A NON-DISCRIMINATION APPROACH TO THE RIGHT TO LAND OF INDIGENOUS PEOPLES AGAINST A SUI GENERIS APPROACH: IS IT POSSIBLE IN INTERNATIONAL HUMAN RIGHTS LAW?

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ARTICLE

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1 INTRODUCTION

Presently, the indigenous peoples’ right to land is one of the most contentious areas in international law, especially in relation to the norm of non-discrimination. ‘Indigenous peoples’ can be defined as subjects who have held historical continuity and cultural characteristics in their living areas before they were colonised.¹ The lands are vital for their identification and physical existence, as they tend to even associate their lives with their inhabited areas.² These aspects of their land rights were reflected broadly in the articles of the United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP), adopted in 2007.³ Like other human rights, the land right of indigenous peoples is based on the principle of non-discrimination in international human rights law, especially in its substantive form.⁴ According to article 2 and the preamble of UNDRIP, indigenous peoples have ‘suffered from historic injustices’, because of the ‘colonization and dispossession of their lands, territories and resources’.

Nevertheless, the relationship between the right to land of indigenous peoples and the principle of non-discrimination has not necessarily been that clear, especially because this right can become an exception in international human rights law. Primarily, the main ground of justification of the right to land is the past wrong, which can go against current entitlements.⁵ This right has also been mentioned as one of the clearest examples of collective rights, while the conception of human rights is strongly committed to universal application for every individual.⁶ In addition, as this right to land can lead to the decline of national territorial sovereignty, states tend to interpret it in a very narrow way.⁷ Therefore, according to some scholars, the land right of indigenous peoples constitutes a sui generis approach as distinct from general human rights framework.⁸ This is especially in contrast with other ‘minorities’ mainly treated in article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR),⁹ who are vulnerable to social influences of the dominant populations but try to keep their distinct ethnic, linguistic or religious characteristics as a cultural tradition at the same time.¹⁰ This is evident in the sense that the collective right to land has not been recognized as an entitlement of the minorities.¹¹

This paper proposes that the right to land of indigenous peoples is compatible with the substantive principle of non-discrimination in international law by understanding the permanency of this right as a form of special measures for substantive equality. This will be shown through the human rights practices in countries and regional and international institutions.

⁵ See below 2.1(c), text at footnotes 55 and 62.
⁸ See below 2.1, text at footnotes 38, 39, and 61.
⁹ ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.
¹¹ Will Kymlicka, Multicultural Odyssey (OUP 2007) 271-2, 290.
Section 1 of the paper describes the frameworks related to substantive non-discrimination and the rights of indigenous peoples in international human rights law. Section 2 discusses whether the indigenous peoples’ right to land is compatible with the framework of non-discrimination in international human rights law. Section 3 explains the dynamic relationship of the right to land and substantive non-discrimination in terms of sustainable cultural management and the right to property.

2

THE FRAMEWORKS AND RELATIONSHIPS OF THE RIGHT TO LAND OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND NON-DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW

2.1 The Right to Land of Indigenous Peoples in International Law

Many international legal practices on the rights of indigenous peoples to land and non-discrimination have been developed, either directly or indirectly. Although UNDRIP is not strictly an international treaty, it is suggested it constitutes a comprehensive part of customary international law in relation to indigenous peoples.12 In addition, the International Labour Organization (ILO) has engaged significantly with the rights to land and non-discrimination of indigenous peoples, especially since the ILO Convention No. 107 (C107) in 1957 came into being.13 In addition to C107, the ILO Convention No. 169 (C169) of 1989 contains the influential norm in the sense its rules have been considered even by non-contracting countries, in the sense that reflects many countries’ opinions and practices in this area.14 Even though the provisions in these instruments does not explicitly mention the right to land of indigenous people, it has been supported by human rights developments, and it has significantly contributed to them. Although there is said to be no universal human rights treaty pertaining to the right to land, this right is closely connected to certain rights, such as self-determination, life, and health.15 A case in point that shows progressive protection of the right to land is the right of minorities in article 27 of ICCPR. The right to land of indigenous peoples has been preserved pragmatically through the individual complaint procedure under the Optional Protocol, in order to protect their cultural rights.16 Also, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) aims to protect this right through the Committee on the Elimination of Racial Discrimination (CERD) as typically shown in General Recommendation No. 23.17 The right to land is also supported by the principle of

property rights, which is inseparable from the principle of non-discrimination, and is stipulated in article 17 of the 1948 Universal Declaration on Human Rights (UDHR) and article 21 of the 1969 American Convention on Human Rights (ACHR).18

