basic features of the right, underlining the right to property's close proximity to the right to non-discrimination. This implies that recent developments within the sphere of non-discrimination are of direct relevant also for the contemporary understanding of the right to property. With these basic understandings in place, Chapter 5 proceeds to survey how the right to property has been applied in the context of indigenous peoples' rights to lands and territories. Indigenous peoples' land and resource rights are as such outside the scope of the doctoral thesis. Still, establishing what property rights indigenous peoples hold to their traditional territories is highly relevant to the thesis. That is so, because another hypothesis of the thesis is that an analogy can be drawn between property rights to land, on one hand, and to collective creativity, on the other. The thesis assumes that if it can be established that indigenous peoples hold property rights to territories traditionally used, it is possible that they

also hold property rights to subject matter traditionally created. Or in IPR-language, the thesis wishes to analyze whether the fact that the *terra nullius* doctrine, previously applied to indigenous lands, appears to have been revoked, implies that the same is true with regard to the notion of the public domain, applied to indigenous peoples collective creativity. Consequently, having surveyed indigenous peoples' property rights to land, Chapter 5 investigates whether the conclusions drawn can be readily translated into the sphere of collective creativity. It also outlines some international legal sources specifically addressing indigenous peoples' property rights to their collective creativity. Similar to Chapter 4, Chapter 5 draws no definitive conclusions as to indigenous peoples' property rights to their collective creativity. These are saved for Chapters 9 and 12.

Chapter 6 analyzes the relevance of the UN Declaration on the Rights of Indigenous Peoples (DRIP), adopted by the UN General Assembly (UNGA) in September 2007, to the doctoral thesis. Chapter 6 notes the significance of the DRIP deliberations essentially coinciding with the development of the body of law surveyed by Chapters 4 and 5. This is noteworthy, since most of the legal sources Chapters 4 and 5 outline emanate from expert bodies etc. As Chapter 7 elaborates, the legal status of such sources depends largely on how they are received by states, as the ultimate creators of international law. As the DRIP was crafted during the same time-period as the body of law surveyed in Chapters 4 and 5 emerged, the Declaration offered states an excellent opportunity to lend or not lend their political support to this body of law. Having thus noticed the significance of the DRIP, Chapter 6 turns to analyzing DRIP provisions relevant to the doctoral thesis. The Chapter concludes that the material rights DRIP sets forth appear in large parts to be in line with the legal sources surveyed in Chapters 4 and 5.

1.4.3 Chapter 7: International law on legal sources – legal method

As Section 1.3 underlined, the aim of the doctoral thesis is to establish positive law pertaining to indigenous peoples' rights to own and/or determine over their collective creativity. But to establish what constitutes law, one must obviously first establish what are relevant legal sources, what relative weight they carry vis-à-vis each other, and how these sources should be interpreted. This is the purpose of Chapter 7, which outlines international law on international legal sources. Chapter 7 is an integral – indeed a key - part of the thesis' legal analyses. At the same time, Chapter 7 serves the additional purpose of picturing the legal

method the doctoral thesis uses. In sum, Section 1.3 described how the aim of the doctoral thesis is to determine what constitutes positive law. Chapter 7 outlines the norms the thesis follows in order to determine what makes up relevant law.

As is customary, Chapter 7 takes Article 38.1 of the Statute of the ICJ as point of departure for establishing what international legal sources are relevant when establishing what constitutes positive law. The Chapter then proceeds to describe the nature and characteristics of these sources. Doing so, however, the Chapter notes that the primary sources of law are all vexed with certain problems. While customary law, general principles of law and peremptory norms all benefit from universal applicability, it is often difficult to objectively establish the content of these sources, or, indeed, whether a norm exist at all. Treaties, on the other hand, are normally clear and objective in their content. But instead, they lack universal applicability. Different mixes of states being parties to various treaties results in a fragmented legal structure, ultimately breaking down to a network of binary state relationships. Having noted that the formal primary international legal sources appear to provide a rather incomplete legal system, Chapter 7 turns its attention to what is sometimes labelled “soft law” sources and certain other sources not mentioned as primary sources in the ICJ Statute 38.1, such as ICJ and treaty body jurisprudence. The Chapter describes the soft law sources and notes that these could constitute helpful compliments to “hard law” sources – if accepted as law. Chapter 7 therefore surveys whether international law on international legal sources maintains a clear distinction between “hard law” and “soft law” sources, or, if one wish, between legal sources and non-legal sources. The Chapter concludes that such a strict division between relevant and non-relevant legal sources appears no longer to be upheld. Rather, a more flexible approach seems to have been adopted. In other words, sources such as UN Declarations and treaty body jurisprudence are also relevant international legal sources when determining what constitute positive international law. That said, Chapter 7 further notes that a hierarchy among international legal sources still exist, and that “soft law” sources normally need to find support in complementing sources, should they be considered as mirroring law proper.

The second part of Chapter 7, Section 7.4, surveys international norms on treaty interpretation, as enshrined in the Vienna Convention on the Law of Treaties²¹ (VCLT)

²¹ Adopted on 23 May 1969

Articles 31 and 32. Section 7.4 notes the prominence these provisions give to subsequent practices in treaty interpretation. This is of specific relevance to the doctoral thesis for two interrelated reasons. First, the relevance of subsequent practice implies that treaty provisions that at one point were understood to have a limited and clearly defined applicability can nonetheless subsequently have evolved to take on new meanings. Second, the prominence given to subsequent practice is important because of the legal status it bestows UN treaty body jurisprudence. Treaty body jurisprudence, Section 7.4 concludes, constitutes a specific form of subsequent practice. If not contested by states, treaty body jurisprudence is a relevant international legal source when determining what constitutes positive law. Finally, Chapter 7 concludes that norms for treaty interpretation must reasonably be analogously applicable also to formally non-legally binding instruments, such as UN Declarations.

1.4.4 Chapters 8-10: Concluding analyses on indigenous peoples' rights to own and/or determine over their collective creativity

At this point, Chapters 4-6 have outlined and surveyed the content of relevant international legal sources. Further, Chapter 7 has added information on the legal status and relative weight of these sources. With this information at hand, the doctoral thesis is in a position to establish the scope and content of indigenous peoples' right to their collective creativity. The purpose of Chapters 8-9 is to conduct these concluding analyses. Chapter 8 surveys whether indigenous peoples enjoy such rights under the rights to culture/self-determination. Chapter 9 subsequently addresses the right to property. As indicated, the basis for the survey is, naturally, the legal sources surveyed in Chapters 4-6, analyzed in accordance with international law on international legal sources, as outlined in Chapter 7.

Chapter 8 initially aspires to establish the legal status of indigenous peoples under international law, i.e. if indigenous peoples constitute "peoples" for legal purposes. Based on the conclusion with regard to indigenous peoples' status under international law, the Chapter proceeds to address the closely related issue of whether indigenous peoples' can enjoy the right general right to self-determination, enjoyed by all peoples, or whether rather a potential right to self-determination of indigenous peoples is a *sui generis* right, particular to them. Having considered these paramount underlying issues, Chapter 8 moves on to establish, as detailed as possible based on the legal sources at hand, the scope and content of indigenous peoples rights to culture/self-determination, as these rights pertain to collective creativity.

Chapter 9 initially seeks to establish to what extent indigenous peoples hold property rights to their collective creativity. It subsequently proceeds to determine whether potential property rights might be subject to certain limitations. The matter of limitations is a serious issue in the context of property rights to collective creativity. That is so because, as Section 1.4.2 explained, the right to property is essentially an aspect of the right to non-discrimination. This poses the question; if property rights are extended to indigenous peoples' property rights, shall such rights, as could be argued should follow from the right to non-discrimination, be burdened with the same limitations as IPRs in general? If so, this would for instance imply that the rights are limited in time.

Chapter 10 addresses some outstanding arguments sometimes raised against the notion that indigenous peoples hold rights. Among these are whether it is at all possible to identify a collective worthy of rights, and whether recognition of group rights poses threats to the well-being of individual members of the group. Finally, Chapter 10 answers whether it makes sense, from a legal perspective, that indigenous peoples are free to consume Japanese sushi and French wine, at the same time as they may shield their own cultures from Japanese and French consumers.

1.4.5 Chapter 11: IP-neighbouring rights

Chapter 10 concludes the human rights analysis. Chapter 11 subsequently investigates to what extent indigenous peoples can hold rights to their collective creativity based on IP-neighbouring rights. Initially the Chapter surveys a number of international non-human rights processes with the potential of extending IP-similar rights to indigenous peoples over their TK and/or TCEs. International legal instruments with potential such effects have been/are being elaborated mainly under the auspices of the World Intellectual Property Organization (WIPO), the Convention on Biological Diversity (CBD) and, to a lesser degree, the UN Food and Agricultural Organization (FAO), and the UN Economic, Social and Cultural Organization (UNESCO).

Having concluded to what extent these processes have, or are about to, award indigenous peoples IP-neighbouring rights to their creativity, Chapter 11 turns to surveying potential interfaces between human rights and IPRs. The purpose of this exercise is the same as when the doctoral thesis in previous chapters surveyed if various human rights interlink and

overlap. The hypothesis is that to the extent such is the case, the conclusions within the various spheres of law are mutually supportive. In other words, if interfaces can be established between IPRs and the human right to property, the doctoral thesis might be able to draw more concrete and certain conclusions as to the scope and content of indigenous peoples' rights to their collective creativity.

1.4.6 Chapter 12: Conclusions – Is Miss Finland legally entitled to wear the traditional Saami dress?

Chapter 12 aims to wrap up the legal analyses of the doctoral thesis in two distinct ways. The first half of the Chapter illustrates, as precisely and concretely as possible, to what extent indigenous peoples have the right to own and/or determine over their collective creativity. It does so by returning to the illustrative examples provided in the very outset of this Chapter. Chapter 12 hence starts off by answering whether Miss Finland entering the evening gown event in the Miss Universe competition in a traditional Saami dress raises international legal issues. The Chapter then turns to the questions whether multinational cooperations may patent indigenous TK absent consent, whether indigenous art may be used by non-members for commercial purposes. And so on. Subsequently, the second half of the Chapter offers more general concluding remarks on indigenous peoples' legal status and rights under contemporary international.

1.5 *The doctoral thesis' understanding of "culture", "cultural heritage" and "collective creativity"*

For the purposes of the doctoral thesis, "cultural heritage" refers to the collected cultural elements of an indigenous people created by humans, whether tangible or intangible. This limitation implies that the thesis does not address rights to lands, waters and natural resources *per se*, albeit, as outlined above, such rights are still indirectly of great relevance to the thesis. Neither does the doctoral thesis envelope pure spiritual beliefs or thoughts. Neither does the thesis venture into the sensitive areas of what rights indigenous peoples hold to their own genome and human remains.²² Throughout, the doctoral thesis uses the terms "indigenous

²² Clearly, the doctoral thesis does not submit that its understanding of "cultural heritage" is in any way universal. On the contrary, it is designed for the specific purposes of the thesis. Indeed, the term "cultural heritage" is probably more often used in a broader sense, and is potentially extremely inclusive. It can, in its broadest understanding, include more or less any element in a people's society. For an elaborate discussion on

peoples' cultural heritage" and "indigenous peoples' collective creativity" interchangeably. In both instances, the terms refer to the specific creativity of a specific indigenous people.

Of course, the term "culture" has over the years been given at least as many meanings as "cultural heritage". Clearly, various understandings of "culture" are plausible, depending on from what angle one approaches the topic. For the purposes of the doctoral thesis, there is no need, and probably not possible, to define "culture". When the term is used, what is understood by "culture" is hopefully clear from the context. Most often, the thesis uses the term "culture" in the context of "rights to culture" or "cultural rights". Sometimes, "rights to culture" or "cultural rights" refer specifically to indigenous peoples' rights to their distinct collective creativity/cultural heritage. But in other instances, "rights to culture" or "cultural rights" might be referring to a more sweeping understanding of "culture". Under such circumstances, the broader right embraces the more specific right to cultural heritage/collective creativity, but probably offers limited guidance as to what more particularly is included in the right. Again, hopefully it will be clear from the context what right is referred to in each instance.

Having in general terms defined the subject matter of concern to the doctoral thesis, it might be pertinent already at this point to describe in more concrete terms what "cultural heritage"/"collective creativity" embraces. Principle 1 of the Draft Guidelines on the Protection of the Cultural Heritage of Indigenous Peoples²³ illustrates well the thesis' understanding of "cultural heritage"/"collective creativity". Pursuant to this provision, cultural heritage is

"... tangible and intangible creations, manifestations and productions includ[ing] the practices, representations, expressions – as well as the instruments, objects, artefacts ... that indigenous peoples ... recognize as part of their cultural heritage. It further includes the knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, as well as knowledge that is embodied in the traditional lifestyle of an indigenous people, or is contained in codified knowledge systems passed between generations. Cultural heritage, transmitted from generation to generation, is constantly recreated by indigenous peoples in response to changes in

the meaning of the terms "culture", "cultural heritage" and "cultural identity", as well as on how these terms relate to each other, see Prott, *Cultural Rights as Peoples' Rights*, pp 93-106.

²³ The Guidelines can be found in the Annex to UN Doc. (E/CN.4/Sub.2/AC.4/2006/5). They were prepared under the auspices of the former UN Working Group on Indigenous Populations (WGIP), in a joint effort by WGIP member, Professor Yokota, and the Saami Council, an NGO representing the Saami people. For a background of the Guidelines, see UN Doc. A/HRC/Sub.1/58/22, paras. 23-24. The Guidelines have limited authority as a source of international law. As stated, they are used here for illustrational purposes.

their environment and their interaction with nature and their history, and provides them with a sense of identity and continuity. Cultural heritage ... manifests itself, inter alia, in the following domains:

(a) ... medicines ...; (b) Traditional knowledge and practices concerning nature and the universe; (c) Literary works and oral traditions and expressions, such as tales, poetry and riddles, aspects of language such as words, signs, names, symbols and other indications; (d) Musical expressions, such as songs and instrumental music; (e) Performances or works such as dances, plays and artistic forms or rituals, whether or not reproduced in material form; (f) Art, in particular drawings, designs, paintings, carvings, sculptures, pottery, mosaics, woodwork, metalwork, jewellery, musical instruments, basket weaving, handicrafts, needlework, textiles, carpets, costumes, architectural forms; and (g) Social practices, rituals and festive events.²⁴

From this definition follows that most elements of cultural heritage constitute either forms of knowledge or various cultural expressions. In other words, the thesis is essentially concerned with rights to what is normally labelled TCEs and TK. Even though it should be clear from the quoted definition above, it is worth particularly underscoring that the reference to “traditional” in both TCEs and TK in no way suggests that a cultural element needs to be old to constitute TK or TCEs. TK and TCEs can be highly adaptive, and hence new.²⁵ Rather, “tradition” refers to the context in which the element was developed. In other words, to be relevant to the thesis, creativity need not necessarily be old, but must have been created in a cultural context of an indigenous people and have cultural significance to the people.

1.6 *Limitations*

1.6.1 *The doctoral thesis does not address conservation and preservation of cultural heritage*

The World Community’s interest in TK and TCEs has virtually exploded during the last decade or so. This is exemplified by the fact that today, some ten plus UN system organizations are engaged in activities pertaining to TK and TCEs of e.g. indigenous peoples. Far from all of these activities, however, aspire to identify rights to cultural heritage. Rather, they aim is to preserve and conserve cultural heritage for the benefit of humankind. Such activities and regulations of cultural heritage lies outside the scope of the doctoral thesis,

²⁴ The quote has deleted language referring to cultural heritage held by individual members of the group, as well as non-man created parts of the culture such as lands, natural resources and sites. The reason is of course that such parts of culture fall outside the scope of this doctoral thesis.

²⁵ Biber-Klemm and Szymura Berglas, *Problems and Goals*, p. 17, Taubman and Leistner, *Analysis of Different Areas of Indigenous Resources*, pp. 59-60, Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 327, Stoll and von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law II*, p. 20, and Brown, *Who Owns Native Culture?*, p. 183

which only aspires to survey to what extent indigenous peoples hold exclusive rights to elements springing from their respective cultures.

1.6.2 The doctoral thesis is only concerned with indigenous peoples' rights

The fact that the doctoral thesis surveys only rights of indigenous peoples embeds two limitations. First, the thesis does not aspire to establish what rights ethnic groups not qualifying as “peoples” under international law might have to their creativity. This limitation hence excludes from the scope of the thesis cultural/ethnic groups not fulfilling the objective criteria of a people under international law.²⁶ Second, only rights of “indigenous peoples” - and not of peoples in general – are explored.²⁷ The doctoral thesis is aware that both limitations involve implicit assumptions as to the meaning of the concepts “peoples” and “indigenous peoples” under international law. Given that arriving at a correct understanding of these terms is a central part of the thesis, it can be perceived as prejudgemental to spell out these assumptions already in the introductory Chapter. Still, it is probably advantageous for a clear understanding of the thesis that these limitations are clear from the outset.

Finally, it is underlined that the fact that the doctoral thesis is only concerned with collective rights proper limits the analyses of the thesis to rights to cultural heritage held by indigenous peoples as such. Of course, individual members of an indigenous people, as well as sub-segments of indigenous peoples' societies, can also hold rights to various elements of that culture. But these rights too, are beyond the ambit of the thesis. The thesis only investigates what rights indigenous peoples have to their collective creativity vis-à-vis non-members.

²⁶ That is not to say that such groups cannot enjoy rights to their cultural heritage. But to what extent such is the case is beyond the scope of the thesis.

²⁷ This limitation embeds no presumption that non-indigenous peoples should hold less, or different, rights to their cultural heritage than indigenous peoples. On the contrary, it is probably more likely that indigenous and non-indigenous peoples hold similar, perhaps even almost identical, rights to their collective creativity. But it lies outside the scope of the doctoral thesis to survey whether indigenous peoples' rights to their cultural heritage are matched by similar rights of other peoples.

2. CLASSICAL INTERNATIONAL LAW AND EARLY PHILOSOPHY ON PEOPLES' RIGHTS

2.1 *Introduction*

Chapter 1 underlined that the doctoral thesis has no ambition to comprehensively outline classical international law's position on the rights of peoples. History of law is as such beyond the ambit of this work. Neither does the thesis aspire to provide a full survey of the political philosophical theories emerging roughly at the same time as the embryo to the early international legal system, and which exercised influence over the latter. For the purposes of the thesis, it is sufficient to present a general outline of the basic features of classical international law and the political theories underpinning the law. A basic understanding of the history of international law, as well as of the interplay between the law and political thought, is imperative to any analysis of contemporary international law on indigenous peoples' rights. That is so because a survey of what rights indigenous peoples possess as collectives is intrinsically linked to how international law has conventionally understood the concept "peoples". The historical understanding of peoples is important since, as this Chapter will explain, the contemporary international legal system adopted classical international law's perception of "states, "peoples" and human rights. Hence, classical international law assists us in establishing a correct understanding of what has been contemporary international law's position on peoples' rights - until at least very recently.

2.2 *The period prior to the Peace of Westphalia*

Ideas and philosophies that were legal in character, even though blended with theology, emerged in Europe during the Renaissance epoch.²⁸ At this time, theology aspired to establish the content of a divine order of affairs. Simultaneously, certain scholars embarked on defining a natural legal order held to pre-exist human society, and which was intrinsically linked with the rest of God's creation.²⁹ This school, holding that there exists a law given by nature – or God – which hence is independent of human norm-creating, is commonly referred

²⁸ Anaya, *Indigenous Peoples in International Law II*, pp. 15-16

²⁹ Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, pp. 61-62, and Koskenniemi, *From Apology to Utopia*, p. 95

to as the natural law school.³⁰ To Renaissance legal scholars such as Vitoria (1486-1547), issues pertaining to state and nationhood were irrelevant to the question of what rights people ultimately possess under law. These rights can, and should, be deduced from nature/God, irrespective of the will and power of the realm, it was held.³¹

The Renaissance period did not only witness the emergence of the first international legal theories in Europe. During this era European adventurers exploring all directions of the compass needle increasingly brought Europeans in contact with other cultures, including indigenous populations. Having only recently commenced thinking in terms of international norms, and having simultaneously witnessed the world “increase”, the European legal scholars naturally started to develop ideas as to what laws should pertain to Europe’s relationship with populations on other continents. At first, European scholars were at least to some extent hospitable to the notion that indigenous populations’ societal structures constituted distinct polities possessing rights under international law. For instance, Vitoria – probably the most influential legal scholar of the time³² - developed a natural law theory submitting that the indigenous populations of the Americas possessed autonomous rights handed down to them by God. Consequently, Vitoria asserted, the European powers had to respect these rights. Based on this basic principle of respect, Vitoria crafted an elaborate system of rules aimed at governing the Europeans’ encounters and relationship with indigenous societies. He held that the indigenous populations of the Americas were owners of their land, having dominion in both public and private affairs. Indigenous lands could only be appropriated by the Europeans following procedures prescribed by law. Further, Vitoria posited, indigenous populations’ status as distinct legal and political identities should be respected, although Vitoria also asserted that indigenous populations were not full sovereigns in the same sense as the European powers.³³ Vitoria devoted considerable attention to the issue of defining the legal relationship between Europe and the indigenous populations.³⁴

³⁰ Natural law has been defined as rules and principles deducible from nature, reason or ideas of justice. They are hence norms given irrespective of the consent of a law-maker such as a state. See Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, pp. 60-61.

³¹ Koskenniemi, *From Apology to Utopia*, p. 101

³² Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 13-14

³³ Vitoria seems to have been of the opinion that the Indians were not full sovereigns due to being too pagan, at least when it came to the right to wage war. See Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 52-60.

³⁴ Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 30, Crawford, *The Creation of States*, pp. 263-264

Mere claims by a European Emperor or the Pope were rejected. Probably, most of Vitoria's contemporary legal scholars shared his teachings on the rights of indigenous peoples.³⁵

Vitoria exercised considerable influence over Grotius³⁶ (1583-1645), commonly regarded as the most prominent of the founding fathers of international law.³⁷ As Vitoria, Grotius came to conclude that indigenous populations were owners of their land and could constitute polities with rights. Further guided by Vitoria, he also submitted, however, that indigenous populations' legal status was not necessarily on par with the European powers. Grotius and other legal scholars of the time held that only European model of political and social organization, characterized by exclusivity of territorial domain and hierarchical, centralized, authority, qualified as nations proper. Most indigenous societies were, Grotius and others noted, organized in less stringent structures.³⁸ In other words, it was not the fact that the indigenous societies were indigenous that disqualified most of them from the status of nationhood. Rather, it was that their societal structures were generally too loose to meet the European idea of a nation.³⁹ In addition, some Indian nations in the Americas not recognized as nations, were nonetheless perceived as distinct, independent political communities.⁴⁰ The recognition of indigenous populations as subjects of international laws was further highlighted by the fact that the European powers regarded treaties and other agreements concluded with indigenous populations to have full international legal status.⁴¹ In conclusion, notions of international norms, when first surfacing in the 1500s, did hold that indigenous populations could constitute distinct international legal polities, enjoying rights as such.

³⁵ Anaya, *Indigenous Peoples in International Law II*, pp. 16-19, Crawford, *The Creation of States*, pp. 263-265, Koskenniemi, *From Apology to Utopia*, pp. 100-101, and Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 18-29

³⁶ Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 14

³⁷ See Lauterpacht, *The Grotian Tradition in International Law*, in which Lauterpacht describes Grotius importance for international law at his time and beyond.

³⁸ That said, certain indigenous communities were perceived as qualifying as nations. See e.g. the United States Supreme Court's ruling in *Cherokee Nation v Georgia* (30 US 1 (1831)) and *Worcester v Georgia* (31 US 350, 380; 6 Pet 515, 561 (1832)) where the Supreme Court held that "*the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial...*". Another example was the Maori Confederation in New Zealand. Also Hawaii and Tonga early acquired status as nations under international law. See Crawford, *The Creation of States*, pp. 260-263 and 300, and Anaya, *Indigenous Peoples in International Law II*, pp. 15-19.

³⁹ Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 53

⁴⁰ Anghie, *Imperialism, Sovereignty and the Making of International Law*, Ch 2, and McHugh, *Aboriginal Societies and the Common Law*, pp. 98-108.

⁴¹ For instance, the United States appears at the time to have made no real distinction between treaties entered into with indigenous populations and other "nations". See Anghie, *Imperialism, Sovereignty and the Making of International Law*, Ch 2, and McHugh, *Aboriginal Societies and the Common Law*, pp. 98-108.

2.3 *The period between the Peace of Westphalia and the League of Nations*

Structures with state-similar features had existed in Europe since the 1400s. Still, it is generally held that the nation-state and the embryo to the contemporary law of nations surfaced in tandem in Europe following the end of the 30-Year War in 1648.⁴² The Peace of Westphalia entrenched the realm of kingdoms in Europe, and offered the idea of certain stability in the relations between the “nations” of Europe. At Westphalia, the sovereigns of Europe agreed that order was to be guaranteed by the sovereigns themselves. Implicit in this notion was also that the right of the sovereigns to provide for order was inherent. The “state”, for international legal purposes, had seen the light.⁴³

The relative stability that followed after the Peace of Westphalia gave room for political thought. In the wake of the 30-Year War, classical liberal theories emerged in Europe. The liberal ideals broke with the previously dominating natural law theories. Liberal thinkers gradually abandoned the idea that there exists an order given by nature or God pre-existing human polities dictating the social order of the society.⁴⁴ Hobbes explains the sentiment of the era well. According to him, ideas of natural law are merely a set of subjective preferences and speculations in disguise of a general idea of justice. Hobbes submitted that “*[g]ood and evil are not objective or unchanging qualities of things but the subjective description of the apparently beneficial or harmful effect of things.*”⁴⁵ Instead, liberals suggested that the social order should be based on the subjective consent of individuals. Liberals submitted that respect for individual decisions results in a social order which represents the will and interests of each individual in the best possible way. Therefore, everyone should agree to such a

⁴² Cassese, *International Law*, pp. 23-24, and Barth, *Cultural Rights*, p. 85

⁴³ Lenzerini, *Sovereignty Revisited*, p. 157, Raic, *Statehood and the Law of Self-Determination*, pp. 20-21, Koskenniemi, *From Apology to Utopia*, p. 94, Lauterpacht, *The Grotian Tradition in International Law*, p. 17, Hudson, *Fables of Sovereignty*, pp. 28-29, Keal, *Indigenous Sovereignty*, p. 315, and Kingsbury, *Legal Positivism as Normative Politics*, pp. 413-414

⁴⁴ Koskenniemi, *From Apology to Utopia*, pp. 75-82, 94 and 107. The succinct outline of the history of international law presented here must necessarily oversimplify matters somewhat. It should be noted that the early liberals did not denounce the existence of a divine or natural law at once. Rather, liberals initially assumed that divine and/or natural laws were of a very general nature. They consequently doubted that these laws would allow themselves to be translated into practical circumstances. Further, to the extent natural law could be discerned, liberals gradually came to presume that such law was in conformity with state practice. Consequently, liberals abolished searching for the content of a natural order of affairs. As it was presumed that state action represented natural law, it was not necessary to independently deduct the law of nature from other sources. In other words, natural law theories prevailed as theories, but gradually became less relevant for the practical understanding of international law. See *The Gentle Civilizer of Nations* pp. 92-96 and 100 and *From Apology to Utopia*, p.108 and 131.

⁴⁵ Koskenniemi, *From Apology to Utopia*, pp. 79-80

system. The founding fathers of liberal political theory perceived some form of a social contract, implicitly introducing assumptions that a group of individuals had self-identified as a distinct group, sharing a common culture and a common desire to live together.⁴⁶ But not only had these groups of individuals consented to live together in a distinct society. They had also, according to liberalism, agreed that this society should be governed by a sovereign ruler. The group had done so, it was submitted, because a sovereign was paramount to social order and only social order could prevent violence and save individuals from constant fear. In other words, the duty to obey the sovereign was based on self-interest. Hence, according to classical liberal theory, each individual has the right to agree to her personal preferences. But in addition, and importantly, once these preferences are in place and can be ascertained, the sovereign has the right to enforce such norms. They can no longer be challenged by the individual based on subsequent changes of will.⁴⁷

The liberal scholars further developed norms governing the relationship between nation-states, essentially by adapting the theories they had developed regulating the relationship between the individual and the state to intra-state relationships. It is telling that Vattel (1714-1767), the most influential international legal scholar of the time, viewed states as super-individuals.⁴⁸ As sovereigns, states were perceived to be free in a manner comparable to individuals. Consequently, similar to individuals, states were only bound by norms they had consented to. The will of the sovereign created law. Since all states were sovereign, and equally sovereign, no state had the right to impose norms on the other.⁴⁹ But at the same time, once the nation-state had consented, and a norm hence been established, the nation-state could no longer opt out of the norm with reference to subsequently changed preferences. A “law of nations” had replaced natural law.⁵⁰ Clearly, the notion of state sovereignty is incompatible with natural law. As mentioned, natural law holds that there exists a normative code that pre-dates the sovereign, and which the sovereign has no power to change or nullify. The new

⁴⁶ Famous liberal philosophers such as Hobbes, Locke, Kant and Rousseau all used the notion of a fictitious social contract to justify their respective theories of justice. See Fassbender, *The United Nations Charter As Constitution of the International Community*, p. 559, and Kymlicka, *Contemporary Political Philosophy*, p. 61. See also Van Dyke, *The Individual, the State and Ethnic Communities in Political Theory*, p. 34, and Koskenniemi, *From Apology to Utopia*, pp. 74-75.

⁴⁷ Koskenniemi, *From Apology to Utopia*, pp. 75, 81 and 113

⁴⁸ Koskenniemi, *From Apology to Utopia*, p. 113

⁴⁹ Lauterpacht, *The Grotian Tradition in International Law*, p. 29, and Koskenniemi, *From Apology to Utopia*, pp. 115-121

⁵⁰ Anghie, *Imperialism, Sovereignty and the Making of International Law*, p., 42, Anaya, *Indigenous Peoples in International Law I*, pp. 13-14.

legal order, on the other hand, submitted that the will of the sovereign was normative.⁵¹ Vattel and his colleagues were not interested in seeking to deduce any divine or natural law. Rather, they sought to establish what constituted international norms by observing state practice.⁵²

Naturally, Vattel's and other liberals' view on international law was an instant success with the sovereigns. This new understanding of international law established the state as the international legal subject and legitimized the states' actions as law.⁵³ In the wake of the Peace of Westphalia, the interest of the realm and liberal theory formed a perfect match. The sovereigns wanted to entrench their sovereignty, and the liberals professed that by law, they had this right. Liberalism uncritically accepted the existing European polities. The international legal system professed that military power determines territorial control, and that a territory thus defined constitutes a state. Further – of significant importance to this doctoral thesis - international law came to assert that the population of the state – thus defined - constitutes a “people”.⁵⁴ Regardless of whether the state encompassed several ethnicities and/or cultures, it was considered a “nation-state”.⁵⁵

It is critical to note how the liberal theories of justice that emerged and gradually got entrenched during this era not only rested on - but presupposed – that nation-states exist that pre-dates the law and further that the population of the state constitutes a people for legal purposes. These basic building blocks of the international legal system in turn followed indirectly from the principal assumptions that (i) according to a social contract, the individual has – previous to the formulation of any theory of justice – agreed to be governed by the sovereign, and (ii) the boundaries around the polity where the liberal theories apply – i.e. the state - have been settled prior to any theory of justice.⁵⁶ The state as the principal subject of international law could no longer be questioned. It became self-evident that the world was

⁵¹ Koskenniemi, *From Apology to Utopia*, p. 115-121 and 224

⁵² Koskenniemi, *From Apology to Utopia*, p. 112, and *The Gentle Civilizer of Nations*, pp. 50-51

⁵³ Koskenniemi, *From Apology to Utopia*, p. 120

⁵⁴ Anaya, *Indigenous Peoples in International Law II*, pp. 19-22

⁵⁵ Eide has submitted, however, that for a brief period of time, liberalism actually did acknowledge the sovereignty of the people, ethnically/culturally understood. But the role of the people was quickly transformed into the fictional idea of a state. See Eide, *Economic, Social and Cultural Rights*, p. 13. Also, under the Treaty of Westphalia, the parties did agree to respect the rights of certain religious minorities. The Congress of Vienna (1815) and the Treaty of Berlin (1878) too, expressed certain concerns for minorities. See Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 50-51. But these were odd examples in an era that otherwise created and emphasized the role of the nation-state.

⁵⁶ Kymlicka, *Multicultural Citizenship*, pp. 1-4, Crawford, *The Creation of States*, pp. 6-8, Carens, *Aliens and Citizens*, pp. 341-342, and Walzer, *Spheres of Justice*, p. 138

naturally divided into states, possessing rights precisely by the virtue of being states. The international legal system had no opinion on who could form a state, or on states' rights to continuously exist. To liberals "*The formation of a new State [was] ... a matter of fact, and not of law.*"⁵⁷ This understanding of international law became increasingly entrenched during the 1800s.⁵⁸

In the 1800s, international lawyers became viewed as scientists. As such, their quest was not, in line with the above, to formulate subjective opinions or speculations about the content of a law handed down by nature or God. Rather, the role of the international lawyer was to identify the content of the law. This task could only be carried out by studying state practice. Liberals came to hold that the law could be objectively understood by studying state's developments through history. State practice was perceived as an inevitable historic development towards the highest possible degree of freedom, and as such reflective of objective law.⁵⁹ These studies of the objective law resulted in the conclusion that the European powers were the most developed states. International law, it was held, was based on the cultural processes of Europe, processes of civilization in contrast to other cultures who were deemed as only half-civilized or even savage.⁶⁰ In other words, the policies and norms proclaimed by the sovereigns of Europe reflected the most developed and correct law.⁶¹ The notion that the practices of the most "developed" nations also reflected objective law allowed the lawyers to legally distinguish between civilized and non-civilized societies. Only when having reached the required need of civilization, i.e. when resembling European states to a sufficient degree, could societal structures outside Europe enter the international legal

⁵⁷ Crawford, *The Creation of States*, pp. 3-5 and 10. Territories outside Europe were awarded status as states if the European powers deemed them sufficiently "civilian", or Christian. Examples of entities accepted as states where the United States, the Ottoman Empire, China, Afghanistan, Bukhara, Burma, Ceylon, Japan, Korea, Siam, Brunei and the Mogul and Maratha Empires of India. Nonetheless, the European states, joined by the United States in 1783, remained the dominant states and the principal creators of international law. See Crawford, *The Creation of States*, pp. 14 and 260-261, Anaya, *Indigenous Peoples in International Law I*, p. 19 and fn. 102, Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 58, and Cassese, *International Law*, pp. 25-31.

⁵⁸ Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 33 and 43, and Koskenniemi, *From Apology to Utopia*, pp. 122-123, 132 and 141-143.

⁵⁹ Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 43, and Koskenniemi, *From Apology to Utopia*, pp. 122-123 and 141-143

⁶⁰ Koskenniemi, *The Gentle Civilizer of Nations*, p. 72-73

⁶¹ Koskenniemi, *From Apology to Utopia*, pp. 144-147, 153 and 232, and *The Gentle Civilizer of Nations*, p. 51 and Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 40-41, 49 and 61-62

community.⁶² Sovereignty became essentially a European feature.⁶³ Through colonization, the rest of the world got assimilated into an international legal system that was essentially European. The “civilized” European nations determined what constituted international law, and could therefore unilaterally decide their relationship with the rest of the world. This included their relationship with indigenous populations,⁶⁴ who naturally were considered non-civilized societies. Consequently, breaking with the teachings of Vittoria and Grotius, international law came to hold that indigenous populations did not constitute international legal subjects.⁶⁵

Hence, by the early 1900s, international law had abandoned any remaining consideration of indigenous populations as polities with rights. At the same time, the European powers had come to crave indigenous populations’ traditional lands and natural resources. These two factors contributed to it being increasingly held that indigenous territories were empty – *terra nullius* – and hence free for colonization. It did not matter that indigenous populations inhabited these areas, since they had not developed an appropriate and sufficient relationship with the land, measured against European standards. The European powers viewed the indigenous populations as insufficiently similar to themselves. The position that the taking of indigenous land demanded a treaty was gradually abandoned, and the Western colonizers – supported by international law of the time – commenced appropriating indigenous territories, placing these under their own hegemony and control.⁶⁶ Invoking the notion of sovereignty and the positive law of the sovereign, the European powers declared that uncivilized indigenous populations held no rights under international law, including to land. The European states brought indigenous populations into the realm of their sovereignty.⁶⁷ It

⁶² Simpson, *Two Liberalisms*, pp. 544-548, and Koskenniemi, *The Gentle Civilizer of Nations*, pp. 73-75 and 135

⁶³ Koskenniemi, *The Gentle Civilizer of Nations*, pp. 127-128

⁶⁴ Koskenniemi, *From Apology to Utopia*, pp. 144-147, 153 and 232, and Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 32-33, 53-61 and 98-99

⁶⁵ Koskenniemi, *The Gentle Civilizer of Nations*, pp. 113-115 and 126, and Crawford, *The Creation of States*, p. 29

⁶⁶ Oppenheim, *International Law*, p. 292, Koskenniemi, *From Apology to Utopia*, p.152 and *The Gentle Civilizer of Nations*, pp. 116 and 140-141, Cassese, *International Law*, p. 28, Hannum, *Autonomy, Sovereignty, and Self-Determination II*, p. 93, Crawford, *The Creation of States*, pp. 263-267, Macklem, *Indigenous Recognition in International Law*, p. 184, Anghie, *Imperialism, Sovereignty and the Making of International Law*, Ch 2, McHugh, *Aboriginal Societies and the Common Law*, pp. 98-108, Castellino, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, p. 69, *Territorial Integrity and the “Right” to Self-Determination*, pp. 522 and 529-531 and *The Right to Land, International Law & Indigenous Peoples*, pp. 92-101, Anaya, *Indigenous Peoples in International Law I*, pp. 19-20, and Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 8

⁶⁷ Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 30 and 34

became increasingly held that indigenous populations were destined to disappear; a “prophecy” that was actively promoted by states by denouncing any claim of indigenous populations to rights to land and self-government.⁶⁸ Indeed, it was held that international law embraced the right and duty of the European states to promote “civilization”, also by force.⁶⁹

As seen, the social contract theories embedded in classical liberalism awarded the sovereign the right to craft and enforce norms. Such decisions could not be challenged by the individual once she had “consented” to the social contract. But liberalism is also a school professing the freedom of the individual. Consequently, it was only natural that liberal scholars commenced elaborating the first human rights ideas in Europe. With time, the individual’s rights and freedoms vis-à-vis the state became an integral part of liberalism.⁷⁰ For considerable time, however, human rights norms remained mostly ideas. Classical international law did not embrace human rights, even though rights such as the right to personal freedom, civil liberty, commerce, property and the freedom of conscience were at times to some extent acknowledged.⁷¹ Still, a coherent human rights system would be developed much later.⁷² As the doctoral thesis shall return to below, even though certain practices, such as slavery, with time became regarded as illegal, it was only with the adoption of the human rights instruments in the wake of World War II that human rights genuinely became part of international law. In addition, it is worth noting that the human rights ideas developed during the centuries following the Peace of Westphalia were human rights of individuals only. There were no considerations of group rights.⁷³ The state-individual dichotomy had become deeply entrenched in, and integral to, classical liberalism.

In conclusion, the nation-state emerged in Europe in the aftermath of the Peace of Westphalia. The legal theories that surfaced simultaneously and got entrenched during the following centuries took the nation-state for granted as *the* international legal subject. It was presumed

⁶⁸ Tully, *The Struggles of Indigenous Peoples for and of Freedoms*, p. 40, and Koskenniemi, *The Gentle Civilizer of Nations*, p. 127

⁶⁹ Koskenniemi, *The Gentle Civilizer of Nations*, pp. 98-99

⁷⁰ Anaya, *Indigenous Peoples in International Law I*, p. 13, and Eide, *Economic, Social and Cultural Rights*, pp. 12-13

⁷¹ Koskenniemi, *The Gentle Civilizer of Nations*, pp. 50 and 55

⁷² Cassese, *International Law*, p. 143. In the absence of a coherent system of human rights, a number of treaties entered into in the era between the Peace of Westphalia and the League of Nations included certain provisions on in particular freedom of religion. However, these treaty provisions were haphazard, incoherent and rarely adhered to in practice. See Lerner, *Group Rights and Discrimination in International Law*, pp. 7-8.

⁷³ Johnston, *Native Rights as Collective Rights*, p. 185, Glazer, *Individual Rights against Group Rights*, p. 126, and Mancini and de Witte, *Language Rights and Cultural Rights*, p. 251

that a “people” equalled the aggregate of the population of the territory of the sovereign. Further, the dominating political theories of the era gradually held it self-evident that no law could pre-exist the sovereign because the sovereign was the sole creator of law. International law came to be synonymous with the will of the state. Indigenous populations could not be state-forming peoples, and hence lacked legal personality. In addition, the early human rights ideas were of no use to indigenous populations either, as they were only concerned with the relationship between the individual and the state. Groups had no place in an international legal system based on the state-individual dichotomy.

2.4 *The League of Nations epoch*

The early 20th Century witnessed the first trembling steps towards democracy in some countries. But the advent of democracy had no immediate impact on state sovereignty theories, or on international law’s understanding of “peoples”. In 1914-1918, the world was hit by the first of the world wars. In an attempt to avoid further global conflicts, the first world organization – The League of Nations – was created in the aftermath of World War I. As one of its tasks, the League and its creators set out to craft the first comprehensive international legal system.⁷⁴ The aim was to codify and structure, but to some extent also reshape, international law as it had been known since the Peace of Westphalia.

The League of Nation era affirmed classical international law’s position that international norms emerge only as a result of state consent. This position was confirmed e.g. by the ruling by the Permanent Court of International Justice’s (PCIJ) – an international tribunal established by the League of Nations - in the famous *Lotus Case* (1927).⁷⁵ At the same time, the League of Nations epoch also saw the first attempt to objectively define what polity constitutes a state. As Section 2.3 described, classical international law held that the state pre-existed the law, implying that becoming a state was a matter of being accepted as such by already existing states. The attempts to formally define what constitutes a state were not successful, but some further non-European polities were accepted as states during this

⁷⁴ Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 123-125

⁷⁵ *The Case of the S.S. “Lotus”*, PCIJ, Ser. A. No. 10, 1927. In its judgement, the PCIJ for instance declared that “*International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally as expressing principles of law...*” . See Section III, para. 4.

epoch.⁷⁶ Further, statehood was not a pre-requisite for membership in the League of Nations. Also collective entities similar to states, such as dominions and colonies, could become members of the League.⁷⁷ In a similar vein, and more important for the present purposes, the League of Nations also concerned itself with the situation of minorities and the principle of self-determination.

The general perception was that World War I had to a large degree been sparked by tensions between ethnic groups forced to share the same polity when the nation-states were created. As a response, the League of Nations actively promulgated an international legal system hospitable towards rights of minorities. The previously haphazard ideas on minority protection were now formulated into a system. Particular consideration was given to ethnic groups having been denied the right to independence when the political map of nation-states was shaped. Reflecting this spirit, a number of treaties were entered into explicitly aiming at rendering it possible for such minorities to preserve their cultural characteristics and traditions.⁷⁸

As mentioned, the aftermaths of World War I also brought with it the first coherent discussions on the principle of self-determination, in particular championed by U.S. President Woodrow Wilson. President Wilson understood self-determination in a democratic context, e.g. as a right of the population of a nation-state to freely choose its government and sovereign. But he also explicitly linked the principle of self-determination to rights of minorities. For instance, he proposed a provision to the League Covenant suggesting a fairly far-reaching right of racial groups to secession.⁷⁹ President Wilson was successful to some extent. For instance, the League of Nation Covenant introduced a Mandate System, pursuant to which European powers were to support trust territories' development towards self-

⁷⁶ Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 137-138

⁷⁷ Article 1 (2) of the League Covenant

⁷⁸ Crawford, *The Right to Self-determination in International Law*, pp. 14-15, Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 31 and 51-54, Wheatley, *Democracy, Minorities and International Law*, pp. 8-9, Lerner, *Group Rights and Discrimination in International Law*, pp. 11-12, Kingsbury, *Reconciling Five Competing Conceptual Structures*, p. 78, Raic, *Statehood and the Law of Self-Determination*, pp. 191-192, and Shaw, *Self-Determination and the Use of Force*, p. 37

⁷⁹ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 27-32, Anaya, *Indigenous Peoples in International Law I*, p. 76 and Cassese, *Self-determination of Peoples*, pp. 18-23. In the years immediately following the Russian revolution, the Soviet Union too, appears to have been of the opinion that the principle of self-determination applies to ethnic groups. However, it clearly did so in a Marxist context, viewing self-determination as a tool in the struggle for class-liberation. See Cassese, *Self-determination of Peoples*, pp. 16-18, Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 32-33 and Anaya, *Indigenous Peoples in International Law I*, p. 76.

government, in some instances through becoming fully sovereign states. But the Mandate System introduced by the League pertained to territories in their entirety. It offered little support to ethnic and culturally distinct groups.⁸⁰ In fact, the Mandate System sought to extinguish cultural practices viewed as backwards by the Europeans, such as those of “native tribes”.⁸¹ What is more, even if President Wilson enjoyed certain success in making international law embracing the principle of self-determination, the victory was far from complete. Both the Treaty of Versailles and the League of Nations Covenant fell short of proclaiming self-determination as a right.⁸²

Also juridical decisions of the era reflected an increased interest in the situation of minorities and the principle of self-determination. In an advisory opinion in the *Minority Schools in Albania Case* (1935), the PCIJ proclaimed that an ethnic minority in Albania had the right to preserve traditions and national characteristics distinguishing it from the majority population. The PCIJ stated that “*equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations.*” The Court further proclaimed that “*The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race ... the possibility of ... preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.*” To achieve this end, the Court further proclaimed that states should ensure the minority group “*suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.*”⁸³ Read today, the PCIJ’s advisory opinion in the *Minority Schools of Albania Case* strikes as remarkably modern. Notably, the PCIJ did not merely hold that children of minority groups had the same rights to schooling as children of the majority population, a position that in itself would only be firmly established in international law following the establishment of the United Nations more than a decade later.

⁸⁰ League of Nations Covenant, Article 22. For an extensive outline of the League of Nations’ Mandate System, see Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 119-190. Anghie argues that even if formally aiding territories outside Europe to become states, the Mandate System in effect still served the purpose of maintaining the European powers’ control over these areas.

⁸¹ Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 168-169. See also Kingsbury, *Legal Positivism as Normative Politics*, pp. 412-413. Here Kingsbury discusses the writings of two legal scholars that exercised considerable influence on the law during the League of Nation epoch; Oppenheim and Westlake. They both held that native tribes were not legally capable of managing their own affairs, and that their treatment should hence be left to the conscience of the state.

⁸² Crawford, *The Right to Self-determination in International Law*, p. 14, Shaw, *Self-Determination and the Use of Force*, p. 37, and Cassese, *Self-determination of Peoples*, p. 33

⁸³ *Minority Schools in Albania*, Advisory Opinion, PCIJ Ser. A./B., No. 64, 1935.

Of much greater significance is the PCIJ distinguishing between “*equality in law*” and “*equality in fact*”. When asserting that minority children’s different cultural background awards them a right to be treated differently compared with the majority population, i.e. to have a schooling culturally accustomed to them, the PCIJ is well ahead of its time. Section 4.8 will elaborate how the non-discrimination discourse has only very recently entertained the notion that those that are different have a right to be treated as such.

The *Minority Schools in Albania Case* hence well illustrates the post-World War I era’s view on the rights of minorities. In the same vein, the opinion of the Commission of Jurists appointed by the League of Nations to review the *Åland Islands Case*⁸⁴ (1920), illustrates the epoch’s understanding of the principle of self-determination. The Commission of Jurists too, placed emphasis on the relationship between the principle of self-determination and the right of minorities. It noted that the two principles had the same object; to assure ethnic groups the possibility to maintain and develop their social and ethnical characteristics. According to the Commission, this end should whenever possible be achieved through secession. But when secession was for political reasons not possible, the ethnic group’s right to preserve its cultural characteristics should be implemented through an extensive grant of liberty within the existing state. The Commission of Jurists found that the *Ålanders* did not enjoy a right to self-determination, in the sense that they could unilaterally secede from Finland. The Commission motivated its finding with that the principle of self-determination had not emerged into a right under international law, chiefly because of not being incorporated into the Treaty of Versailles. Notwithstanding, the Commission held that the *Ålanders* were entitled to preserve their identity through a regime of autonomy, underlining that the principle of self-determination must “*be brought into line with that of the protection of minorities*”.⁸⁵

As the *Minority Schools in Albania Case*, the *Åland Island Case* illustrates the strong protection awarded to minority groups during the League of Nations era. The *Åland Island*

⁸⁴ The *Åland Islands* are a group of islands situated in the Baltic Sea between Finland and Sweden. The conflict concerned whether the *Åland Islands* were free to secede from Finland to become a part of Sweden. Championing their claim, the *Ålanders* sought to invoke the principle of self-determination. See Crawford, *The Right to Self-determination in International Law*, p. 13.

⁸⁵ Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the *Åland Island Question*, Official Journal of the League of Nations, Special Supplement No. 3, October 1920. See also Cassese, *Self-Determination of Peoples*, pp. 27-31 and 33, Crawford, *The Right to Self-determination in International Law*, pp. 13-14 and *The Creation of States*, pp. 111-112, Fromherz, *Indigenous Peoples’ Courts*, pp. 1355-1356, and Shaw, *Self-Determination and the Use of Force*, p. 37. For an extensive overview of the autonomy arrangements on the *Åland Islands*, see Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp.28-30 and 370-375.

Case further evidences the political force of the principle of self-determination in the inter-war period, even though the principle had not yet crystallized into a right. The cases further highlight the interrelation between self-determination and protection of minority groups. It is true that the Commission of Jurists in the outset equalled the principle to self-determination with a right to independence, and concluded that no such right existed under international law. But this did not leave the *Ålanders* without rights. Rather, guided by the spirit of self-determination, the Commission concluded that international law provided minority groups with a right to autonomy allowing them to preserve their cultural characteristics. In other words, the Commission of Jurists disentangled the principle of self-determination from a right to secession. Having done so, it noted that the underlying rationales behind the principle of self-determination could also be met by an extensive right to cultural autonomy. As the PCIJ's advisory opinion in the *Minority Schools of Albania Case*, the Commission of Jurists findings in the *Åland Islands Case* comes across as strikingly contemporary. Also the logic behind the Commission of Jurists' findings would go unnoticed for several decades in the post-World War II era. But as the doctoral thesis will return to extensively later, international law has recently rediscovered the intrinsic link between self-determination and cultural rights. *The Åland Islands Case* illustrates well that in the final analysis, both set of rights have the same core common objective; the safeguard of the cultural identity of groups.⁸⁶ The Case further demonstrates that such rights can be operationalized through autonomous arrangements rather than through secession.

In conclusion, although legal sources are limited, it appears clear that during the League of Nations epoch, one can discern a clear departure from the international legal order reigning since the Peace of Westphalia. States, through the League of Nation, and international legal institutions broke with the orthodox understanding of the state-individual dichotomy professed by classical liberalism. The international legal order entertained ideas submitting that ethnic and cultural groups can enjoy rights in their own capacity. These rights aspired to award ethnic groups having been denied the right to independence when the nation-states were formed a right to autonomy. But the minority rights recognized during the League of Nations era would not be long-lived. In the 1930s, the minority protection system became questioned, and started to implode. The main reason was a lack of oversight mechanisms and

⁸⁶ Vrdoljak, *Self-Determination and Cultural Rights*, pp.44-46

a perception that the system discriminated between states.⁸⁷ But also political unrest, including the rise of Nazism and Fascism, contributed to the break-down of the League of Nations' minority rights system.⁸⁸ Finally, any potential developments towards recognition of rights of ethnic groups were soon interrupted by the Second World War.

2.5 The post-World War II period – the return of classical international law

2.5.1 Introduction

As mentioned, during the years leading up to World War II, the minority protection system established under the auspices of the League of Nations had already collapsed. In addition, Nazi-Germany used an alleged need to protect German minorities in neighbouring countries to justify several of its aggressions during World War II, and, it was felt, the German minorities had collaborated in this effort. These two circumstances combined to render the International Community adverse to rights of ethnic groups in the aftermath of World War II. Simultaneously, a belief emerged in the post-War epoch that effective protection of individual civil and political rights would indirectly – yet adequately – also protect the cultural characteristics of members of vulnerable minority groups.⁸⁹ Hence, there was no need for specific minority rights.⁹⁰ Or more correctly, such a belief re-emerged. Because a position that justice can be achieved through accurately formulating the state-individual relationship is of course fully in line with the political theories that had been dominating since the advent of the nation-state and international law about 300 years earlier. An additional contributing factor to minority rights being abandoned, it has been suggested, was that many post-War statesmen viewed the abolishment of minority rights as a way to weaken minority groups' possibilities to challenge state-power. The individual human rights approach fitted these statesmen perfectly. It protected members of minorities as individuals, but not the national groups' societal institutions. Thus disempowered, minorities were in a bad position to resist

⁸⁷ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 53-55, and Makkonen, *Equal in Law, Unequal in Fact*, p. 82

⁸⁸ Lerner, *Group Rights and Discrimination in International Law*, p. 10-11

⁸⁹ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, p. 57, Kymlicka, *Multicultural Odysseys*, pp. 29-30, Crawford, *The Right to Self-Determination in International Law*, pp. 14-15, and Kingsbury, *Reconciling Five Competing Conceptual Structures*, p. 78

⁹⁰ Vrdoljak, *Self-Determination and Cultural Rights*, p. 56, and Kymlicka, *Multicultural Odysseys*, p. 29

deliberate nation-building processes of the state.⁹¹ As a consequence, when the foundations for a new world order were created in the wake of World War II, minority rights were substituted for universal individual human rights. As Kunz famously observed in 1954, “[a]t the end of the First World War international protection of minorities was the great fashion ... Today, the well dressed international lawyer wears “human rights”.”⁹²

The debate on self-determination in the post-World War II period followed a similar pattern as the shift in focus from minority rights to universal individual rights. True, a few scholars did suggest that the right to self-determination could apply to peoples in the cultural/ethnic understanding of the term, rather than to a state (or technically more correct, the aggregate of the population of the state). However, following in the footsteps of the classical liberal tradition, most legal scholars frowned at this idea. They submitted that understanding the subject of the right to self-determination in such a manner constituted a contradiction in terms. It was maintained that under international law, it is not possible to refer to a polity as a political entity if not already constituting one. Per definition, polities seeking rights to self-determination have no legal status or any rights under international law, it was submitted.⁹³ In an often used quote, Jennings illustrates the position of the time well, submitting that “[o]n the surface it seem[s] reasonable: let the people decide. It [is] in fact ridiculous because the people cannot decide until somebody decides who are the people.”⁹⁴ In the same vein, the International Law Commission (ILC) expressed the opinion that defining the term state or establishing what characteristics a community shall possess to qualify as a state would serve no purpose.⁹⁵ Clearly, the sentiment was fully in line with the position of classical international law. As seen, it held that the law should not concern itself with what polities make up a state. This was an issue for power politics only. The state, it was confirmed, pre-dates the law.

⁹¹ Kymlicka, *Multicultural Odysseys*, pp. 30-31

⁹² Kunz, *The Present Status of the International Law for the Protection of Minorities*, p. 282

⁹³ Crawford, *The Creation of States*, pp. 124-125

⁹⁴ Jennings, *The Approach to Self-Government*

⁹⁵ ILC, Report 1949:A/925, 9

2.5.2 The UN Charter

The UN Charter became the first international legal instrument to refer to human rights, albeit in a cautious and general manner.⁹⁶ Hence, although human rights ideas had surfaced centuries earlier, it was only in the post-World War II period that human rights became a legitimate concern of international law.⁹⁷ Following the classical legal tradition, the UN Charter affirmed that only individuals can be beneficiaries of human rights. Further, the Charter reflected the centrality of the state in the international legal order, underlining that international law continued to rest on the principle of state sovereignty.⁹⁸ In the same vein, the UN Charter explicitly declared that human rights evolve as a result of acceptance by states.⁹⁹

The UN Charter also came to include references to the principle of self-determination of peoples.¹⁰⁰ These references could be perceived as contradicting the emphasis on the centrality of the state in the international legal order. And certainly, far from all participants at the Conference were in favour of the UN Charter referring to the principle of self-determination. These participants objected to this idea exactly because viewing a reference to self-determination of peoples as straying away from the state-focused approach perceived to be inherent in the world order. It was feared that emphasis on self-determination could lead to national minorities demanding a right to secession. These concerns were allayed, however, by general statements clarifying that references to the principle of self-determination was not to be understood as conferring rights to minorities or other sub-segments of society. When it had been thus clarified that the UN Charter did not refer to rights of peoples in the ethno-cultural meaning of the term - but rather to rights of states through “the agent” the entire population of the state – agreement could be reached on these provisions in the UN Charter. Thus, understood, these Charter provisions do not award rights to groups vis-à-vis the state,

⁹⁶ Brownlie, *The Rights of Peoples in Modern International Law*, p. 1. Brownlie points to that the term “human rights” is relatively new, first appearing in the instruments crafted by the young United Nations.

⁹⁷ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, p. 104

⁹⁸ Articles 2 (4) and 2 (7). See also Cassese, *International Law*, p. 336.

⁹⁹ Articles 13 (1) and 55 (c). See also Cassese, *International Law*, pp. 331-332 and 378.

¹⁰⁰ Articles 1 (2) and 55

but rather pertain to state-to-state relationships.¹⁰¹ In conclusion, the UN Charter confirmed the primacy of the state in international law and entrenched the state-individual dichotomy.

2.5.3 The Bill of Rights and other human rights instruments of the era

Immediately following its establishment, the United Nations embarked on crafting the first universally applicable human rights instrument. In 1948, the UNGA adopted the Universal Declaration on Human Rights (UDHR).¹⁰² Reflecting that minority rights were out of fashion, the UDHR embraced only individual human rights and acknowledged no rights of peoples or other groups.¹⁰³ Still, at least formally the UDHR manifested a final break with the policies of racial supremacy that had underpinned colonization. Since 1948, the fundamental principle of human beings' equal value has been unquestioned in international law.¹⁰⁴ This development was of course significant in itself. But in addition, Kymlicka argues that this first step constituted a condition for later developments in international law, of greater relevance to the doctoral thesis.¹⁰⁵

Two UDHR provisions are of particular relevance to the doctoral thesis. First, pursuant to UDHR Article 27.2, every individual has the right to the protection of the moral and material interests resulting from the scientific, literary or artistic production of which she is the author. But UDHR Article 27 did not only proclaim rights of those creating culture. The provision reflects a conflicting interest in the right to culture relevant still today. While Article 27.2 underscores the right to control and benefit from one's own creativity, Article 27.1 in the same breath proclaims everyone's right to freely participate in the cultural life of society as a whole, to enjoy its arts, and to share in society's scientific advancement and benefits. Evidently, the rights enshrined in Article 27 can at times conflict with each other. One has to strike a balance between the two and in instances when they are incompatible, determine

¹⁰¹ UN GAOR, 6th session, Third Committee, 366th meeting, para. 29, and 397th meeting, paras. 5-6, and UN Doc. E/CN.4/Sub.2/L.625, paras. 77 and 80. See also Alston, *Peoples' Rights*, pp. 260-261, Cassese, *Self-determination of Peoples*, pp. 14-23 and 39-42, Crawford, *The Creation of States*, pp. 112-114, and Vrdoljak, *Self-Determination and Cultural Rights*, p. 62

¹⁰² Adopted and proclaimed by UN General Assembly resolution 217 A (III) of 10 December 1948

¹⁰³ Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, p. 326, Scheinin, *Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights*, p. 4, and Kymlicka, *Multicultural Odysseys*, p. 30

¹⁰⁴ As Fredman points out, it is true that liberal theories for centuries had celebrated the equality of men. But this equality was reserved for men in Europe with means. See *Combating Racism with Human Rights*, pp. 14-15.

¹⁰⁵ Kymlicka, *Multicultural Odysseys*, p. 89

which right prevails. Second, UDHR Article 17 proclaims that everyone owning property must not be arbitrarily deprived of the same.

A second human rights instrument adopted by the UNGA in 1948 constituted a direct response to the atrocities committed during World War II. The Genocide Convention¹⁰⁶ prohibits genocide in all its forms. A convention outlawing genocide offered the World Community an apparent opportunity to break with the state-individual dichotomy. Seemingly, the natural beneficiaries of a right not to be subject to genocide are peoples or other groups. Still, the United Nations and its member states managed to avoid rendering the Genocide Convention a human rights instrument establishing collective human rights proper. Rather, the Convention was framed in a manner not to proclaim rights. Instead, it defines genocide as acts committed with the intent to destroy groups, and obligates states to punish persons guilty of such acts. As a consequence, in particularly if interpreting the Genocide Convention in the context of other human rights instruments adopted during the era, one can hardly invoke the Convention as evidence of international law at the time acknowledging human rights of peoples.¹⁰⁷

At the same time as the United Nations elaborated the universally applicable UDHR, European and American states crafted regional human rights instruments, applying to the European and American Continents, respectively. These instruments too, were products of their time, proclaiming only individual rights. Similarly to UDHR Article 27.2, Article 13.2 of the American Declaration of the Rights and Duties of Man (ADRDM)¹⁰⁸ (1948) proclaimed a right of individuals to have their intellectual creations protected. Further, mirroring UDHR Article 17, pursuant to ADRDM Article 23, individuals have a right to property. In 1969, the Organization of American States (OAS) followed up and built on the ADRDM when adopting the American Convention on Human Rights (ACHR).¹⁰⁹ ACHR Article 21 affirmed the right to property proclaimed by ADRDM Article 23.¹¹⁰ Unlike its

¹⁰⁶ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UNGA Resolution 260 (III) on 9 December 1948

¹⁰⁷ Alston, *Peoples' Rights*, pp. 261-262, and Fromherz, *Indigenous Peoples' Courts*, p. 1352. See, however, also Stavenhagen, *Cultural Rights*, p. 87, where he, referring to Buergenthal, asserts that the Genocide Convention recognizes the right of groups to exist as groups.

¹⁰⁸ Adopted by the Ninth Conference of American States, Bogotá, Mar. 30-May 2, 1948. O.A.S. Res. XXX

¹⁰⁹ Adopted at San José, Costa Rica, at the Inter-American Specialized Conference on Human Rights on 22 November, 1969, OAS Treaty Series No. 36

¹¹⁰ In 1988 the OAS further agreed on an Additional Protocol to the ACHR, including an Article 14 essentially mirroring UDHR Article 27.

American counterparts, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHRFF) (1950) did not embrace the right to property.¹¹¹ But Article 1 of a first additional protocol added to the Convention two years later proclaimed – in line with UDHR Article 17 – that every person is entitled to the peaceful enjoyment of her property.¹¹²

Following the adoption of the UDHR, the UN member states embarked on elaborating and concretizing the rights enshrined in the UDHR in two legally binding human rights instruments. In 1966, the UNGA simultaneously adopted the International Covenant on Civil and Political Rights¹¹³ (CCPR) and the International Covenant on Economic, Social and Cultural Rights¹¹⁴ (CESCR). The UDHR, together with the CCPR and the CESCR, are often jointly referred to the UN Bill of Rights.

The 1966 Covenants remained true to the notion of the centrality of the state in international law, as well as to the perception that human rights apply to individuals only.¹¹⁵ Still, the instruments encompassed a couple of provisions of interest to the doctoral thesis. Essentially mirroring UDHR Article 27.2, CESCR Article 15.1 (c) confirmed that the individual¹¹⁶ has the right to benefit from protection of the moral and material interests resulting from any scientific, literary or artistic production of which she is the author. But as UDHR Article 27, CESCR Article 15.1 also has built into it the tension between the rights of those creating culture and those wanting to access the same. Pursuant to CESCR Article 15.1 (a-b), everyone has the right to take part in cultural life as well as to benefit from scientific progress. The CCPR contains no provision directly pertaining to rights to human creativity. Article 27, however, elaborates on another aspect of culture, proclaiming that individuals belonging to e.g. ethnic minorities shall not be denied the right to enjoy their own culture, in community with other members of the group. Again, the reference to individual members of the group,

¹¹¹ Concluded at Rome, Nov. 4, 1950, E.T.S. 5; 213 U.N.T.S. 221

¹¹² Adopted on 20 March 1952

¹¹³ Adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966

¹¹⁴ Adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966

¹¹⁵ That said, one should note that some argue that already at time of the drafting of the CESCR, the crafters of the Covenant understood the rights set forth by the CESCR, i.e. economic, social and culture rights, to be collective in nature. According to Craven, this is the reason why the CESCR was not equipped with the individual complaints system incorporated into the CCPR. See The UN Committee on Economic, Social and Cultural Rights, p. 458. There seems to be limited support for this position, however, wherefore the doctoral thesis does not pursue this argument any further.

¹¹⁶ Stoll and von Hahn has noted that the right contained in UDHR Article 27 (2) and CESCR Article 15 (1) “*is clearly tied to an individual author or inventor and cannot be held by a group*”. See Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law II, pp. 22-23.

rather than to the group as such, renders it evident that the authors of the CCPR understood Article 27 to set forth a right that was to be enjoyed by individuals only. In addition, Article 27 was framed as a negative right. The state's duty was to not interfere with, rather than to promote, the right proclaimed. Notwithstanding, by calling on states to respect communal cultural practices of members of ethnic groups, CCPR Article 27 did as much as affirming that the right to culture, in order to be applied in any meaningful manner, must in certain circumstances be enjoyed in community with other members of the group. Hence, Article 27 added an - albeit limited - collective dimension to the right to culture, absent in the UDHR. Neither the CCPR nor the CESCER embrace the right to property. The reason for this omission appears to have been that the Western and Eastern blocks could not agree on how the right should be formulated.¹¹⁷ The right to property was, however, included in another legally binding human rights instrument adopted during this era, namely the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹¹⁸ Relevant provisions in the CERD Convention are outlined in Chapters 4 and 5.

The CCPR and CESCER hence built and elaborated on the UDHR. But in addition, the 1966 Covenants also came to embrace the principle of self-determination enshrined in the UN Charter, converting it into a legally binding right.¹¹⁹ The common Article 1.1 of the CCPR and the CESCER proclaims that “*all peoples have the right to self-determination*”. Article 1.2 proceeds to lay out the so called resource dimension of the right to self-determination, stipulating that all peoples have the right to freely dispose of their natural resources and must not be deprived of their means of subsistence. In the same vein, pursuant to the also identical CCPR Article 47 and CESCER Article 25, nothing in the Covenants shall be interpreted as impairing the right of all peoples to enjoy and utilize their natural resources.

The agreement on the common Article 1 had been preceded by a debate similar to the one occurring prior to the adoption of the self-determination provisions in the UN Charter. The proposal to include the right to self-determination in the 1966 Covenants initially met resistance. Again, some states were concerned that the Covenants affirming a right to self-determination of peoples could be interpreted as the Covenants awarding rights to ethnic

¹¹⁷ Cassese, *International Law*, p. 382

¹¹⁸ Adopted by UN General Assembly Resolution 2106 A (XX), of 21 December 1965

¹¹⁹ That said, it should be pointed out that self-determination had for the first time been proclaimed a right by the UNGA in the 1960 UN Declaration on Granting Independence to Colonial Countries and Peoples (UN Resolution 1514 (XV), 14 December, 1960). The Declaration against Colonization is, however, a formally non-legally binding instrument. Regarding the Declaration against Colonization, see further Section 2.5.4.

groups. This, these states feared, could in turn potentially disrupt sovereign states. Notwithstanding, in the debate that ensued, the position that the 1966 Covenants should embrace the right to self-determination increasingly gained momentum. And eventually, the concerned states agreed that it was sufficient that the same safety measures were applied as when the UN Charter was adopted. Consequently, also in connection with the adoption of the 1966 Covenants, a large number of states declared that the right to self-determination enshrined in the common Article 1 could not be interpreted as awarding rights to sub-segments of the state. Rather, with the term “peoples” should be understood the aggregate of the population of the state. Having thus reassured themselves, the UN member states could proceed to adopt the CCPR and the CESCR.¹²⁰

Already prior to the formal adoption of the 1966 Covenants, the UNGA had adopted an instrument elaborating on the resource dimension of the right to self-determination set forth in the common Article 1.2. The Declaration on Permanent Sovereignty over Natural Resources¹²¹ (1962) must reasonably be interpreted in the same light as the common Article 1.2. Literally understood, the Declaration on Permanent Sovereignty over Natural Resources proclaims a right of peoples to their natural resources. At the same time, however, the Declaration mixes references to state’s right to sovereignty over natural resources with that of peoples.¹²² For instance Crawford therefore concludes that it is doubtful whether the subjects of the rights encompassed in the Declaration on Permanent Sovereignty over Natural Resources are peoples in the ethnic/cultural meaning of the word. Rather, he submits, the intended beneficiary of the right was probably the entire population of a state.¹²³ Hence, it appears that the Declaration on Permanent Sovereignty over Natural Resources - at the time of its adoption - was understood to imply that natural resources of a state should benefit the entire population of the state. In line with other international legal instruments adopted during the era, the Declaration did not, however, proclaim specific rights of groups over particular resources.¹²⁴

¹²⁰ Raic, *Statehood and the Law of Self-Determination*, pp. 242-243, Cassese, *Self-determination of Peoples*, pp. 47-52 and 61-62, and Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 41-42

¹²¹ GA Res. 1803 (XVII), adopted on 14 December 1962

¹²² For instance, paras. 1 and 5 of the Declaration refer to the rights and sovereignty of peoples over their natural resources. At the same time, the *consideranda* to the Resolution refers to the inalienable rights of states to dispose of their wealth and resources. See also Brownlie, *Principles of Public International Law*, pp. 515-516.

¹²³ Crawford, *The Right to Self-determination in International Law*, p. 22. In the same vein, see also Cassese, *Self-Determination of Peoples*, pp. 99-100.

¹²⁴ One can further note that in 1974, the UNGA adopted the Charter of Economic Rights and Duties of States (Res. 3281 XXIX), referring exclusively to states’ permanent sovereignty over natural resources.

Through its incorporation into the 1966 Covenants, self-determination had hence evolved from a political principle to a right. Notwithstanding, as understood during the Bill of Rights era, the right had little bearing on “peoples” in the ethnic/cultural meaning of the term. It appears evident that at the time, “peoples” were understood as the aggregate of the population of the state. That said, one should note that the crafters of the common Article 1 deliberately distinguished between “peoples” and “states”. The UN member states consciously opted for rendering peoples, and not “states”, the subjects of the right to self-determination. For instance, Cassese underlines how the right to self-determination was perceived as geared towards peoples, and not to sovereign legal titles.¹²⁵ And Crawford points to that during the negotiations on the CCPR and the CESCR, several proposals for a definition of the term “peoples” were put forward, albeit in the end not included in the Covenants.¹²⁶ Nonetheless, the fact that a definition of peoples was considered underscores that the UN member states consciously made peoples, and not states, subjects of the right to self-determination. The distinction is not irrelevant. As Crawford asked rhetorically already more than 20 years ago; *“If the only rights of peoples are rights against other States, and if there is no change to the established position that the government of the State represents “the State” (i.e. the people of the State) for all international legal purposes irrespective of its representativeness, then what is the point of referring to the rights in question as rights of peoples?”*¹²⁷ True, states and peoples formally being viewed as two distinct subjects might have been of limited relevance at a time when peoples were defined as the aggregate of the population of the state. In all but formal terms, under such circumstances, peoples exercise the right to self-determination essentially as “agents” of the state. Still, as the doctoral thesis shall return to in subsequent chapters, it has certainly been beneficial, perhaps even a pre-requisite, for subsequent developments within the self-determination discourse that already at the time when the right was formulated, UN member states viewed peoples, and not states, as the beneficiaries of the right to self-determination.¹²⁸ The inclusion of a right to self-determination of peoples in the 1966 Covenants would come to spur a debate on peoples’ rights, including on who constitute a people, for legal purposes. Cassese submits that “[s]elf-determination] has set in motion a

¹²⁵ Cassese, *Self-determination of Peoples*, pp. 143-144, 242 and 285. In the same vein, see Brownlie, *The Rights of Peoples in Modern International Law*, pp. 3-5.

¹²⁶ Crawford, *The Creation of States*, pp. 125-126. Similarly, when crafting the African Charter on Human and Peoples’ Rights, the OAU considered, but in the end deliberately omitted, a definition of “peoples” in the Charter. See Rapporteur’s Report, OAU Doc. CM/1149 (XXXVII), Ann. 1, 4, para. 13 (1981).

¹²⁷ Crawford, *The Rights of Peoples*, p. 56

¹²⁸ Of certain relevance is also that the right to self-determination was viewed as applying generally to peoples, and not only in a colonial situation. See Franck, *The Emerging Right to Democratic Governance*, p. 58.

restructuring and redefinition of the world community's basic "rules of the game".¹²⁹ Alston too, argues that despite its vagueness and ambiguity, the inclusion of the right to self-determination in the 1966 Covenants encouraged proponents of peoples' rights proper and instigated an increased inclination to recognize the existence of such rights.¹³⁰ Similarly, Crawford asserts that the recognition of the right to self-determination spurred a development towards acceptance of peoples' rights.¹³¹

But setting potential future developments aside, and merely summarizing international law of the time, the international legal system the young United Nations set out to craft clearly broke with the League of Nations' interest in group rights inspired by the principle of self-determination. Instead, the international legal system again came to rely on classical liberal values. Three of liberal theory's most profound presumptions were incorporated into the international legal system developed in the wake of World War II. First, it was held self-evident that international legal standards emerge from the legal subjects themselves, i.e. from states. The United Nations focused on the primacy of the state and, as a consequence, on state sovereignty. It was assumed that states pre-date international law.¹³² Second, the UN member states accepted the notion that once created, the law binds states. States cannot subsequently opt out of the law due to changed will. Finally, the UN Charter and the Bill of Rights came to incorporate the state-individual dichotomy. The group rights orientation of the League of Nations was substituted for a complete belief in universal individual human rights. As Reynolds has put it; "*Whereas the League [of Nations] had thought a lot about minorities, the United Nations put the emphasis on the rights of individuals on one hand, and the rights of states on the other ... the emphasis was on assimilation and integration.*"¹³³

2.5.4 The decolonization epoch

As self-determination emerged as a right in the midst of the decolonization process, it was almost immediately put into action. The colonies and the United Nations relied heavily on

¹²⁹ Cassese, *Self-determination of Peoples*, p. 1

¹³⁰ Alston, *Peoples' Rights*, p. 1

¹³¹ Crawford, *The right to Self-determination in International Law*, pp. 21-24

¹³² As Friedmann observes, the world during the Bill of Rights era was organized on the basis of states. Fundamental changes in international law could occur only based on state action and states were the repositories of legitimate authority over peoples and territories. See *The Changing Structure of International Law*, p. 213.

¹³³ Reynolds, *Aborigines and the 1967 Referendum*, p. 58. Similarly, Emerson has noted that during the Wilsonian period, focus lay on ethnic communities primarily defined by culture, whereas in the post-World War II era, ethnicity was essentially irrelevant. See *Self-Determination*, p. 463.

self-determination arguments when calling for independence of the colonies from the colonial states.¹³⁴ Section 2.5.3 outlined how the common Article 1 of the 1966 Covenants affirmed self-determination as a right. But as further indicated, the decolonization process also produced a number of legal sources contributing to the transformation of the principle of self-determination into a right, one of which actually pre-dated the adoption of the 1966 Covenants. As mentioned, self-determination was for the first time formally proclaimed a right in the 1960 UNGA Declaration against Colonization, asserting that peoples in colonized territories are entitled to the right to self-determination.¹³⁵ The Declaration against Colonization was immediately followed by UN Resolution 1541 (XV)¹³⁶, awarding the right to self-determination also to non-self-governing peoples. The ICJ too, contributed to confirming self-determination as a right, by applying the right in a couple of cases of the era.¹³⁷ It is worth noting that doing so, the ICJ relied heavily on the formally non-binding Declaration against Colonization.¹³⁸ In addition to confirming self-determination as a right, the mentioned international legal sources further collaborated to widen the applicability of the right. Now, the right to self-determination was not only discussed in the context of the aggregate of the population of a state. Following the decolonization process, international law understood the right to self-determination to apply to peoples in the meaning (i) the aggregate of the population of an independent state, (ii) the entire population of a territory that had not yet attained independence, and (iii) the population of territories geographically separated from the state administering the territory and/or subject to foreign military occupation.¹³⁹

The decolonization process resulted in territories outside Europe regaining the legal status they had been deprived of for centuries. This further resulted in international law no longer being an internal Western affair. Sovereign states in the Third World could now participate in the formulation of international law. The expansion of the world community did not, however, result in any changes in international law's perception of states and state

¹³⁴ Cassese, *Self-determination of Peoples*, pp. 71-74

¹³⁵ UNGA Resolution 1514 (XV). See also Crawford, *The Right to Self-determination in International Law*, p. 17.

¹³⁶ Resolution 1541 (XV) on Principles Which Should Guide Members in Determining whether or not an Obligation Exist to Transmit the Information Called for under Article 73e of the Charter, 15 December 1960, UN GAOR, 15th Session, Supplement No. 16 (A/4684). With non-self governing peoples were understood populations in territories geographically separated from the state administering the territory.

¹³⁷ *Namibia Case*, ICJ Reports (1971), p. 31, *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12.

¹³⁸ Fromherz, *Indigenous Peoples' Courts*, p. 1359

¹³⁹ Crawford, *The Right to Self-Determination in International Law*, pp. 16-20, Anaya, *Indigenous Peoples in International Law I*, p. 77, Cassese, *Self-determination of Peoples*, p. 59 and *International Law*, pp. 61-62, and Xanthaki, *The Right to Self-Determination*, pp. 16- 17

sovereignty. On the contrary, decolonization universalized the European state as the form of political organization having equal sovereign rights and status in the international community.¹⁴⁰ Consequently, the decolonization process had little relevance for indigenous peoples' rights. As noted, the legal entity being awarded the right to self-determination during the decolonization epoch was the entire population of a colonial territory, irrespective of pre-colonial political and cultural patterns. Whether the colony hosted two or more culturally and ethnically distinct populations lacked relevance, as did the fact that several of the colonies' borders had been haphazardly defined by the colonizing powers.¹⁴¹ "*Territory, not "nationhood", was the determining factor.*"¹⁴² As a consequence, the regime of decolonization the United Nations promoted largely by-passed indigenous peoples' societies.¹⁴³ During an epoch that otherwise revolutionized the world order, political thought, state policy and international law on indigenous peoples remained essentially the same. The dominating view continued to be that the colonization of indigenous territories had been just. The newly independent colonies adopted Europe's position on this issue.¹⁴⁴ Ideas that "backward" indigenous societies should be assimilated into the dominant political and social orders engulfing them were common in many states.¹⁴⁵

The assimilatory approach taken towards indigenous peoples during the decolonization era was also reflected in the first human rights instrument adopted specifically addressing the situation of indigenous populations. ILO's Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal populations in Independent Countries (ILO 107)¹⁴⁶ (1957) is clearly a child of its time. As the title suggests, ILO 107

¹⁴⁰ Hindess, *Sovereignty as Indirect Rule*, p. 311, and Koskenniemi, *The Gentle Civilizer of Nations*, pp. 174-175

¹⁴¹ Emerson, *Self-Determination*, p. 463, Franck, *The Emerging Right to Democratic Governance*, p. 54, Castellino, *Territorial Integrity and the "Right" to Self-Determination*, p. 511, and Lerner, *Group Rights and Discrimination in International Law*, p. 13

¹⁴² Hannum, *Autonomy, Sovereignty, and Self-Determination II*, p. 36 (with reference to Pommerance). See also Weissner, *Indigenous Sovereignty*, p. 1150, and Raic, *Statehood and the Law of Self-Determination*, p. 209.

¹⁴³ Stoll and von Hahn, *Indigenous Peoples, Indigenous Knowledge, and Indigenous Resources in International Law I*, p. 6, Kymlicka, *Multicultural Odysseys*, p. 269, and Anaya *Indigenous Peoples in International Law I*, pp. 78-84

¹⁴⁴ Cassese observes that during the negotiations on the UNGA Resolutions outlining the right to self-determination of the former colonies, geopolitical considerations led developing countries, supported by socialist states and with no objections from Western states, to deny the right to self-determination to ethnic groups within the colonial territories. He labels the fact that the right to self-determination emerging during the decolonization era did not apply to ethnic groups a "major flaw". See *Self-Determination of Peoples*, pp. 72-74.

