

PART I
SOVEREIGNTY
AND SELF-DETERMINATION

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The Self-Determination of Indigenous Peoples

The present contribution aims at providing an overview of the features of indigenous peoples covered by the principle of self-determination that the 2007 Declaration on the Rights of Indigenous peoples has explicitly recognised. The principle of self-determination has been of great significance in three main fields of legal practice: 1) the active participation of indigenous peoples in the definition of ‘indigenoussness’; 2) their self-government, that is, their capacity for managing the possession and use of the land; and 3) self-identification. In these fields, a widespread awareness has emerged about the distinctiveness of the indigenous peoples and their traditional and cultural background, leading to a general approach in favour of the recognition of their autonomy and support for coordination between states and indigenous systems. The right of self-determination of indigenous peoples is also relevant beyond the borders of the local state, also thanks to the contribution of the UN organs established to deal with compliance with human rights. Some pitfalls are present, such as the lack of direct access of indigenous peoples to international instruments of recourse.

1. *Premise*

The Declaration on the Rights of Indigenous Peoples of 2007 proclaims in its Preamble ‘the fundamental importance of [indigenous peoples’] right to self-determination to freely determine their political status and freely pursue their economic, social and cultural development.’¹ In the intentions of the authors of the Declaration, self-determination should be instrumental to granting the survival of indigenous peoples as a group, without impinging in the territorial integrity and sovereignty of the state. Indeed, the 2007 Declaration refers to other key founding acts of

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¹ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), General Assembly Res. 61/295, 13 September 2007, Article 3.

the United Nations (UN), including the Charter of the UN,² the 1966 International Covenant on Economic and Social and Cultural Rights,³ and the 1993 Vienna Declaration and Programme of Action.⁴ Therefore, it is quite clear that self-determination has to be read in strict conjunction with the principle of territorial integrity of states, to ensure international peace and stability. Another element worthy of being considered is the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the UN Charter: while referring to '[t]he principle of equal rights and self-determination of peoples', the Declaration emphasises the duty not to harm the national unity and territorial integrity of a state.⁵

However, regarding 'indigenous peoples' there is an evident inadequacy in the referred acts. They have distinctive characteristics in respect of the dominant sectors of the society that form the people as a constitutive element of the state. They have possessed and used the land since time immemorial. Their customs and traditions find expression in forms of self-government that resemble those of a state.

This explains why the inclusion of self-determination in the final text of the 2007 Declaration was met with objections by some states on the grounds that it could inspire politics and actions that could threaten their territorial and political integrity.⁶ Some states asked that in the Declaration

² Charter of the United Nations (UN Charter) 24 October 1945, 1 *UNTS* XVI, Article 1.2 (proclaiming the principle of 'equal rights and self-determination of peoples') and Article 4 (upholding the 'territorial integrity of the state',

³ International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 *UNTS* 3, Article 1.1: ('All peoples have the right of self-determination.')

⁴ Vienna Declaration and Programme of Action, 25 June 1993, Preamble ('Considering the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity'.)

⁵ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, annexed to General Assembly Res. 25/2625 of 24 October 1970 ('Nothing in the foregoing paragraphs shall be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.')

⁶ Statement by Australia before the General Assembly, UN Doc A/61/PV.107, 13 September 2007, 11.

a clear reference be included regarding the illegality of actions undertaken to ‘dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent states’.⁷ To meet these objections, a sentence was introduced in the final text of the 2007 Declaration stating that ‘Nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law’. Although the attitude of some states has since changed,⁸ reservations of the same kind were expressed by the US and Canada in 2008 during the adoption of the Organization of American states (OAS) Declaration on the Rights of Indigenous Peoples, which was finally approved on 15 June 2016.⁹

The said concerns are nourished by the idea that cases for independence could emerge, similar to those submitted to the UN within the decolonisation process promoted since the 1960s in the name of self-determination. In the case of Western Sahara, the UN has legitimised the aspirations of the Saharawi people—recognised by the International Court of Justice (ICJ) as having the characteristics of an indigenous people—to gain independence from Morocco. Extending self-determination to indigenous peoples was seen as paving the way for their establishment as independent states.¹⁰

These arguments do not seem to be well-founded. The acts of dispossession that gave rise to indigeneity began in the sixteenth century. Since the end of colonialism, the present international law system has been widely accepted on the basis of the principle of the intangibility of frontiers.

In addition, the risk that the term ‘self-determination’ could encroach upon the sovereignty of states is contradicted by the attitude of the indigenous peoples themselves. They have made it clear they have no intention to oppose existing governments or establish new states, nor do they possess assets and funds to compete with the dominant actors on the international scene.¹¹ Their right to self-determination should be intended

⁷ Statement by Sweden, UN Doc. A/61/PV.107, 24.

⁸ The reasons for the change can be attributed to a number of factors: the need to gain a good reputation in the world arena, which was especially important for governments applying as partners in multi- or bi-lateral development projects directed towards countries rich with indigenous peoples; the desire to avoid troubles from peoples present in the territory, for fear that an indigenous movement could promote or ally with secessionist parties within the state.

⁹ OAS Declaration on the Rights of Indigenous Peoples, 15 June 2016. See the text of the draft Declaration in Doc. OEA/Ser.K/XVI Gt/Dadin/doc.334/08 rev. 3, 30 December 2008, <https://www.oas.org/dil/GT-DADIN_doc_334-08_rev3_eng.pdf> and the declarations by Canada (25) and US (29).

¹⁰ The case is referred to *infra*, para 3.4 and note 90.

¹¹ See the comment of the Representative of the National Indian Youth Council on the

as ‘the right of autonomy and self-government in matters relating to internal and local affairs, including their financial aspects.’¹² Also in the wording of the Declaration their rights are conceived as being mainly aimed at achieving forms of autonomy related to the management of the land and to participation in the politics of the country in matters of social and economic development, in conformity with their traditions and culture.¹³ Besides, the conceptual basis of their systems is not in keeping with the model of state that prevails in the contemporary international law relations. Therefore, founding a state would entail a change in their political, economic and cultural way of life.

According to some scholars, the condition of indigenous peoples should be better framed within the paradigm of the so-called ‘internal self-determination’, to suggest that they essentially pursue their own political, economic, social, and cultural development through forms of self-government and management of the resources of the land exercised within the limits of the autonomy acknowledged by the state. They consider that the expression ‘internal self-determination’ is more appropriate and in line with the absence of their status of subjects of international law.¹⁴

Draft Declaration in UN Doc. E/CN.4/Sub.2/1989/33/Add. 1, quoted, 13 ff., paras. 1-4.

¹² Statement by Liechtenstein (UN Doc. A/61/PV.107, 13 Sept. 2007, 23) and India in analogous terms (UN Doc. A/61/PV.108, 13 Sept. 2007, 2).

¹³ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, I.2: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right. In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among states in accordance with the Charter of the United Nations, this shall not be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind.’

¹⁴ The expression ‘internal self-determination has been used by the Supreme Court of Canada in the *Quebec Secession* case, Decision of 20 August 1998, para.126 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>>. See G. Arangio-Ruiz, ‘The normative Role of the General Assembly of the United Nations and the Declaration of

However, the expression ‘internal self-determination’ does not seem to fit with the entity ‘indigenous people’. It does not give enough weight to the right to land and self-government that essentially characterise indigenous peoples. The fact that the indigenous rights are implemented through the instruments provided by the internal legal order of the states does not mean that these are the only ways those entities can express their autonomy.

For this reason, it seems that a different point of view should be adopted, in line with the suggestions offered by the 2002 Stavenhagen Report for the UN Commission on Human Rights¹⁵. In order for self-determination to be exercised, constructive arrangements should be concluded between states and indigenous peoples to reconcile the legitimate concerns of states regarding territorial integrity and national unity, and the equally legitimate concerns of indigenous peoples. Stavenhagen starts from the idea that peaceful coexistence has to be made legally binding and not merely optional from the point of view of international law. This approach appears to be the most suitable instrument not only to recognise but also to respect, protect and fulfil the right to self-determination of indigenous peoples. In this sense, self-determination is extended to the composite entity ‘indigenous people’ organised on the traditional land within the borders of a state.

The 2007 Declaration codifies the rights of indigenous peoples, without

Principles of Friendly Relations’, (1972) *Recueil des Cours* 137, 566 and 571 (referring to self-determination as a ‘dynamic element in the world community’ but underlining its inclusion within the category of human rights that each state has to abide by within its territory). See also G. Palmisano, *Nazioni Unite e autodeterminazione interna* (Milano: Giuffrè 1997) 262 ff. for a detailed analysis of this approach and extensive references to authors. See also Malcolm N. Shaw, *International Law* (Cambridge: CUP 2017) 225. According to A. Cassese, *Diritto internazionale I. Lineamenti*, (P. Gaeta ed.), (Bologna: Il Mulino 2003) 76-7, self-determination as a category of customary international law includes a number of sub-categories relating to specific situations, all of which see peoples as playing a central role. See also Id., *Self-Determination of Peoples; A Legal Reappraisal* (Hersch Lauterpacht Memorial Lectures) (Cambridge: CUP 1995); T. Franck, ‘The Emerging Right to Democratic Governance’, (1992) 86 *AJIL* 46; P. Thornberry, ‘The Democratic or Internal Aspect of Self-Determination’, in C. Tomuschat (ed), *Modern Law of Self-Determination* (Dordrecht: M. Nijhoff 1993) 101. For a political theory approach to the problem see J. M. Valadez, *Deliberative Democracy, Political Legitimacy, and Self-Determination in Multicultural Societies*, (New York-London: Routledge 2018).

¹⁵ Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples to the UN Commission on Human Rights, UN Doc. E/CN.4/2002/97, 4 February 2002 <<https://www.refworld.org/docid/45377ac70.html>>. The Office of the Special Rapporteur was set up in 2001 by the UN Commission on Human Rights and renewed by the UN Human Rights Council, that replaced the UN Commission on Human Rights in 2006. For an overall view of the UN bodies in the field of Human Rights see <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>>.

giving them a definition. The notion of indigenous peoples has been the object of a long and difficult debate within the UN institutions. Although it is possible to devise the main features of 'indigenous peoples', the variety and 'richness of civilisations and cultures, which constitute the common heritage of mankind',¹⁶ get in the way of a common exhaustive definition. The outcome of the debates has been providing a sufficiently flexible model, suitable for a vast range of situations that differ from the geographical and historical point of view, to be recognised on a case-by-case basis by the local state.

This contribution focuses on analysing the main fields where self-determination has found a practical accomplishment in the acts of the state and in the national and international jurisprudence: self-government in the relationship of indigenous peoples to their traditional lands and self-identification of members of the indigenous community. These two elements are the main distinctive features of the entity 'indigenous peoples' that contribute, being intimately connected, to the definition of indigenous peoples. For this reason, an introductory section will be devoted to the proposals formulated within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1996. Indigenous peoples have played an active role in the development of a widely endorsed definition. Nevertheless, a definitive formulation is not present in the 2007 Declaration. However, the proposals resulting from the works carried out in the UN and the practice developed also in the African continent seem to provide a useful model to identify the substantial characters of indigenous peoples.