2.2 Conflict with State Sovereignty as Collective Rights

Characteristically, the right to land, as stipulated and practised based on the abovementioned frameworks, relates to communities, as well as the individuals that comprise them. The common article 1(2) about natural resources in ICCPR and the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR) has been formulated as the right to self-determination of indigenous peoples.19 The importance of the right to natural resources is emphasised in the framework of decolonisation, in terms of supporting the indigenous peoples’ self-determination.20 The Inter-American Court of Human Rights (IACtHR) holds that the right to land of indigenous peoples should be understood as a collective right by providing an expansive interpretation to article 21 of ACHR about property rights.21 Nevertheless, collective rights are frequently seen as controversial in relation to state sovereignty and individual human rights. As different from individual rights, collective rights are for the groups’ interests, which cannot be covered by individual rights.22 On the one hand, collective rights could be a potential threat to violate the individual-based human rights, which are inseparably connected to sovereignty.23 On the other hand, human rights bodies have recognized the existence of collective rights, led by the right to self-determination, which is seen as an important element to achieve the other human rights stipulated in ICCPR and ICESCR.24 Furthermore, the right to culture in article 15(a) of ICESCR, originally created for individuals, is interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) as the one that can be claimed by the groups such as indigenous peoples and minorities as separate from the individual rights.25 The African Charter of Human Rights, which lays down the ‘peoples’ rights in articles 19 to 24, including those of self-determination and land in articles 20 and 21 respectively, mentions in the preamble that ‘the reality and respect of peoples’ rights should necessarily guarantee human rights’.

2.3 Substantive Non-Discrimination and Following Special Measures

The rights of indigenous peoples are primarily based on and concerned with the principle of non-discrimination in international human rights law. CESCR states that indigenous peoples have been dealt extensively under this principle ‘among others’.26 According to Thornberry, the entitlements to land for indigenous peoples in international law have resulted largely from the movement towards anti-discrimination and decolonisation, in which CERD has played a central

19 ibid 171.
21 Summers (n 18) 169, see, e.g., Case of the Mayagna (Sano) Anuas Tingui Community v Nicaragua (31 January 2001) IACtHR Series C No 79; Case of the Saramaka People v Suriname (28 November 2007) IACtHR Series C No 172; Kichwa Indigenous People of Sarayaku v Ecuador (27 June 2012) IACtHR Series C No 245; Case of the Indigenous Communities of the Lhaka Honhat v Argentina (06 February 2020) IACtHR Series C No 420.
24 UN Human Rights Committee 21st Session, General Comment No. 12: Article 1 The Right to Self-Determination (12 April 1984) (contained in UN Doc, A/39/40 (1984)) para 1; Lubicon Lake Band v Canada (n 16) para 32.1. See also, Raz (n 22) 208-9.
Non-discrimination is one of the most important principles in international law, such that it is sometimes even referred to as a peremptory norm. Apart from others who have been discriminated against, indigenous peoples have suffered especially from land deprivation. The Inter-American Commission on Human Rights (IACHR), referring to the General Recommendation No. 23 of CERD, notes that a prominent reason for discrimination against indigenous peoples is the denial of their land uses. This is especially seen in the process of land acquisition, in which the lands of indigenous peoples have been understood as terra nullius, ‘a territory belonging to no-one—at the time of the act alleged to constitute the “occupation”’. In the ground-breaking decision of *Mabo v Queensland* (*Mabo*), the High Court of Australia indicated that the fictional understanding of the Aboriginal peoples in question as an object of terra nullius is too discriminatory to maintain in the common law order as well as in international law. In this decision, the characterisation of indigenous peoples as ‘backward’ is especially criticised in the drafting process of ICERD, as such an understanding is associated with the stigma of under-development.

The measures of substantive non-discrimination are understood as ‘affirmative action’, especially when it comes to the protection of minorities, which is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality. In international human rights law, substantive non-discrimination is practiced based on the concept of ‘special measures’. According to the Committee on the Elimination of Discrimination against Women (CEDAW), the human rights body of the Convention on the Elimination of All Forms of Discrimination against Women, special measures are necessary countermeasures against substantive discrimination, ‘rather than an exception to the norms of non-discrimination and equality’.