¹⁴⁵ Tully, *The Struggles of Indigenous Peoples for and of Freedoms*, pp. 40, 43-44 and 52, and Anaya, *Indigenous Peoples in International Law I*, pp. 43-44. This position was backed by a sentiment that indigenous populations were destined to slowly die out regardless. See Hannum, *Autonomy, Sovereignty, and Self-Determination II*, p. 81.

¹⁴⁶ Adopted at 40th ILO Session on 26 June, 1957

focuses on indigenous individuals,¹⁴⁷ and aspired to assimilate members of indigenous groups into the surrounding (more developed) society, rather than to protect them as distinct ethnic and cultural entities.¹⁴⁸

But even if the decolonization process at the time did little to promote rights of indigenous peoples, it need not have been irrelevant to the indigenous rights discourse. Section 2.5.3 pointed to how the UDHR's confirmation of the equal value of all individuals, despite the focus on individual rights, probably paved way for later progressive developments in international law. The decolonization process was surely such a development.¹⁴⁹ In the same vein, the decolonization process, even though at the time blind to indigenous patterns of association, would perhaps decades later spur a belated decolonization process targeting indigenous peoples.¹⁵⁰

In conclusion, by the end of the decolonization era international law understood "peoples" as the aggregate of the population of a state, or of a territory with the right of becoming a state. True, a few scholars - such as Falk - already at the time argued for rights of peoples in the ethnic/cultural understanding of the term, particularly in the context of indigenous peoples.¹⁵¹ But this position enjoyed limited support. Brownlie's is a more representative view of the era. He labelled advocates of the existence of peoples' rights proper eccentric. Brownlie asserted that such rights would ignore the principle of non-intervention and diminish the right of self-determination. He held self-evident that the "people" enjoying the right to self-determination was the aggregate of the inhabitants of a state.¹⁵² Similarly, Hannum took for granted that there are no such things as collective human rights proper, wherefore the right to self-determination has no relevance in the context of indigenous peoples.¹⁵³

¹⁴⁷ Xanthaki, *Indigenous Rights and United Nations Standards*, p. 73. That said, the ILO 107 did incorporate certain provisions that appear to address the collective aspect of indigenous rights, in particular within the area of land and resources.

¹⁴⁸ Stoll and von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law I*, p. 7, and Swepston, *Indigenous Peoples in International Law and Organizations*, p. 55

¹⁴⁹ Kymlicka, *Multicultural Odysseys*, p. 89, and Raic, *Statehood and the Law of Self-Determination*, p. 201

¹⁵⁰ Kymlicka, *Multicultural Odysseys*, pp. 89 and 269-270. He submits that once the World Community had accepted the rights of the former colonies, it was difficult to deny indigenous claims for correction of historic injustices. For a similar opinion, see also Gray, *The Indigenous Movement in Asia*, p. 42. Compare also al Attar, Aylwin and Coombe, *Indigenous Cultural Heritage Rights in International Human Rights Law*, p. 315.

¹⁵¹ Falk, *The Rights of Peoples*, pp. 17-37, in particular pp. 34 and 35

¹⁵² Brownlie, *Principles of Public International Law*, p. 540-541 and 553-555, and *The Rights of Peoples in Modern International Law*, pp. 4-16

¹⁵³ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 95-103

3. POLITICAL THEORY UNDERPINNING THE LAW

3.1 Introduction

Chapter 2 outlined how liberalism not only emerged with the nation-state, but presupposes it. It was explained how liberal philosophy constructed social contract theories to explain how a group of men had come together to form a state, and agreed to be ruled by a sovereign. The social contract theories, and hence the nation-state, had no room for rights of ethnic and/or cultural groups within the state. As further explained, these theories came to underpin first the classical international legal system, and subsequently the contemporary legal system the young United Nations embarked on crafting. The international legal system came to hold that for international legal purposes, a people equals the aggregate of population of a state or a territory. Further, it accepted the notion that states pre-date the law and are free to determine the content of the same. And human rights apply to individuals only.

This Chapter aims to provide an overview over more contemporary political philosophy theories. In particular, it describes how recent political theory has increasingly come to question the underlying fundamentals of classical liberalism, resulting in the emergence of new schools of thought more hospitable towards group rights. Such an overview is relevant to the doctoral thesis, since it could be that these political theories have exercised influence over recent developments within international law. In other words, a basic understanding of the most recent trends within political philosophy might aid in properly understanding relevant spheres of international law. It is underlined, however, that the Chapter does not purport to provide a comprehensive outline of relevant theories within political philosophy. On the contrary, for the purposes of the doctoral thesis, a very general overview over the core elements of these theories is sufficient.

3.2 Further on conventional individual liberalism

Liberal philosophers have since the surface of the basic liberal ideas formulated various branches of liberal theories, such as utilitarianism, liberal equity and libertarianism.¹⁵⁴ Still,

¹⁵⁴ Kymlicka, *Contemporary Political Philosophy*, pp. x-xi and 10-53. While liberal thinkers have sought to formulate various theories based on the fundamentals of liberalism, other philosophers have of course rejected the

for centuries no coherent liberal theory was successfully formulated, and attempts to come up with a theory under which all liberals could unite had almost been abolished. However, in 1971, John Rawls published *A Theory of Justice*, an elaborate attempt to present a coherent liberal theory of justice. *A Theory of Justice* revitalized the liberal school, resulting in the formulation of various contemporary liberal individualistic theories, almost always presented as a response to Rawls. Rawls' mayor innovation was that he offered a formula for redistributive justice, not previously present in liberalism. Rawls' introduced a "veil of ignorance", which he claimed the population of some kind of fictional pre-social state would opt for, if allowed to choose the principles that should govern their society. Rawls submitted that the usual account of the state of nature is unfair, since some people have more bargaining power than others, due to better natural talents, more initial resources and supreme physical strength. This is unjust, since natural advantages are a result of pure chance, and are not deserved. Rawls addressed this perceived flaw in classical liberal theories by hypothetically not allowing people to be aware of their personal characteristics, talents and resources when formulating their position on what constitutes a just society. Rather, they had to agree on the rules governing the society behind the "veil of ignorance".¹⁵⁵

Rawls' theory might be interesting for those studying what constitutes a fair distribution of resources in society. But what is relevant here is how irrelevant *A Theory of Justice* is if the interest is the relationship between the state and groups. Rawls' is still a theory resting on the fundamentals of classical liberalism. Despite adding the element of a veil of ignorance, he follows the old liberal tradition by assuming a hypothetical social contract.¹⁵⁶ Rawls too, presumes that due to uncertainties and scarcities of social life, individuals in the original position would agree to cede decision-making power to a sovereign. True, the society Rawls envisions differs from a state ruled by a despot. According to Rawls' theory, the social contract is only valid as long as the sovereign uses its powers to guard the individual against scarcities and uncertainties. If the sovereign abuses this trust, the individual is no longer

underlying premises of liberalism in whole or in part, focusing on offering alternative concepts and principles to those provided by liberalism. Some of these theories, e.g. Marxism, have at times enjoyed considerable support. Notwithstanding, since these theories have had limited impact on the international legal system, they are not dealt with further in this context.

¹⁵⁵ Rawls, *A Theory of Justice*, pp. 11-12, 18-21, 74-80 and 136-142. See also Martin, Rawls, pp. 559-564, and compare May, Modood and Squires, *Ethnicity, Nationalism and Minority Rights*, p. 1, and Lea, *Property Rights, Indigenous People and the Developing World*, p. 32.

¹⁵⁶ Indeed, Fassbender notes that *A Theory of Justice* resulted in a revival of social contract theories. See *The United Nations Charter As Constitution of the International Community*, p. 559.

under duty to honour the contract.¹⁵⁷ But *A Theory of Justice* is a social contract theory nonetheless, presupposing the existence of a state and not considering that the state might not be ethnically or culturally homogenous.

The attempts to build on Rawls' comprehensive theory of liberal justice had no greater impact on group rights theory. For instance, Ronald Dworkin aspired to add to Rawls' veil of ignorance by accommodating for individuals that are handicapped or otherwise naturally disadvantaged. Dworkin imagines an auction, where all individuals start with the same share of resources to bid, and are at the same time unaware of their natural talents and disadvantages. Each person is fictionally asked how much they would spend on insurance against being disadvantaged. The amount of the society's resources the society utilizes to compensate for natural disadvantages would, provided that the theory works, equal the total amount paid by individuals for such insurances in the fictitious auction.¹⁵⁸ But albeit fine-tuning the veil of ignorance, Dworkin too rests on the notion of a social contract, assumes the nation-state, and allows no rights of groups.¹⁵⁹

As seen, also in the more modern conventional liberal theories of justice, the central building blocks of classical liberalism prevailed. Justice was still to be achieved within a polity – the state - whose borders and membership had been determined prior to the formulation of the theory of justice.¹⁶⁰ Liberalism remained indifferent - and formally neutral - to the ethnocultural identities of the citizens of the state. They acknowledged rights of the individuals only, with no room for ethnic and/or cultural groups. It was not the role of the state to promote cultural groups' possibility to maintain and develop their specific culture, they held.¹⁶¹ On the contrary, the state should – and importantly, it was perceived, could – remain neutral between various cultures within the state. In this sense, liberalism claimed to

¹⁵⁷ Rawls, *A Theory of Justice*, pp. 11-12, 21-22 and 75

¹⁵⁸ Dworkin, *A Matter of Principle*, pp. 206-213. See also, Kymlicka, *Contemporary Political Philosophy*, pp. 75-82, and Hartney, *Some Confusion Concerning Collective Rights*, p. 212.

¹⁵⁹ Worth briefly touching upon is also an influential group of contemporary liberal thinkers disagreeing with Rawls and Dworkin that redistribution is just. Libertarians criticize Rawls and Dworkin for rendering certain individuals mere resources for the life of others. They submit that the state has no right to encroach upon individuals' right freely to dispose of their goods and services, even for the purpose of increasing equality. Libertarians asserts that a just distribution of resources is simply a distribution follows from people's free choices. See Nozick, *Anarchy, State and Utopia*, pp. 169-172, and compare Kymlicka, *Contemporary Political Philosophy*, pp. 103-109. Libertarianism too, is irrelevant in the context of group rights, and not further touched upon here.

¹⁶⁰ Kymlicka, *Contemporary Political Philosophy*, pp. 254-256

¹⁶¹ Young, *Structural injustices and politics of difference*, pp. 61-62, and Kymlicka, *Contemporary Political Philosophy*, pp. 343-345

be apolitical, or even hostile to politics.¹⁶² To conventional liberals, it does not matter if minority groups do not share their beliefs. Indeed, to many liberals, local fallacy is the main justification for championing an all-embracing theory of justice. Collective rights are regarded as per definition political.¹⁶³ Many liberals submit that the aim of political philosophy is exactly to provide a theory of general applicability – i.e. universal to all societies – which can assist in identifying practices that have their roots in various groups’ cultures but that are nonetheless unjust and as a consequence should be grinded down.¹⁶⁴ To the classical liberal, gradual disappearance of cultures constitutes no problem in itself. On the contrary, various forms of liberalism share the assumption that the individual’s interests are best promoted by allowing her to decide what live to pursue without the imposition of culture. Individuals are not defined by membership in any particular community. They can always opt out of their cultural background. Hence, community matters only to the extent that it contributes to the well-being of the individual member. It has no value in its own right, and therefore no right to exist in perpetuity, conventional individual liberalism holds.¹⁶⁵

3.3 *Criticism of conventional individual liberalism*

3.3.1 **Generally**

Having been essentially uncontested for centuries, in the 1980s conventional individual liberalism got challenged. Gradually, political thinkers commenced addressing the fact that conventional liberalism pre-supposes a state pre-dating the liberal theories.¹⁶⁶ Some noted that conventional liberalism seems to support an abstract world, ignoring the realities of current societies.¹⁶⁷ In the real world, two or more ethnic and/or cultural groups coinhabit almost all states. And conversely, often the territory of one group stretches across national borders. The question is then; if a state is not ethnically homogenous, how plausible is the notion that all its citizens have at one point in history come together to form a social contract? In reality, all citizens of a state do not feel an equal affinity to all other citizens, nor do they

¹⁶² Koskenniemi, *From Apology to Utopia*, p. 5

¹⁶³ McDonald, *Should Communities have rights?*, p. 228

¹⁶⁴ Kymlicka, *Contemporary Political Philosophy*, p. 211 and Dworkin, *A Matter of Principle*, p. 219

¹⁶⁵ Buchanan, *The Morality of Secession*, p. 358, and Kymlicka, *Contemporary Political Philosophy*, pp. 212, 221 and 336

¹⁶⁶ Ivison, Patton and Sanders, *Political Theory and the Rights of Indigenous Peoples*, pp. 6-7, Shachar, *Multicultural Jurisdictions*, p. 9, Kymlicka, *Contemporary Political Philosophy*, p. 61, and Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, p. 31

¹⁶⁷ Keating, *So many nations, so few states*, pp. 39-41, and Gould, *Diversity and Democracy*, p. 171

necessarily feel a solidarity vis-à-vis other groups.¹⁶⁸ In fact, a marginalized group might be adverse to the majority culture. And if liberalism presupposes a fictitious homogenous state, is it at all possible to formulate a coherent, all embracing, liberal theory of justice?

Conventional liberals still answer the posed question in the affirmative. They retort that liberalism has never purported to rely solely on the existence of an ethnically and culturally homogenous state.¹⁶⁹ Rather, conventional liberals submit, the two essential assertions of liberalism are that (i) a state can always be cultural neutral, having the capacity not to promote one culture over another, and (ii) individuals are not defined by membership in any particular community, but are always free to question all their relationships – including cultural ones. The state can, conventional liberalism posits, cater for an environment where all individuals, regardless of ethnic/cultural background, have an equal opportunity to lead the life they wish, in accordance with the cultural parameters they opt for. It would seem that if these assertions can be substantiated, the claim that the ethnically and culturally homogenous state is a fiction would be less of a problem for conventional individual liberalism. Because everyone would then still be free to lead the life she wishes, also within the fictional state. However, the criticism of conventional individual liberalism has challenged also these two presumptions.

If starting with the second presumption, both liberal and non-liberal thinkers have increasingly come to hold that individuals are not the atomized, generic, objects that individual liberalism might presume. Rather, it is asserted, many individuals are rooted in, and their identity to a large degree defined by, their cultural background. They are not free – as conventional liberalism argues - to question all their relationships, including their cultural affinity. Consequently, many philosophers agree, it is not possible to formulate any relevant theory of justice without taking cultural identity into account. The doctoral thesis shall return to this second line of criticism of individual liberalism in Sections 3.4 and 3.5. But first, it shall survey whether the state can remain neutral between cultures.

As indicated, political theorists have increasingly come to argue that even if the liberal state remains *formally* neutral and refrains from actively promote the culture of the majority, the

¹⁶⁸ Waldron, *Minority Cultures and the Cosmopolitan Alternative*, pp. 95-96

¹⁶⁹ Walzer, *Spheres of Justice*, p. 140, and Tully, *Identity Politics*, pp. 524-525

state is nonetheless incapable of being neutral *in practice*.¹⁷⁰ Because, it is asserted, the liberal understanding of being neutral is being passive, but being passive implicitly favours the majority culture. That is so, since members of the dominant culture possess an institutional advantage over members of the minority.¹⁷¹ The state is almost inevitably implicitly biased towards the needs and interests of the majority group. As Shachar has put it, referring to Spinner; “... *minority cultures often come to the game after it has already begun and do not define the governing standards of a society’s institutions*”.¹⁷² Hence, members of the majority generally obtain disproportionate representation in the cultural elites. State legislation, norms and policies are in most instances based on the majority culture.¹⁷³ As Miller observes, “*majority voting as a way of implementing democratic principles applies only once the boundaries of the relevant constituency have been determined. A majority vote cannot be used to fix these boundaries, since the outcome of such a vote will itself depend on who is included in ... the electorate...*”.¹⁷⁴ The biased decision-making structures for instance tend to result in decisions on what languages can be officially used favouring the language of the majority. Similarly, the majority culture is regularly promoted by the educational system. The majority’s views and cultural assumptions are likely to become the norm.¹⁷⁵ In conclusion, increasingly more political thinkers came to hold the view that conventional individual liberalism fails to address entrenched inequalities in society, wherefore in the liberal state, all cultures simply do not enjoy the same chance to prosper, or even to survive.

3.3.2 Particularly on nationalism

The criticism of the purportedly neutral liberal state has gone beyond submitting that the state involuntary favours the majority culture. Political philosophy has increasingly noted that the

¹⁷⁰ Arel, Political stability in multinational democracies, p. 72, Spinner-Halev, Multiculturalism and its Critics, p. 553-554, and Koskeniemi, From Apology to Utopia, pp. 5-6

¹⁷¹ Walker, Plural Cultures, Contested Territories, pp. 215-216, and Requejo, Political liberalism in multinational states, pp. 110-115

¹⁷² Shachar, Multicultural Jurisdictions, p. 73

¹⁷³ Van Dyke, The Individual, the State, and Ethnic Communities in Political Theory, p. 50, Shachar, Multicultural Jurisdictions, p. 23, and

¹⁷⁴ Miller, Nationality in divided societies, pp. 316. In the same vein, Addis notes that populations like the Aboriginal people of Australia can never achieve equal status in a marketplace of cultural values or through elections, and underscores that “*What a seemingly neutral state purports not to affirm, is affirmed for it by a market that acts as its surrogate. In the matters of group affiliation, state neutrality, in the face of unequal circumstances between minorities and majorities, is nothing less than an affirmation of one particular way of life...*”. See Individualism, Communitarianism, and the Rights of Ethnic Minorities, pp. 644-645.

¹⁷⁵ Mancini and de Witte, Language Rights as Cultural Rights, p. 251, Tully, Identity Politics, p. 523, Arel, Political stability in multinational democracies, p. 78, Wheatley, Democracy, Minorities and International Law, p. 4, and Young, Together in Difference, p. 163

liberal state do not only indirectly support the culture of the dominant group. Political leaders in most liberal states are acutely aware that the state is not ethnically and/or culturally homogenous. They know that not all citizens feel the same solidarity vis-à-vis all other segments of the society. For effective rule and political stability, political leaders tend to try to “correct this flaw”. As a result, in many liberal states conventional individual liberalism has become a self-fulfilling prophecy. Liberalism, it has been observed, often leads to nationalism; a calculated way for a state to deal with the shortcomings inherent in classical liberalism.¹⁷⁶ Liberal states – although purportedly neutral between cultures – have in most instances consciously nurtured a national identity defined by the culture of the dominant population, an identity to which all citizens of the state – per definition – are deemed to belong.¹⁷⁷ Citizens are convinced to believe that they do belong to one, homogenous, nation. Nationalism seeks to erase cultural difference between various segments of the population of the state. It aims at eliminating any sense among minority groups of togetherness and otherness. Gellner notes, “*Nations as a natural, God-given way of classifying men ... are a myth; nationalism, which sometimes takes pre-existing cultures and turns them into nations, sometimes invents them, and often obliterates pre-existing cultures: that is a reality...*”¹⁷⁸ If successful, nationalism results in assimilation.

An additional observation can be made in the context of nationalism. Recall how Section 2.5 explained that many post-World War II statesmen deliberately opted for the individual human rights approach, rather than group rights, exactly because the individual rights approach creates an environment prone to nationalism. It fitted liberal nationalisation theories to define “peoples” as the aggregate of the inhabitants of the state, and international law followed suit. In other words, here one sees a concrete example of political philosophy impacting on

¹⁷⁶ Kymlicka, *Contemporary Political Philosophy*, pp. 261-264

¹⁷⁷ Wheatley, *Democracy, Minorities and International Law*, pp. 2-3, Makkonen, *Minorities’ Rights to Maintain and Develop Their Cultures*, p. 193, and *Equal in Law, Unequal in Fact*, pp. 34-35, Simpson, *Paths Toward a Mohawk Nation*, p. 122, Anaya, *On Justifying Special Ethnic Group Rights*, pp. 228-229, Kymlicka, *Contemporary Political Philosophy*, pp. 311-312, 346 and 348, and Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 206. See in particular Kymlicka, *Multicultural Odysseys*, pp. 5 and 61-66, where he elaborates in depth the interdependence between conventional liberalism, the notion of the nation-state and nationalist policies. He concludes that virtually all Western democracies, former communist states and former colonies have at one point or another pursued nationalisation strategies. See also Koskeniemi, *The Gentle Civilizer of Nations*, pp. 63-64, where he demonstrates how already the liberal legal scholars that transformed the study of law into a “science” in the 1800s acknowledged nationalism as an integral part of their project. Patten too points to that some liberals indeed acknowledge that a certain amount of nationalism might be necessary to realize the liberal ideals. See *Liberal citizenship in multinational societies*, pp. 281-282.

¹⁷⁸ Gellner, *Nations and Nationalism*, pp. 48-49. Similarly, Raic argues that nationalism consciously fosters the illusion that states are ethnically and culturally homogenous. See *Statehood and the Law of Self-Determination*, p. 176. See also Keating, *So many nations, so few states*, p. 55, and Oommen, *New Nationalisms and Collective Rights*, p. 135, where he observes that nationalism tends to “*transform a state-nation into a nation-state*”.

international law. What is interesting for the purposes of the doctoral thesis is; if the winds within political philosophy changes direction, resulting in an environment hospitable to group rights, would that new position too, impact on the law?

3.4 *Communitarianism*¹⁷⁹

Section 3.3 hence demonstrated how questions surrounding whether the liberal state can remain cultural neutral, or whether it is in fact prone to nationalism, caused many political thinkers to challenge conventional individual liberalism from the 1980s and onwards. In addition, during this period, the second assertion on which conventional individual liberalism rests, namely that the individual is not defined by membership in a particular community, but is rather free to question her cultural background, also became increasingly contested. As Section 3.3.1 indicated, more and more political philosophers asserted that it is incorrect to describe a person's identity as separate from her cultural background. A new school within political theory - communitarianism – emerged, as a response to conventional individual liberalism. The label “communitarianism”, and its criticism of liberalism, invites one to revisit the cry of the French Revolution; “*liberté, égalité and fraternité*”. The early liberals celebrated freedom and equality - but also community. However, with time, ideas on community gradually disappeared from liberal thought, and in modern liberal theories on justice, community was no longer part of the discourse.¹⁸⁰

Communitarianism calls for community to recover its place alongside liberty and equality in theories of justice. In fact, communitarians argue that community is the most important of the three values celebrated by the French Revolution. They disagree with the basic premises underpinning the various liberal theories of justice. Indeed, communitarians do not even share liberalism's main aspiration, i.e. to formulate one coherent theory of justice, applicable to all societies. Communitarians submit that the search for a universal theory of justice is misguided. They posit that liberals misconstrue the individual's capacity to decide what life

¹⁷⁹ Kymlicka has in a later work referred to “communitarianism” as the “traditional conception of multiculturalism”, when underlining that multiculturalism, as he understands it, is not rooted in cultural conservatism, but in liberalism. See *Multicultural Odysseys*, pp. 99-108. This thesis uses the term “communitarianism” exactly to denote that communitarianism, unlike multiculturalism (which is dealt with in Section 3.6), is not a liberal theory. At the same time, communitarianism shall not be confused with Marxism. The latter views community as something to be achieved through revolution. Communitarians, on the other hand, believe that the communitarian society need not be created, only recognized and respected. See Kymlicka, *Contemporary Political Philosophy*, pp. 208-209.

¹⁸⁰ Kymlicka, *Contemporary Political Philosophy*, p. 208

best to pursue. Communitarianism holds that liberalism greatly underestimates the importance of the individual's cultural background for her capacity to make meaningful choices about how to lead a good life.¹⁸¹ They assert that the self is embedded in established social practices particular to the community, which one cannot necessarily opt out of. Hence, the attachment an individual has to her distinct culture greatly contributes to what sort of person she is, as well as to her understanding of that person.¹⁸² As a consequence, one cannot develop one single relevant theory of justice, communitarians posit. They submit that conventional individual liberalism neglects that respect for individual rights and freedoms and individual well-being is only possible within the context of a particular community.¹⁸³ Communitarianism argues that if one wishes to identify what justice is, one must first investigate how a particular culture values social goods. Consequently, what is just cannot be measured against one single theory of justice. Instead, a society acts just if it behaves in accordance with the shared values of its particular culture. All cultures should hence be allowed to be self-governing polities.¹⁸⁴ In sum, in its purest form communitarianism submits that all cultures and societies shall be left to their own devices.¹⁸⁵

3.5 *Criticism of communitarianism*

Liberal thinkers have largely been unconvinced by the communitarian argument. They disagree with the suggestion that an individual is essentially irrevocably defined by her cultural background. Liberals tend to assert that if cultural communities have successfully remained homogenous, this is normally not so much due to individual choices of the individual members of the group. More often, the group has maintained its distinctiveness because of decision-making power in the group being restricted to men with means. Liberals claim that communities would not maintain such like-mindedness if they were to fully include

¹⁸¹ Spinner-Halev, *Multiculturalism and its Critics*, pp. 546-547, Weeks, *The Value of Difference*, p. 88, Moore, *Liberalism, Communitarianism, and the Politics of Identity*, pp. 323-324, and Kymlicka, *Contemporary Political Philosophy*, p. 212 and 246-247

¹⁸² Habermas, *Three Normative Models of Democracy*, pp. 24-25, Sandel, *The Procedural Republic and the Unencumbered Self*, p. 23

¹⁸³ Johnston, *Native Rights as Collective Rights*, p. 180, and Kymlicka, *Contemporary Political Philosophy*, pp. 209-212

¹⁸⁴ Walzer, *Spheres of Justice*, Margalit and Raz, *National Self-Determination*, p. 88, and Kymlicka, *Contemporary Political Philosophy*, pp. 211 and 221-224

¹⁸⁵ Not all communitarians agree as far as suggesting that cultures should be completely left to their own standards. Some communitarians agree with liberals that the individual's personality is not completely determined by her cultural context. Disagreeing with conventional individual liberalism, however, these communitarians nonetheless maintain that choices of what constitutes a good life can only be meaningfully executed in a society protecting the community's particular way of life. See Kymlicka, *Contemporary Political Philosophy*, pp. 244-245.

other segments of society, such as women, in decision-making processes. Liberals submit that communitarianism tends to entrench social practices that marginalize certain groups in the community, and that these practices have been designed with the exact intent of keeping a small segment of society in power.¹⁸⁶

Some liberals – often grouped together under the label “cosmopolitans”¹⁸⁷ - completely reject communitarianism’s assertion that an individual’s cultural background is of significant importance to her. Cosmopolitans maintain that cultural belonging is of no deciding relevance to the individual. They posit that one can simply not claim that individuals are necessarily in need of their cultural roots. Cosmopolitans argue that the individual is capable of thinking of herself as not defined by her cultural background. They admit that certain individuals may enjoy a life heavily influenced by their cultural background. But the individual nonetheless do not need this background, cosmopolitans assert. Indeed, some cosmopolitans submit that it is something artificial about seeking to preserve minority cultures. For instance, Waldron suggests that in a world formed by technology, trade, mass immigration and the dispersion of cultural influences, to engage oneself in the traditional practices of e.g. an indigenous culture might be a fascinating anthropological experiment, but nonetheless entails an artificial dislocation from what is really going on in the world. He submits that engaging in the traditions of an indigenous community in the modern world is like living in Disneyland believing that one’s surrounding epitomizes what it is for a culture to really exist, at the same time as demanding the funds to live in Disneyland as well as the protection from modern society for the boundaries of Disneyland.¹⁸⁸

Not all cosmopolitans may have made their arguments as pointedly as Waldron. But they do agree that from the arguments outlined above, it naturally follows that there is no need to support or even protect minority cultures. Rather, cosmopolitans suggest that cultures live and adapt to changes in their geographical and political surroundings. Sometimes a culture withers away. In other instances, the culture adapts and continues to thrive, or successfully blend with another culture. These are natural processes that the state shall in no way interfere

¹⁸⁶ Kymlicka, *Contemporary Political Philosophy*, pp. 258-260

¹⁸⁷ One should be aware, however, that “cosmopolitanism”, as “communitarianism”, is not a term of art. Appiah, for instance, appears to refer to the school this doctoral thesis labels cosmopolitanism as “universalism”. See *Cosmopolitanism*, p. 57. In fact, Appiah describes himself as a cosmopolitan. But it is clear that he is not a cosmopolitan as the term has been defined by this thesis. Rather, he could perhaps be described as a “multiculturalist light”. See e.g. *Cosmopolitanism* p. 151, where Appiah describes cosmopolitanism as “*universality plus difference*”.

¹⁸⁸ Waldron, *Minority Cultures and the Cosmopolitan Alternative*, pp. 100-101 and 109-110

with. In fact, cosmopolitans maintain, protecting cultures includes an imminent risk of artificially entrenching non-desired cultures and cultural practices, restricting individual freedom.¹⁸⁹

But most liberals have not responded to communitarianism in the cosmopolitan way. Even if remaining unconvinced by the communitarian argument that the individual is ultimately defined by her cultural background, they admit that communitarians pose a question which cannot be outright dismissed. Communitarianism identifies a paradox of liberalism; how should a theory celebrating the freedom of the individual address individuals that genuinely – informed and freely – do view themselves as defined by their culture? As Carens has noted, the individualistic assumption of conventional liberalism makes sense to persons from the West because of their traditions.¹⁹⁰ In other words, how should liberalism address non-liberal cultures with individuals that freely and informed do not value individual autonomy? By pointing to these questions, communitarianism, even though not becoming a dominant school in itself, nonetheless came to impact on political philosophy. Communitarianism sparked a trend among liberal thinkers towards considering whether a liberal theory of justice should, and can, accommodate also for the interests of groups that wish to continue to remain distinct. Communitarians inspired the crafting of liberal theories carving out space for ethnic and racial groups, in between those of states and individuals.¹⁹¹

3.6 *Multiculturalism*

3.6.1 *Generally*

Rather than outright denouncing communitarianism's assertion that the individual's cultural background is important to her well-being, a group of liberals hence commenced attempting to reconcile the tension between conventional individual liberalism and communitarianism. Multiculturalism aspires to develop a political theory of justice that rests on the fundamental values of liberalism, but at the same time accommodates for cultural diversity. In other words, it aims at bringing together respect for the individual *and* for the autonomy of the

¹⁸⁹ Pieterse, *Ethnicities and multiculturalism*, p. 43, Kymlicka, *Contemporary Political Philosophy*, pp. 221-228, and Hylland Eriksen, *Ethnicity, Class, and the 1999 Mauritian riots*, p. 78

¹⁹⁰ Carens, *Aliens and Citizens*, p. 345. Already Hume noted that it is all too easy to judge societies by standards they do not recognize. See, *A Dialogue*, p. 330.

¹⁹¹ Moore, *Liberalism, Communitarianism, and the Politics of Identity*, pp. 325-327, and Shachar, *Multicultural Jurisdictions*, pp. 1-2 and 22

community.¹⁹² Multiculturalism asserts that liberalism can embrace the community's interests and rights, without compromising liberalism's basic individualistic premises.¹⁹³ It hence rejects the classical liberal premise that one single polity must coincide with one single culture.¹⁹⁴ In that sense, one can say that multiculturalism takes liberalism back to its origin, again celebrating not only *liberté* and *égalité*, but also *fraternité*. At the same time, as indicated above, multiculturalism also rejects communitarian arguments that the individual is essentially irrevocably defined by her cultural background, wherefore the community should be free to manage its own affairs and to establish its own understanding of justice.¹⁹⁵ Multiculturalism seeks to accommodate for group rights, but without sacrificing the freedom of the individual.

Multiculturalism tries to reconcile liberalism with group rights through addressing two of the serious lines of criticism directed towards conventional individual liberalism identified by Section 3.3.1. Recall that conventional liberalism was predominantly challenged because of (i) allegedly ignoring that the identity of the individual is significantly tied to her cultural background, and (ii) taking for granted that the state can remain neutral between cultures.¹⁹⁶

Contrary to conventional liberals and cosmopolitans, multiculturalists agree that the cultural background of the individual is important to her in a manner that must be accounted for in any adequate theory of justice. Humans have, they suggest, a basic yearning to belong. True, individuals want freedom and equality as well, but also community.¹⁹⁷ If the group as such is not well respected, the dignity and self-respect of its members is also at risk.¹⁹⁸ If the culture of the community is in decay, or if it is persecuted or discriminated against, the options and opportunities open to its members will shrink, and the pursuit of goals and

¹⁹² Lea, Property Rights, Indigenous People and the Developing World, pp. 34-35, Kymlicka, Contemporary Political Philosophy, pp. 244 and 284, and May, Modood and Squires, Ethnicity, Nationalism and Minority Rights, p. 4

¹⁹³ Norman, Justice and stability in multinational societies, p. 95, Tully, Identity Politics, p. 523, and Ivison, Patton and Sanders, Political Theory and the Rights of Indigenous Peoples, pp. 5-6

¹⁹⁴ Spinner-Halev, Multiculturalism and its Critics, p. 547, and Young, Structural injustice and the politics of difference, p. 76

¹⁹⁵ O'Neil, Mutual Recognition and the accommodation of national diversity, pp. 224-227

¹⁹⁶ Multiculturalists too, pay less attention to the third line of criticism often directed against liberalism, i.e. that liberal theories presuppose the existence of an already established state. Multiculturalism not being overly concerned with this line of criticism should come as no surprise. As Section 3.3.1 explained, liberals generally maintain that the homogenous state being a fiction matters less, provided that the criticism directed towards the presumption that cultures do not matter and towards the purportedly neutral state can be properly met.

¹⁹⁷ Young, Together in Difference, pp. 155-175, Van Dyke, The Individual, the State and Ethnic Communities in Political Theory, p. 49, Spinner-Halev, Multiculturalism and its Critics, p. 550

¹⁹⁸ Spinner-Halev, Multiculturalism and its Critics, p. 547, Kymlicka, The Rights of Minority Cultures, p. 7, and O'Neil, Mutual Recognition and the accommodation of national diversity, p. 226

happiness be less successful. And this, multiculturalists argue, threatens the most basic premises of liberalism. Multiculturalism admits that the individual's range of options for leading a good life is to some extent determined by her cultural heritage. It is cultural structures, multiculturalism submits, that provide us with "a context of choice" for making informed decisions. Individual well-being depends on successful pursuit of goals and relationships that are culturally determined, multiculturalism maintains. Membership in a cultural collective may therefore be a relevant criterion for distributing benefits and burdens; the core of all liberal theories of justice.¹⁹⁹

With regard to the second line of criticism, multiculturalists agree with the arguments outlined in Section 3.3, submitting that even though the state may be *formally* neutral, cultural minorities nonetheless *in practice* suffer from disadvantages. They face inequalities that are not a result of their choice, but by decisions by people outside their society. Multiculturalists concur that behind the veil of formal objectivity, the state is not neutral. Rather, in reality, the state does - consciously or unconsciously - allow the values and practices of the majority culture to dominate in legislation and other policies. The fact that the state is not, and cannot be, neutral is another compelling reason to accept rights of groups, multiculturalists agree. A legitimate theory of justice cannot base its principles on the assumption that pre-existing societal structures can always provide for justice, they conclude.²⁰⁰

3.6.2 Multiculturalism specifically on indigenous peoples

Based on the outlined premises, multiculturalists submit that rights should be awarded to minority groups. The rights granted shall be accustomed to the characteristics of the group in question. For instance, Kymlicka distinguishes between "national minorities" and "ethnic groups", where the former are territorially concentrated groups that at one point were self-governing and who wish to remain as distinct cultural and self-governing entities. Ethnic groups, on the other hand, are characterized by looser forms of association. Members of ethnic groups share certain cultural criteria, but the group as such cannot be said to constitute a cultural or political entity. If using Kymlicka's classification, indigenous peoples clearly

¹⁹⁹ Owen and Tully, *Redistribution and recognition*, p. 270, Young, *Structural injustices and politics of difference*, p. 63, and Spinner-Halev, *Multiculturalism and its Critics*, p. 547

²⁰⁰ Donders, *Towards a Right to Cultural Identity*, p. 41, Kymlicka, *Contemporary Political Philosophy*, pp. 343-347 and *Multicultural Citizenship* pp. 108-116 and 126-130, and Karmis and Gagnon, *Federalism, federation and collective identities in Canada and Belgium*, p. 174

constitute typical examples of national minorities, whereas for instance immigrant groups fall under the heading ethnic groups.

According to Kymlicka, only national minorities enjoy the full set of group rights, e.g. rights to self-government.²⁰¹ Similarly, Tully agrees that a state can consist of more than one people with self-determining rights.²⁰² Indigenous peoples constituting groups with full group rights is further underlined by the fact that many multiculturalists have specifically addressed the situation of indigenous peoples. For instance, Kymlicka submits that an implementation of the right to self-determination might be necessary for indigenous groups to enjoy the same freedom as others, given their particular and distinct cultural, spiritual and institutional history. He further posits that if one wants to respect Native Americans as members of a distinct cultural community, one must also recognize their claim for protection of their collective cultural identity. Kymlicka hence argues for a right to self-determination of indigenous peoples within state borders, submitting that it is erroneous of liberals to simply assume that subjecting indigenous governments to state jurisdiction is just.²⁰³ Young too, asserts that the legitimate interest of indigenous peoples cannot be accommodated for within the conventional state-individual dichotomy.²⁰⁴ In the same vein, Buchanan points to that achieving a greater degree of self-determination is often the only practical way for indigenous peoples to protect their societies and cultures from destruction.²⁰⁵ Commenting on to the *Quebec Session Case*²⁰⁶, Tully too argues for an internal right to self-determination of indigenous peoples. He posits that the effective enjoyment of the right to self-determination constitutes a pre-requisite for indigenous peoples being free.²⁰⁷

3.6.3 Limitations of multiculturalism

Multiculturalism hence argues for extensive self-governing rights of indigenous peoples. Still, the group rights multiculturalism advocates are in no way unlimited. On the contrary, multiculturalism presupposes that communities, although entitled to certain rights, at the same

²⁰¹ Kymlicka, *Multicultural Citizenship*, pp. 10-14, 17, 63, 95-97 and 166, *American Multiculturalism*, pp. 221-222, and *Contemporary Political Philosophy*, p. 339

²⁰² Tully, *Multinational Democracies*, pp. 9-10

²⁰³ Kymlicka, *Multicultural Citizenship*, pp. 166-167

²⁰⁴ Young, *Hybrid Democracy*, p. 247

²⁰⁵ Buchanan, *The Morality of Secession*, pp. 351-353

²⁰⁶ See Section 4.7.3.

²⁰⁷ Tully, *Multinational Democracies*, pp. 7, 12-13, and 30-33

time accept basic liberal-democratic values.²⁰⁸ Being a liberal theory, multiculturalism does emphasize the autonomy of the individual, in turn establishing clear limitations on the scope of protection multiculturalism is prepared to extend to groups. For instance, Kymlicka divides group rights into (i) rights of the community vis-à-vis members of the group, and (ii) rights protecting the group from the larger society. He argues that only the latter category is worthy of protection. The state, Kymlicka submits, should prevent indigenous peoples from using its self-governing rights to limit the freedom of individual members. Rights of indigenous peoples are compatible with liberalism only if also safeguarding the freedom of individual members of the group. In other words, indigenous peoples are entitled to pursue nation-building, but merely to the extent that such endeavours do not encroach upon the rights and liberties of the individual members of the group. In conclusion, individual rights always take precedent over group rights.²⁰⁹

3.7 *Criticism of multiculturalism*

All have not been convinced by the multiculturalist arguments. Cosmopolitans maintain that the state shall remain neutral between cultures and that awarding specific rights to individuals based on membership in a particular group is per definition discriminatory.²¹⁰ They further insist that a person's identity is not tied to her cultural background to the degree multiculturalists suggest. A person can in most instances change her cultural affinity, cosmopolitans continue to argue.²¹¹ They further argue that extending protection to minority cultures is always arbitrary, due to the difficulties associated with (i) defining who constitutes groups deserving protection, (ii) determining who constitutes a member of such groups, and (iii) deciding who identifies what cultural practices are worthy of protection. In the same vein, some cosmopolitans continue to reject multiculturalism because of concerns that recognition of collective rights might result in the collective violating the rights of individual members of the group. They argue that e.g. many indigenous cultures do not place much

²⁰⁸ Kymlicka, *Contemporary Political Philosophy*, pp. 256 and 338-339

²⁰⁹ Kymlicka, *Contemporary Political Philosophy*, pp. 340-343 and 352, and *Multicultural Citizenship*, Ch. 3. Another multiculturalist, Kukathas, has another solution for potential conflicts between collective and individual rights. He too, stresses the fundamental importance of individual rights. But Kukathas submits that the important thing is that individual members have the right to exit the group. Provided that a right to exit exists, liberalism should accept also illiberal practices of a group, Kukathas posits. See *Are There Any Cultural Rights?*, pp. 228-256, in particular pp. 238-239. Section 10.3 will return to the issue of potential conflicts between group and individual rights.

²¹⁰ Pogge, *Group Rights and Ethnicity*, pp. 187-193 and 196-215, and Kymlicka, *Contemporary Political Philosophy*, p. 365

²¹¹ Spinner-Halev, *Multiculturalism and its Critics*, p. 548

emphasis on individuals' freedom of choice, wherefore if freedom is what we desire, cultural interference rather than cultural protection should be our choice.²¹²

Communitarians, on the other hand, maintain that multiculturalism, despite its attempts to accommodate for the interests of groups, as a liberal theory rooted in the notion of the nation-state, is still not sufficiently sensitive towards cultural diversity.²¹³ For instance, Kymlicka has been criticized for uncritically accepting the concept of the very same state he sets out to challenge.²¹⁴ The criticism has perhaps been particularly vocal in the context of indigenous peoples. It has been pointed out that multiculturalism should be more observant to differences between indigenous peoples on hand, and ethnic and cultural minorities, on the other. For instance, Idleman underlines that multiculturalism might work for minorities seeking respect for their culture distinctiveness as part of the majority society. He asserts, however, that multicultural does not particularly well match indigenous peoples' aspirations to remain as distinct societies.²¹⁵

3.8 Conclusions - the success of multiculturalism and its potential relevance for international law

Despite the outlined criticism, the success of multiculturalism has been remarkable. In about two decades, it has become the dominant school within political philosophy. In fact, it has been submitted that multiculturalism has almost evolved as a consensus position among liberals interested in cultural and community rights.²¹⁶ Hence, it might be correct as Parekh posits that a theory of politics that fails to recognize that people value and feel secure in their identity has small chances of success.²¹⁷ The success of multiculturalism might be of significant relevance to the doctoral thesis. As outlined above, one hypothesis of the thesis is that international law does not exist in vacuum. Rather it is influenced by developments

²¹² Ivison, Patton and Sanders, *Political Theory and the Rights of Indigenous Peoples*, p. 8, Spinner-Halev, *Multiculturalism and its Critics*, p. 548, Parekh, *Redistribution or recognition*, p. 201, and Kukathas, *Are There any Cultural Rights?*, p. 242. Chapter 10 shall address issues pertaining to the relationship between the group and its individual members and what groups deserve protection.

²¹³ McGoldrick, *Multiculturalism and its Discontents*, p. 219

²¹⁴ Young, *Structural injustice and the politics of difference*, p. 78

²¹⁵ Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, pp. 589-660, in particular 590-592. For a similar argument, see also Spinner-Halev, *Multiculturalism and its Critics*, pp. 548-549.

²¹⁶ See Kymlicka, *Contemporary Political Philosophy*, pp. 335, 340, 365-366 and 373. Other scholars noting the success of multiculturalism include McGoldrick, *Multiculturalism and its Discontents*, p. 219, Weinstock, *Liberalism, multiculturalism, and the problem of internal minorities*, p. 245, and Gagnon, *The moral foundations of asymmetrical federalism*, p. 320.

²¹⁷ Parekh, *Redistribution or recognition*, p. 207

within other fields, including within political theory.²¹⁸ To the extent this notion is correct it is of obvious importance that after 300 years where conventional liberal individualism has essentially been the only political philosophical theory exercising influence over international law, a new school of thought has become dominant within political philosophy. If this theory, which in sharp contrast to conventional liberalism asserts that it is incorrect to take the state for granted as the only self-governing polity and that group rights shall be recognized, would come to exercise influence over international law in the manner conventional individual liberalism has done until date, this could be of cardinal importance for the indigenous rights discourse. That is not least so, since multiculturalism does identify indigenous peoples as particularly strong candidates for self-governing and other group rights.

Of course, Section 3.5 noted that multiculturalism presupposes that ethnic groups share the liberal values of the surrounding society. Further, most multiculturalists hold that group rights must yield in conflict with individual rights. Certainly, it can be argued, as some have indeed done, that these limitations, if acted upon, restrict multiculturalism's usefulness to indigenous peoples. As mentioned above, the doctoral thesis addresses these arguments in Chapter 10. At this point, it is not relevant to discuss the pros and cons and the more precise content of the various political philosophical schools. It is again underlined that the thesis does in no way purport to provide a complete outline of relevant philosophical theories. What is relevant for the present purposes is to analyse in depth to what extent the fact that the new dominating political theory breaks with some of the most fundamental building blocks of conventional liberalism has impacted on international law. This is the purpose of the remainder of the doctoral thesis.

²¹⁸ See e.g. McCrudden, *The New Concept of Equality*, p. 24, who argues that multiculturalism has had a significant impact on international law.

4. OUTLINE – THE RIGHTS TO CULTURE AND SELF-DETERMINATION

4.1 *Introduction*

Chapter 2 outlined how the nation-state and liberalism surfaced together in the aftermath of the Peace of Westphalia. In collaboration, European sovereigns and liberal scholars gradually crafted an international legal system simultaneously confirming and justifying the power of the state and liberal theories with focus on the individual. It was decided that the state pre-dates theories of justice and law. International law was defined as emerging from state practice. With time, ideas of rights of the individual vis-à-vis the state were formulated, constituting the embryo to the modern human rights system. Hence, the classical international legal system (i) viewed the state as the only collective international legal subject, and (ii) professed individuals as the only objects of human rights. There was no room for groups - such as indigenous peoples - in this legal order. Chapter 2 further described how the young United Nations accepted these basic features when setting out to craft the contemporary international legal system in the wake of World War II. The League of Nations' brief interest in group rights was quickly rejected.

But Chapter 3 outlined how the foundation for conventional liberal individualism, and the nationalism often following in its wake, has recently been, it would appear successfully, challenged. This Chapter surveys to what extent these developments within political philosophy have been mirrored in similar developments in international law. The Chapter examines whether it is correct as Crawford asserts that political theory and international law have in parallel moved towards acknowledging that mere respect for individual human rights are not enough to protect peoples' cultures.²¹⁹ Doing so, the Chapter focuses on the basic underlying question as to what extent international legal sources submit that indigenous peoples enjoy rights as such, more specifically the rights to culture, self-determination and non-discrimination. The doctoral thesis is not at this point particularly concerned with the scope and content of these rights. Naturally, the Chapter spells out relevant legal sources,

²¹⁹ Crawford, *The Right to Self-determination in International Law*, pp. 23-24

which is of course indicative of also the material content of the rights. But the actual analyses of the scope and content of the rights are saved for subsequent chapters.

As Chapter 1 indicated, the indigenous rights discourse tends to analyze cultural rights and the right to self-determination separately, although acknowledging the interdependence of the two rights.²²⁰ Due to a presumed interdependence of the rights, this doctoral thesis opts, however, to analyze the right to self-determination and collective cultural rights together. It is a hypothesis of the thesis that the two rights have evolved in tandem. This Chapter hence surveys whether increased recognition of peoples' rights in general has emerged in parallel with an acknowledgment of that the right to self-determination applies also to "peoples", understood as distinct cultural and ethnic polities, and not as the aggregate of the population of a state or territory. Or the other way around, the Chapter investigates whether indigenous people have achieved status as subjects of international law, and, if so, whether this entail that they enjoy both (i) collective human rights in general, and (ii) the right to self-determination. It is assumed that if the answer to the question of whether indigenous peoples hold cultural rights proper has been answered in the affirmative, so has the question of whether they constitute "peoples" for the purposes of the right to self-determination, and vice versa.

Chapter 1 underscored that the doctoral thesis does not address indigenous peoples' rights to lands and natural resources as such. The Chapter further described, however, how land rights are nonetheless relevant to the doctoral thesis. Also when surveying land rights, the thesis uses a disposition that probably differs somewhat from what is common. The indigenous rights discourse tends to treat indigenous peoples' rights to lands and resources as one set of rights. But at least for the purposes of this thesis, it is more helpful to divide the land rights into two categories of rights, where the distinction is based on the justifications underpinning the rights. The thesis hence distinguishes between (i) indigenous peoples' rights to land and resources having as foundation a recognition that indigenous peoples' having continued access to and control over their traditional lands constitutes a prerequisite for them being able to preserve and develop their distinct cultural identities, on one hand, and (ii) indigenous peoples' land rights deriving from the general right to property, on the other. Consequently, the doctoral thesis includes no separate land rights chapter. Rather, this Chapter addresses

²²⁰ See e.g. Vrdoljak, *Self-Determination and Cultural Rights*, pp. 41-78.

legal sources on land rights as cultural rights. Subsequently, Chapter 5 outlines land rights rooted in the general right to property.

4.2 Peoples' rights in general during the 1970s and 1980s

Chapter 2 hence concluded by noting that the international legal system the young United Nations crafted was not hospitable towards the notion of peoples' rights proper. At the same time, however, the Chapter also observed that the inclusion in the common Article 1 of the 1966 Covenants of a right to self-determination geared towards peoples and not states sparked a debate that would intensify during the 1970s and 1980s. These decades witnessed small, sporadic and non-conclusive, but nonetheless discernable signs of acceptance of peoples' rights.

In 1970, the UNGA adopted the Declaration on Friendly Relations among States.²²¹ The Friendly Relations Declaration essentially confirmed the understanding of the right to self-determination established during the decolonization process. Yet scholars have suggested that the Declaration did somewhat broaden the understanding of the right to self-determination, or at least signalled that a wider application of the right might be emerging. It has been submitted that the Friendly Relations Declaration added an element to the right to self-determination, requiring that the central government of the state represent also the interests of minority populations.²²² It should be noted that even if correct, the assertion is not that the Friendly Relations Declaration enshrined a right to self-determination in the meaning self-governing rights for e.g. indigenous peoples. What is being considered is still a right where power ultimately vests with the majority population's political institutions.²²³ Still, the

²²¹ GA Res. 2526, UN GAOR, 25th Sess., Supp. 28 (1971), 9 ILM 1292

²²² Crawford, *The Right to Self-determination in International Law*, pp. 17 and 27-29 and Cassese, *Self-Determination of Peoples*, p. 113

²²³ Crawford, *The Right to Self-determination in International Law*, p. 16, Anaya, *Indigenous Peoples in International Law I*, p. 44, and Castellino, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, p. 69. That said, one should note that during the negotiations on the Friendly Relations Declarations, the United Kingdom posited that the right to self-determination belongs to peoples "*geographically distinct and ethnically or culturally diverse from the remainder of the territory of the State administering it*". Further, the United States delivered remarks with similar effects. See UN Doc. A/AC.125/L.32, 2 (Para. B) and UN Doc. A/AC.125/SR.69, pp. 18-19. Further, Lebanon initially wanted the Friendly Relations Declaration to clarify that the right to self-determination applies to indigenous populations. See Cassese, *Self-Determination of Peoples*, pp. 115-118. The proposals are interesting, even though it appears that both the United States and the United Kingdom presupposed that also ethnically distinct groups would have to exercise their right to self-determination through the central authorities of the state, at least as a first resort. Due to objections from developing countries, states in the end agreed on a compromise submitting that the right to self-determination applies "*without distinction as to race, creed or colour*".

Friendly Relations Declaration seems to have introduced the notion that the right to self-determination could encompass a duty on states to take into account specific interests of minority segments of the state.²²⁴ If so, this would imply that the right to self-determination is not only formally, but also in practice, vested in peoples and not the state, albeit the implications of this practical distinction are still limited.

The *Frontier Dispute* did not involve a self-determination situation proper. Yet the ICJ declared that it is difficult to see how the principle of territorial integrity can be reconciled with that of self-determination.²²⁵ The opinion expressed by the ICJ could be understood as indicating that the Court contemplated considering the right to self-determination in the context of a people in the meaning a segment of the population of the territory. Because it is difficult to see how a right to self-determination applying to the entire population of a territory can be difficult to reconcile with the principle of territorial integrity of states. Only if the right to self-determination is deemed applicable to a particular group within the state does it seem that the right is capable of contradicting the principle of territorial integrity. This interpretation of the ICJ's ruling in the *Frontier Dispute* finds further support in the World Community's response to another dispute of the 1980s; the so called *De Gasperi-Gruber* dispute, concerning the Tyrol/Alto Adige-province in Italy. According to Cassese, the UNGA's response to the *De Gasperi-Gruber* issue suggests that UNGA held the position that ethnic groups could be entitled to the internal aspect of self-determination, a right not encompassing a right to secede, but to autonomy within existing borders.²²⁶

The UN Human Rights Committee's²²⁷ (HRC) General Comment No. 12/27 on the right to self-determination pointed to the distinct connection between the right to self-determination and economic development and confirmed that the right to self-determination applies beyond colonial situations. At the same time, the Committee did not suggest that the right to self-determination embraces self-governing rights of sub-segments of a state or territory.²²⁸ In the

²²⁴ Crawford, *The Creation of States*, p. 118

²²⁵ *Frontier Dispute (Burkina Faso v. Mali)*, Judgement, I.C.J. Reports 1986, p. 554., para. 25, and Crawford, *The Right to Self-determination in International Law*, p. 36

²²⁶ After World War II, Austria and Italy entered into the De Gasperi-Gruber Agreement, which essentially intended to protect the rights and interests of the German-speaking population in the Tyrol/Alto Adige-province in Italy. In 1960, Austria complained that Italy violated the agreement, and brought the issue before the UNGA. See Cassese, *Self-Determination of Peoples*, pp. 104-107.

²²⁷ The HRC is the body established by the CCPR to authoritatively interpret the provisions of the Convention. See Part IV of the CCPR. If accepted by states, HRC jurisprudence is of significant relevance when interpreting CCPR provisions. See further Chapter 7.

²²⁸ General Comment No. 12: The right to self-determination of peoples (Art. 1) : . 13.03.1984

same vein, the UNGA Declaration on the Right to Development proclaims a right of peoples to economic, social, cultural and political development.²²⁹ Proponents of peoples' rights often invoke the Declaration on the Right to Development, arguing that it evidences the existence of such rights. But similarly to other instruments of the time, it appears that the term "peoples" in the Declaration did not refer to peoples in the ethnic/cultural meaning of the term. Rather, with "peoples" was again surely understood the aggregate of the population of a state or a territory.²³⁰

On a regional level, in 1975 the Conference on Security and Cooperation in Europe (CSCE) adopted the Helsinki Final Act.²³¹ In the Helsinki Final Act, participating states committed to respect the equal right of *states* to self-determination. Obviously, the reference to "states" indicates that the perception remained that the practical difference between states and peoples in a self-determination context is negligible. At the same time, however, the Helsinki Final Act reaffirmed that the right to self-determination stretches beyond the colonial context, applying also to peoples in independent countries.²³² The Act further indicated developments within the field of minority rights, proclaiming that states shall respect *and protect* the rights of persons belonging to minorities. The reference to "protect" seems to suggest a deviation away from the notion that the state should remain passive and neutral between cultures. Specifically with regard to indigenous peoples, in 1983 the Inter-American Commission on Human Rights (IACCommHR) affirmed the position that indigenous groups do not constitute peoples proper for legal purposes, holding that the right to self-determination did not apply to the Miskito People of Nicaragua.²³³

²²⁹ Declaration on the Right to Development, G.A. Res 41/128, Dec. 4, 1986

²³⁰ In addition, it is disputed whether international law recognizes a right to development. Despite the adoption of the Declaration on the Right to Development, most Western states reject that development amounts to a human right. The Declaration is hence a result of an ongoing battle where former colonies and other developing states argue for economic rights vis-à-vis industrialized states. It must be read in this context. Interpretations suggesting that the Declaration on the Right to Development proclaim rights of sub-segments of the state against the central government have few proponents. See Anaya, *Indigenous Peoples in International Law I*, p. 108 and Andreassen and Marks, *Development as a human right*. The latter offers an extensive overview over the right to development.

²³¹ 14 ILM (1975) 1292. The CSCE is now called Organization for Security and Cooperation in Europe (OSCE). The OSCE's main aim is to promote security in Europe. But doing so, it entertains a broad concept of security, embracing issues pertaining to human rights and democracy. See OSCE Human Dimension Commitments: A Reference Guide, 2001.

²³² Crawford, *The Right to Self-determination in International Law*, p. 31, and Xanthaki, *Indigenous Rights and United Nations Standards*, p. 139

²³³ *Miskito Case*. Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Docs. OEA/Ser.L/V/II.62, doc. 10 and rev. 3 (1983) and OEA/Ser.L/V/II.62, doc. 26 (1984)

In conclusion, it is clear that by the end of the 1980s, international law still understood peoples as either (i) the aggregate of the population of an independent state, (ii) the entire population of a territory not yet having attained independence, or (iii) the population of a territory geographically separated from the state administering the territory and/or subject to foreign military occupation. Only peoples in this meaning were the beneficiaries of e.g. the right to self-determination, albeit there had been certain signs of a possibly enlarged understanding of the concept peoples. That said, there were indications of states and legal scholars commencing to think in terms of rights of peoples beyond those of the aggregate of the population of the state. In particular, the Friendly Relations Declaration had suggested that the right to self-determination not only formally, but also in practice, vest in peoples and not the state.

4.3 *The 1970s and 80s: The foundation for indigenous peoples' rights is laid down*

The 1970s and 1980s hence witnessed negligible developments with regard to peoples' rights in general. But these were also these decades when the world community commenced seriously contemplating the situation of indigenous populations. Doing so, the UN and its member states soon acknowledged that the situation of indigenous populations differ from that of e.g. ethnic and cultural minorities. It was noted that - despite colonization and assimilation policies - indigenous populations had to a large degree managed to preserve their own distinct societies and ways of life, deeply rooted in their ancestral lands. This characteristic, it was held, warranted formulation of rights specifically targeted at indigenous populations.²³⁴ In particular, states recognized the clear connection between loss of indigenous lands and marginalization of these populations. Dispossessed from their lands, indigenous populations are particularly vulnerable to pressure from the majority society. Continued access to their traditional territories is paramount to indigenous populations' physical and cultural survival, it was concluded.²³⁵ Since it was held that indigenous societies

²³⁴ Thornberry, *The Convention on the Elimination of Racial Discrimination*, p. 17, and Kymlicka, *Multicultural Odysseys*, pp. 31 and 272-293

²³⁵ Johnston, *Native Rights as Collective Rights*, p. 194, and Stoll and von Hahn I, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, p. 15. Also the IACommHR have recognized the distinct link between the possibility of indigenous peoples to preserve their distinct cultures and continued access to their traditional territories, and that such access is essential to their survival and collective well-being. See e.g. the *Miskito Case*, OEA/Ser.L/V/II.62, doc.26. (1984). See also the Inter-American Court on Human Rights' ruling in the *Awes Tingni Case, Mayagna (Sumo) Community of Awes Tingni v. Nicaragua*, Judgement of 31 August, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001), para. 149, where the Court observed

had never really been incorporated into the majority society, when the world community commenced discussing increased legal recognition of indigenous populations, it concentrated on crafting norms targeted at them, with a particular focus on allowing their societies and collective cultures to continuously exist.²³⁶ This early decision to distinguish indigenous populations from minorities and other sub-segments of society for international legal purposes would have profound consequences for the indigenous rights discourse.

The United Nations work directed towards indigenous populations commenced in 1971, with the UN Economic and Social Council (ECOSOC) authorizing the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) to prepare a study on the “Problem of Discrimination against Indigenous Populations”.²³⁷ The study, commonly referred to as the “Cobo Report” after its formal author José Martínez Cobo, compiled a large amount of data on the situation of indigenous populations around the globe. It consisted of a series of partial reports, submitted between 1981 and 1983, and was finally completed in 1986.²³⁸ The Report denounced the assimilation approach taken by e.g. the ILO 107. It asserted that emphasis should be placed on indigenous populations’ ethno-development and self-determination, rather than on integration and protection.²³⁹ The Cobo Report submitted that self-governance is an inherent part of indigenous peoples’ cultural and legal heritage, contributing to their cohesion and maintenance of their social and cultural traditions. Martínez Cobo concluded that self-governance is a pre-condition for indigenous peoples being able to preserve, develop and pass on to future generations their distinct cultural and ethnic identity. He submitted a series of recommendations on how the United Nations could commence rectifying past wrongs and seriously address the situation of indigenous peoples.²⁴⁰

that the close relationship indigenous peoples have with their land constitutes a foundation for their cultures, spiritual life and cultural integrity.

²³⁶ Keal, *Indigenous Sovereignty*, pp. 317-330. As Macklem observed, indigenous rights are differentiated rights recognizing differences. See *Indigenous Recognition in International Law*, p. 208.

²³⁷ E.S.C. Res. 1589(L), May 21, 1971, U.N. ESCOR, 50th Sess., Supp. No. 1, at 16, U.N. Doc. E/5044 (1971). The Sub-Commission on Prevention of Discrimination and Protection of Minorities was later renamed the Sub-commission on the Promotion and Protection of Human Rights and subsequently abolished following the establishment of the UN Human Rights Council.

²³⁸ U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add. 1-4 (1986)

²³⁹ The Cobo Report, paras. 336 and 337

²⁴⁰ Cobo-report Add. 4, U.N. Sales No. E.86.XIV.3 (vol. 5 Conclusions and Recommendations). See also Anaya, *Indigenous Peoples in International Law II*, pp. 62-63

As indicated, the Cobo Report profoundly impacted on the United Nations' and its member states' attitude towards and activities directed at indigenous populations.²⁴¹ The World Organization intensified its information gathering on indigenous issues, arranged expert seminar and engaged in other activities addressing the situation of indigenous peoples.²⁴² More importantly, even prior to its completion, the Cobo Report spurred the United Nations to act on some of the concrete recommendations in the Report. In terms of institution-building, the most important outcome of the Cobo Report was the establishment in 1982 of the UN Working Group on Indigenous Populations (WGIP), as a subsidiary body to the Sub-Commission.²⁴³ The WGIP's mandate was to review developments pertaining to the situation of indigenous populations and to develop international standards outlining the rights of such groups. Through reviewing developments on the situation of indigenous populations, the WGIP built on the Cobo Report and contributed to increased awareness of and focus on indigenous issues in the UN system and beyond. But even more important was the WGIP's work within standard-setting, and in particular the initiative to craft the Draft DRIP.

In 1985, the Sub-Commission approved the WGIP's decision to embark on crafting a draft DRIP for possible eventual adoption by the UNGA.²⁴⁴ The WGIP worked on the draft until 1993, when it submitted an agreed draft DRIP to the Sub-Commission. The Sub-Commission adopted the draft and passed it on to the UN Commission on Human Rights (Commission HR). In 1995, the Commission HR decided to establish an ad-hoc working group (WGDD) entrusted with the mandate of reaching a political agreement on the DRIP.²⁴⁵ The negotiations within the WGDD would go on for more than a decade, resulting in the Declaration process in its entirety taking almost a quarter of a century to complete. The process would at times lack momentum or even be in a dead-lock.²⁴⁶ But even if the future of the DRIP might at times have appeared uncertain, the fundamental premise that indigenous rights should first and foremost aim at allowing indigenous peoples' to preserve and develop

²⁴¹ In addition, the Cobo Report exercised considerable influence outside the UN-system. It resulted in international legal experts starting to pay attention to the legal status of indigenous peoples. In addition, indigenous peoples' representatives commenced engaging themselves internationally in a more organized and strategic fashion than had previously been the case. See Kinnane, *Indigenous Sustainability*, pp. 182-183, and Minde, *The Destination and the Journey*, pp. 12-35.

²⁴² Anaya, *Indigenous Peoples in International Law II*, pp. 62-63

²⁴³ Human Rights Commission Res. 1982/19 (Mar. 10, 1982); E.S.C. Res. 1982/34, May 7, 1982, Supp. No. 1, para. 26, U.N. Doc. E/1982/82 (1982). The WGIP met annually from its inception until it was abolished following the establishment of the UN Human Rights Council in 2006.

²⁴⁴ Res. 1985/22

²⁴⁵ Res. 1995/32

²⁴⁶ Regarding the DRIP process and its outcome, see Chapter 6.

their distinct collective cultures and societies had been established. And based on this cardinal understanding, international law on indigenous peoples' rights continued to develop while the political deliberations on the DRIP were ongoing. But before turning to rights specifically addressing indigenous groups, the doctoral thesis will survey a set of rights formally individual in nature, but nonetheless relevant to the indigenous peoples' rights discourse.

4.4 *Minority rights – light collectivization of individual rights*

Chapter 3 outlined how by the early 1990s multiculturalism had successfully challenged some of the basic premises of conventional liberalism. Philosophers came to question whether states can in fact remain neutral between cultures. Mirroring this development, international law makers increasingly came to doubt whether a human rights system solely relying on universal human rights applying equally to all individuals regardless of cultural background is apt to protect minority cultures. They started to consider whether not particular legal measures might sometimes be necessary to address the situation of minority groups.²⁴⁷ In addition, political crises in various parts of the world, not least the Balkan crisis, led many to argue that recognition, rather than denial, of minority rights contributes to peace and order.²⁴⁸

As a result, the early 1990s witnessed the adoption of a number of international legal instruments pertaining to minorities. Most notably, in 1992 the UNGA adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Minorities Declaration proclaims that persons belonging to minorities have the right to enjoy their own culture freely, without discrimination. This right might be exercised individually as well as in community with other members of the group. The Minorities Declaration further calls on states to actively promote the realization of these rights.²⁴⁹

²⁴⁷ Crawford, *The Right to Self-Determination in International Law*, pp. 23-24 and 65, Donders, *Towards a Right to Cultural Identity?*, p. 4, Anaya, *Indigenous Peoples in International Law II*, p. 51, Lerner, *Group Rights and Discrimination in International Law*, pp. 19-20, and Kymlicka, *Multicultural Odysseys*, pp. 6-7, and *The Rights of Minority Cultures*, p. 18

²⁴⁸ Vrdoljak, *Self-Determination and Cultural Rights*, pp. 64, 68-69, Wheatley, *Democracy, Minorities and International Law*, pp. 59-60, Lerner, *Group Rights and Discrimination in International Law*, p. 29, and Barth, *Cultural Rights*, pp. 89-90

²⁴⁹ UNG Resolution 47/135, of 18 Dec. 1992, Articles 1.2, 2.1 and 3.1

In a regional context, the Council of Europe considered but never adopted an additional protocol to the ECHRFF, addressing the situation of national minorities.²⁵⁰ The Council did, however, adopt a couple of other instruments aiming at protecting linguistic and other cultural rights of members of national and ethnic minorities, most notably the European Framework Convention for the Protection of National Minorities.²⁵¹ Further, the CSCE declared that members of national minorities have the right to maintain and develop their culture, must be free of any attempt of assimilation, shall be allowed to preserve their cultural objects, and shall be allowed to participate in affairs relating to the protection and promotion of their distinct identities.²⁵² As the UN Minorities Declaration, the European instruments too, impose obligations on states to actively promote the rights set out in the instruments.

None of the mentioned instruments confer rights to minority groups as such. The UN Declaration is commonly referred to as the “Minorities Declaration”. But the label is misleading. As the full title (Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities) reveals, the legal subjects enjoying rights under the Minorities Declaration are individual members of the group, not the group as such. In other words, the rights the Minorities Declaration proclaims are individual in nature. The same is true for the European instruments. These too, award the individual members of minority groups the right to maintain and develop their cultural identity, but contain no rights pertaining to the group as such. Indeed, the European Framework Convention incorporates an explicit rejection of the existence of collective rights.²⁵³

Even if the rights enshrined in the minority rights instruments formally are individual in nature, it has been suggested that they can only be adequately implemented through the establishment of some kind of separate authority of the minority group.²⁵⁴ And at least European states have acknowledged the potential value of autonomous administrations for national minorities.²⁵⁵ In the same vein, both the Council of Europe’s Parliamentary

²⁵⁰ Recommendation 1201 on an additional protocol on the rights of national minorities to the European Convention on Human Rights, Council of Europe Parliamentary Assembly Text

²⁵¹ Council of Europe, Framework Convention for the Protection of Minorities, Strasbourg, November 1994, H (94) 10

²⁵² Concluding Documents of the Vienna Meeting (1989), para. 59, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), Art. 32 and 35, Geneva CSCE Meeting of Experts on National Minorities (1991), Section 4, and Charter of Paris for a New Europe, CSCE, 30 I.L.M. 193 (1991). See also Packer, *The OSCE High Commissioner on National Minorities*, p. 253.

²⁵³ Article 3 (2) and Explanatory Report annexed to the Framework Convention, paras. 13, 31 and 37

²⁵⁴ Packer, *The OSCE High Commissioner on National Minorities*, p. 265

²⁵⁵ OSCE Charter for European Security, Istanbul, November 1999, 39 ILM 255 (2000), para. 19

Assembly and the UN Working Group on Minorities have submitted that minority rights might sometimes be most effectively implemented through the establishment of autonomous functions of the group as such.²⁵⁶ Neither body has gone as far as suggesting, however, that minority groups have a *right* to autonomy. Rather, as noted, the European Framework Convention explicitly rejected the idea that national minorities should have a right to autonomy. In fact, Europe seems more recently to have back-tracked, and is no longer even considering autonomous arrangements for national minorities in Europe.²⁵⁷

But although minority rights are formally speaking individual, it is critical to further note that these rights nonetheless indirectly extend protection also to the cultural identity of the minority group as such. Minority rights do incorporate an implicit recognition of that protection of the individual member necessitates a certain respect also for the group *per se*.²⁵⁸ For instance, while the Minorities Declaration only awards rights to individuals, Articles 1 and 2.1 positively oblige states to respect not only individual members of the minority group, but also the group as such. Commenting on the Minorities Declaration, the UN Working Group on Minorities has underlined that states can only fully implement the rights the Declaration enshrines if ensuring adequate conditions for the existence and identity also of the group as such.²⁵⁹ Moreover, European Community (EC) law has evolved to call on states to positively promote minority rights. European Union Council Directive 2000/43 allowed member states to adopt measures advancing the situation of individuals belonging to disadvantaged ethnic groups.²⁶⁰ In addition, the preamble of the European Framework Convention proclaims that the Convention should not only ensure rights of persons belonging to minorities, but also protect the minority groups as such. And pursuant to Article 5 (1), parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity and cultural heritage. Further, the Advisory Committee established to assist in the implementation of the Framework Convention has held that states shall take positive

²⁵⁶ Recommendation 1201 of the Council of Europe's Parliamentary Assembly (1993), Article 11, and UN Doc. E/CN.4/Sub.2/AC.5/2005/2, paras. 14 and 20

²⁵⁷ Kymlicka, *Multicultural Odysseys*, pp. 209-210

²⁵⁸ For instance, Lerner observes, with references to Thornberry and Estebanez, that the European Framework Convention indicated a shift from pure individualism towards recognition also of the collective elements in human rights. See *Group Rights and Discrimination in International Law*, p. 23.

²⁵⁹ UN Doc. E/CN.4/Sub.2/AC.5/2005/2, paras. 14 and 20

²⁶⁰ OJ L 180, p. 22, adopted on 19 July 2000. See also Szyszczak, *Protecting Social Rights in the European Union*, p. 502.

measures to overcome structural injustices.²⁶¹ Already in 2003, McCrudden submitted that EC law was about to embrace an obligation on states to positively promote equality, and not only prevent discrimination.²⁶² It appears that he has been proven right. Recently, the ECHR has held that states have an obligation to take positive measures to prevent discrimination.²⁶³ As the rulings by the ECHR are binding on EC members²⁶⁴, this position now constitutes binding EC law. In other words, the European minority rights protection system not only allows, but obliges, states to take positive measures to ensure equality in practice. As Section 4.9 will elaborate further, a positive obligation of states to respect and preserve the cultural distinctiveness of individual members of minority group implies an indirect protection also of the group as such. One could say that the minority rights system brought with it an increased acceptance of a certain amount of “collectivization” of the formally speaking individual rights, or at least added a collective dimension to these rights.

In conclusion, the minority rights instruments broke with the classical liberal tradition and rejected the notion that the state could and should remain neutral between cultures. Instead, international law came to hold that the state is obliged to actively intervene to protect and promote the cultural distinctiveness of members of minority groups. This, in turn, extended an indirect protection also to the group as such. Still, the minority rights system stopped short of establishing group rights proper.²⁶⁵

²⁶¹ ACFC Document ACFC/31 DOC (2008) 001, 5 May 2008, para. 14

²⁶² McCrudden, *The New Concept of Equality*, p. 21

²⁶³ *Andrejeva v. Latvia* [GC], Appl. No. 55707/00, Judgement of 18 February 2009, para. 82. Similar conclusions follows also from *Thilmmenos v. Greece*, Appl. No. 34369/97, Judgement of 6 April 2000, *Chapman v. The United Kingdom* [GC], Appl. No. 27238/95, Judgement of 18 January 2001, *Nachova and others v. Bulgaria* [GC], Appl. No. 43577/98 and 43579/98, Judgement of 6 July 2005, and *Stoica v. Romania*, Appl. No. 42722/02, Judgement of 4 March 2008.

²⁶⁴ Revised Treaty on European Union, Article 6 (3)

²⁶⁵ The distinction between minorities and indigenous peoples in international law has been maintained and entrenched since the 1990s. Kymlicka argues that the distinction is proper when comparing indigenous peoples with new minorities, such as immigrant groups. But he maintains that it makes less sense to legally separate old national minorities – i.e. ethnic groups that have lived in states at least as long as the majority population, are large in number, culturally distinct and have clear political organizations – from indigenous peoples. Kymlicka submits that international law distinguishes between old national minorities and indigenous peoples due to politics, not principles. Unlike indigenous peoples, old national minorities are often perceived as threats to national security, he posits. For this reason, states fail to recognize such groups. See *Multicultural Odysseys*, pp. 272-293. Kymlicka’s observation is interesting, and the doctoral thesis shall return briefly to it in the final Chapter. Still, it is beyond the scope of the thesis to investigate whether the rights analyzed in the thesis should reasonably apply also to groups other than indigenous peoples. For the purposes of the thesis, it is sufficient to note that Kymlicka does not criticize the direction the indigenous rights discourse has taken. On the contrary, he supports this development, at least to the point where indigenous peoples’ rights come into conflict with the rights of individual members of the group. With the regard to the latter issue, see Chapter 10.

4.5 *Collectivization of the right to culture – CCPR Article 27*

The “collectivization” of formally individual human rights has not been confined to the minority rights instruments. Also provisions in general human rights treaties proclaiming cultural rights of members of minority populations have been interpreted in a progressive manner. Recall that pursuant to CCPR Article 27, “... *persons belonging to ... minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture...*”. As Section 2.5.3 outlined, as other human rights provisions adopted during the first decades of the United Nations, CCPR Article 27 is a child of its time. When adopted, the provision envisioned only individuals as bearers of the rights proclaimed. Moreover, Article 27 placed no positive obligation on states to protect cultures. On the contrary, the phrase “*shall not be denied the right*” indicates that the state should remain neutral and not actively protect any particular culture within the state.²⁶⁶

Notwithstanding the limited applicability suggested by the wording of CCPR Article 27, the HRC has in a series of observations gradually collectivized the individual right the provision sets forth, particularly in the context of indigenous populations. The Committee has not disputed that the right to culture enshrined is formally individual. Still, the HRC has nonetheless interpreted CCPR Article 27 as extending an indirect protection also to the cultural integrity of indigenous population as such, with a particular focus on their traditional land and resource based activities. Further progressing the understanding of the provision, the Committee has in addition repeatedly underlined that states have a positive obligation to realize the rights reflected in CCPR Article 27.

In the *Kitok Case* (1988), the HRC confirmed that reindeer husbandry, as a traditional livelihood of the indigenous Saami people, enjoys protection under CCPR Article 27.²⁶⁷ In *Ominayak v. Canada* (1990), the Committee confirmed its finding in the *Kitok Case* and concluded that the exploitation of timber, gas and oil in the aboriginal Lubicon Lake Band’s traditional territory amounted to a violation of CCPR Article 27, since these activities

²⁶⁶ Article 30 of the Convention on the Rights of the Child (CRC) (General Assembly Resolution 44/25 of 20 November 1989) is essentially a clone of CCPR Article 27. The provision hence proclaims that children of ethnic minority origin shall not be denied the right to, in community with other members of the group, enjoy their own culture. Different from CCPR Article 27, CRC Article 30 specifically affirms that this right applies also to indigenous children. But similar to CCPR Article 27, CRC Article 30, as understood at the time of adoption, embraced only individual rights, although CRC Article 5 (respect for local customs) flirts with the collective dimensions of the right to culture.

²⁶⁷ *Ivan Kitok v. Sweden*, Comm. No. 197/1985, views adopted 27 July 1988

effectively destroyed the Band's traditional hunting and fishing grounds.²⁶⁸ In 1994, the HRC affirmed that culture manifests itself in many forms, for instance in the particular way of life of indigenous populations. Doing so, the Committee underlined that certain cultural rights, even though formally individual, lose all relevance if disconnected from the community as such.²⁶⁹ The HRC has subsequently repeatedly affirmed that CCPR Article 27 encompasses a dimension that protects indigenous peoples' collective culture, e.g. in the two *Länsman Cases*²⁷⁰ (1994 and 1996) and in *Apirana Mahuika et al v. New Zealand*²⁷¹ (2000). The Committee has further on several occasions confirmed states positive obligation's to respect and positively implement the collectivized rights of indigenous peoples.²⁷²

If the progressive interpretation of the minority rights instrument constitutes a collectivization of individual rights "light", the HRC has probably gone as far in collectivizing the right to culture as is possible without formally declaring the right a collective human rights proper. For instance, in the *Lubicon Lake Band Case*, the applicant was an individual, but the findings of the Committee were clearly in everything but formal terms directed towards the Band as such. The Band had formulated its claim as a violation of the collective right to self-determination pursuant to CCPR Article 1. Formally, the HRC had to translate the claim into an assertion of as a violation of the individual right to culture set forth by CCPR Article 27. Doing so, however, the Committee confirmed the interdependence of the two rights, in the context of indigenous peoples. In *Apirana Mahuika* the HRC took one step further. The Committee again reaffirmed that the right enshrined in CCPR Article 27 is formally individual in nature. Notwithstanding, the HRC explicitly underlined the interdependence between CCPR Articles 27 and 1, submitting that the individual right to culture must be understood in light of the collective right to self-determination. Thus, the Committee acknowledged that if not formally so in practice, Article 27 does extend a protection also to

²⁶⁸ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Comm. No. 167/1984, views adopted 26 March 1990. See also Kingsbury, *Reconciling Five Competing Conceptual Structures*, p. 80.

²⁶⁹ HRC General Comment No. 23: The rights of minorities (Art. 27) : . 08..04.1994. CCPR/C/21/Rev.1/Add.5. See also Lenzerini, *Indigenous Peoples' Cultural Rights*, pp. 124-125.

²⁷⁰ *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

²⁷¹ *Apirana Mahuika et al v. New Zealand*, Comm. No. 547/1993, views adopted 27 October 2000

²⁷² Concluding Observations on Finland, UN Doc. CCPR/C/79/Add. 91, para. 10, on New Zealand, UN Doc. CCPR/C/75/NZL, para. 4, on Guatemala, UN Doc. CCPR/CO/72/GTM, and on the Philippines, UN Doc. CCPR/CO/79/PHIL. See also Scheinin, *Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights*, p. 4.

the cultural identify of the indigenous people *per se*.²⁷³ That CCPR Article 27 enshrines a collectivized right to culture is hence clear. But what is the material content of the right? If summarizing the findings in the outlined jurisprudence, the content and scope of the right to culture the HRC has formulated can be summarized as states having a positive obligation to prevent any activity that renders it impossible or considerably more difficult for the indigenous group to continuously pursue its cultural practices. No proportionality test is allowed. It is irrelevant whether the competing activity would generate significant positive effects for the society as a whole. If the activity seriously harms the culture of the indigenous group, it is prohibited.²⁷⁴

The HRC's progressive interpretation of CCPR Article 27 constitutes the most explicit examples of collectivization of individual rights. Still, it is worth mentioning that the Committee on Economic, Social and Cultural Rights (CESC) has, when applying the right to health enshrined in CESCR Article 12 in the context of indigenous peoples, opined that "*the health of the individual is often linked to the society as a whole*".²⁷⁵

States appear essentially to have accepted the HRC's understanding of CCPR Article 27. In more recent instances when indigenous parties have brought states before the Committee claiming a breach of CCPR Article 27, states have argued that the competing activity do not seriously harm the indigenous people's culture. But they have not denied the right as such. Hence, states have indirectly accepted the HRC's interpretation of the provision. Consequently, it has been suggested that this understanding of CCPR Article 27 today forms part of customary international law.²⁷⁶ The basic features of CCPR Article 27, as interpreted by the HRC, have also been confirmed in other international legal sources.²⁷⁷ Since the

²⁷³ *Apirana Mahuika et al v. New Zealand*, Comm. No. 547/1993, para. 9.2. See also Scheinin, *Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights*, p. 9.