The practice of international institutions and of states and the relevant jurisprudence contributes to ongoing debates about the place of indigenous peoples in international legal theory. The point is whether they should be considered as mere beneficiaries of rights, or rather as actors in the international law relations. The latter view seems more in keeping with the developments of the practice, both national and international. A special place will be devoted to the cases before the national courts and the international bodies. The analysis of the jurisprudence is not intended to be exhaustive. Cases have been selected to highlight how the self-determination of the indigenous peoples does receive a general recognition in state practice.

¹⁶ General Assembly Resolution 61/295 13 September 2007, with annexed 2007 Declaration, Preamble.

2. *Defining Indigenous Peoples*

2.1. *The Definition of Indigenous Peoples in the Practice of International Intergovernmental Organizations*

As already remarked, in the 2007 Declaration a general definition of indigenous peoples is lacking. The drafters worked out the text using as a reference point the definition given in the final report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, set up by the UN Commission on Human Rights (the so-called Daes Report), published in 1996, with the contribution of representatives of international governmental and non-governmental organizations and legal experts.¹⁷ This achievement was the result of an animated debate that had started in the late 1970s about the implications of post-colonisation and the need to ensure the well-being and development of the inhabitants of the former colonies.

Indigenous peoples contributed through their own representatives or through NGOs taking part in the Working Group set up in 1982 by the said Sub-Commission. The Working Group was the first experiment of direct involvement of indigenous peoples expressing their views and highlighting the situation regarding the implementation of their rights in the world. They contributed, even if only with a consultative role, to the adoption of a text that was forwarded to the UN Commission on Human Rights after being adopted by the Sub-Commission.¹⁸

The indigenous representatives had maintained a cautious attitude about reaching a definition that would work in all situations that could be considered as 'indigenous'. They preferred to highlight the distinctive characteristics of indigeneity, stressing the importance of the historical ties of those peoples with the original lands and territories, in conjunction with

¹⁷ See 'Explanatory Note' by Erica-Irene Daes in UN Doc. E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993, and the following Reports, devoted to the definition of 'Indigenous peoples': UN E/CN.4/Sub.2/1994/31, 8 July 1994, and UN E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996. These documents are available at the following address: <https://ap.ohchr.org/documents/alldocs.aspx?doc_id=6760>.

¹⁸ The Working Group (1982-1995) was a subsidiary organ of the Economic and Social Council, in support of the activities carried out by the Sub Commission on Prevention of Discrimination and Protection of Minorities in the years. It was replaced by the Working Group on the Draft Declaration under the direct supervision of the UN Commission on Human Rights (1995-2006). See the text of the Report by Martinez Cobo 'Study of the Problem of Discrimination against Indigenous Populations', in <<https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html>>.

their right of self-government and the principle of self-identification. For many, a general definition risked introducing elements of rigidity that would fail to cover the multiplicity of global cultures.¹⁹ Only indigenous representatives from Asia stated that a formal definition was urgent to prevent governments from denying the existence of indigenous peoples in their countries.

For these reasons, the analysis of the concept of ‘indigenous people’ carried out by the Rapporteur Daes was rather aimed at providing a guide for the UN organs in view of the codification of the indigenous peoples’ rights or when addressing possible infringements of those rights.

The following elements have been considered relevant for a people to be qualified as ‘indigenous’: (a) priority in time, with respect to the occupation and use of a specific territory; (b) voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) self-identification, as well as recognition by other groups, or by state authorities; and (d) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.²⁰ As the Report remarks, these features need not all be present at the same time. It minimises the importance of the lack of a common name in different states to identify the indigenous peoples living within their borders (they could be ‘Natives’, ‘Indians’, or ‘Aborigines’). According to the Rapporteur, the list of the elements proposed for a definition should be applied in a flexible way, enabling a constructive dialogue between governments and indigenous peoples for the recognition of people as ‘indigenous’, where self-definition by the indigenous peoples themselves should be granted.²¹ Thus,

¹⁹ See the declaration by Mr. J. Bengoa, member of the Working Group, in UN Doc/CN/Sub.2/AC.4/1996/2, 10 June 1996, 12, para. 41.

²⁰ Daes Report of June 10, 1996, referring to the progress of the Working Group on Indigenous Populations established within the UN Sub-Commission on Prevention and Discrimination and Protection of Minorities: UN E/CN.4/Sub.2/AC.4/1996/2, paras. 60-65 and 69. The said Sub-Commission, set up in 1947 as a subsidiary organ of the Economic and Social Council, was renamed in 1999 as the Sub-Commission on the Promotion and Protection of Human Rights. When the UN Human Rights Council replaced the UN Commission on Human Rights in 2006, responsibility for the Sub-Commission passed to the Council.

²¹ This point is specially emphasised by F. Marcelli, ‘I popoli indigeni nel diritto internazionale’, in F. Marcelli (ed.), *I diritti dei popoli indigeni* (Roma: Aracne 2009) 35-36. See B. Kingsbury, ‘Indigenous Peoples’ in Wolfrum, R. (ed), (2011) *Max Planck Encyclopedia of Public International Law on line*, <<http://www.iilj.org/wp-content/uploads/2016/08/Kingsbury-Indigenous-Peoples-1.pdf>>, para. 7 (highlighting that ‘[t]hese open-ended approaches to definition help in bridging between two different sensibilities.

an important role was left to subsequent developments of the practice. A series of UN reports, instruments of UN organs, charged with assessing the situation of single indigenous peoples, and international judicial decisions have provided further relevant elements for defining 'indigenouness'.

The 1996 Daes Final Report represents a step forward considering the previous efforts to reach a definition of indigenous peoples. First of all, it shows the awareness of the collective meaning of indigeneity, providing a more advanced construction in comparison to the original approach of the International Labour Organization (ILO) Conventions, prevalently centred on the situation of the individuals suffering because of the discriminatory behaviour of the employers due to their being members of indigenous communities.²²

In addition, the Daes Final Report adopts the term 'people' instead of 'population'. The latter is present in the Covenant of the League of Nations: article 22 of the Covenant entrusted Member states with the 'duty of promoting the well-being and development of the *indigenous populations*' of the territories that remained under their control. That term conveyed the idea that they were not able to stand by themselves, being at a lower level than the more 'advanced societies'. The work carried out within the League of Nations was aimed at setting up different degrees of supervision as appropriate to those particular territories in the name of the 'sacred trust of civilisation'.²³

Ethnicities and identities are dynamic and multiple: ethnic identity may be negotiated and re-fashioned by groups in different relational contexts, and individuals frequently in complete good faith present quite different ethnic identities in different settings. Yet many arguments based on indigenous peoples' rights presume, with good reason, a fixity of the group and a continuity of its identity and sense of place over time, and this may be of great importance to the persons themselves and their understandings of their ancestors, divinities, territories, future generations, and responsibilities'.)

²² ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 *ILM* 1382). The ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107, 26 June 1957, 328 *UNTS* 247) has been replaced by ILO Convention No. 169, in force since 5 September 1991, that has been adhered to by 23 states. ILO Convention No. 107 entered in force in 1959 and was adhered to by 27 countries. The latter is still in force in its actual form and content for those Members that have not ratified Convention No.169.

²³ The term 'population' also appeared in the UN acts adopted before the 1960s. See for instance General Assembly Res. 275 (III) 11 May 1949, recommending the Economic and Social Council to study the situation of the 'aboriginal population and other underdeveloped social groups of the American Continent', with a view to promoting their standards of living, integration and development. The resolution can be read online:

The ILO Convention no. 107 of 1957, concluded after WWII and concerning the protection and integration of Indigenous and other Tribal populations in Independent Countries, also referred to 'populations'. In particular, it provided that customs and institutions of indigenous 'populations' should be retained where these were 'not incompatible with the national legal system or the objectives of integration programmes'²⁴ and 'to the extent consistent with the interests of the national community and with the national legal system.'²⁵

The proposal to replace the term 'population' with the term 'peoples' had already been submitted to the said Working Group on Indigenous Populations by a number of indigenous representatives, but had been rejected because critics contended that the use of the term 'peoples' could suggest a new model running counter to the international law concept of the exclusive territorial sovereignty of the states. Several governments raised similar objections regarding the 'self-determination' of indigenous peoples.²⁶ In the opinion of some states, the self-determination of indigenous peoples would determine a form of 'separate development of statehood or extra-citizenship rights.'²⁷

The general use of the term 'peoples' was finally legitimised in the ILO Convention No. 169 of 1989, entitled 'Indigenous and Tribal Peoples Convention' that replaced the former ILO Convention No. 107 of 1957.²⁸ This represented a step towards the acknowledgment of the autonomy of indigenous peoples. This Convention places special emphasis on the role played by indigenous peoples and the need to respect their culture and spiritual values,²⁹ giving comparatively less space to the perspective

<<http://www.worldlii.org/int/other/UNGA/1949/10.pdf>>. In the resolution, the material and cultural development of the aboriginal populations was seen also as resulting in a 'more profitable utilisation of the natural resources of America to the advantage of the world'.

²⁴ ILO Convention No. 107, Article 7 para. 2.

²⁵ *Id.* Article 8.

²⁶ Doc. UN E/CN.4/Sub.2/1989/33/Add.1, 20 June 1989. See the statements of Czechoslovakia (*ibid.* 6, para.2), of Finland (*ibid.* 7, para. 1) and of Sweden (*ibid.* 9, para 1).

²⁷ See the statement of Australia (*ibid.* 3, para 5): 'if there is a conflict between an indigenous right and a state law or citizenship right, the latter is to be overriding.'

²⁸ *Supra*, note 22.

²⁹ See ILO Convention No. 169, Article 1: '1. This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present

of integration that had been the dominant outlook in the previous ILO Convention No. 107.³⁰ Thus, Convention no. 169, giving full expression to all the rights already codified in the ILO Conventions with reference to the whole range of activities involving indigenous peoples, inaugurated a view that was subsequently acknowledged in the Daes Report and in the 2007 Declaration.³¹

2.2. The Recognition of the Indigenous Peoples of the African Continent

As we have seen, the Daes Report includes among the constitutive elements of the definition of indigenous peoples their marginalisation or dispossession by their neighbours regardless of ethnic origin. This approach has significance when it comes to qualifying the peoples of the African continent.

Before the drafting of the Daes Report, questions had been raised about how to identify indigenous peoples in Africa because of the colonisation in that continent being relatively recent in time. This made it difficult to single out indigenous peoples who were ethnically similar to the dominant society of the local state.

Ambiguities in this regard may be traced back to the Final Act of the Berlin Conference for Africa of 26 February 1885 on the principles ruling recognition of the territorial claims of European Powers in Africa: in Art. 6 the expression 'indigenous populations' was used in a way to suggest that it

state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The 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' and Article 5 ('(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected; (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected'.

