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Kaito Suzuki

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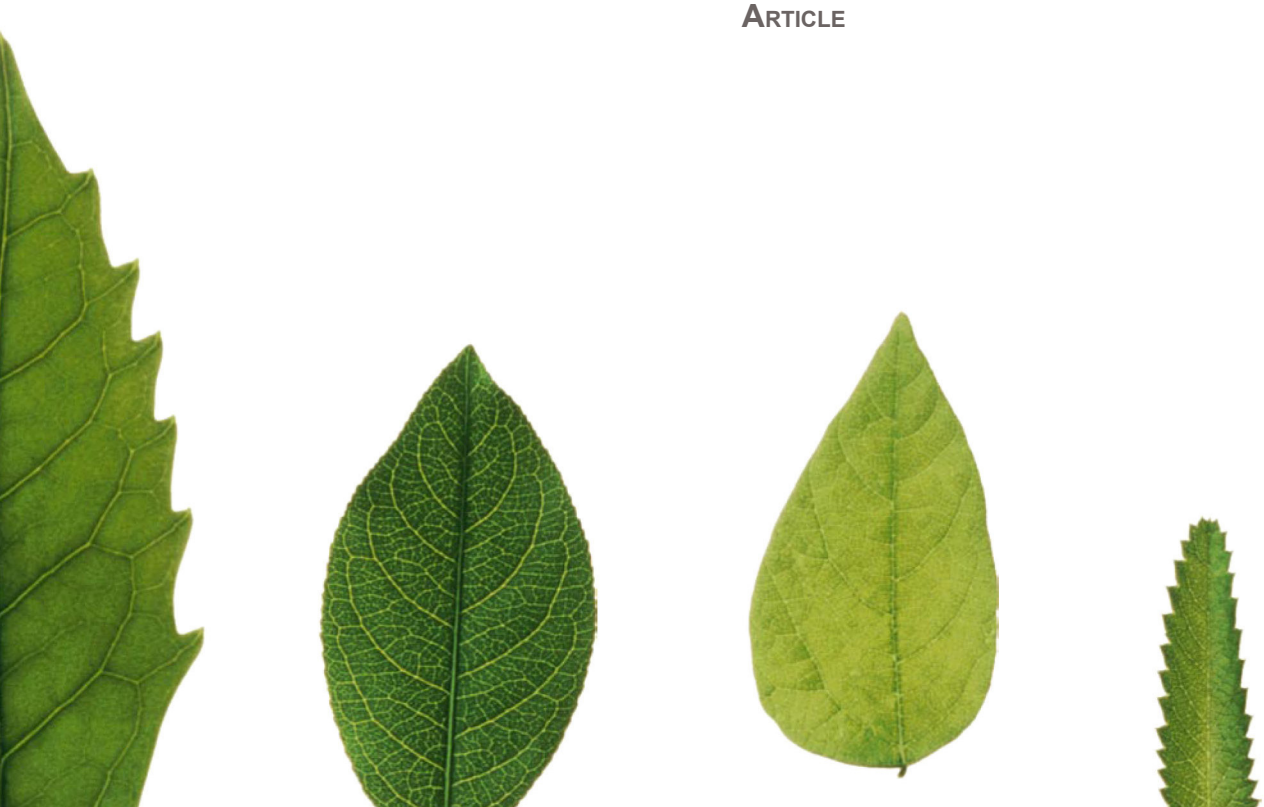

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Article

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1 INTRODUCTION

Presently, the indigenous peoples' right to land is one of the most contentious areas in international law, especially in relation to the norm of non-discrimination. 'Indigenous peoples' can be defined as subjects who have held historical continuity and cultural characteristics in their living areas before they were colonised.[1] The lands are vital for their identification and physical existence, as they tend to even associate their lives with their inhabited areas.[2] These aspects of their land rights were reflected broadly in the articles of the United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP), adopted in 2007.[3] Like other human rights, the land right of indigenous peoples is based on the principle of non-discrimination in international human rights law, especially in its substantive form.[4] According to article 2 and the preamble of UNDRIP, indigenous peoples have 'suffered from historic injustices', because of the 'colonization and dispossession of their lands, territories and resources'.