²⁷⁴ See also Scheinin, *The Right to Self-Determination under the Covenant on Civil and Political Rights*, pp. 193-207.

²⁷⁵ General Comment No. 14: *The right to the highest attainable standard of health* : . 11.08.2000. E/C.12/2000/4, para. 27. The CESC is the body entrusted to authoritatively interpret the provisions of the CESCR. (The CESC conducts this task under the auspices of the ECOSOC, which is the body formally authorized by the CESCR to oversee the implementation of the Convention.) See CESCR Part IV and Alston, *The International Covenant on Economic Social and Cultural Rights*, p. 65. CESC jurisprudence is consequently of significant importance when interpreting CESCR provisions. If accepted by states, one can assume that the findings of the CESC reflect a correct understanding of the CESCR. See further Chapter 7.

²⁷⁶ Wheatley, *Democracy, Minorities and International Law*, p. 15, and Anaya, *Indigenous Peoples in International Law I*, p. 100

²⁷⁷ For instance, Section 4.7.2 will explain how a collective right to culture of indigenous peoples has essentially been confirmed by the UN Committee on Elimination of Racial Discrimination (CERD Committee) in General Recommendation No. 23: *Indigenous Peoples* : . 18/08/97. (The CERD Committee is the body established by

collectivized version of the individual right enshrined in CCPR Article 27 still does not amount to a peoples' right, or even a collective right, the doctoral thesis will refer to the right as an informal right of indigenous populations, rather than as a right of indigenous peoples.

4.6 *The ILO 169 – recognition of collective rights proper of indigenous groups*

Sections 4.4 and 4.5 described how the adoption of minority rights instruments and progressive interpretations of cultural rights provisions in general human rights instruments collaborated to create an indirect protection of the cultural identity also of groups as such. But these Sections further underlined that formally speaking, minority rights, also when applied to indigenous populations, remain individual rights. At the same time, Section 4.3 explained that when the world community commenced seriously addressing the situation of indigenous peoples, it was soon acknowledged that such work should focus on the collective aspects of their societies. One outcome of this recognition was the decision by the ILO to re-examine ILO 107.

The re-examination of the ILO 107 resulted in the adoption in 1989 of ILO 169. ILO 169 broke with the assimilatory and individual rights approach in ILO 107. In line with has been outlined in Section 4.3, in the deliberations on ILO 169 it was early decided that the Convention should predominantly focus on promoting respect for the continued existence of indigenous groups' distinct societies, social structures, identities and ways of life.²⁷⁸ The approach of ILO 169 has been labelled “*ethno political self-government*”,²⁷⁹ as the Convention certainly foresees self-governing rights of indigenous peoples.²⁸⁰ ILO 169

CERD Part II to authoritatively interpret the provisions of the Convention. CERD Committee jurisprudence is consequently highly relevant when interpreting CERD provisions. If accepted by states, one can assume that the findings of the CERD Committee reflect a correct understanding of CERD. See further Chapter 7.) In the same vein, CESC's interpretation of the right to culture in General Comments No. 17 (Article 15, paragraph 1 (c)), E/C.12/GC/17, 12 January 2006, and No. 21 (Article 15, para. 1 (a)), E/C.12/GC/21, 20 November 2009 further supports this conclusion. As Section 4.6, immediately below, will further elaborate, a similar right follows also from ILO 169 Articles 2.2 (b) and 5 (a). Compare also Lerner, *Group Rights and Discrimination in International Law*, p. 15. As Section 4.7.3 will outline, the IACHR and IACommHR have reached similar conclusions in their jurisprudence pertaining to indigenous peoples, as has the African Commission on Human and People's Rights (AfCommHPR), in *Endorois People v Kenya. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm. 276/2003, para. 235.

²⁷⁸ Tomei and Swepston, *Indigenous and Tribal Peoples: A Guide to ILO 169*, Swepston, *Indigenous Peoples in International Law and Organizations*, pp. 53 and 57, and Kymlicka, *Multicultural Odysseys*, p. 32

²⁷⁹ Myntti, *National Minorities, Indigenous Peoples and Various Models of Political Participation*, p. 24. For a similar position, see Lenzerini, *Sovereignty Revisited*, p. 178.

²⁸⁰ Fromherz, *Indigenous Peoples' Courts*, p. 1367

consequently enshrines a number of rights of indigenous populations pertaining e.g. to their cultures, ways of life, traditions and customary laws.

ILO 169 Articles 2 (2) (b) and 5 (a) declare that states have the responsibility to protect the cultural values, practices and rights of indigenous peoples. Pursuant to Article 7, indigenous peoples have the right to control, to the largest extent possible, their economic and cultural development. Article 23 underlines that indigenous peoples' handicrafts are important to the maintenance of their cultures. The Convention, in its Article 13, also affirms that continued access to their traditional lands, territories and natural resources constitutes a prerequisite for indigenous peoples being able to preserve and develop their distinct cultures. Pursuant to Articles 14, indigenous peoples have the right to own lands they continuously use with some degree of exclusivity. As to lands today shared with the majority population, ILO 169 awards indigenous peoples usufruct rights. Article 15 confirms that to the extent indigenous peoples enjoy rights to land pursuant to Article 14, this right also envelopes natural resources situated on such land. The ILO 169 does not specifically address collective creativity, beyond the reference to handicrafts in Article 23. The absence of provisions addressing TK, TCEs etc. can most likely be explained by this topic not having been subject to much discussion at the time of the adoption of the ILO 169.²⁸¹ In addition to the rights pertaining directly to culture and land, a second facet of the ILO 169 focuses on participatory rights in decision making processes.²⁸²

ILO 169's focus on collective rather than individual rights is also highlighted by the Convention, unlike its predecessor ILO 107, referring to indigenous groups as "peoples", rather than "populations". The ILO's guide to ILO 169 affirms that the term "peoples" is used precisely to denote that indigenous peoples constitute organized societies with an identity of their own, rather than mere groupings sharing some racial or cultural characteristics".²⁸³ But even if the reference to peoples was conscious, it is clear that states were not ready to acknowledge indigenous groups as beneficiaries of peoples' rights proper. Neither were they ready to accept that the ILO 169 could be invoked to argue for the existence of collective human rights in general. For these reasons, the right to self-

²⁸¹ Swepston, *Indigenous Peoples in International Law and Organizations*, p. 57. See also al Attar, Aylwin and Coombe, *Indigenous Cultural Heritage Rights in International Human Rights Law*, p. 311, where the authors note that indigenous peoples' rights to cultural heritage have achieved international attention only during the last two decades.

²⁸² See in particular ILO 169 Article 6.

²⁸³ Tomei and Swepston, *Indigenous and Tribal Peoples: A Guide to ILO 169*, p. 7

determination was consciously kept out of the ILO 169.²⁸⁴ Moreover, ILO 169 Article 1 (3) underlines that, "[t]he use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." Having reassured themselves that the ILO 169 could not be used to claim the right to self-determination or other peoples' rights, states felt confident in accepting collective rights limited in their application to indigenous populations. Still, although ILO 169 fell short of recognizing peoples' rights, states acknowledging that indigenous populations hold collective rights *sui generis* to them were still significant. For the first time, it was recognized that collectives others than the aggregate of the population of a state or a territory could hold rights proper.²⁸⁵ In that sense, the ILO 169 further confirmed the particular status of indigenous groups in international law.²⁸⁶

In conclusion, the ILO 169 is important to the doctoral thesis predominantly because of furthering the development of collective rights proper in general. But in addition, the ILO 169's affirmation of indigenous populations' – including indigenous peoples' – right to a collective cultural identity and to control their cultural development, is of relevance to the material right the thesis surveys. Some might point to that the ILO 169's status as an international legal source is weakened by the fact that only 20 states have to date ratified the Convention. Still, the relatively low number of ratifying states need not entail that the outlined central features of the ILO 169, the aspects of the Convention of greatest interest to the thesis, do not constitute established international law. As Chapter 7 will elaborate, the

²⁸⁴ Swepston, *Indigenous Peoples in International Law and Organizations*, p. 57

²⁸⁵ Anaya, *Indigenous Peoples in International Law I*, pp. 40 and 48-49. Notwithstanding, since these rights apply to groups not necessarily constituting peoples, the doctoral thesis throughout refers to rights deriving specifically from ILO 169 as rights of indigenous populations, rather than of indigenous peoples.

²⁸⁶ ILO 169 defines its beneficiaries not as "*indigenous peoples*", but as "*indigenous and tribal peoples*". As Chapter 10 will elaborate, albeit no official definition exists, "indigenous peoples" is today, at least almost, a term of art. At the same time, it remains uncertain what groups constitute "tribal peoples". The term appears not to be used outside the ILO 169. In any event, for the present purposes, it is not necessary to probe deeper into this issue, as the doctoral thesis only surveys rights of indigenous peoples. Still, it is worth noting in passing that the developments in international law subject to study in the thesis will presumably demand a clearer distinction between indigenous "peoples" and other indigenous groups. International institutions etc. have so far grouped indigenous peoples and communities together under the label "indigenous peoples". This constitutes less of a problem when no indigenous groups is considered as qualifying as peoples. But if international law was to acknowledge peoples defined in terms of culture/ethnicity, there is an immediate need to formally distinguish between groups qualifying as indigenous peoples and those that do not. Under such circumstances, indigenous groups not constituting peoples would still benefit from rights enshrined in ILO 169 etc., but not from peoples' rights such as the right to self-determination. In other words, the ILO 169 would apply to two categories of groups; indigenous groups not constituting peoples and indigenous peoples. See also Kingsbury, *Indigenous Peoples as an International Legal Concept*, pp. 30-31, who notes that ILO 169 applies to a broader set of groups, of which those qualifying as indigenous peoples are in addition entitled to rights specific to indigenous peoples under e.g. the DRIP. For a similar conclusion, see further Scheinin, *The Right of a People to Enjoy its Culture*, pp. 154-158.

fact that a right is enshrined in a treaty with few ratifying states does not in itself preclude the right from constituting international law proper. To the extent the treaty provision is supported by other international legal sources, the right can still be legally binding. And as the remainder of this Chapter and subsequent Chapters will demonstrate, both the basic features of the ILO 169 and the specific material rights of interest to the thesis, have been confirmed by a number of other international legal sources.²⁸⁷

4.7 Contemporary international law on indigenous peoples' rights

4.7.1 Introduction

The Sections above described how by the mid-1990s, international law had seen two challenges of the state-individual dichotomy. Minority rights had been “collectivized” to provide indirectly protect also groups as such, not least when applied to indigenous peoples. In addition, predominantly through the adoption of ILO 169, international law had recognized that indigenous groups can hold collective rights *sui generis* to them. But international law was yet to recognize indigenous groups as peoples proper, with rights as such. This Section surveys the development in international law beyond mere recognition of collectivized individual rights and *sui generis* indigenous group rights. Doing so, the Section essentially seeks to establish the status of international law on indigenous peoples up to the adoption of the DRIP. That said, a few post-DRIP international legal sources are also outlined.

4.7.2 Universally applicable international legal sources

The first part of the 1990s saw the enactment of a few legal sources confirming the position of classical international law. Both the Political Declaration of the UN World Conference on Human Rights²⁸⁸ (1993) and the CERD Committee's General Recommendation No. 21²⁸⁹

²⁸⁷ With regard to the obligation on states to protect the cultural practices of indigenous peoples, as enshrined in ILO 169 Articles 2 (2) and 5 (a), references can particularly be made to the HRC's interpretation of CCPR Article 27, outlined in Section 4.5. As Section 4.7 will elaborate, this right is also enshrined in CERD General Comment No. 23. As to indigenous peoples' right to control their cultural development, references can be made to all international legal sources proclaiming a right to self-determination of indigenous peoples (to be exercised through autonomous and self-governing arrangements), as will be described in Section 4.7 and Chapter 6. These sources, and additional sources outlining cultural rights of indigenous peoples also surveyed in Section 4.7 and Chapter 6, further support the general feature of the ILO 169 that indigenous peoples enjoy collective rights.

²⁸⁸ United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, 32 ILM

(1996) essentially affirmed international law's conventional understanding of peoples. These documents underscored that the right to self-determination applies beyond a colonial context. At the same time, they borrowed language from the Friendly Relations Declaration and declared that the right to self-determination should not be construed as authorizing any action impairing the territorial integrity of states possessed with a government representing the whole people belonging to the territory. The reference to "the whole people" in singularises confirms that the crafters understood the term "people" to refer to the aggregate of the inhabitants of a territory or a state.²⁹⁰ That said, in line with what has been outlined under Section 4.2, the reference to government representing the whole population of the state also affirmed the Friendly Relations Declaration's position that the right to self-determination do apply to peoples, and not states, albeit with "peoples" were clearly understood the entire population of a state. Moreover, having underscored that international law does not recognize a general right for people to secede, the CERD Committee stated that this does not preclude political arrangements between different groups within the state. This seems to indicate that the Committee at least foresaw that the implementation of the right to self-determination could encompass autonomy arrangements for segments of the population of the state. Even though not phrased as a legal right, the CERD Committee starting to think of self-determination in terms of autonomy arrangements for groups is indicative.

When the CERD Committee a year later specifically addressed rights of indigenous peoples, it confirmed and built on the collective rights the ILO 169 proclaims. The CERD does not contain any provisions specifically referring to indigenous peoples. Moreover, the rights the Convention enshrines, including the right to property in Article 5 (d) (v), are all formulated as individual rights. Notwithstanding, in General Recommendation No. 23, the CERD Committee both acknowledged CERD's relevance to indigenous peoples and interpreted the rights in the Convention to have a collective dimension, when applied to such peoples. The Committee encouraged states to recognize and respect indigenous peoples' distinct cultures, ways of life and cultural identities. It called on states to ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs.²⁹¹ The CERD Committee especially called on states to recognize and protect the rights of indigenous

²⁸⁹ General Recommendation No. 21 Right to self-determination: . 23/08/96

²⁹⁰ Crawford, *The Right to Self-determination in International Law*, pp. 30-31, and Bloch, *Minorities and Indigenous Peoples*, pp. 374-375

²⁹¹ Notably, this paragraph of General Comment No. 23 concurs with the HRC's interpretation of CCPR Article 27.

peoples to own, develop, control and use their communal lands, territories and resources. In this context, the Committee particularly underlined that indigenous peoples hold property right over their lands and resources. Finally, the CERD Committee posited that no decision directly relating to indigenous peoples' rights and interests must be taken without their informed consent. It has been debated what the CERD meant with "consent" in this context. According to Thornberry, member of the Committee at the time of the enactment of General Recommendation No. 23, one should distinguish between situations that (i) pertain to all citizens of the country, and (ii) that concerns the indigenous people directly. In the former situation, Thornberry submits that General Recommendation No. 23 awards indigenous peoples a mere participatory right. But in the latter scenario, he asserts that General Recommendation No. 23 suggests that indigenous peoples enjoy a true veto right.²⁹²

Section 4.5 described how the HRC when "collectivizing" the right to culture had stopped short of formally proclaiming a collective right to culture. By the late 1990s, however, the Committee was ready to conclude that the CCPR do embrace a collective right proper of indigenous peoples. This development did not occur in the context of the right to culture pursuant to CCPR Article 27. Rather, the HRC commenced applying the only peoples' right proper known at the time - the right to self-determination in CCPR Article 1 – to indigenous peoples. Since 1999, the Committee has systematically applied the right to self-determination to indigenous peoples in country specific reports on states recognizing the existence of indigenous populations within their borders. The HRC has developed a rather coherent jurisprudence on the relevance of the right to self-determination to indigenous peoples.

In certain instances, the Committee has merely referred to the indigenous group in the context of CCPR Article 1, often requesting the state party to report on what measures it has taken to implement the right to self-determination of the indigenous people.²⁹³ By considering indigenous peoples in the context of CCPR Article 1, the Committee confirms the position that the right to self-determination enshrined in Article 1 applies also to indigenous groups qualifying as a people for international legal purposes. Scheinin, member of the HRC during the period when the Committee developed its position on indigenous peoples' right to self-determination, affirms that certain indigenous groups do constitute peoples for the purposes of

²⁹² Thornberry, *The Convention on the Elimination of Racial Discrimination*, pp. 33-34

²⁹³ See e.g. CCPR/C/79/Add.112 (Norway), CCPR/CO/82/FIN (Finland), and CCPR/CO/75/NZL (New Zealand).

the common Article 1 of the 1966 Covenants.²⁹⁴ In some instances, the HRC has explicitly applied the right to self-determination to indigenous peoples.²⁹⁵ Doing so, the Committee has often placed emphasis on the right to self-determination's resource dimension. For instance, in 1999 the HRC, with explicit reference to the indigenous peoples in Canada, emphasized that "*the right to self-determination requires, inter alia, 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*".²⁹⁶ The HRC further proclaimed that indigenous peoples have the right to control their cultural development. The Committee has drawn a similar conclusion, also referring to Article 1, in concluding observations on Mexico, calling on the state party to respect indigenous peoples' collective right to culture and traditional patterns of living.²⁹⁷ The HRC's sister body, the CESC, has been more careful to apply CESCR Article 1 to indigenous peoples. However, it has done so on a few occasions, thus concurring with the HRC that the right to self-determination applies to indigenous groups to the extent such groups constitute peoples for international legal purposes.²⁹⁸ In conclusion, the two treaty bodies that have the opportunity to take a position on the applicability of the right to self-determination have both held that the right to self-determination applies to indigenous peoples. In doing so, the Committees have particularly underlined that the right to self-determination, in the context of indigenous peoples, embraces a right of these peoples to exercise control over their distinct cultures.

In the context of indigenous peoples' right to self-determination, it is also interesting to note the HRC's conclusions in *Gillot et al v. France*.²⁹⁹ The provision invoked in *Gillot* was not CCPR Article 1, but Article 25 (b), proclaiming all citizens' right to e.g. participate in general

²⁹⁴ Scheinin, *Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights*, p. 3 and *What are Indigenous Peoples?*, p. 6

²⁹⁵ In 2006 the HRC concluded that the extinguishment of aboriginal rights in Canada may amount to extinguishment of rights pursuant to CCPR Article 1. See CCPR/C/CAN/CO/5. Further in 2006, the Committee commended Norway for entering into an agreement with the Saami parliament, as well as for enacting legislation furthering the Saami people's right to self-determination pursuant to CCPR Article 1. See CCPR/C/NOR/CO/5.

²⁹⁶ CCPR/C/79/Add.105. Similarly, in 2000, the HRC, with reference to CCPR Article 1 (2), 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. In the same vein, in 2002, the Committee expressed concern over Sweden not allowing the Saami people a significant role in decision-making processes affecting their traditional lands and economic activities. See CCPR/CO/74/SWE.

²⁹⁷ CCPR/C/79/Add.109. In the same vein, the Committee has called on the United States to take further steps to secure the rights of indigenous peoples under CCPR Articles 1 to exercise greater influence in decision-making affecting e.g. their culture. See CCPR/C/USA/Q/3/CRP.4.

²⁹⁸ See e.g. Concluding Observations on the Russian Federation, UN Doc. E/C.12/1/Add.94, paras. 11 and 39.

²⁹⁹ *Marie-Hélène Gillot et al v. France*, Comm. No. 932/2000, views adopted 15 July 2002. Regarding *Gillot*, see also Scheinin, *Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights*, pp. 14-15.

elections. Yet the case has bearing on the question of who constitute a people for legal purposes. The complaint concerned participatory rights in a referendum held in New Caledonia, which the Caledonians had decided should be open only to persons with sufficient ties to the territory. Gillot and other ethnic Frenchmen submitted that this limitation amounted to a violation of their right to participate in political processes. The HRC interpreted CCPR Article 25 in the light of Article 1, and concluded that due to the fact that the referendum was arranged in a process of decolonization and self-determination, it was legitimate to restrict participation to persons with sufficient ties to New Caledonia. The opinion taken reaffirms the Committee's position that a "people" need not be understood as the entire population of a territory, since the HRC defined the ethnic Caledonians as a people.³⁰⁰

The CESCR has recently held the formally individual right to benefit from the moral and material interests resulting from one's scientific and artistic production enshrined in CESCR Article 15.1 (c) to apply also to collectives, in particular in the context of indigenous peoples. In General Comment No. 17, the CESCR declared that Article 15.1 (c), in addition to protecting individual rights, also safeguards peoples, communities and other groups collective cultural heritage. Further, the Committee underscored that the provision calls on states to adopt measures ensuring the effective protection of the interests of e.g. indigenous peoples relating to their cultural heritage. According to CESCR, such measures might include the recognition of the collective authorship of indigenous peoples to elements of their culture. The Committee further declared that, when protecting indigenous peoples' cultural heritage, states shall respect the principle of free, prior and informed consent of the indigenous authors concerned and, where appropriate, provide for the collective administration by indigenous peoples of the benefits derived from their productions. In addition, the CESCR stated that authors shall retain a moral right to their work which shall survive even if such works have, under conventional IPR-mechanisms, entered the so called the public domain.³⁰¹ Presenting this progressive interpretation of CESCR Article 15.1 (c), CESCR recognized that the drafters of the CESCR at that time had not foreseen that the provision could apply to collectives. Still,

³⁰⁰ As in the above mentioned observations on Morocco, the HRC left the question open whether the ethnic Caledonians constituted an indigenous people or "just" a people. Hence, *Gillot* too offers no guidance as to whether the Committee recognizes that also a non-indigenous sub-group of a state can constitute a people for the purposes CCPR Article 1.

³⁰¹ Regarding the meaning of the concept public domain, see Sections 5.4.3-5.4.5.

the Committee concluded, a progressive interpretation of the provision was necessary, given recent developments in international law.³⁰²

CESC further commented on CESCR Article 15.1's aspiration to please both creators and users of culture. General Comment No. 17 hence submits that a balance should be struck between producers of artistic expressions and knowledge, and users of the same material. Further, when implementing CESCR Article 15.1, states shall ensure that protection of the moral and material interests resulting from one's creativity does not impede the state's ability to comply with its obligations towards those wishing to take part in cultural life and benefit from the scientific progress of society. CESC further underlined that the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions is motivated by an interest to encourage the active contribution of creators to the arts and sciences, and by a wish to promote progress in society as a whole.³⁰³ As Section 2.5.3 touched upon, and as Section 5.4 and Chapter 11 will elaborate further, this juxtaposition in the right to culture is also an underlying feature of IPRs. The CESC also underscored the link between CESCR Article 15.1 and property rights.

Recently, the CESC has adopted another General Comment on CESCR Article 15. General Comment No. 21 addresses everyone's right to take part in cultural life pursuant to CESCR Article 15.1 (a), in other words the right balancing the right to benefit from one's own creativeness enshrined in Article 15.1 (c). Hence, one could perhaps have expected General Comment No. 21 to tune down the right to control specific cultural elements. Yet, General Comment No. 21 does not set forth any rights to access others peoples' cultures, against their will. True, the CESC calls on states to facilitate *the possibility* to access other cultures. But General Comment No. 21 contains no language suggesting a *right* to access elements of other peoples' cultures, if access is denied.³⁰⁴ Rather, as General Comment No. 17, General Comment No. 21 too, focuses primarily on e.g. indigenous peoples' rights to control their specific cultures.

³⁰² CESC General Comment No. 17, paras. 2, 7, 10, 12 and 32. Almost a decade before the CESC presented General Comment No. 17, O'Keefe had argued for expanding CESCR Article 15.1 (c) to apply also to groups. See *The Right to Take Part in Cultural Life*, pp. 917-918.

³⁰³ CESC General Comment No. 17, paras. 4, 15 and 35

³⁰⁴ This reading of General Comment No. 21 e.g. finds support in the definitions of "*cultural life*" and "*to participate*" in paras. 10-15.

General Comment No. 21, para. 7, underlines that indigenous peoples have the right of all human rights recognized in the UN Charter and the Bill of Rights. Para. 9 repeats General Comment No. 17's recognition that although at the time of adoption, CESC Article 15 was deemed to apply to individuals only, in light of recent developments the provision must today be understood to embrace rights also of groups. Para. 36 calls on states to protect and respect the cultural identity of indigenous peoples. Para. 49 (d) proclaims that states shall respect indigenous peoples' rights to their culture and heritage. Pursuant to para. 43, states shall take measures to prevent signs, symbols and other expressions of a particular culture from being taken out of context for the purposes of marketing or for exploitation by the mass media. Para. 37 affirms that indigenous peoples hold rights to their collective creativity, including to TK and TCEs. The provision further calls on states to respect the principle of free, prior and informed consent of indigenous peoples with regard to such subject matter. In fact, the CESC lists as one of five core elements of General Comment No. 21 states' obligation to "*obtain [indigenous peoples'] free and informed consent when the preservation of their cultural resources, especially ... cultural expressions, are at risk.*"³⁰⁵ As General Comment No. 17, General Comment No. 21 affirms the moral rights aspects of CESC Article 15.1 (c).³⁰⁶

Not only UN treaty bodies have acknowledged collective rights of indigenous peoples. In its recently adopted Operative Policy on indigenous peoples, OP 4.10, the World Bank too, has interpreted international law as awarding rights to indigenous peoples as such.³⁰⁷ Paras. 10 and 11 of OP 4.10 declare that a borrower might only receive funding from the World Bank for projects in indigenous territories provided that there is broad support within the indigenous community for the project. A footnote 4 to OP 4.10 clarifies that paras. 10 and 11 do not award any individual member of the people a veto rights. But the indigenous people as such can object to the project.

It is also worth to briefly touch upon the Indigenous Peoples Cultural Heritage Guidelines, crafted by the WGIP as one of its last act before being dissolved.³⁰⁸ The Guidelines contain

³⁰⁵ Para. 55 (e)

³⁰⁶ Stoll and von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, p. 22

³⁰⁷ The World Bank Operational Manual, Bank Procedures BP 4.10 (January 2005)

³⁰⁸ E/CN.4/Sub.2/AC.4/2006. The Guidelines were crafted in a joint project involving the NGO the Saami Council and WGIP member Professor Yokota. The WGIP Guidelines in turn builds on previous work conducted by the then Chairperson-Rapporteur of the WGIP, Mdm. Daes. Between 1993 and 1995, Mdm Daes undertook studies on the protection of the cultural heritage of indigenous peoples. The final outcome of her work was a set

an elaborate set of provisions suggesting an extensive protection of indigenous peoples' cultural heritage. Worth noting for the purposes of the doctoral thesis, the Guidelines proclaim a right of indigenous peoples to own and control elements of their distinct collective creativity. The WGIP did not manage to formally adopt the Guidelines before its abolition. Neither has the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)³⁰⁹ or any other UN body so far picked up the Guidelines. At present, therefore, the Indigenous Peoples Cultural Heritage Guidelines have little authority as a legal source. Notwithstanding, they could be viewed as yet an indicator of the general trend in international law.

In conclusion, all the most central human rights treaties the UN has adopted have been interpreted - by bodies authoritatively entrusted to do so - as embracing rights of indigenous peoples *per se*. Most notably, both treaty bodies tasked to interpret the application of the right to self-determination have affirmed that the right applies to indigenous peoples. That is so, albeit none of the surveyed instruments were understood to envelope rights of indigenous peoples as such at the time of their adoption. This progressive development in international law has also been confirmed by certain sources beyond treaty bodies. The sources surveyed are strikingly coherent. They assert in chorus that indigenous peoples constitute "peoples" for international legal purposes, enjoying the right to self-determination and other collective rights, including within the sphere of culture.

4.7.3 Regional legal sources

The development enshrined in the outlined globally applicable international legal sources has been matched by similar conclusions in regional processes in Africa, the Americas and Europe. These processes have developed a fairly extensive – and coherent – bulk of legal sources relevant to the question of whether indigenous peoples can hold rights under international law. In Asia, regional processes confirming indigenous peoples' rights are lacking.³¹⁰ This might partly be due to relatively few states in Asia recognizing the existence of indigenous peoples within their borders. But in addition, the Asian region traditionally does not cooperate within the field of human rights. For instance, Asian regional cooperation

of Principles and Guidelines on the Protection of Indigenous Cultural Heritage. See U.N. Doc E/CN.4/Sub.2/1995/26 (1995).

³⁰⁹ Regarding the EMRIP, see further 4.7.4, below.

³¹⁰ Some Asian states have, however, recognized indigenous peoples' rights in their national laws. Reference can here for instance be made to the Philippine Indigenous Peoples Rights Act, Republic Act No. 8371 (1997).

bodies such as the ASEAN do not engage in standard-setting activities within the area of human rights.³¹¹ Lack of documented support from the Asian region need therefore not be taken as evidence of the region being adverse to indigenous peoples' rights.³¹² Also in Oceania, regional standard-setting activities are lacking. But here, domestic processes in relevant countries have confirmed indigenous peoples' rights.³¹³

On the African Continent, as the title suggests, the African Charter on Human and Peoples' Rights (AfCHPR) contains a range of provisions proclaiming peoples' rights. As with the international instruments, questions have been raised as to what is understood with the term "peoples" in AfCHPR.³¹⁴ And similar to its international counterparts, it appears clear that at the time of adoption, the term "peoples" in the AfCHPR referred to the aggregate of the population of the state.³¹⁵ But also the AfCHPR has been subject to progressive interpretation. The AfCommHPR has recently interpreted the term "peoples" in the Charter as not necessarily referring to the aggregate of the inhabitants of the state. The term can also, the Commission submits, refer to ethnic/cultural sub-groups of a state. For instance, the AfCommHPR has confirmed that a distinct ethnic group within Zaire, the Katangese, constitute a people for the purposes of the right to self-determination, stating that "[t]he issue in the case is not self-determination for all Zaireans as a people but specifically for the Katangese." The Commission further clarified that the Katangese should exercise the right to self-determination through self-government in conformity with the principle of territorial integrity, i.e. within the state of Zaire.³¹⁶ In the same vein, in *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, the AfCommHPR held that an ethnically distinct group in Nigeria, the Ogoni people, constituted a people for the purposes of the right to self-determination. And as in the *Katangese Case*, the Commission

³¹¹ Thio, *International law and secession in the Asia and Pacific regions*, pp. 303 and 345

³¹² For instance, as Section 6.2 will demonstrate, the vast majority of the Asean states voted in favour of the DRIP.

³¹³ In New Zealand, this position was confirmed already by the Treaty of Waitangi, entered into by the Crown and the Maori in 1840. The status of the Treaty of Waitangi was subsequently affirmed in the Constitution Act of 1852 and the Maori Land Act of 1862. The Treaty of Waitangi continues to serve as the basis for the relationship between New Zealand and the Maori people, and its confirmation of the Maori as a people is hence still uncontested. With regard to Australia, see e.g. the Aboriginal Affairs Act of 1973 (No. 115, 1973), the Aboriginal and Torres Strait Islanders Commission Act of 1989 (No. 150, 1989) and the Council for Aboriginal Reconciliation Act of 1991 (No. 127, 1991).

³¹⁴ Kiwanuka, *The Meaning of "Peoples" in the African Charter on Human and Peoples' Rights*, p. 80-101, and Nobel, *The Concept of "Peoples" in the African Charter on Human and Peoples' Rights*, pp. 9-17

³¹⁵ Raic, *Statehood and the Law of Self-Determination*, pp. 246-247, and Hannum, *Autonomy, Sovereignty and Self-Determination II*, pp. 46-47

³¹⁶ *Katangese Peoples' Congress v. Zaire*, Communication No. 75/92 (1995), para. 6. See also Dugard and Raic, *The role of recognition in the law and practice of secession*, pp. 107-108.

held that the Ogoni people's right to self-determination was to be exercised through autonomous arrangements, rather than through secession.³¹⁷

The AfCommHPR has also explicitly affirmed that the right to self-determination applies to indigenous peoples, and encompasses a bundle of rights, including the right to self-government, the right to recognition of their traditional way of life and freedom to preserve and develop their respective cultures.³¹⁸ Further, Pityana, member of the AfCommHPR has observed the striking resemblance between AfCHPR Article 20, addressing the right to self-determination, and the corresponding provision in the, at the time, draft DRIP.³¹⁹ In the same vein, the AfCommHPR's Working Group on Indigenous Peoples/Communities has concluded that indigenous rights are collective rights, crucial to indigenous peoples' capacity to survive as distinct peoples.³²⁰ It appears clear that today, the term "peoples" in the AfCHPR encompasses also sub-groups within the state.³²¹ What is more, the African Charter has been explicitly authoritatively interpreted to award rights to indigenous peoples, including the right to self-determination, to be exercised through autonomous arrangements within the state.

On the American Continent, human rights bodies have particularly been active within the field of land and resource rights. These cases are surveyed in Section 5.3. With regard to indigenous peoples' rights in general, the IACommHR has explicitly recognized the collective aspect of indigenous peoples' rights, proclaiming that indigenous peoples' cultures shall in part be protected through guaranteeing the people rights as such.³²² The Commission has further held that states must not engage in acts detrimental to indigenous peoples' ethnic identity.³²³ The IACommHR has also emphasized the need to continuously guarantee indigenous peoples continued access to their traditional lands as a prerequisite to preserve and

³¹⁷ *Ogoni Case. Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001), paras. 45 and 58

³¹⁸ Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted at 41st ordinary session (May, 2007), para. 27. In the Advisory Opinion, the AfCommHPR referred to the *Katangese Case*, indicating that it views the Katangese People as indigenous.

³¹⁹ Pityana, *The challenge of culture for human rights in Africa*, p. 232

³²⁰ Conceptual Framework Paper (2nd draft) by the Working Group on the Rights of Indigenous Peoples/Communities in Africa of the African Commission on Human and Peoples' Rights, 20 December, 2002

³²¹ See also Wheatley, *Democracy, Minorities and International Law*, pp. 82-83.

³²² IACHR, *The Human Rights Situation of Indigenous Peoples of the Americas*, OEA/Ser.L/V/II/108, Doc. 62 (2000), p. 125

³²³ Third Report on the Situation of Human Rights in the Republic of Guatemala OEA/Ser.L/V/II. 67, doc. 9 (1986), at 114

develop their distinct cultures.³²⁴ Albeit, as indicated, the recent jurisprudence on indigenous rights emanating from the IACHR and IACCommHR are predominantly interesting from a property rights perspective, many of these cases in addition place emphasis on indigenous peoples' collective rights to their cultural identity, culture and way of life.³²⁵ On the American continent, the Caribbean Community too has committed to protect the rights of indigenous peoples as well as to respect their cultures and way of life.³²⁶

For several years, the American states have attempted to codify the rights of the indigenous peoples of the Continent, in collaboration with these peoples. In 1989, the General Assembly of the Organization of American States (OAS) decided to commence work on a declaration on the rights of the indigenous peoples of the Americas (the OAS Declaration). In 1995, The IACCommHR approved a draft OAS Declaration to serve as a basis for these negotiations. Since then, American states and indigenous peoples from the American conclave have been negotiating a Declaration on the rights of the indigenous peoples residing in North and South America. The process is yet to be completed. Still, the present draft contains a number of interesting provisions.³²⁷ For instance, Article 3 proclaims that “*Within the States, the right to self-determination of the indigenous peoples is recognized, pursuant to which they can ... promote their ... cultural development.*” Article 20.1 elaborates that indigenous peoples have the right to autonomy/self-government with respect to e.g. culture and administration of land and resources. Further, pursuant to Article 5, indigenous peoples have the right to full enjoyment of all human rights recognized in the UN Charter and the Inter-American human rights instruments. Article 6.2 and 10.1 proclaim that indigenous peoples have the right to their own cultures and to develop their cultural identity. Article 13.1 proclaims that indigenous peoples have the right to preserve, use and transmit to future generations their histories, oral traditions, system of knowledge and literature. Pursuant to Article 12.3, indigenous peoples have the right to respect for e.g. their traditional dresses. Article 28.1 proclaims that indigenous peoples have the right to recognition of property and ownership of their tangible and intangible cultural heritage and intellectual property. And Article 28.2

³²⁴ Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc. 10, rev. 1 (1997), at 115, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., (2000), at Ch. X, para. 16 and Third Report on the Situation of Human Rights in Paraguay. OEA/Ser.L/V/II.110 Doc. 52 (2001), Ch. IX, para. 47

³²⁵ *Moiwana village v. Suriname*, Judgement of June 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 145 (2005) and *Saramaka People v. Suriname*, Judgement on November 28, 2008, Inter-Am. Ct. H.R. (Ser. C) No. 172 (2008). See also Donders, *Towards a Right to Cultural Identity?*, pp. 232-236.

³²⁶ Article XI of the Caribbean Charter of Civil Society (1997)

³²⁷ OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 3, 30 December 2008

clarifies that the intellectual property of indigenous peoples includes e.g. TK, designs and tangible and intangible cultural heritage. Pursuant to Article 24.1 and 2, indigenous peoples have right to recognition of property and ownership rights over lands they have traditionally occupied or used. Finally, Article 12.2 proclaims that indigenous peoples have right to restitution with regard to such parts of their cultural heritage of which they have been dispossessed.

The “*Eleventh Meeting of Negotiations in the Quest for Points of Consensus*”, held by the Working Group to Prepare the OAS Declaration, identified what parts of the OAS Declaration on which there is consensus.³²⁸ The status document records that of the provisions listed above, agreement has been reached on Articles 5 (indigenous peoples collective rights), 6.2 (collective rights to culture; on the parts of the provision relevant to the doctoral thesis), 10.1 (cultural identity), 12.3 (traditional dresses), 13.1 (cultural elements) and 20 (autonomy/self-government; on the parts of the provision relevant to the thesis). The status document further records that no agreement has yet been reached on Articles 3 (self-determination), 12.2 (restitution), 24.1 and 2 (property rights to land) and 28.1 and 2 (property rights to cultural heritage). A vast majority of the participants in The Working Group on the OAS Declaration has agreed that in a situation that no agreement can be reached on a certain provision, the DRIP shall be used as the baseline for further negotiations. Such deliberations shall result in an outcome where the OAS Declaration is consistent with the DRIP.³²⁹

From the American Continent, it is further worth mentioning a Supreme Court case of interest to the doctoral thesis. For obvious reasons, it is uncommon that domestic courts get the opportunity to consider on the applicability of the right to self-determination. A notable exception arose, however, when the Supreme Court of Canada was asked to rule on whether the province of Quebec could unilaterally secede from Canada. Deciding under what circumstances, if at all, Quebec had a right to secession, the Court also got the opportunity to indirectly touch upon whether this right could also apply to sub-groups within the province. After a thorough analysis, the Supreme Court concluded that a people, for international legal purposes, may make up only a portion of the total population of the state. In other words, the

³²⁸ “*Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*”, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 3, 30 December 2008

³²⁹ Report of the Chair, 14 January 2008, document OEA/Ser.K/XVI GT/DADIN/doc.321/08, Section II, G. Although not commenting on the most recent draft, Anaya too, notes that the draft OAS Declaration rests on established human rights norms. See Anaya, *Divergent Discourses About International Law*, p. 242.

Supreme Court denounced the notion that a people necessarily equals the aggregate of the population of a state. According to the Supreme Court, to restrict the definition of “peoples” in such a manner would render the right to self-determination largely duplicative.³³⁰ In other words, the Supreme Court supported the view that also non-state forming peoples can be the beneficiaries of the right to self-determination. The Court underlined, however, that such peoples need to fulfil the right to self-determination through the internal aspect of the right, i.e. through autonomous arrangements within existing state borders.³³¹

Compared with its Inter-American counterpart, the ECHR has had few opportunities to consider rights of indigenous peoples. As Europe hosts few indigenous populations, the indigenous rights discourse is not in forefront in Europe in the same way as it is in the Americas. On the rare occasions the Court has been challenged with indigenous issues, it has taken a fairly conservative approach, as the European human rights institutions have in general taken a rather cautious stand on minority rights.³³² Still, in *G and E v. Norway*, the European Commission on Human Rights (ECommHR) opined that Article 8 of the ECHR in principle entitles indigenous peoples a right to respect for their particular lifestyle.³³³ Moreover, in a political context, the EU Northern Dimension Action Plan, adopted by the EU Council of Ministers, underlines that indigenous peoples of the Arctic are the beneficiaries of the “*inherent right to self-determination*” as well as of a right to their culture.³³⁴

³³⁰ In the same vein, it is worth noting that when repeating the safeguard clause from the Friendly Relations Declaration, the Supreme Court referred not to a government representing “the whole of the people of the state”, but to a government representing the whole of “the people or peoples” residing within its territory.

³³¹ [1998] 1 SCR 217, at 536 and 582 (para. 123-126). See also Crawford, *The Right to Self-determination in International Law*, pp. 47-50 and 59-60, and Durnberry, *Lessons Learned*, pp. 416-452, in particular pp. 436 and 443-446. Durnberry concurs with the interpretation that the Supreme Court opined that the native people of Quebec constitute peoples for international legal purposes, with the same legal status as other peoples in Quebec. He further adds that he shares this position.

³³² Estébanez, *Council of Europe Policies Concerning the Protection of Linguistic Minorities and the Justiciability of Minority Rights*, p. 279, and Alston, *Peoples’ Rights*, pp. 275-276

³³³ *G and E v. Norway*, Appl. No. 9278/81 and 9415/81, Decision on 3 October 1983. A similar position by the ECHR can also be inferred from the recent *Handölsdalen Sami Village and Others v. Sweden*, Appl. No. 39013/04, Judgement of 30 March 2010, also concerning Saami communities. Regarding this case, see further Section 5.3.3.

³³⁴ Commission of the European Communities COM (2003) 343 final, adopted on 10 June 2003. Already in 1994, the European Parliament had pronounced that indigenous peoples have the right to determine their own destinies as well as a right to their separate culture, including a right to have the tangible and intangible features of their cultures protected. See *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, adopted by the European Parliament in its plenary session, Strasbourg, Feb. 9, 1994, Eur. Parl. Doc. PV 58(II) (1994). Further, when Finland and Sweden joined the EU in 2004, the EU accepted an exception to the Union’s general competition rules, allowing Finland and Sweden to render reindeer husbandry as a sole right of the Saami people. The exception was justified by reindeer husbandry’s fundamental importance to the Saami culture. See Article 1 of Protocol 3 to Finland’s and Sweden’s ascending treaty to the EU.

Given the small number of European states hosting indigenous peoples, Europe has naturally not embarked on crafting a European indigenous rights instrument. But Finland, Norway and Sweden have engaged in a process specifically addressing the rights of the Saami people. In 2002, these countries tasked an Expert Group with crafting a draft Nordic Saami Convention, which was subsequently presented in 2005. The draft Convention contains a number of provisions underlining that the Saami people enjoy rights as a people, including the right to self-determination, ownership rights to lands and resources and cultural rights.³³⁵ The Saami Convention remains a draft. When presenting the draft, the experts did, however, underline that they had crafted the Saami Convention in a manner reflecting relevant international norms. The Nordic states have also confirmed the Saami people's right to self-determination in action, by establishing Saami parliaments as tool for the implementation of Saami self-determination.³³⁶ As to the other indigenous people of the European Arctic, the Inuit, Denmark has also posited that the Inuit constitute a people with rights as such, including the right to self-determination. Most recently, Denmark has affirmed this position in the Act on Greenland Self-Government.³³⁷

In conclusion, four continents have seen developments that closely mirror the outlined trend in globally applicable international legal sources. Both African and American human rights institutions have affirmed that indigenous peoples are beneficiaries of collective rights, including the right to self-determination and cultural rights. The AfCommHPR has underlined that the right to self-determination shall be exercised through autonomous and self-governing arrangements, and not through secession. American bodies and processes have reached similar conclusions. The OAS Declaration process is yet to be completed. Still, the deliberations have resulted in agreements on issues such as that indigenous peoples are bearers of collective rights, including to culture and cultural identity, and that they are entitled to autonomy/self-government arrangements. Even though a formal recognition of the right to self-determination is lacking, for practical purposes, the Americas seem to have taken a

³³⁵ Article 3 proclaims that the Saami people – as a people – have the right to self-determination, pursuant to which they e.g. have the right to determine their cultural development. The Expert Group explicitly affirms that the right to self-determination the Saami Convention proclaims is the general right of peoples enshrined e.g. in the common Article 1 of the 1966 Covenants. Pursuant to Article 31 (1), the Saami people has the right to manage their TK and TCEs, and pursuant to 31 (2) states shall see to that the Saami people can exercise influence over activities that utilize the Saami culture for commercial purposes as well as receive a fair share of the profits arising from such activities. Further, the Saami culture shall be protected from utilization of cultural elements that in a deceptive fashion pretends to be of Saami origin.

³³⁶ Finnish Constitution (731/1999), Article 17.3 and Act on the Saami Parliament (974/1995), Norwegian Saami Act (12. juni 1987 nr. 56), and Swedish Saami Parliament Act (1992:1433)

³³⁷ Act no. 473 of 12 June 2009

similar position as Africa, emphasizing indigenous peoples' right to autonomy. The Canadian Supreme Court has confirmed this position. Europe has been less active in the indigenous rights discourse. Yet the European Union too, has confirmed that indigenous peoples are entitled to the right to self-determination. It is further significant that all countries in Europe with recognized indigenous peoples have affirmed that these peoples are entitled to the right to self-determination, to be exercised through autonomy/self-government. Similar rights are recognized, in principle, in Oceania. The only Continent having largely omitted to address peoples' rights is Asia. However, the Section has noted there are natural reasons for this inactivity, which need not be interpreted as an aversion against indigenous peoples' rights *per se*. In sum, there appears to be regional support for the progressive development seen in globally applicable international legal sources.

4.7.4 Recognition of the status of indigenous peoples in UN institution building and processes

The outlined recent developments within the indigenous rights discourse have been mirrored in UN processes and institution building. In this context, one can first note the DRIP process. As Section 6.2 will outline further, the DRIP is the only international legal instrument that has been negotiated between states and the beneficiaries of the instrument. Albeit formal UN rules of procedures demanded that states own the process, in practice, indigenous peoples' representatives participated in the negotiations on par with state representatives. What is more, it was understood from the outset that the DRIP could not be adopted absent the support also of indigenous peoples. This feature of the DRIP process underlines indigenous peoples' unique status in the international legal order.³³⁸

As to institution building, in 2000 the United Nations established the Permanent Forum on Indigenous Issues (Permanent Forum), as a subsidiary body to the ECOSOC.³³⁹ The composition of the Permanent Forum underlines the particular status of indigenous peoples within the international legal system. The Permanent Forum has 16 members, of which eight are appointed by states and eight appointed among candidates nominated by indigenous peoples. This feature of the Permanent Forum renders it unique in the UN system. It is the

³³⁸ Barelli, *The Role of Soft Law in the International Legal System*, p. 970, and Åhrén, *The UN Declaration on the Rights of Indigenous Peoples*, p. 86

³³⁹ Res. E/RES/2000/22

only UN body where member states share decision making power with non-state actors.³⁴⁰ Hence, the Permanent Forum structure seems to affirm indigenous peoples' status as self-determining entities under international law.³⁴¹ Further, in 2007 the UN Human Rights Council established the EMRIP,³⁴² a body that also highlights the special status of indigenous peoples in the world community. The Human Rights Council has established only two advisory bodies. The Advisory Committee is tasked with advising the Human Rights Council on all sorts of human rights issues.³⁴³ The only other advisory body established by the Council - EMRIP - advises the Council specifically on indigenous issues. Furthermore, as the Permanent Forum, the EMRIP underlines the trend towards allowing indigenous peoples to represent themselves, also in the UN system. The resolution creating the EMRIP declares that when appointing members to the five seats in the EMRIP, preference shall be given to qualified indigenous persons. When the first set of members was appointed to the EMRIP, almost all of them were picked among indigenous candidates.³⁴⁴

In conclusion, UN processes and institution building pertaining to indigenous peoples confirm the outlined trend within material rights. But in addition, the way in which the DRIP was negotiated and the structure of the Permanent Forum and the EMRIP, might in fact also contribute to the creation of material law. Boyle and Chinkin observe that indigenous peoples' participation in the DRIP process and their representation on the Permanent Forum on par with state representatives, seem to establish a principle, backed by state practice. These practices underscore, they submit, that today, rights of indigenous peoples cannot be determined without their participation and consent³⁴⁵

³⁴⁰ Boyle and Chinkin, *The Making of International Law*, p. 50

³⁴¹ Anaya, *Indigenous Peoples in International Law II*, pp. 219-220, *IWGIA-Handbook, The Permanent Forum on Indigenous Issues*, and Xanthaki, *Indigenous Rights and United Nations Standards*, p. 175

³⁴² Human Rights Council Res. 6/36

³⁴³ Human Rights Council Res. 5/1

³⁴⁴ Worth mentioning in the context of institution building within the UN system pertaining to indigenous issues is also the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. (Human Rights Council Resolution 6/12.) The Special Rapporteur institute might not underline indigenous peoples' status as peoples. But it underscores international law's distinction between indigenous peoples and minorities, as the latter category have their own independent expert.

³⁴⁵ Boyle and Chinkin, *The Making of International Law*, p. 50

4.8 *The right to non-discrimination*

4.8.1 Introduction

Chapter 2 described how the conventional international legal system was not hospitable to rights of indigenous peoples. On the contrary, it promoted only universally applicable individual human rights, and called on states to remain neutral between cultures. This Chapter has, however, explained how this position has been increasingly challenged during the last three decades or so. The Chapter has outlined how this progression has occurred in three separate – but interlinked - processes, whereof the two first have occurred around the same time, whereas the third, even though there are overlaps, can be said to be more recent. The Chapter has described how the first two developments in international law consisted of (i) a “collectivization” of formally individual human rights, amounting to an indirect protection also of the group as such, and (ii) recognition of collective rights proper *sui generis* to indigenous groups, first and foremost illustrated by the adoption of ILO 169. Subsequently, the Chapter surveyed legal sources – both globally applicable and regional – asserting that indigenous groups, to the extent they qualify as peoples under international law, enjoy rights as such, including the right to self-determination.

This Section of the Chapter now turns to the right to non-discrimination. This is essentially a right to have all other human rights applied to one on an equal basis.³⁴⁶ Consequently, it is reasonable to assume that if international law has evolved in the manner the Chapter above suggests, these developments have been echoed within the rubric of non-discrimination. In other words, if international law awards indigenous peoples rights as collectives, one can expect the right to non-discrimination too, to have acquired a collective dimension.

4.8.2 The conventional understanding of the right to non-discrimination

Already UDHR Articles 2 and 7 enshrine the right to non-discrimination, and the right has subsequently been incorporated into a number of human rights instruments, including the CCPR (Articles 2.2 and 26) and the CESCRC (Article 2.2). Most notably, the adoption of the CERD in 1965 implied that an entire international treaty was devoted to the issue of

³⁴⁶ CERD Convention Article 1.1, CESCRC and CCPR Articles 2.2, and Tomasevski, Indicators, p. 533

discrimination. Today the right to non-discrimination is generally held to form part of international customary law, and possibly even to constitute a peremptory norm.³⁴⁷

Pursuant to the CERD Article 2.1 (a), states undertake not to engage in any act discriminating not only individuals, but also racial groups. Further, Article 2.2 proclaims that states shall, when the circumstances so warrant, take special measures to ensure the protection not only of individuals belonging to a group, but also of the racial group as such. The provision goes on to underline, however, that such measures must not result in maintenance of separate rights for the group. In the same vein, pursuant to Article 1.4, special measures shall not be deemed discriminatory, provided that the measures do not result in lasting group rights. At first glance, Articles 1.4 and 2.2 might be perceived as proclaiming at least light collective rights to non-discrimination. It is generally held, however, that at the time of the adoption, these provisions were not interpreted as establishing rights of groups.³⁴⁸ In fact, they were rather understood as prohibiting group rights, only allowing temporary special treatment of groups.³⁴⁹ Further, special measures could only be undertaken to bring members of minority cultures to the same level as the majority population. Measures aiming at preserving the group's cultural distinctiveness were not foreseen.³⁵⁰ CERD Committee member Thornberry has observed that at the time of adoption, the CERD was “*dedicated to eliminating discrimination rather than positively recognizing diversity.*”³⁵¹ Similarly, Makkonen notes that the CERD was a child of its time, enveloping no explicit references to e.g. cultural rights.³⁵² That during this era, the CERD was not understood as supporting group rights also follows from Article 2 only placing obligations on states, rather than proclaiming rights of groups. The central material provision of the CERD Convention, Article 5, only speaks of “everyone's” right to non-discrimination, clearly indicating its applicability to individuals only.

³⁴⁷ See further Sections 7.2.2 and 7.2.4.

³⁴⁸ Cassese, *Self-Determination of Peoples*, p. 329, Fredman, *Combating Racism with Human Rights*, p. 23, and Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination*, p. 57

³⁴⁹ Thornberry, *International Law and the Rights of Minorities*, pp. 266-268, and Makkonen, *Equal in Law, Unequal in Fact*, p. 95

³⁵⁰ Still, Makkonen notes that Articles 1.4 and 2.2 were perceived as rather radical at the time, when calling on states to take special measures – albeit temporary such – to combat discrimination. But as Makkonen further observes, perhaps due to the provisions being somewhat ahead of their time, states seem initially not to have adhered to them in any significant manner. See *Equal in Law, Unequal in Fact*, pp. 102-103.

³⁵¹ Thornberry, *the Convention on the Elimination of Racial Discrimination*, p. 18

³⁵² Makkonen, *Equal in Law, Unequal in Fact*, p. 92

Notably, the outlined conventional understanding of the right to non-discrimination corresponds well with the traditional interpretation of the right to culture. Both sets of rights were perceived as rights of individuals only, and states were in both instances supposed to remain neutral, and not positively promote the rights. As seen, CCPR Article 27 was understood in accordance with its wording, i.e. as a negatively formulated right, merely calling on states not to interfere with individuals exercising their culture. Similarly, under the CERD Convention, only such special measures were accepted that aimed at bringing minority cultures to the level of the majority culture. No measures promoting cultures were envisioned.³⁵³ At the time, “special” rights for particular segments of the population of the state were deemed inherently discriminatory.

4.8.3 Acceptance of special measures promoting cultural diversity

Sections 4.4 and 4.5 described how, subsequent to the adoption of the CERD, international law on minorities’ rights and the right to culture broke with the conventional individual liberalism tradition. Instead, international law came to hold that the state is obliged to actively intervene to protect and promote the cultural distinctiveness of members of minority groups, extending an indirect protection also to the group as such. The HRC’s interpretation of CCPR Article 27 was identified as particularly important for this development. Section 4.5’s analysis was limited to the HRC’s view on the right to culture. But the Committee has progressively interpreted the non-discrimination provisions in the CCPR too. In General Comment No. 31 (2004), the Committee opined that CCPR Article 26 embraces a positive duty on states to prevent discrimination³⁵⁴ This position was applied around the same time in *Jacobs v. Belgium*³⁵⁵, where the HRC also interpreted CCPR Article 26 as encouraging relatively far-reaching positive measures by the state to prevent discrimination. In the same vein, the CESCR has recently held that CESCR Article 2.2 obliges states to take measures to prevent discrimination.³⁵⁶

³⁵³ Kymlicka too, has noted that the right enshrined in CCPR 27, as understood at the time of its adoption, essentially equalled the conventional understanding of the right to non-discrimination. See *Multicultural Odysseys*, p. 35.

³⁵⁴ General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant: . 26.05.2004. CCPR/C/21/Rev.1/Add.13, para. 8

³⁵⁵ *Jacobs v. Belgium*, Comm. No. 943/2000, views adopted on 7 July 2004

³⁵⁶ General Comment No. 20, (Article 2, para. 2), E/C.12/GC/20, 10 June 2009 paras. 9 and 36. See also Makkonen, *Equal in Law, Unequal in Fact*, p. 120.

Simultaneous with its sister-bodies, the CERD Committee has progressively interpreted the right to non-discrimination enshrined in the main international legal instrument aiming at preventing discrimination. In General Recommendation No. 14³⁵⁷, the Committee first observed that differentiation in treatment does not constitute discrimination provided that the criteria for differentiation are legitimate. Subsequently, the CERD Committee held that the CERD Article 2.2 embraces an obligation on states to take affirmative action when the circumstances so warrant.³⁵⁸ Similarly, in General Recommendation No. 20, the Committee opined that states are positively obliged to prevent discrimination caused by private entities.³⁵⁹ In 2009, the CERD Committee summarized its previous findings, and firmly underlined that the CERD includes a positive obligation on states to take special measures to ensure non-discrimination in practice.³⁶⁰ In other words, the Committee has come to interpret CERD as demanding quite different positive measures compared with those envisioned at the time of the adoption of the Convention. The CERD Committee now interprets the right to non-discrimination as calling on states to take positive measures promoting the cultural particularities of members of minority groups, on a permanent basis. Such measures stand out in stark contrast, compared with temporary measures aiming at bringing members of minority groups to the same level as the majority population, as CERD was previously understood to promote.

In conclusion, the right to non-discrimination has evolved to call on states to take positive measures to positively protect members' of minority populations' possibility to preserve their cultural distinctiveness.³⁶¹ Interpreted in such a manner, the understanding of the right to non-discrimination appears to – for all practical purposes – essentially match the “collectivized” minority rights and right to culture as outlined in Sections 4.4 and 4.5. The doctoral thesis shall return to this comparison in Section 4.9

³⁵⁷ General Recommendation No. 14: Definition of discrimination (Art. 1, par. 1) : . 22.03.1993

³⁵⁸ Concluding Observations on the United States, A/56/18, para. 299, on Uruguay, CERD/C/304/Add. 78, para. 13, and on Fiji, CERD/C/62/CO/3, para. 15

³⁵⁹ General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5), A/51/18 (Annex VIII, A) 15 March, 1996. See also Thornberry, *The Convention on Racial Discrimination*, pp. 25-26.

³⁶⁰ 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, 24 September 2009

³⁶¹ Makkonen, *Equal in Law, Unequal in Fact*, pp. 172-173. That said, Makkonen further notes that the more precise content of this obligation remains ambiguous. But this does not nullify the existence of the general principle, which is what is relevant for the present purposes.

4.8.4 The contemporary understanding of the right to non-discrimination - protection of group rights

The doctoral thesis has hence concluded that the CERD Committee and other relevant bodies have more recently interpreted the right to non-discrimination as including a positive obligation on states to prevent discrimination in a manner respecting cultural differences. In the context of indigenous peoples, the Committee appears to have been ready to take this development one step further. In the previously discussed General Recommendation No. 23, the CERD Committee interprets the right to non-discrimination enshrined in the CERD as applying - also formally - to indigenous peoples. The opening paragraph of the General Recommendation proclaims that “*discrimination against indigenous peoples falls under the scope of the [CERD] Convention...*”. In subsequent paragraphs, the Committee proceeds to elaborate on the more precise scope and content of, what would then be, a right to non-discrimination of indigenous peoples. Paragraph 4 (e) declares that states shall ensure that indigenous communities can exercise their cultural rights and revitalize their cultural traditions and customs. Paragraph 5 calls on states to especially recognize and protect indigenous peoples’ right to own and control their communal lands and resources. The CERD Committee has reaffirmed these positions in subsequent observations and decisions. In doing so, the Committee has underscored that indigenous peoples’ collective right to non-discrimination also embraces a right to protection of their culture and way of life.³⁶² Thus understood, the right to non-discrimination is not only a right of indigenous individuals to have all human rights applied to them equally with other individuals. It is also a right of indigenous peoples to enjoy peoples’ rights on an equal basis with other peoples.³⁶³

In the previously referred to General Recommendation No. 32, the CERD Committee also gets the opportunity to return to the question of CERD’s relevance to groups. Doing so, the Committee reiterates that the application of the principle of non-discrimination demands that the characteristics of groups are taken into account. It further underlines that special measures might be one tool to accommodate for the particular situation of groups.³⁶⁴ General Recommendation No. 32 further addresses the relationship between collective human rights and the right to non-discrimination, in general, and the relationship between collective human rights and special measures, in particular. The CERD Committee clarifies that CERD Article

³⁶² Early Warning & Urgent Action Procedure initiated against New Zealand, Decision 1 (66), CERD/C/DEC/NZL/1.27/04/2005/ and the United States of America, DECISION 1 (68), CERD/USA/DEC/1

³⁶³ Compare Tomasevski, Indicators, p. 533 and Eide, Economic, Social and Cultural Rights, p. 549.

³⁶⁴ General Recommendation No. 32, paras. 8 and 11

1.4 stipulating that special measures “*should not lead to the maintenance of separate rights*” must not, in a contemporary understanding of the right to non-discrimination, lead to the conclusion that this right is incompatible with group rights. On the contrary, the Committee underscores that special measures normally being time-limited, does not imply that collective human rights are not permanent. Special measures, the CERD Committee emphasizes, might be necessary to realize group rights, but must not be confused with such. The Committee makes similar comments with regard to CERD Article 2.2. Albeit specifically referring to “indigenous peoples”, the General Recommendation No. 32 does not echo General Recommendation No. 23’s proclamation that the right to non-discrimination applies directly to such peoples.³⁶⁵ Explaining the CERD’s relevance to groups, the CERD has further observed that the Convention is a living instrument which must be interpreted and understood in the circumstances of contemporary society.³⁶⁶

As seen above, also treaty bodies others than the CERD have contributed to the understanding of the right to non-discrimination. In addition to affirming that the right to non-discrimination embraces a positive duty on states to prevent discrimination, the HRC already in 1989 concluded that the right to non-discrimination need not necessarily mean identical treatment in every instance. It has repeated this position in subsequent jurisprudence. The Committee has stressed that different treatment does not amount to discrimination as long as the criteria for differentiation are reasonable and objective.³⁶⁷ In other words, the HRC has not called for different treatment of situations that are notably different, but has legitimized such action. In the same vein, the CESCR has in the previously referred to General Comments No. 20 stated that combating discrimination requires paying sufficient attention to, and eliminating, systematic discrimination of groups.³⁶⁸

On a regional level, European institutions, in particular the ECHR, have been active in interpreting the right to non-discrimination. The ECHR has noted an emerging consensus

³⁶⁵ See in particular General Recommendation No. 32 paras. 15, 26 and 35. See also Makkonen, *Equal in Law, Unequal in Fact*, p. 95.

³⁶⁶ Communication (*Hagan v Australia*), A/58/18, Annex IIIA, 26/2002, para. 7.2

³⁶⁷ General Comment No. 18: Non-discrimination, A/45/40, Annex VI/A, paras. 7 and 8, *Süsser v. Czech Republic*, Comm. No. 1488/2006, views adopted 25 March 2008, *Vjateslav Tsarjov v. Estonia*, Comm. No. 1223/2003, views adopted on 26 October 2007, and *X v. Colombia*, Comm. No. 1361/2005, views adopted on 30 March 2007

³⁶⁸ CESCR 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 (2009), UN Doc. E/C.12/GC/20, paras. 8, 12 and 39

among European states that minorities are entitled to protection of their distinct identities and lifestyles.³⁶⁹ The EC court, the European Court of Justice (ECJ) has, as the HRC, acknowledged that treating instances different that are significantly different need not amount to discrimination.³⁷⁰ The ECHR has, however, taken the ECJ/HRC recognition that treating different cases differently *need* not constitute discrimination one step further. In the *Thilmmenos Case*, the ECHR held that the right to non-discrimination does not only entail that equal cases be treated equally, but also that different cases be treated differently. Having initially noted that “*The 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 ECHR proceeded to declare that it “... *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*”.³⁷¹ Since, as Section 4.4 explained, rulings of the ECHR have direct effect on EC law, one can expect the EC institutions to also accept the ruling in *Thilmmenos*. Recent interpretations of the European Social Charter confirm that European law embraces the facet of the right to non-discrimination asserting that different situations call for different treatment.³⁷²

The Section has hence described how CERD General Recommendation No. 23 submits that the right to non-discrimination not only indirectly, but formally, applies to indigenous peoples as such. The Committee has subsequently, for instance in General Recommendation No. 32, affirmed that the right to non-discrimination do have relevance also for groups *per se*. The CERD Committee has added that special measures can be one tool through which to address the situation of groups, catering for their cultural distinctiveness. At the same time, however

³⁶⁹ *Chapman v. the United Kingdom*, Appl. No. 27238/95, paras. 90-93

³⁷⁰ The ECJ has repeatedly held that the principle of equal treatment includes that “*different situations must not be treated in the same way unless such treatment is objectively justified*.” See e.g. Case C-210/03, *Swedish Match* (2004) ECR I-11893, para. 70. See also Stavenhagen, *Cultural Rights*, pp., 91-92, and McCrudden, *The New Concept of Equality*, p. 20.

³⁷¹ *Thilmmenos v. Greece*, Appl. No. 34369/97. The ECHR has in principle confirmed this position in subsequent case-law, but has at the same time in practice been careful to apply this facet of the right to non-discrimination. See *Chapman v. The United Kingdom*, Appl. No. 27238/95, *Nachova and others v. Bulgaria*, Appl. No. 43577/98 and 43579/98, and *Stoica v. Romania*, Appl. No. 42722/02. See also Makkonen, *Equal in Law, Unequal in Fact*, pp. 127-128, and Arnardóttir, *Equality and non-discrimination under the European Convention on Human Rights*, pp. 10-11. Arnardóttir argues that *Thilmmenos* shall be interpreted to imply that while relevant equalities demands equal treatment, only “highly” relevant inequalities requires unequal treatment.

³⁷² The European Committee on Social Rights, tasked with interpreting and implementing the Social Charter has noted that discrimination occurs also when states fail, without objective and reasonable justification, to treat differently persons whose situation is different. See ECSR, *ERRC v. Italy*, decision of 7 December 2005, para. 36, and *Autisme-Europe v. France*, decision of 4 November 2003, para. 52.

the Committee has also, with the sole exception of General Recommendation No. 23, distinguished between collective human rights in general and the right to non-discrimination. The CERD Committee has affirmed that the right to non-discrimination should be applied in a manner supporting the realization of group rights in general. But it has stopped short of repeating its suggesting that the right to non-discrimination as such formally constitute a collective right proper. Neither does the notion that the right to non-discrimination applies formally to peoples find support in the other legal sources surveyed. The legal doctrine concurs with this assessment.³⁷³ In sum, evidence suggests that the right to non-discrimination has not yet evolved to *formally* apply to groups as such.

That said, the right to non-discrimination might still have acquired a facet rendering it *indirectly* applicable also to groups, and, perhaps, in particular to indigenous peoples. We have seen that the ECHR has proclaimed that the right to non-discrimination embraces a right of those that are significantly different to be treated as such. The HRC has not explicitly called for differential treatment. But it has affirmed that treating those individuals different whose situation is significantly different is a legitimate aspect of the right to non-discrimination. In the same vein, CESCR has opined that states must take measures to eliminate systematic discrimination of groups, in a manner recognizing their cultural differences. It would appear that for all practical purposes, an obligation to undertake such measures is very similar to an obligation to treat individuals different that have different cultural identities. Both measures presumably imply particular rights of individual members of minority groups to continuously pursue their cultural practices, resulting in indirect protection also of the group as such. Further, the CERD Committee too, has held that the right to non-discrimination must be applied in a manner protecting collective cultural rights in general. Clearly, this understanding of the right to non-discrimination demands that different cases be treated differently. On an individual level, protection of the cultural rights of the group as such boils down to a right of the individual member to practice the cultural traditions specific to the group, i.e. a right to be different compared with members of the majority population.

³⁷³ For instance, Makkonen, having studied the right to non-discrimination in depth, concludes that the right to non-discrimination, despite recent developments, formally remains individual in nature. Makkonen further infers, however, that this has not prevented the right from responding to recent trends within political philosophy, such as welfare liberalism and communitarianism. See *Equal in Law, Unequal in Fact*, pp. 178-179.

In sum, all relevant UN treaty bodies and the ECHR concur that the right to non-discrimination no longer only demands that equal cases be treated equally. In addition, the right to non-discrimination envelopes a right of members of minority cultures to be different, in a manner respecting their cultural distinctiveness. As Hannum has noted; “*A fundamental state obligation under international human rights norm is to eliminate discrimination, not to destroy all differences.*”³⁷⁴ Importantly for the purposes of the doctoral thesis, as is further clear from the above, the second facet of the individual right to non-discrimination further implies that the right has evolved to apply, not formally, but in practice, also to groups. A right of individuals to be treated differently for all practical purposes protects also the cultural distinctiveness of the group as such.³⁷⁵ The conclusion that the right to non-discrimination protects also groups as such finds support in the legal doctrine.³⁷⁶ This conclusion is also in line with Petrova’s and Parekh’s observations that it is a fact that racial discrimination - per definition - presupposes the existence of ethnic and/or racial groups in society. Even if an individual might be the victim of racial discrimination, she is so not because of her own characteristics, but because of association with a particular group. Consequently, racial discrimination cannot be tackled in individual terms.³⁷⁷ As a final observation in this context, one can note that the right to non-discrimination demanding not only that equal cases be treated equally, but also that different cases be treated differently, implies conformity in

³⁷⁴ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, p. 476

³⁷⁵ For instance, hunting might constitute a traditional livelihood with a specific cultural significance to an indigenous people, but not to the majority population. Under such circumstances, a contemporary understanding of the right to non-discrimination calls for differentiation in treatment between members of the indigenous and the majority populations when it come to e.g. hunting quota, securing continuous possibilities to hunt for the indigenous population. Such differential treatment directly protects the cultural identity of the individual member of the group. But in addition, securing hunting quota for the individual member of the group, also secures hunting as a traditional cultural-based livelihood of the people as such.

³⁷⁶ The 2008 Declaration of Principles of Equality (www.equalrightstrust.org, 25 April, 2010), signed by 128 prominent human rights experts, submits that the right to non-discrimination applies also to groups. See in particular principles 5 and 9. McCrudden concurs that the aspect of the right to non-discrimination calling for different cases to be treated differently is in effect a group right. See *The New Concept of Equality*, pp. 22-23. For similar observations with regard to the similarity between a collective right to culture and an individual right to be treated differently, see Thornberry, *The Convention on the Elimination of Racial Discrimination*, p. 23, Wheatley, *Democracy, Minorities and International Law*, p. 22, Lea, *Property Rights, Indigenous People and the Developing World*, p. 20, Castellino, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, p. 61, Tomasevski, *Indicators*, p. 533, Hartney, *Some Confusion Concerning Collective Rights*, p. 220, Packer, *On the Content on Minority Rights*, p. 122, Stavenhagen, *Cultural Rights*, p. 98, and Anaya, *Indigenous Peoples in International Law II*, p. 139. Makkonen agrees that such a right is starting to take shape. See *Equal in Law, Unequal in Fact*, pp. 180-181.

³⁷⁷ Petrova, *Racial Discrimination and the Rights of Minority Cultures*, p. 67, and Parekh, *Redistribution or recognition*, p. 210. In the same vein, Fredman has noted, having studied jurisprudence from the Canadian Supreme Court, that in order to determine whether an individual has been discriminated against, one must often first determine whether the group she belongs to has historically been disadvantaged. See *Providing Equality*, pp. 177-179. Fredman’s observations are made in the context of equality within the sphere of social welfare. Still, they support the argument that it is not possible to craft adequate non-discrimination law if not also addressing the situation of the group as such.

practice with, if not a formal recognition of, CERD General Recommendation No. 23's assertion that the right to non-discrimination applies directly to indigenous peoples.

The described development suggests that the rights to culture and non-discrimination have continued to evolve in tandem. Section 4.8.3 noted that the right to non-discrimination progressing to include a positive obligation on states to prevent discrimination appears to have been matched by the right to culture acquiring a collective dimension rendering it indirectly applicable also to groups. Obviously, the further evolved understanding of the right to non-discrimination outlined above, implying that also this right indirectly benefits groups, corresponds even better to the mentioned aspect of the right to culture. But the progressed implication of the right to non-discrimination also brings this aspect of the right closer to the understanding of indigenous peoples' cultural rights proper. As Section 4.7 described, indigenous peoples cultural rights imply, in general terms, that indigenous peoples are entitled to protection of their cultural identity and practices. The parallel of this right to a right to non-discrimination entailing a positive right of indigenous individuals to preserve and pursue their distinct cultural practices, resulting in a protection of the cultural identity also of the group as such, is apparent. In sum, again we see how the conclusions within different spheres of law are mutually supportive. What has been inferred above with regard to the contemporary understanding of the right to non-discrimination supports the conclusions drawn in the contexts of the rights to culture and self-determination, and vice versa.³⁷⁸

As a final observation in this context, it is interesting to recall the PCIJ's interpretation of the right to non-discrimination 75 years ago in the *Minority Schools in Albania Case*.³⁷⁹ Clearly, the PCIJ's opinion that "*equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations*", presents a striking resemblance to the position international law has again taken some seven decades later. Similarly, the PCIJ's comparison between the right to non-discrimination and cultural rights of groups could have been cut out of a legal source of yesterday. Recall how the Court proclaimed that "*[t]he idea underlying the treaties for the protection of minorities is to secure*

³⁷⁸ Makkonen notes that group oriented rights are emerging in other spheres of law, including within the area of cultural rights. He maintains, however, that the relationship between non-discrimination law, on one hand, and such other spheres of law, on the other, "*is by no means clear or resolved*". See *Equal in Law, Unequal in Fact*, p. 171. Petrova concurs that norms of equality and human rights in general are not sufficiently integrated. See *A Right to Equality Integral to Universal Human Rights*, p. 4. One aspiration of the doctoral thesis is of course to shed some light on the relationship between these areas of law.

³⁷⁹ See Section 2.4.

for certain elements incorporated in a State, the population of which differs from them in race ... the possibility of ... preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.” It would appear that after three quarters of a century, international law is back at the position taken by the PCIJ in the *Minority Schools in Albania Case*.

4.8.5 Briefly on the relationship between the right to non-discrimination and the universality of human rights

Section 2.5 explained how it has been an underlining principle in the modern international human rights system since it emerged that human rights are individual and universal; i.e. they apply equally to all individuals. Not surprisingly therefore, it has been argued that the recent developments in international law towards recognition of group rights and that the right to non-discrimination embracing also a right to differential treatment, violate the keystone principle of the universality of human rights. If human rights are indeed universal, is it not a paradox to suggest that they apply differently depending on cultural context? As McGoldrick puts it, “*while international human rights is a universal doctrine, multiculturalism can appear to be a localising doctrine*”.³⁸⁰ Given the centrality of the notion of the universality of human rights in the conventional human rights system, it appears pertinent that the doctoral thesis briefly responds to these assertions.

Anaya answers the posed question simply by noting that if universal rights protecting cultural differences is a paradox, then contemporary human rights law has embraced this paradox.³⁸¹ As already pointed to several times, and as Chapter 7 will elaborate further, international law is not cast in stone. It is constantly evolving, including the understanding of its underlying principles. This Chapter has surveyed such developments within the field of cultural rights and the right to non-discrimination. Provided that the conclusions in the Chapter are correct, it is of little use to point at the principle of universality of human rights. As Anaya has observed, if it should be correct that the notion of universality of human rights cannot be reconciled with group rights and differential treatment, then international law has opted for the latter. And, as this and the previous Chapter have outlined, international law has done so exactly because of an increased acknowledgment that a human rights system focusing solely

³⁸⁰ McGoldrick, *Multiculturalism and its Discontents*, p. 233

³⁸¹ Anaya, *Indigenous Peoples in International Law II*, p. 133

on universal individual rights fails to adequately protect the interest of ethnic and cultural groups – as well as of their members - and can potentially erase cultural diversity. As Crawford has noted, accepting the universality of human rights without accommodating for cultural differences can be viewed as akin to accepting that human rights do not protect against assimilation.³⁸² In the same vein, Fredman has observed that the conventional understanding of the right to non-discrimination “*is based on an assumption of conformity to a given norm, and therefore of assimilation.*” Equal cases be treated equally implies, she points to, that she who seeks non-discrimination protection must agree to be considered to be “like” the standard model.³⁸³

It is true that the idea of universality of human rights - in the sense that human rights are individual only, and applies equally to all individuals - is incompatible with group rights. Section 2.5 described how, in the wake of World War II, states deliberately opted for the former alternative. Now, this Chapter has demonstrated that states have simply changed their position, and accepts a group oriented aspect of international law, particularly in the context of indigenous peoples. That said, the contemporary understanding of the rights to culture and non-discrimination is not incompatible with the principle of universal human rights – in the sense that human rights apply equally to all on a global level.. The rights to culture and non-discrimination still have universal *applicability*. The only difference is an acknowledgement of that when the universally applicable right is being *implemented*, this need not result in mainstreaming, i.e. equality in law. Rather, implementing a right taking into consideration different cultural contexts could result in differentiated treatment, allowing for the preservation of distinct cultural identities, i.e. equality in fact. In other words, the right to preserve one’s particular identity applies universally. But implementing these right demands difference in treatment, exactly because of these cultural differences.

³⁸² Crawford, *The Right to Self-Determination in International Law*, p. 24

³⁸³ Fredman, *Combating Racism with Human Rights*, p. 16. Compare also Otto, *Rethinking the “Universality” of Human Rights Law*, pp. 7-8.

4.9 Conclusions

4.9.1 Introduction

The Chapter has surveyed international legal sources pertaining to indigenous peoples' right to preserve, develop and determine over their cultural identities, practices and societies. It identified three general spheres of law as relevant to this analysis; the right to culture, the right to self-determination and the right to non-discrimination. Still, throughout, the Chapter has noted how the rights to culture, self-determination and non-discrimination overlap, interlink and are mutually supportive. This is rather natural. In the final analysis, the applicability of each of the three rights to indigenous groups depends largely on the same question; can indigenous groups constitute "peoples" for international legal purposes? If so, it makes sense that they enjoy both the right to self-determination and a collective right to culture. An analysis concluding that indigenous peoples, as peoples, enjoy the right to culture, but not the right to self-determination, or vice versa, is improbable. It is further rationale that if indigenous peoples have been held to be beneficiaries of human rights, that the right to non-discrimination, being one of the most fundamental of human rights, is also entertained in this context.

It is repeated that the focus of this Chapter has been, and continuous to be, on the identified underlying general question, i.e. whether indigenous peoples constitute peoples with rights as such under international law. The material scope and content of potential rights are subject to analyses in Chapters 8 and 12. So the question is then, to what extent do indigenous peoples enjoy rights proper under international law. To answer the posed question, the Section will first briefly recap the two set of rights outlined above not constituting indigenous peoples' rights proper, namely (i) collectivized minority rights, and (ii) rights *sui generis* to indigenous populations under ILO 169. These conclusions will then serve as a stepping-stone when the Section turns to indigenous peoples' rights proper.

4.9.2 Collectivized individual rights and rights *sui generis* to indigenous populations

Section 4.5 described how both novel minority rights instruments and evolved understandings of existing treaty provisions have rejected the notion that the state shall remain neutral between cultures. On the contrary, the state has a positive duty to ensure that members of minority groups can preserve their cultural distinctiveness. They must not be treated as a member of the majority culture against their wish. Importantly, this evolved understanding of minority rights/the right to culture extends, in all but formal sense, a protection also to the collective culture and cultural identity of the group as such; so called “collectivized individual rights”.

Sections 4.8.3 and 4.8.4 surveyed the right to non-discrimination, discovering that this right has evolved to match the development within the right to culture. Simultaneously with the right to culture evolving to take on the “collectivized” aspect, the right to non-discrimination progressed to embrace a positive obligation on states to protect members of minority groups’ possibility to preserve their cultural distinctiveness. It was concluded that this facet of the right to non-discrimination corresponds almost exactly with collectivized individual rights to culture.³⁸⁴ As the collectivized right to culture, this aspect of the right to non-discrimination also indirectly protects the group as such.

In sum, during the 1990s and into the early 2000s the rights to culture and to non-discrimination evolved in tandem. Analyzing the two rights in conjunction, the doctoral thesis does not hesitate already at this point to conclude that international law firmly establishes that states have a positive duty to ensure that indigenous groups can continuously pursue their culture practices and preserve and develop their collective cultural identity.³⁸⁵ The right is not formal, but indirect. But that does not impact on the content or effect of the right.