³⁰ Cfr. R. Devasish Roy, 'The ILO Convention on Indigenous and Tribal Populations, 1957 (No. 107) and the Laws of Bangladesh: a Comparative Review', Publ. ILO 2009 <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_114957.pdf>.

³¹ Perplexities have been expressed also in the debates of the 14th session of the Working Group on Indigenous Populations (29 July- 2 August 1996). See Daes Report, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 16, para. 61.

referred to the local inhabitants of the continent, with the exception of the white settlers and their descendants that represented the dominating class of the newly-established states after the decolonisation.³² These ambiguities are still present in the annex to General Assembly Res. 1541 (XV) of 1 January 1961, on the principles that should guide Members in abiding by their duties under Art. 73 e) of the Charter relating to the administration of non-self-governing territories. It is equivocal in establishing that 'prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the Country administering it.'³³

These elements contributed to frustrate the intention of Martínez Cobo, as expressed in his 1982 Report at the UN Working Group on Indigenous Populations, to devote more specific consideration to the African continent as a place where suppression, dispossession and discrimination of indigenous peoples, initiated by the colonial regimes, has continued under the post-colonial regimes.³⁴ In addition, the Working Group had not received enough data in reply to requests for information about the populations present in that continent. Some African governments have even denied the presence of indigenous peoples within their borders, being concerned that recognition of historical titles in favour of indigenous peoples could endanger the rights of the landowners who could claim the possession of a valid title according to the law of the country.

A step towards a less restrictive view came from the practice of the Inter-American Commission and the Inter-American Court of Human Rights (IACtHR) declared the duty to grant collective rights protection to groups

³² *Final Act of the Berlin Conference for Africa*, 26 February 1885 on the principles ruling recognition of the territorial claims of European Powers in Africa, French text available at <<https://mjp.univ-perp.fr/traites/1885berlin.htm>>.

³³ General Assembly Res. 1541 (XV) 1 January 1961, on the principles that should guide Members in abiding by their duties under Article 73 e) of the Charter relating to the administration of non-self-governing territories, Principle no. IV. Text in <<https://documents.un.org/prod/ods.nsf/xpSearchResultsM.xsp>>.

³⁴ Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations—Final Report (Supplementary Part)*, Doc. UN E/CN.Sub.2/1982/2/Add. 6, 20 June 1982, para. 5 (stating that some groups could be considered within the number of indigenous peoples, referring to 'groups which occupied or sought refuge in jungle areas, thick forests or mountains, or other areas of difficult access, where they could maintain their own distinct culture and way of life, and who have remained in relative isolation up to the present date.' The Report quoted a study by Hermán Santa Cruz for the UN. A subsequent Report expressed the need that indigeneity should be restricted to 'certain population groups in several African Countries or regions': Doc. UN E/CN.Sub.2/1983/21/Add. 8, 30 September 1983, para. 20.

beyond the 'narrow/aboriginal/pre-Colombian' understanding of indigenous peoples to include peoples deported from Africa and settled in the Americas. They recognised some peoples of African descent living in the Americas because of slavery between the fifteenth and the nineteenth centuries³⁵ to be entitled to be protected as indigenous peoples.³⁶ This was in consideration of the fact that their culture and ways of life differ considerably from the dominant society and their survival as peoples depends on the regular access to their traditional land and the natural resources contained therein.

The 2006 Report of the African Commission's Working Group on Indigenous Populations/Communities addresses the specific problem of definition:³⁷ starting from the definition proposed in the Daes Final Report, it emphasises the marginalisation suffered by communities whose subsistence depends on hunting, gathering or nomadic herding, also following the adoption by the governments of politics to support sedentary farming.

When distinguishing the character of African indigenous peoples, the period of colonisation should not be seen as the only benchmark time-line. Identifying as indigenous all the inhabitants of the African continent before colonisation, with the exception of those who are the direct or indirect descendants of colonisers, would result in an anomalous extension of indigeneity to all the non-descendants of colonisers. In the case *von Pezold and Border Timbers v. Zimbabwe*, decided by an ICSID Arbitral Tribunal in 2015, members of the von Pezold family claimed that the Government of Zimbabwe had unlawfully expropriated their property in violation of the Germany–Zimbabwe Bilateral Investment Treaty.³⁸ The Government

³⁵ An estimated 13 million Africans were illegally transported from the shores of West Africa to the western hemisphere. See N.J. Udombana, 'Reparations and Africa's Indigenous Peoples', in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: OUP 2009) 396.

³⁶ See *Moiwana Community v. Suriname*, IACtHR (Preliminary Objections, Merits, Reparations and Costs) (ser. C) No. 124, Judgment 15 June 2005; *Case of the Saramaka People v. Suriname*, IACtHR (Preliminary Objections, Merits, Reparations, and Costs) (ser. C) No 172, Judgment 28 November 2007.

³⁷ 2006 Report of the African Commission's Working Group on Indigenous Populations/Communities, Submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' Adopted by the African Commission on Human and Peoples' Rights (ACommHPR) at its 28th ordinary session <https://www.iwgia.org/images/publications//African_Commission_book.pdf> The African Commission has been established within the framework of African Charter for Human and Peoples Rights of 1981, in force since 1986. The Commission has vast competences, mainly related to the carrying out of enquiries upon requests from states or individuals or related to the settlement of disputes.

³⁸ *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID ARB/10/15, Award 28 July 2015.

objected that the policy of redistributing lands was in the public interest, aimed at recovering land from which the black people had been forced from during colonisation. According to the Tribunal, the Claimants were targeted on the basis of their skin colour and, hence, the expropriation was discriminatory and in breach of the BIT.

The Tribunal has also denounced some discriminatory elements, albeit not relevant to decide the case, present in the Land Reform Policy and in the new Zimbabwean Constitution, enacted in 2013, providing for a different regime of compensation for black or white expropriated Zimbabweans. After ‘carefully consider[ing] the Respondent’s arguments relating, in effect, to the righting of historical wrongs’, the Tribunal rejected the argument that expropriation was in the public interest because ‘[o]nce taken, large parts of the properties [were] not actually re-distributed to a historically disadvantaged or otherwise landless population’.³⁹ Moreover, the redistribution of lands in favour of new Settlers/War Veterans landowners did not in fact contribute to the economic development of the Country. The Tribunal also rejected a request to submit an *amicus curiae* brief by an NGO allegedly representing indigenous tribes, stressing that ‘neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings’.⁴⁰

A substantial contribution towards the definition of indigenous peoples has been given by the African Commission on Human and Peoples’ Rights, since the so-called *SERAC* case involving the state of Nigeria (2000),⁴¹ while a number of other procedures have taken place before the Constitutional Courts of South-Africa, Botswana, and Nigeria.⁴²

³⁹ Id. para. 502.

⁴⁰ *Border Timbers Ltd, Border Timbers International (Private) Ltd, and Hangani Development co. v. Republic of Zimbabwe*, ICSID ARB/10/25, Procedural Order 2, 26 June 2012, para. 57. For commentary, see V. Vadi, ‘Crossed Destinies: International Economic Courts and the Protection of Cultural Heritage’, (2015) 18 *Journal of International Economic Law* 51–77.

⁴¹ *Soc. & Econ. Rights Action v. Nigeria*, Comm. No 155/96, 27 October 2001, <<http://caselaw.ihra.org/doc/155.96/view/en/#merits>>.

⁴² See *Aleksor Ltd. v. The Richtersveld Community*, South African Constitutional Court, Case CCT 19/03, Judgment 14 October 2003, <<https://cer.org.za/wp-content/uploads/2011/12/Richtersveld-Community-v-Alexcore-Ltd.pdf>>; *Roy Sesana and Others v. Attorney General*, Botswana, High Court in Lobatse, Case No. 52/2002, Judgment 13 December 2006 < <http://www.saflii.org/bw/cases/BWHC/2006/1.html>>; *The Bodo Community and Others v. Shell Petroleum Development Company Nigeria*, Supreme Court of Nigeria, Case No. 52/2005, Judgment 5 June 2015, (a summary in < <http://lawpavilionplus.com/summary/judgments/?suitno=SC.52%2F2005>>).

In the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya* before the African Commission, the Respondent state objected that the Endorois did not deserve special treatment since they were no different from the other Tugen sub-group. For the respondent, the inclusion of some of the members of the Endorois in 'modern society' had affected their cultural distinctiveness. Accordingly, it would have been difficult to define them as having a distinct legal personality. Consequently, the representation of the Endorois by the Endorois Welfare Council was not legitimate.⁴³

The African Commission rejected these arguments on the basis of the evidence submitted to it. The Commission declared that the Endorois 'can be defined as a distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner from the Tugen sub-tribe or indeed the larger Kalenjii tribe.' The Commission reached this conclusion on the basis of the same elements considered in the jurisprudence of the Inter-American Court. Namely, the Court considered the distinctiveness of indigenous peoples' social, cultural, and economic features, consisting in their special relationship with their ancestral territories, and the possession of their own norms, customs, and/or traditions that regulate, at least partially, the coexistence of the members of the group.⁴⁴

Analogously, in the *Ogiek* case decided on 27 July 2017, the African Court on Human Rights and Peoples' Rights adopted the same view, also referring to the definition developed within the African Commission's Working Group⁴⁵ and to the works of the UN. The Court stated that the Ogiek, who had lived in the Mau Forest long before the occupation of the Country by colonisers, possessed the prerequisites to be considered an indigenous people, and should be distinguished from the other neighbouring indigenous groups (the Maasai, Kipsigis, and Nandi).⁴⁶

⁴³ Communication No. 276/2003, 11-25 November 2009 <http://www.worldcourts.com/achpr/eng/decisions/2009.11_CMRD_v_Kenya.htm>

⁴⁴ *Ibid.* para.161. The African Commission found that the Respondent state had infringed Articles 1, 8, 14, 17, 21 and 22 of the African Charter, in the Recommendations of Banjul (Gambia), 46th Ordinary Session, 11 – 25 November 2009.