### 3

#### THE CONTROVERSY ABOUT THE RELATIONSHIP BETWEEN THE RIGHT TO LAND OF INDIGENOUSPEOPLES AND SUBSTANTIVE NON-DISCRIMINATION

#### 3.1 The Exceptional Character of Indigenous Peoples

##### 3.1.1 The Context of ‘Indigenous Peoples’ and ‘Remedial’ Self-Determination

The frameworks described above may suggest that indigenous peoples should be considered outside the human rights and non-discrimination legislation. Firstly, it can be argued that the rights of indigenous...
peoples to land can be seen as an exception to the general order of international law and state practices. The indigenous peoples’ rights as a part of sui generis law are mentioned clearly in Canadian jurisprudence.37 This trend is said to be more obvious in terms of the right to land than other rights.38 According to Kingsbury, the distinguishing features of indigenous peoples can be seen as a mixture of historical land deprivation, current vulnerability and wishes for the future.39

This is supported by the legal status of indigenous peoples as having the right to a ‘remedial’ form of self-determination. According to Anaya, the remedial side of self-determination aims to correct the situation of colonisation, while the substantive aspect can be related to the institutional setting and ‘ongoing’ procedural rights for the subjects.40 It is also indicated that indigenous peoples feel that they are ‘unique’ in the sense that they have not been given suitable remedies for their past land deprivation.41 The special character of indigenous peoples’ self-determination typically appears in the conception of indigenous sovereignty in some practices, in which the pre-modern entitlement is emphasized in the form that excludes minorities.42

The special character of land entitlement for indigenous peoples can also be seen in the use of indigenous sovereignty that excludes the property rights of non-indigenous populations. However, this concept is understood as the right to self-government in general and cannot be used by other minorities considering its pre-modern conception.43 For instance, especially in the USA, indigenous sovereignty is understood as an exclusive entitlement of indigenous peoples including management of property rights within it.44

3.1.2 The Land Right as a Permanent ‘Specific Right’

Some scholars argue that an entitlement reflecting the decolonisation context can be distinguished clearly from ‘special measures’ as a ‘specific right’. According to the General Recommendation No. 32 by CERD, while special measures are temporary, specific rights are permanent, including the right to land and the rights of women which cannot be shared with men. The Recommendation also states that ‘[s]pecial measures should not be confused with specific rights pertaining to certain categories of person or community’.45 However, special measures should be cancelled once the substantive discrimination is eliminated, because they essentially lead to the inferior treatment of other groups.46 Vrdoljak also states that specific rights for indigenous peoples and minorities are specially clear when it comes to the right to remedy,47 which is essential to UNDRIP.48 The government of New Zealand also contends that the rights of indigenous peoples are different from special measures in international human rights law, as the former are permanent in character.49 The Waitangi Tribunal also

42 Allen (n 38) 237-8.
45 CERD General Recommendation No. 32 (n 35) paras 11, 15, 16. This has been clarified since the drafting stage; Summary Record of the 414th Meeting Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc, E/CN.4/Sub.2/SR.414 (7 February 1964) 8.
48 Federico Lenzerneti, ‘Reparation, Restitution and Redress’ in Jessie Hohman and Alexandra Xanthaki (eds.), The UN Declaration on the Rights of Indigenous Peoples (OUP 2018) 574; Anaya (n 12) 995.
49 CERD Summary Record of the 1821st Meeting, UN Doc, CERD/C/SR.1821 (21 September 2007) paras 58, 60; Summary Record of the 1822nd Meeting, UN Doc, CERD/C/SR.1822 (8 August 2007) para 21. See art 2 of Treaty of Waitangi (6 February 1840).
complained that the right to land of the indigenous peoples was occasionally interpreted as a temporary entitlement and that this could not return or remedy the historic marginalisation of indigenous peoples suffered.\textsuperscript{50} This kind of treaty like Waitangi Treaty, created between indigenous peoples and colonial states including Canada, New Zealand and the United States, still cannot be ignored for reversing the injustices.\textsuperscript{51}

3.1.3 The Right to Land as a Retroactive Remedy

The relationship of the land right with the doctrine of non-retroactivity might indicate a disagreement over the land right of indigenous peoples with general international human rights law. This principle has been recognised broadly as essential in protecting international human rights law, as evident from article 18 of the European Convention on Human Rights, indicating that ‘The restrictions … to the said rights and freedoms shall not be applied for … other than those for which they have been prescribed’ (emphasis added).\textsuperscript{52} The strong backlash against potential retroactivity can be seen even in the prominent contexts involving decolonisation, slavery, racial discrimination and indigenous peoples.\textsuperscript{53} More specifically, this is understood as the universal principle of inter-temporal law, which means that land acquisition should be reviewed by the law which could be applied when the acquisition in question occurred. It is considered as a basic requirement of non-retroactivity under customary international law.\textsuperscript{54}