Turning to rights *sui generis* to indigenous populations, Section 4.3 described how the UN, when starting to consider indigenous rights, distinguished between indigenous populations

³⁸⁴ Section 4.9.3 will draw some final conclusions with regard to how both the right to non-discrimination and the right to culture/self-determination has continued to progress to take on a third facet

³⁸⁵ As seen, the minorities’ rights instruments further support this conclusion.

and minorities. The importance of the distinction became apparent when the Chapter, having concluded the analyses of minority rights, turned its attention to rights of indigenous populations. Differing from minority rights, the indigenous rights discourse focused, also formally, on the collective aspects of indigenous societies. Sections 4.3 and 4-6 demonstrated how the distinction between minority and indigenous rights became apparent in two draft Declarations developed in two parallel processes at approximately the same time. While the draft Minority Declaration focused on equal treatment between individuals, the draft DRIP enshrined collective rights proper of indigenous peoples to e.g. self-determination and culture. In the same vein, the ILO 169 focuses on collective rights too.

Section 4.6 outlined how the ILO 169 proclaims that indigenous groups hold collective rights proper, including to culture and to “ethno-political self-government”. The Section concluded that despite the relatively limited number of states having ratified the ILO 169, these core aspects of the Convention reflects crystallized international law. It is reiterated that the doctoral thesis does not hesitate to draw this conclusion already at this point. That is particularly so if interpreting the ILO 169 in light of the parallel developments within cultural rights and the right to non-discrimination. At the same, Section 4.6 further inferred that although ILO 169 refers to the beneficiaries of the rights of the Convention as “peoples”, it is evident that the Convention does not enshrine peoples’ rights proper. Notwithstanding - together with the collectivized right to culture/the evolved understanding of the right to non-discrimination - the ILO 169 proclaiming collective rights of indigenous populations to rights to “ethno-political self-government” and culture served as a stepping-stone for indigenous peoples’ rights proper. And it is to these rights the doctoral thesis now turns.

4.9.3 Indigenous peoples’ rights proper

Section 4.7 observed that the most central UN treaty bodies have all recently held that indigenous peoples do enjoy rights as such. In particular, the two treaty bodies that have the opportunity to address the applicability of the right to self-determination have concurred that indigenous groups can constitute peoples for international legal purposes, then being the beneficiaries of the right to self-determination. The Section further noted that these findings have been supported by regional sources from all but one continent.

Section 4.8.4 noted that the parallel development between the right to culture and the right to non-discrimination did not end with the latter right confirming the collectivized right to culture. Rather, as legal sources evolved suggesting that the right to culture applies also formally to indigenous peoples, the right to non-discrimination too, continued to progress. Section 4.8.4 concluded that the right to non-discrimination has taken on a third facet, implying that it applies also to groups as such, albeit indirectly. Hence, although the comparison limps in the sense that there is limited support for the right to non-discrimination constituting a right proper of indigenous peoples, for all practical purposes the right to non-discrimination offers support also for the conclusion that indigenous peoples enjoy rights proper to culture/self-determination.³⁸⁶

Above, the doctoral thesis did not hesitate to conclude that collectivized human rights and *sui generis* collective rights of indigenous populations have crystallized into law. Here, a joint analysis of the rights to self-determination/culture and non-discrimination supports a conclusion that international law has also recognized that indigenous peoples do enjoy peoples' rights proper. Still, as indicated above, such recognition constitutes a much more dramatic step for international law to take, compared with acknowledging collectivized individual rights/rights *sui generis* to indigenous populations. States had also had relatively little time to react to the sources submitting that indigenous peoples constitute peoples proper, with rights as such, including the right to self-determination, prior to September 2007.³⁸⁷ These two factors create a certain degree of uncertainty as to what extent the sources Section 4.7 has surveyed reflect established international law. This uncertainty is also reflected in the legal doctrine of the time.

Based on the outlined legal sources, several legal scholars argued that international law had recognized rights proper of indigenous peoples. For instance, Johnston asserted that international law at least recognizes a right of ethnic/cultural groups to self-preservation.³⁸⁸ Lenzerini agreed that indigenous peoples have emerged as distinct subjects of international

³⁸⁶ As Section 4.9.2 noted, this conclusion follows from differently framed but yet concurring jurisprudence from the ECHR, the HRC, the CERD Committee and the CESC. The conclusion also enjoys broad support in the legal doctrine.

³⁸⁷ Recall that this Section focuses on international legal sources pre-dating the adoption of the DRIP. Hence the reference to September 2007.

³⁸⁸ Johnston, *Native Rights as Collective Rights*, pp. 186-187

law.³⁸⁹ More concretely, Weller asserted that indigenous peoples enjoy a right to self-determination, as did Xanthaki.³⁹⁰ Tomuschat submitted that indigenous peoples undoubtedly constitute “peoples” in the ethnic meaning of the term, enjoying the right to self-determination (but not the right to secession).³⁹¹ Anaya elaborated that the human rights character of self-determination must no longer be obscured by a state-centred world. He underscored that self-governance is the key feature of indigenous peoples’ right to self-determination, exercised through political institutions allowing them to exist and develop according to their distinct characteristics.³⁹² Similarly, Castellino underscored that international law has come to hold that self-determination applies to peoples in the ethnic meaning of the word, and that in this context, the right shall be exercised through constructive arrangements within the state.³⁹³ In the same vein, Stavenhagen noted that international law has found it more fruitful to move towards redefining the concepts of the nation than to stick firmly to the classical state-individual dichotomy.³⁹⁴ Koskenniemi added that the internal aspect of self-determination encompasses a right of e.g. indigenous peoples to have their distinct identity respected by the majority society.³⁹⁵

Other legal scholars noted that international law was about to embrace rights of indigenous peoples, but were not ready to conclude that the development had been completed. Kingsbury posited that in order to adequately address the needs and aspirations of groups, there is a need to reinvent international law and add additional concepts that go beyond the state-individual dichotomy.³⁹⁶ In the same vein, Crawford asserted that it had become increasingly acknowledged that conventional human rights are inadequately defined to protect those that want to be different, and further that there is an apparent risk that a complete focus on individual human rights can serve as a vehicle for assimilation. He further noted that acknowledging that “peoples” are entitled to self-determination at the same time as submitting that the right applies solely to the aggregate of the inhabitants of the state renders the concept of self-determination a “*cruel deception*”. In line therewith, Crawford recognized the trend in

³⁸⁹ Lenzerini, *Sovereignty Revisited*, p. 181. Durnberry drew the same conclusion with regard to the indigenous peoples of North America. See *Lessons Learned* pp 431-435.

³⁹⁰ Weller, *Towards a General Comment on Self-Determination and Autonomy*, pp. 12 and 16, and Xanthaki, *The Right to Self-Determination*, pp. 22-23.

³⁹¹ Tomuschat, *Secession and Self-Determination*, pp. 23-45

³⁹² Anaya, *Indigenous Peoples in International Law I*, p. 78, *Indigenous Peoples in International Law II*, p. 150, and *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, pp. 325-326

³⁹³ Castellino, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, pp. 67-68

³⁹⁴ Stavenhagen, *Cultural Rights*, pp. 96 and 108

³⁹⁵ Koskenniemi, *National Self-Determination Today*, p. 267

³⁹⁶ Kingsbury, *Reconciling Five Competing Conceptual Structures*, p. 78

international law towards recognizing a right to self-determination of peoples in the ethnic/cultural understanding of the term, particularly in the context of indigenous peoples.³⁹⁷ Similarly, noting that the internal aspect of self-determination has conventionally been exercised through participation in the general decision-making processes of the state, Raic added that one can envision other ways of exercising this right, including through autonomy arrangements. He further asserted that the application of the right to self-determination to sub-groups of the state appears to follow from the *raison d'être* of the right.³⁹⁸

A third category of legal scholars, on the other hand, continuously rejected the notion that indigenous peoples can enjoy rights proper. Section 2.5.4 has already mentioned the positions taken by Brownlie³⁹⁹ and Hannum.⁴⁰⁰ In addition, Kohen asserted that international law acknowledges only one people where there exists a state.⁴⁰¹ Similarly, Cassese submitted that the right to self-determination does not apply to ethnic groups.⁴⁰² Alfredsson equated the internal aspect of self-determination with democratic governance, e.g. with a right to a government representing the entire population of the territory, without considerations of ethnic and cultural differences.⁴⁰³ In the same vein, Shaw and Raic agreed that the right to self-determination formally apply to indigenous peoples, but in the same breath rendered this recognition essentially meaningless when suggesting that from this general recognition, it does not necessarily follow that the right implies a right to autonomy/self-government.⁴⁰⁴

³⁹⁷ Crawford, *The Right to Self-Determination in International Law*, pp. 24, 26, 39-40, 64, 99 and 121, and *The Creation of States*, pp. 99 and 120-121

³⁹⁸ Raic, *Statehood and the Law of Self-Determination*, pp. 239 and 248

³⁹⁹ Brownlie, *Principles of Public International Law*, p. 540-541 and 553, and *The Rights of Peoples in Modern International Law*, pp. 4-16

⁴⁰⁰ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 95-103

⁴⁰¹ It should be noted, however, that it might be that Kohen took this position because of equating the right to self-determination with a right to secession. See *Secession*, pp. 9 and 16.

⁴⁰² Cassese, *International Law*, pp. 63-64, and *Self-Determination of Peoples*, pp. 53-54, 64, 101, 124, 131 and 298

⁴⁰³ Alfredsson, *The Right to Self-determination and Indigenous Peoples*, pp. 41-54

⁴⁰⁴ Shaw, *Self-Determination and the Use of Force*, pp. 41-43, and Raic, *Statehood and the Law of Self-Determination*, pp. 146, 255-257, 283-285 and 446. Raic's position is somewhat complex. As indicated, he first noted that the right to self-determination has moved beyond the colonial context, and applies, in addition to the entire population of a state, also to ethnic/cultural sub-groups. At the same time though, Raic submitted that international law has yet to recognize a right to self-determination to be exercised through autonomy. This addition seems to suggest that Raic did not foresee a right to self-determination in any meaningful understanding of the term. Raic further suggested, however, somewhat contradictory, that a state agreeing to autonomous arrangements for an ethnic group indicates that the group qualifies for the internal aspect of the right to self-determination. And, as mentioned above, he finally added that applying the right to self-determination to ethnic/cultural groups, ensuring protection for their collective identity, is in line with the *raison d'être* of the right to self-determination.

As indicated, by 2007, the doctrine was split on whether international law had confirmed that indigenous peoples constituted peoples proper, enjoying rights as such. At the same time, the surveyed international legal sources in chorus suggested that such was the case. But even if the sources were strikingly coherent, they also mainly originated from expert bodies and international tribunals. State reactions were largely absent. For this reason, and since, as mentioned, affirming that indigenous peoples constitute “peoples” proper would constitute a paradigm shift in international law, the doctoral thesis refrains, at this point, from drawing a definitive conclusion on whether the position reflected in the international legal sources outlined in Section 4.7 had crystallized into law. Rather, the thesis shall return to this issue in Chapters 6 and 8. To end this Chapter, Section 4.10 instead briefly touches upon the compatibility of a potential right of indigenous peoples to self-determination with the (i) external and (ii) internal aspect of sovereignty, i.e. with the principles of (i) the territorial integrity of state and (ii) state jurisdiction.⁴⁰⁵ Some might submit that these two principles in fact preclude the development in international law suggested in Section 4.7.

4.10 *Implications of a right to self-determination of indigenous peoples on state sovereignty*

4.10.1 The external aspect - territorial integrity of the state

Chapters 2 and 3 explained that the state is a fictitious, legal, concept. Man must decide what polity constitutes a state. As Chapter 2 described, traditionally, international law included no definition of states. A polity became a state if the already existing sovereigns accepted it as such. Following the failed attempt by the League of Nations to objectively define states, lawyers debated whether states shall continuously come into existence through recognition by other states, or whether rather a state shall be defined by objective criteria. With time, the latter alternative prevailed, and it is now settled that international law objectively defines what territorial entities constitute states.⁴⁰⁶ States being objectively defined does not change,

⁴⁰⁵ Sovereignty has been defined as (i) jurisdiction over its territory and permanent population, (ii) a duty of non-intervention in the area of exclusive jurisdictions of other states, and (iii) the dependence of obligations arising from international law on the consent of the obligator. See Brownlie, *Principles of Public International Law*, pp. 106-107, 119 and 287, and Cassese, *International Law*, pp. 49-51. In other words, sovereignty is essentially about independence, or territorial integrity, externally, and of self-determination, or jurisdiction, internally. See Koskenniemi, *From Apology to Utopia*, p. 240

⁴⁰⁶ Arbitration Commission of the Hague Conference on Yugoslavia, Opinion No. 1 [*Disintegration of the SFRY*] (1991) 92 ILR 162, pp 164-165, Cassese, *International Law*, pp. 73-77, and Raic, *Statehood and the Law of Self-Determination*, pp. 29-37

however, the fact that they remain artificial entities.⁴⁰⁷ Notwithstanding, states remain the only legal persons under international law, and the sole creators of such law. They are also perceived as the only international legal subjects that can preserve peace and stability.⁴⁰⁸ Consequently, out of pure self-interest, but also motivated by maintenance of peace and order, states are highly sceptical towards developments in international law that threatens the existence or position of states. Hence, the principle of territorial integrity of states has been, and continuous to be, a cornerstone in the international legal system. It appears that it has exercised certain influence also on the indigenous peoples' rights discourse.

Section 4.9, immediately above, concluded that there might have been some reluctance against acknowledging a right to self-determination of indigenous peoples. As further indicated, contributing to states' hesitance to accept a right to self-determination applying also to sub-segments of the state appears to have been a concern that such recognition would result in, or at least encourage, separatist movements. In other words, states' reluctance might largely have been motivated by an assumption that the right to self-determination is, or at least encompasses, a right to statehood.⁴⁰⁹ The concern is to some extent understandable. Section 2.5 described how the right to self-determination has most effectively, and visibly, been invoked and implemented in the context of decolonization. As a consequence, the right to self-determination come to be equalled with a right to independence. Against this background, it is reasonable if states initially feared that a right to self-determination of indigenous peoples would result in a second wave of secessionist movements.

But albeit politically understandable, states' concerns are from a legal perspective unfounded. It is generally agreed that under international law, the right to self-determination does not encompass a right to secede, save in extreme circumstances. If the state is guilty of gross human rights violations rendering it impossibility to exercise the right to self-determination

⁴⁰⁷ For the present purposes, it is not necessary to probe deep into the criteria for statehood. In passing, it can be mentioned that the constitutive elements of statehood are generally perceived to follow from Article 1 of the so called Montevideo Convention (LNTS, Vol. 165); a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. See further Raic, *Statehood and the Law of Self-Determination*, pp. 24-25 and Brownlie, *Principles of Public International Law*, pp. 70-72 and 86. That said, these criteria have at times been applied with certain a certain amount of pragmatism. See Crawford, *The Creation of States*, pp. 175-220 and 252, Brownlie, *Principles of Public International Law*, pp. 63-65, and Koskenniemi, *from Apology to Utopia*, pp. 272-282.

⁴⁰⁸ Cassese, *International Law*, pp. 71-72 and 134, Boyle and Chinkin, *The Making of International Law*, pp. 17 and 41, Raic, *Statehood and the Law of Self-Determination*, pp. 18 and 26, and Crawford, *The Creation of States*, p. 252

⁴⁰⁹ Anaya, *Indigenous Peoples in International Law II*, pp. 7 and 80, Raic, *Statehood and the Law of Self-Determination*, pp. 242-243, and Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 96 and 473

within the state's borders, and secession constitutes a remedy for the oppressed people, it is allowed.⁴¹⁰ Consequently, indigenous peoples' right to self-determination, with the exception of abnormal circumstances, must be effectuated through autonomy arrangements within existing state borders. Hence, recognition of a right to self-determination of indigenous peoples is in full compatibility with the cardinal principle territorial integrity of states.

4.10.2 The internal aspect - jurisdiction

Section 4.10.1 mentioned that states are the only legal persons international law recognizes. But albeit the only legal persons, states need not be the sole legal subjects of international law. Already at the advent of the contemporary international legal system, Lauterpacht observed that “[t]here is no rule in international law which precludes ... bodies other than states acquiring directly rights under ... international law, and, to that extent, becoming subjects of [international law]”.⁴¹¹ Since then, international law has positively recognized a number of entities as legal subjects, beyond states. In the *Reparation for Injuries Case*, the ICJ proclaimed that the United Nations, as an international organization, enjoys status as an international legal subject.⁴¹² Subsequently, and more relevant for the present purposes, in the more recent *East Timor Case*, the ICJ held that the people of East Timor, at a time when East Timor formed part of Indonesia, constituted an international legal subject, albeit not an international legal person. The Court underlined that even though international law primarily regulates state behaviour, it also recognizes rights of other entities, such as peoples.⁴¹³

Also the legal doctrine affirms that states being international law's sole legal persons do not prevent other entities from becoming subjects of international law. Cheng observes that the

⁴¹⁰ Crawford, *The Right to Self-determination in International Law*, pp. 39 and 49-60, and *The Creation of States*, pp. 383-418, Cassese, *Self-Determination of Peoples* p. 124, 167, 283, 334 and 349, Buchanan, *The Morality in Session*, p. 352, Tomuschat, *Secession and self-determination*, pp. 35-36 and 84-86, Dugard and Raic, *The role of recognition in the law and practice of secession*, pp. 102-107, Tancredi, *A normative “due process” in the creation of States through secession*, pp. 175-184, Alfredsson, *Minorities, Indigenous and Tribal Peoples, and Peoples*, p. 164, Raic, *Statehood and the Law of Self-Determination*, pp. 321-329, and Thornberry, *Self-Determination and Indigenous Peoples*, p. 49. See also the *Quebec Session Case*, [1998] 1 SCR 217, paras. 123-124 and 130. For a different opinion, see, however, Kohen, *Secession*, pp. 10 and 19-20, where he argues that international law does not recognize a remedial right to secession. Instead, he offers some examples where international law might regulate secession.

⁴¹¹ Lauterpacht, *The Subjects of the Law of Nations*, p. 444

⁴¹² *Reparation for Injuries Case. Reparation for injuries suffered in the services of the United Nations*, Advisory Opinion: I.C.J. Reports . 1949, p. 174

⁴¹³ *East Timor Case. Portugal v. Australia*, Judgement, I.C.J. Report: 1995, p. 90. See in particular p. 102. Compare also the *Western Sahara Case*, para. 63, and see Brownlie, *Principles of Public International Law*, p. 169, and Tully, *The Struggles of Indigenous Peoples for and of Freedoms*, pp. 55-56.

capacity to hold rights and duties under a legal system is not cast in stone. States are free to endow other entities with the status of subjects of international law.⁴¹⁴ Similarly, Brownlie notes that the world community should be, and historically has been, ready to demonstrate flexibility when it comes to awarding political entities status as subjects of international law. International law opens up for, indeed foresees, situations where other legal entities than states perform tasks normally associated with the state.⁴¹⁵ Crawford too, posits that the fact that states remain the principal international legal subjects does not prevent other distinct territorial communities from being international legal subjects too. Nor does, he observes, respect for the principle of territorial integrity of states demand that distinct ethnic groups within the state be subjugated to the rule of the majority society. They can still hold rights to diverse arrangements of “secession less sovereignty”.⁴¹⁶ It is hence beyond doubt that international law has the capacity to accept other polities than states as legal subjects. And it is equally clear that this general principle applies also in the specific context of indigenous peoples.⁴¹⁷ In principle nothing prevents indigenous peoples from qualifying as international legal subjects, as long as this does not threaten the external aspect of state sovereignty, i.e. the territorial integrity of states. But is the potential status of indigenous peoples as international legal subjects also compatible with the internal aspect of state sovereignty, i.e. the state’s right to manage its internal affairs?⁴¹⁸

The notion that states are sovereign follows from liberalism’s assumption that there can exist no pre-fixed laws governing the society pre-dating the emergence of man and the state. Since no law can derive from an authority above states, law that binds states must emanate from states.⁴¹⁹ In that sense, the principle of state sovereignty represents the basic constitutional doctrine of international law.⁴²⁰ The principal understanding of sovereignty is hence straightforward. The state is free to run its internal affairs without outside interference, and to determine its relationship with the international community, including to agree/not agree to

⁴¹⁴ Cheng, *Introduction to Subjects of International Law*, pp. 24-25

⁴¹⁵ Brownlie, *Principles of Public International Law*, pp. 59, 63, 77 and 107

⁴¹⁶ Crawford, *The Creation of States*, pp. 197 and 253, and *The right to Self-determination in International Law*, p. 65. For a similar opinion, see also Ivison, Patton and Sanders, *Political Theory and the Rights of Indigenous Peoples*, p. 14.

⁴¹⁷ Macklem, *Indigenous Recognition in International Law*, pp. 178-179

⁴¹⁸ Compare Hudson, *Fables of Sovereignty*, pp. 24-25 and 28-29.

⁴¹⁹ Koskenniemi, *From Apology to Utopia*, pp. 94-95 and 224, and Raic, *Statehood and the Law of Self-Determination*, p. 26

⁴²⁰ Hannum, *Autonomy, Sovereignty, and Self-Determination II*, p. 26, and Young, *Hybrid Democracy*, p. 247

international legal obligations. But from this understanding of sovereignty further follows that albeit *the concept* of sovereignty is clear, what *more precise powers* are included in the sovereignty of a particular state vary. Sovereignty has the capacity to respond to needs and interests of the society, and to limit its own applicability. It is in the process of constant erosion, as international law places more and more obligations on states. Indeed, placing limitations on what actions a state can undertake with reference to its sovereignty is the exact purpose of international law, not least in the context of human rights.⁴²¹ In other words, sovereignty implies nothing more than that a state shall be free from such outside interference in its territory that does not follow from international law.⁴²² Hence, if international law has concluded that indigenous peoples hold rights as such, including the right to self-determination, this does not in any way contradict the internal aspect of state sovereignty – jurisdiction. It simply constitutes another example of state jurisdiction having been limited by international law. At the same time it implies, in the context of self-determination, that the self-determining mandate - or the jurisdiction if one wants - of the indigenous people has simultaneously expanded.⁴²³

⁴²¹ Cassese, *International Law*, pp. 98 and 123, Brownlie, *Principles of Public International Law*, pp. 291-293, Bianchi, *Immunity versus Human Rights*, pp. 261 and 265, Raic, *Statehood and the Law of Self-Determination*, pp. 25-26, Fassbender, *The United Nations Charter As Constitution of The International Community*, p. 582, Wiessner, *Indigenous Sovereignty*, pp. 1146-1149, Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, p. 394, Hinsley, *Sovereignty*, p. 219, and Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, pp. 326-327

⁴²² Lenzerini, *Sovereignty Revisited*, pp. 158-160

⁴²³ It has hence been established that indigenous peoples' rights do not conflict with the liberal principle of state sovereignty. In fact, one could argue that indigenous peoples' rights conform to the liberal theories underpinning the international legal system. Chapter 2 outlined how social contract theories hold that a state is formed by an agreement among any group of men. But Chapter 3 demonstrated that the notion that a random group of men - without uniting ethnic or cultural ties - somehow at some point came together to form a state obviously is a fiction. In fact, it appears more likely that a group of men with some kind of ethnic and cultural kinship would enter into a social contract. Certainly, an ethnic/cultural group knowing that it would constitute a vulnerable minority in a state appears to be an unlikely candidate to sign a social contract. (See Petit, *Minority Claims under Two Conceptions of Democracy*, p. 205, and compare Van Dyke, *The Individual, the State and Ethnic Communities in Political Theory*, p. 45.) To randomly allow the present order to remain makes little sense from a liberal point of view as well. (Parekh, *The Rushdie Affair*, p. 310, Anaya, *Indigenous Peoples in International Law I*, p. 183, and Packer, *The OSCE High Commissioner on National Minorities*, p. 265)

5. OUTLINE - PROPERTY RIGHTS

5.1 *Introduction*

Chapter 4 indicated that during the first two decades or so of the indigenous rights discourse, indigenous rights were essentially couched in terms of cultural rights and participatory rights. Indigenous rights were defined as rights needed to allow indigenous populations to preserve and develop their distinct societies and cultures.⁴²⁴ Clearly, when indigenous peoples' right to lands, territories and natural resources are solely thought of in terms of cultural rights, to claim rights to such subject matter, indigenous peoples have to demonstrate that lands etc. are important to them, should they be able to exercise their culture and/or preserve their cultural identity.

More recently, however, indigenous peoples' rights have increasingly come to be viewed through the prism of property rights, particularly in the context of land and recourse rights. Claiming property rights to land, the indigenous people need not necessarily show that the land is vital to its culture, although that is of course often the case. Rather, the property rights argument is essentially based on the right to non-discrimination. It asserts that if domestic law acknowledges property rights in general to land, having resulted in private title to land of the non-indigenous population in non-indigenous territories, then the indigenous peoples shall be awarded property rights to its traditional territory too. It is irrelevant whether the land is culturally important or not. The only criterion having to be met is that the land has been traditionally used. But property rights of indigenous peoples need not necessarily be confined to the area of land rights. As the right to culture applies to both lands and creativity, it appears possible to draw an analogy between land rights and rights to collective creativity, also in the context of property rights.

The reason why conventional real estate law has denied indigenous peoples rights to land and conventional IPRs denied indigenous peoples right to their collective creativity is essentially the same. Both the land rights system and the IPR-system were designed so to fit another

⁴²⁴ As Section 4.6 mentioned, and as the below will elaborate further, ILO 169 Article 14 do operate with language seemingly suggesting that indigenous peoples hold property rights to land. Nonetheless, it appears that until at least recently, ILO 169 Article 14 has not been considered in a property rights context.

culture, and not apply to indigenous collective land-use/creativity. In the land rights context, this feature of the land rights system can be summarized in the term *terra nullius*. *Terra nullius*' counterpart within the sphere of IPRs is the notion of the public domain. Section 5.3 outlines how the doctrine of *terra nullius* has recently been revoked and indigenous peoples hence increasingly awarded property rights to their traditional lands and natural resources. Section 5.4 subsequently analyzes whether an analogy can be drawn between these recent developments within the sphere of land rights, and the area of collective creativity. But prior to embarking on these analyses, Section 5.2, immediately below, provides a brief overview over the basic characteristics of property rights.

5.2 *The conventional understanding of the human right to property*

5.2.1 *Property rights theory*

For the present purposes, it is not necessary to embark on a lengthy exposé over the extensive discussions within property rights theory. Still, it is pertinent to briefly touch upon the theoretical background, since it has relevance for a proper understanding of the legal right to property. Put simply, property rights can be described as norms that govern access to and control of material resources.⁴²⁵ The term “*property right*” is generally understood as embracing a catalogue of rights.⁴²⁶ For the purposes of the doctoral thesis, Waldron’s dissection of the right into certain broad categories can serve as a useful illustration of the various elements philosophy generally ascribes to the right to property. Waldron divides the right to property into the categories “*Immunities against Expropriation*”, “*Natural property rights*”, “*Eligibility to hold property*” and “*The general right to have private property*”.⁴²⁷ The two first categories are of less relevance here. But a comparison of the two latter – which are the property rights elements that have attracted by far the most attention – describes well the most important dividing line within property rights philosophy.

One school of liberal thinkers argue that individuals should be awarded a positive right to have property. This submission is based on a belief that holding property has a moralizing effect on the owner. It is suggested that having property is necessary for the individual’s

⁴²⁵ Waldron, *The Right to Private Property*, p. 34

⁴²⁶ Munzer, *A Theory of Property*, p. 23

⁴²⁷ Waldron, *The Right to Private Property*, pp. 17-24

development of a complete identity and personality. The individual needs certain property to be a full person, this school argue. Proponents of a general right to property hence place property rights on an equal footing with other civil rights, holding that property too, is critical to the freedom of the individual.⁴²⁸

But far from all political thinkers believe that the right to property should amount to a positive right to be provided with property. A competing property rights theory focuses on the third of Waldron's elements, i.e. "*Eligibility to hold property*". Clearly, this element suggests a considerably more modest form of property right, compared with the category "*The general right to have private property*". "*Eligibility to hold property*" merely implies that everyone shall have an equal right to acquire property, and that once a property right has been thus acquired, it shall be recognized and protected. If the equal opportunity to acquire property results in some individuals holding no property, this does not constitute a problem for proponents of this theory. Thinkers such as Locke and Nozick are commonly associated with this school. They maintain that property rights are special rights occurring as a result of special relationships based on contingent events such as original acquisition.⁴²⁹ Put simply, two basic schools of theory hence argue about what the right to property *should* be. What is important for the purposes of the doctoral thesis is, however, what *is* the right to property under international law?

5.2.2 The legal right to property under international law

The right to property was integrated into the contemporary human rights system already at its inception. UDHR Article 17.1 proclaimed that everyone has the right to own property. Further, pursuant to Article 17.2, no one must be arbitrarily deprived of property rights she has come to hold. The right to property was also included in the regional human rights instruments adopted during this era. ACHR Article 21.1 recognizes a right to property which can only be encroached upon subject to payment of just compensation. In the same vein, Article 1 of Protocol 1 to the ECHRFF proclaims everybody's right to peaceful enjoyment of possessions. The ECHR has clarified that the phrase "*right to peaceful enjoyment of*

⁴²⁸ Waldron, *The Right to Private Property*, pp. 15-56. Clearly, here one recognizes the basic liberal arguments in general, and Rawls' and Dworkin's theories on redistribute justice, in particular. See Chapter 3 and also Lea, *Property Rights, Indigenous People and the Developing World*, pp. 14-15.

⁴²⁹ Lea, *Property Rights, Indigenous People and the Developing World*, p. 15, and Waldron, *The Right to Private Property*, pp. 131, 136 and 138

possessions” shall be understood as a right to property.⁴³⁰ As Section 2.5.3 and 4.8 touched upon, the right to property was subsequently codified as a legally binding right through its inclusion in the CERD Convention Article 5 (d) (v), pursuant to which states undertake to eliminate discrimination e.g. by guaranteeing everyone’s right to own property. The right to property has subsequently been included in a number of international legal instruments. On a regional level, in addition to the mentioned American and European instruments, Article 14 of the AfCHPR proclaims the right to property, as does the Arab Charter on Human Rights, adopted in 1994 (yet to enter into force)⁴³¹. The right to property is today generally considered to form part of customary international law.⁴³²

The definition of the right to property in the above mentioned instruments answers which of the two positions submitted on the nature of the right to property within political philosophy has prevailed in international law. The right to property recognized in international law is the right to acquire property on an equal basis, and, once property has been thus acquired, a right not to be arbitrarily deprived of the same.⁴³³ The right to property encompasses no right to be provided with property. In other words, if returning to Waldron’s vocabulary, international law on property rights embraces the element “*eligibility to Hold Property*” but not a “*general right to have property*”.⁴³⁴ International law takes a positivist approach towards property rights, as long as domestic law is not discriminatory. Consequently, a domestic legal system need not recognize private property rights. But if it does so, the property right must apply without discrimination. In other words, the right to property is essentially a particular aspect of the right to non-discrimination.

⁴³⁰ *Marckx v. Belgium*, Appl. No. 6833/74, Judgement of 13 June 1979

⁴³¹ International Human Rights Reporter, Vol. 4, No. 3 (1997), pp. 850-857, Article 25

⁴³² Anaya, *Indigenous Peoples in International Law II*, p. 105

⁴³³ See also Krause, *The Right to Property*, pp. 191-192.

⁴³⁴ Surprisingly little is written on the meaning of the right to property under international law in the legal doctrine. It appears that it is simply taken for granted that the right to property is merely a right to protection of acquired, and not a right to have, property. For instance, Lillich has pointed out that during the drafting of UDHR Article 17, it was held self-evident that decisions on ownership of property are subject to national law. Hence, there was no need to explicitly affirm this fact in UDHR Article 17. See *Global Protection of Human Rights*, p. 157. Similarly, Waldron observes that probably no state constitution has embraced a positive right to hold property and that the UDHR protects merely the right to acquire property on an equal basis with other citizens. See *The Right to Private Property*, pp. 21-24.

5.3 *Particularly on property rights pertaining to indigenous lands*

5.3.1 **The rejection of the *terra nullius* doctrine**

The above concluded that the right to property embraces no positive obligations on states to recognize property rights. But this limitation does not render the right to property irrelevant to the indigenous rights discourse. Section 4.8 described how the right to non-discrimination has recently evolved to take on additional understandings. And as seen, the right to property is essentially an aspect of the right to non-discrimination.

Section 4.8 explained how the right to non-discrimination has gradually evolved to demand respect for cultural differences of groups. Similarly, the *terra nullius* regime – and more importantly its effects - has been denounced in steps. First, international law rejected the *terra nullius* doctrine as scientifically false. For instance, in the *Western Sahara Case*, the ICJ held that occupation is not a valid manner to acquire title to land if the land area in question is indeed inhabited. Consent is needed. Notably, the Court underlined that an area is not inhabited for legal purposes simply because its inhabitants are being perceived by some as primitive, or in wanting of a governmental structure. Some form of social and political organization is sufficient, the ICJ held. The ICJ's ruling was significant because it clarified that the land area in dispute was not *terra nullius* because of “only” being used by nomadic Saharan tribes upon the arrival of the Spaniards. At the same time, the *Western Sahara Case* did not as such contribute to the indigenous rights discourse. Having concluded that the land did not constitute *terra nullius*, the ICJ did not hold that the Saharan tribes who had used the land could claim right to the area in question. Rather, the Court found that there existed a link between the tribes and the Sherifian State, the predecessor to modern Morocco, wherefore Morocco could rely on the tribes' land use to claim the area.⁴³⁵

Subsequently, however, the *terra nullius* doctrine has been rejected also in the explicit context of indigenous peoples. In fact, the Supreme Court of Canada denounced the doctrine already in the 1973 *Cader Case*,⁴³⁶ and has since repeated its position on numerous occasions.⁴³⁷

⁴³⁵ *Western Sahara Case*, 1975 I.C.J. 12. Regarding these aspects of the Western Sahara Case, see also Castellino, Territorial Integrity and the “Right” to Self-Determination, pp. 517, 535-536.

⁴³⁶ *Cader v. AG BC* [1973] SCR 313

Similarly, in the famous *Mabo Case*⁴³⁸, the High Court of Australia also broke with the *terra nullius* doctrine, and courts in the United States too have delivered judgements denouncing the doctrine.⁴³⁹ On the African Continent, the Constitutional Court of South Africa has expressed the general sentiment well. The Court concluded that given that the indigenous populations had occupied their traditional land since time immemorial, failing to recognize their ownership to the land “*was racially discriminatory against ... indigenous land owners*”. The Court further elaborated that “*the racial discrimination lay in the failure to recognize ... indigenous ... ownership while, on the other hand, according protection to registered title[s]*” of the non-indigenous population.⁴⁴⁰ Also the legal doctrine has concluded that international law has firmly rejected the *terra nullius* doctrine.⁴⁴¹

5.3.2 Indigenous peoples’ property rights to lands continuously used

But even if the *terra nullius* doctrine has formally been rejected, states have in most instances in practice continued to rely on the historical legacy of the doctrine. State laws and policies still tend to treat indigenous peoples’ traditional territories as the property of the state. Often the state offers no justification for this position and opts to ignore the questionable legal basis on which it claims rights to indigenous territories.⁴⁴² Alternatively, it relies on formal positivism. The state may concede that as a theory, the *terra nullius* doctrine is difficult to justify. But the state still maintains that be that as it may, the doctrine nonetheless resulted in law, and that law is valid until substituted by a new law. Hence, it concludes, whatever ownership rights indigenous peoples might historically have possessed over their traditional land, those rights have been erased.⁴⁴³ Recent developments in international law, however, suggest that the state can no longer rely on the legacy of the *terra nullius* doctrine to deny indigenous peoples’ rights to their traditional territories.

⁴³⁷ See e.g. *Guerin v. The Queen*, 13 D.I.R. (4th) 321 (1984), *R. v. Sparrow*, 70 D.I.R. (4th) 385 (1990), and *Delgamuukw v. British Columbia*, 3 Supreme Court Reports (1997). See also Allen, *The Right to Property in Commonwealth Constitutions*, pp. 24-26.

⁴³⁸ *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. The Mabo Case was followed by a similar ruling in *Wik v. Queensland* (1996) 187 C.L.R. 1.

⁴³⁹ See e.g. *United States v. Lara*, 19 April 2004, 541, U.S. 193 (2004).

⁴⁴⁰ *Alexkor Ltd. & Another v. Richtersveld Cmty. & Others*, 2003 (5) SA 460 (CC) (S. Afr.), in particular paras. 96, 99 and 103.

⁴⁴¹ Wiessner, *Indigenous Sovereignty*, p. 1154, Lenzerini, *Sovereignty Revisited*, p. 167, Macklem, *Indigenous Recognition in International Law*, pp. 184-185, Tully, *The Struggles of Indigenous Peoples for and of Freedoms*, p. 54, Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 111, and Castellino, *The Right to Land, International Law & Indigenous Peoples*, pp. 92-101

⁴⁴² Ivison, Patton and Sanders, *Political Theory and the Rights of Indigenous Peoples*, p. 12

⁴⁴³ Anaya, *Divergent Discourses About International Law*, pp. 244-245.

Already the ILO 169 indicated a development towards recognition of indigenous peoples' property rights to land. Pursuant to ILO 169 Article 14.1, "*The right to ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.*" The wording of Article 14.1 clearly suggests that indigenous peoples hold ownership rights to lands continuously used exclusively, or almost exclusively, by them and usufruct rights to lands they today share with the majority population. Still, states appear to have been reluctant to acknowledge that indigenous peoples could invoke Article 14.1 to claim ownership rights to land. It has been submitted that despite that Article 14.1 unambiguously refers to "*right to ownership*", it is sufficient that the indigenous people enjoy secured continued use to the land in question for the state to be in conformity with the provision. Formal recognition of ownership rights is not necessary, it has been asserted.⁴⁴⁴ In other words, despite formulated as a property rights provision, states preferred to view the Article 14.1 as enshrining "only" a cultural right. With such an interpretation, Article 14.1 obliges states to ensure that indigenous peoples can continuously pursue traditional livelihoods and other culturally significant land and resource based activities in general. But they need not necessarily recognize property rights to any specific land area. ILO 169 Article 14.1 conventionally being viewed through the prism of cultural rights should come as no surprise. As mentioned above, at the time of the adoption of the ILO 169, indigenous land rights were essentially solely couched in terms of cultural rights. Hence, despite the adoption of ILO 169, the notion that indigenous peoples hold property rights to their traditional territories continued to meet resistance. But, as indicated above, the land rights discourse has evolved since the adoption of ILO 169.

Sections 4.8 and 4.9 concluded that it is probably premature to infer that the CERD Committee's submission that the right to non-discrimination formally applies to indigenous peoples as peoples have been firmly established in international law. These Sections further concluded, however, that for all practical purposes, the right to non-discrimination has evolved to take on an aspect implying that indigenous peoples have a positive right to respect

⁴⁴⁴ Tomei and Swepston, *Indigenous and Tribal Peoples: a guide to the ILO Convention No. 169*

for their cultural distinctiveness. The right to non-discrimination has evolved to provide for more than formal equality. There must also be equality in practice.

The evolved understanding of the right to non-discrimination should have direct implications for the right to property, since, as noted, the right to property is essentially a right to non-discrimination. Consequently, viewed through the prism of a contemporary understanding of the right to non-discrimination, it should no longer be sufficient that domestic real estate law is formally non-discriminatory. There should be equal treatment in fact. Under the conventional understanding of the right to non-discrimination, domestic land rights policies awarding all individuals an equal opportunity to acquire property rights to land based on individual land use common to the majority population complied with the law. But today, to the extent domestic law and policies recognizes property rights to land in general, such law must, it would seem to follow from the evolved understanding of the right to non-discrimination, provide for equal treatment also in practice, taking cultural differences between different spheres of society into account. Also property rights laws and policies that are formally neutral might be regarded as discriminatory, if favouring the regular behaviour of one segment of society. For instance, it would seem to be discriminatory to design a domestic legal system awarding property rights to land based on stationary use common to the non-indigenous population, but not to the more fluctuating land use common to the indigenous people. In conclusion, it logically follows from the evolved understanding of the right to non-discrimination that indigenous peoples hold property rights to lands, territories and natural resources traditionally used and/or occupied. And this conclusion has also been firmly confirmed in international legal sources on property rights.

First, one can again recall CERD Committee's General Recommendation No. 23's proclamation that indigenous peoples being deprived of their traditional lands constitutes a specific form of discrimination directed against them. Further, the General Recommendation calls on states to "*recognize and protect the rights of indigenous peoples to own, develop [and] control*" their lands and natural resources. In other words, the Committee underlined that general right to property enshrined in CERD Article 5 (d) (v) apply also to indigenous peoples' collective land use. The CERD Committee has repeated this interpretation of Article 5 (d) (v) in various country specific observations. For instance, the Committee has with

reference to General Recommendation No. 23 called on Sri Lanka to recognize and protect the Veddas people's right to own their communal lands and natural resources.⁴⁴⁵

Further, the CESC has recently interpreted the CESC to embrace a right of indigenous peoples to deny access to natural resources situated on their traditional territory.⁴⁴⁶ A right to deny access is of course a central element of the right to property. Highlighting that it was a property right it proclaimed, the Committee underlined that the natural resources need not be culturally significant for the right to free, prior and informed consent to apply. Further, in 2009, the CESC explicitly declared that indigenous peoples have rights to lands and natural resources traditionally occupied and/or used and called on states to respect the rights of indigenous peoples to own and control such lands and resources.⁴⁴⁷

These findings of UN treaty bodies have been affirmed by regional international legal sources. The IACHR and the IACCommHR have recently interpreted the property rights provisions in the ADRDM and the ACHR as enveloping a right of indigenous peoples' to lands and resources traditionally used.⁴⁴⁸ In the ground-breaking *Awás Tingni Case*, the IACHR articulated that the right to property enshrined in the Inter-America human rights instruments – albeit formulated as an individual right - embraces also indigenous peoples' right to communal property. The Court observed that in indigenous cultures, ownership is not centred in the individual, but rather vest in the community. The IACHR underlined that such rights arise from the indigenous people's traditional communal occupation and use of the land area in question. Thus, the Court concluded, indigenous peoples enjoy property rights to lands and natural resources traditionally used. The IACHR underlined that the right applies

⁴⁴⁵ Concluding Observations A/56/18(SUPP), para 335. See also Concluding observations on Suriname, CERD/C/64/CO/9, para. 11, on Mexico, CERD/C/MEX/CO 15), and on Botswana, A/51/18/ (SUPP), in particular paras. 304-305.

⁴⁴⁶ Concluding Observations on Ecuador, UN Doc. E/C.12/1/add.100, para. 12, and Concluding Observations on Columbia, UN Doc. E/EC.12/Add.74, para. 12

⁴⁴⁷ CESC General Comment No. 21, para. 36

⁴⁴⁸ In fact, the IACCommHR already in 1985 recognized that the indigenous *Yanomami* people in Brazil hold collective rights to their traditional territories. It is doubtful, however, whether the Commission had property rights proper in mind when ruling in the *Yanomami Case*. In line with the general understanding of indigenous peoples' land rights during this era, the IACCommHR's focus seems rather to have been on the importance of continued access to traditional lands as a pre-requisite for indigenous peoples being able to preserve and develop their cultural identity. See *Yanomami Community v. Brazil*, Case 7615, decision of 5 March 1985, p. 31.

irrespective of whether the state has recognized that the indigenous people hold formal title to the area in dispute.⁴⁴⁹

The Inter-American Human Rights institutions have subsequently confirmed and elaborated on the ruling in the *Awás Tingni Case* in numerous cases. The IACommHR has concluded that under international human rights law, the Maya communities in the Toledo District in Belize hold property rights to lands and natural resources traditionally used.⁴⁵⁰ Similarly, in the *Dann Sisters Case*, the IACommHR held that “*general international legal principles applicable to indigenous human rights encompass a right for indigenous peoples of recognition of their property and ownership right with respect to lands, territories and resources they have traditionally occupied*”.⁴⁵¹ The IACHR has subsequently confirmed this position in a number of cases, most recently in a very clear and concrete manner in *Saramaka People v. Suriname*.⁴⁵²

The extensive jurisprudence on indigenous peoples’ property rights to land emanating from the Inter-American system has not been matched by equally many cases in other regions. This is only natural since, the American Continent is unique in that the vast majority of America states both host indigenous populations and recognize these as indigenous peoples. But although the case law is less numerous, it is clear that other regional human rights institutions share the Inter-American human rights institutions’ position on indigenous peoples’ property rights to land. Recently, the AfCommHPR got the opportunity to address indigenous peoples’ property rights to land in *Endorois People v. Kenya*. Doing so, the AfCommHPR took the position of its American counterpart and - with explicit reference to the IACHR’s ruling in the *Saramaka Case* - held that the Endorois people have property rights to its traditional land.⁴⁵³ Already prior to the ruling in the *Endorois Case*, the AfCommHPR’s Working Group of Experts on Indigenous Populations/Communities had interpreted the AfCPHR as protecting indigenous peoples’ property rights to lands and natural resources traditionally occupied. The Working Group concluded that the land alienation and dispossession of indigenous peoples from their traditional lands and natural resources

⁴⁴⁹ *Awás Tingni Case*, para. 149. Regarding the *Awás Tingni Case*, see further Anaya, *Indigenous Peoples in International Law II*, pp. 145-146, and Binder, *The Case of the Atlantic Coast of Nicaragua*, pp. 249-251.

⁴⁵⁰ *Maya indigenous communities of the Toledo District. v. Belize*, Case 12.053, decision on October 12, 2004

⁴⁵¹ *Mary and Carrie Dann v. United States*, Case No. 11.140, decision on December 27, 2002, para. 130

⁴⁵² *Saramaka People v. Suriname*, Ser. C, No. 172. See also e.g. *Moiwana village v. Suriname*, Ser. C, No. 145.

⁴⁵³ *Endorois People v Kenya*, Case 276/2003, in particular paras. 214-215. It is worth noting that the AfCommHPR explicitly referred to the Endorois as an indigenous people. See e.g. para. 226

constitutes a serious violation of the African Charter's provisions proclaiming all peoples' right to their natural resources and property.⁴⁵⁴ In Europe, in a recent finding the ECommHR held that in principle, traditional communal Saami land use is protected as a property right under Additional Protocol 1, albeit on the merits finding the particular claim inadmissible.⁴⁵⁵ International legal sources on indigenous peoples' property rights to land have in the recent years also been reflected in domestic jurisprudence. In addition to the cases referred to in Section 5.3.1, reference can in particular be made to cases emanating out of Belize, Botswana and New Zealand.⁴⁵⁶

In conclusion, international law has firmly embraced that indigenous peoples hold property rights to territories traditionally and continuously used. The right is not an outcome of what Waldron labels a "General right to hold property". Property rights to land have not been awarded because of being deemed important to indigenous peoples' cultural identity. Rather, UN bodies and courts have interpreted property rights in the meaning "Eligibility to hold property" in a contemporary manner. The property right endorsed by international law is still a theory of historical entitlement, only with a contemporary view on who are historically entitled.⁴⁵⁷

Notably, the evolved understanding of the right to property deviates significantly from the wording of CERD Convention Article 5 (d) (v), which seems to proclaim a property right for individuals only. Hence, also with regard to property rights, we see how international law has progressed to recognize a collective dimension in a right that was traditionally understood to be purely individual. As noted above, this development is natural, given that the right to property is essentially a right to non-discrimination. Still, the right to property having

⁴⁵⁴ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the AfCommHPR at its 28th ordinary session (2005), paras. 20-22

⁴⁵⁵ *Case of Handölsdalen Sami Village and Others v. Sweden*, Appl. No. 39013/04

⁴⁵⁶ *Aurelio Cal v. Attorney General of Belize*, Supreme Court, Claim 121/2007, Judgement of 18 October 2007, para. 127, *The Kalahari Game Reserve Case*. High Court of Botswana, Misc. No. 52 of 2002, of 13 December 2006, *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 and *Te Runanga o Wharekuari Rekkohu Inc. v. Attorney-General* [1993] 2 N.Z.L.R. Particularly noteworthy is the Supreme Court in Belize's observation that customary international law requires Belize to respect the rights of its indigenous peoples to lands and natural resources traditionally used.

⁴⁵⁷ See also Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, p. 193, where he observes that the recent developments acknowledging property rights to land of indigenous peoples can be seen as deriving from the general right to property. The recent developments in international law also imply that one should now probably reinterpret the understanding of ILO 169 Article 14.1 to give the provision a meaning that is more in line with its wording. See also Lenzerini, *Sovereignty Revisited*, p. 179, where he argues that the ILO 169 proclaims property rights to land.

evolved in parallel with the right to self-determination, the right to culture and the right to non-discrimination supports Chapter 4's conclusions that these developments are mutually supportive in favour of the existence of collective rights of indigenous peoples.

5.3.3 The right to restitution – including benefit-sharing

International law has hence confirmed that indigenous peoples hold property rights to lands traditionally and continuously used. But what about lands traditionally used by indigenous peoples, but which have been deprived in colonization processes or through other means? Does the evolved understanding of the right to property also embrace a right of indigenous peoples to have those lands returned?

The ILO 169 encompasses no provision proclaiming a right of indigenous peoples to restitution with regard to lands taken without consent. ILO 169 Articles 13-15 speak only of lands and natural resources indigenous peoples continuously use.⁴⁵⁸ Still, the ILO Secretariat has, in its guide to the ILO 169, asserted that the Convention's land-rights provisions should be understood as entailing at least a limited right to restitution, provided that the present day indigenous society maintain some connection to the land area in question, for instance when an indigenous group has relatively recent been expelled from the territory in dispute.⁴⁵⁹ It is uncertain, however, to what extent states have accepted this assertion by the ILO Secretariat. In any event, the right to restitution the ILO Secretariat reads into ILO 169 is clearly a very limited one. Some other international legal sources do, however, proclaim a more general right to restitution.

The HRC has, in the context of indigenous peoples, interpreted CCPR Article 27 to under certain circumstances embrace a right to restitution with regard to lands taken from

⁴⁵⁸ ILO 169 Article 16.3 might at first glance be understood as setting forth a right to restitution. Pursuant to this provision, indigenous peoples have a right to return to lands taken without their consent. Article 16.4 adds that when this is not possible, indigenous peoples should – if at all feasible - be provided with lands equal in size and quality as a compensation for their loss. On a closer reading, however, it is clear that Articles 16.3-4 are limited to apply to situations when indigenous peoples have been forcefully removed from their traditional territories pursuant to Article 16.2, as an exception to the general prohibition of forceful reallocation put forward by Article 16.1. In other words, the right to restitution enshrined in Articles 16.3-4 applies only to situations when lands have been taken in accordance with Articles 16.2, subsequent to the state's ratification of ILO 169. Thus understood, the provision lacks retroactive effect.

⁴⁵⁹ Tomei and Sweptson, *Indigenous and Tribal Peoples: a guide to the ILO Convention No. 169*, p. 31

indigenous peoples without their consent.⁴⁶⁰ The CERD Committee has in General Recommendation No. 23, explicitly opined that indigenous peoples' property rights to land envelope a right to restitution. The Committee calls on states to "*where [indigenous peoples] have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories*". Further, the Committee asserts, when restitution is not feasible, compensation should be awarded, if possible in the form of lands and territories.⁴⁶¹ The CERD Committee's confirmation that the implementation of the right to non-discrimination might demand action that addresses past injustices is significant. As outlined above, indigenous peoples' property rights to lands and natural resources are founded precisely on the right to non-discrimination. The CESC has recently echoed the observations of the CERD Committee, proclaiming that when indigenous lands have become inhabited or otherwise used by the non-indigenous population without the free, prior and informed consent of the indigenous people, states shall "*take steps to return these lands and territories*".⁴⁶²

Section 5.3 described how UN treaty bodies' findings that indigenous peoples hold property rights to lands continuously occupied and/or used by them have been matched by a broad body of jurisprudence from regional and domestic courts. The same has not been the case with regard to the right to restitution. There seems to be essentially no instance where a regional court has called on states to return land to indigenous peoples taken without their consent.⁴⁶³ Neither is there any other evidence of that a right to restitution has been accepted as law. Despite the treaty bodies' coherent position, the doctoral thesis therefore refrains from – at this point – concluding that indigenous peoples' right to restitution of lands, territories and natural resources have been firmly established in international law.

In the context of restitution, one must also note the issue of benefit-sharing in the context of extraction of natural resources by non-members on indigenous peoples' traditional territories.

⁴⁶⁰ Concluding observations on Guatemala, CCPR/CO/72/GTM, para. 29. Article 27 is of course a cultural rights provision. Notwithstanding, it is noteworthy that the HRC has recognized the principle of a right to restitution of indigenous peoples.

⁴⁶¹ General Recommendation No. 23, para. 5

⁴⁶² CESC General Comment No. 21, para. 36. On a regional level, the right to restitution is also enshrined in ACHPR Article 21.2. However, similarly to the ILO 169 Article 16, it appears that AfCHPR Article 21 provides for a right to restitution only when lands have been taken subsequent to the ratification of the Convention. The AfCHPR too, hence seems to lack retroactive effect.

⁴⁶³ One can note, however, that AfCommHPR member Pityana has noted that the wording of AfCHPR Article 21 pertaining to natural resources bears a striking resemblance with the corresponding provision of the [then draft] DRIP (i.e. Article 28). See Pityana, *The challenge of culture for human rights in Africa*, p. 232.

Benefit-sharing does of course not constitute restitution in the full meaning of the right. It embraces no right of indigenous peoples to regain control over lost territories. But benefit-sharing could be labelled partial restitution, since it implies that a certain amount of the proceeds from natural resource extraction from territories no longer fully controlled by indigenous peoples, but that still are traditionally theirs, shall be returned to those peoples.

A right of indigenous peoples to share in profits from resource extraction does not follow from any international legal instrument, and is not enshrined in many other international legal sources either. However, regional human rights institutions addressing indigenous peoples' property rights to land have recently held that indigenous peoples have a right to share in the benefits from extraction of natural resource emanating from lands traditionally used by them, but no longer under their control.⁴⁶⁴ In addition, in essentially all Western countries with recognized indigenous peoples, a practice has been established or is emerging that indigenous peoples are entitled to benefit sharing when resources are extracted for industrial purposes from their territories.⁴⁶⁵ Clearly, based on these limited legal sources, one cannot conclude that a right to benefit-sharing has been established in international law. Notwithstanding, the trend towards acceptance of such a right is evident.

5.4 *Indigenous peoples' property right to their collective creativity*

5.4.1 Introduction

Section 5.3 hence concluded that contemporary international law – viewed in the light of an emerged understanding of the right to non-discrimination - embraces a right to property of indigenous peoples to lands and natural resources traditionally and continuously used. The Section further inferred that a right to restitution with regard to lands traditionally used, but subsequently unjustly taken is at least emerging. This Section now surveys to what extent international law has progressed in a similar manner within the sphere of collective creativity. On one hand, it would not be surprising if international law on collective creativity lags behind that pertaining to land. After all, land rights have been in the forefront since the inception of the indigenous rights discourse. In contrast, the international community has at a

⁴⁶⁴ See e.g. the *Saramaka Case*, Ser. C No. 172 and *Endorois People v Kenya*, Case 276/2003, para. 294

⁴⁶⁵ ADHR (Arctic Human Development Report) 2004, Akureyri: Stefansson Arctic Institute, pp.132-134, and *Apirana Mahuika et al v. New Zealand*, Comm. No. 547/1993

much later stage begun to focus on TK, TCEs etc. But on the other hand, Section 5.3 has demonstrated how the *terra nullius* doctrine has recently been rejected. As indicated, it appears that the *terra nullius* doctrine traditionally has had a similar impact on indigenous peoples' lands as the notion of the public domain has had on their collective creativity. Perhaps this poses the question of whether the notion of the public domain - as applied to indigenous peoples' collective creativity - should be rejected too?

In order to survey whether international law recognizes a property right of indigenous peoples over their collective creativity, this Section first offers a very brief and generalizing overview over the structure of the IP-system. It is underlined that the doctoral thesis does not purport to provide any detailed insight into the complex IPR-mechanisms. For the present purposes, a general understanding of the most basic features of the IP-system is sufficient. Particular attention is given to copyrights, patents and trademarks, as the most central IPRs.⁴⁶⁶ These rights are also the IPRs most often mentioned in the context of protection of indigenous peoples' collective creativity. Once the basic features of the IP-system have been outlined, the Section turns to investigating how well these features correspond with the general characteristics of indigenous peoples' collective creativity. The Section subsequently analyzes whether there are any differences between land, on one hand, and collective creativity, on the other, suggesting that international law should not extend property right protection also to collective creativity. Finally, the Section surveys whether international legal sources suggest that indigenous peoples hold property rights to their collective creativity.

5.4.2 The basic features of conventional IPRs

IPRs has been described as a bundle of interests vested in the owner of the IPR, who has the capacity to authorize or prevent others from acting in a specific manner with regard to the IPR.⁴⁶⁷ That said, IPRs are rarely absolute or indefinite. Most IPRs are designed with an aim

⁴⁶⁶ Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 13

⁴⁶⁷ Cullet et al, *Intellectual Property Rights, Plant Genetic Resources and Traditional Knowledge*, p. 113. For instance, Carpenter defines copyrights as the granting of an exclusive right to reproduce, distribute, perform and display the work publicly. See *Intellectual Property Law and Indigenous Peoples*, pp. 57-58. And patents have been described as exclusionary rights over an invention which can be converted into a market monopoly. Once established, the patent prevents others from using, producing or selling the invention. See Dutfield and Suthersanen, *Global Intellectual Property Law*, pp.110-111. Trademarks serve essentially two purposes. First, a trademark identifies a product to buyers and users, assuring them that the origin of the product is what they

to maximize creativity. The legislator seeks to achieve this end by awarding a creator sufficient, but not more, remuneration from her work. Once the creator has been duly compensated, others shall be allowed to build on her work.⁴⁶⁸ In other words, law and economics aspects underpin the structure of the IP-system.⁴⁶⁹ As a result of this basic rationale behind the IPR-system, with few exceptions, IPRs eventually expire and the work end up in the so called public domain.⁴⁷⁰ In other words, the public domain is designed and defined with the intention to promote efficient economic growth.⁴⁷¹

In addition to the limited term of protection, in particular two other basic features of IPRs are particularly relevant for the purposes of the doctoral thesis. First, generally speaking, for a work to be eligible for IP-protection, it must be sufficiently new. In other words, the creator must add some kind of “value” to the bulk of previously existing creativity.⁴⁷² Second, a

expect it to be. Second, trademarks protect the creator of a product from illicit reproducing by others. See Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 138-139 and 141-146.

⁴⁶⁸ Fishner, *Theories of Intellectual Property*, p. 169, Geroski, *Markets for Technology*, p. 97, Drahos, *The Universality of Intellectual Property Rights*, p. 13, and *Intellectual Property and Human Rights*, p. 350, Lea, *Property Rights, Indigenous Peoples and the Developing World*, pp. 220 and 227, and Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 48, 51-53, 75 and 110

⁴⁶⁹ Cohen, *Copyright, Commodification and Culture*, p. 138

⁴⁷⁰ Sterling, *World Copyright Law*, pp. 193-194. For instance, once the work has been disclosed to a wider public, copyright protection is normally awarded for 50-70 years following the death of the author. See Lucas-Schloetter, *Folklore*, pp. 389, and Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 79-80 and 97. Design protection is often described as a particular form of copyright. Design protection, however, has an even shorter life-span, than copyrights. It is normally valid for 10-25 years. See Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 169-174. Patent protection is normally valid for 20 years, from the filing for registration. See Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 112-113 and 128. A particular form of patent-similar protection has been extended to plant varieties. But as a specific form of patents, plant variety protection is subject to the same time-limitations as patents. See Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 187-191. Trademarks, on the other hand, differ from copyrights and patents in that protection can last in perpetuity, once the trademark has been duly registered.

⁴⁷¹ Chander and Sunder, *The Romance of the Public Domain*, p. 1340

⁴⁷² For instance, for a work to be eligible for copyright protection, it must meet what is normally labelled the originality criterion. For a work to be considered original, it must sufficiently distinguish itself from already existing works. There is no universal definition of the originality criterion. Generally speaking, however, the threshold is not set particularly high. When it is clear that the creator has made some form of personal input beyond existing works, and it is unlikely that another creator independently would have come up with the same creation, the work is normally eligible for copyright protection. The originality criterion does not demand that the work be of certain quality, or useful. See Carpenter, *Intellectual Property Law and Indigenous Peoples*, p. 69, and Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 79-80. Similarly, for an invention to be eligible for patent protection, it needs to meet a novelty criterion. For two reasons, however, the novelty criterion under patent law is more demanding compared with the originality criterion applying to copyrights. First, a greater degree of novelty is necessary to achieve a patent, compared with copyrights. An inventor can be inspired by, but must not unduly build on, previous inventions for the invention to be patentable. Still, the test is not too demanding. It is sufficient that the invention is not obvious to a person skilled in the particular field. Second, unlike the originality criterion, the novelty criterion demands that an invention be of a certain quality. The invention must have at least some kind of use. See Cullet et al, *Intellectual Property Rights, Plant Genetic Resources and Traditional Knowledge*, pp. 125-126, and Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 120-123. Trademarks, on the other hand, need not include any level of originality. Any kind of mark can be trademarked, as long as it cannot be confused with previously existing marks. But a trademark must normally be a commercial purpose. See Carpenter, *Intellectual Property Law and Indigenous Peoples*, p. 76.

creator of a work must normally be known for the work to be eligible for IP-protection. That is not to say that the creation cannot be a collective effort. Artists, inventors etc. collaborating to create a work does not *per se* deprive the work of its protectability. But even if many, the creators behind a work must be identifiable.⁴⁷³ If not, the work is normally not eligible for IP-protection.

5.4.3 Moral rights and liability regimes

Moral rights

In particular in jurisdictions based on the Roman law tradition⁴⁷⁴, it has been traditional to bestow a creator of a work with, in addition to economic rights, certain non-monetary moral rights. The basic idea behind these rights is to protect the author beyond her mere economic interests, and also see to her identity, personality and reputation.⁴⁷⁵ The most commonly recognized moral rights are the rights of the creator to (i) determine when, if at all, a work should be made public, (ii) be associated with her work, and (iii) protection against distortions of the work. The latter right awards the creator a right to object to mutilations or other modifications of the work, or to derogatory action with regard to the work that would be prejudicial to the creator's honour or reputation.⁴⁷⁶ Whether something constitutes a distortion or derogatory action must be determined based on the subjective opinion of the creator of the work.⁴⁷⁷

Due to their nature, moral rights distinguish themselves from the economic rights in certain respects. For instance, moral rights are generally inalienable from the creator of a work and

⁴⁷³ Lea, Property Rights, Indigenous People and the Developing World, p. 263. For instance, copyright protection can only be awarded to an identified creator (or creators). The work cannot be anonymous. Copyright protection need not, however, be awarded to the creator of a work. If the creator of a work is unknown, and the work has not been disclosed to the general public, copyright protection can be achieved by anyone who finds the work, and makes it available to the public. Also with regard to patents, for a work to be eligible for protection the creator (or creators) of the work must be identifiable. Again, however, trademark protection deviates from copyrights and patents. Trademarks need not be identified to a particular creator. Anyone can file for trademark-registration, as long as the general criteria are met. See Brown, Who Owns Native Culture?, p. 76.

⁴⁷⁴ Common law jurisdictions have traditionally been more sceptical, or even outright hostile, towards the notion of moral rights. See Dutfield and Suthersanen, Global Intellectual Property Law, p. 27. Graham and McJohn notes, however, with reference to Brown, that with time, moral rights have become increasingly acknowledged also in jurisdictions such as the one of United States. See Indigenous Peoples and Intellectual Property.

⁴⁷⁵ von Lewinski, International Copyright Law and Policy, p. 50

⁴⁷⁶ Lucas-Schloetter, Folklore, pp. 390-391, von Lewinski, International Copyright Law and Policy, pp. 51-52 and 133-137 and Carpenter, Intellectual Property Law and Indigenous Peoples, p. 73.

⁴⁷⁷ von Lewinski, International Copyright Law and Policy, pp. 134

can hence not be transferred. Further, moral rights tend to last in perpetuity.⁴⁷⁸ This also implies that moral rights can continue to pertain to the creator even if the economic rights in a work have been transferred to a person other than the creator of the work.⁴⁷⁹

At least at first blush, it would appear that moral rights can offer certain protection to cultural elements springing from indigenous cultures. Certainly, the focus on protection of the identity of the author and the indefinite term of protection should appeal to indigenous peoples.⁴⁸⁰ At the same time, one should note that a limitation in conventional moral rights protection is that, for moral rights to apply at all, the cultural element must first meet the regular criteria to be legible for IP-protection.⁴⁸¹ As the next Section shall turn the doctoral thesis' attention to, this is not always an easy task for elements of indigenous peoples' collective creativity. The thesis shall further discuss the potential relevance of moral rights to the protection of indigenous peoples' collective creativity shortly below and in Chapter 9.

Liability regimes

The above has explained that generally speaking, IPRs are exclusive rights granting the creator of a work essentially complete control over the work. This regular feature of IP-protection is generally referred to as property regimes. In certain instances, however, IPRs do not offer such an embracing protection. In addition to property regimes, the IP-system sometimes operates with what has been labelled "liability regimes". Liability regimes do not offer a complete protection to the creator over her work. Liability regimes allow others to use the work, but demand that the user in return pay a fee to the holder of the work. A liability regime approach can hence be perceived as offering a compromise position between the public domain and absolute IPRs. Translated into an indigenous context, a liability regime would hence deny an indigenous people the possibility to prevent use of its collective creativity. In return, however, the liability regime ensures the indigenous people monetary compensation when cultural elements springing from its culture are used by non-members.⁴⁸²

⁴⁷⁸ Drahos, *The Universality of Intellectual Property Rights*, p. 8, Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 75-76 and 89-90, Cullet et al, *Intellectual Property Rights, Plant Genetic Resources and Traditional Knowledge*, pp. 113 and 128, Cottier and Panizzon, *A New Generation of IPR for the Protection of Traditional Knowledge*, p. 227, von Lewinski, *International Copyright Law and Policy*, pp. 53, and Brown, *Who Owns Native Culture?*, p. 56

⁴⁷⁹ von Lewinski, *International Copyright Law and Policy*, p. 133

⁴⁸⁰ Compare Lucas-Schloetter, *Folklore*, pp. 390-392

⁴⁸¹ Lucas-Schloetter, *Folklore*, p. 392

⁴⁸² Chander and Sunder, *The Romance of the Public Domain*, pp. 1369-1370, and Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 346

The doctoral thesis will return to the relevance of liability regimes to the protection of indigenous peoples' collective creativity shortly too.

5.4.4 How do the general features of the conventional IPR-system square with indigenous peoples' collective creativity?

Indigenous peoples' creativity tends to be a result of continued reworking of already available and known material. Elements of TK and TCEs normally build on a huge collective bulk of indigenous people's cultural heritage. Indigenous creativity is marked by a dynamic interplay between old and new, evolving at slow pace. Indigenous peoples' collective creativity regularly contains substantial elements of already existing works, with relatively little being added to the "existing" TK, TCEs etc. Innovation is restricted, as faithful reproduction of the culture is often important. Art can be viewed as a means to communicate history, culture etc. wherefore the artist is bound by respect for the tradition and is not given free rein for inspiration. Not uncommonly, it is not even possible to discern a "new work" from the existing bulk of cultural elements springing from the indigenous people. This characteristic of indigenous peoples' creativity implies that they run an apparent risk of not being deemed sufficiently new for IP-purposes. That is particularly so with regard to TK, which often fails to meet the novelty criteria embedded in patent legislation.⁴⁸³

Further, indigenous cultures tend to place great emphasis on the collective. Indigenous peoples generally view elements of their collective creativity to vest with the people. Pre-existing traditional culture is generally perceived to be collectively "owned" by the people or the community, inasmuch as the notion of authorship is relevant at all.⁴⁸⁴ The fact that authorship tends to be of little relevance in indigenous cultures also result in elements of indigenous creativity not uncommonly being of anonymous origin, i.e. the individual creator/s is/are unknown. Creativity is often distinguished by being attributable to the community.

⁴⁸³ Kongolo, *Unsettled International Intellectual Property Issues*, p. 42, Taubman and Leistner, *Analysis of Different Areas of Indigenous Resources*, p. 72, Carpenter, *Intellectual Property Law and Indigenous Peoples*, pp. 54 and 69-70, Xanthaki, *Indigenous Rights in International Law over the Last 10 years*, Cottier and Panizzon, *A New Generation of IPR for the Protection of Traditional Knowledge*, p. 216, Lucas-Schloetter, *Folklore*, pp. 384-385, and Biber-Klemm et al, *Flanking Policies in National and International Law*, pp 245-246. Lucas-Schloetter, illustrates that within the field of music, the singer often "*is a collective voice whose objective is not to innovate but to conserve by preserving the heritage that has been transmitted to him*".

⁴⁸⁴ Taubman and Leistner, *Analysis of Different Areas of Indigenous Resources*, p. 60, Biber-Klemm and Szmura Berglas, *Problems and Goals*, pp. 18-19, Stoll and von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law I*, p. 14

This characteristic contributes to rendering elements of indigenous peoples' cultures ineligible for IP-protection.⁴⁸⁵

Finally, even when elements of indigenous peoples' collective creativity meet/have met the novelty/originality criteria and have a known creator, the limited term of protection inherent in IPRs renders such mechanisms unsuited to protect the cultural heritage of indigenous peoples. The major bulk of indigenous peoples' collective creativity was of course created, and also disclosed to a wider public, some time ago. Even though many indigenous people keep parts of their collective creativity secret, most elements of indigenous peoples' cultures have by now been exposed to a wider public. This implies that although these elements might have been eligible for IP-protection at some point, the time-limitation inherent in most IPR-mechanisms has deprived these elements of their protectability.⁴⁸⁶ Moreover, even if an element of an indigenous people's culture presently meets all criteria for being eligible for IP-protection, and has not yet been disclosed to the public, it will still end up in the public domain within a foreseeable future, if the indigenous people seeks IP-protection. This aspect of IPRs, sometimes referred to as "pyrrhic protection" often in itself renders IP-protection unattractive to indigenous peoples.⁴⁸⁷

In conclusion, to a limited extent, indigenous peoples' creativity can be eligible for IP-protection. For instance, indigenous peoples' TK is at times sufficiently novel and has not been disclosed to a wider public, and is hence eligible for patent registration. In the same vein, parts of contemporary artistic works springing from indigenous cultures can be original enough to qualify for copyrights. Notwithstanding, the novelty/originality criteria and the demand that a creator must be known for a work to be eligible for IP-protection often render indigenous peoples' collective creativity without IP-protection. And the limited term of

⁴⁸⁵ Carpenter, *Intellectual Property Law and Indigenous Peoples*, pp. 54 and 67-68, Cottier and Panizzon, *A New Generation of IPR for the Protection of Traditional Knowledge*, pp. 216-218, Xanthaki, *Indigenous Rights in International Law over the Last 10 years*, Kongolo *Unsettled International Intellectual Property Issues*, p. 43, Lucas-Schloetter, *Folklore*, pp. 386-388, and Biber-Klemm and Szmura Berglas, *Problems and Goals*, pp. 18-19. Lucas-Schloetter elaborates that TCEs are indeed in their very nature impersonal. She further points to that the IP-element anonymous works do not apply well in the context of TCEs either. Neither is the concept joint authorship helpful, since those jointly contributing to TCEs are often from different generations. That said, to claim that traditional property rights are always collective in nature while IPRs are individual is an oversimplification. Specific elements of indigenous peoples' cultures can of course be held by individuals or smaller segments of the people. See Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 328, and Biber-Klemm and Szmura Berglas, *Problems and Goals*, pp. 18-19.

⁴⁸⁶ Carpenter, *Intellectual Property Law and Indigenous Peoples*, p. 70, Xanthaki, *Indigenous Rights in International Law over the Last 10 years*, Lucas-Schloetter, *Folklore*, pp. 389, and Biber-Klemm, *Origin and Allocation of Traditional Knowledge*, pp. 159-160

⁴⁸⁷ Taubman and Leistner, *Analysis of Different Areas of Indigenous Resources*, pp. 86 and 106

protection most IPRs offer implies that almost all elements of indigenous peoples' collective creativity are already in the so called public domain, or will end up there soon.⁴⁸⁸ In short, (i) the inherent rationale built into the IP-system positing that works should eventually end up in the public domain, and (ii) the individualistic feature of the IP-system, combines to render most elements of indigenous peoples' distinct collective creativity ineligible for IP-protection.⁴⁸⁹

Generally speaking, the conventional IP-system is hence inapt to protect the collective creativity of indigenous peoples. That said, it is worth recalling that one aspect of IPRs might be more compatible with indigenous peoples' aspirations. Section 5.4.3 outlined how moral rights serve the purpose of protecting the identity of the creator. For this reason, moral rights have the capacity to last in perpetuity, even when the economic rights once pertaining to the work have since long expired. The moral rights aspects of IPRs could potentially be of significance for the protection of indigenous peoples' collective creativity. Still, as Section 5.4.3 further explained, the moral rights embedded in conventional IPRs are rather limited in scope. In addition, moral rights presuppose that the work as such is eligible for IP-protection, something, as seen, is not always the case with elements of indigenous peoples' cultural elements. Notwithstanding, it is worth bearing the moral rights aspects of IPRs in mind when the doctoral thesis embarks on the concluding analyses of to what extent indigenous peoples hold property rights to their collective creativity in Chapter 9.

⁴⁸⁸ Drahos, *Intellectual Property and Human Rights*, p. 357, Graham and McJohn, *Indigenous Peoples and Intellectual Property*. Graham and McJohn point to that the structure of the IPR-system implies that indigenous traditional songs often do not enjoy copyright protection, at the same time as a modern recording of the song by a non-member does. Graham and McJohn, with reference to Chandler and Sunder, further observe that the structure of conventional IPRs often result in knowledge generated in developed countries enjoying IP-protection, while knowledge developed in indigenous societies is open for all to use.

⁴⁸⁹ Some might argue that one exception to the general conclusions outlined above is that indigenous peoples' signs, symbols etc. can often be trademarked. That is particularly so, since certain possibilities exist for a collective association to file for trademark protection, an option which could fit indigenous peoples well. See Kur and Knaak, *Protection of Traditional Names and Designations*, p. 301. In this context, reference can also be made to geographical indicators. Geographical indicators serve similar purposes and features as trademarks. Geographical indicators indicate that a product originates from a certain territory or region. Protection for such a good can be achieved when a characteristic of that good is essentially attributable to its geographical origin. See Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 195. In other words, under certain circumstances, indigenous products can achieve protection for a cultural element not because of the element being distinct to the people, but to the area from which the people spring. One should note, however, that geographical indicators only concern the identification in the marketplace of products. They are hence only helpful to protect cultural elements when these are commodified as products. See Taubman and Leistner, *Analysis of Different Areas of Indigenous Resources*, pp. 107-108, and Kur and Knaak, *Protection of Traditional Names and Designations*, pp. 301, 307-308 and 328. This limitation obviously lessens the value of geographical indicators to indigenous peoples. Similarly, trademark protection must also serve a commercial purpose. In addition, it might not always be possible for an indigenous people to register a sign, symbols for cultural or spiritual reasons, since registration exposes the sign or symbol to the public.

5.4.5 Comparison between property rights to land and to collective creativity continuously in indigenous peoples' possession

The right as such

Section 5.2 inferred that the right to property is essentially a right to non-discrimination. It embraces no right to be provided with property. But the right to property provides that everyone must have the same opportunity to acquire property, and once property has been thus acquired, one must not be arbitrarily deprived of the same. Section 5.3 described how international law conventionally did not endorse property rights to land of indigenous peoples. The land rights system was designed in a manner that resulted in it essentially by-passing indigenous forms of communal land use. The Section further described, however, how – viewed through the prism of the general right to non-discrimination – the right to property has recently evolved and now awards indigenous peoples rights to their traditional territories. Sections 5.4.1-4 outlined how traditional IPRs in a similar fashion as conventional land rights law have been crafted in a manner so that they fail to extend protection to the major bulk of indigenous peoples' collective creativity. This Section surveys whether there – given that property rights to land and to creativity are both based on the same right to non-discrimination - is any rationale why property rights pertaining to human creativity should not undergo the same developments as property rights to land, in the particular context of indigenous peoples.

When commencing to compare rights to land and rights to human creativity, one obviously immediately notes the difference in the matter subject to protection. Indeed, from a factual point of view, it is difficult to imagine two matters as different as land and human creativity. The former is rock steady, while the latter need not even be in tangible form. Certain forms of creativity can be reproduced in infinity,⁴⁹⁰ where each copy is equally representative of the creator's production. There is no original, no "mastercopy", in that sense. A real estate, on the other hand, is a unique piece of property. Land cannot be reproduced. There can be only one "version" of it.

The outlined difference between land and human creativity is, however one of fact, and not law. Again, it is pertinent to recall that the right to property is essentially a right to non-

⁴⁹⁰ See also Cullet et al, Intellectual Property Rights, Plant Genetic Resources and Traditional Knowledge, pp. 113-114.

discrimination. It is up to domestic law to determine what subject matter deserves property rights protection. Once that decision has been made, the right to property applies equally to all such subject matter, however different. In other words, it is the role of domestic law to determine whether land, on one hand, and human creativity, on the other, are so different that one deserves property right protection and the other does not. And when this call has been made, no authority can second-guess the decision.⁴⁹¹ Clearly, almost all domestic jurisdictions today recognize property rights to both land and human creativity. In both instances, holders of such rights can expect courts to uphold the rights and governmental authorities to enforce the rights. Hence, the fact that human creativity factually distinguishes itself from land seems not in itself to warrant a differentiation in legal protection.⁴⁹²

In addition, the doctoral thesis has on a few occasions - referring to the comparability between the *terra nullius* doctrine and the notion of the public domain - alluded to how the two rights have traditionally excluded indigenous peoples' collective rights in similar fashions. It has been described that the *terra nullius* doctrine was essentially a legal concept created by European legal scholars, taking land use typical to the European cultures as point of departure when determining what forms of occupation and use of land resulted in rights thereto. As a consequence, a legal system was created in Europe holding that typical European land use resulted in property rights to land, whereas land use common to indigenous cultures did not. The result was that the Europeans could invoke the *terra nullius* doctrine to, in complete compliance with international law, appropriate indigenous peoples' territories through occupation.

In a comparable fashion, the doctoral thesis has further pointed to how the notion of the public domain is also a legal concept invented by European legal scholars. It has its roots in the European culture and legal thinking. Unlike the *terra nullius* doctrine, the public domain was perhaps not deliberately construed for the purposes of accommodating for "legal" European

⁴⁹¹ Another matter is that the scope and term of property right protection can differ between various forms matter. No property right is absolute, and as already touched upon, and to which we shall return below, the limitations can vary between e.g. land and human creativity. But that does not impact on the question whether property rights as such pertain to the matter.

⁴⁹² Moreover, there might be greater similarities between land and human creativity than meet the eye at first blush. If we limit our comparison to initial acquisition, which is the mean of acquisition that is most relevant for the purposes of this doctoral thesis, rights to the two matters are established in a comparable fashion. IPRs are awarded to original creators, real estates to original users. Both are awarded to identifiable individuals, group of individuals or legal entities. With regard to real estate, primary rights are awarded due to individual and discernable use of land. As to IPRs, rights follow from individual creativity.

acquisition of the belongings of other cultures. Notwithstanding, the notion of the public domain has had an effect on indigenous peoples' collective creativity very similar to that of the *terra nullius* doctrine on their collective lands. As real estate law, framing IPRs with the structure and social patterns of the European society in mind resulted in conventional IPRs offering only a limited protection to forms of human creativity common to indigenous cultures. As a consequence, the invention of the public domain has catered for the appropriation of indigenous peoples' collective creativity, in a fashion similar to how the notion of *terra nullius* allowed Westerners to occupy indigenous lands. Indeed, as Dutfield has observed, indigenous peoples viewing TK as vesting in the collective has led non-members to treat TK as "*res nullius*" before it being "discovered" by scientists, corporations etc.⁴⁹³ The similarities between the *terra nullius* doctrine and the public domain is further underlined by the fact that the term "public domain" in fact originates from U.S. land laws.⁴⁹⁴ Both real estate law and IPRs have hence conventionally been designed in ways resulting in them by-passing indigenous patterns of association, albeit perhaps less deliberately so with regard to IPRs. As further indicated, the elements that have been built into the two sets of laws to give this effect are similar too.