⁴⁵ Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples adopted by the ACommHPR at its 41st Ordinary Session held in May 2007 in Accra, Ghana, <https://www.iwgia.org/images/publications/0460_ACHPR_Advisory_Op-UNDRIP_UK_2010.pdf>

⁴⁶ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Appl. No. 006/2012, Judgment 26 May 2017. The decision can be read at <<https://africanlii.org/fr/afu/judgment/african-court/2017/9>>, paras. 102-113. For an analysis of the case, see

3. *The Indigenous Rights to the Land*

3.1. *The Inherent Character of the Rights to the Land and the Rejection of the Doctrine of Terra Nullius*

Among the rights codified in the 2007 Declaration, the right to the land has a prominent place. Possession and use of the land and its resources represent prerogatives that are intrinsic to the characteristics of indigeneity, being connected to the survival of indigenous peoples' autonomous political, economic, and social structure and their unique cultural and religious traditions. The ties with the land feature a kind of distinctive spiritual relationship.⁴⁷ states must respect the customs, tradition and land tenure systems of the indigenous peoples when recognising 'the right of the indigenous peoples to own, use, develop and control the lands, territories and resources that they possess'.⁴⁸

The adoption of the Declaration indicates the definitive rejection of the doctrine of *terra nullius*, as it referred to the lands that were the object of conquest or occupation by the European colonisers. That doctrine found support in decisions by national Courts and in public statements of the nineteenth century, in the wake of the theory of the supremacy of the sovereignty of the state. It considered indigenous peoples as deprived of any right to settle or use the resources of the lands inhabited by them unless they received a title from the state. In Australia, that approach prevailed until the middle of the twentieth century.⁴⁹ Still in the 1971 case *Milirrpum* (known as the *Gove land rights* case), Judge Blackburn of the Australian Supreme Court of the Northern Territory denied that a 'communal native act' could be validly recognised lacking a title from the Crown. The Court argued that the legal titles provided by the law of the country were unknown in the law system of the indigenous people.⁵⁰ The arguments of the Court seem to deny the existence of original titles, where recognition is given to the existing indigenous system based on customary rules. Given the denial of original titles, indigenous peoples were forcibly removed from the land

Focarelli's chapter in this book.

⁴⁷ UNDRIP, Article 25.

⁴⁸ UNDRIP, Article 26.

⁴⁹ *Milirrpum v. Nabalco Pty Ltd* (1971) Australian Supreme Court (NT), 17 *FLR* 141, Judgment 27 April 1971, 242 <<https://www.atns.net.au/agreement.asp?EntityID=1611>> para. 214.

⁵⁰ *Coe v. Commonwealth* (1979), High Court of Australia No. 68, Judgment 5 April 1979 <<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1979/68.html>>.

during the 1950s and 1960s, which was around the time of the housing boom. In other contexts, non-recognition of indigenous titles was rather the result of the indifference of the European countries, leading to a *de facto* presence—in the absence of a legal title awarded by the state—of indigenous peoples, the unique non-disturbed settlers of distant, sometimes inhospitable, lands.⁵¹

The same approach has been used to deny the validity of treaties concluded between the colonisers and the original inhabitants of the land. Their character of binding treaties under international law has often been denied and the territories have been considered the domain of absolute power of the new occupants. In support of that approach, the argument was put forward that those treaties had contradictory traits: though possessing elements similar to treaties concluded between sovereign entities, they awarded new settlers with the power to unilaterally modify or annul the said treaties, also taking advantage of the lack of adequate instruments of knowledge on the side of the indigenous leaders. For instance, the Treaty of Waitangi between the British Crown and Māori Chiefs from the North Island of New Zealand, signed on 6 February 1840, has been interpreted as enabling complete sovereignty over Māori lands and resources, whereas the Māori believed that they had only given the British Crown the consent to use their land.⁵² Although contradicted by the circumstances of the conclusion of those treaties, this interpretation prevailed in the jurisprudence,⁵³ until the Treaty of Waitangi Act of 10 October 1975 proclaimed the duty to comply with the principles of the Treaty of Waitangi, providing that a Tribunal should be established to receive complaints relating to the interpretation and implementation of the Treaty.⁵⁴

In the United States, the very practice of treaty-making with Indian peoples was abolished through the Indian Appropriations Act of 3 March 1871: ‘No Indian nation or tribe within the territory of the United states shall be acknowledged or recognized as an independent nation, tribe, or

⁵¹ This can be said for Greenland, Alaska, North Canada, also owing to the difficult conditions for inhabitants of those lands.

⁵² Treaty of Waitangi between the British Crown and Māori Chiefs from the North Island of New Zealand. The text is available at <<https://www.waitangitribunal.govt.nz/treaty-of-waitangi/english-version/>>.

⁵³ *Wi Parata v. The Bishop of Wellington*, New Zealand Supreme Court, Judgment 18 July-17 October 1877 <<http://www.nzlii.org/nz/cases/NZJurRp/1877/183.pdf?query=Wi%20Parata>>78: ‘The title of the Crown to the territory of New Zealand was acquired, *jure gentium*, by discovery and priority of occupation, the territory being inhabited only by savages.’

⁵⁴ The Treaty of Waitangi Act is available at <<https://www.waitangitribunal.govt.nz/treaty-of-waitangi/meaning-of-the-treaty/>>

power with whom the United States may contract by treaty'.⁵⁵ Though providing that the obligations of any former treaty lawfully made and ratified with any such Indian nation or tribe would not be invalidated, that act fuelled a growing consensus about the illegitimacy of the demands for autonomy by tribal nations in modern America. Treaty-making was progressively abolished as an instrument to rule the settlement on the lands, while tribal land ownership broke up through allotment and federal government forced cultural assimilation policies. This trend found its full expression in the U.S. Supreme Court's ruling in *Lone Wolf v. Hitchcock* (1903), which finally recognised the power of Congress to abrogate the existing treaties with Indian tribes.⁵⁶

3.2. *The Shift towards the Qualification of the Indigenous Peoples as entitled with Original Rights within the National Legal Order of the state*

The doctrine of *terra nullius*, which denied the existence of any inherent rights of indigenous peoples to the possession or use of the land, ceased to be followed during the 1960s. Besides the role played by the international organizations, other elements contributed to the demise of the doctrine: the movement for the protection of human rights, which found its main expression in the UN's 1948 Universal Declaration of Human Rights⁵⁷ and in the debates leading to the UN Covenants of 1966;⁵⁸ access of the new generations of indigenous peoples to education leading to an increased awareness of the existing mechanisms to obtain recognition; the growing contacts between indigenous peoples overseas and the creation of an international indigenous movement; and pressure on the Governments who

⁵⁵ U.S. Congress, Final Draft of the Indian Appropriations act of 1871, Digital Exhibits, <<http://digitalexhibits.libraries.wsu.edu/items/show/5701>> para. 71: 'Future treaties with Indian tribes.'

⁵⁶ *Lone Wolf v. Hitchcock*, U.S. Supreme Court, Case No. 553, Judgment 5 January 1903 <<https://supreme.justia.com/cases/federal/us/187/553/>> 187: '[t]he power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.'

⁵⁷ UN General Assembly, Universal Declaration of Human Rights, 217 (III) A, Paris, 10 December 1948, <<http://www.un.org/en/universal-declaration-human-rights/>>

⁵⁸ International Covenant on Civil and Political Rights (ICCPR), United Nations General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976, 999 *UNTS* 171. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is quoted *supra*, note 3.

received military support by indigenous members during the Second World War to obtain a reward for the sacrifice of blood and lives.

These elements encouraged a general trend towards reversing the theory that indigenous peoples' rights over their original lands had been extinguished through dispossession at the time of colonisation. Eviction and occupation of the lands they had inhabited since time immemorial started to be considered to threaten their very survival and to violate fundamental human rights. Even if the case of dispossession dates back to a time when conquest and colonisation were not illegal, this does not exclude that the contemporaneous effects of continuing past wrongs can be the object of adjudication. In this respect, the UN Human Rights Committee played a crucial role. It examined situations that were the consequences of historical failures to protect indigenous rights in the light of the UN Covenant of 1966 on the Civil and Political Human Rights, even if the facts originating those situations happened long before the Covenant entered into force.⁵⁹ In addition, the ILO Committee decided cases relating to the effects of relocation of indigenous communities out of their original lands that happened before the entry into force of Convention No. 169 (1989).⁶⁰

The qualification of indigenous rights to the land as having an 'inherent' character can be found in the national case law of the American and Australian continents since the 1970s. Different governments started to consider the relationship with indigenous peoples under a new approach that favoured the original character of the rights. According to commentators, the milestone of this new trend was a well-known decision by the Supreme Court of Canada, *Calder v. Attorney General of British Columbia*, considered as the catalyst for the recognition of original rights.⁶¹ In the aftermath, the

⁵⁹ Among the most relevant cases see *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (14 February 1984), Final View 26 March 1990, U.N. Doc. Supp. No. 40 (A/45/40) 1 (1990); *Lovelace v. Canada*, Communication No. R.6/24/1977 (29 December 1977), Final View 30 July 1981, U.N. Doc. Supp. No. 40 (A/36/40) 166-181. See *infra*, note 103.

⁶⁰ See for instance Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), on the basis of article 24 of the ILO Constitution by the Sulinermik Inuussutissarsiatuqartut Kattuffiat (SIK) (ILO Doc. GB.277/18/3 and GB.280/18/5).

⁶¹ Supreme Court of Canada, *Calder v. Attorney General of British Columbia*, 31 January 1973 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do>>, rejecting by majority the judgment of the Court of Appeal that '[after] conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer'. Although the decision had no practical effect on the judiciary plane, it was the catalyst for following decisions that accepted the same approach and for the start of negotiations between Canada and the Nisga's Tribal Council in 1976, to reach

title to the land of indigenous peoples was recognised on the basis of two elements: prior occupation of land before the arrival of colonisers, i.e. before the assertion of sovereignty by the colonisers, and pre-existence of central and distinctive attributes of the original societies. In New Zealand, the qualification of the indigenous rights to the land as having an ‘inherent’ character was expressed in the case *Te Weeki v. Reg. Fisheries Officer* 1986⁶², which rejected the *terra nullius* doctrine. Other cases subsequently followed. In Australia, a similar approach was inaugurated by the 1992 *Mabo* case.⁶³ The new trend also prevailed in the decisions of the courts of some Asian and African states from the 1990s onwards.⁶⁴

The perception of the self-standing, non-derivative rights of the indigenous peoples is founded in two main elements: the factual and continuous use of the land and its resources since the remote past, and the laws in force within the system of the indigenous society that governs the use of the land.⁶⁵ Therefore, the exercise of the rights to the land possessed

an agreement ratified in 2000 that recognised that people’s self-government. The model of that treaty was used in negotiations with other First Nations.

⁶² *Te Weeki v. Reg. Fisheries Officer* (1), High Court of New Zealand Case M662/85, Judgment 19 August 1986, NZ.L.R. 682-687.

⁶³ *Mabo v. Queensland* (2), High Court of Australia, Fed. Case 92/014, Judgment 3 June 1992, 175 C.L.R. 1, para. 42: ‘A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.’ <<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/23.html>>.

⁶⁴ See J. Gilbert, ‘Historical Indigenous Peoples’ Land Claims: a Comparative and International Approach to the Common Law Doctrine on Indigenous Title’, (2007) 56 *ICLQ* 585–8. According to Gilbert, that doctrine of the original, inherent character of the rights of indigenous peoples stems from the common doctrine of ‘acquired rights’ of the nineteenth century: a change in sovereignty (by conquest or acquisition) does not affect the acquired rights of the inhabitants of the country (*ibid.* 590-592). An ambiguous approach has been followed by the Sapporo (Japan) District Court, Civil Division No. 3, Judgment 27 March 1997 in the case *Kayano et al. v. Hokkaido Expropriation Committee (the Nibutani Dam Decision)*, in (1999) 38 *International Legal Materials* 394. Here the Court, while declaring the illegality of the Confiscatory Administrative Rulings to build a dam because of the enormous damages caused to the Ainu people, that is referred to as an indigenous people, seems not to go beyond the recognition of their cultural rights in the same way as they are recognised to minorities. No referral is present as to original titles on the land or to self-determination as intended in the 2007 Declaration on indigenous peoples. The same ambiguity is present in the Ainu Promotion Act of 26 April 2019 (references in <<https://www.loc.gov/law/foreign-news/article/japan-new-ainu-law-becomes-effective>>).