However, the character of retroactivity is evident in the entire framework of the indigenous peoples’ rights. Retrospective application is also said to be sought in the entire social ‘reconciliation’ process for the Indigenous Peoples in Canada,\textsuperscript{55} not only for the written land rights, but also for trust-building in the whole society.\textsuperscript{56} Retroactivity is also imbibed in the ‘cultural heritage’ of indigenous peoples which maintains and sustains their distinct identity, shared with the members of their communities and others, such as sacred sites, ceremonial objects and traditional artworks.\textsuperscript{57} For their protection, Daes propounded the Unification of Private Law (UNIDROIT) Convention in 1995 to be retroactive referring to the drafting process, while it ended up with a denial of retroactivity.\textsuperscript{58} The UNDRIP framework regarding the right to cultural heritage is said to follow Daes’ position.\textsuperscript{59} The ‘remedial’ self-determination is highlighted as an exception of the rule of inter-temporal law, by re-examining the constitutional processes of colonisation.\textsuperscript{60} Vrdoljak suggests that

\begin{itemize}
\item[51] Gilbert (n 7) 62.
\item[59] Jessie Hohman, ‘The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation’ in Hohman and Xanthaki (n 48) 284.
\item[60] Anaya (n 40) 107.
\end{itemize}
retroactivity of UNDRIP can be explained as *sui generis*. While some terms such as ‘compensation’ and ‘restitution’ were criticized for their association with retroactive application of law and even with human rights violation in the *travaux préparatoires*, these words ended up in article 28 of UNDRIP. During the drafting process of UNDRIP, the USA emphasized that the lands of indigenous peoples will be protected and compensated in current and future cases.

**3.2 Refutation: Declining Exclusivity and Balancing with Human Rights**

**3.2.1 Diffusion of ‘Indigenous Peoples’ and ‘Decolonisation’**

The context of protection of indigenous peoples can expand, and therefore the *sui generis* approach cannot be retained easily. Basically, although one example is shown above, the definition of indigenous peoples is not fixed in international law. Even the central concepts of ‘indigenous’ and ‘colonisation’ are controversial and have remained unclear in international law. Despite the common belief that colonisation is mainly about European countries’ conquest, remedial self-determination suggests that the rights of indigenous peoples should be preserved in Asian and African countries, which experienced state-building after World War II, because that process may have ignored the ethnic distinction. This is especially evident in the supervision of the *Framework Convention on the Protection of National Minorities* by its Advisory Committee, in which non-indigenous minorities such as Romani people are protected broadly. Also, it is argued that the collective right to land of ‘peasants’ is a part of international law since the adoption of the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDRPO). In relation to land, this declaration understands the ‘peasants’ as ‘any person who engages or who seeks to engage … in small-scale agricultural production for subsistence and/or for the market, and … who has a special dependency on and attachment to the land’ (emphasis added) while also including the indigenous peoples.

Furthermore, the land right has been referred to as an entitlement for other subjects in international legal documents. When it comes to the ‘minorities’, not only are they protected under the same provisions of ICCPR and ICESCR, but the rights assigned to them are as comprehensive as those for indigenous peoples. This is especially evident in the supervision of the *Framework Convention on the Protection of National Minorities* by its Advisory Committee, in which non-indigenous minorities such as Romani people are protected broadly.


62 UN Commission on Human Rights 53rd Session, UN Doc, E/CN.4/1997/102 (10 February 1997) paras 73, 83, 243, 273; 57th Session, E/CN.4/2001/85 (6 February 2001) paras 145–8. See UNDRIP (n 3) art 28(1): ‘Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources…’ (emphasis added).


64 See above ‘Introduction’, n 1.


66 Thornberry (n 17) 37–8.

67 See Anaya (n 40) 108; Kymlicka (n 11) 266–7.


69 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, No. 2 of 2007 (adopted 29 December 2006, entered into force 31st December 2007) preamble.


to land, which is actually referred to as being supported 'individually and/or collectively' in the declaration was deemed necessary in terms of the decolonisation process.

As far as indigenous sovereignty is concerned, it is related to human rights both in terms of the rights to self-government and property. According to Pentassuglia, although the right to autonomy (self-government) has been especially mentioned in relation to the right to self-determination of indigenous peoples, it is required in the context of diversity protection rather than the decolonization process. Both the United Nations and European human rights bodies have recognised self-government as an effective measure to achieve minorities’ rights to effective participation. Even in the US, especially since the 1980s, indigenous sovereignty has been compared to the rights to non-indigenous ownership of lands and restricted to require a consensual agreement with non-indigenous populations.

3.2.2 Permanency and Continuity of Substantive Non-Discrimination

Despite the apparent conflict between temporality and permanency, there has been an attempt to coordinate the right to land of indigenous peoples with special measures. According to Åhrén, the position of CERD

illustrated in the General Recommendation No. 32 is inappropriate, partly because it does not consider the possibility of applying the right to non-discrimination of indigenous peoples mentioned in the General Recommendation No. 23. The latter recommendation has been widely supported to protect indigenous peoples’ right to land. He suggests that such an interpretation can even incentivize countries to reject indigenous rights based on equality.