Sections 5.4.2 and 5.4.4 explained how indigenous peoples' creativeness tends to be collective in nature. Indigenous art, knowledge etc. evolve gradually and are not uncommonly a result of a communal effort. The Sections further described how this characteristic of indigenous creativeness results in a major bulk of their collective creativity failing to meet the originality/novelty criterion and the criterion demanding that a work not be anonymous, both inherent in the IPR-system. Section 5.3 outlined how similar criteria have until very recently prevented indigenous peoples from acquiring property rights to land. Like creativeness, indigenous peoples' land use tends to be communal in nature. Often, it is not possible to attribute a particular individual's use to a particular land-patch. And as with creativity, indigenous cultures generally perceive land to vest with the collective. Conventional real estate law, on the other hand, submits that property must be individually held. The criterion that IPRs demand an identifiable creator is hence directly translatable into conventional real estate law. But also the originality/novelty criterion can be said to have a

⁴⁹³ Dutfield, *The Public and Private Domains*

⁴⁹⁴ Cohen, *Copyright, Commodification, and Culture*, pp. 124 and 127-128. In the same vein, analyzing to what extent Australian property rights law protects the collective creativity of the Aboriginal peoples, Carpenter draws a direct parallel between jurisprudence pertaining to property rights to land and jurisprudence relating to IPRs. See *Intellectual Property Law and Indigenous Peoples*, pp. 64-66.

counterpart in conventional real estate legislation. As seen, for someone to acquire property rights to land based on occupation, conventional real estate law demands that the use has been sufficiently intense and exclusive. In other words, the use must result in the particular land-patch being significantly distinguishable – or significantly “original” - compared with the same land-patch prior to use. A comparison can here be made with IPRs, where a work too must be significantly distinguishable from matter existing prior to the work. The comparison limps in the sense that in real estate law the measurement of whether the work is sufficiently “original” is based on a comparison with a particular object, i.e. that particular land-patch prior to use. In the context of IPRs, on the other hand, the measurement is with all previously existing matter, i.e. all previously existing creativity. But the comparison is on the mark in the sense that in both instances, it is the indigenous people’s work that is deemed not sufficiently original to result in rights. In the context of real estate law, the indigenous people’s work does not render the land-patch sufficiently original compared with the land-patch prior to the indigenous people working on it. In the context of IPRs, the work is not sufficiently original compared with the indigenous peoples’ previous “works”. In conclusion, two of the three criteria contributing to indigenous peoples’ collective creativity normally being ineligible for IPR protection – i.e. that a work must not be anonymous and must be sufficiently new/original – can be readily translated into real estate law. In a comparable manner, rights to land too were traditionally denied indigenous peoples because of a notion that individual utilizers of the land could not be identified and that the use did not sufficiently distinguish the land from the same land prior to use.

In sum, the most salient difference between intellectual property and real estate is the intangible nature of IPRs.⁴⁹⁵ But this difference is not relevant in the sense that it justifies a different legal treatment of indigenous peoples’ traditional creativity, compared with their traditional land use. On the contrary, the reasons having conventionally kept indigenous peoples from acquiring property rights to land are strikingly present also in the context of their collective creativity.

Limitations in the right

Hence, a comparative analysis between conventional real estate law and IPRs seems to result in the conclusion that there are no relevant rationales for indigenous peoples not holding

⁴⁹⁵ Carpenter, *Intellectual Property Law and Indigenous Peoples*, pp. 56-57

property rights to their collective creativity. What remains to survey is the content and scope of the right. In other words, is the right absolute, or must indigenous peoples endure certain limitations in the right? After all, it seems to follow from Section 5.3 that indigenous peoples' collective property rights to land have emerged as a direct counterpart to conventional individual real estate rights, the only significant difference being precisely the collective nature of indigenous peoples' rights. There is no evidence of indigenous peoples being exempted from limitations normally applying to property rights to real estate. Since a potential property right of indigenous peoples to their collective creativity is based on an analogy with land rights, it would seem to follow that indigenous peoples have to accept limitations generally applying to IPRs.

Section 5.4.2 outlined how the aspiration to balance the interest of the creator of a work, and those wanting to build on the same, constitutes an inherent feature of IPRs. For this reason, IPRs are rarely absolute. Various forms of limitations normally apply.⁴⁹⁶ Some of these can surely be of considerable relevance in certain instances. But relatively speaking, they do not seriously impact on the scope and content of a potential property right, particularly if one can expect cultural rights to prevent uses that are derogatory or otherwise culturally problematic. One can further note that property rights to land too, are rarely absolute. Also land rights holders must generally accept certain limitations in their right. Hence, IPRs do not deviate from other property rights in this context. Moreover, the doctoral thesis would lose its focus if embarking on a detailed survey of these limitations. For these reasons, the Section will not embark on an analysis of the potential impact of limitations normally applying to IPRs, or on their relevance to property rights to collective creativity. As seen, however, one limitation applies to IPRs that is not present in almost any other property right. And this limitation must be addressed, since, if applying to collective creativity too, it would seriously impact on the scope of the right.

As discussed in depth above, IPRs are with few exceptions limited in time. Given that the property rights the doctoral thesis is considering derives from IPRs, it would seem to follow that potential property rights of indigenous peoples to their collective creativity should be

⁴⁹⁶ Exceptions from copyright protection often apply with regard to use for teaching purposes or news reporting. However, such expectations must regularly not conflict with normal economic expectations of the holder of the work nor unreasonably prejudice her legitimate interests. The fact that the author may find the borrowing misleading or offensive does not necessarily prevent the use, however. Trademarks too, can be subject to similar limitations as copyrights. In the same vein, states are free to determine that certain products shall not be eligible for patents. See Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 79, 92-95, 115 and 151-152.

subject to the same limited term of protection as IPRs in general. But on the other hand, it could be argued that not only the applicability of the right to property as such, but also the scope of protection, should be accustomed to the particular cultural context in which the right is being applied. As seen, indigenous peoples seeking property rights to their collective creativity are chiefly motivated by an interest in preserving their cultural identity, rather than in monetary gain. In this context, one should note that an analogy with the conventional IP-system does not rule out protection in perpetuity. Section 5.4.3 described how conventional IPRs embed, in addition to economic rights, also moral rights, aiming at protecting the identity of the author. And these rights can last indefinitely. In conventional IPRs, the moral rights aspects are downplayed, since it is inherent in the IPR-system that the main motivator behind creativity is monetary gain. But if considering property rights applying in a context where the main motivator is not financial benefit, but protection of cultural identity, one could perhaps argue that in the comparison with IPRs, greater focus shall be on the moral rights aspect of such rights? That would seem to argue for a protection that perhaps does not last in perpetuity, but as long as a cultural element remains culturally significant to the indigenous people in question. The doctoral thesis shall return to this question in the concluding analyses of indigenous peoples' property rights over their collective creativity in Chapter 9.

5.4.6 Restitution - collective creativity already in the public domain

Section 5.3.3 observed that a number of international legal sources coherently assert that indigenous peoples hold property rights also to territories traditionally used, but which have subsequently been unduly taken without consent. However, due mainly to an absence of evidence of acceptance of the right on a regional and domestic level, the Section nonetheless refrained from concluding that international law has fully embraced a right to restitution pertaining to territories traditionally occupied and/or used, but which are no longer under the indigenous people's control. Instead, the Section noted that a right to restitution is emerging. This conclusion was drawn both with regard to "full restitution", i.e. return of lands lost, and "partial restitution", i.e. rights to share in profits from resource extraction on indigenous peoples' traditional territories by non-members.

Naturally, the just inferred implies that it is not possible, based solely on an analogy with land rights, to conclude that indigenous peoples hold property rights to collective creativity created, but no longer controlled, by them. This conclusion applies both to cultural elements

(i) in the public domain, and (ii) to which third party rights pertain. When a right to restitution of lands has crystallized into law, it obviously immediately becomes relevant to conduct an analogous analysis between lands and collective creativity also with regard to subject matter no longer controlled by indigenous peoples. But today, as the right to restitution is merely emerging, such an analysis falls outside of the scope of the doctoral thesis.

5.4.7 International legal sources on indigenous peoples' property rights to their collective creativity and conclusions

Section 4.7 outlined how CESC General Comments No. 17 and 21 have interpreted CESCR Article 15.1 (c) to imply that the right to benefit from the protection of the moral and material interests resulting from creativity shall apply to, in addition to of individuals, also to groups. Making this observation, the CESC has particularly noted the situation of indigenous peoples. The Section further explained that albeit CESCR Article 15.1 (c) appears in a treaty proclaiming only economic, social and cultural rights, and not property rights, General Comments No. 17 and 21 also noted that the right enshrined in CESCR Article 15.1 is at least akin to a property right, or more precisely, an IPR. The observation is pertinent. A right to benefit from one's creativity encompasses a right to prevent others from utilizing the same work. As Section 5.4.2 explained, the right to control access to a work is a basic features of IPRs. General Comments No. 17 and 21 in addition observed that the reference in CESCR Article 15.1 (a) to everyone's right to take part in cultural life further highlights the resemblance between CESCR Article 15.1 and IPRs. As Section 5.4.2 elaborated, the same balancing between those creating culture, and those wishing to access the same, is inherent in IPRs. In sum, it is not suggested here that CESCR Article 15.1 is not relevant when analyzing cultural rights. But the doctoral thesis do conclude that CESCR Article 15.1 (c) (and for the same reason also the parallel UDHR Article 27) in addition presents features that are so similar to IPRs that the provision is relevant also when analyzing property rights to human creativity. This conclusion also finds support in the legal doctrine.⁴⁹⁷

⁴⁹⁷ Both Drahos and Dutfield and Suthersanen have noted the striking similarity in structure between CESCR Article 15.1 and IPRs. See Drahos, *Intellectual Property and Human Rights*, p. 354, and Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 218. And Green, who has studied the drafting history of both UDHR Article 27 and CESCR Article 15.1, concludes that the crafters of these provisions did view UDHR Article 27 and CESCR Article 15.1 (c) as protecting intellectual property rights. See *Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights*, Background Paper submitted by M. Green, UN Doc. E/C.12/2000/15. See paras. 4-7 for UDHR Article 27 and paras. 8-43 for the CESCR Article 15.

Hence, CESC General Comments No. 17 and 21 support the conclusion following from an analogy with land rights that indigenous peoples hold property rights to their collective creativity. In that sense, one can draw a parallel between CESC General Comments No. 17 and 21 and the CERD Committee's General Recommendation No. 23. Where the latter submits that the right to property enshrines a collective right of indigenous peoples to lands traditionally used, the former Comments assert that indigenous peoples enjoy the same right with regard to their collective creativity. Indigenous peoples have not (yet) taken cases pertaining to their collective creativity to international tribunals in the way they have done with regard to land. Consequently, no case law addressing property rights to creativity exists, comparable to the one that has been developed within the land rights discourse. Neither has CESC's findings been matched by similar conclusions by other treaty bodies. General Comments No. 17 and 21 are hence relatively isolated as legal sources explicitly proclaiming that indigenous peoples hold property rights to their collective creativity. Still, these sources receive substantive support from a cotemporary understanding of the fundamental right to non-discrimination, enshrined first and foremost in the analogy with land rights carried out in Section 5.4.5. Notwithstanding, the doctoral thesis refrains at this point from drawing any definitive conclusions as to indigenous peoples' property rights to collective creativity still controlled by them. This conclusion is saved for Chapter 9.

With regard to cultural elements no longer in indigenous peoples' control, there is no explicit support in international human rights sources for the existence of such a right. That said, one can note CESC General Comment No. 17's proclamation that indigenous peoples' moral rights continue to apply also when the economic rights have expired. But again, the general support for a right to restitution with regard to collective creativity that an indigenous people has unduly lost remains limited.

6. THE RELEVANCE OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

6.1 *Introduction*

Chapters 4 and 5 described how during the last two decades or so, rights that are formally individual in nature have been “collectivized” to extend a protection to the cultural identity and practices also of indigenous groups as such. Moreover, international law has accepted group rights *sui generis* to indigenous populations. But most importantly, the Chapters described how the two decades produced a number of international legal sources within the spheres of culture, self-determination, non-discrimination and property, all asserting that indigenous peoples are the beneficiaries of peoples’ rights proper. Chapters 4 and 5 inferred that the developments within these different spheres of law point in one direction; that indigenous peoples hold rights to their collective creativity, under both the rights to culture/self-determination and the right to property, viewed in the light of the right to non-discrimination. The Chapters further noted that the fact that all surveyed areas of law have progressed in tandem implies that the conclusions drawn within each field of law are mutually supportive.

At the same time, Chapters 4 and 5 have, with one or two exceptions, consciously refrained from drawing definite conclusions as to what extent international law has affirmed that indigenous peoples hold rights to their collective creativity. Before embarking on the concluding analyses, the doctoral thesis devotes this entire Chapter to the most important legal source within the indigenous rights discourse; the UN Declaration on the Rights of Indigenous Peoples - DRIP. As Section 4.1 indicated, the reason why the thesis opted not to address the DRIP together with other relevant legal sources is that the elaboration on the DRIP commenced roughly simultaneously with the developments in international law Chapters 4 and 5 have surveyed. As these Chapters noted on a few occasions, the surveyed sources mainly emanate from expert bodies and international tribunals. For this reason, i.e. because of lack of evidence of state response, Chapters 4 and 5 with few exceptions refrained from drawing definitive conclusions as to the content of the law. DRIP offered states an

excellent opportunity to provide the previously lacking response.⁴⁹⁸ The DRIP-process was ongoing during essentially the same time as the expert body/international tribunal jurisprudence was elaborated, and it focused on the core issues within the indigenous rights discourse. In many instances, states actually avoided giving their response to the law on indigenous peoples' rights emerging through the sources surveyed in Chapters 4 and 5 precisely because they viewed that the matters would be finally solved in the DRIP. Due to Drip's cardinal importance as the main source where states could offer a concerted view on the recent developments within the indigenous rights discourse, the thesis has essentially⁴⁹⁹ divided its analyses into a pre-DRIP and a post-DRIP part.

6.2 *Background*

6.2.1 *The adoption of the DRIP*

Section 4.3 covered the history of the DRIP up and until the UN Commission HR established and passed the draft DRIP onto the WGDD. The WGDD's first seven sessions generated little progress. But the 8th and 9th sessions saw an embryo of progress, and during the 10th session, the DRIP process gained momentum. At the 10th session, a few states tabled a revised version of the draft DRIP⁵⁰⁰, which addressed some key state concern at the same time as it in large parts was acceptable to indigenous peoples' representatives. The new, more workable draft, spurred participants to engage in concrete text negotiations, resulting in agreements on several of the DRIP provisions and a general understanding on many more. Still, the 10th session ended the WGDD's mandate. But having demonstrated progress, the WGDD was mandated to hold one extra session.⁵⁰¹ Prior to the extra session, the WGDD Chairman circulated a Chair's text, setting forth a complete DRIP proposal.⁵⁰² At its 11th session, the WGDD did reach an agreement on almost all DRIP provisions, including on most of the articles of direct relevance to the doctoral thesis. These included Articles 3 and 4 on self-determination, Articles 1 and 2 and 22 *bis* on collective human rights and Article 31 on indigenous peoples' collective creativity. Still, the 11th session ended without complete

⁴⁹⁸ Barelli too, notes that the DRIP represents the culmination of a political and legal process that commenced in the early 1980s. See *The Role of Soft Law in the International Legal System*, p. 969.

⁴⁹⁹ As previously mentioned, Chapters 4 and 5 do refer to some legal sources emanating from the period after the adoption of the DRIP.

⁵⁰⁰ E/CN.4/2004/WG.15/CRP.1 and E/CN.4/2004/WG.15/CRP.2

⁵⁰¹ Commission on Human Rights Resolution 2005/50

⁵⁰² UN Document E/CN.4/2005/89/Add. 2

agreement on a DRIP.⁵⁰³ Notwithstanding, the general sentiment was that the WGDD had come as far as it possibly could, in particular since it appeared unlikely that the WGDD would receive an additional extend mandate. Consequently, at the end of the 11th session, the WGDD Chairman was unofficially authorized to fill in the few remaining blanks and present a Chair's text that he would recommend to the UN for adoption.⁵⁰⁴

Shortly after that the WGDD had concluded its work, the UN Human Rights Council (HR-Council) replaced the Commission HR. Prior to the HR-Council's 1st session, the Chairperson of the WGDD presented his Chair's text.⁵⁰⁵ In June 2006, the HR-Council adopted the DRIP with 30 votes for, 2 against, 12 abstentions and 3 absentees,⁵⁰⁶ and passed it on to the UNGA for final approval. However, prior to the UNGA taking action on the DRIP, the African Group of States (AGS), who had largely been absent during the WGDD process, had discovered certain issues in the DRIP they needed to see clarified. Consequently, when in November 2006, the UNGA's 3rd Committee moved towards adoption of the DRIP, the AGS called for the decision to be deferred one year. Following a vote, the 3rd Committee decided in line with the AGS's position, and postponed action on the Declaration.⁵⁰⁷

The months prior to the 2007 UNGA session saw intense negotiations between the AGS and Latin American and European states working for an adoption of the DRIP. These deliberations revealed that most of the AGS's concern could be allayed by African states being further enlightened about the more precise meaning of some of the rights enshrined in the DRIP. But the AGS also needed two material amendments to DRIP, as adopted by the HR-Council. First, a reference to the principle of territorial integrity of states was included in Article 46.⁵⁰⁸ Second, a preambular paragraph was added to the DRIP, addressing the fact that the Declaration includes no definition of what groups constitute "indigenous peoples".⁵⁰⁹

⁵⁰³ The main outstanding issue was the land-rights provisions. Albeit there was a general agreement also on these, no concrete provisions enjoying complete support existed.

⁵⁰⁴ UN Document E/CN.4/2006/79, paras. 28 and 30

⁵⁰⁵ UN Document E/CN.4/2006/79

⁵⁰⁶ HRC Resolution 2006/2

⁵⁰⁷ Resolution A/C.3/61/L.57/Rev. 1. On 20 December 2006, the UNGA plenary affirmed the 3rd Committee's decision.

⁵⁰⁸ The addition read: "*Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent states*". [Addition in bold.]

⁵⁰⁹ The preambular paragraph seems to simply underline the obvious, namely that the situation of indigenous peoples differ from region to region. It reads; "*Recognizing that the situation of indigenous peoples varies from*

In addition, a few amendments of mere editorial character were introduced. Neither the material nor the editorial amendments are of direct relevance to the doctoral thesis. With these amendments, the UNGA could move towards adoption of the DRIP. The Declaration was adopted by a vote, with 143 votes in favour, 4 against, 11 abstentions, and the remaining UN member states being absent.⁵¹⁰ As clear from the overwhelming majority in favour, all geographical regions strongly supported the adoption of the DRIP. The four states voting against the Declaration were Australia, Canada, New Zealand and the United States of America.⁵¹¹ Since then, Australia and New Zealand have changed their position, and have officially endorsed the DRIP.

6.2.2 Interpretative statements

In total, 38 states took the floor in connection with the vote on the DRIP in the UNGA to explain their position on the Declaration. Some of the interpretative statements are of direct relevance to the doctoral thesis. Australia expressed dissatisfaction with DRIP's reference to self-determination, claiming that this right applies only in a decolonization and secession context. The United States suggested that the right to self-determination enshrined in DRIP is not the general right to self-determination applying to all peoples, but rather a *sui generis* right, a comment that was echoed by the United Kingdom. India, on the other hand, opined that the right to self-determination applies only to colonies and not to segments of sovereign independent states, placing emphasis on the principle of territorial integrity. Iran made a comment of similar content. Liechtenstein, for its part, expressed its support for innovative approaches to the right to self-determination and noted with satisfaction the DRIP provisions indicating new steps in the UN dealing with this right. It stressed that the DRIP's emphasis on the right to autonomy and self-government offered a promising approach which would genuinely address the aspirations and needs of many peoples. The United States, Canada, New Zealand and Nigeria expressed dissatisfaction with the land and resource rights provisions. Nigeria added a general dissatisfaction also with the self-determination provisions. The United States – with reference to preambular paragraph 22 – opined that the DRIP could not be understood as recognizing the existence of collective human rights proper,

region to region, country to country, and from community to community and that each State should observe this Declaration in the light of its national circumstances [...]”.

⁵¹⁰ UNGA Resolution 61/295

⁵¹¹ For an extensive outline of the DRIP process and an in depth analysis of what resulted in its adoption, see Åhrén, *The UN Declaration on the Rights of Indigenous Peoples*.

a position supported by the United Kingdom. The United Kingdom underlined that beyond the right to self-determination, it does not accept the existence of any collective human rights. In the same vein, Sweden declared that it recognizes the existence of collective rights only to the extent that such rights are not regarded as human rights, and expressed the opinion that individual human rights prevail over the collective rights enshrined in the DRIP.

If briefly summarizing the outlined interpretative statements, one notes that only a limited number of states commented on the rights directly relevant to the doctoral thesis, such as self-determination⁵¹², rights to lands and natural resources and the existence of collective human rights proper. In no instance was a presented position shared by more than a few states.⁵¹³ At the same time, the DRIP was adopted with an overwhelming majority and has gained increased support in the period after the adoption. Against this background, one cannot reasonably hold that the relatively few interpretative statements with incoherent content significantly impact on the understanding of the DRIP. On the contrary, the absence of coherent resistance against any of the rights enshrined in the DRIP strengthens the legal relevance of the Declaration.⁵¹⁴

6.3 *The content of the UN Declaration on the Rights of Indigenous Peoples*

6.3.1 Introduction

The Chapters above have identified (i), indigenous peoples' right to culture/self-determination, and (ii) the right to property (understood through the prism of the right to non-discrimination) as the spheres of human rights law of particular relevance when analyzing to what extent indigenous peoples' have the right to own and/or determine over their collective creativity. In addition, the doctoral thesis has observed that international law's position on (i) the existence of collective human rights proper in general, and (ii) rights to lands and resources, is of significant relevance for a proper understanding of the existence, scope and

⁵¹² That said, it should be noted that a large number of states commented on the relationship between the right to self-determination and the principle of territorial integrity of states, enshrined in DRIP Article 46. But again, the issue of territorial integrity is not relevant to the doctoral thesis.

⁵¹³ In this context, recall further that Australia and New Zealand, since delivering their respective interpretative statements, have reversed their position on DRIP.

⁵¹⁴ For a similar opinion, see also Wiessner, *Indigenous Sovereignty*, p. 1162.

content of the material rights subject to study in the thesis. DRIP addresses all these spheres of law.

6.3.2 Collective human rights proper generally

Chapter 4 illustrated how the question of whether indigenous peoples can be the beneficiaries of collective human rights proper has constituted a cornerstone in the indigenous rights discourse. Consequently, it is only natural that this was one of the most controversial issues also in the DRIP process. Early in that process, many states expressed concern with the notion that indigenous peoples could be the bearers of human rights proper. But as the process progressed, increasingly fewer states objected to the existence of such rights. At the final sessions of the WGDD, only the United Kingdom openly argued for DRIP taking a cautious attitude towards the idea that indigenous peoples enjoy human rights proper.⁵¹⁵ And the UK's concerns were allayed at the final session of the WGDD, implying that the DRIP language on collective rights represent a consensus position.⁵¹⁶

At the final session of the WGDD, it was agreed that the issue of collective rights be dealt with through amendments to Articles 1 and 2, and the addition of a preambular paragraph that in the final version of the DRIP ended up having number 22.⁵¹⁷ Article 1, in its final version, reads: "*Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law*". Article 2, in pertinent parts, proceeds to stipulate; "*Indigenous peoples and individuals are free and equal to all other peoples and individuals...*" And pursuant to relevant parts of pp 22, "*... indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights...*". Certainly, the quoted provisions could have been crafted in a more precise manner. They are marked by an attempt to accommodate for a few dissenting views within the WGDD, at the same time as reflecting the position of the vast majority. Notwithstanding, studying the provisions carefully, the conclusion with regard to their content is clear.

⁵¹⁵ That said, most certainly a few silent states shared the concern of the United Kingdom, if not necessarily to the same extent. As reflected in their interpretative statements, the United States and Sweden were two such states, and the UK sentiment was surely shared also by a few other EU states.

⁵¹⁶ In other words, Sweden's, the UK's and the US's interventions in connection with the adoption of the DRIP must be understood as interpretations of, and not objections to, relevant DRIP provisions.

⁵¹⁷ During most of the WGDD-deliberations, this provision was generally referred to as pp 18 *bis*.

Article 1 hence unambiguously proclaims that “*indigenous peoples have the right to full enjoyment ... of all human rights*”. In between, however, the provision adds that indigenous peoples enjoy this right “*as a collective or as individuals*”. This language certainly adds an amount of ambiguity to the DRIP’s understanding of the term “*peoples*”. If a “*people*” can enjoy rights “as individuals”, are we really talking of “*peoples*” in the normal understanding of the concept? One could argue that such is probably not the case. But on the other hand, despite its reference to individuals, Article 1 does in clear language affirm that also indigenous peoples are bearer of human rights. Even if the notion that these rights can be enjoyed also by individuals is confusing, this is necessarily not enough to nullify the implication of the unambiguous proclamation in the provision’s first part. Further, if momentarily setting aside the issue of *human* rights, and just focusing on the suggestion that a people can enjoy rights as individuals, one must reasonably conclude that this makes no sense - regardless of whether the right is a human right or not. As Chapter 7 will explain further, provisions in international instruments shall, in case of doubt, be interpreted in a manner that gives the provision a reasonable understanding, in the context of the instrument as a whole. Consequently, since the language suggesting that peoples enjoy rights as individuals makes little sense, the reasonable understanding is not to allow it to nullify the unambiguous language holding that indigenous peoples enjoy human rights. Rather, one should essentially disregard the language as incoherent and illogical.

In the same vein as DRIP Article 1, pp 22 first unambiguously declares that “*indigenous peoples possess collective rights*”. In the same breath, however, the provision goes on to explicitly refer to individual rights as human rights, something it omits to do with regard to peoples’ rights. It could therefore be argued that an *e contrario* interpretation of the provision must result in the conclusion that indigenous peoples’ collective rights do not constitute human rights. But pp 22 does proclaim that indigenous peoples are bearer of rights. Given that these rights do occur in a human rights instrument, it appears pertinent to presume that at least most of these rights are in fact also human rights.⁵¹⁸ Hence, similar to the ambiguity built into DRIP Article 1, it is somewhat confusing that pp 22 explicitly confirms that individual rights are human rights, at the same time as it fails to do so with regard to collective rights. But as stated, nothing precludes a reading of pp 22 implying that collective

⁵¹⁸ See also Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, p. 187.

rights are also human rights. And given that the alternative interpretation gives the implausible conclusion that a vast majority of rights enshrined in a human rights instrument are in fact not human rights, the only reasonable conclusion is that pp 22 confirms, rather than precludes, the existence of indigenous peoples' collective human rights. The DRIP encompasses a number of material provisions proclaiming collective rights of indigenous peoples. In fact, the majority of its provisions envelope rights where the beneficiary of the right is the indigenous people as such, rather than individual members of the group.⁵¹⁹ Despite the ambiguity built into DRIP Article 1 and pp 22, these provisions cannot be understood as rebutting what seems clearly to follow from the material provisions of the DRIP, namely that indigenous peoples enjoy collective human rights.

It can be added that this conclusion gains further support from DRIP Articles 2 and 3, read in conjunction. Article 2 univocally proclaims that "*indigenous peoples are equal to all other peoples*". Notably, the provision does not explicitly stipulate that indigenous peoples have equal *rights* with other peoples. Nonetheless, a people can hardly be equal with other peoples if it does not enjoy the same rights as other peoples do. A reasonable interpretation of Article 2 hence suggests that inasmuch "*peoples*" in general enjoy rights – including human rights – so do "*indigenous peoples*". But this is in itself no conclusive evidence of the existence of human rights of peoples. Those maintaining that the DRIP does not support the notion of collective human rights proper question exactly whether peoples in general, indigenous or not, can be the beneficiaries of human rights. If one's position is that no people enjoy human rights, DRIP Article 2 proclaiming that indigenous peoples are equal with other peoples is not a valid argument for the existence of human rights of peoples.

But the claim that DRIP Article 2 confirms the existence of collective human rights becomes more convincing if reading the provision in conjunction with Article 3. Pursuant to DRIP Article 3, "*Indigenous peoples have the right to self-determination.*" Section 6.3.4 analyzes the specific content of this provision in more depth. For the present purposes, it is sufficient to note that Article 3 appears to affirm that indigenous peoples do enjoy collective human rights, at least to the same extent as other peoples. That is so, since the few states that are still inhospitable to the notion of collective human rights in normally agree that the right to self-determination constitutes the one exception to the general rule.

⁵¹⁹ See also Barelli, *The Role of Soft Law in the International Legal System*, p. 961, where he draws the same conclusion.

In conclusion, DRIP Articles 2 and 3 confirm that indigenous peoples do enjoy collective human rights at least to the same extent as other peoples. Still, these provisions *read in isolation* say little about to what extent international law in general recognizes collective human rights proper, beyond the right to self-determination. However, in addition, the above has demonstrated that a reasonable understanding of Article 1 and pp 22, read in conjunction, strongly suggests that the DRIP enshrines collective human rights, also beyond the right to self-determination. And if reading Articles 1 and pp 22 together with Articles 2 and 3, the conclusion must be that the DRIP does confirm that indigenous peoples are the beneficiaries of collective rights in general. That is particularly so if analyzing these provisions against the background of the Declaration as a whole and in light of the international legal sources surveyed in Chapter 4. Chapter 4 concluded that there was overwhelming support in both global and regional international legal sources for international law having affirmed that indigenous peoples enjoy rights proper. Notwithstanding, Section 4.9 abstained from determinatively concluding that international law had embraced this position, because of lack of evidence of state support. Now one can note, however, that DRIP Articles 1-3 and pp 22, read in conjunction with the Declaration as a whole, undoubtedly affirm the position taken by UN treaty bodies, regional human rights bodies and other international legal sources.

6.3.3 Cultural rights

The outline and analyses above have illustrated that the line between cultural rights and property rights is not always crystal clear. The rights are interwoven and mutually supportive. This is also the case with the DRIP provisions addressing these subject matters. Nonetheless, the doctoral thesis continues to distinguish between cultural rights on one hand, and property rights, on the other. Hence, this section addresses indigenous peoples' rights to their collective creativity as a cultural right and Section 6.3.4 the right to self-determination. Subsequently, Section 6.3.5 proceeds to surveying indigenous peoples' property rights to their collective creativity. It is underlined, however, that due to the overlap of the rights, certain DRIP provisions has to be examined under multiple sections.

Pursuant to DRIP Article 8.1, indigenous peoples' have the right not to be subjected to destruction of their cultures. Further, Article 8.2 (a) proclaims that states shall provide effective mechanisms for prevention of, and redress for, any action with the aim or effect of

depriving them of their integrity as distinct peoples or of their ethnic identities. In the same vein, pursuant to DRIP Article 7.2, indigenous peoples have the collective right to live in freedom as distinct peoples. Clearly, Article 8 foresees a fairly extensive protection for indigenous peoples' collective identity. Read together, Articles 7 and 8 reaffirm that indigenous peoples have a right to their collective cultural identity, and further that states have a positive duty to protect this right. As Chapter 4 has demonstrated, this right had been enshrined in numerous international legal sources also prior to the adoption of DRIP.

More specifically, pursuant to Article 5, indigenous peoples have the right to maintain and strengthen their distinct cultural institutions. And Article 11.1 proclaims that indigenous peoples have the right to practice and revitalize their cultural traditions and customs. Further, pursuant to Article 12.1, indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies. And Article 13 underlines that indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures. Article 15 proclaims that indigenous peoples have the right to the dignity and diversity of their cultures, traditions and histories. Clearly, these provisions do not speak of elements normally associated with property rights. Rather, they stipulate that indigenous peoples have the right to practice, develop and revitalize cultural traditions and practices such as languages, philosophies and spiritual ceremonies because doing so is presumed important to the cultural identity of the indigenous people. These provisions can hence be viewed as fleshing out the general provisions on cultural identity in Articles 7 and 8. One should note, however, that none of the provisions demands that it can be demonstrated that the practice etc. is important to the cultural identity of the indigenous people for the right to apply.

Pursuant to Article 31 "*indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including ... genetic resources ... knowledge of the properties of fauna and flora, oral traditions, literatures, designs ... and ... visual and performing arts. They also have the right to, maintain, control [and] protect ... their intellectual property over such cultural heritage...* ".⁵²⁰ The right to "control and protect" cultural elements is more a property right element than a cultural right,

⁵²⁰ In addition, Article 24 clarifies that indigenous peoples have rights also to their traditional medicines.

wherefore this aspect of Article 31 is dealt with in Section 6.3.5. But Article 31 further underlines that indigenous peoples have the right to maintain and develop their cultural heritage. In that respect, Article 31 can be viewed as complementing the provisions outlined above, extending a similar protection to elements of indigenous peoples' collective creativity.

But are the fairly sweeping rights to a cultural identity and to practice maintain and develop cultural elements and practices relevant for an analysis of specific concrete rights to elements of indigenous peoples' cultures? Admittedly, the link is neither immediate nor obvious. But non-members utilization of and/or access to elements of indigenous peoples' distinct cultures can in fact sometimes be of great harm to the cultural identity of the indigenous people in question. If so, such utilization can violate the rights enshrined in DRIP Articles 7 and 8, as elaborated on in e.g. Article 31. Again, the example of the traditional Saami dress is useful here. As mentioned, the traditional dress is a very important cultural denominator for the Saami people. If the non-Saami population starts using the Saami dress, this blurs the distinction between the Saami and the majority culture, wherefore such use can constitute a violation of Articles 8 and 31, read in conjunction. In the same vein, under certain circumstances, copying and/or reproduction by non-members of a cultural practice or custom might prevent the indigenous people from maintaining and developing the same. For instance, non-members performing a spiritual ritual might deplore the practice of its spiritual and cultural value for the indigenous people the ritual springs from. Under such circumstances, copying of the ritual by the non-member can constitute a violation of DRIP Articles 11 and 12.⁵²¹ Similarly, for indigenous peoples' histories, philosophies, literatures etc. to remain culturally significant, it may be necessary not to reveal these to non-members. Indeed, they may not even be openly shared within the group. If use by non-members of such oral traditions deprives the tradition of its cultural value, it may violate DRIP Article 13.

Also the cultural rights provisions in the DRIP essentially reaffirm the position taken by the legal sources Chapter 4 has outlined. Section 4.5 demonstrated how the HRC has interpreted CCPR Article 27 to encompass a positive duty on states to protect indigenous peoples' cultures and cultural identities, prohibiting competing activities that seriously threaten the cultural identity and cultural practices of members of an indigenous population (directly) and

⁵²¹ Taubman and Leistner agree that the DRIP provides basic protection for indigenous peoples' cultural identity and "collective personality. See Analysis of Different Areas of Indigenous Resources, p. 172. In the same vein, Lucas-Schloetter points to that the use of a non-member of a sign, symbol etc. of an indigenous people that is of sacred nature can cause serious cultural offense and harm to the people. See Folklore, p. 344.

of the group as such (indirectly). True, the HRC jurisprudence more or less exclusively pertains to land based activities. But there is no apparent reason why the principle should not apply also to cultural practices relating to collective creativity. The underlying principle enshrined in the HRC's interpretation of CCPR Article 27 coincides with the outlined DRIP provisions.⁵²² Further, Section 4.6 showed that the DRIP provisions on cultural rights find further support in Articles 2.2 (b) and 5 (a) of ILO 169, which also call for protection of indigenous peoples' cultural rights as well as of their cultural practices. Section 4.9 concluded that the ILO 169's position outlined above and the concurring interpretation of CCPR Article 27 by the HRC have already been accepted by international law in general. These positions are hence reaffirmed by the DRIP. In addition, one can recall that CESCR General Comment No. 21 proclaims that indigenous peoples – as peoples - have the right to protection of their collective cultural identity. As Section 6.3.2 has already concluded, also this position finds strong support in the DRIP.

6.3.4 The right to self-determination

As mentioned, DRIP Article 3 proclaims that “[i]ndigenous peoples have the right to self-determination.” Since the right to self-determination constitutes the keystone of peoples' rights, it is of obvious importance to determine what is embedded in the right to self-determination as enshrined in DRIP.⁵²³ There seems to be three basic possible alternatives.

First, Chapter 2 outlined how according to the conventional understanding of the internal aspect of the right to self-determination, all citizens of the state – regardless of ethnic and cultural background – have the right to participate in the political life of the state, on an equal basis. Hence, an interpretation of DRIP Article 3 in line with the conventional understanding of the internal aspect of the right to self-determination would entail nothing more than indigenous individuals being entitled to participate in the political life of the state, on the same basis as other citizens. In other words, indigenous peoples would have the right to determine over their collective creativity to the extent they could achieve this end through

⁵²² In addition, Section 4.7 described how the HRC's interpretation of CCPR Article 27 receives support from the CERD Committee's General Recommendation No. 23 and the draft OAS Declaration Article 13.1, underlining indigenous peoples' right to preserve and use their collective creativity. The Section also noted that the latter provision has been agreed on in the negotiations on the OAS Declaration.

⁵²³ It is underlined that for the present purposes, only the internal aspect of self-determination is relevant. Moreover, Section 4.10 has explained that the DRIP could hardly impact on the applicability of the external aspect of self-determination, at least as far as secession is concerned, something DRIP Article 46.1 also explicitly affirms.

individual members running for office in general elections of the country or through other political processes open to all citizens.

Such an interpretation of Article 3 is implausible, however. As thoroughly outlined above, it is a defining characteristic of indigenous rights that indigenous peoples are entitled to preserve their own distinct societies, side-by-side with the majority society. Since emerging in the 1980s, the contemporary indigenous rights discourse has focused on protecting autonomous functions of indigenous peoples' societies, rather than on integrating indigenous individuals into the majority society. As Chapter 4 outlined, this focus in international law has only become increasingly entrenched in recent years. The DRIP echoes these general developments in international law, firmly underlining that indigenous peoples' right to self-determination is primarily to be exercised through autonomous and self-governing functions. For instance, following DRIP Article 3's general proclamation that indigenous peoples are the beneficiaries of the right to self-determination, Article 4 proceeds to stipulate that "*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs...*" That indigenous peoples' right to self-determination is primarily a right to govern their societies through their own autonomous decision-making mechanisms is further emphasized by Article 5, proclaiming that "*Indigenous peoples have the right to maintain and strengthen their distinct political, legal ... and cultural institutions...*" and that they participate "*... if they so choose, in the political ... and cultural life of the state*". Article 5 hence underlines that only as a second alternative, and merely to the extent the indigenous people so choose, shall matters pertaining to the people's political, legal and cultural interest be administered by state institutions.

It is hence clear that indigenous peoples' right to self-determination is, first and foremost, not a political right in the conventional sense, but a right to make decisions through the people's own autonomous institutions. What remains to be answered, however, is whether the right to self-determination DRIP enshrines suggests that international law no longer knows peoples in the meaning the sum of the population of a state. Alternatively, does DRIP entail that international law now recognizes two categories of people? The latter would imply that both peoples in the conventional understanding, i.e. the aggregate of the population of the state, and peoples defined in terms of ethnicity and culture (at least in the context of indigenous peoples), are entitled to the right to self-determination. This further begs the question; how does indigenous peoples' right to self-determination relate to the right enjoyed by the majority

people? Is the right to self-determination enshrined in DRIP the same right to self-determination enjoyed by all peoples? Or is alternatively the right to self-determination Article 3 puts forward a *sui generis* right, particular to indigenous peoples (and possibly also to other non-state forming peoples)? If the latter is correct, one can assume that the right to self-determination of indigenous peoples is sub-ordinated to the general right to self-determination proclaimed by e.g. the common Article 1 of the 1966 Covenants.

If trying to address the posed questions, one can first note that the wording of DRIP Article 3 support the conclusion that the right enshrined is the general right to self-determination, enjoyed by all peoples. Article 3 reproduces verbatim, except for the insertion of “indigenous” before peoples, the common Article 1.1 of the 1966 Covenants. Article 3 hence submits that the right to self-determination indigenous peoples enjoy is *the* – and not *a* - right to self-determination. The reference to “*the right*” posits that the right proclaimed is the already existing, and not a new, right. This conclusion is further supported by a contextual interpretation of the DRIP. No international legal source suggests that there exists more than one form of self-determination. On the contrary, as Section 4.7 outlined, sources addressing indigenous peoples’ right to self-determination, such as the HRC’s interpretation of the common Article 1 of the 1966 Covenants, suggest that indigenous peoples do enjoy the general right to self-determination. Further, the WGDD Chairperson-Rapporteur declared that he understood the right to self-determination enshrined in DRIP to be the general right enjoyed by all peoples, and not as a *sui generis* right.⁵²⁴ This interpretation of the DRIP has also found support in the legal doctrine.⁵²⁵

If the understanding of DRIP Article 3 outlined above is correct, this presumably implies that “peoples” in the meaning the aggregate of the population of the state no longer exists in international law. This understanding has then been replaced by an interpretation submitting that peoples only exist as defined by ethnic/cultural terms. But one could also imagine an alternative position where international law has room for two categories of peoples. The first category would then continuously be the entire population of the state. The second category

⁵²⁴ In addition, also the Chairperson-Rapporteur of the WGIP, i.e. the chief drafter of the original draft DRIP, noted in an explanatory note when the WGIP handed over the draft to the Commission HR that indigenous peoples are peoples enjoying the general right to self-determination. See UN Document E/CN.4/Sub.2/1993/26/Add. 1, paras. 2, 7, 11, 17 and 19.

⁵²⁵ Anaya, *Divergent Discourses About International Law*, p. 242, and *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, pp. 185 and 191, and Xanthaki, *Indigenous Rights in International Law over the Last 10 Years*

of peoples would then be ethnically/culturally defined. But importantly, under such circumstances, the second category of peoples would include *both* the indigenous people and the majority people.⁵²⁶ And equally important, the indigenous people and the majority people would be *equally* self-determining in matters of their respective internal affairs. In issues of joint interest, such as the foreign policy of the state, they would presumably exercise joint decision-making in a system akin to a federation.

For the purposes of the doctoral thesis, if the alternative is correct suggesting that DRIP Article 3 submits that indigenous peoples enjoy *the* right to self-determination, applying to all peoples, it is not necessary to dwell on whether this entails (i) that peoples in the meaning the aggregate population of the state no longer exist or, alternatively (ii) that this category of people still exists, but only to make decisions in matter of common interest to the two peoples in the state defined in terms of ethnicity/culture (i.e. the majority people and the indigenous people). What is relevant is that in both instances, indigenous peoples' right to self-determination in internal affairs – e.g. in matters pertaining to their creativity – is *equal* to the right to self-determination enjoyed by the majority people. In other words, if this alternative is correct, indigenous peoples are the beneficiaries of a right to self-determination which is not subordinated to the right of self-determination of the majority people. Clearly, the implications of this conclusion are vast. In principle, indigenous peoples' decision-making institutions then have the same right to decide in cultural affairs as do the (national) parliament, government etc. on behalf of the majority population. There is no legal reason why decisions taken by the former should carry less weight than those by the latter. Obviously, such an understanding of the right to self-determination calls for substantial redistribution of decision-making power, or sovereignty if one wishes, within states hosting indigenous peoples.

Despite the vast implication of indigenous peoples' right to self-determination being the general right enjoyed by all peoples, only two states objected to this conclusion at the time of the adoption of the DRIP.⁵²⁷ In addition, it is difficult to determine whether Liechtenstein applause of the DRIP's innovative approach to the right to self-determination intended to

⁵²⁶ For the benefit of simplicity, we presume here that there exist only one indigenous people in the state used as an example.

⁵²⁷ In addition, Germany did a similar statement in connection with the vote on the DRIP in the HR-Council, but did not repeat this position in the UNGA. As Section 6.2 described, two more states suggested that the right to self-determination does not apply beyond a decolonization context. However, as concluded immediately above, such an interpretation of the DRIP is implausible, and the comments should therefore be disregarded.

voice a position on the general right/*sui generis* right issue. In any event, the small number of states positing that indigenous peoples' right to self-determination is not the general right is not sufficient reason to depart from the reasonable interpretation of DRIP Article 3, as outlined above.

Hence, an interpretation of both the wording of DRIP Article 3 and other relevant international legal sources supports the conclusion that the right to self-determination DRIP enshrines is the general right enjoyed by all peoples. The interpretative statements delivered in connection with the adoption of the DRIP give no reason to deviate from this conclusion. In fact, the vast implications associated with understanding DRIP as awarding indigenous peoples *the* general right to self-determination seem to be the one argument against such a conclusion. But it is a relevant one. Have states, the primary creators of international law, truly accepted a development in international law implying that a vast amount of their decision-making power has been transferred to indigenous peoples? Have they genuinely agreed to place indigenous peoples on par with other peoples? There doctoral thesis take no definite position on this issue at this point. It shall return to which of the two options might be correct in Chapter 8.

Regardless of whether indigenous peoples' right to self-determination is the general right or a *sui generis* right, what the thesis can safely conclude is that DRIP affirms that the right to self-determination has evolved to apply beyond a colonial context. What is more, DRIP further confirms that irrespective of whether indigenous peoples' right to self-determination is the general right or a *sui generis* right, the internal aspect of the right goes beyond a mere right to political participation of members of the indigenous population on an equal basis with other citizens. Rather, the DRIP underscores the position taken in the sources outlined in Chapter 4 that the right to self-determination shall first and foremost be exercised through self-governing and/or autonomy arrangements. As to the content and scope of such a right, the doctoral thesis will predominantly address this issue in Chapter 8. Already here, however, it is noted that guidance can be derived from DRIP provisions fleshing out the general right to self-determination proclaimed by Article 3. The right to autonomy/self-government in matters relating to their internal and local affairs enshrined in DRIP Article 4 must reasonably embrace cultural matters. In addition, further guidance can be obtained from the DRIP

provisions pertaining to cultural elements, whereof most have been discussed in Section 6.3.3, immediately above.⁵²⁸

Again, we see how the DRIP reaffirms developments in international law enshrined in other international legal sources. Despite substantive evidence in e.g. treaty body jurisprudence⁵²⁹ and the positions taken by regional human rights institutions, Section 4.7 abstained from concluding that international law has firmly established a right to self-determination of indigenous peoples. The reason was the absence of concrete evidence of state support for such a position. Through DRIP, states offers the previously lacking political support for the right to self-determination applying also to indigenous peoples in a form where the right is chiefly to be exercised through autonomy/self-government.

6.3.5 Indigenous peoples' property rights to their collective creativity

Section 6.3.3 described that pursuant to DRIP Article 31, indigenous peoples have the right to control their distinct cultural heritage. The exemplary list in the provision following the general proclamation is so extensive that it is clear that Article 31 intends to cover essentially all forms of collective creativity. In addition, Article 31 also stipulates that indigenous peoples have the right to maintain and control their intellectual property pertaining to such collective creativity.⁵³⁰ As mentioned, Article 31 does not declare that indigenous peoples have the right to *own* their distinct cultural heritages. Rather, Article 31 uses the verb “*control*”. One could question what the use of the verb “*control*” implies for Article 31 as a property rights provision. Normally, the term “own” is used to denote a property right. On the other hand, as further mentioned, Article 31 does proceed to proclaim that indigenous peoples have the right to maintain and control intellectual property over their cultural heritage.

⁵²⁸ This is in line with the doctoral thesis's general observation that indigenous peoples' collective right to culture and their right to self-determination, as the latter right pertains to culture, interlink to a large degree.

⁵²⁹ Most important in this context is of course the HRC's and CESCR's application the right to self-determination to indigenous peoples. But the right to self-determination applying to indigenous peoples also finds support in CERD General Recommendation No. 23, proclaiming that decisions relating to indigenous peoples' rights or interests must only be taken with their consent. Barelli too, concludes that DRIP Article 3 is in line with recent jurisprudence from treaty bodies. See *The Role of Soft Law in the International Legal System*, p. 976.

⁵³⁰ As further mentioned, DRIP Article 24, probably somewhat redundantly, given the wide scope of Article 31, underscores that indigenous peoples have rights also to their traditional medicines.

The structure of and the verb use DRIP Article 31 opts for are somewhat puzzling. As follows also from the outline in Chapter 5, it is questionable whether the concept “*intellectual property*” has any meaning in itself. As seen, as with all forms of property, international property rights law takes a positivist approach towards IPRs. An IPR is essentially a right to an element of human creativity that a domestic jurisdiction at any given time deems eligible for IPR-protection.⁵³¹ DRIP Article 31’s reference to “*intellectual property*” could hence be understood as simply a reference to domestic law. Thus understood, the wording lacks self-standing meaning. It only comes into play to the extent domestic law recognizes IPRs over collective creativity.⁵³² In short, DRIP Article 31’s reference to intellectual property would seem to be redundant.

One need not, however, necessarily understand the reference to intellectual property in DRIP Article 31 in such a restrictive manner. Section 5.4 concluded that an analogy with land rights law reveals that indigenous peoples’ collective creativity should also enjoy property rights protection. The Section further noted that there is at least a trend in international legal sources to extend property rights protection to collective creativity, as enshrined first and foremost in CESC General Comments No. 17 and 21. The reference to intellectual property in Article 31 could be interpreted as affirming this development in international law. Interpreted in this manner, the provision proclaims that states are obligated to extend IP protection also to indigenous peoples’ collective creativity. Indeed, this is a more plausible understanding of Article 31 since, in doubt, preference should be given to an interpretation giving the provision a meaning, rather than rendering it redundant.⁵³³ Thus understood, DRIP Article 31 offers support to the development in international law asserting that indigenous peoples hold property rights to their collective creativity.

In any event, as mentioned, Article 31 does explicitly proclaim that indigenous peoples have the right to *control* their collective creativity. This is in other words a right following directly from DRIP, and is not contingent on domestic law. Section 5.4.2 outlined how, as property

⁵³¹ Drahos, *The Universality of Intellectual Property Rights*, p. 1, and Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 12-14 and 68

⁵³² This is true also when domestic IP-law is instructed by international IPR-agreements outside the sphere of human rights. The reference to intellectual property is still a reference to another legal system, and does not proclaim an independent right.

⁵³³ See further Section 7.4 on interpretation of international legal instruments. Carpenter, Katyal and Riley agree that the DRIP awards indigenous peoples collective property rights to both tangible and intangible resources. See *In Defence of Property*, p. 1025. In the same vein, Xanthaki asserts that DRIP calls on states to create *sui generis* IP-systems of protection. See *Indigenous Rights in International Law over the 10 Last Years*.

rights in general, IPRs envelope a catalogue of “sub-rights” such as right to possession, right to use, right to control access by others and rights to transmit/disseminate. Clearly, a right of indigenous peoples to “*control*” their collective creativity embraces many of the listed sub-rights, if perhaps not all of them entirely.⁵³⁴ In particular, the right to control must reasonably be understood as encompassing a right to prevent non-members from accessing and/or illegitimately using elements of the indigenous people’s culture. In conclusion, DRIP Article 31 proclaims that indigenous peoples have the right to control their collective creativity, or at least cultural elements still held by them. The provision calls on states to effectuate these rights through IP-laws. Albeit it is probably more likely that the rights will be operationalized through IP-neighbouring rights, rather than IP-rights proper, the DRIP once again confirms recent developments in other international legal sources.

As mentioned, the applicability of DRIP Article 31 might be limited to cultural elements continuously under indigenous peoples’ control. Present tense formulations such as “*control*” and “*maintain*” suggest that the provision is not intended to have restitutionary effects. If so, Article 31 does not apply to cultural elements in the public domain or elements to which third party rights pertain. On the other hand, the wording of Article 31 does not rule out that the provision applies also to such subject matter either. The provision proclaims that indigenous peoples have the right to control “*their*” creativity. The question is hence what is understood with “*their*”. It might, at least under certain circumstances, be far-fetched to claim that a cultural element falls under the category “*their*” if a third party hold rights to the element, i.e. own it. But if there are no competing rights, i.e. if the element is in the public domain, it is perhaps more reasonable than indigenous peoples submit that the cultural element is “*their*”, if the people in question maintain a cultural connection to the element. The doctoral thesis shall return to this question in Chapters 8 and 9.

6.3.6 Property rights to land

In a manner similarly to ILO 169 Article 13, DRIP Article 25 underscores indigenous peoples’ right to maintain and strengthen their distinct spiritual relationship with traditional lands, waters and territories. Following this affirmation of the underpinning rationale for why indigenous peoples hold cultural rights to lands, DRIP Articles 26 sets forth what rights, more

⁵³⁴ Recall also Waldron’s definition of property rights as norms that govern access to and *control* of material resources. See *The Right to Private Property*, p. 31.

specifically, indigenous peoples hold to lands and natural resources traditionally used and continuously occupied. Article 28 then proceeds to address what rights indigenous peoples hold to territories traditionally used but which have subsequently been lost or taken without their consent. In comparison, the rights contained in DRIP Article 26 are expressed with greater clarity compared with ILO 169 Article 14 and 15. Moreover, as Section 5.3.3 explained, the ILO 169 contains no provision comparable to DRIP Article 28.

Article 26.1 generally proclaims that “*Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired*”. The language in the initial paragraph of Article seems open-ended enough to embrace both cultural and property rights. For the present purposes, however, the property right aspect of DRIP Article 26 is most interesting. DRIP Article 26.2 explicitly confirms that indigenous peoples hold property rights to lands and natural resources, declaring that “*Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of ... traditional occupation or use...*”. Hence, pursuant to Article 26.2, indigenous peoples have ownership rights to lands and natural resources traditional occupied or used, irrespective of whether the lands or resources are of culture importance to the indigenous people in question. Moreover, the state need not have acknowledged these rights. What is required is that the indigenous people continuously “possess” the concerned territories, irrespective of state recognition.

There is no universally applicable definition of “*possess*”. But Black’s Legal Dictionary’s broadly defines “*possess*” in a manner probably fairly accurately describing a general understanding of the term in most jurisdictions. According to Black’s, to “*possess*” something is “*to have in one’s actual control; to have possession of*” a subject matter. Further, “*possession*” is: (i) The fact of having or holding property in one’s power, the exercise of dominion over property; and (ii) the right under which one may exercise control over something to the exclusion of others. Against the background of this definition, some might argue that indigenous land utilization is not sufficiently exclusive and intense to qualify as “*possession*”. At least, this argument can be made against nomadic indigenous land use, or uses that in other ways are more fluctuating than what is common in non-indigenous cultures. However, the reference to “*possession*” in DRIP Article 26.2 can hardly be understood in such a restrictive manner.

Interpreting the reference to “possession” in DRIP Article 26.2 in the suggested manner could in fact be described as reverting back to the *terra nullius* doctrine. Section 5.3 described how international law has recently reinterpreted the notion of property rights so not to discriminate against land and natural resource utilization common to indigenous cultures. It would be unreasonable not to interpret the term “*possess*” in DRIP Article 26.2 against the background of these developments. It would be a contradiction in terms to first in principle recognize that indigenous peoples’ traditional use of land results in property rights thereto, only to immediately thereafter make such rights contingent on a conventional understanding of the term “*possess*”. Such an interpretation would render Article 26.2 essentially without effect. That could hardly have been the intention, particularly when noting the proximity between the concepts “property rights” and “possession”. If comparing Black Law Dictionary’s definition of “possession” with the definitions of “property rights” discussed in Section 5.2, one immediately notes that the definitions are very similar. This is natural, as property rights are essentially rights to legal protection of possessions. Hence, as the understanding of property rights have recently evolved, the understanding of the term “*possession*” in DRIP Article 26.2 shall also be customized to land use common to indigenous cultures. It follows that pursuant to DRIP Article 26.2, indigenous peoples hold property rights to territories and natural resources traditionally and continuously used, irrespective of how disperse and irregular the traditional land use of the particular indigenous peoples might be. This interpretation of DRIP Article 26.2 further finds support in doctrine and jurisprudence.⁵³⁵ Notably, DRIP Article 26.2 does not employ the two-tire approach used by ILO 169 Article 14. In other words, pursuant to the provision, indigenous peoples hold property rights to land irrespective of whether the land area in question is today to some extent shared with the majority population, as long as the indigenous people continuously use the territory. In conclusion, Section 5.3.2 inferred that international law that indigenous peoples’ property rights to lands, waters territories and natural resources traditionally and continuously used has crystallized into international law. DRIP Article 26.2 clearly mirrors and reaffirms this development. Indirectly, therefore, DRIP Article 26.2 also lends support to the analogy between property rights to land and property rights to human creativity, as outlined in Section 5.4.

⁵³⁵ McNeil has underlined that “*possession*” in the context of indigenous peoples must be understood to mean “*possession in fact*”, in turn giving rise to a presumption of that the indigenous people also has “*possession in law*”. See *Emerging Justice?*, p. 141. Similarly, in the *Delgamuukw Case*, the Canadian Supreme Court affirmed that physical occupation by an indigenous people is evidence of possession in law. See *Delgamuukw v. British Columbia*, p. 1101. Xanthaki too, notes that indigenous peoples’ own customary land tenure system results in “*possession*” under the DRIP. See *Indigenous Rights in International Law over the Last 10 Years*.

As to the right to restitution, Article 28.1 proclaims that “*Indigenous peoples have the right to ... restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally ... occupied or used, and which have been ... taken ... without their free, prior and informed consent*”. As in Article 26.2, the key criterion is hence traditional use and/or occupation, rather than state recognition of rights. The phrase “*traditional use and occupation*” must reasonably given the same meaning in DRIP Article 28.1 as in 26.2, i.e. it must be understood in a cultural context of the particular indigenous people. In other words, pursuant to Article 28.1, territories that an indigenous people has traditionally used and/or occupied in a manner significant for its culture, but which have subsequently been taken without its consent, shall be returned. Once returned, the indigenous people hold property rights to the territory in question. Only when restitution is at all not feasible is other forms of compensation a relevant option.

As DRIP Article 28 calls for full restitution in all instances, it is natural that the DRIP contains no provision on the right to benefit-sharing. One can note, however that DRIP Article 28 does proclaim that when restitution of land is not at all possible, there can be monetary compensation instead. Perhaps one can also imagine situations where restitution is *not impossible*, but still *highly unpractical*, also from the point of view of the indigenous people. The land area in question might for example today already be full of extractive industries. In such instances, it is reasonable to interpret DRIP Article 28 as, although full restitution is not technically speaking impossible, offering benefit-sharing arrangements as a more practical alternative, provided that the indigenous people agrees.

In conclusion, Section 5.3.3 noted the clear and discernable trend in international law towards recognition of a right to restitution of indigenous peoples.⁵³⁶ Notwithstanding, the Section did not infer that a right to restitution has been clearly affirmed in international law. The reason for not drawing that conclusion was lack of evidence of support for such a position in regional and national processes. In addition, the legal doctrine has failed to identify a right to restitution in international law. Clearly, through DRIP Article 28.1, states have now provided support for the development towards a right to restitution as outlined in Section 5.3.3. The DRIP offers no support, however, with regard to partial restitution, as it embeds no benefit-

⁵³⁶ For instance, the Section observed that all relevant UN treaty bodies have discussed in terms of a right to restitution of indigenous peoples with regard to lands taken without consent. The CERD and CESC Committees have most clearly underlined this right in General Recommendation No. 23 and General Comment No. 21, respectively.

sharing provision. Chapter 9 will return to the question of whether DRIP Article 28 entails that a right to restitution has been firmly established in international law.

6.3.7 The right to non-discrimination

Section 6.3.2 concluded that DRIP Articles 1, 2 and 3 and pp 22, read in conjunction with DRIP as a whole and the international legal sources surveyed in Chapter 4, confirm that indigenous peoples are the beneficiaries of peoples' rights proper, to the same extent as other peoples. In addition to underscoring that indigenous peoples enjoy collective human rights, this conclusion also has implications for the right to non-discrimination. The inferment confirms not only the conclusion drawn in Sections 4.8.4 and 4.9, namely that the right to non-discrimination indirectly protects also indigenous peoples as such.⁵³⁷ In fact, DRIP Articles 1, 2, and 3 and pp 22 further supports an inferment Section 4.9 abstained from drawing, i.e. that indigenous peoples enjoy a right proper to non-discrimination, in line with the CERD Committee's General Recommendation No. 23.

6.3.8 Article 46

DRIP Article 46 groups together certain issues pertaining to how the rights enshrined in the Declaration impact on matters of great interest to society as a whole as well as on rights and interests of other segments of society. Pursuant to DRIP Article 46.1, nothing in the Declaration may be construed as authorizing any action constituting a threat to the territorial integrity of the state. As Sections 4.10 and 6.3.4 explained, this provision merely reaffirms well established international law.⁵³⁸ As further mentioned, the issue of secession lacks relevance to the doctoral thesis, wherefore Article 46.1 is not discussed further. Potentially more interesting are DRIP Article 46.2 and 3.

⁵³⁷ Anaya too, posits that the right to non-discrimination enshrined in DRIP applies to indigenous peoples. See *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, p. 185. In the same vein, Kymlicka notes that DRIP is a response to claims that conventional individual liberalism renders cultural minorities vulnerable to injustices by the majority. See *The Rights of Minority Cultures*, p. 18.

⁵³⁸ It is repeated that indigenous peoples' right to self-determination not enveloping a right to secession does not bar the possibility that indigenous peoples enjoy the general right to self-determination, applying to all peoples. As Section 4.10 explained, *no* people are entitled to a general right to secession, indigenous and non-indigenous peoples alike. See also Fromherz, *Indigenous Peoples' Courts*, pp. 1346-1347, where he observes that Article 46.1 prohibiting secession does not prohibit indigenous peoples from enjoying all other aspects of the right to self-determination.

Pursuant to Article 46.2, when exercising the rights enshrined in the DRIP, “*the human rights ... of all should be respected*”. Further, the rights the DRIP sets forth may be subject to such limitations that are determined by law and “*are in accordance with international human rights obligations.*” However, any such limitation must be “*non-discriminatory and strictly necessary solely for the purpose of securing due ... respect for the rights ... of others... and for meeting the just and most compelling requirements of a democratic society*”. Article 46.3 stipulates that the rights DRIP proclaims shall be “*interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith*”.

Some might argue that the general limitations DRIP Article 46.2 and 3 set forth can be invoked by states to significantly curb the applicability of the material rights enshrined in the DRIP. Still, it is doubtful whether an interpretation allowing the rather sweeping formulations in Article 46.2 and 3 to a large degree set aside the concrete formulations in the material provisions of the DRIP is plausible. The intention can hardly be that, as a general rule, third party rights and the interest of society at large take precedent over the material DRIP provisions. With respect to the interest of society as a whole, this conclusion follows explicitly from the wording of DRIP Article 46.2, underlining that the provision applies only when there is a need to meet the most “*compelling requirements of a democratic society*”, a situation that is unlikely to occur often. But also with regard to third party rights, Article 46.2 and 3 can reasonably not be understood as stipulating anything more than that the rights enshrined in DRIP cannot always be exercised without the consideration of the rights of third parties. Thus interpreted, Article 46.2 and 3 merely underlines a well-known feature of the human rights-system, namely that the patch-work of human rights is not perfect. Sometimes, human rights contradict. In such instances, one has to find ways to reconcile the contradicting rights, without unduly violating either of them. In certain circumstances, doing so might require the state to shoulder some of the burdens, e.g. by compensating one of the parties for having to accept the rights of the other. Article 46.2 and 3 point to that such reconciliation might sometimes also be necessary with regard to human rights of indigenous peoples, on one hand, and those of other members of the society, on the other. This being the only reasonable interpretation of Articles 46.2 and 3 follows also from Article 46.3 underlining that the DRIP provisions shall be interpreted in accordance with the principle of non-discrimination. It would simply be discriminatory to argue that indigenous peoples’ human rights should be

subject to more severe limitations in case of conflicts between rights, than rights of other segments of society.

With such an interpretation of Article 46.2 and 3, the provisions' impact on the material rights relevant to this doctoral thesis is limited. For instance, the question of whether DRIP supports the notion that indigenous peoples do enjoy human rights proper in general can only be determined by a thorough and contextual analysis of all relevant DRIP provisions. Section 6.3.2 has conducted such an analysis and has answered the question in the affirmative. A provision in sweeping terms pointing to the relevance of third party rights and the interest of society as a whole cannot rebut the conclusion drawn that indigenous peoples enjoy peoples' rights, without discrimination.

In the same vein, Section 6.3.4 described how DRIP confirms that indigenous peoples are the beneficiaries of the right to self-determination, and that this right shall chiefly be implemented through autonomy and self-governance. What remains to be determined is whether the right enjoyed is the general right to self-determination enjoyed by all peoples, or rather a right *sui generis* to indigenous peoples. If the former alternative is correct, Article 46.2 and 3 have little relevance. Under such circumstances, indigenous peoples enjoy the same right to self-determination as other peoples. This right will surely often have to be reconciled with the right to self-determination of the majority people. But Article 46.2 and 3 can hardly be invoked to argue for the balancing as a general rule being tilted in favour of the majority people, since that would be discriminatory. Should, on the other hand, the right to self-determination DRIP Article 3 proclaims be a right *sui generis* to indigenous peoples, the situation is perhaps somewhat less straight-forward. Under such circumstances, indigenous peoples' right to self-determination is presumably subordinated to the right to self-determination enjoyed by the majority people. This might give wider room for consideration of the interest of other segments of the society, when determining the scope and content of indigenous peoples' right to self-determination. Notwithstanding, also in such an instance, a general provision calling for respect for third party rights and the interest of society as a whole cannot reasonably be understood as setting aside the general structure for how the right to self-determination is to be operationalized. In other words, DRIP Article 46 cannot obliterate the concrete provision in Article 4, affirming that indigenous peoples' right to self-determination is first and foremost a right to autonomy/self-government in internal and local affairs. Neither can Article 46 reasonably be understood as impacting on the fact that the

reference to “*internal and local affairs*” in Article 4 embraces indigenous peoples’ collective creativity, as e.g. defined by the very concrete DRIP Article 31.

But even if having little relevance to the general structure of the right, Article 46.2 and 3 might potentially partly impact on the *scope and content* of a right to self-determination *sui generis* to indigenous peoples. The word “partly” is used, since the provisions’ relevance with regard to cultural elements still controlled by indigenous peoples must reasonably be limited. As mentioned, DRIP Article 31 guides us as to the scope and content of the right to self-determination enshrined in Articles 3 and 4. Article 31 explicitly and unambiguously confirms that indigenous peoples have the right to “control” elements of their collective creativity still held by them. Again, such a concrete right can hardly be set aside by Article 46’s general reference to the interest of society as a whole. And the reference to third party rights is of course irrelevant in this context, since no third party rights exist to cultural elements controlled by indigenous people. However, the situation might be different with regard to cultural elements to which third parties hold rights, or which are already in the public domain. Clearly, if third party rights have been established to cultural elements having escaped the control of indigenous peoples, such rights cannot be simply disregarded. But it might be that the cost for respecting these rights shall be borne, wholly or partly, by the government, rather than by the indigenous people. Moreover, it can be that under certain circumstances, a fair balancing of the rights implies that continued use by the third party is not all together prohibited, but that there shall be benefit-sharing with the indigenous people that has created the cultural element. With regard to cultural elements already in the public domain, this might constitute an instance when the interest of society as a whole provided for by DRIP Article 46.2 and 3 does come into play. As Section 5.4 explained, the IPR-system, including the notion of the public domain, has been constructed exactly for the purpose of maximizing creativity, believed to benefit society as a whole. At the same time, one should recall DRIP Article 46.3’s call for a non-discriminatory implementation of the Declaration. And as Section 5.4 explained, the arguments calling for a reconsideration of the public domain in the context of indigenous peoples’ collective creativity are precisely arguments rooted in the right to non-discrimination. Consequently, if a careful evaluation of the rights to property/non-discrimination has resulted in the conclusion that the public domain needs to be reformulated, the applicability of DRIP Article 46 might be limited.⁵³⁹ The doctoral thesis

⁵³⁹ Also with regard to cultural elements to which third party rights pertain or that are in the public domain, one should further recall DRIP Articles 5, 7, 8, 11, 12, 13 and 15, outlined above. As explained, these provisions

shall return to these issues in Chapters 8, 9 and 12. With regard to cultural elements in the public domain, again, the reference to third party rights does not come into play. Of course, per definition no third party rights pertain to subject matter in the public domain.

For the reasons just mentioned, DRIP Article 46.2 and 3 must have limited relevance also with regard to indigenous peoples' property rights to their collective creativity. As seen, the right to property *is* essentially a right to non-discrimination. Section 5.4 explained how recent developments in international law seek to accustom the property rights concept to the situation of indigenous peoples, precisely because doing so is perceived to be in line with evolved understandings of the right to non-discrimination. Section 6.3.5 inferred that DRIP Article 31 is in line with this development. For the same reasons, Article 46.2 and 3 is of little relevance to indigenous peoples' property rights to land and natural resources pursuant to DRIP Article 26.2. But the interest of society as a whole, and not least concern for third party rights, might be of relevance in the context of indigenous peoples' right to restitution proclaimed by Article 28, for the same reasons that applied to elements of indigenous peoples' collective creativity already in the public domain, described above. However, a difference between creativity and lands is precisely that in the case of the latter, a DRIP provision (Article 28) explicitly, in concrete language, calls for restitution. Again, this must be perceived to limit the applicability of Article 46's reference to the interest of the society as a whole. With regard to third party rights, however, such rights can certainly not be disregarded. But the presence of an explicit provision on restitution in the DRIP reasonably increase the onus on the state to facilitate reconciliation between indigenous and third party rights, also by providing compensation if necessary.

6.3.9 Endorsement of DRIP by the UN system and beyond

In the relatively short time-period that has passed since the UNGA adopted the DRIP, several international bodies have endorsed the Declaration, indicating the DRIP's conformity with international law in general. In General Comment No. 21, the CESCR underlines that several of the rights DRIP enshrines are also reflected in CESCR Article 15, as understood in the light of recent developments in international law. Further, with reference to DRIP Articles 20 and 33, the CESCR interprets CESCR Article 15 to embrace a protection of indigenous peoples'

protect indigenous peoples' from use by non-members of their cultural heritage that is culturally insensitive or otherwise harmful to the people's cultural identity. These are fundamental human rights, which reasonably limits the applicability of DRIP Article 46.2 and 3.

way of life, means and subsistence and cultural identity. Other DRIP provisions referred to by the CESC in General Comment No. 21 include 1, 11-13 and 19.⁵⁴⁰ Also other UN treaty bodies have commenced taking DRIP into account when interpreting their respective instruments in the context of indigenous peoples.⁵⁴¹ Further, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has stated that “[*The DRIP*] represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law”. He further added his intention to measure state conduct vis-à-vis indigenous peoples by the yardstick of the DRIP⁵⁴² The UN Office of the High Commissioner on Human Rights has underlined that its work is to assist states and indigenous peoples in implementing the DRIP.⁵⁴³ Further, the UN Development Group, composed of all UN system organizations and programs working with development, has acknowledged that DRIP provides the relevant legal framework for their work towards indigenous peoples.⁵⁴⁴

Also regional organizations of states have embraced the DRIP. The OAS uses the Declaration as “*the baseline for negotiations and ... a minimum standard*” for the draft OAS DRIP, discussed in Section 4.7.3.⁵⁴⁵ Further, the IACHR relied in part on DRIP in the *Saramaka Case*,⁵⁴⁶ as did the AfCommHPR in the *Endorois Case*.⁵⁴⁷

⁵⁴⁰ The CESC has also made similar observations in country specific observations with regard to Nicaragua. See *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua*, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 35.

⁵⁴¹ Committee on the Rights of the Child General Comment No. 11, CRC/C/GC/11, para. 82, and CRC/C/BOL/CO/4 (Bolivia), para. 3 (c), and CERD Committee CERD/C/USA/CO/6 (United States), para. 29, CERD/C/FJI/CO/17 (Fiji), para. 13, and CERD/C/CAN/CO/18 (Canada) para. 27.

⁵⁴² *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the Human Rights Council*, UN Doc. A/HRC/9/9 (11 August 2008), para. 85

⁵⁴³ Expert Mechanism on the Rights of Indigenous Peoples, “Statement by Ms. Kyung-wha Kang, Deputy High Commissioner for Human Rights”, 1st sess., Geneva (1 October 2008), pp. 4-5

⁵⁴⁴ UN Development Group, *Guidelines on Indigenous Peoples’ Issues* (1 February 2008). In the same vein, the 31 UN specialized agencies making up the Inter-Agency Support Group on Indigenous Issues have pledged to advance the spirit and letter of the DRIP, and to contribute to DRIP remaining a living document. See Statement on the UN Declaration on the Rights of Indigenous Peoples, adopted at Annual Meeting in September 2007.

⁵⁴⁵ Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), *Report of the Chair on the Meetings for Reflection on the Meetings of Negotiations in the Quest for Points of Consensus (Washington, D.C., United States – November 26-28, 2007)*, OEA/Ser.K/XVI, GT/DADIN/doc.321/08 (14 January 2008), p. 3

⁵⁴⁶ *Saramaka People v. Suriname*, Series C No. 172, paras. 131 and 214

⁵⁴⁷ *Endorois People v Kenya*, Case 276/2003, para. 232. The AfCommHPR has also officially welcomed the adoption of the DRIP, noting that the Declaration is in line with the position and work of the Commission. See Communiqué on the UN Declaration on the Rights of Indigenous Peoples, Doc No ACHPR/Res. 121 (XXXXII, of 28 November 2007). The Commission has also made specific references to the DRIP when discussing indigenous peoples’ rights to lands and natural resources. See “Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights”, online: http://www.achpr.org/english/other/Draft_guideline_ESCR/Draft_Pcpl%20&%20Guidelines.pdf.

6.3.10 Conclusions

The DRIP deliberations commenced essentially at the same time as UN expert bodies, international courts etc. gradually started to view indigenous rights through a new prism. Chapters 4 and 5 outlined how the new take on indigenous rights resulted in the indigenous rights discourse challenging some of conventional international law's most fundamental building blocks. These Chapters surveyed a vast amount of international legal sources asserting that indigenous peoples constitute peoples proper, and as such are the beneficiaries e.g. of the right to self-determination. Up and until that point, the right to self-determination had only been contemplated in the context of the aggregate of the population of a state or territory aspiring to become a state. In addition, the sources surveyed in Chapter 4 posited that indigenous peoples – as collectives – are bearers of human rights in general, rights that previously had been reserved for individuals. The sources outlined in Chapter 5 asserted that the *terra nullius* doctrine has been abolished and that indigenous peoples hold property rights to their traditional lands, as well as possibly to their collective creativity. Underpinning many of the mentioned rights, Chapters 4 and 5 observed that the indigenous rights discourse also calls for an evolved understanding of the right to non-discrimination, implying that the right protects, at least indirectly, also indigenous peoples as such. Finally, the Chapters concluded that the developments within the various areas of law are mutually supportive.

Notwithstanding, Chapters 4 and 5 with one or two exceptions refrained from drawing definitive conclusions as to the status of the various set of rights, mainly because of a lack of evidence of acceptance on a national level. The introduction noted that while the outlined development in international law progressed, many states deliberately abstained to taking an official position on indigenous rights, holding that states' political position on indigenous rights would be determined in the WGDD process. Having now surveyed the content of DRIP in depth, the doctoral thesis concludes that states - through adopting the DRIP – appears to have given their political consent to the developments outlined in Chapters 4 and 5. This Chapter 6 demonstrates that DRIP reaffirms essentially *all* the positions taken by the international legal sources outlined in Chapters 4 and 5.⁵⁴⁸ Still, before concluding that states have given their support to the outlined developments, the doctoral thesis has to consider the legal status of the DRIP. As a declaration, the DRIP is in itself not a legally binding

⁵⁴⁸ Xanthaki too notes that the DRIP can be perceived as an agreed interpretation of various relevant pre-existing international legal sources. See *Indigenous Rights in International Law over the 10 Last Years*.

instrument. What does this mean for the relevance of the conclusions outlined above? This question – obviously of fundamental importance to the thesis - is addressed in the following Chapter on international law on international legal sources.

7. INTERNATIONAL LAW ON INTERNATIONAL LEGAL SOURCES

7.1 *Introduction*

The survey of international legal sources in Chapters 4-6 paid limited attention to the fact that the various sources might carry different weight under international law. In addition, the Chapters only incidentally considered international legal norms for interpreting international legal sources. Before the doctoral thesis can move to conclude to what extent indigenous peoples have the right to own and/or determine over their collective creativity under international law, the doctoral thesis has to address international law on international legal sources. This is the purpose of this Chapter.

Section 7.2 initially outlines the various categories of legal sources generally acknowledged by international law, as well as describes the relative authority normally attributed to them. Section 7.3 then proceeds to discuss to what extent the formally relatively strict hierarchy of sources – in particular the distinction between so called hard and soft law – constitutes an accurate description of the international legal system, in reality. Section 7.4 outlines international law on treaty interpretation and further discusses to what extent such norms are analogously applicable also to the interpretation of other international legal instruments, such as declarations.

7.2 *Legal sources in international law*

7.2.1 Introduction

Chapter 2 described how from the outset, international law came to rest on the assumption that states pre-date the law, wherefore, as a direct consequence, no law can exist above the states. Rather, resting on such a presumption, states must, per definition, be the ultimate creators of international law. We further saw that this position got entrenched during the League of Nation epoch, as reflected e.g. in the *Lotus Case*. As seen, in the *Lotus Case*, the PCIJ confirmed that the surface of an international norm presupposes state consent, wherefore

the main sources in international law are treaties and customary law.⁵⁴⁹ Even though written already in 1908, an article of Oppenheim, one of the most prominent legal scholars of the era⁵⁵⁰, describes the sentiment of the time well: “[I]nternational law is a law not above but between states” ... “there is no central authority above the sovereign states which could compel them to comply with the rules of international law...” and “existing recognized rules of international law ... are ... found in customary practice of states or in law-making conventions”. Oppenheim foresaw that these conventions would never change.⁵⁵¹ That said, one should note that some legal scholars of the post-World War I era argued against a strict application of legal positivism. For instance, Lauterpacht defended the continued role of natural law ideals in the international legal system, and not only in legal theory.⁵⁵² This doctoral thesis will not probe deeper into the positivist-natural law debate of the early 1900s. It is merely noted that the legal practice and mainstream doctrine clearly favoured positivism.⁵⁵³ Notwithstanding, throughout the analyses in this Chapter, it might be worth bearing in mind that the positivism-natural law debate, here represented by Oppenheim and Lauterpacht, did continue into the 1900s.

If after these initial comments embarking on the analysis of the nature and status of international legal sources, one can initially note that Oppenheim’s prediction proved correct at least in the sense that in the wake of World War II, the world community attempted to formalize what constitute legal sources under international law. The UN Charter established the ICJ and the ICJ Statute Article 38 lays out what are relevant sources of international law for the purposes of the Court. Pursuant to Article 38.1, the ICJ shall in its rulings primarily apply (a) international conventions establishing rules expressly recognized by contracting states, (b) international customary law, and (c) general principles of law recognized by civilized nations. In addition, Article 38.1 (d) provides that the ICJ shall apply judicial decisions and the teachings of the most highly qualified international legal scholars as

⁵⁴⁹ *The Case of the S.S. “Lotus”*, PJI, Ser. A. No. 10, 1927, Section III, para. 4

⁵⁵⁰ Kingsbury, *Legal Positivism as Normative Politics*, p. 402

⁵⁵¹ Oppenheim, *The Science of International Law*, pp. 321-322 and 333. Parts of Oppenheim’s article is actually written as a response to natural law theories, which can be understood as suggesting that these still played a role at the first half of the 1900s. However, it is further clear that Oppenheim’s criticism is directed towards natural law proponents *among legal scholars* and *not within international law as such*. Oppenheim submits that natural law theories have served the law in the past, but is now *passé*. He hence argues that to be useful to international law, the legal doctrine too, should focus on positive law. See pp. 329-330 and 333. In other words, Oppenheim seems to confirm Chapter 2’s description of the difference between international law proper and international legal theory during the Peace of Westphalia-World War II era. International law as such rested firmly on state consensus, while legal scholars had not necessarily given up the mission to discern a law above the sovereign.

⁵⁵² Lauterpacht, *The Grotian Tradition in International Law*

⁵⁵³ Shelton, *Normative Hierarchy in International Law*, pp. 295 and 302

secondary sources when primary sources offer insufficient guidance. The ICJ Statute Article 59 clarifies that judicial decisions, including by the Court itself, formally constitute no primary source, as they have binding force only between the parties to the dispute. The ICJ Statute Article 38.1 does not rank the primary sources of international law, but it is clear that treaties and customary law make up the most important sources. Treaties and custom ensures, at least in principle, complete compliance between those that make the law and those bound by it.⁵⁵⁴ In other words, the ICJ Statute essentially confirmed the PCIJ's and Oppenheim's assertions as to what constitute relevant international legal sources. The applicability of Article 38 has not been confined to the ICJ. The ICJ Statute Article 38 is generally held to reflect customary international law on international legal sources.⁵⁵⁵

The short and concrete list of sources might give the impression that the system of international legal sources is precisely and clearly defined. In practice, however, things might be somewhat more complicated. The doctrine of international legal sources following from the ICJ Statute Article 38 has been criticized both for at all formally listing what constitutes relevant sources of law and for failing to list enough sources. If starting with the first argument, the formal list of sources has been criticized for contradicting the underlying principle that an international norm, to constitute law proper, must ultimately be linked to state behaviour.⁵⁵⁶ Therefore, it has been asserted, a doctrine of international legal sources can at best be an attempt to describe how state behaviour might be manifested.⁵⁵⁷ Ross asserts; “[t]he basis of the doctrine of legal sources is in all cases actual acceptance and that alone.”⁵⁵⁸ If taking this position, clearly, there can be no meaningful doctrine on legal sources. That is so since states, as the ultimate creators of international law, can always at any given time decide what constitute relevant sources or not, irrespective of any “existing” normative system.