⁶⁵ See for instance the Swedish Land Code of 1734, amended on 1 January 1972, that

by the indigenous peoples cannot be subject to the same rules as those governing the legal titles based on the law of the country as concerns the nullification or transfer of the original titles.

The regime of indigenous rights to the land is fully compatible with state sovereignty. This approach is in line with the evolution of theories on territorial sovereignty. According to the concept prevailing at the beginning of the twentieth century, the relationship between the state and the territory was to be qualified in terms of ownership or possession by the state. This approach has gradually changed, giving primary weight to sovereign functions and considering the territory as the domain wherein states exercise those functions. In this perspective, the presence of different titles within the borders of the state should be considered as fully consistent with sovereignty. Indeed, sovereignty does not necessarily entail that the territory in its entirety is covered by land titles: it can co-exist with the absence of activities controlled by the state or with titles of external origin.⁶⁶

The existence of indigenous peoples' rights does not restrict the sovereignty of the state; rather, it shapes how the sovereign functions of the state are carried out, and how the land and its resources are managed.⁶⁷ Without necessarily speaking of a shared sovereignty with indigenous peoples, the indigenous peoples are definitively granted a special place among the other components of the society in respect of possession of the

grants ownership or usufruct when the use of the land lasted such a long time that nobody knew or heard that the situation had ever been different. Lacking a demarcation of the lands subject to winter grazing in the Reindeer Husbandry Act of 1993, the issue of the existence of those titles is the object of evidence given to the courts should a dispute arise with landowners. These elements have been considered in the proceedings before the European Court of Human Rights (ECHR), case *Handölsdalen Saami Village and others v. Sweden* (Appl. no. 39013/04), Judgment 4 October 2010 (Final), originated from a claim by non-indigenous inhabitants that opposed to winter grazing by the Saami people. The Court has not envisaged in the case a violation of Article 6 of the European Convention on Human Rights. See however the partly dissenting opinion of Judge Ziemele (*ibid.* 20).

⁶⁶ See *Island of Palmas case* (or Miangas), *United States of America v. The Netherlands* (Arbiter Huber), Award, 4 April 1928, *II Reports of International Arbitral Awards*, 829-871, <http://legal.un.org/riaa/cases/vol_II/829-871.pdf>, 8 (holding that 'the continuous and peaceful display of territorial sovereignty by peaceful relation to other states is as good as a title') and 9 (holding that 'Sovereignty cannot be exercised in fact at every moment on every point of a territory.')

⁶⁷ For a detailed overview of the main theories of sovereignty expressed since the beginning of the twentieth century, see M. Nino, *Land grabbing e sovranità territoriale in diritto internazionale* (Napoli: Editoriale scientifica 2018) 128-187.

land and the traditional use of natural resources.⁶⁸

Besides, the indigenous vision—as also found in the recent debates through their representatives or NGOs—is far from regarding appropriation of a territory as an instrument for conquest and occupation, or as providing a title analogous to the full sovereignty of a state.

The recognition of the existence of a separate set of rules having a distinct origin in respect of the state's legal system does not imply that indigenous peoples possess a form of independent power on the land or even the power of addressing problems connected with possible territorial vindications from inside or outside the borders of the state. They rely on the exclusive capacity of the state to protect its borders and, if needed, to engage in international frontier disputes.⁶⁹

3.3. The Legal Effects of Recognition of the Sovereign Rights of the Indigenous Peoples to the Land

Recognition of the sovereign rights of indigenous peoples to the land may find support in domestic statutes recognising indigenous rights in the form of property rights or titles to use, manage, and possess land.⁷⁰ However, such statutes do not replace the original titles, which maintain their inherent character and are not subject to the rules of the state. Even constitutional rules that codify aboriginal rights do not exhaust the content of the indigenous rights.⁷¹

⁶⁸ With specific reference to the interplay between states and indigenous peoples, M. Nino qualifies the rights of the indigenous peoples to use the land and natural resources as a form of 'shared sovereignty' (*ibid.* 27).

⁶⁹ A vast literature exists on the requisite of independence, strictly connected to sovereignty of the state, in the sense that the latter has the capacity of excluding other governing powers from the territory. See, among others, B. Conforti, 'Cours général de droit international public', (1988) 212 *Recueil des Cours* V, 144-163; L. Henkin, 'General Course on Public International Law', (1989) 216 *Recueil des Cours* IV, 26 and 130; P.M. Dupuy, 'L'unité de l'ordre international', in (2002) 297 *Recueil des Cours* 95 (calling 'independence' as a factual situation that guarantees sovereignty and, at the same time, receive from sovereignty a legal qualification or '*formalisation juridique*'). See also J.E.S. Fawcett, 'General Course on Public International Law', (1971) 132 *Recueil des Cours* I, 381-85.

⁷⁰ See *Tsilhqot'in Nation v. British Columbia*, Canadian Supreme Court, Judgment 26 June 2014, 2 *S.C.R.*, 279, para. 34. The Canadian Supreme Court has also referred to the requisite of exclusivity of the possession of the land, in the sense that the presence of titles for other peoples had to be excluded, both under the common law of the Country and according to the aboriginal rules (*ibid.* 285-6 paras. 48-9).

⁷¹ See *Delgamuukw v. British Columbia*, Canadian Supreme Court, Judgment 16 June

The recognition of indigenous rights in domestic legal instruments can facilitate the coexistence between different titles within the territory of the state, at the same time giving more certainty to the titles of the indigenous group living in the country. In case of disputes between indigenous peoples and other sectors of society, domestic courts become available.⁷² For this reason, indigenous rights are generally the object of special rules, establishing priority in respect of property titles or other titles conferred on the land.⁷³

However, such recognition implies a legal fiction, since it consists in adapting a legal category of the law of the country to the indigenous rights that are based on an external source—i.e. the indigenous legal system based in the practices and uses of the indigenous people. This can sometimes prove a difficult task. For instance, in the British legal system, the ‘Aboriginal titles’ of indigenous peoples of the former colonies of the Crown cannot be assimilated to the right of property, nor to sovereign rights. Therefore, they have been included, through a legal fiction, among those titles on the land that the sovereign granted to private persons in exchange for the duty to provide goods or services to the Sovereign. However, they have to be distinguished from the latter, being free from any duty towards the Crown (‘freehold title’), besides being permanent in principle.⁷⁴

Domestic statutes recognising indigenous rights do not have a constitutive effect of such entitlements; rather, they merely recognise such rights. Given the declaratory effect of domestic acts of recognition of indigenous rights, the indigenous titles are granted against the consequences of possible new acts repealing them⁷⁵ or reforming the same, for instance in the sense of changing

1997, 3 S.C.R. <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1569/1/document.do>>1015. Section 35 of the Canada Constitution Act of 1982, provides recognition of the existing aboriginal and treaty rights.

⁷² For a comparison between the status of indigenous peoples in North America, Australia, New Zealand and Northern Europe, see K. Göcke, *Indigene Landrechte im Internationalen Vergleich* (Max Planck Institut: Springer 2015) 229 ff.

⁷³ In Sweden, the use of the land by the Saami people has been codified taking into account the use for time immemorial according to the land Code in force since 2 January 1972. The *Reindeer Husbandry Act*, as amended in 1993, codifies the Saami right of winter grazing on the lands possessed from time immemorial.

⁷⁴ Göcke, *Indigene Landrechte*, 232.

⁷⁵ See *Calder v. British Columbia*, para. 328 (‘when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right”. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished’.)

the original title into a right of property.⁷⁶ In addition, domestic measures conferring on other subjects rights on the native lands cannot in principle have the effect of extinguishing indigenous rights. According to the Preliminary working paper by Erica-Irene Daes to the UN Commission on Human Rights of 20 June 1997 ‘extinguishment would mean to give vulnerable and inferior legal status for indigenous land and resource ownership’.⁷⁷

The original character of the ‘aboriginal’ titles is not just the consequence of their priority in time in respect of the moment of colonisation. Rather, it is strictly connected with the existence of practices, customs, and traditions integrated in the distinctive culture of the peoples, inherent in the characters of the indigenous society, that already existed at the time of contact with the colonisers.

Because of the distinctive elements of the indigenous rights to the land, the relationship of states with the indigenous peoples living in their territory appears to be similar to those that exist with foreign systems of law. Questions as to how the land should be managed, or relating to the continuity of the use of the land have been addressed in the relevant case law taking into account the quality of the activities carried out by the indigenous people and their consistency with the distinctive characters of the traditional indigenous culture. In the case *Van der Peet*, decided on 21

⁷⁶ See UN Doc. A/54/18, Suppl., March-August 1999, Report of the Committee on the Elimination of Racial Discrimination, Annex VIII, at 6 (Dec. 2/54) (pointing out that the *Australian Native Act* 1993 as amended in 1998 along the case law of the Australian High Court raised reasons of concerns.)

⁷⁷ Doc. UN E/CN.4/Sub.2/1997/17, para. 29. However, the High Court of Australia in the case *Wik v. Queensland* (‘Pastoral Leases case’), Judgment 23 December 1996, (1996) 71 ALJR 173 <<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1996/40.html>> declared that extinction may result from an act of the state unequivocally having the intention to produce that effect. See statement by Judge Brennan (*ibid.* 76 f.). : ‘Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it. Such laws or acts may be of three kinds: (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title. A law or executive act which, though it creates no rights inconsistent with native title, is said to have the purpose of extinguishing native title, does not have that effect “unless there be a clear and plain intention to do so”. Such an intention is not to be collected by enquiry into the state of mind of the legislators or of the executive officer but from the words of the relevant law or from the nature of the executive act and of the power supporting it. The test of intention to extinguish is an objective test’. See also Supreme Court of Canada, *Delgamuukw v. British Columbia*, *supra* note 71, 1120, para. 180 and *passim*: the Canadian Supreme Court asserted that extinction can only be the result of an act of the Crown sufficiently clear as to that effect.