Alternatively, special measures are often considered as long-standing to protect the diversity of social groups. Bossuyt suggests that special measures are occasionally reviewed in terms of the preservation of racial or ethnic diversity, referring to the article 1 of the UNESCO Declaration of 1978 which says that ‘All individuals and groups have the right to be different’ in article 1 (emphasis added).

Furthermore, special measures have not been necessarily distinguished from specific rights generally in international human rights law. For instance, CEDAW separates the special measures under article 4(1) from the permanent measures under article 4(2), as those based on biological differences compared to men. However, ‘maternity’ as a biological feature of women becomes vague if it can also mean the ‘social function’ of women. If it includes the social aspects of women’s rights, it suggests discrimination based on stereotypes, which are also common grounds of discrimination against minorities. In the case of Aïyne de Sylva, CEDAW demonstrates that women’s reproductive rights differentiated from men were questioned as ‘specific needs of women’. Nevertheless, CEDAW also indicates that the discriminations based

72 ibid, art 17(1).
77 Matthias Åhrén, Indigenous Peoples’ Status in International Legal System (OUP 2016) 156–7.
78 CERD General Recommendation No. 23 (n 17) paras 1, 6;
79 Åhrén (n 77) 159.
80 UN Doc, E/CN.4/Sub.2/2002/21 (n 34) paras 20–1, 62.
82 CEDAW General Recommendation No. 25 (n 36) para 16.
84 ibid 244–5. See Åhrén (n 77) 156.
indigenous peoples, as states have justified them based on the right to equality.\textsuperscript{81} Scholarly writings suggest that United States should introduce C169, even when there has been a concern to recognise the indigenous peoples’ rights on the policies and judiciaries.\textsuperscript{82}

When it comes to the right to self-determination, the indigenous peoples’ entitlement has not only been regarded as remedial but also can be understood as a reflection of ongoing discrimination. As Anaya says, this kind of self-determination can be seen as a right for restoration from the continuous discrimination which has been produced by the connection between \textit{terra nullius} and 'extinguishment practice' in the common law countries, which usually means expropriation without compensation.\textsuperscript{83} The system of extinguishment has been criticized for being discriminatory by the human rights bodies in terms of its intent and effect.\textsuperscript{84} In the Concluding Observation for Canada, CERD requires proof that the extinguishment practice was given up, as both Canada and CERD admit that land grabbing is directly related to the marginalization of indigenous peoples.\textsuperscript{85} According to Waldron, reparations for indigenous peoples should apply more to ongoing discriminatory situations than only to past injustices, considering the reconciliation between historic and current interests.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{85} CEDAW 47th Session, General Recommendation No. 28 on the Core Obligations of States parties under Article 2, UN Doc CEDAW/C/GC/28 (16 December 2010) para 5.
\item \textsuperscript{86} Island of Palmas Case (n 54) 845.
\item \textsuperscript{88} Karen Knop, \textit{Diversity and Self-Determination in International Law} (CUP 2002) 160-1.
\item \textsuperscript{89} Western Sahara (n 30) para 70. For the Spanish entitlement, see UNGA 2318th Plenary Meeting, Question of Spanish Sahara, UN Doc, A/RES/3292 (13 December 1974). See also, Legal Consequences for States of the Continued Presence of South Africa in Namibia (21 June 1971) ICJ Advisory Opinion para 53.
\item \textsuperscript{90} Patrick Macklem, \textit{ Sovereignty of Human Rights} (OUP 2015) 154.
\item \textsuperscript{81} Francesco Francioni, ‘Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?’ in Lenzerini (n 61) 42-4.
\item \textsuperscript{83} UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (n 4) paras 42–3. Anaya (n 40) 142; Gilbert (n 87) 609–610; Native Title Act No. 110, 1993 of Australia defines ‘extinguish’ in art 237A: ‘after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect’.
\item \textsuperscript{84} Åhrén (n 77) 188-92.
\item \textsuperscript{85} Report of the CERD, 60th and 61st session, Consideration of Reports, Comments and Information Submitted by States Parties under Article 9 of the Convention, UN Doc, A/57/18 (21 August 2002) para 331.
\end{itemize}
IACtHR observes the continuing violation of article 21 by connecting the state’s obligation to prevent the crimes from happening, as tribal and indigenous peoples are inclined to be the victims of displacement.97

4 STRENGTHENING THE INDIGENOUS PEOPLES’ RIGHT TO LAND IN INTERNATIONAL HUMAN RIGHTS LAW

This section aims to explain how the land right can bring together several elements, which not only maintain but also develop the frame of non-discrimination in international human rights law. All these elements reflect the necessity of dynamism in the non-discrimination norm in terms of sustainable non-discrimination for cultural diversity management and collective property rights to land. These aspects are also mutually related to one another.