At the same time, the ICJ Statute Article 38 has been criticized for failing to accept as legally relevant certain instruments, decisions etc. that, it is argued, are relevant to international law making albeit not necessarily deducible from state consensus. Examples of such sources

⁵⁵⁴ Chinkin, *Normative Development in the International Legal System*, p. 21

⁵⁵⁵ Brownlie, *Principles of Public International Law*, p. 4

⁵⁵⁶ Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, pp. 51-60, and Cassese, *International Law*, p. 153

⁵⁵⁷ Koskeniemi, *From Apology to Utopia*, pp. 165-166

⁵⁵⁸ Ross, *A Text-book of International Law*, p. 195. For a similar argument, see also Weil, *Towards Relative Normativity in International Law?*

might be decision by international organizations intended to be binding⁵⁵⁹, UN Declarations and other resolutions adopted by the UNGA. Further, although pursuant to ICJ Statute Article 59 formally binding only on the involved parties, rulings by the ICJ and other authoritative international tribunals are generally also perceived to be relevant when establishing what constitutes international law.⁵⁶⁰ Section 7.3 shall return to the criticism directed against presenting the international normative order as a formalized system from which it follows exactly what constitutes and not constitutes law. But before embarking on this analysis, the following Section briefly introduces the sources most commonly referred to as relevant sources of international law. The outline takes ICJ Statute Article 38.1 as point of departure, but also addresses certain instruments etc. not listed in the ICJ Statute, but that nonetheless are often discussed in the context of international norms.

7.2.2 Peremptory norms

Albeit not listed in the ICJ Statute Article 38, so called peremptory norms – or *jus cogens* – are generally held to rank first among international legal norms.⁵⁶¹ Pursuant to VCLT Article 53, a treaty is void if conflicting with a peremptory norm. Even if Article 53 only refers to treaties, it is widely accepted that international customary norms and unilateral state practice too, must not violate peremptory norms. Also these sources are void if not in conformity with norms constituting *jus cogens*.⁵⁶² Peremptory norms are hence be describe as a superior category of law, ranking above, and taking precedent over, other legal sources. Further to VCLT Article 53, a peremptory norm can only be modified by a subsequent international norm with the same legal status.

When it comes to how it is formed, *jus cogens* can be said to constitute a particular form of international customary law.⁵⁶³ Consequently, as Section 7.2.4 will elaborate further, a peremptory norm emerges when there is coherent customary state practice, coupled with *opinio juris*, i.e. states must also subjectively perceive that their actions constitute a reflection of law. Additionally compared with customary laws in general, however, for a norm to

⁵⁵⁹ Cassese, *International Law*, p. 183

⁵⁶⁰ Crawford, *the Right to Self-determination in International Law*, p. 32, Brownlie, *Principles of Public International Law*, pp. 19-21, Boyle and Chinkin, *The Making of International Law*, p. 268, and Cassese, *International Law*, pp. 194-195

⁵⁶¹ Cassese, *International Law*, p. 199

⁵⁶² Brownlie, *Principles of Public International Law*, p. 5, Crawford, *The Creation of States*, p. 107, and Raic, *Statehood and the Law of Self-Determination*, p. 143

⁵⁶³ Cassese, *International Law*, pp. 199-202

acquire the status of *jus cogens*, there must also be *opinio juris* holding that the norm is of an absolute nature.⁵⁶⁴ Similar to customary norms in general it is sufficient that a significant number, but not necessarily all, states are of the opinion that a norm constitutes *jus cogens* for the norm to acquire such status.⁵⁶⁵

Against the background of the basic structure of the international legal system outlined in Chapter 2, there should come as no surprise that the notion of *jus cogens* is not uncontroversial. Obviously, the idea of international norms of superior nature squares badly with the principle of state sovereignty. Indeed, it might seem like a contradiction in terms that norms exist above those agreed to by the ultimate creators of law.⁵⁶⁶ Consequently, some positivist legal scholars have heavily criticized the notion of peremptory norms.⁵⁶⁷ Proponents of natural law, on the other hand, suggest that the concept of *jus cogens* is in fact a reflection of the continued relevance of natural law ideals to the contemporary legal system.⁵⁶⁸ And at the time of adoption of VCLT Article 53, several states also declared the view that the provision is an expression of natural law.⁵⁶⁹ Others, wishing to defend the peremptory norm institute while still not give in to natural law ideas, have pointed to that Article 53 stipulates that for a norm to acquire the status of *jus cogens*, it must be accepted as such by “*the international community of States as a whole*”.⁵⁷⁰ However, it has been retorted, one can seriously question what relevance this caveat has in practice. Certainly, it must be a fiction that all states at one particular point in time have come together to give their consent to a norm acquiring the status of *jus cogens*. In reality, equity and reason are presumably more relevant factors when an international customary norm is elevated to the status of *jus cogens*, it has been argued.⁵⁷¹

Given the problems associated with reconciling peremptory norms with the fundamental principle of state sovereignty, it is only natural that there has been little agreement on what international norms amount to *jus cogens*, beyond obvious examples such as prohibition of

⁵⁶⁴ Reuter, Introduction to the Law of Treaties, pp. 142-146

⁵⁶⁵ Talmon, The Constitutive Versus the Declaratory Theory of Recognition, p. 131, Cassese, International Law, pp. 201-202

⁵⁶⁶ Cassese, International Law, p. 171

⁵⁶⁷ See e.g. Weil, Towards Relative Normativity in International Law?, pp. 423-430, where he delivers a heated argument against the whole idea of the international legal system enveloping norms of unequal status.

⁵⁶⁸ Evans and Capps, International Law (Volume I), p. xiv

⁵⁶⁹ Boyle and Chinkin, The Making of International Law, p. 11

⁵⁷⁰ Shelton, Normative Hierarchy in International Law, p. 301

⁵⁷¹ Koskenniemi, From Apology to Utopia, pp. 322-325 and 391-392

slavery and genocide. Peremptory norms have rarely been relied on in practice, including by the ICJ.⁵⁷² Yet two rights of significant importance to the doctoral thesis are generally perceived to constitute peremptory norms; the rights to self-determination⁵⁷³ and non-discrimination.⁵⁷⁴ One should recall, however, that both these rights, at their core, reflect fundamental values, *and*, as conventionally understood, *only* these values. The right to self-determination was first understood essentially as a right of peoples to be free from foreign domination. And the traditional understanding of the right to non-discrimination was a right of individuals to be treated as equals. Most certainly, it is these core concepts of the rights to self-determination and non-discrimination that have been considered *jus cogens*. It appears unlikely – given the state practice/*opinion juris* requirements – that the aspects of the rights to self-determination and non-discrimination that have evolved more recently – and which are relevant to indigenous peoples - have already been elevated to the status of *jus cogens*⁵⁷⁵, albeit this is certainly a possible future development. In any event, given the uncertain role the *jus cogens* institute plays in the international legal system, there seems to be little need to pursue this discussion any further for the purposes of the doctoral thesis.

7.2.3 International treaties

A treaty has been defined as “*any international agreement in written form ... and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act...) concluded between two or more States or other subjects of international law and governed by international law*”.⁵⁷⁶ The term “other subjects” refers to subjects of international law beyond

⁵⁷² International Law Association (ILA): Final Report on the Impact of International Human Rights Law on General International Law (2008), Section 1.2, and Boyle and Chinkin, *The Making of International Law*, p. 17. Shelton notes that while the concept of *jus cogens* might be much discussed in the legal doctrine, there is less support for such norms in state practice and judicial opinions. See *Normative Hierarchy in International Law*, pp. 292 and 297. Similarly, the ILA observes that even if the existence of *jus cogens* norms in principle is beyond doubt, examples of them being applied in practice are still rare.

⁵⁷³ Anaya, *Indigenous Peoples in International Law I*, p. 75, Cassese, *Self-determination of Peoples*, pp. 169-170, and *International Law*, pp. 65-66, Brownlie, *Principles of Public International Law*, p. 489, Crawford, *The Creation of States*, p 101, and Raic, *Statehood and the Law of Self-Determination*, p. 145 and 203. Further, in the *East Timor Case*, the ICJ stated that the right to self-determination is one of the essential principles of international law.

⁵⁷⁴ International Law Commission, UN Doc. A/56/10, p. 284, Cassese, *International Law*, pp. 65 and 203, Hannum, *Autonomy, Sovereignty and Self-Determination*, pp. 20 and 117, and Brownlie, *Principles of Public International Law*, p. 489. It should be noted that Hannum only stretches as far as agreeing that the right to non-discrimination *possibly* constitutes *jus cogens*. This observation was, however, made as early as in the 1990s.

⁵⁷⁵ Raic, *Statehood and the Law of Self-Determination*, pp. 146-147 and 219, Weller, *Towards a General Comment on Self-Determination and Autonomy*, p. 8, and Makkonen, *Equal in Law, Unequal in Fact*, p. 83

⁵⁷⁶ International Law Commission Yrbk. ILC (1962), ii. 161, and Brownlie, *Principles of Public International Law*, p. 580. For an extensive discussion on all criteria present in the definition of treaties, see Aust, *Modern Treaty Law and Practice*, pp 16-23.

states with the capacity to be parties to international treaties.⁵⁷⁷ In this particular context, however, the concerned is only with treaties between states.

In one sense, treaties are the most uncomplicated of the international legal sources. Treaty provisions are normally comparatively straight-forward in both content and reach. Further, treaties are binding only on the parties to the treaty, bringing the advantage of legal certainty. At the same time, however, this feature of treaties can also be said to be their greatest disadvantage, since it deprives treaties of the universal applicability denoting e.g. customary law. Different mixes of states being parties to various treaties results in a fragmented legal structure, ultimately breaking down to a network of binary state relationships. True, treaties tend to influence state practice in general. To the extent such practice is matched by *opinio juris*, treaty provisions come to coincide with customary international law, and the rights enshrined in the treaty becomes binding also on non-parties.⁵⁷⁸ But to the extent such a development does not occur, treaties result in a complicated patchwork of rights and duties where different states are bound to varying degrees.⁵⁷⁹

7.2.4 Customary international law

As Section 7.2.2 indicated, international customary law is made up of one objective and one subjective criterion. For a customary norm to emerge there must be both an observable general practice among states and *opinio juris*, i.e. states must subjectively agree that they are legally bound to act in conformity with the discernable practice.⁵⁸⁰ That said, as Section 7.2.2 further indicated, it is generally held that substantial, but not complete, uniformity in state practice is required for a customary norm to materialize. And consent can be tacit and/or implied. There is no need for states to explicitly give their support to the norm.⁵⁸¹ Further,

⁵⁷⁷ Brownlie, *Principles of Public International Law*, p. 580

⁵⁷⁸ Brownlie, *Principles of Public International Law*, p. 13

⁵⁷⁹ That said, as a general rule, the doctoral thesis will not denote how many UN member states have ratified a particular treaty. If nothing is stated to the contrary, a treaty referred to has been widely ratified, and is treated as binding international law for the purposes of the thesis.

⁵⁸⁰ *North Sea Continental Shelf*, Judgement, I.C.J. Reports 1969, p. 3, paras. 73-74, Cassese, *International Law*, p. 156, Brownlie, *Principles of Public International Law*, pp. 6-8, and Koskenniemi, *From Apology to Utopia*, pp. 394-395

⁵⁸¹ Charney, *Universal International Law*, p. 536, and Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, pp. 71-75

evidence of non-compliance, or even explicit rejection of the norm, by a few states does not necessarily preclude the existence of a customary norm.⁵⁸²

Sources evidencing the existence of a customary norm include essentially all acts and documents demonstrating state practice and intent.⁵⁸³ Customary international law can often be deduced from rulings by international tribunals, in particular the ICJ. But also regional human rights courts contribute to the making of customary law.⁵⁸⁴ Obviously, treaty making is a particularly important form of state practice. Indeed, under certain circumstances, the adoption of a treaty by enough sufficiently representative states can result in a norm instantly becoming customary international law.⁵⁸⁵ More often, however, treaties are a source of evidence for the existence of a customary international norm.⁵⁸⁶ Naturally, if the same or similar treaty provision occurs in a number of treaties, this strongly indicates that the provision reflects a customary norm. That is particularly so if states not formally bound by the treaty act in conformity with, or do not object to, the norm enshrined in the treaty provisions.⁵⁸⁷ Also a treaty that has not yet entered into force can be indicative of a customary norm.⁵⁸⁸ Similarly, treaties with only a limited number of ratifying states can contribute to the emergence of customary international law.⁵⁸⁹

In the same vein, non-binding instruments, such as UN declarations adopted by the UNGA, often evidence both state practice and *opinio juris*, and consequently customary law.⁵⁹⁰ The fact that an instrument is non-binding is often of little relevance in international customary law-making. Treaties do not enshrine *opinio juris* because of their legally binding nature. States opinion can be equally evidenced by voting on a non-binding instrument.⁵⁹¹ Indeed, as

⁵⁸² ICJ Reports (1986), (*Case of Nicaragua v. United States*), Brownlie, Principles of Public International Law, p. 7, Cassese, International Law, p. 157, and Weil, Towards Relative Normativity in International Law, pp. 434 and 437

⁵⁸³ Brownlie, Principles of Public International Law, p. 6

⁵⁸⁴ Boyle and Chinkin, The Making of International Law, pp. 299

⁵⁸⁵ *North Sea Continental Shelf Case*, paras. 73 and 74, and the *Barcelona Traction Case*, Barcelona Traction, Light and Power Company, Limited, Judgement, I.C.J. Report 1970, p. 3, para. 32

⁵⁸⁶ Brownlie, Principles of Public International Law, p. 13

⁵⁸⁷ Reuter, Introduction to the Law of Treaties, pp. 108-109 and 139.

⁵⁸⁸ *Namibia Case* I.C.J. Reports (1971), para. 47, and Brownlie, Principles of Public International Law, p. 14

⁵⁸⁹ Boyle and Chinkin, The Making of International Law, p. 234

⁵⁹⁰ *Nuclear Test Case*. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J., Reports 1996, p. 226, para. 70. Brownlie, Principles of Public International Law, pp. 14-15 and 663, Shelton, Law, Non-Law and the Problem of "Soft Law", p. 1, and Boyle and Chinkin, The Making of International Law, pp. 77 and 212

⁵⁹¹ Shelton, Normative Hierarchy in International Law, pp. 292-293 and 320-321, and Boyle and Chinkin, The Making of International Law, p. 215

treaties, also non-binding UNGA resolutions can under certain circumstances create instant customary law. In the *Nicaragua Case*, the ICJ inferred the existence of *opinio juris* primarily out of a non-binding UNGA resolution⁵⁹², albeit some other sources contributed to the Court's conclusions. Moreover, the ICJ started its deliberations by investigating whether there was *opinio juris*. Only subsequently did the Court survey if there was state practice to support the *opinio juris*.⁵⁹³ Doing so, the ICJ stated that it “*does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. ... [T]he Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule.*”⁵⁹⁴ The ICJ's ruling in the *Nicaragua Case* implied a fairly dramatic down-grading of the importance of state-practice, vis-à-vis *opinio juris*. Prior to the *Nicaragua Case*, it was generally thought that if one was more important than the other, practice had priority over *opinio juris*.⁵⁹⁵ Now, the ICJ deduced *opinio juris* basically from states' votes on a non-binding UNGA Resolution. Having thus established the existence of *opinio juris*, the ICJ presumed the existence of a customary norm that then needed to be rebutted by contradicting state practice. Holding that *opinio juris* constituted a presumption for a customary norm resulted in the ICJ concluding that such a norm had indeed materialized, despite the limited evidence of supporting state practice. In fact, there was not insignificant evidence of state-practice contradicting the existence of the norm, something that the Court also explicitly acknowledged.⁵⁹⁶

The ICJ's ruling in the *Nicaragua Case* has significant implications for the understanding of how international law is created, for two interrelated reasons. First, the case submits that the UNGA has transcended its traditional recommendatory role and can in fact create instant international law by adopting declarations and other formally non-binding resolutions with overwhelming majority.⁵⁹⁷ As Morrison has noted, the *Nicaragua Case* appears to change

⁵⁹² UNGA Resolution 2625 (XXV) (The Friendly Relations Resolution)

⁵⁹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, I.C.J. Reports, 1986, p. 14, in particular paras. 184-206. See also Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, pp. 75-76.

⁵⁹⁴ *Nicaragua Case*, para. 186

⁵⁹⁵ Simma and Alston, *The Sources of Human Rights Law*, p. 88

⁵⁹⁶ *Nicaragua Case*, para. 186. See also Charney, *Universal International Law*, pp. 537-538, and Boyle and Chinkin, *The Making of International Law*, pp. 234-235

⁵⁹⁷ Tasioulas, *In Defence of Relative Normativity*, pp. 96-100 and 114, Charney, *Universal International Law*, p. 546-547, and Simma and Alston, *The Sources of Human Rights Law*, pp. 96-97. See also Crawford, *The Criteria for Statehood in International Law*, p. 152, where he notes that UNGA resolutions can have “quasi-legislative effect”. Charney underlines, however, that formally speaking the UNGA of course does not have

UNGA Resolutions from a part of formation of international customary law to “*the end result of that process*”, transforming such resolutions from “*soft law principles*” to “*hard law prescriptions*”.⁵⁹⁸ Second, not only does the *Nicaragua Case* confirm that UNGA Declarations etc. can create instant customary law. In addition, the UNGA’s power is further enhanced by the ICJ’s findings that if *opinio juris* can be demonstrated, the existence of a customary norm shall be presumed. As demonstrated by the *Nicaragua Case*, this implies that evidence of sufficient coherent contradicting state practice is needed to deprive the declaration of its legal implications.⁵⁹⁹ Having underlined the significance of the *Nicaragua Case*, it is worth recalling Section 2.5.4’s observation that the ICJ already in the 1970s relied heavily on a non-binding UNGA Resolution when ruling in the *Namibia* and *Western Sahara Cases*.

The *Nicaragua Case* further illustrates that although the constitutive elements of customary law are clear in principle, ascertaining what constitutes concerted state practice, and in particular the collective subjective opinion of states, is often associated with great practical difficulties. Evidence of both state practice and *opinio juris* might be disperse, and difficult to assess and evaluate. As a result, one must often take recourse to secondary sources.⁶⁰⁰ Koskenniemi goes as far as submitting that custom-ascertainment is often not at all a process where pre-existing rules are deduced. Rather, due to the difficulties associated with establishing state practice and *opinio juris* in an objective manner, international tribunals, including the ICJ, tend to resort to equity arguments, he posits.⁶⁰¹ *In principle*, the *opinio juris* criterion embedded in customary norms implies that customary law creation, as the making of treaties, respects the notion that international law emerge only as a result of state consent. But *in practice*, one can, particularly if Koskenniemi’s observation is correct, question how well international law-making through customary norms complies with the principle of state sovereignty. As seen, *opinio juris*, and hence the presumption of a customary norm, can be deduced from a few, also non-legally binding, instruments. The

independent legislative authority. And Simma and Alston are critical to the ruling by the ICJ in the *Nicaragua Case*.

⁵⁹⁸ Morrison, Legal Issues in the Nicaragua Opinion, pp. 161-162. Morrison also adds, however, that “*Whether states are willing to accept this expanded view of the binding effect of resolutions remains to be seen.*”

⁵⁹⁹ International Law Association: Final Report on the Impact of International Human Rights Law on General International Law (2008), Section 2

⁶⁰⁰ Boyle and Chinkin, The Making of International Law, pp. 163 and 190

⁶⁰¹ Koskenniemi, From Apology to Utopia, pp. 396-397, 409-411 and 467-471. Similarly, Boyle and Chinkin agree that establishing what constitutes customary international law is no scientific process, and involve political choices. See The Making of International Law, pp. 278-279.

norm then materializes despite the objection and/or contradicting practices of a few states. A customary norm can hence emerge despite lack of consent, and then binds also objecting states.⁶⁰² True, customary norms can probably emerge only with great difficulty in instances of a number of persistent objectors. Still, customary law-making appears to constitute an exception from a rigid application of the principle of state-sovereignty. Obviously, one has strayed away even further from the principle of state consent if customary norms can be deemed to exist based on equity. The doctoral thesis shall return to this issue in Section 7.3

7.2.5 General principles of law recognized by civilized nations

As Section 7.2.1 mentioned, the ICJ Statute Article 38.1 groups general principles of law recognized by civilized nations together with treaties and customary law as the primary sources in international law. In principle, such principles are supposed to be norms common to a vast majority of domestic legal systems. In other words, one should be able to deduce general principles of law recognized by civilized nations by identifying common patterns in national laws.⁶⁰³ Not surprisingly, however, this imprecise definition has resulted in questions as to what practical role, if any, such principles serve in the international legal system.⁶⁰⁴ It has been suggested that general principles of law recognized by civilized nations are difficult to discern from customary law and peremptory norms.⁶⁰⁵ In sum, it appears clear that even though formally speaking a primary legal source, in practice, general principles of law recognized by civilized nations play a limited, if any, role in the international legal system.⁶⁰⁶

⁶⁰² The *Asylum Case*. Columbian-Peruvian asylum case, Judgement of November 20th, 1950: I.C.J. Reports 1950, p. 266, para 276 and 277, *The Nicaragua Case*, para. 186, *The North Sea Continental Shelf Case*, para. 74, Koskenniemi, *From Apology to Utopia*, p. 395, Cassese, *International Law*, pp. 157 and 162-163, and Brownlie, *Principles of Public International Law*, p. 7

⁶⁰³ Brownlie, *Principles of Public International Law*, pp. 16-17. Principles of law recognized by civilized nations should not be confused with general principles of international law. As stated, the former are deduced from *domestic legal systems*. The latter category, on the other hand, is made up of general legal principles that can be deduced from *international legal sources* such as treaties and customary law, by crystallizing their core features. General principles of international law are not legal sources proper, but rather enhance the understanding of the international legal system. Examples of such principles are state sovereignty and respect for human rights. See Cassese, *International Law*, p. 188.

⁶⁰⁴ Koskenniemi observes that the ICJ has never explicitly applied or even referred to general principles of law recognized by civilized nations in its rulings. See *From Apology to Utopia*, p. 402. Others concur that the ICJ has only occasionally used general principles of law as a source of international law. See Carney, *Universal International Law*, p. 536, Brownlie, *Principles of Public International Law*, pp. 16-17, and Chinkin, *Normative Development in the International Legal System*, p. 21.

⁶⁰⁵ Reuter, *Introduction to the Law of Treaties*, pp. 141-142 and 145, and Brownlie, *Principles of Public International Law*, pp. 18-19

⁶⁰⁶ On a principal level, it can be added that Koskenniemi submits that general principles of law recognized by civilized nations challenge the principle of state sovereignty to an even larger degree than customary laws. He asserts that normally it is not possible to discern a general principle of law that supports one state's position over another. As a consequence, international tribunals etc. will in practice have to take recourse to reason or equity to

7.2.6 “Soft law” etc.

The term “soft law” is used to distinguish a certain category of legal sources from “hard law”. If maintaining this distinction, the latter category refers to sources that are formally legally binding, i.e. sources listed as primary sources in the ICJ Statute Article 38.1 plus peremptory norms. Soft law then is simply a label placed on a variety of legal sources perceived to have some relevance in the international legal system, but which are formally speaking not legally binding on their own/as such.⁶⁰⁷ As Section 7.2.1 indicated, the use of the term “soft law” has been criticized from two opposite angles. Some assert that it is wrong to talk about soft law because a source is either law or not law. There are no intermediates.⁶⁰⁸ Others might agree that formally speaking, the distinction between hard and soft law is valid. But they nonetheless question whether such a formalistic approach can be maintained in practice. With these observations in mind, the doctoral thesis will continuously use the term “soft law”, but will come back to the issue as to whether it is appropriate to differentiate between hard and soft law sources.

Sources commonly referred to as soft law are e.g. UN Declarations and other resolutions adopted by the UNGA or other bodies of international cooperation. Other examples include standards, principles, joint statements etc. adopted by intergovernmental meetings or organizations.⁶⁰⁹ As mentioned, rulings by international tribunals such as the ICJ are formally binding only on the parties. The ICJ has no formal power to make law. Similarly, UN treaty body jurisprudence formally speaking also lacks universal applicability. As a consequence, these sources too are sometimes referred to as soft law.⁶¹⁰ However, it is probably incorrect to use “soft law”, even in the laxest understanding of the term, to describe these sources. Rather, jurisprudence from international tribunals and treaty bodies are sources interpreting

settle the dispute, meaning that as a general rule, invoking general principles of law recognized by civilized nations as a legal source most often implies holding states bound to “norms” to which they have never consented. See *From Apology to Utopia*, pp. 258-270 and 402-405. In a similar vein, see also Boyle and Chinkin, *The Making of International Law*, p. 286.

⁶⁰⁷ Shelton, *Normative Hierarchy in International Law*, p. 319, Boyle and Chinkin, *The Making of International Law*, pp. 212-213

⁶⁰⁸ Carney, *Compliance With International Soft Law*, p. 115

⁶⁰⁹ Boyle and Chinkin, *The Making of International Law*, pp. 212-213

⁶¹⁰ Boyle and Chinkin, *The Making of International Law*, p. 213

“hard law” sources, thus informing us of their content.⁶¹¹ As seen, rulings of the ICJ and other authoritative international tribunals are generally perceived to be of great importance when determining what constitutes international law. Indeed, it is often precisely through a ruling by the ICJ that we become aware of an international norm. And we have further seen that the findings of treaty bodies too, play an important role in international law-making.⁶¹² In the same vein, pursuant to ICJ Statute Article 38.1 (d), the legal doctrine constitutes only a secondary international legal source. Still, the writings of leading legal scholars fulfil many of the same purposes as jurisprudence. The legal doctrine too, is a source for determining what constitutes relevant international law⁶¹³, as are the findings of the ILC.

In conclusion, it is clear that formally speaking (i) “soft law” sources proper, such as UN Declarations, (ii) international legal sources interpreting hard law sources, such as rulings by the ICJ and regional human rights courts and treaty body jurisprudence, and (iii) secondary sources such as the legal doctrine, do not constitute “hard law”. In fact, some posit that these “sources” do not constitute law at all. They maintain that there exist no such thing as degrees of international law. At the same time, plenty of evidence suggests that all three categories of “sources of law” play some kind of role in the international normative system. If so, is it correct to claim that they have no legal implications? The next session addresses this question, of cardinal importance to the doctoral thesis.

7.3 *Conclusions on the relative status of various international legal sources*

7.3.1 *The inherent tension between the notion of binding international norms and the principle of state sovereignty*

Throughout, the doctoral thesis has underlined how the international legal system rests on the liberal premise that international law emerges from those it governs. No law exists above the state. Rather, state sovereignty provides that states are the ultimate creators of law. But as further seen, liberalism also rests on a second premise, intrinsically connected to the first. It holds that once the sovereigns have duly created a norm, the norm must be obeyed, including

⁶¹¹ For a different opinion, see, however, Shelton, *Commentary and Conclusions*, pp. 451-452. At the same time though, Shelton notes that treaty body jurisprudence can be more important for the formulation of international law than “primary soft law sources”. See p. 461.

⁶¹² For a similar opinion, see Boyle and Chinkin, *The Making of International Law*, pp. 156-157.

⁶¹³ Talmon, *The Constitutive Versus the Declaratory Theory of Recognition*, p. 165

by the sovereigns themselves. In international law, this precept is mirrored in the equally fundamental notion that once the law-making state has agreed to be bound by international law, it cannot opt out of the law at will. When established, international law is perceived as objective and external to state behaviour, will or interest. At first glance, this second premise seems straight-forward, providing the foundation for a complete and coherent theory of law. But if considering it more closely, is not the second precept, to be operational in practice, dependent on the first? It would seem like an illusion to talk about objective and external law *at the time when the law is applied*, if one can not objectively determine how the law became law *at the time of emancipation*. And at the time of emancipation, the law is, it would appear, only what those it is supposed to govern say it is. This “definition of law” perhaps does not provide the same foundation for a complete and coherent theory of law, as did the definition at the time of application?

To elaborate further on what seems to be an inherent contradiction in the international legal system, the doctoral thesis will rely heavily on Koskenniemi’s analyses in *From Apology to Utopia*. Koskenniemi observes that liberalism’s first precept - the notion that international law is to be deduced from the actions and intent of the same polities that the law is supposed to govern - embeds a juxtaposition that international lawyers have wrestled with since the surface of the international legal system. Koskenniemi points to that a legal theory assuming not only that the law always can – but should – be deduced from state behaviour and intent is problematic, since it implies an assumption that state behaviour is correct. And a theory of law that seems to hold that state behaviour equals the law – i.e. that action/intent and the law, per definition, coincide - is easily accused of be in want of a meaning. Because is not under such circumstances an exercise aiming at deducing the law from state behaviour redundant? For all practical purposes, it would appear that it is the conduct, and not “the law”, that binds. And if that is the case, is it correct to refer to international law as a legal system?

Koskenniemi notes that liberal lawyers have been aware of that a rigid application of the principle of state sovereignty may render the international legal system vulnerable to attacks suggesting that it is not a legal system at all. Liberals accept that in order to constitute a legal system proper, international law should reasonably be binding upon states. Clearly, a legal system that fails to bind its subjects seems rather pointless. It would appear that if one wish to label international law “law”, in any meaningful understanding of the term, state action/intent cannot define the law. But the problem is that the alternative is troublesome to liberals too. If

one is not to derive the law from state consent, this would seem to imply that international law has at some point acquired an autonomous status. It has somehow got disconnected from the sovereign. And that, in turn, would seem to mean that we are back to some form of ideas of natural justice, a notion inherently contradictory to liberalism. And therein lays, Koskenniemi observes, the inherent juxtaposition of an international legal system rooted firmly in the liberal premise of state sovereignty. A liberal international legal system cannot abandon the notion that the law is the result of the exercise of state sovereignty. At the same time, one cannot simply ignore the question whether a legal system completely in hands of those it is supposed to govern is a legal system at all.

Koskenniemi further observes that attempting to rebut the outlined criticism resulting in the conclusion that the international “legal system” is in fact not a legal system at all, liberals have pointed to both the most concrete form of international law-making, i.e. treaties, and the most sweeping, i.e. general principles of law. It has been argued that treaties create law in the way liberals imagine. One can objectively determine when and how treaties have come into being. And once in force, a state bound by a treaty cannot opt out at will. This is surely correct. But Koskenniemi notes, treaties emerge slowly, if at all, even, or perhaps particularly, in areas where they are mostly needed. And they only bind those states that have explicitly agreed to be bound. In other words, as Section 7.2.3 noted, an international legal system relying heavily on treaties will be a very fragmented one. It ultimately boils down to a network of binary state relationships, with an apparent risk of failing to bind many states to the most needed and basic norms. Some states will not be bound by any international norms at all. Moreover, these states will often be the states whose behaviour the international community is most keen to influence. It is questionable if one can label such a system a legal system.

Liberals have further sought to the identified potential flaw in the international legal system by referring to ideas that go beyond state practice and will. These attempts have been successful, Koskenniemi concedes, in the sense that such ideas have sometimes been accepted as international law. But, he further argues, the success is an illusion. It can be explained by these principles being of a general and obvious character, and self-evident to the degree that there is no risk of states differing in opinion on them. (Koskenniemi mentions as example “*respect for humanity*”). The price paid for such self-evidentness, however, is that it is not

possible to concretize such principles so that they regulate state behaviour in any meaningful manner. In other words, these ideal norms are rather unhelpful as law.

Koskenniemi concludes that strictly upholding the principle of state sovereignty without risking that the international legal system is accused of being no legal system at all is a futile project. He calls for a pragmatic approach. According to Koskenniemi, the solution is neither to resort to extreme formalism, nor to treat international law as politics – or natural law. One shall respect that the law is to be found in recognized legal sources, evaluated through methods lawyers have been trained to practice. But one should not, Koskenniemi posits, expect such processes to come up with clear-cut solutions to each and every dispute. Often, the international lawyer will to some extent have to rely on reason and equity.⁶¹⁴ The conclusion seems to be that the international legal system is a legal system, albeit not a perfect one.

The doctoral thesis will not constructively evaluate Koskenniemi's analyses in any detail. It is merely noted that generally speaking, he seems to be describing a reality. As Section 7.2.2 described, Koskenniemi is not alone in pointing to the apparent contradiction between a concept such as peremptory norms and the principle of state sovereignty. And as Section 7.2.4 outlined, others too have noted that it is often a fiction that a customary norm is identified through evidence of state practice and *opinio juris*. Rather, what Sections 7.2.2 and 7.2.4 outlined with regard to customary norms being found to exist also absent explicit evidence of state practice/*opinio juris* shall probably be viewed as practical adjustments to the reality Koskenniemi pictures. In short, Sections 7.2's description of the nature of the system of international legal sources supports Koskenniemi's assertion that the international legal system is not a perfect system. Further, for it to remain even an imperfect system, the principle of state sovereignty cannot be - and has not been - strictly upheld. Boyle and Chinkin concur that no international legal theory offers a complete scientific answer to international law-making.⁶¹⁵ In the same vein, Evans and Capps note that today, most international lawyers agree that there has been a substantial shift away from the positivist

⁶¹⁴ Koskenniemi, *From Apology to Utopia*, pp. 63, 85, 142, 158-167, 396-411, 467-471, 513-561, 568-569, 573-575, 583-584, 589 and 616. Koskenniemi posits that international problem-solving is a practice where one should reach the most acceptable solution in the particular circumstance, guided, but not fully and exactly informed, by norms. Koskenniemi compares knowledge of international law with knowledge of a language. It is a set of rules that places constraints on the user, but nonetheless offers more than one correct option to her. See also Koskenniemi, *The Gentle Civilizer of Nations*, pp. 502-517.

⁶¹⁵ Boyle and Chinkin, *The Making of International Law*, p. 19

view of international law, towards a view of an international legal system “*which has a greater claim to be called a genuine system of “public” international law*”.⁶¹⁶

The question is then, what implications do these characteristics of the international legal system have for the doctrine on international legal sources? As seen, the traditional firm distinction between hard law and soft law sources (or, some would argue, the distinction between legal sources/sources of something else) is a direct implication of a strict reliance on the principle of state sovereignty. But if, as shown, the principle of state sovereignty in reality is not - and cannot be - strictly upheld, does not this imply that there need not be, perhaps cannot be, a strict distinction between hard and soft law sources either?

7.3.2 Hard law and soft law – like hard boiled and soft boiled eggs?

There seems to be wide support for the position outlined above in the legal doctrine. Chinkin notes that many legal scholars agree that if international law does not, and cannot, strictly uphold the principle of state consent in international law making, it makes little sense to firmly categorize international legal sources into binding and non-binding law either.⁶¹⁷ At the same time it is posited that neither must one retort to politics. For instance, Boyle and Chinkin, referring to Simma and Paulus, submit that an “*enlighten positivist*” should recall the centrality of formal sources at the same time as recognizing wider methods of determining state consent. In an “*enlightened positivist*” legal system, it is a fallacy to dismiss soft law as non-law.⁶¹⁸ Haas notes that hard law and soft law share the same objective, namely a need of states to signal their commitment to other states to create a world order.⁶¹⁹ Charney has made a similar observation.⁶²⁰ Brownlie too, has noted that the normative impact of an international instrument does not necessarily depend solely on its formal legal status.⁶²¹ Or as Van Dijk has fittingly observed with regard to the Helsinki Final Act; “*The conclusion that the Final Act is not a legally binding agreement does not mean that the matters agreed upon between*

⁶¹⁶ Evans and Capps, *International Law (Volume I)*, p. xiii

⁶¹⁷ Chinkin, *Normative Development in the International Legal System*, p. 23

⁶¹⁸ Boyle and Chinkin, *The Making of International Law*, pp. 12 and 212. See also Barelli, *The Role of Soft Law in the International Legal System*, p. 959, where he makes a similar observation.

⁶¹⁹ Haas, *Choosing to Comply*, p. 43. See also Brown Weiss, *Understanding Compliance with Soft Law*, p. 535

⁶²⁰ Charney, *Compliance with International Soft Law*, p. 116

⁶²¹ Brownlie, *Principles of Public International Law*, pp. 3-4 and 534

*the participating states ... should not be binding.*⁶²² Reinicke and Witte conclude that today, almost all legal scholars see a role for soft law.⁶²³

Hence, the fact that the principle of state sovereignty is not strictly upheld implies that it is for principal reasons not rationale to dismiss soft law sources as non-law. In addition, practical reasons render a distinction between hard law and soft law difficult too. The sections above have demonstrated the inadequacies of treaties and custom as sole sources of law. Treaty law has the advantage of clarity, but suffers from gaps and fragmentation. Customary law benefits from universality. But at the same time, it is normally associated with great difficulty to identify such norms. Hence, relying solely on formal hard law sources, one will often receive only limited guidance as to what constitutes the more precise scope and content of international law within a specific area.

With regard to (i) “soft law” sources proper, (ii) international legal sources interpreting hard law sources, and (iii) secondary sources, the situation is often the opposite, compared with hard law. These sources are formally not legally binding, but often concrete and capable of forming a coherent pattern of law. As Chapter 6 elaborated, DRIP spells out precisely formulated rights of indigenous peoples over a broad spectrum. Rulings by the ICJ and UN treaty body jurisprudence are often clear and exact in their content. And the legal doctrine of course aspires both to systemize the law and explain its details. In that sense, these sources are often more indicative to the content of relevant international law than the comparatively obscure hard law sources. In fact, Sections 7.2.4 and 7.2.6 explained how state practice and *opinio juris* can often, indeed sometimes only, be deduced from soft law sources, rulings by the ICJ and the legal doctrine⁶²⁴. In addition, it is often through treaty body jurisprudence one is informed of evolved interpretation of a treaty provision having emerged into customary law. Against this background, it seems almost like a chimera to speak of soft law sources as “soft law”. If the law can only be read out of soft law sources, do not these sources for all practical purposes constitute the law?

That there is no clear distinction between “soft” and “hard” law sources has of course also been confirmed by the ICJ’s ruling in the *Nicaragua Case*, discussed in Section 7.2.4. The

⁶²² van Dijk, *The Implementation of the Final Act of Helsinki*, pp. 110 and 114

⁶²³ Reinicke and Witte, *Independence, Globalization, and Sovereignty*, p. 94

⁶²⁴ Brownlie, *Principles of Public International Law*, pp. 23-24

Nicaragua Case demonstrates that under certain circumstances, non-binding UN resolutions are not only indicative of, but instantly create, customary international law. Kirgis submits that the UNGA might in particular have this capacity in vital areas such as human rights. He further suggests that the more pressing the human rights issue, the less state practice is needed to substantiate *opinio juris*.⁶²⁵ Boyle and Chinkin agree that less evidence of state practice seems to be needed to establish customary law within the area of human rights.⁶²⁶ To this assertion, however, Simma and Alston retort that such reasoning “*seems to be a case of arriving at the wrong conclusion for the right reason*”.⁶²⁷ It could be that Simma and Alston are correct in pointing out that Kirgis has not substantiated his claim sufficiently, and that his submission is too sweeping. But nonetheless, the fact remains that the *Nicaragua Case* do evidence that UN declarations can constitute instant evidence of *opinio juris* and hence of a customary norm, even in the presence of evidence of a certain amount of contradicting state practice.⁶²⁸ And since the UNGA has the capacity to create instant customary law, it makes sense that UNGA particularly can do so within areas of law where the need is most urgent, of which human rights is surely one.

It hence appears inappropriate to label sources “soft law”, since all evidence points to that there is no clear distinction between “soft” and “hard” law sources. Indeed, as the *Nicaragua Case* illustrates, “soft law” sources can at times create instant law by themselves. More common is probably however, that “soft” law sources – as sources of law - do not create law in isolation, but through interplaying with “hard” law source.⁶²⁹ For instance, provisions in UN declarations can of course reflect, indeed sometimes essentially clone, provisions from formally legally binding treaties. UN declarations interacting with treaties in this manner indicates that the declaration provision reflects legally binding law, or at least that the right reflected in the provision is emerging into hard law.⁶³⁰ In a similar fashion, soft law sources

⁶²⁵ Kirgis, Custom on a Sliding Scale, pp. 147-149

⁶²⁶ Boyle and Chinkin, The Making of International Law, p. 285

⁶²⁷ Simma and Alston, The Sources of Human Rights Law, p. 96. See also ILA: Final Report on the Impact of International Human Rights Law on General International Law (2008), where the ILA refers to a letter from the US Department of state. In the letter, the Department criticizes the development towards relying, in its opinion, too heavily on UN documents etc. and too little on actual state practice, when establishing customary law.

⁶²⁸ Recall further in this context that the ICJ relied heavily on a non-binding UNGA Resolution also in the *Western Sahara* and *Namibia Cases*. On this particular issue, these cases hence confirms the ICJ’s finding in the *Nicaragua Case*.

⁶²⁹ Barelli, The Role of Soft Law in the International Legal System, p. 959, Boyle and Chinkin, The Making of International Law, p. 220, Bilder, Beyond Compliance, pp. 70-72, Charney, Compliance with International Soft Law, p. 115, and Chinkin, Normative Development in the International Legal System, pp. 36-37

⁶³⁰ Boyle and Chinkin, The Making of International Law, p. 213

are often an important device for attribution of meaning of international norms as well as for perceiving changes in international law.⁶³¹

Having noted the broad support for the position that international law has moved away from formal positivism and a strict upholdance of state consent, it should be mentioned that this development has not occurred without criticism. One of the most recognized representatives of this line of criticism is Weil, who already in 1983 vehemently criticized international law straying away from formal positivism. He maintained that law is either law or not law and that no law exist above the state. Consequently, he therefore both launched an attack on the *jus cogens* institute and heavily criticized the ICJ's trend to demand less evidence of the existence of a customary norm, at the same time as disregarding consistent objections to the norm by states.⁶³² A number of legal scholars maintain this position still today.⁶³³ Notwithstanding, it must be concluded that the above has overwhelmingly demonstrated that it is neither principally correct, nor practically feasible, to maintain a strict line between "hard" and "soft" law. Weil and others might have put forward arguments against the notion of soft law and in defence of a formal positivism that attracted considerable attention. Still, it is clear that international law has opted for a different path.

Whether it is correct, as Lauterpacht suggested, that natural law theories are still influencing international law today, the doctoral thesis takes no opinion on.⁶³⁴ But the thesis does conclude that factual evidence show that in the end, Oppenheim's prediction that the principle of formal positivism would never be challenged has not been proven correct. Nor has international law responded to Weil's concerns.⁶³⁵ International law has moved beyond a strict reliance on treaties and customary law as sole legal sources. It has further strayed away

⁶³¹ Boyle and Chinkin, *The Making of International Law*, p. 12

⁶³² Weil, *Towards Relative Normativity in International Law*, pp. 417-418, 423-442

⁶³³ Chinkin, *Normative Development in the International Legal System*, pp. 23-24. Chinkin makes this observation with regard to certain colleagues. As clear from the above, he himself takes a different position. Similarly, Bilder, having underlined that international normative arrangements often blend hard and soft law elements, still points to that states have found it useful to draw a line between binding and non-binding norms. See, *Beyond Compliance*, p. 71.

⁶³⁴ For a principled discussion on natural law's relevance in international law today, see further Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, pp. 60-66. Again, the doctoral thesis refrains from labelling certain aspects of international law "natural law". But it can be noted that Orakhelashvili's conclusion that international law has a dualistic composition where positive law and natural law coexist, seems to be in line with the findings of this thesis. Orakhelashvili submits that international law today is in the first place positive law, but that there is also sometimes necessary to fill gaps and complement positive law with arguments that goes beyond state consent and take account of reason, perceptions of justice etc. Whether one labels this aspect of the international legal system "natural law" or something else is less important. What matters is that it appears to be an accurate description of international law today.

⁶³⁵ Tasioulas, *In Defence of Relative Normativity*, pp. 337-346

from a strict division of law into hard and soft law. Hence, the doctoral thesis will not use this categorisation in subsequent chapters. In line with the conclusions above, the thesis will consider sources such as UN declarations and the jurisprudence from international tribunals and UN treaty bodies as international legal sources proper. At the same time, the thesis will also be mindful of the formal hierarchy of international legal sources. It will be respectful of that in most instances, for a formally non-binding source to be considered as reflecting law its content should be backed up by treaties, customs and in general of state acceptance. International law, it is also concluded, is not politics. The approach taken might be illustrated by comparing hard and soft law with hard and soft boiled eggs. One can certainly determine that some eggs are harder than others, but it is not always possible to classify eggs as hard or soft boiled. Further, as a soft boiled egg can evolve into a hard boiled egg, but not to anything less than an egg, soft law has the capacity to develop into hard law, but it will rarely disintegrate into something less than law.⁶³⁶

7.4 *Norms for interpreting treaties and other international legal instruments*

7.4.1 *Treaties*

The VCLT contains norms on interpretation of treaties between state-parties.⁶³⁷ VCLT Article 31.1 stipulates that when interpreting an international treaty, the primary source is the text of the instrument. A treaty provision shall normally be given the content that an ordinary understanding of its wording suggests, in light of the context, object and purpose of the treaty as a whole.⁶³⁸ That is not to say that the understanding of a treaty provision is static. Pursuant to Article 31.3 (b), when interpreting a treaty, one shall take into account subsequent explicit agreements between the parties as to the understanding of the treaty, but also subsequent practice in the application of the treaty which demonstrates an evolved understanding of the provision.⁶³⁹ The important role given to subsequent practice reflects that international law is an evolving body of law. Pursuant to the VCLT Article 32, when a

⁶³⁶ Compare Boyle and Chinkin, *The Making of International Law*, p. 212

⁶³⁷ Two other Vienna conventions regulate treaty making between states and international organizations and treaties in the context of state succession, respectively. These instruments have, however, not yet entered into force and are in any event without interest for the purposes of the doctoral thesis.

⁶³⁸ See also Reuter, *Introduction to the Law of Treaties*, p. 96, and Brownlie, *Principles of Public International Law*, p. 602.

⁶³⁹ See also Reuter, *Introduction to the Law of Treaties*, p. 96.

treaty-provision is unclear one may take recourse to preparatory work and other documentation that demonstrate the intent of the parties at the time of the adoption of the instrument.⁶⁴⁰ But the wording of Articles 31 and 32 makes it explicit that preparatory works in connection with the preparation of the treaty are secondary sources, compared to subsequent practice.⁶⁴¹ The VCLT places emphasis on interpretation of treaties promoting efficiency and progressive development, and do not offer unlimited support to state sovereignty.⁶⁴² In other words, treaties shall be given a fair and equitable understanding, in line with the progressive development of international law, even if a few states are not fully supporting this development. It is generally held that VCLT Articles 31 and 32 reflects customary international law.⁶⁴³

The evolving nature of treaties is not least present in human rights instruments, which, it has been observed, must be particularly responsive to changed social conditions and evolved perceptions of rights.⁶⁴⁴ In fact, human right treaties shall probably respond to subsequent practice beyond what follows from the wording of VCLT Articles 31 and 32. The VCLT, including its Articles 31 and 32, was designed with bilateral state treaties first and foremost in mind. As a consequence, albeit the VCLT reflects international customary law, it is also generally agreed that the VCLT Articles 31 and 32 do not adequately take into account the specific nature of human rights treaties. Clearly, there is a significant difference between a bilateral state treaty, which can be compared with a contract between two parties, and a treaty aiming at ensuring human rights on a global level. Even though individuals and groups are not formal parties to the latter, obviously such a treaty has been designed with their, and not states', interest in mind. When interpreting human rights treaties, one should therefore place even more emphasis on subsequent practice than the VCLT suggests.⁶⁴⁵ In other words, human rights treaties have a greater capacity to more quickly evolve over time to take on new and additional meanings than do other treaties.

⁶⁴⁰ See also Brownlie, *Principles of Public International Law*, pp. 605-606.

⁶⁴¹ See also Cassese, *International Law*, p. 179, and Reuter, *Introduction to the Law of Treaties*, pp. 97-98.

⁶⁴² Cassese, *International Law*, p. 171

⁶⁴³ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgement, I.C.J. Reports 1999, p. 1045, Reuter, *Introduction to the Law of Treaties*, p. 140, Aust, *Modern Treaty Law and Practice*, p. 232, and Boyle and Chinkin, *The Making of International Law*, p. 191

⁶⁴⁴ Boyle and Chinkin, *The Making of International Law*, pp. 151 and 244

⁶⁴⁵ ECHR, *Soering v. United Kingdom*, Appl. No. 14038/88, Judgement of 7 July 1989, para. 87, ECHR *Ireland v. UK*, Appl. No. 5310/71, Judgement of 18 January 1978, para. 239, Makkonen, *Equal in Law, Unequal in Fact*, pp. 76-77, Scheinin, *Impact on the Law of Treaties*, ILA, Final Report on the Impact of International Human Rights Law on General International Law, 73rd Conference of the ILA, Rio de Janeiro, Brazil, 17-21 August 2008, p. 7, and ILA, Resolution No 4/2008, adopted at 73rd Conference of the ILA, Rio de Janeiro, Brazil, 17-21 August 2008

Chapters 4-6 made numerous references to evolved understandings of treaty provisions in support for existence of rights. This Section has hence established that doing so is completely in line with the law of treaties. The emphasis placed on subsequent practice when interpreting treaties is of particular relevant for the legal status of treaty body jurisprudence. Treaty body jurisprudence constitutes a particular form of subsequent practice pursuant to the VCLT Article 31.3 (b). Notably, the provision does not refer explicitly to *state* practice. Rather, it generically mentions any subsequent practice in the application of a treaty provision establishing an agreement among the parties regarding its interpretation. Treaty bodies are set up by the treaty they are supposed to monitor. In other words, they are, through an agreement among the state-parties to the treaty, explicitly authorized to contribute to subsequent practice leading to an evolving understanding of a treaty provision. The state-parties have accepted to adhere to the findings of treaty bodies, and have hence recognized the role of these bodies in developing the understanding of treaty provisions as living instruments.⁶⁴⁶ Hence, treaty body jurisprudence constitutes an important source of international law “*that a lawyer would be foolish to ignore*”.⁶⁴⁷

Treaty bodies are not the only interpreters of international law contributing to evolved understandings of treaty provisions. Anaya points to how the IACHR, when ruling in the *Awas Tingni Case*, “*was not deterred by the absence of any specific reference in the American Convention on Human Rights to indigenous peoples or collective rights [or] by the individualistic terms in which the right to property is expressed in the American Convention...*”. He notes that rather than finding itself bound by the mere wording of the property rights provision, the Court looked at the core values of the right to property as expressed in the Convention and matched these values with trends in the indigenous rights discourse. Anaya further observes that the IACCommHR took a very similar adaptive approach to the right to property in the *Dann Sisters Case*, where the Commission too, relied on trends and developments in the international indigenous rights discourse.⁶⁴⁸ Anaya’s is a pertinent observation. As a common thread, the doctoral thesis has demonstrated how the indigenous rights discourse is to a large degree about adapting the conventional international normative framework to the particular context of indigenous peoples. Chapter 5 and Sections

⁶⁴⁶ Boyle and Chinkin, *The Making of International Law*, p. 217

⁶⁴⁷ Boyle and Chinkin, *The Making of International Law*, p. 156

⁶⁴⁸ Anaya, *Divergent Discourses About International Law*, pp. 253 and 255

4.8 and 4.9 demonstrated that a contemporary understanding of the right to non-discrimination not only supports, but calls for such adaptation. The Chapter above has concluded that the principle of positivism in international law is not so rigid as to preclude adaptive understandings of international law. Hence, it is not only acceptable and understandable, but expected, that international institutions interpreting treaties takes this approach. Courts do, and so should treaty bodies. It can be presumed that treaty body jurisprudence reflects the relevant understanding of a treaty provision, unless concerted state objection to the jurisprudence speaks in favour of the original understanding of the provision. In other words, also tacit state-approval qualifies the treaty-body jurisprudence as subsequent practice relevant for the interpretation of the provision.⁶⁴⁹

In conclusion, treaty body jurisprudence constitutes subsequent practice highly relevant to a correct understanding of human rights treaty provisions. Absent coherent state objection, one can presume that findings of treaty bodies reflect international law. The same is true for progressive interpretations of treaty provisions by international tribunals, including human rights courts. Finally, it can be added that Section 7.3 described how non-binding instruments such as UN declarations and treaties interplay to establish international law. If a UN declaration is adopted subsequent to a treaty and includes provisions addressing the same issue as an earlier treaty provision, the declaration provision too can indicate an evolved understanding of the treaty provision. Clearly, a subsequent vote on a declaration in the UNGA constitutes subsequent practice relevant to the interpretation of the treaty, to the extent the parties to the treaty also participated in the vote on the declaration.⁶⁵⁰

7.4.2 Other international instruments

The VCLT is directly applicable only to legally binding treaties, and does not formally apply to UN declarations and other non-binding instruments. However, Section 7.4.1 described that VCLT Articles 31 and 32 are widely regarded to form part of international customary law. As these are universally accepted principles for interpretation of international legal texts, it is difficult to see why these principles should not guide interpretations also of treaty similar

⁶⁴⁹ For similar opinions, see Scheinin, *Impact on the Law of Treaties*, p. 33, Makkonen, *Equal in Law, Unequal in Fact*, p. 78, and ILA, *Final Report on the Impact of International Human Rights Law on General International Law*, 73rd Conference of the ILA, Rio de Janeiro, Brazil, 17-21 August 2008, p. 8. Aust too, submits that subsequent state practice can be tacit. See *Modern Treaty Law and Practice*, p. 241.

⁶⁵⁰ Boyle and Chinkin, *The Making of International Law*, p. 212, and Shelton, *Law, Non-Law and the Problem of "Soft Law"*, p. 1

instruments. That is particularly so since Section 7.3 has concluded that there is no relevant reason to draw a strict line between formally binding and non-binding legal instruments. Reasonably therefore, the norms enshrined in VCLT Articles 31 and 32 are relevant also for the interpretation of also formally non-binding international instruments, not least when such instruments are formulated in concrete and legalistic language, and hence do not deviate in style from treaties.

7.5 *Conclusions*

The Chapter has noted that formally, treaties and customary law (and also general principles of law recognized by civilized nations) constitute the primary sources of international law, or, if one wants, hard law. But the Chapter further concluded that in practice, the doctrine on international legal sources has not upheld the clear distinction between hard and soft law sources. The reasons, the Chapter observed, are mainly two; one principal and one practical. First, to remain a legal system at all, the international legal system has not strictly upheld the principle of state sovereignty in international law making. This in turn resulted in there being no principal reason to maintain a clear distinction between hard and soft law, either. Second, formal primary sources of law often offer insufficient guidance as to what constitute relevant international law. The practicing lawyer therefore simply has to take recourse to secondary sources. The alternative would be to rely on subjective values. That said, the Chapter also inferred that one must still recognize that different legal sources carry different legal status. One cannot simply treat non-legally binding sources as binding. But to the extent the content of a non-legally binding source finds certain support in other sources, it is relevant when determining what constitutes law.

For the purposes of the doctoral thesis, this conclusion is of particular relevance with regard to the DRIP. Clearly, the DRIP is *as such* a formally non-legally binding source. But it follows from this Chapter that the DRIP provisions can still be highly indicative as to what constitutes law proper. If a DRIP provision is sufficiently mirrored in other legal sources, it is reasonable to conclude that the provision reflects international law proper. Chapter 6 demonstrated how essentially all DRIP provisions reflects previously adopted international legal sources. As Barelli has observed, “*the strong relationship between the content of the Declaration and existing law should be recognized.*” He further notes that this fact underlines

the legal significance of the DRIP.⁶⁵¹ The fact that the DRIP was adopted with such overwhelming support gives it particular authority⁶⁵², and comparing the Declaration with existing sources is rendered easier by the fact that the DRIP is crafted in a concrete, treaty-style, fashion. In sum, the subsequent chapters analyzing to what extent indigenous peoples have the right to own and/or determine over their culture will give significant prominence to the DRIP.

The Chapter has further inferred that subsequent practices are a most relevant source when interpreting treaty provisions. That is particularly so with regard to human rights treaties, which, the Chapter observed, must be capable of responding to developments in the society and evolved perceptions of rights. The Chapter noted that treaty body jurisprudence is a specific form of subsequent practice, which states have agreed to respect when establishing the treaty body through the instrument the body is set up to monitor. The Chapter concluded that one should be able to presume that the findings of a treaty body adequately reflect law, in the absence of coherent state objections to the treaty body's interpretation of a treaty provision. The Chapter further observed that in a similar fashion, international tribunals contribute to evolved understandings of treaty provisions, not least within the field of human rights. As to subsequent state practice, it was noted that states voting on human rights instruments in the UNGA is of particular relevance for determining evolved understandings of treaty provisions. The Chapter observed that the law of treaties formally applies only to legally binding instruments, but concluded that the same principles must apply also to non-binding instruments. Finally, the Chapter inferred that the outlined understanding of the law of treaties is in complete harmony with the contemporary understanding of the right to non-discrimination, as outlined in Section 4.8.

For the purposes of the doctoral thesis, the prominent role the law of treaties gives to treaty body jurisprudence is of particular relevance. It is clear from Chapters 4 and 5 that UN treaty bodies have been very active in advancing indigenous rights. Also significant is the fact that if a DRIP provision resemblances a previously adopted treaty provision, the DRIP version of the provision can constitute such subsequent state practice that evidences an evolved

⁶⁵¹ Barelli, *The Role of Soft Law in the International Legal System*, p. 966

⁶⁵² Fromherz, *Indigenous Peoples' Courts*, p. 1344

understanding also of the treaty provision.⁶⁵³ It follows from this Chapter that the subsequent chapters, analyzing to what extent indigenous peoples have the right to own and/or determine over their culture, should give treaty body jurisprudence due weight. In interpreting treaty provisions, the subsequent chapters will further pay close attention to similarities between such provisions and DRIP articles.

⁶⁵³ Barelli, *The Role of Soft Law in the International Legal System*, p. 966, and Fromherz, *Indigenous Peoples' Courts*, p. 1343. Fromherz notes that DRIP provisions matching UN treaty body jurisprudence indicates the binding character of the norm.

8. CONCLUSIONS - CULTURAL RIGHTS AND THE RIGHT TO SELF-DETERMINATION

8.1 *Introduction*

Having concluded the analyses in Chapters 4-7, the doctoral thesis is ready to survey to what extent indigenous peoples have the right to own and/or determine over their distinct collective creativity. This Chapter considers whether indigenous peoples hold such rights based on the rights to culture and self-determination, where after Chapter 9 turns to the right to property. The analysis of this Chapter consists of two parts. Section 8.2 surveys the more precise legal status of indigenous peoples under international law. Section 8.3 subsequently establishes the scope and content of the rights to culture/self-determination.

8.2 *Indigenous peoples' legal status under international law*

8.2.1 *Indigenous peoples as international legal subjects in general*

Chapter 4 described how when the UN and its member states commenced seriously addressing indigenous rights in the 1980s, they from the outset acknowledged that the particular situation of indigenous populations warranted treating them as distinct societies, existing side-by-side with the majority society. Chapter 4 concluded that international law has firmly established that “collectivized” individual cultural rights indirectly protect also indigenous groups as such. It further inferred that indigenous populations enjoy collective rights *sui generis* to them, as enshrined in ILO 169.

But for the purposes of the doctoral thesis, collectivized individual rights and *sui generis* rights of indigenous populations are mostly important for having paved way for later developments. Chapter 4 further outlined how during the last decade or so, the indigenous rights discourse has evolved to posit that indigenous peoples enjoy rights as peoples. The Chapter also inferred that these developments have been matched by the right to non-discrimination taking on a second facet, implying that the right applies at least indirectly also to indigenous peoples as such. The fact that the rights to culture, self-determination and non-discrimination have gone through corresponding developments during the same time-period

implies, Chapter 4 concluded, that the Chapter's conclusions within the sphere of each right are mutually supportive. In conclusion, already prior to the adoption of the DRIP, relevant international legal sources strongly suggested that international law had evolved to recognize rights proper of indigenous peoples. This position was also generally favoured by the legal doctrine. Still, other legal scholars suggested that these rights were merely emerging and some outright dismissed the suggestion that indigenous peoples could enjoy rights proper. Since it was further uncertain to what extent the outlined developments had been accepted on a national level, Chapter 4 opted not to determinatively conclude that indigenous peoples' rights proper had been firmly accepted by international law.

Chapter 6 described how the UN member states in 2007 adopted the DRIP with overwhelming majority. The Chapter noted that the Declaration confirmed the position taken by the international legal sources outlined in Chapter 4 within essentially all relevant areas of law, suggesting that states have lent their political support to positions taken by e.g. UN treaty bodies and international courts. Still, the doctoral thesis did also recognize that the DRIP, as well as several of the sources surveyed in Chapter 4, are formally non-legally binding. Having analyzed international law on international legal sources, Chapter 7 concluded, however, that international law no longer maintains a sharp distinction between "hard" and "soft" law sources. The Chapter hence inferred that to the extent a DRIP provision finds support in other legal sources, this indicates that the provision reflects law proper. Chapter 7 further concluded that under the law of treaties, subsequent practice – including treaty body jurisprudence - is a significant factor in any treaty interpretation, but in particular when interpreting human rights treaties. Chapter 7 inferred that in absence of coherent state objections, one should normally be able to rely on treaty body jurisprudence as reflecting law proper.

As noted above, there was considerable support in the legal doctrine for the notion that indigenous peoples constitute peoples proper already prior to UNGA's adoption of the DRIP. Naturally, this support has only increased following the overwhelming endorsement of the Declaration. Quite a few legal scholars have found time to comment on the DRIP following its adoption. And the chorus is clear. There is general agreement that the Declaration affirms indigenous peoples' status as international legal subjects, enjoying e.g. the right to self-determination. Legal scholars further concur that the right to self-determination is first and foremost to be implemented through autonomy and self-government.

The doctoral thesis noted that Weller prior to the adoption of the DRIP had concluded that indigenous peoples are the beneficiaries of the right to self-determination. Naturally, he has not changed his position subsequent to the adoption of the Declaration.⁶⁵⁴ Kymlicka too, had already prior to the adoption of the DRIP concluded that indigenous peoples' right to the internal aspect of self-determination has been widely endorsed by states. Following the adoption of the DRIP, he simply notes that the Declaration affirms that the right to self-determination applies also to indigenous peoples.⁶⁵⁵ In the same vein, Wiessner notes that a survey of state practice and *opinio juris* reveals that international law has recognized a right to self-determination of indigenous peoples in political, economic and social affairs to be exercised through autonomy and self-governing functions.⁶⁵⁶ Xanthaki too, interprets the DRIP as affirming that indigenous peoples are entitled to the right to self-determination.⁶⁵⁷ Barelli observes that the DRIP is the first international legal instrument that proclaims a right to autonomy.⁶⁵⁸ Similarly, al Attar, Aylwin and Coombe observe that indigenous peoples' right to autonomy has emerged quicker than anyone could have expected only a decade ago.⁶⁵⁹ Fromherz submits that the internal aspect of indigenous peoples' right to self-determination is to be exercised through self-governing and autonomous functions.⁶⁶⁰ In the same vein, Scheinin affirms his previous observations that the trend within international law the last two decades or so has been to stray away from reducing individuals to formally equal

⁶⁵⁴ Weller, *Settling Self-Determination Conflicts*

⁶⁵⁵ In line with what has been outlined in Section 4.7.3, Kymlicka observes that essentially all Western countries with indigenous peoples have accepted that these enjoy rights to various forms of self-government. He further notes that most Latin America countries too, have introduced systems for cultural autonomy for their indigenous peoples and that other Latin American countries are moving in the same direction. See *Multicultural Odysseys*, pp. 80-81, 103-104, 108 and 249, and *American Multiculturalism and the "Nations Within"*, pp. 225-227. Kymlicka makes no similar observations with regard to Africa and Asia. But as Section 4.7.3 further narrated, this is probably a result of the whole indigenous peoples issue being more complex in these Continents, due to many states either not recognizing that they host indigenous populations or, alternatively, maintaining that the entire population of the state is indigenous. Still, as further seen, regional African human rights institutions have recognized self-governing rights of ethnically/culturally defined peoples of Africa.

⁶⁵⁶ Wiessner, *Indigenous Sovereignty*, pp. 1156-1157

⁶⁵⁷ Xanthaki, *Indigenous Rights in International Law over the Last 10 Years*

⁶⁵⁸ Barelli, *The Role of Soft Law in the International Legal System*, p. 961. Some might argue that if it is correct, as Barelli suggests, that the DRIP is the only international legal source speaking of a right to autonomy, this seems to indicate that the right is *not* firmly established in international law, given that the DRIP is formally a non-legally binding instrument. But such arguments shoot beside the point. The question here is not whether international law recognizes a right to autonomy *as such*. Rather, the analysis is of whether a right to self-determination exists which can only be meaningfully *exercised* through autonomy and self-governance.

⁶⁵⁹ al Attar, Aylwin and Coombe, *Indigenous Cultural Heritage Rights in International Human Rights Law*, p. 323

⁶⁶⁰ Fromherz, *Indigenous Peoples' Courts*, pp. 1370-1371. Others that conclude that indigenous peoples have a right to autonomy include Loukacheva. See *On Autonomy and Law*.

and atomistic citizens of the state.⁶⁶¹ Against the background of the adoption of the DRIP, one can perhaps expect also previously sceptical legal scholars to reverse their position on indigenous peoples' rights when having an opportunity to address the topic again. That is particularly so, since a couple of these have already opined that international law *should* head in the direction DRIP submits.⁶⁶²

Reading all these sources in conjunction, the doctoral thesis concludes that international law has affirmed that indigenous peoples are the beneficiaries of collective rights proper, including of the right to self-determination. The HRC and CESCR have interpreted the common Article 1 to apply also to indigenous peoples. The lack of concerted state objection to these observations in itself suggests that indigenous peoples do enjoy the right to self-determination. But states have not only tacitly agreed to the evolved understanding of CCPR and CESCR Article 1. They have actively supported this development by endorsing the DRIP, including its Article 3.⁶⁶³ Conversely, HRC/CESCR interpretation of the common Article 1 and other legal sources with similar content supports the notion that DRIP Article 3 reflects law proper. Further, DRIP Articles 4 and 5 reaffirm international law's general approach towards indigenous peoples since the inception of the indigenous rights discourse, when underscoring that the right to self-determination shall be implemented within state borders through autonomy and self-government. Here too, the argument also works the other way around. The fact that the right to self-determination shall be first and foremost implemented through self-government/autonomy has been endorsed in other legal sources and state practice in turn confirms that DRIP Article 4 and 5 reflect binding law. In a similar fashion, the DRIP and treaty body jurisprudence have collaborated to establish – beyond doubt – that indigenous peoples enjoy collective human rights proper in general.

⁶⁶¹ Scheinin, *The Right of a People to Enjoy its Culture*, pp. 151-152

⁶⁶² For instance, Cassese noted already in 1995 the tendency in international law towards recognizing that the internal aspect of self-determination should apply also to minority groups, and that many states had agreed to discuss the right in relation to sub-segments of the state. Based on these observations, Cassese recommended that the concept of self-determination be remodelled so to better apply to ethnic groups. He asserted that the right to self-determination for such groups should encompass a right to autonomy and a broad measure of self-government. See *Self-determination of Peoples*, pp. 104, 107, 330, 339, 349-351, 354-355 and 362. Similarly, Hannum observed a trend in international law aspiring to provide for creative attempts catering for autonomy and self-determination of e.g. indigenous peoples. Doing so, he submitted that in many instances, only true group rights can adequately promote the interests of e.g. indigenous peoples. See *Autonomy, Sovereignty, and Self-Determination II*, pp. 473-475

⁶⁶³ In addition, as noted by Kymlicka and Wiessner, states have supported a right to self-determination of indigenous peoples to be implemented through autonomy arrangements through domestic recognition and action.

In sum, the DRIP closes a debate that has gone on for decades, namely what is understood with the term “peoples” in the phrase “*all peoples have the right to self-determination*”. The term “peoples” can no longer be understood, or at least not exclusively understood, as referring to the aggregate of the inhabitants of a state. Rather, a people is to be defined, or in any event can also be defined, in terms of a population with certain distinct cultural and ethnic characteristics. There can be more than one people in a state, and a territory of a people can also stretch across state borders. At least this is true for indigenous peoples.⁶⁶⁴

As indicated above, the described development must be categorized as nothing less than a paradigm shift in international law. Since 1648, international law has ensured the state’s unchallenged political position by equalling the sum of the inhabitants of a state with a people. This position implied that there could be no peoples’ rights in any meaningful understanding of the term, since a people in practice, if not formally, coincided with the state. The political map changes rather dramatically when peoples become political entities other than the state, also for practical purposes. The existence of peoples proper challenges the state in unprecedented ways. As Sections 4.10 and 6.3.4 explained, the challenge is not against the territorial integrity of the state. Rather, within the state, indigenous peoples, on one hand, and state representative institutions, on the other, are now competing for jurisdiction. International law must now define people-state relationship in manners previously unknown.⁶⁶⁵ As Section 6.3.4 indicated, how this competition for jurisdiction plays out in practice will to a significant degree depend on whether indigenous peoples are peoples in general for international legal purposes, or whether they rather make up a *sui generis* category of peoples. Or in other words, are indigenous peoples the beneficiaries of *the right to self-determination*, or is rather their right a *sui generis* right?

⁶⁶⁴ From a purely legal perspective, it would be logical for international law pertaining to non-indigenous non-state forming peoples to follow in the footsteps of the indigenous peoples’ rights discourse, as noted by Kymlicka above. He asserts that it makes little sense to deny national minorities with ancient roots to their territories autonomous rights when such rights have been recognized for indigenous peoples. (For a view similar to Kymlicka’s, see also Xanthaki, *Indigenous Rights in International Law over the Last 10 years*.) It is repeated that it lies outside the scope of the doctoral thesis to analyze what impacts the DRIP might have beyond the scope of indigenous peoples.

⁶⁶⁵ Kymlicka, having concluded that indigenous peoples are entitled to the right to self-determination, added that this development fundamentally reshapes the notions of state sovereignty and nationhood in international law. That is so, since self-governing arrangements of indigenous peoples do include genuine transfer of power, i.e. transfer of sovereignty from the state to the indigenous people. See *Multicultural Odysseys*, pp. 3-5, 33 and 206-211, and *American Multiculturalism and the “Nations Within”*, pp. 225-227.

8.2.2 Do indigenous peoples constitute peoples in general or a *sui generis* category of peoples?

Section 6.3.4 inferred that a text interpretation of the DRIP submits that indigenous peoples do enjoy the general right to self-determination. The Section further noted that this conclusion also follows from a contextual interpretation of the DRIP. All other international legal sources - such as the HRC and CESC jurisprudence - speak only of one – of “*the*” - right to self-determination. In the same breath, however, Section 6.3.4 acknowledged that international law affirming that indigenous peoples enjoy the general right to self-determination might have vast implications for the internal structure of the state. Hence, although conventional interpretations of relevant international legal sources suggest that indigenous peoples are the beneficiaries of *the* right to self-determination, the Section questioned whether it is realistic that states have intended to consent to such a potentially extensive right. True, the vast majority of states found no reason to explicitly declare their opposition against the notion that the DRIP enshrines the general right to self-determination, enjoyed by all peoples, in connection with the UNGA vote. This speaks for a tacit support for what seems to follow from the wording of DRIP Article 3. But at the same time, states have not explicitly consented to this interpretation. And it could be argued that the potential vast implications of such an understanding of Article 3 might be so far-fetched to certain states that they have not even considered this alternative.

It is difficult to get any further guidance on which alternative is correct, beyond these general observations. The legal doctrine too, offers limited guidance. This could be a result of legal scholars simply taking for granted that there exist only one right to self-determination under international law, wherefore it is this one right that applies also to indigenous peoples. But again, an alternative option might be that legal scholars too, hold it unimaginable that states would ever accept a right to self-determination of indigenous peoples demanding transfer of jurisdiction placing these peoples on par with the majority people. Other legal scholars might not have seen the same need as this doctoral thesis to define the legal status of indigenous peoples in detail. That said, a few legal scholars have commented on the relative legal status of indigenous peoples, vis-à-vis the majority people.

Kohen appears to hold the opinion that indigenous peoples constitute *sui generis* legal entities, asserting that indigenous peoples constitute a distinct category of legal subjects in

international law.⁶⁶⁶ Scheinin, on the other hand, submits that indigenous peoples' right to self-determination is the general right enshrined e.g. in the common Article 1 of the 1966 Covenants.⁶⁶⁷ Anaya concurs, arguing that when the right to self-determination has evolved to apply beyond the colonial situation, "peoples" must not be defined in terms of population of a state, but by spheres of ethnographic cohesion and historically exercised territorial sovereignty.⁶⁶⁸ In the same vein, Crawford, having observed that the right to self-determination is about to emerge as right of peoples in the ethnic/cultural meaning of the term, posits that the right must then apply equally to state-forming peoples, colonial populations, and to non-state forming peoples.⁶⁶⁹ Xanthaki interprets the DRIP as affirming that indigenous peoples are entitled to the general right to self-determination.⁶⁷⁰ Prior to the adoption of the DRIP, Weller submitted that the right to self-determination indigenous peoples enjoy is distinct to them.⁶⁷¹ Following the adoption of the DRIP, however, Weller appears to have changed his opinion, now holding that the right enjoyed is the general right.⁶⁷²

In conclusion, an analysis of relevant international legal sources posits that indigenous peoples constitute peoples like all other peoples for international legal purposes, consequently enjoying the general right to self-determination. This is also the position generally favoured in the legal doctrine. Notwithstanding, it remains uncertain to what extent states have accepted this understanding of the right to self-determination. Consequently, when now turning to surveying the scope and content of indigenous peoples' rights to their collective creativity, the doctoral thesis will remain open also to the possibility that indigenous peoples' right to self-determination is in fact a *sui generis* right.

⁶⁶⁶ Kohen, *Secession: International Law Perspectives*, pp. 1-20

⁶⁶⁷ Scheinin, *Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights*, pp. 4 and 11, and *How to Resolve Conflicts Between Individual and Collective Rights?*, pp. 236-237

⁶⁶⁸ Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Claims*, p. 78

⁶⁶⁹ Crawford, *The Right to Self-Determination in International Law*, pp. 39-40 and 64

⁶⁷⁰ Xanthaki, *Indigenous Rights in International Law over the Last 10 Years*

⁶⁷¹ Weller, *Towards a General Comment on Self-Determination and Autonomy*, pp. 12 and 16

⁶⁷² Weller, *Settling Self-Determination Conflicts*

8.3 *The content and scope of indigenous peoples' right to culture and the right to self-determination*

8.3.1 Introduction

It is hence clear that indigenous peoples constitute international legal subjects, enjoying peoples' rights to culture and self-determination. The doctoral thesis has further established that the right to self-determination shall be effectuated through autonomy and self-governance. This is true regardless of whether indigenous peoples' right to self-determination is the general or a *sui generis* right. Following this general conclusion, this Section seeks to determine the content and scope of the right to autonomy/self-governance. Section 8.3.2 surveys two common features of autonomy arrangements present regardless of which of the two alternatives are correct. Section 8.3.3 subsequently specifically addresses indigenous peoples' rights to their collective creativity based on the assumption that their right to self-determination is the general right. Section 8.3.4 finally considers the scope and content of indigenous peoples' rights if their right to self-determination is rather a *sui generis* right.

8.3.2 Common features

8.3.2.1 Competing activities threatening the cultural identity or preventing practices of indigenous peoples

Regardless of whether indigenous peoples' right to self-determination is the general or a *sui generis* right, one must take their cultural rights as outlined in Chapter 4 and Section 6.3.3 into account. Chapter 4 established that international law clearly embraces a general right of indigenous peoples to continuously pursue their cultural practices and to maintain and develop their distinct cultural identity. It was further inferred that this right has been mirrored in parallel developments within the sphere of the right to non-discrimination. Although not reflecting a collective right proper, the HRC's interpretation of CCPR Article 27 can be said to elaborate on and concretize the general right to cultural identity. Section 4.5 described how the HRC has posited that CCPR Article 27 places a positive obligation on states to prevent any competing activity that renders it impossible or considerably more difficult for an indigenous group to continuously pursue its cultural practices. In other words, albeit formally

an individual right, the right to culture enshrined in CCPR Article 27 has been understood as protecting also indigenous groups as such. Section 4.6 elaborated that this acceptance is reflected e.g. in ILO 169 Articles 2 (2) and 5 (a), proclaiming that states have an obligation to protect e.g. the cultural practices of indigenous peoples. The CERD Committee too, has concurred with the HRC, e.g. in General Recommendation No. 23.⁶⁷³

Section 6.3.3 demonstrated that the DRIP has reaffirmed the outlined right to culture, in particular through its Articles 1-2 and 7-8. Further, Section 6.3.3 inferred that albeit the HRC jurisprudence essentially pertains to land-based cultural activities, there is no reason why the underpinning principles behind the right should not apply also to collective creativity. Reading (i) the HRC's jurisprudence on CCPR Article 27, (ii) other international legal sources such as the ILO 169 and the CERD Committee's General Recommendation No. 23, (iii) the contemporary understanding of the right to non-discrimination as outlined in Section 4.8, and (iv) the DRIP, in conjunction, the doctoral thesis concludes that the described right to culture is firmly established in international law. Consequently, indigenous peoples have the right to prevent access to their collective creativity pursuant to the right to culture to the extent non-members utilization of and/or access to elements of their cultures is harmful to the cultural identity of the people in question or renders it considerably more difficult for the people to practice its own culture.

The test of whether a violation of a right has occurred envelopes a subjective element. It must be based on the standards of the culture which allegedly has been harmed. When determining whether an indigenous peoples' cultural identity is harmed by non-members' use of its cultural elements, one must consider the cultural and societal context of the people in question. Generally speaking, indigenous cultures are vulnerable. Many indigenous peoples struggle to maintain their distinct cultures and societies, and to not become engulfed by the majority society. As Mercer has noted, identity becomes an issue when in crisis.⁶⁷⁴ Under such circumstances, unauthorized utilization of indigenous peoples' cultural elements can quickly cause serious harm to a people's cultural identity. This might be the case, even when the utilization appears harmless to an outsider. For instance, utilization of a cultural element distinguishing the indigenous people from the majority culture might further dilute already

⁶⁷³ As Section 4.7.3 observed, the IACHR and IACommHR have reached similar conclusions in their jurisprudence pertaining to indigenous peoples. The outlined right to culture is further enshrined in OAS Declaration Articles 6.2, 10.1 and 13.1, on which there are agreement.

⁶⁷⁴ Mercer, *Welcome to the Jungle*, p. 43

thin cultural borders preventing the indigenous people from being absorbed into the majority society. Consequently, when determining whether a non-member's use of a cultural element of an indigenous people violates the right to culture, one must consider the effects the use has on the people in question. One cannot apply a fixed objective standard, in particular not a standard based on conventional Western notions of interchangeabilities of cultures.

8.3.2.2 Territorial *and* cultural autonomy in internal and local affairs

Chapter 4 described how it is a defining characteristic of indigenous peoples that their cultures are continuously intrinsically linked to a fairly definable traditional territory. The specific forms of indigenous peoples' autonomy/self-governance will certainly have to vary depending on cultural/geographical/legal contexts. Still, given indigenous peoples' intrinsic connection to their traditional territories, their autonomous arrangements will always have a certain degree of territorial base. At the same time, no legal source suggests that indigenous peoples' right to autonomy is purely territorial. On the contrary, it is clear that indigenous peoples also have a right to cultural autonomy, i.e. an autonomy applying to all members of the people, irrespective of their physical residence. In other words, indigenous peoples' autonomous/self-governing arrangements embrace elements of their culture also beyond the borders of their traditional territory.⁶⁷⁵ Regardless of whether indigenous peoples' right to self-determination is the general or a *sui generis* right, the right is essentially a right to a combination of cultural and territorial autonomy to be exercised within state borders, adapted to the factual circumstances.