August 1996, the Supreme Court of Canada had to establish whether the practice, custom or tradition related to fishery arising from the prior social organization and distinctive culture of an aboriginal community (named Sto:lo) included also the right to exchange fish for money or other goods. If the latter activity was not significant enough, they should be subject to the same rules and limits as the activities of the same kind carried out by non-indigenous persons.⁷⁸

In the light of the indigenous priorities, the co-existence of concurring titles on the land cannot be definitely excluded, provided the latter do not interfere with the use of the resources and the activities essential to the survival of the group, such as hunting, fishing or pastoralism. Sometimes, restrictions to the use of the land may result from the need to reduce the quantity of resources such as fish to be caught, in order to ensure access to the resources also in favour of other right holders. The essential characters of indigenous traditions entail that the use of the land is intimately connected with the respect of their spiritual values, besides the primary interest to safeguard the continued existence of the group. According to Art. 14 of the ILO Convention no. 169 (1989), exclusivity of use of the land is not essential to qualify a people as indigenous.⁷⁹

In Australia, alternative regimes have been set up on the basis of appropriate consultations between the state and indigenous peoples, also providing for possible restitution of the lands to natives in case of cessation of use by non-indigenous pastoralists. The question was considered in 1999 by the UN Committee on the Elimination of Racial Discrimination with reference to the *Australian Native Act* as amended in 1998.⁸⁰ The Committee underlined the existence of pitfalls in the system of the Australian rules

⁷⁸ *R. v. Van der Peet*, Supreme Court of Canada, Judgment 21 August 1996, (1996) 2 S.C.R. 507 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1407/1/document.do>>. The Court confirmed the existence of the aboriginal right to sell fish for sustenance purposes, to be protected under section 35 of the Constitution Act 1982.

⁷⁹ ILO Convention No. 169, Article 14: '1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. 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. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.'

⁸⁰ UN Doc. A/54/18, Suppl., March-August 1999, Report of the Committee on the Elimination of Racial Discrimination, Annex VIII, 112 ff.

governing native rights, and the ambiguities of the case law.⁸¹ The case led to a reconsideration by the Government, which expressed the intention to support the genuine aspirations of indigenous people to achieve greater self-sufficiency, and to ensure that all Australians share equally a common future, which will form the basis of a lasting reconciliation.⁸² Relevance has been given to the traditional and cultural system of the indigenous peoples in the management of the resources of the land and the parties tried to find a negotiated solution.

In addition, the unified Nordic Convention on indigenous Saami rights and culture, signed in 2017 between Finland, Norway and Sweden, emphasises the rights of indigenous peoples to use traditional land, as well as the state duty to negotiate in matters of special relevance and to involve the Saami Parliament in decisions that concern the Saami people specifically.⁸³

As we see from the practice, problems of sharing the use of the land have been prevalently considered in the light of activities such as recreational fishing and commercial fishing concurring with those carried out by the indigenous peoples to meet food requirements. Nowadays the need to ensure the conservation of resources has emerged under different terms, with the protection of resources against pillage being a common concern both for non-indigenous peoples and the indigenous peoples themselves, though the latter are often the victims of practices that risk endangering or shortening the availability of exhaustible natural resources.⁸⁴

⁸¹ High Court of Australia, *Wik v. Queensland*, *supra* note 77, holding that the interest of the non-indigenous 'pastoralists' was a limited one, i.e. for 'grazing purposes only', as the leases stated. Such an interest could, in law, be exercised and enjoyed to the full without necessarily extinguishing native title interests. However, according to the Court, in case that evidence and legal analysis lead to inconsistency between the legal interests of the lessee (as defined by the instrument of lease and the legislation under which it was granted) and the native title (as established by evidence), the native title, to the extent of the inconsistency, should be extinguished.

⁸² *Tsilhqot'in Nation v. British Columbia*, Supreme Court of Canada, *supra* note 70, 279, para. 34 and paras 48–9 (holding that the presence of titles for other peoples had to be excluded, both under the common law of the Country and the aboriginal rules).

⁸³ The Convention between Finland, Norway, and Sweden, drafted in 2017, can be read at <<https://www.sametinget.se/105173>>. See Articles 16 and 17. See also Article 34 that considers the case of use by the Saami in association with other users, establishing that 'due regard' will be paid by the Saami and the other users to the interests of each other and the nature of the competing rights.

⁸⁴ See R. S. Abate & E. A. Kronk (eds), *Climate Change and indigenous Peoples. The search for legal remedies*, (Cheltenham UK-Northampton, MA-USA: Elgar 2013).

3.4. *The Continuity of the Relationship with the Land and the Situation of Nomadic Peoples*

The qualification of indigenous titles as inherent and original is necessarily made on the basis of the indigenous customs and rules. Analogously, in order to establish whether those titles can be considered valid, continuity of the use of the land needs to be ascertained. Two elements have to be considered: 1) the persistency of the quality of the activities performed by indigenous peoples; and 2) the effective occupancy of the land.

As to the element of continuity in the quality of activities, it must be interpreted in a flexible way, acknowledging evolution over time and avoiding an approach favourable to ‘frozen rights’ dating back to the time of colonisation.⁸⁵ The evolution of practices, customs, and traditions into modern forms should not prevent their protection as original rights, provided that continuity with pre-contact practices, customs, and traditions is demonstrated.⁸⁶ This means that reference to the indigenous rules is of a dynamic kind, provided the crucial elements of ancient culture and tradition are present.

Coming to the effective occupancy or use, this element is well-known in the international legal practice, being constantly referred to by international courts when charged with the settlement of inter-state border disputes. In comparison to continuity in inter-state relations, the constant occupancy and unbroken use of land can be the object of a burdensome activity to collect testimonials of facts throughout the history of the people. Evidence gathering and mapping are crucial elements in order to obtain a favourable adjudication in a land claim.⁸⁷ In order for the element of continuity of occupation to operate there is no requirement of an unbroken chain between current practices and the customs and traditions that existed prior to contact with the colonisers. Such link can be resumed after interruption.⁸⁸

Evidence of continuity of use is problematic with regard to proving the titles of nomad peoples to the use of the resources of the land where they have traditionally had access. In this case, it is most predictable that use

⁸⁵ ‘Frozen rights’ is the expression used in the *Sparrow* case, decided by the Supreme Court of Canada on 31 May 1990, [1990] 1 SCR 1075, at <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do>> 1093.

⁸⁶ *Van der Peet*, *supra* note 80, 557.

⁸⁷ See J. Gilbert & B.B. Begbie-Clench, ‘“Mapping for Rights”: Indigenous Peoples, Litigation and Legal Empowerment’, (2018) 1 *ELR*, 6-13.

⁸⁸ *Van der Peet*, *supra* note 78, 510.

of a territory does not have an exclusive character. We already referred to Article 14 of ILO Convention no. 169 (1989), providing that '[p]articular attention shall be paid to the situation of nomadic peoples and shifting cultivators'.⁸⁹

The continuity of the use of the land has been considered in the Advisory Opinion on *Western Sahara* (1975) of the ICJ, concerning the nomad peoples of South-West Sahara. The opinion aimed at determining whether Morocco had acquired sovereign rights. The Court excluded that every nomadic passage or use could give rise to a title on the land. Nonetheless, it held that 'regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources' could suffice to establish title on land. The Court considered the specific situation of the aboriginal group in question, by saying that sufficient occupation is a 'question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used.'⁹⁰

Shifting to national case law, the Canadian Supreme Court of British

⁸⁹ ILO Convention No. 169, Article 14.

⁹⁰ *Western Sahara, Advisory Opinion*, 1.C.J. Reports 1975, No. 61, para. 87: 'In general, the Court was informed, the right of pasture was enjoyed in common by these tribes; some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights. Perennial water-holes were in principle considered the property of the tribe which put them into commission, though their use also was open to all, subject to certain customs as to priorities and the amount of water taken. Similarly, many tribes were said to have their recognized burial grounds, which constituted a rallying point for themselves and for allied tribes. Another feature of life in the region, according to the information before the Court, was that inter-tribal conflict was not infrequent.' and para. 152: 'The information before the Court makes it clear that the nomadism of the great majority of the peoples of Western Sahara at the time of its colonization gave rise to certain ties of a legal character between the tribes of the territory and those of neighbouring regions of the Bilad Shinguitti. The migration routes of almost all the nomadic tribes from Western Sahara, the Court was informed, crossed what were to become the colonial frontiers and traversed, inter alia, substantial areas of what is today the territory of the Islamic Republic of Mauritania. The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes in both territories, and their burial grounds in one or other territory. These basic elements of the nomads' way of life, as stated earlier in this Opinion, were in some measure the subject of tribal rights, and their use was in general regulated by customs. Furthermore, the relations between all the tribes of the region in such matters as inter-tribal clashes and the settlement of disputes were also governed by a body of inter-tribal custom. Before the time of Western Sahara's colonization by Spain, those legal ties neither had nor could have any other source than the usages of the tribes themselves or Koranic law. Accordingly, although the Bilad Shinguitti has not been shown to have existed as a legal entity, the nomadic peoples of the Shinguitti country should, in the view of the Court, be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated.'

Columbia argued that '[t]he fact that aboriginal peoples were non-sedentary ... does not alter the fact that nomadic peoples survived on the land prior to contact with Europeans and, further, that many of the practices, and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.'⁹¹

When the use of the land involves more than one state, this transboundary use does not represent an obstacle against recognising the rights of indigenous peoples. However, should only one of the states involved be ready to recognise the indigenous rights, the indigenous communities might be tempted to move into the territory of the state having a legislation more favourable to support their rights. This situation may give rise to border disputes and lead to the displacement of the indigenous people from the original lands placed within one of the states involved. In the *Maritime Delimitation* case between Eritrea and Yemen, decided on 17 December 1999, the Arbitral Tribunal considered the presence of a local community using fishing resources since time immemorial across boundaries. Even if the Tribunal abstained from carrying out any investigation about the identification of those peoples as indigenous, it considered that fishing and navigational activities were elements that the states parties should assess in order to guarantee the perpetuation of the traditional fishing regime and peaceful relations.⁹²

4. *Self-identification and Membership*

4.1. *Recognition of Individuals as Members of an Indigenous People*

Membership of an indigenous community is primarily a question of self-identification of the group itself in accordance with 'the right of all peoples to be different, to consider themselves different, and to be respected as such' and 'to determine their own identity and membership in accordance

⁹¹ Supreme Court of British Columbia, *Delgamuukw v. British Columbia* (1997) 1095, para. 139, and *Tsilhqot'in Nation v. British Columbia* (2014) 284, para. 66.