4.1 The Development of Special Measures for Cultural Maintenance of Indigenous Peoples through the Right to Land

Special measures for the land entitlement of indigenous peoples have become permanent because of increasing reference to preservation of their culture. ILO’s C107 assessment points that indigenous peoples should be assimilated with the rest of society. Although C107 acknowledges the collective ownership of lands by indigenous peoples, it sees it as transitory, which is reflected in article 3.98 Underlying this view is the fact that national economic development is regarded inseparable from integration, and therefore the continuous land right of the indigenous peoples was seen as an obstacle for economy under C107. This view is also supported by the requirement for equality of individuals under international human rights law.99

However, the reference to temporality of the land right cannot be seen in C169.100 It was required to deemphasise the mention of special measures for the right to land in the drafting process of C169.101 According to Thornberry, the possibilities for permanency of special measures can also be shown in the other ILO treaties, especially in the ILO Convention No. 111 (C111).102 Even though C111 is not specifically for indigenous people, it is regarded as a meaningful source to protect indigenous peoples.103 Likewise, ICERD is also criticized for maintaining only the temporary framework of special measures as it may sometimes be led to assimilation.104

There are some examples in regional, international, and national human rights interpretations that try to categorise special measures as the land right for indigenous peoples. In the Case of Saramaka People v Suriname, the IACtHR highlighted the necessity to recognise the communal land ownership rights. It was so because the Court was of the opinion that ‘special measures are necessary in order to ensure their survival in accordance with their traditions and customs’, and such a treatment should not just be a ‘privilege or permission’.105 Based on IACtHR, the African

97 Case of the Moiwana Community v Suriname (15 June 2005) IACtHR Series C No. 124 paras 43, 122.
98 Anaya (n 40) 55–6; C107 (n 13) art 3.2 (b).
100 Compare art 3.2.b of C107 (n 13) with art 4 of C169 (n 14).
105 Saramaka v Suriname (n 21) paras. 103, 116. See also, Kichwa v Ecuador (n 21) para 171.
Commission on Human and Peoples’ Rights (AfCHPR) also recognises that special measures are to protect the continuous traditional livelihoods of indigenous peoples, which includes the right to land. This position was also visible in the drafting process of ICERD, as special measures are indicated as becoming permanent in some cases, as in the case of the land right of the indigenous peoples in Mexico. In India, CERD evaluated that the ‘effective environment’ of affirmative action for the marginalised subjects has been produced, and it is said to be comparable to the Inter-American jurisprudence. In the landmark case of Orissa Mining Corp v Ministry (Niyamgiri), land rights under FRA was construed as a ‘permanent stake’ without any kind of time restriction.

4.2 Connecting the Past, Current and Future Interests of the Indigenous Peoples as a Prohibition on ‘Ongoing’ Discrimination

The interpretation of remedial self-determination as continuing non-discrimination plays an important role in interpreting the right to land of indigenous peoples. According to Corntassel, the ‘ongoing’ discrimination that is mentioned by Anaya should be interpreted to imply ‘sustainable self-determination’. This understanding is premised on the idea that the decolonisation process has not been properly handled, and therefore protecting the livelihoods of indigenous peoples is a necessary aim.

This understanding of historical discrimination suggests a connection between the ‘remedial’ and ‘substantive’ self-determination, which is necessary for upholding the rights of indigenous peoples. Posner and Vermeule propose that the return of lands as compensation for historical wrongdoing to culturally cohesive subjects is justified as part of the right to self-government. Such a view is supported by UNDRIP, in which the right to self-government is considered in article 4 as a main measure of the indigenous self-determination. They also point out that compensation for past injustices tends to become continuous because of multi-factorial nature of the issue. The expansive feature of self-determination is also derived from the abstract meaning of the common article 1 of ICCPR and ICESCR. This connection between historical and current discrimination can be described as the position in which special measures are not ceased until they have a sufficient ‘effect’ in reality. Unlike the approach that emphasises the ‘intention’ to recognize the particular discrimination, the effects in real life situation are frequently seen as a standard to identify discrimination. This seems to be supported broadly by international human rights law and practices, including C111, ICCPR, ICEDAW, ICERD and ICESCR.