It is further clear that indigenous peoples' right to autonomy/self-government embraces their collective creativity. Section 6.3.4 described how DRIP Article 3, mirroring other international legal sources on the right to self-determination, affirms that indigenous peoples' right to self-determination envelopes a right of these peoples to determine their cultural development. Section 4.7.2 also described how the HRC on a number of occasions has explicitly confirmed that indigenous peoples' right to self-determination embraces a right to control their cultural development. Further, pursuant to DRIP Article 4, in exercising their

⁶⁷⁵ See Weller, Towards a General Comment on Self-Determination and Autonomy, pp. 5-7. Weller distinguishes between cultural (non-territorial) and territorial autonomy, where cultural autonomy awards the autonomous people the right to foster the preservation and further development of its cultural identity. Territorial autonomy, on the other hand, as the title suggests refers to autonomy within a distinct territorial area within the state.

right to self-determination, indigenous peoples have the right to autonomy and self-government in their internal and local affairs. The terms “*cultural development*” and “*internal and local affairs*” must reasonably envelope indigenous peoples’ collective creativity. Indigenous peoples’ collective creativity constitutes a central element of their cultures, and the creation of cultural elements is an integral part of the developments of their cultures. Consequently, there can be no doubt that indigenous peoples’ right to autonomy/self-government embraces their collective creativity, including elements situated outside their traditional territories.⁶⁷⁶

8.3.3 Further on indigenous peoples’ right to self-determination as the general right

Section 6.3.4 noted that if the right to self-determination indigenous peoples enjoy is the general right enjoyed by all peoples, the right is not subordinated to the right to self-determination of the majority people. On the contrary, under such circumstances, the indigenous people and the majority people – per definition – have an equal right to self-determination. Indigenous people’s right to self-determination being equal to the right enjoyed by the majority people sets the basic parameters for the scope and content of the right. Under such circumstances, indigenous peoples have the same right to determine over their creativity as do the majority people. To determine the more precise scope of and content of indigenous peoples’ right to self-determination as the general right, it might be helpful to divide their collective creativity into three categories; (i) creativity still controlled by the indigenous people in the sense that it has not been disclosed to a wider public, (ii) creativity in the public domain, and (iii) creativity to which third party rights pertain.

With regard to collective creativity still in indigenous peoples’ control, there can be no doubt that indigenous peoples have the right to continuously determine over such cultural elements. If their right to self-determination is equal to that of the majority people, clearly indigenous peoples have the right to determine whether they want to disseminate elements of their culture still under their immediate control to non-members.

⁶⁷⁶ Still, it can be recalled that Section 4.7.3 underlined that the agreed OAS Declaration Article 20.1 affirms that indigenous peoples have the right to self-government in e.g. cultural affairs. Dutfield and Suthersanen too, underline that the right to self-determination has a great degree of relevance for indigenous peoples’ claims to control their traditional knowledge. See *Global Intellectual Property Law*, p. 216.

As to collective creativity in the public domain, Section 5.4 explained that the public domain has been deliberately defined to encompass certain categories of creativity because the amount of protection, which follows in inversion from this definition, is perceived to result in maximum amount of creativity. This in turn, is perceived to benefit society as a whole. In other words, there is no doubt that there exists a clear, and at least from certain perspectives legitimate, interest competing with indigenous peoples' right to self-determination when addressing indigenous peoples' cultural elements in the public domain. Notwithstanding, it is doubtful whether this competing interest can limit the applicability of indigenous peoples' right to self-determination. Section 6.3.8 concluded that interest of society as a whole carries little weight when determining the scope of indigenous peoples' right to self-determination as the general right. That is so because if the indigenous people and the majority people enjoy equal rights to self-determination, there is no apparent reason why the state/the majority people should continuously determine access to a cultural element created by the indigenous people simply because the laws of the state have at one point rendered the element publicly available. As mentioned, the public domain has been carefully calculated to maximize certain values identified *by the majority people*. A fundamental rationale behind recognizing a right to self-determination of indigenous peoples is precisely to correct past policies perceived to be flawed. An equal right to self-determination must thus imply that indigenous peoples should be allowed to determine *their own* values. If they do not value the rationales behind the public domain, they should not be bound by it. Hence, as a general rule, indigenous peoples have the right to determine over all cultural elements in the public domain.

The situation might be somewhat more complicated when third party rights pertain to the cultural element. This category of cultural elements will of course gradually disappear, as third party IPRs expire. One by one, these elements will end up in what was previously the public domain, but what is now a sphere of creativity to which, in line with the just concluded, indigenous peoples' right to self-determination applies.⁶⁷⁷ But while third party rights remaining valid, as Section 5.2 described, the state is obliged to respect such rights. It is untested waters what obligations the state has vis-à-vis indigenous peoples with regard to elements to their creativity to which third parties hold rights. One can imagine everything from a duty to expropriate such third party rights in order to bring them back under the control of the indigenous people, to no obligations at all. Still, again, indigenous peoples' rights to

⁶⁷⁷ The exception is IPRs, most notably trademarks, who can potentially last in perpetuity.

self-determination as the general right in principle implies that these peoples shall be brought to level with the majority people when it comes to the possibility to control their culture. This argues for an obligation of the state to expropriate at least cultural elements of particular importance to the indigenous people. In addition, with regard to cultural elements not expropriated, it appears reasonable that the indigenous people can prevent not only use by non-members that directly threatens the cultural identity of the indigenous people and/or prevent it from continuously pursuing its cultural practices, but also other uses that are derogatory, offensive and/or culturally insensitive. This category of cultural elements will of course gradually disappear.

Section 5.4 explained that the field of IPRs is subject to extensive international regulation. Consequently, states with indigenous populations are likely to have entered into multiple international IP-treaties embracing also creativity of indigenous people. In other words, indigenous peoples' rights outlined above might to a not insignificant degree have been prejudiced by previous IP-treaties. But again, it is underlined that the indigenous rights discourse aims at amending structures in the international legal system. Existing international obligations are therefore not a defence for ignoring indigenous peoples' rights, in particular not if the competing right is not a human right. Rather, shall amend the present IP-system, bringing it in conformity with indigenous peoples' right to self-determination. Amending basic structures of the international IP-system might come across as a rather dramatic enterprise. But in fact, as Chapter 11 will elaborate, states are already engaged in standard-setting activities with this precise purpose and capacity.

8.3.4 Further on indigenous peoples' right to self-determination as a *sui generis* right

8.3.4.1 Introduction

As seen, indigenous peoples' right to self-determination as the general right is fairly straightforward. If the right is instead a *sui generis* right, a more careful analysis might be needed to establish its scope and content. Still, some parameters for the analysis have been set. Also as a *sui generis* right, the right to self-determination is still a right to autonomy/self-government within existing state borders. Further, the right to autonomy/self-government is presumably subordinated to the general right to self-determination enjoyed by peoples in the meaning the

entire population of the state. Before specifically surveying the scope and content of the right to self-determination as a *sui generis* right, the Section immediately below considers, in general terms, what limitations are embedded in the notion that the right is sub-ordinated to right to self-determination enjoyed by the population as a whole.

8.3.4.2 Is indigenous peoples' right to self-determination as a *sui generis* right limited to issues completely internal to the indigenous people?

Some states have been quick to suggest that indigenous peoples' right to self-determination being subordinated to that of the entire population of the state implies that indigenous peoples lack decision-making power in all matters that are also relevant to the majority population. In other words, this position suggests that DRIP Article 4's reference to "*internal and local affairs*" envelopes only entirely internal and local affairs, i.e. issues that have no relevance whatsoever to the majority population and/or the state. Inversely, these states also submit that in matters of concern to the majority population/the state, indigenous peoples enjoy a mere right to consultation. Further, in instances where consultation leads to no agreement, the position of the state prevails.⁶⁷⁸ This is, however, not a plausible interpretation of the right to self-determination, even as a right *sui generis* to indigenous peoples. Suggesting that the right applies only when there is no conflict is a contradiction in terms, rendering the right meaningless. And positing that the right to self-determination amounts to no more than a right to consultation confuses two different rights.

Suggesting that indigenous peoples' right to self-determination is only a genuine right self to determine in instances where there are no competing interests in effect limits the applicability of the right to situations where it has no meaning. If there are no conflicting interests, there is no situation to regulate, because there is only one legal subject is involved in the matter. Under such circumstances, the indigenous people will organize matters its own way irrespective of the law. In other words, it is a contradiction in terms to claim that the right to self-determination applies only in instances where there are no conflicts of interest. A right can – per definition - exist only in a relationship between two or more legal subjects. When there is no conflict, there is no relationship, only one subject minding its own business. Under such circumstances, there is no need for, and cannot exist, any right, including no right to self-

⁶⁷⁸ Notably, this position is rather similar to Thornberry's interpretation of the right to consent enshrined in the CERD Committee's General Recommendation No. 23, as presented in Section 4.7.

determination. Conversely, it is only in areas where there is a risk of divergence of opinion between the majority people and the indigenous people that rights, such as the right to self-determination, is needed. It is in these situations that the right to self-determination must offer guidance as to how to settle the conflict.⁶⁷⁹ In conclusion, indigenous peoples managing affairs of no interest to the majority population/the state is – per definition – not an example of them exercising a right to self-determination. In other words, suggesting that the right to self-determination applies only in such instances equals saying that the right does not exist at all, a position the doctoral thesis has demonstrated is not correct.

But what about the inverted argument? It has not only been submitted that a true right to self-determination of indigenous peoples exists only in matters of sole concern to them. States have further posited that the right to self-determination does apply also in cases where interests conflict, however as a right of indigenous peoples to be involved in decision-making processes impacting them. But, it is further submitted, in instances where no agreement is reached, the position of the state prevails. But this cannot be a correct understanding of the right to self-determination either. Giving the right to self-determination such a narrow interpretation does violence to the right. It (i) has no support in international legal sources on the rights to self-determination and consultation, (ii) is discriminatory, (iii) contradicts the law of treaties, and (iv) is out of line with the legal doctrine.

Even if it should be correct that the right to self-determination indigenous peoples enjoy is not the general, but a *sui generis*, right, it is still a right to self-determination, not a right to consultation. Indigenous populations' right to consultation is well established in international law, e.g. in ILO 169 where the right is considered a cornerstone.⁶⁸⁰ Also the HRC has systematically interpreted CCPR Article 27 to embrace not only material cultural rights, but also procedural rights demanding that indigenous groups be duly consulted before competing

⁶⁷⁹ The outlined argument is well illustrated also by this doctoral thesis. There is no example of the preceding Chapters addressing a situation where an element of collective creativity of an indigenous people is of interest solely to that people. The Chapters have only sought to determine whose will prevails in instances of competing interests with regard to elements of indigenous peoples' collective creativity. The reason is of course precisely that there is no need to talk about rights in situations where there exist only one interest and opinion. A comparison can also be made with the conventional understanding of the right to self-determination, applying to peoples in the meaning the aggregate of the population of the state. We have seen that this right is directed precisely against other states, demanding that they do not interfere in the internal affairs of the sovereign. And it is only when there exists an interest of another state to intervene the right has meaning. No one would come up with the idea of suggesting that the right applies only to matters in which no other states have an interest.

⁶⁸⁰ See in particular ILO 169 Article 6, and Anaya, *Indigenous Peoples in International Law II*, pp. 153-154, and Tomei and Swepston, *Indigenous and Tribal Peoples; a Guide to the ILO Convention No. 169*, p. 8.

activities are initiated that impact on their cultures.⁶⁸¹ Finally, the right to consultation has been recognized in the specific context of indigenous peoples too.⁶⁸² It is hence clear that the right to consultation is well established in international law.⁶⁸³ It is, however, equally clear that the right to consultation is a right different from the more recently established right to self-determination, although there are connection points. The two rights are enshrined in different legal sources. For instance, the HRC has identified a right to consultation applying indirectly also to indigenous groups to be enshrined in CCPR *Article 27*. Subsequently, it has held that the right to self-determination enshrined in CCPR *Article 1* applies to indigenous peoples. It is clear from the HRC jurisprudence that it views the right to self-determination as a different, and meatier, right compared with the right to consultation. Other sources too, clearly distinguish between the rights to consultation and self-determination. For instance, it was clear during the DRIP elaborations that Article 3 was to enshrine the right to self-determination, and not a right to consultation.⁶⁸⁴ Naturally, this was also the reason why Article 3 was one of the most difficult provisions to reach an agreement on in the DRIP process. Had DRIP Article 3 been understood as enshrining merely the already established, and fairly uncontroversial, right to consultation, it would not have taken a quarter of a century to reach an agreement on the provision. It simply makes no sense that the only thing agreed on after 25 years of hard negotiations was an additional label for the right to consultation.

Indigenous peoples' right to self-determination not being a mere right to consultation also follows from how the former right has conventionally been interpreted in a non-indigenous context, as outlined in Section 2.5. Clearly, if indigenous peoples' right to self-determination is a *sui generis* right, there must be some key differences between this aspect of the right and the right to self-determination applicable to the entire population of the state. Still, it follows from Sections 2.5 and 6.3.4 that we are still talking about two aspects of one right, not of two different rights. Indigenous peoples' right to self-determination as a *sui generis* right must be implemented within the framework of states. But it is nonetheless a right to self-determination. This fact is underlined by the second part of DRIP Article 3 and the common Article 1 of the 1966 Covenants. Having affirmed that “[*All peoples/Indigenous peoples*] have the right to self-determination”, the instruments proceed to add “*By virtue of that right*

⁶⁸¹ See the sources emanating from the HRC discussed in Section 4.5.

⁶⁸² See e.g. CERD Committee General Recommendation No. 23, para. 4 (d).

⁶⁸³ Indeed, Anaya submits that at least the core concepts of the right to consultation form part of international customary law. See Anaya, *Indigenous Peoples in International Law II*, pp. 155-156.

⁶⁸⁴ This was of course also the reason for opting for the language “*Indigenous peoples have the right to self-determination*”. See further immediately below.

they freely determine their political status and freely pursue their economic, social and cultural development.” Section 2.5 described how this dimension of the right to self-determination has been understood to mean that peoples have a right to define their relationship with other peoples (the external aspect) and a right to be sovereign in internal affairs (the internal aspect). As mentioned, this is the core, the essence, of the right to self-determination. As Section 6.3.8 explained, it follows explicitly from DRIP Article 46.2 that the rights enshrined in the DRIP shall be applied in a non-discriminatory manner. If it should be correct that indigenous peoples’ right to self-determination is a *sui generis* right, it is reasonable that the right be accustomed to the fact that it applies to a segment of, and not to the entire, state. A *sui generis* right to self-determination must be reconciled with the general right to self-determination applying to the entire population. But to suggest that the very core, the essence that gives the right meaning, is not present at all in indigenous peoples’ right to self-determination, this is discriminatory. That is the same thing as saying that indigenous peoples, unlike other peoples, are not entitled to the right to self-determination.

That indigenous peoples’ right to self-determination cannot be understood as a mere right to consultation also follows from the law of treaties. Section 7.4.1 outlined how under the law of treaties, a treaty provision shall, absent convincing evidence to the contrary, be given the meaning following from an ordinary understanding of the wording of the provision. Section 7.4.2 inferred that the same rule apply also to provisions contained in formally non-legally binding instruments. The phrase “[*All/Indigenous*] peoples have the right to self-determination” in the common Article 1/DRIP Article 3 cannot reasonably be understood as simply providing for a right to consultation. The same is true for the wording “*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government...*” in DRIP Article 4. It is simply impossible to understand the cited language as referring to a right to be consulted.⁶⁸⁵ This conclusion finds further support in the fact that, as mentioned, a particular right to consultation already exists under international law. If the intention was to refer to this right, language to that effect would presumably have been

⁶⁸⁵ For instance, the New Oxford Companion of Law defines self-governance (and indirectly autonomy) in the context of indigenous peoples as a claim that “*could result in independent statehood or autonomous existence within existing state structures*”. As noted, the notion that a right to self-governance could result in statehood is generally speaking unfounded. But the point here is that no suggestion is made that a right to self-governance (or autonomy) could be equated with a right to consultation.

used.⁶⁸⁶ The ordinary understanding of CCPR and CESCR Article 1 and DRIP Articles 3-5 are hence clear. There is no evidence supporting a different interpretation.

As indicated, interpreting indigenous peoples' right to self-determination as a right to consultation further contradicts the legal doctrine. Above, the Chapter outlined how a number of legal scholars have opined that indigenous peoples are entitled to a right to self-determination. Several of these scholars have added that the right is to be effectuated through autonomy/self-government.⁶⁸⁷ No one has suggested that the content and scope of the right to self-determination amount to a mere right to consultation.⁶⁸⁸ The Chapter has further described how some legal scholars have not yet found enough evidence in international legal sources to conclude that a right to self-determination of indigenous peoples has been firmly established. They have settled for the observation that such a right is/might be emerging. It is worth noting, however, that also these scholars seem to note that once the right has crystallized, it must amount to a right to self-determination in the true meaning of the term, and not to a mere right to consultation.⁶⁸⁹

⁶⁸⁶ The right enshrined in DRIP Article 3 being a genuine right to self-determination also follows from the inclusion of the Friendly Declarations safeguard clause in DRIP Article 46.1. Article 46.1 makes no explicit connection to the right to self-determination. Still, as Chapter 6 narrated, states did understand DRIP Article 46.1 as referring back to Article 3. Had DRIP Article 3 been understood to proclaim a mere right to consultation, states presumably had seen no need to include a provision calling for respect for the territorial integrity of states in the Declaration.

⁶⁸⁷ Scheinin, *Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights*, pp. 4 and 11, and *How to Resolve Conflicts Between Individual and Collective Rights?*, pp. 236-237, Xanthaki, *Indigenous Rights in International Law over the Last 10 Years*, Weller, *Towards a General Comment on Self-Determination and Autonomy*, pp. 12 and 16, and *Settling Self-Determination Conflicts*, Wiessner, *Indigenous Sovereignty*, pp. 1156-1157, Barelli, *The Role of Soft Law in the International Legal System*, p. 961, al Attar, Aylwin and Coombe, *Indigenous Cultural Heritage Rights in International Human Rights Law*, p. 323, Fromherz, *Indigenous Peoples' Courts*, pp. 1370-1371, and Loukacheva, *On Autonomy and Law*. Recall also Kymlicka's submission that indigenous peoples' right to self-determination fundamentally reshapes the notions of state sovereignty in international law, since self-governing arrangements of indigenous peoples do include genuine transfer of power. See *Multicultural Odysseys*, pp. 3-5, 33 and 206-211, and *American Multiculturalism and the "Nations Within"*, pp. 225-227. Recall further how Anaya has underscored that self-governance is the key feature of indigenous peoples' right to self-determination, to be implemented through their own political institutions. See *Indigenous Peoples in International Law I*, p. 78, *Indigenous Peoples in International Law II*, p. 150 and *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, pp. 78 and 325-326.

⁶⁸⁸ That said, Thornberry's interpretation of the right to consent enshrined in CERD General Comment No. 23 (See Section 4.7) could be viewed as a dissenting opinion. According to Thornberry, indigenous peoples' right to consent enshrined in the CERD amounts precisely to a veto-right in entirely internal affairs, and to a participatory right in matters pertaining to all citizens of the state. But Thornberry's interpretation pertains specifically to the right to consent as formulated in one particular legal source, not to the right to self-determination as set forth by international law in general. And more importantly, the observation was made prior to the adoption of the DRIP. Perhaps Thornberry would concur with this conclusion above, if today commenting not on the right to consent in General Recommendation No. 23, but on the right to self-determination in general.

⁶⁸⁹ Crawford, *The Right to Self-Determination in International Law*, pp. 39-40 and 64, Cassese, *Self-determination of Peoples*, pp. 104, 107, 330, 339, 349-351, 354-355 and 362, and Hannum, *Autonomy, Sovereignty, and Self-Determination II*, pp. 473-475

In conclusion, the Section had already inferred that the claim suggesting that indigenous peoples' right to self-determination applies only in matters of no relevance to the majority population and/or the state cannot be correct. We now see that the inverted argument cannot be substantiated either. It is not possible to interpret indigenous peoples' right to self-determination as a mere right to consultation. Consequently, indigenous peoples' right to self-determination – also as a *sui generis* right – is a genuine right to self-determination also in instances where the indigenous people's interests conflict with those of the state/the majority people. At the same time, as the above and Section 6.3.8 have indicated, the right need not be absolute. It must be reconciled with the right to self-determination of the population of the state as a whole. Similarly, if the state as such and/or third parties hold legitimate and sufficient interests in the collective creativity of indigenous peoples, or even rights to such, one can not just ignore these rights and interests.

This conclusion is fully in line with the general understanding of autonomy in the legal doctrine. For instance, Hannum and Lillich have posited that autonomy amounts to “*independence of action on the internal or domestic level.*”⁶⁹⁰ But autonomy need not mean unlimited jurisdiction. There is room for cooperative arrangements between the central government of the state and the autonomous people on issues of joint interest.⁶⁹¹ Still, it is inherent in the concept of autonomy that the autonomous people enjoy considerable decision making powers, albeit within the framework of the state.⁶⁹² Autonomy hence implies a formal division of political authority between the states decision-making institutions and those of the autonomous group.

8.3.4.3 The material scope and content of indigenous peoples' right to self-determination as a *sui generis* right

To establish an exact content and scope of indigenous peoples' right to self-determination as a *sui generis* right is not entirely easy. This is mostly due to the self-determination discourse until recently having focused almost exclusively on whether the right to self-determination can apply to non-state forming peoples at all. Limited attention has been given to the content

⁶⁹⁰ Hannum and Lillich, *The Concept of Autonomy in International Law*, p. 860

⁶⁹¹ Compare Hannum and Lillich, *The Concept of Autonomy in International Law*, p. 866-868.

⁶⁹² Weller, *Towards a General Comment on Self-Determination and Autonomy*, pp. 5-6. Tully too notes that in affairs concerning both the indigenous people and the majority people, international law calls for shared jurisdiction between the two peoples. See Tully, *The Struggles of Indigenous Peoples for and of Freedom*, p. 53.

of a potential right. Notwithstanding, the legal sources the doctoral thesis has surveyed offer some guidance also as to the scope and content of the right. To proceed with an analysis of the material content of the right to self-determination, it is probably helpful to advance in the manner Fromherz suggests. This implies first surveying general principles, where after one gradually moves down towards more and more detailed provisions.⁶⁹³ For instance, in order to establish the content and scope of the right to self-determination enshrined in DRIP, it is natural to take the general proclamation of the right in Article 3 as point of departure. Thereafter, one proceeds via Article 4 underlining that the right is chiefly to be effectuated through autonomy/self-governance to material provisions such as Article 31. To further ease the analysis, it is in addition again helpful to divide indigenous peoples' collective creativity into cultural elements (i) still controlled by indigenous peoples, (ii) in the public domain, and (iii) to which third party rights pertain.

Cultural elements still controlled by indigenous peoples

Indigenous peoples must reasonably have the right to determine over collective creativity still controlled by them, in the sense that the cultural elements have not been disclosed to a wider public, also under the right to self-determination as a *sui generis* right. Even if legal sources elaborating on the content of the right to self-determination are scarce, this follows essentially from the basic features of the right. Section 8.3.2.2 inferred that indigenous peoples' right to self-determination undoubtedly embraces these peoples' collective creativity, as central elements of their respective cultures. Section 8.3.4.2 concluded that also a *sui generis* right is a genuine right to self-determination, and not merely a right to be consulted. And as Section 8.3.3 noted in the context of indigenous peoples' right to self-determination as the general right, there are no significant competing interest pertaining to collective creativity still controlled by indigenous peoples. These facts alone give the conclusion that indigenous peoples have the right to determine over collective creativity not yet shared with a wider public also under the right to self-determination as a *sui generis* right. Still, it can be added that this further follows from DRIP Articles 3, 4 and 31, read in conjunction, where Article 31 explicitly underlines that indigenous peoples have the right to “*control*” their collective creativity. Support for this conclusion is also found in other legal sources the doctoral thesis has surveyed, such as CESC General Comments No. 17 and 21.

⁶⁹³ Fromherz, *Indigenous Peoples' Courts*, pp. 1371-1372

Cultural elements in the public domain

The above established that to determine the content of the right to self-determination, one should seek guidance in legal sources fleshing out indigenous peoples' material rights to their collective creativity. As further indicated, however, such sources are scarce. Still, when affirming that the right to self-determination enshrined in CCPR Article 1 applies also to indigenous peoples, the HRC has particularly emphasized these peoples' right to determine over their respective collective cultures. More specifically, CESC General Comments No. 17 and 21 affirm that indigenous peoples hold rights to their collective creativity, underlining that such creativity can only be accessed subject to their consent. General Comment No. 17 elaborates that indigenous peoples, where appropriate, have a right to collectively administer their cultural elements. As mentioned repeatedly, these conclusions by the UN treaty bodies receive direct support from DRIP Article 31, proclaiming a right of indigenous peoples to control elements of their collective creativity.

Still, these sources are not only relatively few. The question is also what answers they offer specifically with regard to cultural elements already publicly available. The HRC/CESC jurisprudence on CCPR/CESCR Article 1 is too generally formulated to give any guidance as to its applicability to the public domain. Section 6.3.5 noted that DRIP Article 31, using the present tense formulations "*control*" and "*maintain*", places certain question marks behind the provision's applicability to creativity no longer under direct control of the indigenous people in question. In the same breath, however, the Section inferred that it is plausible to interpret the reference to "*their*" creativity as enveloping also cultural elements in the public domain. To a work in the public domain, there exist - per definition - no competing claims, at least from an IP-perspective. No one else can claim an objective particular attachment to the cultural element. Therefore, if indigenous peoples have created elements, maintain cultural attachments to it, and perceive them as their own, the elements must at least be more "*theirs*" than anyone else's.

CESC General Comments No. 17 and 21 too, are somewhat ambiguous in their approach to the public domain. As Section 4.7 described, General Comment No. 17 does explicitly proclaim that an indigenous people's moral rights interest in a cultural element shall last as long as the element is culturally significant to the indigenous people. Perhaps contradictory, however, the General Comment also submits that it is necessary to strike a balance between the producers of creativity, on one hand, and the users of the same, on the other. Similarly,

the CESC also posits that creators' rights must not impede the state's obligation to allow everyone to take part in the cultural life and scientific progress of the society as a whole. As further noted, however, the subsequent CESC General Comment No. 21 downplays the importance of striking a balance between those creating and those wishing to access culture. Rather, General Comment No. 21 focuses on e.g. indigenous peoples' right to control their cultures. In sum, the CESC General Comments seem to be in line with the general benchmarks outlined above, but offer little guidance beyond those. Still, CESC General Comment No. 17 does explicitly proclaim that indigenous peoples' moral rights interests pertain also to creativity in the public domain. The contradictory proclamation that due consideration shall be given also to the interest of those wishing to access culture should probably therefore be understood as pertaining chiefly to the economic rights aspects. Also with regard to the economic rights, one should note, however, that the subsequent General Comment No. 21 does not include the contradictory remarks of General Comment No. 17. All matters considered, CESC General Comments No. 17 and 21 appear to suggest that indigenous peoples' moral rights apply to a fairly large bulk of their collective creativity in the public domain, whereas the scope of the economic rights is probably more limited.

Hence, material legal sources are both few and relatively imprecise. Moreover, the sources are formally non-legally binding. It follows from the conclusions in Chapter 7 that both DRIP Article 31 and the CESC General Comments in principle are relevant legal sources when establishing what rights indigenous peoples hold to their collective creativity. But the Chapter also inferred that for these sources to be relevant, they generally speaking need support from other legal sources and/or state (tacit) consent. Here, explicit support from other legal sources is obviously lacking. Still, the CESC General Comments and DRIP Article 31 must be considered at least indicative as to the scope and content of indigenous peoples' right to self-determination. Moreover, further guidance can be found in the general rationale behind acknowledging indigenous peoples' right to self-determination.

The doctoral thesis has established how the acknowledgment of indigenous rights in general, and the right to self-determination in particular, is a result of a paradigm shift in the perception of some of the most fundamental building blocks in international law, most notably a shift in view of who constitute a people for legal purposes. Recognizing indigenous peoples as beneficiaries of the right to self-determination is an acknowledgment of that they too, have the right to determine the course of their distinct societies. As Section 8.3.3

indicated, to first conclude *in principle* that such a profound development has occurred in international law, only to immediately thereafter infer that the shift has little relevance *in practice* because of pre-existing laws, makes little sense. But that would be the exact result if concluding that indigenous peoples' right to self-determination does not pertain to cultural elements in the public domain, since almost all such elements are/will be in the public domain. Section 5.4 explained that the rationale for re-evaluating the public domain in the context of indigenous peoples is precisely that the conventional IP-system has been designed to fit another culture, and hence for cultural reason are inapt to address indigenous peoples' collective creativity. Throughout, the doctoral thesis has explained that at one of the core elements of the contemporary indigenous peoples' rights discourse is to correct structural discrimination between cultures. More specifically, Section 6.3.8 pointed to that the scope and content of the right to self-determination, at least as enshrined in the DRIP⁶⁹⁴, shall be defined in a non-discriminatory manner. As Section 8.3.3 concluded, against this background, it would appear strikingly discriminatory to assert that indigenous peoples' right to self-determination, also as a *sui generis* right, would not apply to cultural elements in the public domain because of pre-established societal structures created by other peoples. These arguments speak strongly for indigenous peoples' right to self-determination – also as a *sui generis* right – in principle applying to elements of their culture in the public domain.

At the same time, one cannot ignore that indigenous peoples' right to self-determination as a *sui generis* right is subordinated the right to self-determination enjoyed by peoples defined as the aggregate of the population of the state. Neither must one ignore that relevant legal sources coherently underline that the interest of society as a whole must be taken into consideration when determining the scope of the right. Sections 6.3.8 and 8.3.3 noted that the public domain has been designed with the precise intention to benefit society as a whole, i.e. the people understood as the sum of the population of the state. Hence, one could argue that the *sui generis* right – unlike indigenous peoples' right to self-determination as the general right – should not award full control over cultural elements in the public domain. Rather, the right should be reconciled with the rights and interest of society as a whole.

⁶⁹⁴ As seen, this follows explicitly from DRIP Article 46, particularly if read in conjunction with Articles 1 and 2 and pp 22. But it appears reasonable, in line with Sections 4.8's and 4.9's conclusions, that if indigenous peoples are indeed beneficiaries of a right to self-determination, the right to non-discrimination shall generally guide the implementation of the right.

The conclusion of the above appears to be a presumption that the right to self-determination – also as a *sui generis* right – do apply to cultural elements in the public domain. Still, profound and genuine interest of the state/society as a whole can render it legitimate that a cultural element in the public domain remains free to use by non-members. To determine when this exception to the general rule applies, one must presumably consider both the level of interest of society as a whole, and the impact of the use on the indigenous people. To illustrate, two obvious examples can be used. Use for teaching purposes by non-members of cultural elements in the public domain causing no harm to the indigenous people is presumably allowed. On the other hand, again, cultural elements of particular cultural and/or spiritual value to the indigenous people in question shall be taken out of the public domain and be returned to the indigenous people. Where exact to draw the line in between these two examples is more difficult to determine. Probably, this is as close as one can define the scope and content of indigenous peoples’ right to self-determination as a *sui generis*, until further guidance is provided by forthcoming international legal sources.

Cultural elements to which third party rights pertain

Sections 6.3.8 and 8.3.3 underlined that third party rights pertaining to elements of indigenous peoples’ collective creativity cannot simply be ignored. At the same time, Section 6.3.8 further observed that a third party right need not necessarily imply that the right to self-determination – even as a *sui generis* right – does not at all apply to the element. As with cultural elements in the public domain, competing legitimate rights and interests need to be reconciled. Again, guidance beyond these basic benchmarks is essentially limited to DRIP Article 31 and CESC General Comments No. 17 and 21. The above inferred that DRIP Article 31’s reference to “*their*” creativity can reasonably be interpreted as enveloping also collective creativity in the public domain, since no competing interests pertain to the creativity. Obviously, such is not the case with regard to cultural elements to which third parties hold rights. In addition, one must consider DRIP Article 46.2, pursuant to which Article 31 shall be implemented with respect for the human rights of all. In this instance, the third party holds an explicitly property right to the cultural element in question. Hence, the applicability of DRIP Article 31 to collective creativity to which third party rights pertain is limited. As to CESC General Comments No. 17 and 21, the above described how General Comment No. 17 explicitly proclaims that indigenous peoples’ moral rights last as long as a cultural element is culturally significant to the indigenous people in question. Section 5.4.4 explained that moral rights in a work tend to survive even when the economic rights vest in

another legal subject. General Comment No. 17's reference to moral rights therefore seem to indicate that indigenous peoples' moral rights in their collective creativity would apply also to cultural elements to which third parties hold rights.⁶⁹⁵ It is possible, but not necessary, to *e contrario* interpret General Comment No. 17 as implying that indigenous peoples hold no economic rights to their collective creativity when conflicting third party rights pertain to such.

The general rationale behind indigenous peoples' right to self-determination is less relevant in the context of cultural elements to which third parties hold rights, compared with cultural elements in the public domain. As seen, the reason why the rationale behind the right to self-determination so convincingly argued for the right embracing also cultural elements in the public domain was that otherwise, pre-existing law would largely nullify the right. This is not the case with regard to third party rights. As third party rights expire, the cultural elements enter the public domain where after indigenous peoples' rights to such cultural elements instantly apply. Third party rights are hence not a general obstacle to the applicability of the right to self-determination, and the rationale behind the right consequently not in itself sufficient to disregard a third party right.⁶⁹⁶ There must be a particular reason why it is important for the indigenous people to determine over that particular cultural element.

In conclusion, it would appear that indigenous peoples' right to self-determination as a *sui generis* right has almost the inverted applicability with regard to cultural elements to which third parties hold rights, compared with elements in the public domain. Based on the limited sources available, the reasonable conclusion seems to be a presumption that the right to self-determination as a *sui generis* right does not apply to cultural elements to which third party rights pertain. In fact, it is probably difficult to claim that a third party right shall be completely revoked invoking the right to self-determination. Rather, pursuant to the right to self-determination, indigenous peoples' can probably decide that certain uses of the element be prohibited, in line with the moral rights argument set forth by CESC General Comment No. 17. Already mentioned has been uses that threaten the cultural identity of the people and/or prevent it from continuously pursuing its cultural practices. In addition, one can

⁶⁹⁵ CESC General Comment No. 17's submission that a balance be struck between creating and those wishing to access culture clearly does not apply in this context. This language refers to a situation where one party lacks any property rights interest in the work in question, but still wishes to in some way benefit from the same. Here, the conflict is between two competing rights.

⁶⁹⁶ The exception is third party IP-rights with the potential of lasting in perpetuity, such as trademarks.

imagine that indigenous peoples should be entitled to prevent uses that, without falling under the mentioned categories, are still derogatory, offensive and/or culturally insensitive. As with collective creativity in the public domain, it is probably difficult to draw any more concrete conclusions than the just outlined, based on the limited number of legal sources yet available.

8.3.5 Conclusions

If summarizing the conclusions drawn from the limited sources available, one notes that the content and scope of indigenous peoples' right to self-determination seem not to be too dramatic, dependent on whether the right is (i) the general right, or (ii) a *sui generis* right. In both instances, indigenous peoples are entitled to fully determine over cultural elements still under their control. With regard to elements in the public domain, indigenous peoples again enjoy a full right to self-determination if the right to self-determination is the general right. If the right is rather a *sui generis* right, the presumption is that the right applies, but compelling interests of society as a whole do limit the scope and content to some extent. Finally, as to cultural elements to which third party rights pertain, the right to self-determination presumably has limited applicability, both as the general and as a *sui generis* right. In both instances, the state might have certain obligations to expropriate cultural elements of particular importance to the indigenous people. The obligation is presumably somewhat more extensive if the right to self-determination is the general right. As Section 8.3.3 outlined, states have an obligation to amend present IP-law to accommodate for the conclusions above. As further mentioned, such amendments might indeed already be under way in the processes surveyed in Chapter 11.

As a final observation in this context, it is pertinent to compare the contemporary understanding of the *content and scope* of the right to self-determination with the opinion of the Commission of Jurists in the *Åland Islands Case*, in a similar vein as Section 4.8.4 compared the modern understanding of the right to non-discrimination with the *Minority Schools in Albania Case*. Recall how Section 2.4 narrated that in the *Åland Island Case*, the Commission of Jurists placed emphasis on the relationship between the principle of self-determination and rights of ethnic groups, noting the parallel objective to assure the group's possibility to maintain and develop its cultural characteristics. Recall also how the Commission further noted that when secession is not an option, the group's right to preserve its cultural characteristics should be implemented through an extensive grant of liberty within

the state. The *Åland Island Case* of course differ from the above in that the Commission of Jurists did not find that the *Ålanders* where entitled to the right to self-determination. But setting the formal labelling of the right aside, the content and scope of the *Ålanders* right to autonomy the identified by the Commission matches well the content and scope of indigenous peoples' right to self-determination, exercised through autonomy, outlined above.

9. CONCLUSIONS - PROPERTY RIGHTS

9.1 *Indigenous peoples' property rights to cultural elements continuously held by them*

9.1.1 The existence of the right as such

Chapter 5 explained how the right to property is essentially a right to non-discrimination. International law does not recognize a general right to be provided with property. But domestic law must provide equal opportunity to acquire property rights. In addition, the state must not arbitrarily deprive one of property duly acquired. Chapter 5 recognized how indigenous peoples have traditionally been dispossessed of their lands and creativity in similar manners. Both conventional real estate law and IPRs were designed to leave collective land utilization/collective creativeness common to indigenous cultures essentially ineligible for protection. In directly comparable fashions, indigenous peoples' lands were regarded as *terra nullius*, and indigenous peoples' collective creativity as being in the public domain. The Chapter noted that the public domain was probably less deliberately designed to render indigenous peoples' material assets available to others. Yet the effects of the *terra nullius* doctrine and the notion of the public domain on indigenous cultures have been strikingly similar. Designing domestic property rights law in the outlined manner was perfectly in line with the conventional understanding of the right to non-discrimination, Chapter 5 observed. The Chapter further recalled, however, the evolved understanding of the right to non-discrimination as outlined in Sections 4.8 and 4.9, implying that the right has come to extend an indirect protection also to indigenous peoples as such. Given that the right to property is deeply rooted in the right to non-discrimination, Chapter 5 noted that the right to non-discrimination acquiring a collective facet protecting cultural differences among groups should have consequences also for property rights.

Hence, Chapter 5 demonstrated, viewed through the prism of the contemporary understanding of the right to non-discrimination, international property rights law has evolved to hold that inasmuch domestic law recognizes property rights to land in general, such law must be neutral, not only in law but in fact. The law must not disadvantage land use common to the

indigenous people when it comes to the opportunity to establish property rights to land. For instance, it is discriminatory to design a domestic legal system so to award property rights to land based on stationary use common to the non-indigenous population, but not to the more fluctuating land use common to the indigenous people. Based on this general recognition, international law has recently established that indigenous peoples hold property rights to lands, territories and natural resources traditionally and continuously used and/or occupied.

Having drawn these conclusions, Chapter 5 proceeded to conduct an analogy between property rights to land, on one hand, and to creativity, on the other. The aim was to establish whether any differences exist between the two categories of subject matter/rights that justify different treatment in terms of property rights. In other words, it was surveyed whether, when the *terra nullius* doctrine has been rejected in the context of indigenous peoples' land rights, there is any relevant reason why the notion of the public domain must not be considered equally revoked in the context of indigenous peoples' collective creativity. Embarking on the analogous analysis, Chapter 5 immediately noted that factually, it is difficult to find two subject matters less alike than real estate and creativity. However, the Chapter concluded that such factual differences lack legal relevance. Chapter 5 again recalled that the right to property essentially is a right to non-discrimination. Therefore, it is up to domestic law to determine what subject matter shall be eligible for property rights protection. If domestic law has decided that both land and creativity can be subject to property rights, land and creativity are equally protected as property rights, notwithstanding from a factual point of view being very different. There is no second-guessing the domestic law-makers decision, as long as the law conforms with the right to non-discrimination, including its collective facet.

Chapter 5 proceeded to conclude that the *terra nullius* doctrine and the notion of the public domain have had similar effects on indigenous cultures for directly comparable reasons. It was noted that both indigenous peoples' creativeness and land utilization tend to be collective in nature. The Chapter observed how this characteristic of indigenous cultures have resulted in rights to land traditionally being denied indigenous peoples because of a notion that individual utilizers of the land could not be sufficiently identified, and rights to creativeness being denied because of the creator being anonymous. In the same vein, indigenous peoples' creativity has often been deemed ineligible for IP-protection because of not being sufficiently new/original. In other words, the creativity does not distinguish itself enough from the bulk of cultural elements already created by the people. Similarly, indigenous peoples' land use

was traditionally deemed not to result in rights thereto because of not sufficiently distinguishing the particular land area from what the land looked like prior to utilization. The Chapter concluded that the criteria that have conventionally rendered indigenous peoples' collective creativity ineligible for IPR protection – i.e. that a work must not be anonymous and sufficiently new/original – are readily translated into real estate law.

Finally, Chapter 5 noted that a few recently adopted international legal sources submit that indigenous peoples hold property rights to their collective creativity, most notably CESC General Comments No. 17 and 21 and DRIP Article 31. It is underlined that following the conclusions in Chapter 7, these sources are relevant indicators of law proper. Nonetheless, read in isolation these sources clearly do not provide sufficient evidence of a right to property of indigenous peoples over their collective creativity having crystallized into international law. Still, the doctoral thesis infers that indigenous peoples do hold property rights to their collective creativity under established international law. The thesis bases this conclusion on the right to non-discrimination. It has clearly been demonstrated that indigenous peoples hold property rights to their traditional lands. The above has shown that there are no relevant reason why indigenous peoples' collective creativity should enjoy less property rights protection than lands. On the contrary, the traditional justifications for denying the two categories of subject matter protection appear to have been more or less the same. As the conventional legal approach towards indigenous peoples' lands has been held discriminatory, and hence revoked, the same approach must apply to indigenous peoples' creativity. Given that the underlying reasons for not awarding indigenous peoples property rights over their creativity have essentially been the same that have denied them property rights to land, the conclusion can only be that indigenous peoples hold property rights also to their collective creativity. It is underlined that what is inferred is not that this right is about to emerge. It is concluded that indigenous peoples' property rights to their collective creativity has already crystallized into law, since it follows from a correct understanding of the right to property, as a particular aspect of the right to non-discrimination.⁶⁹⁷

⁶⁹⁷ Of course, the conclusion receives certain additional support from the mentioned recently adopted international legal sources. But it is underscored that this support is not needed. The conclusion drawn follows directly from the right to non-discrimination.

9.1.2 The content and scope of the right

Section 5.4 identified one particular limitation embedded in IPRs to be of critical importance when analyzing the scope of indigenous peoples' property rights to their collective creativity. Section 5.4 posed the question; since indigenous peoples' property rights to their collective creativity is based on an analogy with conventional IPRs, does it follow that property rights to collective creativity are subject to the same time-limitations as IPRs? The Section further noted, however, that it could be argued that not only the applicability of the right to property as such, but also the scope of protection, should be accustomed to the particular cultural context in which the right is applied. Section 5.4 observed that property rights to collective creativity are more about cultural identity than monetary gain. Moreover, the Section recalled that conventional IPRs envelope certain aspects - moral rights - aiming precisely at protecting the identity of a creator of a work, and that these rights can last in perpetuity.

As Section 5.4 further described, moral rights have received limited attention in conventional IPRs. The scope and content of IPRs have been designed almost exclusively based on law and economics calculations. In other words, it is the economic rights aspects that have shaped the more precise forms of conventional IPRs. Notwithstanding, as seen, moral rights are an accepted feature of conventional IPRs. What is more, the doctoral thesis is now considering property rights applying in a context where the main motivator is not financial benefit or development, but precisely protection of cultural identity. And again, it should be recalled that the right to property is essentially a right to non-discrimination, and that non-discrimination implies not only formal equality, but equality in practice. Hence, since IPRs embed two recognized aspects, economic and moral rights, and since the right to non-discrimination calls on the right to property to be applied in a culturally sensitive manner, the reasonable conclusion is that an analogy with IPRs in an indigenous peoples' context shall place particular emphasis on a comparison with the moral rights aspects of IPRs. Hence, Paterson and Karjala note that the moral rights approach could be useful for the protection of indigenous peoples' cultural heritage, but at the same time underline that this takes some accustomization of conventional moral rights to the particular context of collective creativity.⁶⁹⁸ This suggests that indigenous peoples' property rights to their collective

⁶⁹⁸ See Paterson and Karjala, *Looking beyond intellectual property*, pp. 644-645. In a similar vein, Taubman and Leistner, having noted that the main motivator behind indigenous peoples wishing to protect their TK is not

creativity should last as long as a cultural element remains culturally relevant to the indigenous people in question. Albeit an isolated source, it is worth recalling that CESCR General Comment No. 17 asserts that indigenous peoples' rights to their creativity under CESCR Article 15.1 (c) envelopes a moral right which shall not disappear even when the work has, under conventional IP-law, entered the public domain.

A conclusion holding that protection should last as long as creativity is relevant to the culture from which it originates gains further support from the fact that, as Section 5.4 also noted, applying conventional IPR-terms of protection to indigenous peoples' collective creativity would render the property right essentially meaningless to the beneficiaries of the right. As Section 5.4 explained, the major bulk of indigenous peoples' collective creativity is already in public domain. And as the Section further noted, with regard to cultural elements yet to be created, indigenous peoples would in most instances not seek property rights protection knowing that the cultural element would end up in the public domain following a relatively short period of protection. Hence, holding that regular IPR-terms of protection apply also to indigenous peoples' property rights over collective creativity is basically the same thing as nullifying a right the doctoral thesis has just concluded exist. Such an understanding of the scope of the right appears both unreasonable and contradictory to the demand that the right to property/non-discrimination be applied in a manner catering for cultural differences.

Consequently, the legal doctrine has strongly argued for indigenous peoples' property rights to their collective creativity not being time-limited. For instance, Brown observes that if native knowledge is collective rather than an invention of a single person, it follows that time-limitations keyed to the human life-span should be replaced by some form of perpetual protection.⁶⁹⁹ Lucas-Schloetter too, asserts that if protection of TCEs is to be effective, it must be without time-limit. She notes that this is not simply a technical issue, as it is when determining term of protection of conventional IPRs. Rather, she posits, it follows from the different *raison d'être* behind copyright and TCEs. As seen, the main motivation behind copyrights is to permit exploitation of the work under best possible conditions. TCEs, on the other hand, Lucas-Schloetter observes, are not created to reach a broad public. They were

commercial gain, argue that acknowledging a form of moral rights over TK is perfectly in line with the "emic" perspective behind IPRs. They submit that it is reasonable to highlight the moral rights aspects since protection is first and foremost aiming at protecting the cultural identity of the community. See Analysis of Different Areas of Indigenous Resources, pp. 84-85.

⁶⁹⁹ Can Culture Be Copyrighted?, pp. 202-203

originally intended for the sole use of the community.⁷⁰⁰ In the same vein, Graham and McJohn point to that non-indigenous authors, composers, inventors etc. to a significant degree rely on the public domain. Their creativity is often a result of inspirations drawn from cultures other than their own. As non-indigenous artists, scientists etc. tend to rely on the public domain for their creativity, it is only fair that they in turn have to accept that others build on their work. But this aspect of the public domain does not apply in the context of indigenous peoples' collective creativity. As outlined, indigenous peoples' collective creativity predominantly builds on previous creations *within* the indigenous people's own culture. Indeed, as Section 1.5 explained, this is precisely the reason why certain knowledge qualifies as "traditional knowledge" and some cultural expressions are defined as "traditional cultural expressions". True, indigenous peoples too, are sometimes to a certain degree influenced by other cultures. But again, such borrowing from other cultures is – per definition – minimal in the context of cultural elements this doctoral thesis surveys. If it was not, the element would not qualify as TK/TCEs. The fact that indigenous peoples, for their tradition-based creativity, only to a minimal degree have borrowed from the public domain leads Graham and McJohn to infer that it is reasonable that indigenous peoples' cultures are in turn shielded from non-members.⁷⁰¹ Similarly, Cohen notes that the conventional IP-system is essentially rooted in law and economics theories and underlines that this "*is not a discipline well suited to the task of modelling creativity itself.*" She further concludes that, with reference to Chander and Sunder, the design given to the public domain by the law and economics theories can be viewed as discriminatory, as the public domain, thus shaped, might be viewed as an instrument created by the West to subordinate non-Western cultures.⁷⁰² Chander and Sunder elaborates that the current construction of the public domain disadvantages and subordinates indigenous peoples.⁷⁰³ And Carpenter notes, referring to Moran, protection lasting as long as the element remains in use in a customary, traditional or sacred context within the people that created it, is not incompatible with IP-rationales.⁷⁰⁴

⁷⁰⁰ Lucas-Schloetter, *Folklore*, p. 390

⁷⁰¹ Graham and McJohn, *Indigenous Peoples and Intellectual Property*

⁷⁰² Cohen, *Copyright, Commodification, and Culture*, pp. 140 and 165. Cohen's observations again underline the similarity between the *terra nullius doctrine* and the notion of the public domain. Notably, her description of the public domain could have passed as a reference to the *terra nullius doctrine*, if delivered in a land rights context.

⁷⁰³ Chander and Sunder, *The Romance of the Public Domain*, p. 1335. To illustrate, Chander and Sunder further quotes Boyle: "*Curare, batik, myths, and the dance "lambada" flow out of developing countries ... while Prozac, Levis, Grisham and the movie Lambada! flow in...*" The former examples are unprotected by IPRs, while the latter is protected. See *The Romance of the Public Domain*, p. 1353. The example clearly refers to the relationship developing-developed countries, but illustrates well also the situation of indigenous peoples.

⁷⁰⁴ Carpenter, *Intellectual Property Law and Indigenous Peoples*, pp. 70-71

In sum, the legal doctrine too concludes that adaptation of conventional IPRs to an indigenous context demands protection as long as the cultural element remains culturally relevant to the indigenous people in question. It makes sense that works protected by conventional IPRs eventually end up in the public domain, since the public domain is an inherent part of that system, and since creators seeking IP-protection generally in turn at least partly rely on the public domain for their creativity. On the other hand, indigenous peoples – almost per definition – do not rely on the public domain when creating TK/TCEs. Further, the law and economics calculations underpinning the public domain do not apply to collective creativity of indigenous peoples. IPRs are designed to maximize creativity through sufficient (but no more) incentives. These incentives are essentially calculated in monetary terms. When the calculation is almost exclusively based on financial inputs, it is natural that the result is protection that has a limited term. If, on the other hand, the rationale behind protection is preservation of cultures and cultural identities, it appears less relevant to calculate the term of protection on the basis of financial input. Rather, it would appear that the term should be decided essentially based on the significance of the cultural element to the culture from which it springs. If rights are motivated by preserving a distinct culture to future generations, a term of protection of merely 20 or 70 years appears almost irrelevant. Cultural expressions of spiritual, sacred and/or cultural value to a people need not lose their value over time.⁷⁰⁵

Based on the above, the doctoral thesis concludes that contemporary international law submits that indigenous peoples' property rights over their collective creativity last as long as a cultural element remains culturally significant to the indigenous people in question. As Chapter 11 will elaborate, this is also the direction in which the negotiations within the UN-system considering IP-neighbouring rights are heading. As indicated, from the fact that the right to property is rooted in the right to non-discrimination, it further follows that the scope of the right embraces not only collective creativity still controlled by the indigenous people, but also creativity created by them but presently regarded to be in the public domain. This follows again from a direct comparison with land rights. What is required for indigenous peoples to hold property rights to land is that the indigenous people has traditionally used and/or occupied the land area in question, and continues to do so. Official recognition of a right is not necessary, but third parties must not have established subsequent rights to the area

⁷⁰⁵ Brown, *Who Owns Native Culture?*, pp. 62-63

in dispute. Translated into the sphere of creativity, this implies that for a right to apply, the indigenous people must have created the cultural element, and still “use” it. “Use” in this context must be understood as a song, ritual, knowledge etc. continuously being culturally relevant to the indigenous people in question, in the sense that it is still part of its cultural life. That being the case, official recognition of a right is not necessary. In other words, it is irrelevant if the state perceives the cultural element to be in the public domain, and not held by the indigenous people. But third parties must not have established right to the cultural element. If so, one must take recourse to the right to restitution.

9.2 *The right to restitution*

9.2.1 *The existence of the right as such*

Chapter 5 recognized that a number of international legal sources submit that indigenous peoples have a right to restitution with regard to lands, territories and natural resources traditionally used and/or occupied by them, but which have subsequently been lost. Section 6.3.6 observed that these sources find support in DRIP Article 28. Chapter 7 inferred that both treaty body jurisprudence and the DRIP are relevant sources when determining what constitutes international law proper. It seems to follow that the right to restitution has crystallized into international law. However, there is essentially no evidence of support in regional or national processes, nor in the legal doctrine, for the right to restitution having been firmly established in international law. Absent any reactions of these kinds, it is difficult to conclude that law proper has been established. Consequently, albeit the concerted view in e.g. treaty bodies and the DRIP predicts an immediate development towards restitution processes, the thesis refrains from drawing such a conclusion today. This further implies that it is not possible to base a right of indigenous peoples to restitution of cultural elements traditionally created, but no longer held, by them on an analogy with land rights.

If a right to restitution of collective creativity does not follow from an analogy with land rights, it must derive from legal sources specifically addressing cultural elements. Chapter 5 did note, however, that such sources are scarce. CESC General Comment No. 17 asserts that moral rights continue to apply to collective creativity also when economic rights have expired. Moral rights continuously applying to a cultural element is of course not a restitution situation proper, since it does not bring the cultural element back under the indigenous

peoples' control. Still, moral rights imply that indigenous peoples' regain certain ties to cultural elements previously completely lost. In addition, Chapter 6 noted that DRIP Article 31 could be interpreted as extending rights also to collective creativity in the public domain, which, if so, would imply a right to restitution in the fuller meaning of the term. Even if, as stated, CESC General Comment No. 17 and DRIP Article 31 are relevant sources of law, they also need support in other sources shall one be able to conclude that they reflect law proper. As seen, such support is lacking. Consequently, indigenous peoples do not yet hold a right to restitution with regard to collective creativity traditionally created by them but to which subsequently third party rights have been established.

9.2.2 The content and scope of the right to restitution – once established

Chapter 1 underlined that the doctoral thesis does not engage in discussions on what the law should be. Neither does the thesis – generally speaking – concern itself with emerging law. In the particular context of restitution, it is pertinent, however, to slightly divert from the general rule. As noted above, it appears to be a question of time before a right to restitution of indigenous peoples with regard to lands, territories and natural resources traditionally occupied and/or used, but which have subsequently been lost, have been confirmed in international law. The above has concluded that there are no reasons why principles underlying indigenous peoples' property rights to land should not apply in the context of property rights to creativity. Consequently, once a right to restitution within the land rights discourse has been affirmed, one can analogously assert that a right to restitution should apply also with regard to collective creativity. Still, as such a right is yet to be established, the doctoral thesis will not probe deep into the potential content and scope of the right. That said, a few general observations are pertinent.

Similar to the observations made in Chapter 8, a right restitution with regard to cultural elements to which third party rights pertain will surely not be unrestricted, at least when it comes to full restitution. Again, third party rights cannot be ignored. Further in line with Chapter 8, a right to complete restitution will presumably pertain to cultural elements of particular spiritual or cultural significance. But in most instances, compromises in forms of partial restitution are probably more likely. And a central element in many such compromises will most likely be benefit-sharing arrangements. Section 5.3.3 outlined how international law has increasingly acknowledged that indigenous peoples are entitled to benefit-sharing

with regard to industrial activities undertaken on their traditional territories. The Section further concluded that such benefit-sharing arrangements could be viewed as forms of partial restitution. That is so, since benefit-sharing implies that proceeds from resource extraction on territories traditionally used by the indigenous peoples, but which the indigenous peoples no longer fully control, are returned to the people. It is further worth recalling Section 5.4.3's observation that benefit-sharing arrangements can be viewed as having a match in the liability regimes embedded in the IPR-system. As liability regimes constitute a compromise between absolute rights and the public domain, benefit-sharing constitute a middle-ground between absolute rights and no control over a land area. As benefit-sharing is emerging as a right within the land-rights discourse, and as the IPR-system is no stranger to such arrangements, it seems reasonable to conclude that in instances when the future right to restitution does not amount to a full right, indigenous peoples will still be entitled to benefit-sharing. In other words, when it is not possible and/or rationale for the right to restitution to imply that third party rights be terminated and the cultural element fully brought back under the control of the indigenous people, the third party shall at least – as long as the right remains valid - share proceeds from utilization of the cultural element with the indigenous people from which it originates.

9.2.3 Further on benefit-sharing

Structure-wise, it hence make sense to treat benefit-sharing as partial restitution, wherefore it conceptually falls under property rights. But as further seen, indigenous peoples' right to self-determination to a large degree applies also to cultural elements in the public domain, and even to some extent to cultural elements to which third party rights pertain. At the same time, it might sometimes not be feasible, or in any event not a reasonable option, to completely return creativity, even if such a right exists. In many instances, elements of indigenous peoples' cultural elements are already so widely spread that bringing the element completely back under the control of the indigenous people is simply not a practical option. In such situations, one can imagine that even if a right to full return of creativity exist, the right might for practical reasons be replaced by benefit-sharing arrangements. This also means that even in instances when a right to benefit-sharing do not necessarily follow from property rights, benefit-sharing arrangements might still be applied, because it follows from a practical implementation of the right to self-determination.

10. FURTHER ON THE RELATIONSHIP BETWEEN INDIGENOUS PEOPLES, PEOPLES, OTHER GROUPS AND INDIVIDUALS

10.1 Introduction

The Chapters above have hence concluded that indigenous peoples hold fairly extensive rights to their culture. Clearly, these rights have been established despite the general concerns outlined in Chapter 1 that group rights should not be recognized because of (i) the difficulties associated with establishing what constitutes relevant groups, and (ii) the potential negative impacts on vulnerable individual members of the group. Albeit it is clear that indigenous peoples' rights have been established despite these concerns, it is pertinent to briefly touch upon why international law has not been overly concerned with these lines of argument. That is the purpose of this Chapter. Doing so, the Chapter will discuss more in detail what is the definitions of indigenous peoples and peoples under international law. The Chapter will also explain why indigenous peoples are free to consume Japanese sushi and French wine, at the same time as they are entitled to shield their own cultures from Japanese and French people.

10.2 The concepts "indigenous peoples" and "peoples" under international law

Naturally, at the same moment as acknowledging that group hold rights, one must define who those groups are. As mentioned, some have denounced the notion of group rights arguing that collectives are not fixed entities and that it is not possible to define what groups constitute collectives worthy of protection. Kukathas, for instance, argues that ethnic identity has a contextual character. An ethnic group is defined based on its relationship with other groups. It can form and dissolve responding to changes in their surrounding environment. He points to that not only ethnic and cultural minorities face inequalities, and criticizes Kymlicka for failing to explain how groups entitled to protection distinguish themselves from other collectives.⁷⁰⁶ And certainly, it is correct that, generally speaking, defining groups can be

⁷⁰⁶ Kukathas, *Are There Any Cultural Rights?*, pp. 232 and 244-245. For similar arguments, see also Phillips, *Democracy and Difference*, p. 297, and Van Dyke, *Collective Entities and Moral Rights*, p. 32. Phillips submits

associated with great difficulties. Similarly, the point is well made that it might sometimes be difficult to justify why certain groupings shall enjoy rights while others, seemingly equally disadvantaged, do not.

The outlined general complexity does not, however, materialize itself in the specific context of indigenous peoples. The developments within political philosophy outlined in Chapter 3 have been important to the indigenous rights discourse, as they sparked and ignited similar developments within international law. Notwithstanding, as the subsequent Chapters have highlighted throughout, international law has not primarily treated indigenous peoples' rights as group rights in general. Indigenous peoples' rights have chiefly evolved not because of a comparison with minorities and other groups, but because of a comparison with peoples' rights in general. Consequently, it is conceptually incorrect to argue against the existence of indigenous peoples' rights by invoking difficulties associated with identifying groups in general.⁷⁰⁷ Further supporting this conclusion is that, as Section 4.3 indicated, "indigenous peoples" is a fairly well understood concept in international law.

International law includes no formally adopted definition of "indigenous peoples". Still, several working-definitions have been elaborated in various contexts, collaborating to providing a relatively precise understanding of what groups constitute indigenous peoples, for international legal purposes. The definitions differ somewhat in the details, but are coherent in their core elements. Probably, the working-definition most often relied on is the so called Cobo-definition, introduced by UN Special Rapporteur Martinez Cobo in his report outlined in Section 4.3. The Cobo-definition of indigenous peoples is reproduced here in its entirety.

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

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

- (a) *Occupation of ancestral lands, or at least of part of them;*

that arguments in favour of recognizing rights for ethnic minorities could also be made with regard to religious, sexual and class groups.

⁷⁰⁷ See also Ivison, Patton and Sanders, *Political Theory and the Rights of Indigenous Peoples*, pp. 20-21, who make a similar argument.

- (b) *Common ancestry with the original occupants of these lands;*
 - (c) *Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc);*
 - (d) *Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);*
 - (e) *Residence in certain parts of the country, or in certain regions of the world;*
- Other relevant factors.”*⁷⁰⁸

Clearly, the Cobo-definition embeds certain key elements. In short, indigenous peoples are groups that inhabited a fairly definable territory prior to invasion and/or colonization. They continue to have a firm attachment to that territory, at the same time as being marginalized in the state(s) they today reside in. Indigenous peoples have common distinct cultural characteristics, including language, traditional livelihoods and spiritual beliefs, that distinguish them from the majority population. Finally, an indigenous people, as a collective, self-identify as a people. Other working definitions of indigenous peoples include those used by the World Bank⁷⁰⁹ and the AfCommHPR.⁷¹⁰ As indicated, these definitions essentially repeat the central elements of the Cobo-definition. For instance, the African Commission’s definition submits that the concept of indigenous peoples embodies the elements (i) self-identification, (ii) a special attachment to a traditional territory, and (iii) a state of subjugation, marginalization and dispossession. In conclusion, international law has a fairly clear understanding of what groups constitute indigenous peoples. As mentioned, this is a result of indigenous peoples’ rights deriving more from peoples’ rights than group rights. Indigenous peoples’ legal proximity to peoples in general rather than to minorities⁷¹¹ and other groups, is further highlighted when comparing the working definitions of indigenous peoples with the corresponding definitions of peoples.

⁷⁰⁸ Paras. 379 – 382 of the Cobo-report

⁷⁰⁹ The World Bank Operational Manual, Operational Policy (OP) 4.10, Indigenous Peoples

⁷¹⁰ Assembly/AU/Dec.56 (IV), p. 93. The ILO 169 defines what groups constitute indigenous and tribal peoples for the purposes of the Convention. Since, as Section 4.6 explained, the ILO 169 does not aspire to identify indigenous peoples proper, this definition is not directly relevant in this context, however.

⁷¹¹ International law does not define minorities. In one way, this is natural. As minorities do not enjoy rights as such, there is no direct need for a definition. Still, individual members of minority groups derive their rights from the group. For that purpose, a definition might be helpful, since it indirectly identifies what individuals can claim minority rights. Hence, certain attempts have been made to define minorities. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities attempted to define minorities as follows: “*A group of citizens of a State, constituting a numerical minority and in non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another...*” See UN Doc. E/CN.4/Sub.2/1985/31 & Corr. 1 (1985). The definition was, however, never adopted. Notably, the attempted definition of minorities shares several of the elements with the working-definitions of indigenous peoples. But the definition differ in that the tresh-hold criteria in the definition of indigenous peoples – the connection to a specific and fairly definable territory – is absent in the definition of minorities. In addition, the minority definition do not emphasize preservation of societal institutions to the extent definitions of indigenous peoples do.

There are natural reasons for international law traditionally not formally defining “peoples”. When “peoples”, for legal purposes, were understood as the population of a territory, there was no need for further definitions. As international law commenced considering peoples in terms of ethnicity/culture, certain working-definitions emerged. Of these, the “Kirby-definition” is probably most commonly used.⁷¹² The Kirby-definition is strikingly similar to the working-definitions of indigenous peoples. It too, focuses on common cultural characteristics and adds a connection to a certain specific territory. The major difference between the Kirby-definition and the working-definitions of indigenous peoples is that the latter, rather naturally, includes no reference to subjugation by another population. Notwithstanding, the similarity between the definitions of peoples – when not understood as the sum of the inhabitants of the state – and indigenous peoples underlines both indigenous peoples’ legal status under international law and their distinction from groups in general.

10.3 Do indigenous peoples’ rights pose a threat to the well-being of individual members of the group?

Chapter 1 underscored that the doctoral thesis only addresses rights of indigenous peoples *per se*. The focus is on the legal relationship between the indigenous people and the outside world. The internal relationship within an indigenous people is as such of no interest to the thesis.⁷¹³ Still, the thesis needs to address the general claim – outlined in Chapter 1 and touched upon by Chapter 3 – that collective rights in general can pose a threat to the well-being of individual members of the group. If substantiated, the assertion could greatly impact on the scope and content of the rights analyzed in previous Chapters.

As mentioned, some fear that accommodating for group rights often caters for systematic maltreatment of vulnerable sub-segments of the group, such as women and the girl-child. To recognize collective cultural rights, it is argued, is to accept the majority within the minority’s

⁷¹² For instance, UNESCO endorses the Kirby-definition. See UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, November 27-30, 1989. Other working definitions of peoples include the same basic elements as the Kirby-definition. See e.g. Christescu’s definition in a more recent UN study; UN ESCOR, 137 UN doc. E/CN.4/Sub.2/404 (vo. 1).

⁷¹³ That is not to say that all cultural elements to which the indigenous people hold rights *vis-à-vis* non-members ultimately vest with the people as a whole. Under internal norms and practices, often customary, cultural elements might – in the internal relationship between the indigenous people and its members – vest with a segment of the indigenous society, or with an individual member of the group. See Stoll and von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law II*, p. 18. But these internal relationships are outside the scope of the thesis.

right to dominate vulnerable elements of the group. In other words, a right to cultural privacy could potentially be used to shield the culture in question from needed scrutiny. As further touched upon, some add to this line of argument that acceptance of group rights tends to freeze cultures in a stage where cultural practices offensive, or even barbaric, to most outsiders are nonetheless accepted by the group. It denies the minority within the minority the possibility to reshape the rules and culture of the group.⁷¹⁴ The concerns have led some to infer either that there can be no such thing as group rights, or, alternatively, that group rights must always yield in conflict with human rights of the individual. For instance, Section 3.6.3 described how Kymlicka distinguishes between group rights (i) directed against members of the group, and (ii) protecting the group from the larger society. He submits that only the latter set of rights shall be accepted. In case of conflict, Kymlicka posits, human rights of the individual always take precedent over collective rights. One can, however, question to what extent holding that individual rights always trump collective rights conforms with liberalism. Chapters 2 and 3 outlined how a collective – the state – is the keystone in liberal theory. The state too, can with authority impose decisions on its members, i.e. its citizens. Also within a state, actions undertaken by the majority (or other authority) can cause great harm to marginalized segments of the state. In other words, the same concerns raised with regard to rights of groups could be raised against the powers exercised by a state. Liberalism fails to explain why action taken by state authorities is more acceptable than authority exercised within an indigenous group. Why should indigenous peoples, unlike state-forming peoples, not have the right to determine the course of their societies just because all members of the group might not look favourably upon a particular action? To take such a position seems to contradict the very core of indigenous peoples' rights. As the doctoral thesis has underlined throughout, the indigenous rights discourse is essentially about allowing indigenous peoples the possibility to form and control their own societies. Until multiculturalism – and other liberal theories - has responded to the posed question, their concern over vulnerable segments of the society is less convincing.⁷¹⁵

⁷¹⁴ Weinstock, *Liberalism, multiculturalism, and internal minorities*, pp. 246-247, Shachar, *Feminism and multiculturalism*, pp. 115-147 and *Multicultural Jurisdictions*, pp. 2-3, 19 and 28-29, Spinner-Halev, *Multiculturalism and its Critics*, p. 549, Kukathas, *Are There Any Cultural Rights*, p. 236, Okin, *Is Multiculturalism Bad for Women?*, p. 26, and Xanthaki, *Indigenous Rights and United Nations Standards*, p. 20

⁷¹⁵ In this context, see Scheinin, *How to Resolve Conflicts Between Individual and Collective Rights?*, pp. 222 and 238. Scheinin points to that Kymlicka, and liberal political theory in general, is less convincing when arguing for the constant precedent of individual rights over collective rights, at the same time as failing to ask the question why minority groups shall be prevented from restricting individual behaviour while at the same time multiculturalism takes for granted that the state has the same power, in some countries to the extent that it can execute its own citizens. Scheinin asserts that one should uphold the same conditions for restrictions of rights, irrespective if administered by a state or a community. In the same vein, Young asserts that the collective's and

Here, multiculturalists might argue that individual human rights have been elaborated exactly to place checks and balances on states when exercising their authority. States are bound to respect all individual human rights. Is it not reasonable to expect indigenous peoples to do the same, in exercising their authority?⁷¹⁶ But this argument misses the point that indigenous peoples' rights is partly a reaction against the conventional state-individual dichotomy failing to adequately address the needs and concerns of groups, and, as an indirect result, of its members. Indigenous rights have to a certain degree emerged because individual rights could not sufficiently protect either the indigenous group or its members. That is why the former political and legal structures have been fundamentally reconsidered. Under such circumstances, it makes no sense to place an entire pre-existing set of rights on indigenous peoples that was developed at a time when international law was blind to indigenous societal structures. Rather, a more flexible approach appears motivated. This is not to say that all sorts of cultural practices are accepted. Clearly, certain individual human rights can never be encroached upon for the benefit of protecting group rights.⁷¹⁷ But setting these fundamental rights aside, which right prevails in instances of conflict between collective and individual rights should be determined on a case to case basis, not through a fixed formula saying that however insignificant individual right always take precedent over collective rights fundamental to the survival of the group.⁷¹⁸

International law concurs that individual rights do not always take precedent over conflicting collective rights. Rather, the interests and rights of the collective need to be balanced against those of the individual. For instance, the HRC has on several occasions held actions normally

the individual's interests need to be balanced against each other regardless of whether the collective is a state or an indigenous people. See *Two concepts of self-determination*, pp. 187-189 and 192-193.

⁷¹⁶ For instance, Shachar indirectly acknowledges that multiculturalism is vulnerable to arguments that there are no major principal differences between a state and an indigenous authority imposing their will on its subjects. Still, she prefers the state-individual dichotomy over group rights, precisely because states are obliged to respect human rights. See Shachar, *Multicultural Jurisdictions*, pp. 2-3, 19 and 28-29.

⁷¹⁷ Scheinin lists as examples of such rights the right to life, the prohibition against torture and inhuman, degrading or cruel treatment, the prohibition of slavery, the prohibition against arbitrary deprivation of liberty and the prohibition of grave forms of discrimination. See *How to Resolve Conflicts Between Individual and Collective Rights?*, pp. 233-234.

⁷¹⁸ This approach further allows e.g. indigenous peoples to take responsibility over their own cultures. As Makkonen points out, probably all cultures have had and have elements of which they are less proud. But no people is slave to its culture. They are likely to grind out dysfunctional cultural practices, if offered the opportunity. See Makkonen, *Minorities' Rights to Maintain and Develop Their Cultures*, p. 205, and also Scheinin, *How to Resolve Conflicts Between Individual and Collective Rights*, pp. 223-224. Kymlicka concurs with this observation, and adds that it would be rather hypocritical of states to deny indigenous peoples self-governing rights allowing their cultural practices to evolve, at the same time as the state labels the same practices barbaric. See *Multicultural Odysseys*, pp. 151-153.

amounting to a violation of an individual right to conform with CCPR Article 27, when the action was deemed necessary to protect the collective cultural identity of the group.⁷¹⁹ In other instances, the HRC has found that the interest of the group could not outweigh the interest of the individual. In short, the Committee has sought to weigh the rights of the indigenous people and those of the individual members against each other. At the same time, the HRC has declared that certain individual rights are absolute, such as fundamental rights of women.⁷²⁰ In the same vein, the CERD has concluded that collective and individual rights must be balanced against each other, at the same time as fundamental individual human rights must not be violated.⁷²¹ Similarly, ILO 169 Article 8.1 calls for respect for indigenous peoples' cultural practices. In the same breath, however, Article 8.2 clarifies that such respect should prevail only when not incompatible with fundamental individual human rights.⁷²² Finally, Section 6.3.8 explained how the DRIP takes the exact same approach to conflict of rights. In conclusion, international law does not support the argument that individual rights always prevail in conflicts with the rights of the group. It has taken a more flexible approach, where only fundamental individual rights as a rule take precedent over collective rights.⁷²³ One can safely assume that individual rights to creativity do not constitute such fundamental individual human rights that as a rule take precedent over indigenous peoples' right to collective creativity. Consequently, generally speaking, potential conflicts between individual and collective rights do not impact on the conclusions of the doctoral thesis. Another matter is that in instances, as mentioned, creativity springing from an indigenous culture vest with individuals, rather than with the people as such. But again, these relationships are outside the scope of the thesis.

⁷¹⁹ *Lovelace v. Canada*, Comm. No. R.6/24, views adopted 30 July 1981, para. 83, *Kitok v. Sweden*, and *Apirana Mahuika v. New Zealand*

⁷²⁰ General Comment No. 28: Equality of rights between men and women (article 3) : . 29.03.2000. CCPR/C/21/Rev.1/Add.10, para. 5. See also Xanthaki, *Indigenous Rights and United Nations Standards*, p. 36, Kontos, *Aboriginal Self-Government in Canada*, pp. 211-215, Anaya, *On justifying Special Ethnic Group Rights*, pp. 224-227, and Scheinin, *How to Resolve Conflicts Between Individual and Collective Rights*, pp. 232-233.

⁷²¹ CERD/C/62/CO/6, 21 March 2003, and Thornberry, *The Convention on the Elimination of Racial Discrimination*, pp. 23-24

⁷²² See also Freeman, *Are there Collective Human Rights?*, p. 29, and compare also Kingsbury, *Reconciling Five Competing Conceptual Structures*, p. 84.

⁷²³ Rights not being absolute but rather balanced against each other is nothing new to the human rights system. Human rights do not form a perfect patch-work. Individual rights too, sometimes contradict. When this occurs, also individual human rights must be weighed against each other, on a case to case basis. There is nothing dramatic about undertaking the same exercise also with regard to collective rights. Freeman too, notes that balancing indigenous peoples' right against the human rights of individual members constitutes an act similar to balancing conflicting individual rights. See *Are there Collective Human Rights?*, p. 29.

10.4 *Overlapping groups and blending cultures*

10.4.1 *Rights to culture in general*

Section 10.2 addressed criticism direct against group rights based on perceived difficulties associated with defining what groups deserve protection. In addition, group rights have been challenged based on the submission that groups overlap, in two senses. First, it has been pointed to that an individual can feel affinity to more than one group. In addition, as Section 1.2 outlined, groups blend in the meaning that they borrow elements from each other. From a factual point of view, these observations are of course correct. Again using the Saami as an example, a person of Saami origin residing in Sweden can certainly define herself as belonging to the Saami people in relation to the Swedish majority population at the same time as rooting for the Swedish national ice-hockey team. On a collective level, it is equally true that cultures have always borrowed elements from each other. For as long as different societies have been in contact, cultures have blended to reinvent their various cultural expressions. Culture is, Brown argues, an abstract concept. Its boundaries are evasive. It is not always easy to exactly define where one culture ends and another begins.⁷²⁴

At the same time, although persons and groups are inspired by each other, cultures often still have certain core features that continue to identify the members of the group, and the group as such. Indeed, that is arguably what makes a culture a culture.⁷²⁵ The preservation of such a core cultural identity is not necessarily precluded by incorporation of elements from other cultures. Rather, it is possible for a group to use and be open to influences by other cultures, at the same time as the group preserves and develop the essential parts of its own culture. Just because indigenous individuals eat sushi and enjoy opera, the peoples do not abandon its defining characteristics, such as language, livelihoods, cultural community and spiritual systems.⁷²⁶ To argue differently flirts with assimilation theories of the past. Section 3.3 narrated how not long ago, assimilation theories directed against indigenous peoples were to some extent justified by the perception that indigenous cultures were destined to physically

⁷²⁴ Brown, *Who Owns Native Culture*, p. 219. See also Spinner-Halev, *Multiculturalism and its Critics*, pp. 551-552.

⁷²⁵ In fact, as Young points to, a group of individuals define themselves as a collective predominantly as a response to surrounding cultures. See *Together in Difference*, p. 165.

⁷²⁶ Thornberry notes that albeit indigenous peoples too, borrow elements of and are influenced by other cultures, such elements tend to be incorporated and absorbed into the indigenous people's culture, rather than obliterating the same. See *The Convention on the Elimination of Racial Discrimination*, p. 17.

die out. Tully notes that there is again a trend within majority societies to hold that indigenous peoples will disappear. The prediction this time, however, is not that indigenous peoples are physically threatened. Rather, they will evaporate due to intermarriages and urbanisation.⁷²⁷

In any event, from an international legal perspective, the arguments above are not particularly relevant. As seen, indigenous peoples have emerged as legal subjects under international law. Today, “indigenous peoples” is almost a term of art. Hence, for legal purposes it is irrelevant whether an indigenous people to some extent has allowed itself to be influenced by other civilizations. As long as a group continues to meet the legal definition of “indigenous peoples”, it enjoys indigenous peoples’ rights. If the group allow its culture to be diluted to the extent that it no longer qualifies as an indigenous people, it no longer holds rights as such.

10.4.2 Why indigenous peoples are free to consume Japanese sushi and French wine, at the same time as shielding their own cultures

The Sections above have hence concluded that potential problems associated with defining legally relevant groups in general is no reason to reject rights of indigenous peoples specifically, including to their distinct collective creativity. Still, the doctoral thesis has only implicitly answered why indigenous peoples accessing other peoples’ cultures does not preclude them from shielding their own collective creativity from non-members. The Chapters above have repeatedly underlined how indigenous peoples’ claims to rights over their collective creativity rest heavily on the principle of non-discrimination. Against this background, how can indigenous peoples consume sushi and French wines, at the same time as they expect Japanese and French to stay away from their cultures? As Brown has pointed to, any proposal suggesting that Americans are not allowed to borrow from or study Japanese or French cultures would be dismissed by legal experts and ordinary citizens alike.⁷²⁸ Why should indigenous peoples be entitled to greater protection of their cultures than the French? The answer is simply that they do not. Indigenous peoples have the same, and not more, rights compared with the French people. But if so, should not elements of indigenous peoples’ collective creativity be available to the French, as elements of the French culture are

⁷²⁷ Tully, *The Struggles of Indigenous Peoples for and of Freedoms*, p. 40

⁷²⁸ Brown, *Who Owns Native Culture?*, p. 37

available to indigenous peoples? The answer is no. This follows both from a proper understanding of the right to self-determination and the right to property.

If starting with the former right, *the French culture is available to Americans because of the French people's own deliberate decisions*. The French, like other peoples, are free to determine that no elements of its culture should exit its jurisdiction. The French people has consciously not opted for this alternative. Instead, it has freely made most aspects of its culture open to others, e.g. though becoming party to international IP-agreements. Noteworthy, however, the French people has at the same time decided that certain aspects of its culture, e.g. champagne and certain cheeses, shall be protected.⁷²⁹ Chapter 8 concluded that indigenous peoples constitute peoples too, enjoying a right to self-determination. Hence, indigenous peoples should have the opportunity to make the same deliberate choices as the French people has already done as to what aspects of its culture to share, and under what terms.

As to the right to property, the relevant comparison is not with the French people, but with Frenchmen. Of course, individual French artists, composer, scientists etc. hold property rights to their creativity. They can expect the French state (and other states) to respect and uphold these rights. Similarly, as Chapter 9 concluded, indigenous peoples too hold property rights to their creativity which states are bound to uphold. The only difference is that the right-holder is a collective. But this difference does not change the fact that the right is held vis-à-vis the state, wherefore the state is under an obligation to uphold the right, including when Frenchmen seek access to the indigenous people's culture.