⁹² Award of the Arbitral Tribunal in the Second Stage of the Proceedings Between Eritrea and Yemen (*Maritime Delimitation*) 17 December 1999, in 22 *Reports of International Arbitral Awards* (1999) 335–410 <http://legal.un.org/riaa/cases/vol_XXII/335-410.pdf> para. 103. For commentary, see S. M. Weldehaimanot and Daniel R Mekonnen, 'Favourable Awards to Trans-Boundary Indigenous Peoples', (2012) 16 *Austrian International Law Review* 60–76 <<http://www.austlii.edu.au/au/journals/AILRev/2012/5.pdf>>

with the traditions and customs of the community'.⁹³ Practice has developed in the sense of strengthening the role of the indigenous groups in regulating individual membership. In this regard, the Stavenhagen Report has highlighted: 'As regards individual membership, indigenous communities usually apply their own criteria, and whereas some states do regulate individual membership, it has become increasingly accepted that the right to decide who is or is not an indigenous person belongs to the indigenous people alone.'⁹⁴

However, membership in indigenous communities not only implies rights and obligations of the individual vis-à-vis his or her group but also has legal effects in the legal order of the state. Therefore, such identification is of interest to and may necessarily involve the competent organs of the government. This could lead to tensions if state organs do not consider an individual as a member of an indigenous community. Members of a group could be excluded from the list adopted by the state, giving rise to an unequal or discriminatory treatment of different native communities.⁹⁵

The parameters followed by states in compiling lists have been the object of a case raised by the Saami people against Finland submitted to the UN Committee on the Elimination of Racial Discrimination in 2003. The Committee criticised the approach followed by the Finnish authorities as being too restrictive as to the definition of who may be considered a Saami to the effects of enjoying the privileges established in favour of the Saami people by the relevant legislation. It considered that by relying mainly, if not exclusively, on criteria such as the language spoken and the taxes levied on their ancestors, the state party was not taking into account to a sufficient degree the principle of self-identification.⁹⁶ The tension has lessened since the establishment by the Nordic Countries involved of a Saami Parliament with consultative role.⁹⁷ Those acts have introduced more flexible criteria

⁹³ UNDRIP Articles 3 and 33.

⁹⁴ Doc. UN E/CN.4/2002/97, quoted *supra* note 15, para. 100.

⁹⁵ In the case *Lubicon Lake Band v. Canada*, Merits, Communication No 167/1984, UN Doc. A/45/40, 26 March 1990, one of the complaints was that Canada had determined the Lubicon Lake Band membership in a way that would deny aboriginal rights to more than a half of the Lubicon people, in an unequal and discriminatory way by comparison to the treatment of all other native peoples (para. 27.3).

⁹⁶ See Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/63/CO/5, 10 December 2003 (Consideration of Reports Submitted by states Parties under Article 9 of the Convention), paras. 11-12.

⁹⁷ Norway Saami Act of 12 June 1987, Finnish Act of the Saami Parliament no. 974 of 17 July 1995 and Sweden Act of 1 January 1993. However, only Sweden has ratified the European Framework Convention for the Protection of National Minorities of 1 February 1995 (entered

for identifying the Saami people.⁹⁸ The new 2017 Convention between Finland, Norway and Sweden codifies criteria for identification that are not as restrictive as in the past.⁹⁹ Even if this Convention is not yet in force, lacking the ratification on the part of the three states involved, the text epitomises a new attitude that is more in conformity with the standards promoted at the level of the international institutions.

Acquiring evidence of the history of given communities and their distinguishing features of indigeneity can be challenging, especially when the history and relevant elements are obscure or not adequately documented, although such evidence can be acquired through the recollection of historical events by the spiritual leaders. Further research may be needed. In some cases, technical or financial support is due by the state to bear the costs connected with the collection of the evidence of the historical origins of a group. The drafters of the 2007 Declaration encountered this problem, as is evident from the text of Article 40 of the 2007 Declaration.¹⁰⁰

in force on 1 December 1998): in the Act of ratification, deposited on 9 February 2000, Saami are listed together with other 'minorities' (Swedish Finns, Roma, Jews and Tornedalers). See S. Errico and B. A. Hocking, 'Reparations for Indigenous Peoples in Europe: The Case of the Sámi People', in F. Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: OUP 2008) 378, highlighting that self-determination has been intended as mainly cultural in kind, acknowledging that their culture and way of life depend on economic activities, such as reindeer herding, hunting and gathering and thus closely rely on the use of land and water.

⁹⁸ According to the Norway *Saami Parliament Act* of 1987, the following requisites are necessary in order to be included in the Saami register and to enjoy the right to vote at elections to the Saameting (=Saami Parliament) (Chapter 2, § 2-6- The Saami electoral register): 'All persons who make a declaration to the effect that they consider themselves to be Saami, and who either (a) have Saami as their domestic language, or (b) have or have had a parent, grandparent or great-grandparent with Saami as his or her domestic language, or (c) are the child of a person who is or has been registered in the Saami electoral register, may demand to be included in a separate register of Saami electors in their municipality of residence. The Saami electoral register is drawn up on the basis of the national population register in the municipality, the register of Saami electors at the time of the last election and the demands for inclusion or deletion received during the electoral term. When a person has been included in the Saami electoral register, this may be registered in the national population register.'

⁹⁹ Convention between Finland, Norway and Sweden, Article 4: 'Persons to whom the Convention applies. The Convention applies to persons residing in Finland, Norway or Sweden that identify themselves as Saami and who (1) have Saami as their domestic language or have at least one parent or grandparent who has or has had Saami as his or her domestic language, or (2) have a right to pursue Saami reindeer husbandry in Norway or Sweden, or (3) fulfil the requirements to be eligible to vote in elections to the Saami parliament in Finland, Norway or Sweden, or (4) are children of a person referred to in 1, 2 or 3.'

¹⁰⁰ See European Court of Human Rights, *Handölsdalen Sami Village and others v. Sweden*, Decision 30 March, 2010 (final, 4 October 2010), Application no. 39013/04, 10-1, paras

Problems connected to membership are not confined to lack of governmental recognition. An abuse may also result from an arbitrary extension of the title of indigeneity by the government that *de facto* nullifies the rights of other members of the group. Self-identification may be invoked to block or limit this kind of abusive behaviour of the state. For example, in a case submitted to the UNHR Committee, a number of individuals had been listed by the Finnish government as candidates to the elections for the Saami Parliament, despite not being considered eligible and entitled to vote according to the Saami customs and traditions. According to the Government, that extension was in conformity with Section 3 of the Finnish Act of 1995 and the Supreme Administrative Court had supported that interpretation. Individuals belonging to the Saami people collectively challenged the Government's proposal by submitting a communication to the UNHR Committee, for breach of the 1966 ICCPR. According to the claimants, that extension entailed a 'dilution' of the right of membership, thus jeopardising their right to express their opinion within the indigenous Parliament. For this reason, they denounced that extension as an infringement of the principle of self-determination under Articles 1, 25, 26 and 27 of the Covenant.¹⁰¹ The Committee endorsed the arguments of the Saami people, highlighting that the Finnish Act provisions related to the electoral rolls of the Saami Parliament had to be interpreted according to reasonable and objective criteria, taking into account the views of the Saami people. The Committee expressed the view that Article 25 of the Covenant had been violated, read alone and in conjunction with its Article 27. Because Article 1 of the Covenant refers to the rights of peoples, it is excluded from the scope of the Optional Protocol of the Covenant. Nonetheless, the Committee held that it could consider Article 1 of the Covenant in deciding on the communication, because the applicants' rights in question possessed not only an individual, but also a collective dimension. Indeed, the dilution of the vote of an indigenous community determined a collective harm that

48-9: '[A]ccording to the claimants, lacking legal aid put a strain on the economy of the Saami villages.' The Court has not envisaged in the case a violation of Article 6 of the European Convention on Human Rights. See however the partly dissenting opinion of Judge Ziemele (*ibid.* 20).

¹⁰¹ Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2668/2015 by a national of Finland also in her capacity as President of the Saami Parliament of Finland (UN Doc. CCPR/C/124/D/2668/2015 of 20 March 2019) and No. 2950/2017 by 22 members of the Saami people, represented by the Saami Arvuut Organization (UN Doc. CCPR/C/124/D/2950/2017, of 1 February 2019- First unedited version).

‘may injure each and every individual member of the community’.¹⁰²

4.2. The Need for Compliance of the Rules on Indigenous Membership with the Principle of Non-discrimination

Acts ruling on the individual membership of indigenous groups may be the object of claims for inconsistency with the principle of non-discrimination. The problem has been raised in connection with provisions of the Canadian Indian Act that treated Indian men and women differently to the effect of being registered as a member of an indigenous community: an Indian man could confer status on his non-Indian wife through marriage, while the same was precluded to an Indian woman married to a non-Indian husband. The UNHR Committee, in the case *Lovelace v. Canada*, decided on 30 July 1981, expressed the view that provisions of Art. 27, 2 (1), 3, 23 (paras. 1 and 4) and 26 of the ICCPR had been breached by Canada.¹⁰³ According to the Committee, the Canadian Government was obliged ‘to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant’, focusing the right of any person belonging to the minority to claim for the benefits of Art. 27 of the Covenant.’¹⁰⁴ The Committee considered that the Canadian Government was in principle committed to amending the Indian Act. However, it expressed the awareness that restoring consistency with human rights had to be achieved through consultations with indigenous people. Therefore, no quick and immediate legislative action could be expected, considered the need of ‘consultation with the Indians themselves who ... were divided on the issue of equal rights.’

Achieving an equilibrium between the statutory rights of indigenous individuals and the principle of self-identification can be a difficult task for the organs of the state. This problem has emerged in the case *McIvor v.*

¹⁰² UN Doc. CCPR/C/124/D/2668/2015, 11, para. 6.9. See also UN Doc. CCPR/C/124/D/2950/2017, 11, para. 8.6.

¹⁰³ UN Doc. A/36/40, 1981, 166-175, 1981, paras. 5, 12 and 14. Ms. Lovelace had lost her Indian status in 1970 on marrying a non-Indian. The marriage eventually broke down, and Ms. Lovelace wished to return to live on the reserve, but was denied the right to do so because she no longer had Indian status.

¹⁰⁴ An analogous approach seems expressed in the UNHR Committee’s CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available in <<https://www.refworld.org/docid/453883fa8.html>> para. 5.35: ‘... under the Covenant, the guarantee of equality and non-discrimination extends to both direct and indirect effects of the state party’s conduct in promulgating and maintaining the registration regime’.

Canada of 2009 because of the sex-based rule to determine the entitlement to Indian registration status contained in the Canadian Indian Act. The Canadian Court of Appeal of British Columbia had to ascertain the constitutionality of the Act. The Court argued that the question was ‘a complex matter that ha[d] not, to date, been thoroughly canvassed in the case law’. Under those circumstances, the Court held that the Canadian Parliament’s ability to determine the aboriginal status was ‘circumscribed’.¹⁰⁵

The *McIvor* case was also submitted to the UNHR Committee for infringement of the ICCPR under articles 26 and 27 in conjunction with articles 2(1) and 3, and was considered in the View published on 11 January 2019.¹⁰⁶ The Canadian Government objected to the fact that certain aspects of the communication submitted by the persons excluded from the lists should be considered as inadmissible because the prejudice connected to the provisions of the Indian Act could not be put only on the Government. According to Canada, ‘[t]he impacts on the authors’ social and cultural relationships that they perceive or in fact suffer because of the provisions under which they are eligible for status should be attributed to the authors’ family and larger social and cultural communities, and not to the state.’¹⁰⁷

The Committee did not accept the arguments of the Canadian Government, stressing the need for the state to adopt ‘positive measures of protection ... not only against the acts of the state itself, whether through its legislative, judicial or administrative authorities, but also against the acts of

¹⁰⁵ *McIvor v. Canada, (Registrar of Indian and Northern Affairs)*, Court of Appeal for British Columbia, Case 153, Judgment 6 April 2009, para. 66 <<http://www.socialrightscura.ca/documents/legal/mcivor/2009bcc153.pdf>>. The Court held that the Canadian Constitution Act of 1982 (as amended in 1985 to guarantee sex equality before the law) still did not fully satisfy the principle of non-discrimination established in the Canadian Charter on Rights and Freedoms enshrined in that Act. Justice Groberman added the following considerations: ‘We have neither an evidentiary foundation nor reasoned argument as to the extent to which Indian status should be seen as an aboriginal right rather than a matter for statutory enactment. This case, in short, has not been presented in such a manner as to properly raise issues under s. 35 of the Constitution Act, 1982’. Though an amendment of the Indian Act had been adopted, a new case was brought before the Superior Court of the Province of Québec, District of Montreal, *Descheneaux v. Canada (Attorney general)*, Case QQCCS No. 3555, Judgment 3 August 2015 <<http://caid.ca/DesDec2015.pdf>>. The plaintiffs argued that they suffered unlawful discrimination and that the new registration provisions of the Indian Act had not gone far enough to address gender-based inequality. The Court found that the registration provisions of the Indian Act were discriminatory and had to be modified.