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106 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (25 November 2009) AfCHPR No. 276/03 paras 187, 260.
108 Concluding Observations of the CERD, India, UN Doc, CERD/C/IND/19 (5 May 2007) para 26; Długoleski (n 68) 238-9.
109 Orissa Mining Corp v Ministry of Environment and Forests (Niyamgiri) (18 April 2013) Supreme Court of India, Writ Petition (Civil) No. 180 of 2011 paras 42, 49 (iv) (a).
111 ibid 117–9.
113 Wiessner (n 2) 44.
114 Posner and Vermeule (n 112) 742.
115 Xanthaki (n 13) 175.
118 ICEDAW General Recommendation No. 25 (n 36) para 20.
was even indicated that the government are obliged to explain the reasons for adoption of such temporary measures.119 According to Craven, although this does not necessarily mean group rights, it can suggest an entitlement towards a member of specific groups.120

Further, substantive non-discrimination can be associated with future entitlement in terms of sustainable development and intergenerational equity. The report of the Special Rapporteur on the Rights of the Indigenous Peoples indicates that the laws relevant to climate change should aim to redress the destructive effects on the lands of indigenous peoples and the subsequent demand for compensation in terms of human rights.121 In addition, IACtHR recognises the necessity to keep the cultural traditions of indigenous peoples alive sustainably when transmitting them from one generation to another.122 IACtHR invoked principle 22 of the Rio Declaration to show that the cultural heritage of indigenous peoples should be managed sustainably.123 In Niyamgiri, not only the ‘permanent stake’ is seen as entitled ‘for generations in symbolic relationship with entire ecology,’ but also cultural tradition or diversity is understood as a part of sustainable development.124 The Supreme Court of India has also indicated that sustainable environmental management should be related to communal cultural arrangement.125

4.3 The Possibilities of Collective Property Rights to Land under Non-Discrimination

The indigenous peoples’ right to land does not necessarily oppose the right to equality, even though these rights may seem incompatible, especially in terms of property rights. Seemingly, the nexus between property rights and equality is mentioned repeatedly, as stipulated in article 5 of ICERD. Article 5 states that ‘… States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone … to equality before the law, notably in the enjoyment of the following rights’, and then illustrates in subparagraph (v) that ‘The right to own property alone as well as in association with others’. (emphasis added) As the right to property has been highlighted as one of the most fundamental norms for individual freedom, it is sometimes assessed as ‘nothing more’ than a particular aspect of equality.126

Nevertheless, the land right of indigenous peoples in international law requires changes in the tenure systems to include the legal entitlement as a collective right. Tenure is not just ownership, but includes a legal remedy for those who do not have the right of ownership like restricting forced evictions which are often conducted without a legal justification.127 In the Concluding observations for El Salvador, CERD recommended that the government should secure the right to lands both for individuals and groups, given that the current land tenure system fails to provide them appropriate information about the system.128 In Endorois v Kenya, the AfCHPR noted that the historical possession of lands by indigenous peoples precedes colonial rule and that this right should be returned via property rights.129 The African Court of Human and Peoples’ Rights (AfCHPR) also supports the idea of collective rights based on article 14 of the African Charter.130 While not directly considering collective property rights as human rights, the UK has evolved the concept of ‘collective

122 Case of the Yakye Axa Indigenous Community v Paraguay (17 June 2005) IACHHR, Series C No. 125 para 175.
123 Kichwa v Ecuador (n 21) paras 212–4; Loaka Huonen v Argentina (n 21) paras 243-54.
124 Niyamgiri (n 109) paras 39, 41-2.
126 Åhrén (n 77) 164-6.
128 CERD Concluding Observations on El Salvador (n 17) paras 20, 21(a).
129 Endorois v Kenya (n 106) para 187.
title to property’ on the creation of UNDRIP.131 Thus, as Åhrén suggests, the interpretation of non-discrimination of indigenous peoples under ICERD can be developed with the adoption of UNDRIP.132

Human rights bodies have even identified restitution of property rights of indigenous peoples. Based on article 5 of ICERD, CERD suggests that it should be possible to claim restitution for ancestral lands under a properly organized framework of ownership system.133 The Human Rights Committee also urged South Africa to practice restitution for indigenous peoples by preparing some countermeasures against past dispossession.134

Furthermore, indigenous peoples’ right to land has been mentioned as a reason for restriction of others’ property rights. The rights of property are limited in regional international human rights law, depending on public interests, relationship to another person’s property right and the general principles of international law.135 In the Yakye Axa v Paraguay, IACtHR indicates that individual and collective rights to land should be balanced, while ‘restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities’.136 IACtHR also states that the rights to property can be restricted because of public interests, including the indigenous peoples’ right to land.137 The framework of FRA seems to show that the communal land rights stipulated in this act do not necessarily violate the rights of others who are not indigenous communities, as they are based on remedy