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

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

1 United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study of the Problem of Discrimination against Indigenous Populations Vol. V- Conclusions, Proposals and Recommendations' UN Doc, E/CN.4/Sub.2/1986/7/Add.4 (1987) paras 1, 2, 8; Navin Rai, 'Implementation of the World Bank's indigenous Peoples policy: A Learning Review' (2006-2008) (Washington, D.C.: World Bank Group, August 2011) para 3 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/427941468163488772/implementation-of-the-world-banks-indigenous-peoples-policy-a-learning-review-fy2006-2008>.

2 Siegfried Wiessner, 'Indigenous Self-determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples' in Elvira Pulitano (ed.), *Indigenous Rights in the Age of the UN Declaration* (CUP, 2012) 50-1.

3 UN General Assembly, The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP*)* UN Doc, A/RES/61/295 (adopted 13 September 2007) arts 10, 25, 26, 27.

4 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Prevention of Discrimination and Protection of Indigenous Peoples and Minorities- Indigenous Peoples and their Relationship to Land' UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001) para 24.

5 See below 2.1.(c), *text at footnotes* 55 and 62.

6 Miodrag A Jovanoviæ, 'Are There Universal Collective Rights?' (2010) 11 Human Rights Review 17, 36–7.

7 Jérémie Gilbert, '*Indigenous Peoples' Land Rights under International Law - From Victims to Actors'* (BRILL, 2nd ed, 2016) 36–7.

8 See below 2.1, *text at footnotes* 38, 39, and 61.

9 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

10 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' UN Doc, E/CN.4/Sub.2/384/Rev.1 (New York, 1979) para. 568.

11 Will Kymlicka, *Multicultural Odysseys* (OUP 2007) 271-2, 290.

Section 1 of the paper describes the frameworks related to substantive non-discrimination and the rights of indigenous peoples in international human rights law. Section 2 discusses whether the indigenous peoples' right to land is compatible with the framework of non-discrimination in international human rights law. Section 3 explains the dynamic relationship of the right to land and substantive non-discrimination in terms of sustainable cultural management and the right to property.

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

2.1 The Right to Land of Indigenous Peoples in International Law

Many international legal practices on the rights of indigenous peoples to land and non-discrimination have been developed, either directly or indirectly. Although UNDRIP is not strictly an international treaty, it is suggested it constitutes a comprehensive part of customary international law in relation to indigenous peoples.[12] In addition, the International Labour Organization (ILO) has engaged significantly with the rights to land and non-discrimination of indigenous peoples, especially since the ILO Convention No. 107 (C107) in 1957 came into being.[13] In addition to C107, the ILO Convention No. 169 (C169) of 1989 contains the influential norm in the sense its rules have been considered even by non-contracting countries, in the sense that reflects many countries' opinions and practices in this area.[14]

Even though the provisions in these instruments does not explicitly mention the right to land of indigenous people, it has been supported by human rights developments, and it has significantly contributed to them. Although there is said to be no universal human rights treaty pertaining to the right to land, this right is closely connected to certain rights, such as self-determination, life, and health.[15] A case in point that shows progressive protection of the right to land is the right of minorities in article 27 of ICCPR. The right to land of indigenous peoples has been preserved pragmatically through the individual complaint procedure under the Optional Protocol, in order to protect their cultural rights.[16] Also, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) aims to protect this right through the Committee on the Elimination of Racial Discrimination (CERD) as typically shown in *General Recommendation No. 23*.[17] The right to land is also supported by the principle of

12 James Anaya, 'The Human Rights of Indigenous Peoples: United Nations Developments' (2013) 35 University Hawaii Law Review 983, 995, 999.