¹⁰⁶ UNHR Committee, Communication No. 2020/2010, UN Doc. CCPR/C/124/D/2020/2010.

¹⁰⁷ *Ibid.* para. 4.4.

other persons within the state.¹⁰⁸ This outcome is correct lacking a specific instrument of complaint against the indigenous group. However, the Government's view that it should not be considered as having the exclusive responsibility seems at least in part reasonable. Given that the Canadian Government had to take into consideration the reasons expressed by the communities involved, no quick and immediate legislative action could be expected to modify the law, especially when those communities had revealed their difficulties in finding a new scheme to replace the old one. Some groups feared that a sudden reinstatement of a large number of persons to indigenous status might overwhelm their resources or dilute traditional First Nations culture. In addition, there was a strong movement among First Nations groups to seek a level of control over membership.

The cases considered show the awareness on the part of the Canadian Government and of the UNHR Committee that consistency with the general principles of human rights has to be achieved via positive cooperation between governments and indigenous peoples. Cooperation between states and indigenous peoples in conformity with human rights is vital to implement the spirit of the Declaration, which makes specific reference to the elimination of all forms of discrimination against indigenous children and women¹⁰⁹ and emphasises that the functioning of indigenous institutions should be 'in accordance with international human rights standards'.¹¹⁰

In addition, as the 2009 Anaya Report highlights, one should not underestimate the importance of the 'engagement of indigenous peoples with states and the broader political and societal structures' in the implementation of the goals of the 2007 Declaration.¹¹¹ Provided that the Declaration is given an appropriate understanding, 'it is a powerful tool in the hands of indigenous peoples to mainstream human rights within their respective societies in ways that are respectful to their cultures and values.'¹¹² In this connection, the role of the UN human rights institutions, mechanisms, and specialised agencies should be enhanced as instruments to ensure cooperation between the governments involved and indigenous peoples in the activities that affect indigenous interests.

¹⁰⁸ *Ibid.* para. 7.10.

¹⁰⁹ UNDRIP Article 22.

¹¹⁰ UNDRIP Article 34.

¹¹¹ Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. J. Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right To Development*, UN Doc. A/HRC/9/9, 11 August 2008, 25, para. 89.

¹¹² *Ibid.*, para. 79.

Some steps have been undertaken within the UN in order to get reliable and up-to-date statistics concerning indigenous peoples. This could help avoid possible disputes and encourage the development of a more relaxed relationship with governments.¹¹³ The UN Statistical Commission, supported by the UN Statistics Division, should respond positively and quickly to the various recommendations on indigenous membership adopted by the World Conference on Indigenous Peoples and the Permanent Forum. The responsibility to support these endeavours stems directly from the UN Declaration on the Rights of Indigenous peoples.

5. *Conclusion*

The practice of the UN institutions and the case law of the states hosting indigenous peoples shows that the 2007 Declaration has been widely implemented through the acts of states and the pronouncements of national courts. A broad awareness has developed about the relevance of the indigenous peoples at the international law level.

In the international practice and in the jurisprudence the rights of the indigenous peoples to land and to the natural wealth and resources of the territory in the interest of their well-being and development have been unequivocally recognised. This entails limits to the use and exploitation of natural resources in indigenous land by others. As we have seen, the regime governing indigenous rights within the border of each state may vary and represents the way the indigenous titles, which have an original character, coexist with the titles to the land that are based in the law of the state. Indigenous rights are sometimes covered under the qualification of property rights, though their characters are different. Their distinctive form can be explained by being inherent in the history and tradition of the indigenous peoples, whose rules are founded in the continuity of custom and culture. The rights of indigenous peoples coexist as distinctive systems with (and within) the legal order of the state and as such have been considered and interpreted by the national courts.

Given the 'open' character of the rights to land of indigenous peoples, they are often the object of claims by private owners. Indigenous peoples have not always been granted the instruments to oppose activities carried out in their lands without their consent by national or international

¹¹³ Information in <<https://core.ac.uk/download/pdf/85165325.pdf>>.

private companies with the support of the state. Sometimes those activities go beyond the limits of ordinary exploitation and have devastating consequences for the territory and the survival of the group.

As to the determination of the membership of individuals to given indigenous groups, the method of registration in the lists of the state that take into account the indigenous rules represents a step towards recognition of the right to self-identification. The UNHR Committee and national courts have recognised the right of indigenous peoples to self-identification and this has resulted in the duty for the state to shape the rules governing the inclusion of candidates in the lists of members in conformity with the criteria belonging to the tradition of the indigenous group involved.

The practice nonetheless shows not only cases where states have infringed the rights of the indigenous peoples but also cases where the rejection of applications for membership in contrast to the principle of non-discrimination has been a consequence of the indigenous rules transposed into the law of a state. In that case, lacking an instrument to take the inconsistency of the indigenous rules before the Human Rights Committee, the only mechanism available for the said Committee was to identify the infringement of the rights by the state because of the discriminatory features of its domestic law.

The chapter also illuminates the interpretation of the principle of self-determination of peoples in international law. In relation to indigenous peoples, that principle should not necessarily be conceived in opposition to given governments or as an aspiration to become fully independent. Only exceptionally does the struggle for independence and the building of a new state receive any explicit support from the UN, as occurred within the decolonisation process or in cases of occupation of territories. In fact, self-determination can also apply to people as a component of the state, meant as a political entity comprehensive of all the different groups that form its social basis, and to indigenous peoples that are not represented in the dominant society.

Indigenous peoples possess distinctive characteristics: their rights are the object of recognition by the states through acts and decisions that identify the indigenous lands, the resources traditionally used by those peoples and the conditions for individuals to be registered as members of the existing indigenous groups. However, the existence and implementation of the indigenous rights is not only relevant within the borders of a state. The chapter shows that the rights of indigenous peoples also matter at the international law level. The proliferation of human rights treaties and

instruments, the extensive involvement of the UNHR Committees, the activities of specialised working groups that focus on indigenous issues, and the views and decisions of human rights treaty compliance bodies and regional human rights courts have all contributed to recognise the rights of indigenous peoples.

The jurisprudence concerning the definition of self-determination as referred to peoples shows that it can be considered as the object of an *erga omnes* right, since it impacts outside the limited framework of the relationships between indigenous peoples and given states, whenever the use of the land and the safeguard of traditional culture of peoples is in question. Therefore, an international agreement between the local state and a third state to use and dispose of the natural resources that jeopardises the rights of peoples to live and practice their traditional culture on their land, without their free, prior, informed consent should be considered as inconsistent with the principle of self-determination.

The case of the *Fisheries Partnership Agreement* between the European Union and the Kingdom of Morocco raised before the EU Court of Justice seems to be particularly significant.¹¹⁴ That agreement lays down terms and conditions for access to the fishing zone by EU vessels, as part of a general policy to ensure closer economic and social cooperation. In an early text of the agreement approved by the EU no mention was made to the fishery zone adjacent to the coast of Western Sahara.¹¹⁵ Thus it was unclear whether the binding effects of the agreement as to the fishing activities in the area should be intended as covering also Western Sahara, where Morocco alleges to possess exclusive sovereign rights.¹¹⁶ The question was submitted to the EU Court, which stated that such an interpretation of the agreement had to be rejected as being inconsistent with the principle of self-determination of the Saharawi people.¹¹⁷ To overcome this problem, a new version of the agreement has been drafted and approved by the EU Parliament and the Council where the coastal waters of Western Sahara are expressly mentioned. In the explanation given by the Parliament, subsequently endorsed in the Council Decision 2019/441 of 4

¹¹⁴ The Court of Justice of the EU was requested for a preliminary ruling twice: *Council of the E.U. v. Front Polisario*, C-104/16 P (Grand Chamber), Judgment, 21 December 2016 (ECLI:EU:C:2016:973) and *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs and Secretary of state for Environment, Food and Rural Affairs*, C-266/16, (Grand Chamber) Judgment 27 February 2018 (ECLI:EU:C:2018:1).

¹¹⁵ See Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ 2006 L 141,1).

¹¹⁶ See *supra*, para. 3.4 and note 90.

¹¹⁷ Case C-266/16, Judgment 27 February 2018, quoted, para. 79.

March 2019, the new text is considered consistent with the self-determination principle having been drafted following the consultations carried out by the EU Commission with the Saharawi people, also taking into account that the agreement is expected to ameliorate their socio-economic conditions.¹¹⁸ Although the outcome of the case does not fully dispel the doubts about whether the agreement does in fact ensure compliance with the principle of self-determination,¹¹⁹ the case provides elements in support of the recognition of the rights of indigenous peoples to the enjoyment of their fishery zones and of their relevance not only in respect of the local state, but also towards third states.

¹¹⁸ See EU Parliament Res. 12 February 2018 (https://www.europarl.europa.eu/doceo/document/A-8-2019-0027_EN.html and explanatory statement. The new text of the agreement was authorized by the EU Council decision No. 2019/441, 4 March 2019 ('Sustainable Fisheries Partnership Agreement') in EUOJ 20.3.2019 L 77/4, 8 ff., (<<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0441&from=EN>>) the Council stated that 'the Fisheries Agreement should be highly beneficial to the people concerned owing to the positive socioeconomic impact on those people, particularly in terms of employment and investment, and to its impact on the development of the fisheries sector and fish processing sector (Preamble, para. 9).' The Council further declared that the Commission, together with the European External Action Service, had taken 'all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent.' (Preamble, para. 11). However, it seems that the Polisario Front and some other parties did not take part in the consultation process. History and text of the agreement in <http://www.europarl.europa.eu/doceo/document/A-8-2019-0027_EN.html>.

¹¹⁹ With reference to the former text of the agreement, see the detailed analysis by E. Milano, 'Il nuovo Protocollo di pesca tra Unione europea e Marocco e i diritti del popolo Sahrawi sulle risorse naturali', in (2014) *Diritti umani e diritto internazionale* 8, 505–12.

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