In conclusion, the question "*If French culture is readily available to an indigenous people, why should not the indigenous people's culture be readily available to the French?*" might at first glance appear like a convincing argument against the recognition of indigenous peoples' rights to their creativity. But a closer look reveals that the question shoots between two targets. First, under the right to self-determination, indigenous peoples have the same right as other peoples to render their culture non-available to non-members. The fact that most state-forming peoples have made most aspects of their cultures readily available to others is no relevant argument for indigenous peoples having to do the same. Second, under the right to

⁷²⁹ Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 192. Compare also Taubman and Leistner, *Analysis of Different Areas of Indigenous Resources*, pp. 107-108.

property the relevant comparison is with non-indigenous individual property rights owners. Indigenous peoples hold civil rights to their creativity that the state must recognize and uphold to the same extent as it upholds property rights of other legal subjects within the state. Here, there is no difference between property rights held by the indigenous people and Frenchmen.

11. IP-NEIGHBOURING RIGHTS

11.1 Introduction

The doctoral thesis has hence concluded that the human rights system awards indigenous peoples fairly extensive rights over their collective creativity. Section 5.4 inferred that conventional IPRs, on the other hand, offer negligible protection to indigenous peoples' cultural heritage. At the same time, the thesis has indicated that processes are ongoing with the potential of establishing what can be labelled IP-neighbouring rights over collective creativity. These processes are subject to study in this Chapter.

The major bulk of the Chapter (Sections 11.2-6) outlines relevant processes and discusses what conclusions can be drawn with regard to the material content of the law based on these. The final section of the Chapter returns to a theme present throughout the doctoral thesis. The Chapters above have on numerous occasions explicitly studied how various areas of law relevant to indigenous peoples' rights have evolved in tandem. Based on these analyses, the thesis has inferred that the conclusions drawn within the different spheres of law are mutually supportive. As a final analysis before the doctoral thesis proceeds to conclude, Section 11.7 surveys whether the common trend of mutually supportive areas of law is also present in the interface between human rights and IP-neighbouring rights.

11.2 The World Intellectual Property Organization (WIPO)

11.2.1 Background of the WIPO IGC

Already in 1982, WIPO jointly with UNESCO adopted Model Provisions for National Laws on the Protection of Expressions of Folklore⁷³⁰ against Illicit Exploitation and Other Prejudicial Actions. Still, WIPO's more intense involvement in these issues is more recent. Its standard-setting activities within the field ensued with the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the WIPO IGC), which convened for the first time in 2001. The

⁷³⁰ The term "Expressions of folklore" is essentially synonymous with "TCEs". The term folklore is increasingly less used due to the perception by some that it has a derogatory undertone.

WIPO IGC's mandate is to investigate to what extent existing IP-mechanisms do/can protect TK and TCEs, and, to the extent such is not the case, whether IP-similar protection should be elaborated.⁷³¹ As part of this mandate, the WIPO IGC has embarked on elaborating two draft instruments on the protection of TCEs and TK, respectively. By the 7th session, two comprehensive draft instruments, labelled "Policy Objectives and Core Principles", had been crafted (The TK and TCEs Instruments). The title might give the association that the TK and TCEs Instruments contain merely generally formulated principles and objectives. But this is misleading. Both instruments set forth an elaborate protection-system spelled out in detailed articles generally speaking crafted in the style giving the impression that they are intended to be legally binding.

Not long after the first drafts of the TK and TCEs instruments had been produced, political disagreements brought the WIPO IGC into a deadlock. But in September 2009, the WIPO General Assembly reached an agreement on a new and concrete mandate for the WIPO IGC. The WIPO GA decision outlines an ambitious roadmap of meetings which shall result in a proposal for one or more legally binding instruments ensuring the effective protection of TCEs and TK, to be presented to the WIPO GA in 2011.⁷³² Since the renewal of its mandate, the WIPO IGC has convened twice (the 15th and 16th sessions). Since the report from the 16th session is not yet available, the analysis of the TK and TCEs Instruments below are based on the outcome from the 15th session.⁷³³

11.2.2 The legal status and content of the TK and TCEs Instruments

Obviously, the legal status of draft instruments is limited. Yet, the WIPO GA has given the draft TK and TCEs Instruments certain value when proclaiming that these shall constitute the basis for negotiations on legally binding instruments. This seems to indicate that the WIPO member states consider that, although further deliberations are necessary, the draft Instruments broadly speaking reflect what IP-neighboring rights on TCEs and TK look/should

⁷³¹ As clear from the title, the WIPO IGC also addresses genetic resources. But since rights to such are outside the scope of this doctoral thesis, these parts of the WIPO IGC deliberations are omitted here.

⁷³² For the WIPO GA Decision, see WIPO/GRTKF/IC/15/4, Annex.

⁷³³ This outcome is reflected in the annexes to WIPO Documents WIPO/GRTKF/IC/16/4 (TCEs) and WIPO/GRTKF/IC/16/5 (TK).

look like.⁷³⁴ Hence, albeit remaining drafts, the TK and TCEs Instruments are indicative of in which direction international IP-neighboring rights might be heading.

Both the draft TK and TCE Instruments rest on the assumption that TK and TCEs, respectively, vest with indigenous peoples to the extent they have created such subject matter. The TK Instrument Policy Objective (xiii) proclaims that the rights of traditional and local communities⁷³⁵ over their TK shall be recognized. Further, pursuant to Articles 7.1 and 7.2, “[t]he principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, subject to these principles and applicable national laws.... [T]he holder of traditional knowledge shall be entitled to grant prior and informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.”⁷³⁶ The reference to “as provided by applicable national legislation” could be understood as suggesting that the TK Instrument renders right to FPIC subject to national legislation. That this is not the intention follows, however, from the Commentary to the TK Instrument, which clarifies that the “TK holders ... should consent to ... proposed use, as a condition for fresh access to TK” and that the reference to national law merely “leaves flexibility to adapt the application of the principle to national legal systems”.⁷³⁷ The TCE Instrument uses a different structure, but its position on who holds TCEs is the same as in the TK Instrument. Pursuant to Article 2, protection of TCEs should benefit those to which a TCE is specific and who maintain and use the TCE. The provision further mentions indigenous peoples and communities as typical such groups. From this provision, it clearly follows that TCE-protection should benefit the holders of TCEs. But it is not explicit that TCEs also vest with the holder, in the sense that it is the holder that grants access to the TCE. Article 4 proclaims, however that “Prior authorization to use [TCEs], when required in these provisions, should be obtained either directly from the

⁷³⁴ This is natural, since the draft Instruments have been drafted reflecting input from member states during the WIPO IGC’s first seven sessions. Taubman and Leistner note that the TK Instrument constitutes a widely-consulted synthesis of normative elements and policy debate. See Analysis of Different Areas of Indigenous Resources, p. 156.

⁷³⁵ The TK and TCEs Instruments refer interchangeably to “traditional and local communities”, “indigenous and local communities” and “indigenous peoples”. The doctoral thesis will not analyze this choice of language any further. It is clear that the phrases “traditional and local communities” and “indigenous and local communities” encompass indigenous peoples.

⁷³⁶ That rights of TK-holders shall be recognized is further underlined by the Commentary to the TK Instrument. See WIPO/IGC/GRTKF/IC/16/5, Annex, p. 9.

⁷³⁷ WIPO/IGC/GRTKF/IC/16/5, Annex, p. 42

indigenous peoples and communities ... or from a designated national authority acting at the request, and on behalf, of the indigenous people and community...”.⁷³⁸

Indigenous peoples being the holders of TK and TCEs they have created also follows indirectly from the term of protection prescribed by the TK and TCE Instruments. Pursuant to Article 9 of the TK Instrument, “*Protection of [TK] ... should last as long as the [TK] fulfils the criteria of eligibility for protection.*” Article 4 defines TK as knowledge that is “*(i) generated, preserved ... and transmitted in a traditional and intergenerational context; or (ii) customarily recognized as belonging to a traditional indigenous community [or] people ... which preserves and transmits it between generations; or (iii) integral to the cultural identity of ... an indigenous or traditional community [or] people...*”. Similarly, the TCEs Instrument Article 6 links the term of protection to the definition of the subject matter of protection, as defined by Article 1. Pursuant to Article 1, an expression of culture qualifies as TCEs if “*... genuine of the cultural and social identity and cultural heritage of indigenous peoples and communities... [and which are] ... maintained, used or developed by indigenous peoples...*”. Notably, to at all qualify as TK/TCEs, knowledge and expressions, respectively, must have a distinct cultural connection to a particular indigenous people. Moreover, to remain TK/TCEs, the element must maintain this connection with its originator. If the connection is broken, the knowledge/expression instantly ceases to constitute TK/TCE. This definition of TK/TCEs indirectly underlines that TK/TCEs vest with those that created the element. Because if the element loses its connection with its creator, it no longer constitutes TK/TCEs. Rather it becomes an ordinary work, protectable only through conventional IPRs. In other words, it is only the group that has created knowledge/cultural expressions that can determine how long such subject matter shall remain TK/TCEs. The Commentary to the TK Instrument Article 4 underlines that although variations in the details are possible, generally speaking, TK must – per definition - somehow be defined through its cultural relevance to a specific group.⁷³⁹

Notably, the outlined definition of TK/TCEs also determines the term of protection. From TK/TCEs being defined essentially through their continuous connection to a particular group, it follows that rights to the subject matter are valid as long as this connection remains. This position is also explicitly stated in the TK Instrument Article 9 and the TCEs Instrument

⁷³⁸ The Commentary to the TCEs Instrument further underlines that state authorities have a role in FPIC-processes only if the indigenous people so requests. See WIPO/IGC/GRTKF/IC/16/4, Annex, p. 29.

⁷³⁹ WIPO/IGC/GRTKF/IC/16/5, Annex, p. 32

Article 6. In this context, it is worth recalling the discussion on the scope of indigenous peoples' property rights to their collective creativity in Section 9.2.2. Section 9.2.2's conclusion that protection shall last as long as a cultural element remains culturally relevant to the indigenous people in question receives firm support from WIPO's deliberations on TK/TCEs. As noted immediately above, the draft WIPO Instruments do not only submit that protection shall last as long as the element remains culturally relevant. The Instruments further infer that this conclusion logically follows from how TK and TCEs must reasonably be defined.⁷⁴⁰ TK and TCEs as a principle belonging to the indigenous people having created such subject matter is hence clear from the TK and TCEs Instrument. From these Instruments, it further unambiguously follows that protection shall last as long as a cultural element remains culturally relevant to the indigenous people in question. But although the basic principal rights are clear, protection is not unlimited. Both the TK and the TCEs Instrument limits the scope of protection, albeit in different ways.

The TCEs Instrument takes a multi-layered approach to the scope of protection. Pursuant to Article 3 (c), secret TCEs enjoy full protection, without any formalities applying. With regard to non-secret TCEs, the TCE Instrument distinguishes between registered and unregistered such.⁷⁴¹ If an indigenous people has formally registered a TCE of particular cultural and spiritual value or significance⁷⁴², Article 3 (a) (i) proclaims that indigenous peoples have the right to consent before third parties utilize such elements.⁷⁴³ From this extensive protection of registered TCEs, Article 3 (a) (ii) excepts signs, symbols etc. With regard to such subject matter, indigenous peoples only enjoy protection from use that disparages, offends or falsely

⁷⁴⁰ Taubman and Leistner concur with and elaborate on the position taken by the TK Instrument (and, one must assume, with the TCEs Instrument). They point to that TK cannot be dealt with simply as information. TK has, they observe, in addition an inherent normative and social component. As information, TK can easily be transmitted beyond its traditional context. But the norms, social practices and values that define the knowledge as TK are much less readily transmitted, due to their intrinsic link with the culture from which the TK springs. The inherent qualities that distinguish TK from knowledge in general starts to break down at the same time as the TK is alienated from its traditional context, they conclude. See *Analysis of Different Areas of Indigenous Resources*, p. 60.

⁷⁴¹ The TCEs Instrument Article 7 (b) introduces a system under which indigenous peoples can register non-secret TCEs with a designated authority for the purposes of protection.

⁷⁴² The reference "*of particular cultural or spiritual value or significance*" has a strike-through in Document WIPO/GRTKF/IC/16/4. This is due to a comment made by one delegation at the WIPO IGC's 15th session. As stated above, as a general rule, the doctoral thesis has accepted such alterations to the TK and TCEs Instrument, hence using the most recent version of the Instruments as a basis for its analyses. In this particular context, however, the alteration amends the entire structure of a provision that has otherwise been consciously designed to have a specific and elaborate structure. Hence, it is unlikely that the modification will be accepted in the end. If so, the entire provision has to be restructured. For these reasons, the thesis makes an exception, and disregards this specific alteration to the TCEs Instrument.

⁷⁴³ To be precise, Article 3 (a) (i) lists a number of uses to which the right to consent applies. The list is, however, so elaborate that it encompasses essentially all uses imaginable.

suggests a connection with the indigenous people, or bring it into contempt.⁷⁴⁴ With regard to non-secret TCEs that (i) is not of particular cultural and spiritual value or significance, or (ii) is of particular cultural and spiritual value or significance, but which the indigenous people nonetheless opts not to register, the TCEs Instrument Article 3 (b) offers a more limited protection. Such TCEs are only protected against uses that (i) fail to identify the indigenous people as the source of the work, (ii) distort or mutilate the work or that are in other ways derogatory, or (iii) falsely or misleadingly indicate a linkage between a product/service of the third party and the indigenous people. In addition, Article 5 (a) (iii) provides for certain exceptions from protection, common to conventional IPRs. These are e.g. uses for teaching purposes and non-commercial research.

Unlike the TCEs Instrument, the TK Instrument does not operate with different layers of protection. Rather, it offers the same level of protection to all forms of TK. Articles 1.1 and 1.2 of the TK Instrument limit TK protection to protection against any acquisition, appropriation or utilization by unfair and illicit means.⁷⁴⁵ Articles 1.3 and 1.4 proceed to amplify uses that are particularly unfair or illicit. The scope of protection the TK Instrument awards is clearly dependent on the understanding of what constitutes “*unfair and illicit means*”. And judging by the exemplifying list in Article 1.3, “*unfair and illicit*” must be given a fairly restrictive interpretation. Clearly, no right to consent exists when TK has been acquired in good faith. Moreover, it appears that acquiring knowledge fully aware of that the knowledge constitutes TK and originates from a particular indigenous people does not amount to unfair or illicit acquisition either. Article 1.3 (i) seems to suggest that for an acquisition to be illicit, the acquirer must essentially have deceived the TK holder, or be guilty of a similar act. This conclusion also follows from Article 8.2, which proclaims that no FPIC requirement applies to TK already in the public domain. That said, one can note that pursuant to Article 1.4, TK holders shall be protected against false and misleading representation that a product or service is produced or provided with the involvement of or endorsement by the TK holder.

In addition to providing absolute rights to TK and TCEs, the TK and TCEs Instruments also prescribe benefit-sharing arrangements in certain instances where indigenous peoples do not

⁷⁴⁴ The justification the Commentary to Article 3 offers for treating signs, symbols etc. different from other forms of TCEs is that doing so is in conformity with the structure of conventional IPR-regimes. See WIPO/GRTKF/IC/16/4, Annex, pp. 25-26.

⁷⁴⁵ In addition, the provisions protect indigenous peoples against subsequent uses if the acquirer of the TK derives commercial benefits from its use, and knew, or was negligent in not knowing, that the TK had originally been acquired by unfair means.

enjoy a right to consent. In other words, with regard to some forms of use, the TK and TCEs Instruments take an approach similar to the liability regimes in conventional IP-systems.⁷⁴⁶ Again, the approaches taken by the two instruments differ quite significantly, which to a large extent is a result of the shifting approaches taken towards the scope of full protection. As noted above, the TK Instrument offers a very limited scope of complete protection. Instead, Article 6.1 proclaims that in all instances when indigenous peoples do not enjoy a right to consent, but they nonetheless are the holders/custodians of TK, they are entitled to benefit-sharing with regard to proceeds arising out of commercial use of their TK.⁷⁴⁷ Article 8.2 underlines that the right to benefit-sharing applies also to TK in the public domain. In the TCEs Instrument, on the other hand, which provides for a broader scope of absolute protection, the right to benefit-sharing is more limited. As a complement to complete protection, The TCEs Instrument Article 3 (b) (iv) calls for benefit-sharing when a use is not prohibited, but utilization is still for gainful intent.

If summarizing, it is clear that the TK and TCEs Instrument will affirm that indigenous peoples are the owners of their collective creativity.⁷⁴⁸ It is further evident that the Instruments will award protection as long as a cultural element remains culturally relevant to the indigenous people in question. But the protection will also, it seems, be limited in scope. On the other hand, the draft Instruments foresee that when no complete protection applies, there shall in most instances be benefit-sharing.

11.3 *The Convention on Biological Diversity (CBD)*

Pursuant to CBD Article 1, the objectives of the Convention are “*the preservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the use of genetic resources*”. The objective, speaking only of GR, could give the impression that the CBD does not pertain to TK. Still, a few provisions in the CBD relate the Convention to such knowledge, even if not explicitly referring to the term.

⁷⁴⁶ This approach is to some extent logical. Dutfield and Suthersanen have noted that liability regimes might be particularly useful with regard to cultural elements that are already widely spread. See *Global Intellectual Property Law*, pp. 346-347. Brown too, points to that reclaiming all cultural elements already in the public domain is almost an insurmountable task. See *Who Owns Native Culture*, p. 67. With regard to liability regimes, see Section 5.4.3.

⁷⁴⁷ See also the TK Instrument’s General Guiding Principles, para. (e) and the Commentary to these, WIPO/IGC/GRTKF/IC/16/5, Annex, pp. 8 and 10. The TK Instrument Article 6.2-4 provides for benefit-sharing also for non-commercial uses.

⁷⁴⁸ Kongolo notes that the WIPO member states have generally supported this position in comments made so far on the TCEs Instrument. See, *Unsettled International Intellectual Property Issues*, p. 56.

Article 8 (j) calls on states to, subject to national legislation, respect and preserve knowledge of indigenous and local communities⁷⁴⁹ embodying traditional lifestyles. Further, pursuant to Article 10 (c), states should protect and encourage customary use of biological resources, in accordance with traditional cultural practices. Notably, these provisions connect to two of the objectives of the CBD (preservation of biodiversity and the sustainable use of its components) rather than address rights to TK.⁷⁵⁰ Further, judging by the wording, the objectives indicate that the CBD aims to conserve biodiversity for the benefit of all, rather than award rights to particular forms of biodiversity to specific groups. Moreover, a preambular paragraph to the CBD proclaims that states hold sovereign rights over their biological resources. Parties have tended to interpret this provision as suggesting that rights not only to GR, but also TK, vest with the state, wherefore the state is, it has been held, free to regulate such subject matter also vis-à-vis sub-groups of the state.⁷⁵¹ Hence, at first glance, the CBD appears to be of limited relevance to the doctoral thesis.

However, notwithstanding the relatively restrictive wording of the Convention text, and despite the erroneous interpretation of the reference to state sovereignty in the CBD preamble, the parties to the CBD have recently come to address rights to TK. The CBD is a framework convention. Its relatively general and principled provisions are supposed to be fleshed out and concretized in subsequent processes. One such process attempts to implement the third objective of the Convention; fair and equitable sharing of benefits arising out of the use of

⁷⁴⁹ The CBD uses the term “*indigenous and local communities*” throughout, as do essentially all relevant subsequent instruments adopted under the auspices of the Convention. The sweeping term “*indigenous and local communities*” was used since at the time of the adoption of the CBD in 1992, there was no agreement on the term “indigenous peoples”. One could have expected that when the parties to the CBD started to elaborate instruments addressing rights to genetic resources and TK, the term “communities” would become problematic. The term lacks meaning under international law, and no attempts have been made to define what groups qualify as “communities”. Consequently, it would appear difficult to endow them with rights. Still, this uncertainty has so far generated little concern in the CBD deliberations. In any event the phrase, “*indigenous and local communities*” clearly envelopes indigenous peoples.

⁷⁵⁰ True, CBD Article 10 (c) appears to assume certain rights for the custodians of biological resources to control and manage such resources, since this presumably follows from their customary norms. Similarly, Article 8 (j) refers to knowledge “of” indigenous and local communities, thus indicating that TK vest with such communities. Hence, Stoll and von Hahn argue that Article 8 (j) envisages some sort of proprietary position of TK holders. See *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law II*, p. 35. But the plain reference to TK of indigenous and local communities could also be interpreted as merely referring to TK to which indigenous peoples hold recognized rights. Such an interpretation gains further support from Article 8 (j)’s reference to “*subject to national legislation*”.

⁷⁵¹ As Section 4.10 has explained, this is not a tenable position. In this context, see also Taubman, *Genetic Resources*, p. 200, who also notes that states’ claim to sovereignty over GR under the CBD might conflict with indigenous rights.

genetic resources.⁷⁵² In 2002, the parties to the CBD adopted voluntary Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, the so-called Bonn Guidelines. Almost immediately following the adoption of the Bonn Guidelines, work ensued aiming at replacing the Guidelines with a legally binding access and benefit sharing regime (the ABS-regime). In 2004, a working group (the ABS WG) was established to produce an ABS-regime,⁷⁵³ by October 2010.⁷⁵⁴ The ABS WG most recently convened in March 2010.⁷⁵⁵ As the WIPO IGC, the negotiations on the ABS-regime have been loaded with difficulties. To facilitate the process, the co-chairs of the ABS WG, prior to the 9th session of the ABS WG, produced a Chairs' text (the draft ABS-protocol), which was further elaborated on at the session.⁷⁵⁶ Clearly, as the TK and TCEs Instruments produced under the auspices of the WIPO IGC, the draft ABS-protocol remains a draft. Moreover, unlike the WIPO Instruments the draft ABS-protocol is generally formulated, and contains essentially no detailed provisions. Still, it is indicative as to where the negotiations on the ABS-regime are heading, and hence also of IP-neighbouring rights.⁷⁵⁷

A preambular paragraph of the draft ABS-protocol proclaims that rights of indigenous and local communities to their TK shall be taken into account. Article 5 *bis* sets forth that states shall take measures with the aim of ensuring that TK held by indigenous and local communities is accessed only subject to their “*consent/approval and involvement*”. Pursuant to Article 4.1, indigenous and local communities are, when applicable, entitled to benefit-sharing when their TK is being used. Article 9.5 stipulates, however, that states shall merely *encourage* benefit-sharing when the TK used is situated in the public domain. If briefly analyzing the draft ABS-protocol, it clearly involves the central elements analyzed throughout the doctoral thesis. The protocol affirms that indigenous peoples hold rights to TK, and that these rights can be both complete rights and rights to benefit-sharing. As to the more precise scope of the rights, as indicated above, the draft ABS-protocol is rather vague. Its draft provisions are not at all as concrete as the WIPO draft TK and TCEs Instruments. But if

⁷⁵² CBD Article 1 only explicitly refers to benefit-sharing in the context of the utilization of GR. Still, the parties to the Convention have read CBD Article 1 in conjunction with Article 8 (j), thus concluding that benefits shall be shared also with regard to use of TK associated with such resources.

⁷⁵³ UNEP/CBD/COP/7, decision VII/19

⁷⁵⁴ UNEP/CBD/COP/9/, decision IX/12

⁷⁵⁵ As the ABS WG, again, failed to deliver the expected result at its 9th session, the ABS WG is reconvening for a resumed session as this doctoral thesis is delivered in early July, 2010.

⁷⁵⁶ UNEP/CBD/WG-ABS/9/3, Annex I

⁷⁵⁷ The focus in the negotiations on the ABS-regime is clearly on GR, which is also mirrored in the Chairs' text. As the doctoral thesis does not address GR, however, in this context are only outlined provisions in the Chairs' text relevant to TK.

speculating, the ABS-protocol will reaffirm that indigenous peoples' TK still under their control can only be accessed with the relevant people's consent. With regard to TK in the public domain, one can foresee some form of benefit-sharing arrangements.

11.4 UNESCO

UNESCO promotes international cooperation within the fields of education, science, culture and communication for the purposes of promoting peace and security. UNESCO was established in 1945, when memories of the atrocities committed in the name of theories on racial superiority were vivid. One main task entrusted to UNESCO was therefore to promote the notion that there are not several - but one - human race. This focus also impacted on UNESCO's approach to culture. Under its Constitution, UNESCO shall address cultural heritage with the aim of preserving it for the benefit of humankind. UNESCO shall assure the conservation and protection of the world's cultural and scientific heritage. Persons of all cultures should have ready access to scientific and cultural progress of all peoples. In other words, the UNESCO Constitution foresees no rights of particular segments of the world community to particular segments of culture. The first instruments UNESCO adopted mirrored the approach taken by the Constitution. They aimed at protecting culture as a common heritage of humankind. The instruments did not envision segments of society having particular rights to "their" culture. For instance, Article 1 of the Declaration on the Principles of International Cultural Cooperation⁷⁵⁸ (1966) proclaims that every people has the right and duty to develop its culture. It submits that all cultures are worthy of respect, but at the same time underlines that all cultures form part of the common heritage of mankind. One can hence draw a clear parallel between the objectives of UNESCO and the CBD. As the CBD was crafted to preserve biological diversity, for the benefit of humankind, UNESCO was established to maintain cultural heritage for the purposes of the entire mankind.

More recent UNESCO instruments have, however, not remained unaffected by the general trends in international law the doctoral thesis has outlined. Already the Declaration on Race and Racial Prejudice⁷⁵⁹ (1978) proclaimed that states have a responsibility to ensure respect for human rights also of groups. Articles 1 (2) and 6 (1) underlined groups' right to be different. Around this time, UNESCO further called on states to guarantee the recognition of

⁷⁵⁸ Proclaimed by the general conference of UNESCO at its 14th session, 4 November 1966

⁷⁵⁹ Adopted by UNESCO General Conference, 24 October – 28 November 1978

the equality of cultures and allow minorities to preserve their cultural identity,⁷⁶⁰ and acknowledged that recognized ethnocide as the denial of an ethnic group to enjoy, develop and transmit its culture, whether collectively or individually.⁷⁶¹ When adopting its Recommendation on the Safeguarding of Traditional Culture and Folklore⁷⁶² (1989) and its Declaration on Cultural Diversity⁷⁶³ (2001), UNESCO had clearly picked up on the international trend to recognize group rights. The Recommendation on Traditional Culture and Folklore proclaims that each people has the right to own its culture. The Declaration on Cultural Diversity held that the defence of cultural diversity is inseparable from respect for human dignity, and linked respect for the group to the effective enjoyment of individual human rights. That said, the Declaration further submitted that in case of conflict between collective and individual rights, the rights of the individual must prevail. Moreover, the Declaration followed the UNESCO tradition and added emphasis on culture as the common heritage of humanity.

It has been suggested that the UNESCO International Convention on the Safeguarding of Intangible Cultural Heritage⁷⁶⁴ (2003) brings this development further. Article 1 (b) proclaims as one of the purposes of the Convention to ensure respect for the intangible cultural heritage of communities, groups and individuals. Still, as the title of the Convention suggests, the material provisions appears to chiefly aspire to safeguard cultural heritage for the benefit of humankind.⁷⁶⁵ The Convention does not explicitly acknowledge that particular groups hold rights to their specific culture. Nonetheless, Francioni maintains that the focus of the Convention is on groups.⁷⁶⁶ Mezey goes further, positing that under the Convention, “*cultural heritage is always specific to a particular group*”.⁷⁶⁷ Further, the Convention for the Protection and Promotion of the Diversity of Cultural Expressions⁷⁶⁸ (2005) promotes everyone’s access to culture, suggesting that such access enhances cultural diversity and encourages mutual cultural understanding. But in addition, the Convention undertakes to

⁷⁶⁰ UNESCO Recommendation, adopted by UNESCO General Conference on 26 November 1976, Article 4. That said, it is unclear what the Recommendation meant with “minorities”. Comments by the UNESCO Secretariat suggest that the term embraced diffuse groups such as migrant workers. See UNESCO Doc. SHC/MD/31, Final Report, Annex II, p. 7.

⁷⁶¹ Declaration of San José, December 1981, F82/2F.32, preambular para. 2

⁷⁶² Adopted by UNESCO General Conference 17 October – 16 November 1989

⁷⁶³ Adopted by UNESCO General Conference on 2 November 2001

⁷⁶⁴ Adopted by UNESCO General Conference on 17 October 2003

⁷⁶⁵ See in particular Article 2 (3).

⁷⁶⁶ Francioni, Culture, Heritage and Human Rights, p. 15

⁷⁶⁷ Mezey, The Paradox of Cultural Property, pp. 7-8. Doing so, Mezey also notes how UNESCO has moved from viewing culture as something belonging to everyone or states towards a group orientation.

⁷⁶⁸ Adopted by UNESCO General Conference 20 October 2005

cater for an environment where individuals and groups can create and have access to their own cultural expressions. In this context, the Convention underlines that particular attention shall be given to the situation of indigenous peoples.⁷⁶⁹ The Convention does, however, stop short of protecting the cultural identity of distinct peoples.⁷⁷⁰

In conclusion, UNESCO has partly remained true to the spirit of its Constitution. It continues to aspire to preserve cultural heritage for the benefit of humankind and to encourage the sharing of cultural elements between cultures. At the same time, the trend in the UNESCO instruments is clear. As the CBD, UNESCO too has moved beyond its objectives. The World Cultural Organization has increasingly underlined that particular groups, including indigenous peoples, do enjoy rights to their particular cultures. In other words, an analysis of the relevant UNESCO instruments essentially confirms, or at least do not contradict, the doctoral thesis' conclusions above.

11.5 The UN Food and Agricultural Organization (FAO)

The FAO has elaborated the International Treaty on Plant Genetic Resources for Foods and Agriculture⁷⁷¹ (ITPGRFA). ITPGRFA Article 1 outlines an objective of the treaty very similar to the objective of the CBD. The objectives are “... *the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use...*” As to relevant substantive provisions, ITPGRFA Article 5 (1) (d) calls on states to “...*[p]romote in situ conservation of wild crop relatives and wild plants for food production, including in protected areas, by supporting, inter alia, the efforts of indigenous and local communities; ...*” Further, Article 9 (2) (a) includes protection for “*traditional knowledge relevant to plant genetic resources for food and agriculture*”. As the CBD, the ITPGRFA is a framework convention. Clearly, ITPGRFA Articles 5 (1) (d) and 9 (2) (a) address similar issues as CBD Article 8 (j), even though the provisions naturally only apply to knowledge pertaining to food protection. Also in other ways, the provisions are less far-reaching than the corresponding CBD provisions.⁷⁷² And unlike the CBD, FAO is yet to engage in standard-setting activities relating to the rights of indigenous peoples. In

⁷⁶⁹ Articles 1 (b-d and h), 2 (2 and 7), 5 (1) and 7 (1) (a) and (b)

⁷⁷⁰ Lenzerini, *Cultural Rights*, p. 130, and Donders, *A Right to Cultural Identity in UNESCO*, p. 337

⁷⁷¹ FAO Resolution 3/2001

⁷⁷² Stoll and von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law II*, p. 42

conclusion, the FAO activities offer little guidance as to the existence and scope of the rights subject to study in the doctoral thesis.

11.6 Conclusions on the scope and content of IP-neighbouring rights pertaining to indigenous peoples' collective creativity

11.6.1 Introduction

It is clear from the above that it is not possible to draw any definitive conclusions with regard to the existence, scope and content of potential IP-neighbouring rights pertaining to collective creativity. The instruments setting forth relatively concrete provisions, i.e. the draft ABS-protocol and in particular the WIPO IGC draft TK and TCEs Instruments, remain drafts. UNESCO has adopted a number of conventions etc. already in force. But these are rather generally formulated and, in addition, to some extent contradictory. The FAO and its activities offer little guidance on what rights indigenous peoples hold over their collective creativity. Notwithstanding, the Chapter will draw certain conclusions as to the scope and content of IP-neighbouring rights, albeit these conclusions necessarily have to be more about clearly discernable trends than about crystallized law.

11.6.2 Beneficiaries of protection

WIPO, of course, addresses creativity from an IPR-perspective. Consequently, the point of departure for essentially all WIPO's activities is that the creator of a work holds rights to the subject matter. Further, the state has a duty to enforce such right. Against this background, it is only natural that the draft TK and TCEs Instruments affirm that indigenous peoples hold rights over their collective creativity. One can safely assume that this principle will be enshrined in the finalized instruments, once agreed upon.

As seen, however, the other fora surveyed have a quite different approach to culture. Generally speaking, at least at first glance, the CBD aims at preserving biodiversity and TK for the benefit of humankind⁷⁷³, and UNESCO takes a similar view with regard to cultural elements. In addition, the reference to state sovereignty over biological diversity in the CBD preamble has resulted in CBD activities traditionally having had a fairly state-centred

⁷⁷³ As further seen, the FAO ITPGRFA takes a similar approach.

approach. Notwithstanding, recent activities undertaken under the auspices of these fora have not been oblivious to the general trends in international law. Hence, the draft ABS-protocol suggests that indigenous peoples are the holders of TK developed by them, submitting that TK can only be accessed subject to their consent. It can be expected that the finalized ABS-protocol, once agreed upon, affirms this principle. Similarly, more recently adopted UNESCO instruments go beyond the UNESCO Constitution, and entertain the idea that groups, including indigenous peoples, can enjoy rights to their particular culture. In conclusion, although processes are still ongoing, one can safely infer that international bodies addressing IP-neighbouring rights will reaffirm recent developments within international human rights law. These fora too, assert/will assert that indigenous peoples are the owners/holders of cultural elements developed by them.⁷⁷⁴

11.6.3 Term of protection

Section 11.2.2 explained how the WIPO IGC's TK and TCEs Instruments take the position that protection of TK and TCEs shall last as long as a cultural element remains culturally relevant to the indigenous people in question. Moreover, the TK and TCEs instruments seem to hold that this logically follows from how TK and TCEs necessarily have to be defined. As one distinguishes TK and TCEs from knowledge/cultural expressions in general by their connection to a particular cultural environment, it is this environment that determines how long knowledge/cultural expressions shall remain TK/TCEs, for legal purposes. In line with this conclusion, Kongolo notes that during the WIPO IGC deliberations, a majority of the WIPO member states have supported a protection of TCEs in perpetuity.⁷⁷⁵ As indicated above, unlike the WIPO IGC deliberations, the negotiations on the CBD draft ABS-protocol have so far focused on who hold rights to TK. Limited attention has been paid to chiselling out the more precise scope and term of potential rights. Hence, it is difficult to speculate on

⁷⁷⁴ In passing, one can note that this conclusion is in line with the African "*Model Legislation for the Recognition and Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Recourses*" (1998). The Model Legislation recognizes that local communities hold collective rights to TK. The jurisprudence too, agrees that indigenous peoples are owners of TK and TCEs developed by them. See Cottier, Introduction, p. xxvii, Kongolo, *Unsettled International Intellectual Property Issues*, p. 61, and Biber-Klemm and Szmura Berglas, *Problems and Goals*, pp. 18-19. See also Taubman and Leistner, *Analysis of Different Areas of Indigenous Resources*, pp. 111 and 143, where the authors note the trend in international law to recognize that the principle of prior informed consent applies to TK. The authors further survey existing TK laws, noting that these clearly recognize that TK protection shall benefit the traditional holders of such knowledge.

⁷⁷⁵ Kongolo, *Unsettled International Intellectual Property Issues*, p. 59

what will be the more precise outcome of these deliberations. The UNESCO instruments too, are silent on the term of protection of potential rights to cultural elements.

In conclusion, although not yet agreed on, the WIPO IGC TK and TCEs Instruments have built into their very structure that rights to TK and TCEs shall last as long as the cultural element remains culturally relevant to the indigenous people in question. It appears likely that this structure will be present also in the finalized instruments. Albeit the CBD and UNESCO offer little guidance on the matter, it appears reasonable to conclude that IP-neighbouring rights are leaning towards a term of protection that is not limited in the way conventional IPRs are. This position is also shared by Cottier and Panizzon.⁷⁷⁶ The conclusion is significant. Section 5.4 and Chapter 9 analyzed in depth whether indigenous peoples' property rights over their collective creativity – as they are rooted in the right to non-discrimination – would be subject to the same time-limitations as conventional IPRs. Following careful deliberations, Chapter 9 concluded that such is not the case. This inference now gains support from the analysis of IP-neighbouring rights.

11.6.4 Scope of protection and benefit-sharing

Sections 11.6.2 and 11.6.3 demonstrated how, although negotiations in the most relevant processes are still ongoing, it appears clear that indigenous peoples' hold/will hold IP-neighbouring rights to their collective creativity and that such rights are valid as long as cultural elements remain culturally relevant. With regard to scope of protection, predictions are more difficult. Section 11.2 outlined how the WIPO IGC TK and TCEs Instruments take very different approaches to the scope of protection. Whereas the draft TCEs Instrument offers a fairly broad scope of protection, the draft TK Instrument submits that complete protection shall be limited to apply only against acquisition and utilization through unfair and illicit means. On the other hand, the TK Instrument asserts that when an indigenous people has created TK, and no complete protection applies, there should be benefit-sharing. It is difficult to see why TK and TCEs should be subject to such different forms of protection. Perhaps, one can therefore expect the different approaches taken to converge as the negotiations progress. If so, it remains to be seen which approach prevails.

⁷⁷⁶ Cottier and Panizzon, *A New Generation of IPR for the Protection of Traditional Knowledge*, pp. 227

For the reasons Section 11.6.3 outlined, the draft ABS-protocol offers even less guidance as to the scope of IP-neighbouring rights. Essentially, the only discussions entertained in the ABS WG pertaining to scope have been on whether rights should be extended also to TK already in the public domain. As seen, the present indications are that indigenous peoples enjoy complete protection only with regard to TK still held by them. Yet it is not possible at this point to definitively conclude that the ABS-protocol, once agreed on, will not award rights also to at least certain TK in the public domain. Discussions are in addition ongoing as to what extent indigenous peoples have rights to benefit-sharing arrangements when rights to ownership/control does not apply, although a provision in the present draft suggests that states need only “*encourage*” benefit-sharing in instances when TK is in the public domain. Again, the UNESCO instruments do not go into details on these issues.

In sum, it is difficult to draw any definitive conclusions as to what scope of protection IP-neighbouring rights will offer indigenous peoples. Still, some trends appear relatively clear. Most likely, IP-neighbouring rights will offer complete protection to cultural elements still under indigenous peoples’ control. What protection will apply to cultural elements in the public domain is less clear. It seems unlikely, however, that a system of protection will emerge awarding indigenous peoples complete rights to all cultural elements in the public domain. Perhaps one can expect a protection system submitting that cultural elements that are sacred or in other ways of great cultural significance shall be under indigenous peoples’ control. Further, it appears clear that complete protection will be complemented by benefit-sharing rights. But it is difficult to predict the more precise scope and content also of such emerging arrangements. To wrap up, IP-neighbouring rights have not crystallized to an extent where one can draw any firm conclusions as to the scope of the rights. Notwithstanding, one can nonetheless infer that the general trend within IP-neighbouring rights seems to, broadly speaking, support the conclusions drawn in Chapter 9. IP-neighbouring rights too, will offer indigenous peoples a mix of complete rights and rights to benefit-sharing arrangements.

11.7 *Interfaces between human rights and IP-neighbouring rights*

The issue of whether IPRs can constitute human rights has been subject to some debate.⁷⁷⁷ Drahos submits that IPRs do not constitute human rights. He points to the limited term of protection inherent in most IPRs, and that the continued existence of some IP-mechanisms is subject to registration. Human rights, on the other hand, are of course valid as long as they are relevant to the human being, and remain in force irrespective of registration. Drahos further notes that human rights are universal, applying equally to all. IPRs, on the other hand, vary from country to country, subject to national legislation. For these reasons, Drahos infers, IPRs cannot be human rights.⁷⁷⁸

This doctoral thesis has pointed to that the rights enshrined in UDHR Article 27.2 and CESCR Article 15.1 appear to be at least akin to IPRs. Consequently, it is only natural that when commenting on Article 15.1, the CESCR addressed the relationship between IPRs and human rights. In General Comment No. 17, the Committee draws a distinction between IPRs and human rights. Human rights, CESCR declares, derive from the inherent dignity and worth of all persons. They are fundamental, inalienable and universal entitlements inherent to and belonging to individuals and sometimes groups. IPRs, on the other hand, the Committee continues, are first and foremost means through which states seek to provide incentives for inventiveness and creativity, for the benefit of society as a whole. In the same vein, CESCR notes that while human rights to creativity protects the moral and material interest resulting from the link between persons, peoples and other groups and their creations, IPRs primarily protect business and corporate interests and investments. As Drahos, the CESCR further points to IPRs generally being of a temporary nature as yet another fact arguing for IPRs not constituting human rights. CESCR concludes by underlining the importance of not equalling IPRs with human rights.⁷⁷⁹ Surprisingly, the CESCR manages to dodge the entire issue of the relationship between human rights and IPRs in its General Comment No. 21.

⁷⁷⁷ Dutfield and Suthersanen, *Global Intellectual Property Law*, p. 213. When contemplating whether IPRs can constitute human rights, the discussion is limited to IPRs held by humans, either individually or as groups. IPRs vesting in cooperations are not considered, since corporations are not, at least not directly, bearers of human rights.

⁷⁷⁸ Drahos, *The Universality of Intellectual Property Rights*, pp. 21-22, and *Intellectual Property and Human Rights*, pp. 355-357

⁷⁷⁹ General Comment No. 17, paras.1-3

Dutfield and Suthersanen, on the other hand, maintain that IPRs are, or at least can be, human rights. They seem to base this conclusion mainly on the proximity between CESCR Article 15.1 and IPRs. Dutfield and Suthersanen argue that the wording of CESCR Article 15.1 proves that IPRs are human rights. They add that in the recent *Anheuser-Busch v. Portugal*⁷⁸⁰, the ECHR has confirmed that IPRs constitute human rights, positing that intellectual property “undeniably attracted the protection of Article 1 of Protocol No. 1” of the ECHR. Dutfield and Suthersanen hence take issue with CESC General Comment No. 17. They submit that the CESC overemphasizes the importance of IPRs for business, and undervalues the moral right aspects of IPRs.⁷⁸¹

So which of the two positions submitted is right? Are IPRs human rights? The answer is probably that the question is not sufficiently precise, resulting in the arguments put forth passing by one another. It is helpful to revisit the brief discussion on the theories behind general property rights outlined in Section 5.2.1. It was explained that property rights theory distinguishes between general and special property rights. Put simply, general property rights theories submit that everyone should have a positive right to own certain property. Special property rights theories, on the other hand, assert that there should be no general right to have property. There should only be a negative right not to be deprived of property, once one has acquired such. The doctoral thesis did not pursue the *theoretical* discussion beyond the just stated. But Section 5.2.2 concluded that from a *legal* perspective, it is clear that the right to property human rights law embraces is that professed by the special rights theories. In other words, the human right to property merely envelopes a negative protection implying that one must not be arbitrarily deprived of property held. Since IPRs is just one form of property among others, it seems to follow that IPRs are not human rights *per se*. As noted, states are in principle free to design their own IPRs, or to have no IP-legislation at all. Similarly, when the ECHR in *Anheuser-Busch v. Portugal* held that IPRs attract the protection of the property rights provision in the ECHRFF, the Court did not suggest that everyone has the right to own IPRs. Rather, the ECHR concluded that when someone holds an IPR, the ECHRFF prevents the arbitrary deprivation of the same right. Hence, if domestic legislation recognizes that certain forms of human creativity is worthy of IP-protection, the right must apply equally to all individuals and groups. In other words, as soon as national law recognizes that certain forms of creativity are protected by IPRs, those rights become protected as human rights to

⁷⁸⁰ *Anheuser-Busch Inc. v. Portugal* [GC], Appl. No. 73049/1, Judgement of 11 January 2007

⁷⁸¹ Dutfield and Suthersanen, *Global Intellectual Property Law*, pp. 214-222

property. But again, international law does not demand that human creativity be protected as a human right to property. One is free to argue that it should be, but that is not the law today. Thus understood, these aspects of UDHR Article 27.2 and CESCR Article 15.1 (c) can be viewed as specialized property rights provisions, explicitly underlining that the general human right to property pertains also to IPRs. In conclusion, depending on from what angle one views the matter, one can claim that there is either a complete interface between IPRs and human rights or almost no overlap at all. In the sense that since IPRs, once established, are protected under the human right to property, there is in a way an exact match between IPRs and the human right to property. But at the same time, one can argue that property rights embracing no obligation on what subject matter shall be protected as IPRs implies that there is no interface *between IPRs and the human right to property*. But even if taking the latter position, this is not to say that there is no interface between *IPRs and human rights in general*.

Chapters 4 and 8 noted that in addition to proclaim rights at least akin to property rights, CESCR Article 15.1 (c) and UDHR Article 27.2 also have cultural rights aspects. Cultural rights are not subject to national legislation in the manner IPRs are. Creators enjoy certain rights over their specific creativity as cultural rights, which domestic law must protect.⁷⁸² In other words, albeit *IPRs* are not in themselves human rights, *creativity* enjoys human rights protection. And to the extent IPRs have been extended to creativity, creativity is also protected under the human right to property. Still, protection of creativity need not necessarily be achieved through IPRs. Penal laws etc. can serve the same purpose. Still, since IPRs are so often used to establish the protection cultural rights demand, cultural rights can be viewed as to some extent driving IPRs, and, by doing so, indirectly also property rights. Cultural rights spark the development of IP-protection which in turn results in human creativity increasingly being protected as property rights. Indeed, it is precisely such a development that is the subject of study in this doctoral thesis. The thesis has to large extent focused on how the human right to property – deeply rooted in the right to non-discrimination – is driving the development of IP-similar rights embracing indigenous peoples’ collective creativity. But at the same time, the search for IP-similar rights extending to collective creativity is also a result of developments within the area of cultural rights. As described, previously the right to benefit from the moral and material interest of one’s creativity was

⁷⁸² As Green observes, UDHR Article 27.1 and CESCR Article 15.1 raise the right to benefit from the “*material and moral interest resulting from one’s work*” to the level of human rights. See Green, Drafting History of the CESCR; E/C.12/2000/15, para. 45.

understood purely as an individual right. But when the right envelopes also collectives, states must somehow respond to this development. One way to do so is through IP-neighbouring mechanisms. In this sense, the search for such tools can be viewed as responding to evolved understandings of both the right to property and the right to culture. This further implies that it is not only the various spheres of human rights law that are mutually supportive. Also the area of IP-neighbouring law supports the conclusions drawn in the human rights chapters. The perceived need to renovate the IP-system to better apply to indigenous peoples' collective creativity in itself lends support to the position that indigenous peoples hold human rights to their collective creativity.

12. CONCLUDING REMARKS

12.1 *Introduction*

As Chapter 1 explained, the doctoral thesis has two purposes. In concrete terms, the Chapters above have tried to answer to what extent indigenous peoples have the right to own and/or determine over their collective creativity. But in addition, in order to conduct these analyses, the thesis has surveyed essentially all areas of international law most central to the indigenous rights discourse. This implies that the thesis has also provided a general overview over indigenous peoples' rights under contemporary international law. With regard to the latter purpose, the specific survey of what rights indigenous peoples enjoy to their collective creativity can be viewed as illustrating examples over how the general principles within the indigenous rights discourse materialize into concrete law when applied to a specific subject matter.

This final Chapter aspires to wrap up and summarize both the specific and general analyses of the thesis. In other words, the Chapter offers some final conclusions as to (i) what rights indigenous peoples hold to their collective creativity, and (ii) what is the general status of indigenous peoples' rights within the contemporary international legal system. The first part of the Chapter returns to the concrete examples of appropriations of indigenous cultures outlined in the very first Section of the doctoral thesis. Based on the conclusions drawn in previous Chapters, Section 12.2 answers to what extent the examples of non-members use of indigenous peoples' cultures conform with international law. Subsequently, Section 12.3 offers some final observations, again based on the analyses above, as to what legal status and rights indigenous peoples have under contemporary international law.

12.2 *Specific examples of potential acts of misappropriation*

12.2.1 **Does Miss Finland have the right to wear the traditional Saami dress?**

The right to culture

The doctoral thesis has concluded that indigenous peoples have a right to be free from utilization of their cultural elements that seriously harms their collective cultural identity. Whether a use causes harm or not must be judged against the cultural parameters of the people whose creativity is being used. Use by non-members of the Saami peoples' traditional dress can under certain circumstances cause considerable harm. That is of course particularly so if the dress is used in a derogatory or otherwise offensive manner. To illustrate, the Rovaniemi area in northern Finland hosts a large tourism industry which has incorporated many of the most prominent features of the Saami culture into its concept. However, most often the Saami cultural elements are displayed in a non-authentic way. Tourist guides regularly welcome visitors at the airport in costumes intended to resemble the Saami traditional dress. Actors post as Saami in fake "Saami villages". The Saami individuals are generally cast as dirty, drunk and half-witted. This practice has resulted in the Saami youth in the area avoiding using their traditional dress in an attempt not to be mistaken for tourist guides or stereotypes. Also in other ways, they hide their cultural background. It is easier to simply blend in with the Finnish population. Clearly, such uses of the Saami culture constitute a threat to the collective Saami cultural identity.

But utilization need not necessarily be objectively derogatory to cause damage. Not all Saami persons physically distinguish themselves significantly from members of the majority population. In addition, even though the Saami remain a dominating culture in central parts of their traditional territories, the Saami population blends with the majority population in most of the Saami people's traditional territory. Under such circumstances, if the non-Saami population in addition starts wearing the traditional Saami dress, the majority population might gradually stop thinking of the Saami as a distinct, separate, culture. Rather, the majority will come to consider the Saami as a part of the majority culture. Soon, the majority population will see no reason for policies aiming at creating an environment where the Saami can preserve their cultural identity.

The above would imply that not all uses of indigenous peoples' traditional dresses by non-members are prohibited. The use must either be seriously culturally offensive or risk integrating members of the indigenous people into the majority population. This would imply that uses of the traditional Saami dress that is respectful, and acknowledges the Saami people's status as a distinct people, is allowed. Examples of such use might be when members of the non-Saami royal families occasionally wear the traditional Saami dress to honour important occasions of the Saami people. Examples that would clearly be disallowed would be common non-Saami persons starting to use the Saami traditional dress on a regular basis (which do not occur presently). Also prohibited is use of the traditional Saami dress by non-Saami persons in the tourist industry, particularly in a derogatory manner. Miss Finland using the Saami dress seems to be a middle-ground example. Much would depend on how more precisely the dress is used. But if used in a correct and respectful manner, acknowledging that the dress is "borrowed", the use is probably legitimate.

The right to self-determination

The Saami traditional dress comes in many regional and local variations. All have been widely disseminated to a general public for a longer period of time. No third party rights would pertain to the Saami traditional dress (although a few non-Saami individuals presumably own a physical example of the dress). The traditional Saami dress is, in other words, in the public domain. Hence, if indigenous peoples enjoy *the* general right to self-determination, they have the right to determine over the use of the traditional Saami dress⁷⁸³, and can hence preclude non-members from using the same. But also if indigenous peoples' right to self-determination is rather a *sui generis* right, they still have the right to determine over cultural elements in the public domain, if no profound and genuine interest of society as a whole exists arguing for it be allowed to take part in the decision making on the use of the cultural element. No such genuine state interest can be said to pertain to the Saami traditional dress. In addition, the above has pointed to how culturally important the traditional dress is to the Saami. Consequently, also under a *sui generis* right to self-determination, the Saami people has the right to determine over the use of its traditional dress.

⁷⁸³ Obviously, since the Saami traditional dress varies between regions and communities, the decision on how each and every variation of the dress is to be used would be made on a regional/local level. But again, the doctoral thesis is not concerned with the internal relationships within an indigenous people.

Property rights

As mentioned, the Saami traditional dress is in the public domain. Hence, the Saami people hold property rights to the dress.

Benefit-sharing

It is difficult to imagine situations where benefit-sharing situations would arise with regard to the traditional Saami dress.

12.2.2 May multinational corporations patent indigenous peoples' knowledge about flora and fauna absent their consent and/or remuneration being paid?

Cultural rights

The doctoral thesis has identified that in certain instances, use of TK by non-members can be seriously harmful to the collective identity of an indigenous people. TK not uncommonly constitutes an integral part of the collective cultural identity of an indigenous people. Use by non-members causing serious injury to the identity of the indigenous people is then prohibited. In case of sacred TK, or TK that for other reasons is of particular cultural importance to the indigenous people, patenting – which includes both a commoditisation and disclosure of the TK – is prohibited.

The right to self-determination

Of course, indigenous peoples' TK can be (i) still controlled by the indigenous people in the sense that it has not been shared with the outer world, (ii) widely known and hence in the public domain, and (iii) subject to patents or other third party rights held by non-members. If indigenous peoples' right to self-determination is the general right enjoyed by all peoples, indigenous peoples have the right to maintain control over TK already held by them. They also, in principle, have the right to regain control over TK in the public domain.⁷⁸⁴ With regard to TK to which third party rights pertain, indigenous peoples have the right to have such returned which is of particular cultural relevance to the indigenous people in question. In addition, they have the right to prevent uses that are culturally offensive or for other

⁷⁸⁴ Sometimes, however, it is probably more or less impossible to bring TK already widely circulating completely back under the control of the indigenous people. In such instances, benefit-sharing might be a viable option. See below under *Benefit sharing*.

reasons inappropriate. With regard to other forms of uses, benefit-sharing might be an option.⁷⁸⁵ As third-party rights expire, indigenous peoples of course regain control over such TK. It does hence not re-enter the public domain.

If indigenous peoples' right to self-determination is rather a *sui generis* right, indigenous peoples still have the right to continuously determine over TK already under their control. As to TK in the public domain, it might be a profound and genuine interest of the state, or perhaps rather of states, to preserve some of the functions of the public domain. Continued use for e.g. teaching purposes and non-commercial research might still hence be allowed. But when such pressing needs of society as a whole is not present, the TK shall as a general rule be returned.⁷⁸⁶ When third party rights pertain, the indigenous people as a general rule does not have the right to have such TK returned until the right expires. Until that time, however, the indigenous people can still prevent uses that are harmful to the indigenous people's culture, or in other ways insensitive. Further, benefit-sharing might again often be an option.

Property rights

Indigenous peoples hold property rights to TK still controlled by the indigenous people and in the public domain. With regard to TK to which third party rights pertain, there are no property rights.

Benefit-sharing

A couple of basic benefit-sharing situations arise in the present example. Indigenous peoples hold rights to TK in the public domain under the right to property. In addition, the right to self-determination too applies to most such TK. Still, if the TK is widely spread, it might be essentially unfeasible to bring the TK back under the indigenous peoples' control. In such instances, it might be an option to allow benefit-sharing arrangements to "replace" full return of the TK. In other instances, even if it would be possible for the indigenous people to regain control of the TK, the TK might not be of such cultural and/or spiritual importance that controlled and culturally respective use by non-members is harmful. Under such circumstances, the indigenous people might voluntarily seek benefit-sharing agreements.

⁷⁸⁵ See further under *Benefit sharing*.

⁷⁸⁶ Again, when this is not possible, benefit-sharing might be an option.

When third party rights pertain to the TK, the indigenous people hold no property rights to the TK in question. However, at least in certain instances, a right to benefit-sharing might follow as a fair middle-ground position under the right to self-determination

12.2.3 Are non-members allowed to copy indigenous art onto carpets, clothes and greeting cards, absent their consent and/or without remuneration being paid?

The right to culture

In certain circumstances, display of its traditional art can cause considerable harm to the collective cultural identity of an indigenous people. That is so if the art is sacred, or for other reasons particularly culturally sensitive. The art being exposed outside its cultural context to a wider public can in such instances deprive the art of its cultural/spiritual value. Under such circumstances, the use is prohibited.

The right to self-determination

Since the art is being copied onto commercial objects, it is presumed that it has been widely disseminated prior to use by non-members. Further, it is assumed that third party IPRs do not pertain to the subject matter (although of course numerous property rights can pertain to physical copies of the art). The situation is hence quite similar with the Saami traditional dress, outlined under 12.2.1. If indigenous peoples' right to self-determination is the general right applying to all peoples, the people essentially enjoys a complete right to control the art. If the right is rather a *sui generis* right, indigenous peoples' right to control its traditional art is still extensive, since in most instances it is difficult to imagine a genuine and pressing need calling for the right not to apply. In sum, the indigenous people will in most instances be allowed to determine the use of its art on carpets, clothes etc.

Property rights

As it is presumed that the art is in the public domain, indigenous peoples hold property rights to the art.

Benefit-sharing

Essentially two benefit-sharing situations seem to be present in this example. As the indigenous people hold rights to the art, it shall in principle be allowed to decide over its use.

But similar to Section 12.2.2, a lot of art might already have been so widely distributed that it is no longer possible to control its further use. Then one can imagine benefit-sharing arrangements as a practical alternative for uses that are not culturally insensitive or inappropriate. And again, also in instances where full control is feasible and practical, the indigenous people might be interested in benefit-sharing arrangements with regard to controlled and culturally respectful use by non-members which are not harmful to the indigenous peoples

12.2.4 Is the tourist industry allowed to freely use attributes of indigenous peoples' cultures?

The question is very generic, and hence difficult to answer concretely. It will of course depend on the nature of the cultural element being used in each instance. Still, generally speaking, one can presume that most attributes used by the tourist industry are in the public domain. This implies that indigenous peoples hold both property rights to the cultural elements. In most instances, the right to self-determination also applies. Unauthorized use by the tourist industry is hence prohibited. If the tourist industry wants to display the indigenous peoples' culture in its activities, it needs to seek benefit-sharing arrangements.

12.2.5 Are non-member artists allowed to copy indigenous handicraft and sell such copies as authentic?

See Section 12.2.3.

12.2.6 Are non-member musicians allowed to fuse indigenous songs into their own productions, without acknowledging the indigenous composer and without paying compensation?

Cultural rights

In most instances, indigenous peoples' traditional songs being used outside their context is probably not so disturbing as to cause serious harm to the indigenous people's culture. Still, if the song e.g. forms part of a sacred ritual, use by non-members – particularly for commercial purposes and/or where the song is distorted - can deprive the song of its spiritual value and hence be seriously harmful to the collective identity of an indigenous people. The use is then prohibited under the right to culture.

The right to self-determination

Indigenous musical tunes are with few exceptions presumably in the public domain. In addition, however, when such a tune is fused into a non-member musician's production, that musician acquires copyright to that version of the song, provided of course that she adds sufficient new elements. Both the legal situation of the original song in the public domain and the new version to which third party rights pertain must be addressed.

With regard to the traditional song in the public domain, indigenous peoples have the right to determine over their traditional songs vis-à-vis non-member musicians irrespective of whether the right to self-determination is the general or a *sui generis* right. In the first instance, this is obvious. Further, as to the right to self-determination as a *sui generis* right, it is difficult to identify a pressing social need arguing for non-members being allowed to exploit indigenous peoples' traditional songs without remuneration.

With regard to new version of the traditional song, to which the non-member musician holds a third party right, the indigenous people can probably in most instances not determine that use of the song shall be discontinued. The exception would be if the song is derogatory or in other ways culturally insensitive, but those instances are probably rare. (In addition, as mentioned above, the indigenous people can determine that the use shall stop if it is seriously harmful to the cultural identity of the group.) However, in line with what has been said about the relevance of a comparison with moral rights when determining the scope of the right to self-determination, the musician is presumably obliged to acknowledge the indigenous people as the originator of the tune. With regard to remuneration, see below under *Benefit-sharing*.

Property rights

To the extent songs are in the public domain, indigenous peoples hold property rights to the tune. No property right applies to the song once a copyright of the musician applies to the song.

Benefit-sharing

As seen above, with regard to songs in the public domain, the indigenous people in principle can decide that the song shall not be fused into the new production. But again, it can sometimes be difficult to control a tune already widely disseminated. In addition, if it does

not cause cultural concerns, the indigenous people might be interested in lending the tune against compensation. In such instances, there shall hence be benefit-sharing. The music-industry has standards for use of other composers' work. But here one must add that the song might have specific cultural value to the indigenous people in question.

With regard to songs to which the musician already hold a copyright, one can imagine that this is such a situation where it is deemed fair that benefit-sharing is provided as a compromise under the right to self-determination.

12.2.7 Are corporations allowed to trade-mark indigenous patterns and signs for commercial purposes?

Cultural rights

Trademarking of indigenous peoples' patterns and signs might be seriously harmful to an indigenous people' collective cultural identity in the same manner as the patenting of their TK sometimes is. To the extent such is the case, trademarking is prohibited for the same reasons outlined under Section 12.2.2.

The right to self-determination

From a legal perspective, the situation when a corporation seeks to trademark an indigenous people's sign etc. is similar to when a people's song is commercialized by non-member musicians, as outlined under 12.2.6. Hence, two different situations must be addressed. When a sign etc. has not yet been trademarked, it "exists" solely in the public domain. But when a corporation has already trademarked the sign, in addition, the corporation enjoys a third party right to the sign in its trademarked version.

With regard to the sign, symbol etc. as such, similar to the situation of the fused song, the indigenous people has the right to determine over the sign etc. vis-à-vis the corporation regardless of whether the right to self-determination is the general or a *sui generis* right. That such is the case if the right to self-determination is the general right is again self-evident. But also if the right to self-determination is rather a *sui generis right*, it is difficult, indeed in this case impossible, to imagine a social need so pressing as justifying that an indigenous people's sign etc. be trademark against the peoples will.

The situation when a sign etc. has already been trademarked is legally different from the borrowed musical tune, outlined under 12.2.6. The reason is that the trademark potentially lasts in perpetuity. This implies that, unlike the song, which will eventually end up in the public domain and hence be brought back under the control of the indigenous people, the people will, unless measures are taken, never regain control over the sign. This speaks for the state having an obligation to expropriate the trademark and return it to the indigenous people. That is of course particularly so if the indigenous people perceives the use of the sign etc. as a trademark as offensive.

Property rights

If the sign is not already trademarked, the indigenous people hold property right to it and can prevent trademarking. If the sign has already been trademarked, no property right pertains.

Benefit-sharing

If the sign is not already trade-marked, the company needs an agreement from the indigenous people to be able to trademark the sign. Such an agreement will presumably include a benefit-sharing arrangement. If the sign is already trademarked, the indigenous people holds no power under the right to property. But as seen, the state might have an obligation to expropriate the sign under the right to self-determination. However, if the trademark is well established and of great value, and continued use not intolerable to the indigenous people, a benefit-sharing arrangement might be a more relevant alternative. In addition, a benefit-sharing arrangement can also be a middle-ground alternative when it is held that a right to full control does not follow from the right to self-determination.

12.2.8 Are non-members allowed to copy indigenous tattoos on themselves?

Cultural rights

Here, one must distinguish between two forms of tattoos. Some indigenous peoples, for instance in the Pacific, customarily tattoo themselves with patterns of cultural significance. If non-members copy such patterns onto themselves, as in the case of pop star Robbie Williams, this can cause serious offense. Indigenous tattoos are often perceived to form part of the identity of the person, and shall hence not be used at all by others, in particular not by non-members. One could say that the situation resembles, but is probably in most instances more offensive, than the use of the traditional Saami dress (the Saami dress too involves a number

of details specific to the identity of the wearer). It is probably difficult to imagine a situation where a non-member would be allowed to use a tattoo of an indigenous people that is culturally significant and forms part of the identity of the bearer.

A quite different situation is when a non-member tattoos a sign, symbol or pattern from an indigenous culture not traditionally used as a tattoo by the people itself. For instance, many indigenous sun symbols are popular objects for tattoos. Under such circumstances, the situation more resembles when indigenous signs are copied onto greeting cards, carpets etc. Naturally, the copy of a traditional sign on a human being might sometimes be particularly culturally sensitive. Notwithstanding, the test of whether the use is prohibited is the same as outlined in Sections 12.2.1 and 12.2.3.

The right to self-determination

In both the instances pictured, the sign is in the public domain. Presumably, no pressing need exists that warrants that non-members are free to use indigenous peoples' signs as tattoos against the people's will. That is of course particularly so with regard to tattoos forming part of the identity of members of the people. The indigenous people hence has a right to determine over the sign, also in the environment of tattoo-shops.

Property rights

In both the above mentioned instances, indigenous peoples hold property right to the sign. Use of the sign, also by a private person on the human body, must be regarded as a violation of that property right.

Benefit-sharing

Benefit-sharing arrangements in the current context are presumably unlikely.

12.3 *General conclusions on indigenous peoples' rights*

12.3.1 *The conventional international legal and political system*

The doctoral thesis initially described how the nation-state and liberalism surfaced together in the aftermath of the Peace of Westphalia. In collaboration, European sovereigns and liberal scholars gradually crafted an international legal system simultaneously confirming and

justifying the power of the state and liberal theories focusing on the individual. Political theories and the state agreed that the state is the sole collective international legal subject, and the only creator of international law. Liberalism and states further concurred that human rights could apply to individuals only. In the thus defined state-individual dichotomy, there was no room for indigenous peoples. They were stuck in a legal no-mans land. In sum, indigenous peoples enjoyed no rights, since (i) states were the only recognized collective legal subjects under international law, and (ii) only individual legal subjects enjoyed human rights. The thesis further outlined how these basic features of the world order and the international legal system got entrenched over the centuries that followed. And when the young United Nations set out to craft the contemporary international legal system, it did not hesitate to adopt the fundamental premises of the liberal legal system.

The decolonization process resulted in the freedom of the former colonies, but did nothing for the indigenous rights discourse. On the contrary, decolonization was interpreted as implying freedom for territories with their populations, irrespective of the territory's ethnic and cultural composition. The population of the territory was subsequently dubbed a people. In other words, the state-creation process furthered by the decolonization movement presented striking similarities with the creation of states in post-Westphalian Europe. It entrenched a legal order where artificially created states were *the* collective international legal subjects, and where there was no room for peoples, ethnically and culturally defined.

The doctoral thesis further observed how the "nation-states", both in Europe and in the former colonial territories, upheld an illusion that the state could be, and was, neutral between cultures. In the liberal nation-state, all cultures have the same opportunity to thrive, it was said. But it has further been demonstrated that in practice, the idea of the nation-state is a self-fulfilling prophecy, because virtually all nation-states promote nationalism. The nation-state is not culturally homogenous. But the population can be lured to believe it is, the ruling elite from the majority culture have realized in most so called nation-states.

In conclusion, entering the 1980s, more than 300 years of international law had confirmed the state as the sole collective international legal subject. Further, the state had human rights obligations to individuals only. A human rights system focusing entirely on equal rights of individuals had been opted for, rather than a system also catering for indigenous peoples and minority groups as such. Notably, an international legal system advocating a clinical state-

individual dichotomy suited perfectly a domestic political system wanting to put cultural differences aside, and focus only on the relationship between the state and the individual.

12.3.2 A spawning-ground for indigenous peoples' rights is created

The international legal and political order pictured above appeared rock-steady. But in the 1980s and early 1990s, two developments occurred somewhat shaking the picture.

First, political theory increasingly challenged the basic premises of conventional individual liberalism. In particular, political thinkers questioned whether (i) the state can be, and is, neutral between cultures, and (ii) individuals are able to disconnect themselves from their cultural and ethnical background in the way classical liberalism suggests. More and more scholars came to agree that the state always indirectly, and most often deliberately, favours the culture of the majority. Further, it was recognized, for many individuals, their cultural and ethnic background is an integral part of the person they are. It is nothing they can change on a market-place of ideas, however lucrative the offer of an alternative culture might be. Within a relative short time-period, a majority of liberal political thinkers joined around these basic premises, resulting in a new dominating wind within political philosophy. This line of thought concluded that the only rationale way to address the facts that (i) the state, left to its own devices, will always favour the culture of the majority culture, and (ii) to certain individuals, leading a good and meaningful life presupposes an environment created by their specific cultural and ethnic background, is to recognize rights proper of the group as such.

Second, around the same time period, the world community turned its attention to the situation of indigenous populations. Doing so, the UN and its member states more or less immediately concluded that the situation of indigenous populations differ considerably from that of ethnic and cultural minorities. It was perceived that indigenous populations, to a larger degree and minorities, had maintained their own distinct societal structures and ways of life. In other words, indigenous societal structures could be said to continuously exist side-by-side with the majority society, to an extent not present among most ethnic and cultural minorities. Also, generally speaking, the political aspirations differed. While indigenous peoples were determined to continuously remain as distinct polities *outside* the majority society, many – if not all – ethnic and cultural minorities aspired for respect for their cultural and ethnic

distinctiveness *within* the majority society.⁷⁸⁷ The perceived difference between indigenous populations and minorities resulted in international law – basically from the outset – taking a different approach to the two categories of groups.

The outlined two developments crystallized into law. One legal response was the emergence of a minority rights system in the early 1990s, manifested both in specific legal instruments addressing the situation of members of minority groups and evolved interpretations of cultural rights provisions in already adopted legal instruments, first and foremost CCPR Article 27. Contributing to this development was the right to non-discrimination, which simultaneously took on a second facet. The right to non-discrimination progressed to not only imply that states must refrain from actively discriminate among individuals. In addition, the right came to embrace a positive obligation on states to prevent discrimination. In practice, the new minority rights, and the evolved understanding of the rights to culture and non-discrimination, extended an indirect protection also to the group as such. Formally, however, minority rights were still rights of individual members of the group, and not of the group as such.

Differently, when international law in parallel for the first time seriously addressed rights of indigenous populations, it focused on the collective aspects of these societies. The rights of indigenous populations, enshrined first and foremost in ILO 169, at least arguably constituted the first example of international law recognizing collective human rights proper, beyond the right to self-determination. In other words, these were rights also formally protecting e.g. the cultures of indigenous populations as such. At the same time, it was clear that ILO 169 did not proclaim peoples' rights. This follows indirectly from the omission of the right to self-determination in the Convention, and explicitly from ILO 169 Article 1 (3).

In conclusion, the outlined legal sources confirmed that international law had broken with a clinical state-individual dichotomy. International law too, had recognized that a complete focus on universal human rights cannot adequately cater for those wishing to remain culturally distinct. Doing so demands protecting also the group as such, wherefore an indirect such protection was catered for. But the outlined legal sources further confirmed the distinction made between indigenous populations, on one hand, and minority groups, on the

⁷⁸⁷ Not accounted for here is the situation and aspiration of non-indigenous non-state forming peoples. As the doctoral thesis has touched upon on a few occasions, both the defining characteristics of such groups and their political aspirations are closer to those of indigenous peoples than of minorities.

other. While minority rights were individual rights, ILO 169 enveloped a broad spectrum of rights applying also formally to indigenous populations *per se*. Further underscoring the legal distinction made between indigenous populations and minority groups was the very different approaches taken in the two UN Declarations applying to the respective groups crafted around this time. As seen, the Minority Declaration proclaimed only individual rights. The draft DRIP, on the other hand, envisioned a number of peoples' rights, including to self-determination. Hence, this era did not result in the establishment of any peoples' rights of indigenous peoples. But the outlined developments were still critical, as they sent the clinical state-individual dichotomy to the history of law books after more than 300 years of reign, and lay the foundation for future developments.

12.3.3 The surface of indigenous peoples' rights proper

Surveying whether international law has taken a final step and recognized rights proper of indigenous peoples, it is helpful to study the rights to culture and self-determination jointly, viewed through the prism of the right to non-discrimination. That is so since the questions (i) do indigenous peoples constitute "peoples" for the purposes of the right to self-determination, and (ii) do indigenous peoples enjoy collective rights to culture, must reasonably produce the same answer. It is either "yes" or "no" in both instances, but not "yes/no" or "no/yes". Moreover, the right to non-discrimination is likely to have followed suit, regardless of whether the path has been towards "yes" or "no".

The above has already demonstrated how the right to cultures and non-discrimination simultaneously took one step together, both taking on a facet indirectly protecting the cultural practices and identity of groups as such. But a joint analysis of international legal sources pertaining to these two set of rights reveals a further parallel development towards a third facet. And progressing towards the third facet, the two rights were joined by a simultaneous development within the right to self-determination.

Since roughly the late 1990s, the UN treaty bodies authorized to take a position on the applicability on the right to self-determination have developed a coherent jurisprudence asserting that indigenous peoples constitute peoples proper for the purposes of the right to self-determination. Simultaneously, all relevant treaty bodies, as well as other international legal sources, have concluded that indigenous peoples hold other peoples' rights proper,

including to their cultural identity and practices. These developments in globally applicable international legal sources have been matched by similar conclusions by regional human rights bodies on most continents. Moreover, state practice has confirmed indigenous peoples' rights in general, and their right to self-determination to be exercised through autonomy and self-government, in particular.

As indicated, the developments within the rights to self-determination and culture have been mirrored by the right to non-discrimination too, taking on a third facet. True, the third facet has been formulated somewhat differently by the various human rights institutions, including by the UN treaty bodies. Notwithstanding, if looking closer at the various wordings, one discovers that the right formulated is essentially the same. The right to non-discrimination too, has recently been interpreted to apply also to groups. The protection is indirect, but nonetheless for all practical purposes implies that the right applies also to groups as such, not least in the context of indigenous peoples. Indeed, certain legal sources hold that in the specific context of indigenous peoples, the right to non-discrimination applies also formally to the group.

Also read isolated as pronouncing three distinct categories of rights, international legal sources emerging during the last decade or so present strong arguments for (i) indigenous peoples constituting "peoples" for self-determination purposes (ii) indigenous peoples being bearers of a collective right to culture, and (iii) the right to non-discrimination applying (indirectly) also indigenous peoples. But if one in addition analyzes these sources together, based on the presumption that the core of each of the three rights is very similar, and has a very similar purpose, the argument that such a right has been established becomes truly convincing. This core right could be formulated in line with:

"Indigenous peoples have a right equal to other peoples to maintain and develop their distinct cultures, societies and way of life, and to determine over these societies."

The conclusions within different spheres of law are in other words mutually supportive. What has been inferred above with regard to the contemporary understanding of the right to non-discrimination supports the conclusions drawn in the contexts of the rights to culture and self-determination, and vice versa. A joint analyze of sources formally pertaining to the rights to self-determination, culture and non-discrimination seems to establish that a right formulated

as above has crystallized in international law. Importantly, it further appears clear that the term “*peoples*” in the formulated right does not refer to peoples in the meaning the aggregate of the population of the state. Rather, “peoples” shall be understood in its true meaning, i.e. in terms of culture/ethnicity. Recent developments within international law have not only made history of the state-individual dichotomy. They have also clarified that for international legal purposes the term “*peoples*” can no longer be understood, or at least not exclusively understood, as referring to the aggregate of the population of the state.

Any lingering doubts about the conclusion above being correct were addressed by the DRIP. The DRIP process commenced essentially as the development in international law outlined above started. States were fully aware that the DRIP was supposed to offer the political response to a progression in international law until that moment driven largely by expert bodies and international courts. Thus informed, states adopted the DRIP with overwhelming support, a support that has increased during the few years that have passed since its adoption. Although not in itself a formally legally binding source, it is clear from a cotemporary understanding of the law on international legal sources, that DRIP interacting with the sources presented above constitutes concluding evidence of the development outlined above having crystallized into international law proper.

Important recent developments within the indigenous rights discourse have not been confined to the sphere of culture/self-determination. Also the conventional right to property has progressed to become highly relevant to indigenous peoples. Analyzing this right to, it helps to adequately conceptualize relevant rights, and survey together rights that bring greater clarity to one another. Indigenous peoples’ right to land, territories and natural resources has at least two foundations. Trying to crystallize the law it helps to distinguish between the two. A division can be made between land rights based on the right to culture, on one hand, and rights rooted in the general right to property, on the other. The former set of rights has been taken into account when analyzing the right to culture as described above. Turning to the right to property, it assists, indeed is necessary, to analyze also this right through the prism of non-discrimination.

In fact, the right to property is, at its core, an aspect of the right to non-discrimination. Unsurprisingly therefore, the right to property – as applied to indigenous peoples – has developed in the same path as the general right to non-discrimination. Recently, international

law has come to hold that it is not sufficient that domestic real estate provides for formal equality. It must also be culturally neutral in practice. It is discriminatory to design the law so that land use common to the majority population results in property rights to land, whereas communal land use characteristic to the indigenous people does not. In other words, inasmuch domestic law generally recognizes property rights to land, it must acknowledge that indigenous peoples use of its traditional territories also results in property rights thereto. That is so irrespective of whether the indigenous people's traditional way of using the land is considerably less intensive compared with land-utilization the law has conventionally acknowledged results in rights to land.

The outlined contemporary understanding of indigenous peoples' property rights to their traditional territories follows e.g. from UN treaty bodies. But also regional human rights institution and domestic courts have developed a coherent jurisprudence confirming this right. Further, as with the rights to self-determination and culture, states have reaffirmed that indigenous peoples hold property rights to lands traditionally and continuously occupied and/or used when adopting the DRIP.

The DRIP further supports the position taken in numerous international legal sources that indigenous peoples enjoy property rights not only to lands continuously used. In addition, it is suggested, they hold property rights to lands traditionally used, but which have subsequently been lost through colonization or other means. It appears clear that a right to restitution is at least emerging. This is so with regard to both the full right to restitution and benefit-sharing. Benefit-sharing could be labelled partial restitution since, albeit not bringing lost territories back under the control of indigenous peoples, it still implies that proceeds from the territory is channelled back to the indigenous people.

As explained, the recent recognition of indigenous peoples' property rights to their traditional territories is a direct result of a correct understanding of the right to non-discrimination. The right to non-discrimination is of course not only underpinning property rights to land, but property rights in general. The recognition of indigenous peoples' property rights to land implies a dismissal of the *terra nullius* doctrine, traditionally invoked to explain why indigenous peoples' traditional territories could be legally colonized because of not being sufficiently inhabited and used. If one examines the underlying rationales behind the *terra nullius* doctrine and the notion of the public domain, one notes that the two concepts have

denied indigenous peoples property rights to various forms of subject matter for very similar reasons. As indicated, indigenous peoples were denied property rights to their traditional lands because their use did not, it was held, sufficiently distinguish the land area in question compared with the same area prior to use. Comparably, indigenous creativity did not, it was deemed, result in property right because of not being sufficiently distinguishable compared with previous works of the people. Further contributing to lack of recognition of property rights were the fact that both indigenous land use and creativity were communal in nature, where one could not – judged by Western standards – sufficiently distinguish individual right-holders.

In sum, the exact same right to non-discrimination underpins both property rights to land and creativity. Indigenous peoples have conventionally been denied property rights to land and creativity for the same underlying reasons. These reasons have been held discriminatory in the land rights context, wherefore it has been recognized that indigenous peoples hold property rights to lands traditionally used. It follows that indigenous peoples hold property rights also to their collective creativity.

12.3.4 Further on the material content and scope of the rights

The rights to self-determination, culture and non-discrimination

Indigenous peoples constitute “peoples” for the purposes of the right to self-determination. All relevant international legal sources point to that the right to self-determination indigenous peoples enjoy is the right to self-determination, applicable to all peoples. This implies a right to self-determination of indigenous peoples on par with the right enjoyed by the majority people. Indigenous peoples hence have no less right to determine over natural resources in their territories, over the teaching of their children or over how their elders should be catered for, than do the majority people.

Still, it cannot be completely excluded that indigenous peoples’ right to self-determination is rather a right *sui generis* to them. If so, this would imply that the right is subordinated to the right enjoyed by peoples in the meaning the aggregate of the population of the state. The difference in scope and content between the two alternatives is not that dramatic, however. Even if indigenous peoples’ right to self-determination is a *sui generis* right, it follows explicitly from international legal sources and equally important from the underpinning

foundation of the right, that the right is to be implemented through autonomy and self-governance, and not through the political channels of the state. In particular from the foundation underlying the right to self-determination, it further follows that the right – also as a *sui generis* right - is still a genuine right to self-determination. In other words, indigenous peoples have a right to be self-determining also in matters of importance not only to the indigenous people, but also to the majority people. The right is not a mere right to consultation. Of course, the right must be exercised with respect for the interests and rights of the state/the majority people. But these rights/interest do not as a rule take precedent over the right to self-determination of the indigenous people. Rather, one must on a case-to-case basis determine which people's position prevails in instances of conflict.

For an illustration of how the right plays out in practice, see Section 12.2's illustration of the content and scope of the right to self-determination as a *sui generis* right in the context of collective creativity.

The right to property

Indigenous peoples hold property rights to lands traditionally used and/or occupied and continuously used by them.

Indigenous peoples hold property rights also cultural elements created by and still controlled by them, as well as to cultural elements in the public domain. These property rights are valid as long as the cultural element remains culturally relevant to the indigenous people in question.

Restitution (including benefit-sharing)

Indigenous peoples' property rights to lands traditionally occupied and/or used, but which have subsequently been lost is at least about to emerge into law. This is true for both full and partial (i.e. benefit-sharing) restitution.

When indigenous peoples' right to restitution pertaining to their traditional lands have crystallized into law, indigenous peoples also enjoy a right to restitution with regard to collective creativity traditionally created by them, but to which third party rights now pertain. This conclusion follows directly from what has been inferred above about the right to non-discrimination being the underlying foundation for property rights to both land and creativity.

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