13 Indigenous and Tribal Populations Convention, 1957 (No. 107) International Labour Conference 40th Session (adopted 26 June 1957, entered into force 2 June 1958) (C107). See UNDRIP (n 3) arts 2(2), 3(3), 11–4; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards-Self-Determination, Culture and Land* (CUP 2007) 49.

14 Indigenous and Tribal Peoples Convention, 1989 (No. 169) International Labour Conference 76th Session (adopted 27 June 1989, entered into force 5 September 1991) (C169); Xanthaki (n 13) 91.

15 UN Economic and Social Council, Substantive Session of 2014, Report of the United Nations High Commissioner for Human Rights, UN Doc, E/2014/86 (11 July 2014) paras 12, 21–34.

16 *Ivan Kitok v Sweden,* UN Human Rights Committee 33rd Session, UN Doc, CCPR/C/33/D/197/1985 (Decision 27 July 1988); *Chief Bernard Ominayak and the Lubicon Lake Band v Canada,* UN Human Rights Committee 38th Session, UN Doc, CCPR/C/38/D/167/1984 (Decision 26 March 1990); *Länsman et al v Finland,* UN Human Rights Committee 52nd Session, UN Doc, CCPR/C/52/D/511/1992 (Decision 8 November 1994); *Ángela Poma Poma v Peru,* UN Human Rights Committee 95th Session, UN Doc, CCPR/C/95/D/1457/2006 (Decision 28 April 2009); *Tiina Sanila-Aikio v Finland,* UN Human Rights Committee 124th Session, CCPR/C/124/D/2668/2015 (Decision 1 February 2019). See Optional Protocol to International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2.

17 CERD General Recommendation No. 23 on the Rights of Indigenous Peoples, 51st Session, UN Doc, A/52/18 (18 August 1997) Annex V, paras 3, 5; Patrick Thornberry, *Indigenous Peoples and Human Rights* (MUP 2002) 21, 214–5. See CERD, *Concluding Observations on El Salvador*, UN Doc, CERD/C/SLV/CO/18-19 (13 September 2019) para 8.

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

2.2 Conflict with State Sovereignty as Collective Rights

Characteristically, the right to land, as stipulated and practised based on the abovementioned frameworks, relates to communities, as well as the individuals that comprise them. The common article 1(2) about natural resources in ICCPR and the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR) has been formulated as the right to self-determination of indigenous peoples.[19] The importance of the right to natural resources is emphasised in the framework of decolonisation, in terms of supporting the indigenous peoples' self-determination.[20] The Inter-American Court of Human Rights (IACtHR) holds that the right to land of indigenous peoples should be understood as a collective right by providing an expansive interpretation to article 21 of ACHR about property rights.[21]

Nevertheless, collective rights are frequently seen as controversial in relation to state sovereignty and individual human rights. As different from individual rights, collective rights are for the groups' interests, which cannot be covered by individual rights.[22] On the one hand, collective rights could be a potential threat to violate the individual-based human rights, which are inseparably connected to sovereignty.[23] On the other hand, human rights bodies have recognized the existence of collective rights, led by the right to self-determination, which is seen as an important element to achieve the other human rights stipulated in ICCPR and ICESCR.[24] Furthermore, the right to culture in article 15(a) of ICESCR, originally created for individuals, is interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) as the one that can be claimed by the groups such as indigenous peoples and minorities as separate from the individual rights.[25] The African Charter of Human Rights, which lays down the 'peoples' rights in articles 19 to 24, including those of self-determination and land in articles 20 and 21 respectively, mentions in the preamble that 'the reality and respect of peoples' rights should necessarily guarantee human rights'.

2.3 Substantive Non-Discrimination and Following Special Measures

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

18 James Summers, 'Property Rights and the Protection of Subsistence in Article 1(2) of the Human Rights Covenants' (2019) 26 International Journal on Minority and Group Rights 157, 160.