5 CONCLUSION

To conclude, it seems that the right to land of indigenous peoples can maintain itself within the framework of substantive non-discrimination in international human rights law, without relying on legal status as a sui generis right. This right can be continuous even under the temporality-based special measures against substantive discrimination, as can be referred from ILO and IACtHR. Although the right to land can be categorised as a permanent ‘specific right’ as well, it is too vague to establish as a different concept, as shown in the General Recommendation No. 32 of CERD. This interpretation has become increasingly realistic in the backdrop of cultural diversity and sustainable development. A human rights-compatible interpretation has been introduced by judicial or quasi-judicial institutions at the national, regional, and international level, which are interlinked to each other as they are compared to each other in the real cases.142

132 Åhrén (n 77) 157. See also, the evolutionary interpretation brought to art 21 of the ACHR. Summers (n 18) 169.
133 CERD, Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Paraguay, UN Doc, CERD/C/PRY/CO/4-6 (4 October 2016) paras 19-20.
136 Yakye Axa v Paraguay (n 122) paras 148–9.
137 Case of the Sawhoyamaxa Indigenous Community v Paraguay (29 March 2006) IACtHR, Series C No. 146 para 138.
138 In Niyamgiri, the Supreme Court of India says that communal rights to land based on customary uses can be more than property rights because they focus on social welfare and remedial entitlement.139 During the drafting of UNDRIP, although Japan opposed the concept of collective rights as harmful to other individuals, it accepted public interests as a restriction on human rights.140 With regards to sustainable development, although IACtHR is of the opinion that property rights to land can be restricted in relation to environmental protection as a legitimate public interest, it admits that the right to land of indigenous peoples can help such a purpose.141

This right has developed as an evolutionary legal interpretation, as illustrated primarily by UNDRIP, and it cannot necessarily be set aside based on the principle of non-retroactive application of law. These conflicts tend to be taken into account in relation to public interests, by which collective interests can be claimed.143

The implication of the sui generis approach should be reconsidered even though the right to land of indigenous peoples as considered a part of human rights, especially in relation to minorities’ rights. Although minorities’ rights largely accord with human rights as evident from article 27 of ICCPR, their ‘special’ rights can be still controversial in relation to compatibility with the norm of equality.144 Similarly, other scholars who criticize the sui generis approach fail to explain how the right to land can be considered as a part of general human rights, beyond the context of minorities as a legal subject.145 Ultimately, the scope of substantive non-discrimination should be analysed from a perspective which considers the method of recognition of diversity.146

Along similar lines, the scope and meaning of principle of substantive non-discrimination itself will be problematic. For example, the category of ‘indigenous peoples’ should be limited because attempts to create a ‘distinction’ can lead to ‘discrimination’.147 Although the grounds of discrimination are limitless, and expansive in theory, they are limited in reality, as evident from the contexts of race and sex.148 The concept of ‘decolonisation’ has been interpreted from many ways, depending on the contexts, including the political, economic and cultural aspects, as well as place of residence.149 Given that some new contexts have emerged, such as ‘neocolonialism’, such an expansion should be carefully considered.150 There is also an incorrect generalisation, when it comes to UNDRIP, that indigenous peoples have relied significantly on the political movement to support their rights.151

Specifically on the rights of indigenous peoples, the connection between ongoing non-discrimination and sustainable development should be analysed. While remedial and substantive self-determination seem to be connected, it does not necessarily suggest sustainable development. Sustainable development aims at intragenerational equity; however, the legal relationship has not been clarified in that regard.152 Furthermore, the controversy over the separation of collective rights and individual ones is important as well, especially in the sense of how to balance them. The rights of indigenous peoples are not absolute, even in the context of UNDRIP, as shown in the procedural aspect of this norm.153 Similarly, the concept of public interest should also be understood clearly.154 Reconsidering the relationship between collective rights and individual rights can result in a discussion of the philosophy underlying international human rights law.155 The recognition of right to land of indigenous peoples will serve twin benefits. Firstly, it will foster a substantive regime for individuals or groups who are usually under substantive discrimination, such as minorities, peasants and women. Secondly, it will also stimulate discussion on how to consider the interests of future generations as well as even non-indigenous peoples whose interests can collide with those of indigenous peoples.

144See, Kristin Henrard, Equal Rights versus Special Rights? (European Communities 2007) 15, 17.
145See, Pentassuglia (n 142) 198; Åhrén (n 77) 96.
146See, Henrard (n 144) 67-68.
151Macklem (n 90) 156–157, 161.
155See, Thomberry (n 102) 213.
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