19 ibid 171.

20 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Indigenous Peoples' Permanent Sovereignty over Natural Resources, UN Doc, E/CN.4/Sub.2/2004/30 (13 July 2004) paras 5-8, 18, 32(a)–(e).

21 Summers (n 18) 169. See, e.g., *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (31 January 2001) IACtHR Series C No 79; *Case of the Saramaka People v Suriname* (28 November 2007) IACtHR Series C No. 172; *Kichwa Indigenous People of Sarayaku v Ecuador* (27 June 2012) IACtHR Series C No 245; *Case of the Indigenous Communities of the Lhaka Honhat v Argentina* (06 February 2020) IACtHR Series C No 420.

22 Joseph Raz, *The Morality of Freedom* (OUP 1988) 199, 208. Peter Jones, 'Group Rights' (2016) Stanford Encyclopaedia of Philosophy <https://plato.stanford.edu/entries/rights-group/>.

23 Jonas Perrin, 'Legal Pluralism as a Method of Interpretation: A Methodological Approach to Decolonising Indigenous Peoples' Land Rights under International Law' (2017) 26 Universitas 23, 43; UN Doc, E/CN.4/Sub.2/2004/30 (n 20) para 18.

24 UN Human Rights Committee 21st Session, General Comment No. 12: Article 1 The Right to Self-Determination (12 April 1984) (contained in UN Doc, A/39/40 (1984)) para 1; *Lubicon Lake Band v Canada* (n 16) para 32.1. See also, Raz (n 22) 208-9.

25 CESCR 43rd Session, General Comment No. 21: Article 15, para(a) Right of Everyone to Take Part in Cultural Life, UN Doc, E/C.12/GC/21 (21 December 2009) paras 32-3, 36-7; Lyndel L Prott, 'Cultural Rights as Peoples' Rights in International Law' in James Crawford (ed.), *The Rights of Peoples* (Clarendon Press 1988) 97.

26 CESCR 42nd Session, General Comment No. 20: Art 2, para 2 Non-Discrimination UN Doc, E/C.12/GC/20 (2 July 2009) para 18.

part.[27] Non-discrimination is one of the most important principles in international law, such that it is sometimes even referred to as a peremptory norm.[28]

Apart from others who have been discriminated against, indigenous peoples have suffered especially from land deprivation. The Inter-American Commission on Human Rights (IACHR), referring to the *General Recommendation No. 23* of CERD, notes that a prominent reason for discrimination against indigenous peoples is the denial of their land uses.[29] This is especially seen in the process of land acquisition, in which the lands of indigenous peoples have been understood as *terra nullius*, 'a territory belonging to no-one—at the time of the act alleged to constitute the "occupation"'.[30] In the ground-breaking decision of *Mabo v Queensland* (*Mabo*), the High Court of Australia indicated that the fictional understanding of the Aboriginal peoples in question as an object of *terra nullius* is too discriminatory to maintain in the common law order as well as in international law.[31] In this decision, the characterisation of indigenous peoples as 'backward' is especially criticised in the drafting process of ICERD,[32] as such an understanding is associated with the stigma of under-development.[33]

The measures of substantive non-discrimination are understood as 'affirmative action', especially when it comes to the protection of minorities, which is 'a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality'.[34] In international human rights law, substantive non-discrimination is practiced based on the concept of 'special measures'.[35] According to the Committee on the Elimination of Discrimination against Women (CEDAW), the human rights body of the Convention on the Elimination of All Forms of Discrimination against Women, special measures are necessary countermeasures against substantive discrimination, 'rather than an exception to the norms of non-discrimination and equality'.[36]

3 THE CONTROVERSY ABOUT THE RELATIONSHIP BETWEEN THE RIGHT TO LAND OF INDIGENOUS PEOPLES AND SUBSTANTIVE NON-DISCRIMINATION

3.1 The Exceptional Character of Indigenous Peoples

3.1.1 The Context of 'Indigenous Peoples' and 'Remedial' Self-Determination

The frameworks described above may suggest that indigenous peoples should be considered outside the human rights and non-discrimination legislation. Firstly, it can be argued that the rights of indigenous

27 Patrick Thornberry, *International Law and the Rights of Minorities* (OUP 1991) 374. For the connection between UNDRIP, human rights and colonisation, see Anaya (n 12) 994–5.

28 B G Ramacharan, 'Equality and Nondiscrimination' in Louis Henkin (ed.), *The International Bill of Rights* (CUP 1981) 32-6.

29 *Maya Indigenous Community of the Toledo District (Belize)* Report No. 40/04, Case 12.053, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.122 (12 October 2004) paras 167–8.

30 Wiessner (n 2) 41–42; *Western Sahara* (16 October 1975) International Court of Justice Advisory Opinion para 79.

31 *Mabo v Queensland (No 2*) (3 June 1992) HCA 23 paras 41–2.

32 ibid 33–4.

33 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Summary Record of the 416th Meeting, UN Doc, E/CN.4/Sub.2/SR.416 (7 February 1964) 10; UN General Assembly 20th Session, Official Records, 3rd Committee, 1305th Meeting, UN Doc. A/C.3/SR.1305 (14 October 1965) para 33; UNGA 24th Session, Official Records, 2nd Committee, 1306th Meeting, UN Doc. A/C.13/SR.1306 (11 December 1965) para 25.

34 UN Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination - The Concept and Practice of Affirmative Action, UN Doc, E/CN.4/Sub.2/2002/21 (17 June 2002) paras 5–6.

35 ibid 40; International Convention on Elimination of All-Forms Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) arts 1.4, 2.2; CERD General Recommendation No. 32: The Meaning of Special Measures, UN Doc, CERD/C/GC/32 (24 September 2009) paras 7, 13, 24, 29, 33.

36 CEDAW 30th Session, General Recommendation No. 25 on article 4 para 1 on Temporary Special Measures (2004) (contained in UN Doc, A/59/38 (2004)) paras 14, 18.

peoples to land can be seen as an exception to the general order of international law and state practices. The indigenous peoples' rights as a part of *sui generis* law are mentioned clearly in Canadian jurisprudence.[37] This trend is said to be more obvious in terms of the right to land than other rights.[38] According to Kingsbury, the distinguishing features of indigenous peoples can be seen as a mixture of historical land deprivation, current vulnerability and wishes for the future.[39]

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

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

3.1.2 The Land Right as a Permanent 'Specific Right'

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

37 *Delgamuukw v British Columbia* (11 December 1997) 3 SCR 1010 paras 82, 112–5, 125–30, 189–90. *Tsilhqot'in Nation v British Columbi*a (26 June 2014) 2 SCR 257 para 72.

38 See, Stephen Allen, 'Limits of the International Legal Project' in Stephen Allen and Alexandra Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of the Indigenous Peoples* (Hart Publishing 2011) 236.

39 Benedict Kingsbury, 'The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia' in Joanne Bauer and Daniel Bell (eds.), *The East Asian Challenge for Human Rights* (CUP 1999) 346.

40 James Anaya, *Indigenous Peoples in International Law* (OUP, 2nd ed., 2004) 104–7.

41 UN Doc. E/CN.4/Sub.2/2001/21 (n 4) paras 22–32, 49.

42 Allen (n 38) 237-8.

43 ibid 237-238; Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 Texas International Law Journal 155, 165-6.

44 Kent McNeil, 'Indigenous Territorial Rights in the Common Law' (2016) 173 Osgoode Legal Studies Research Paper Series 1, 35-36; *Tee-Hit-Ton Indians v United States* (7 February 1955) 348 US 272, 279, 287.

45 CERD General Recommendation No. 32 (n 35) paras 11, 15, 16. This has been clarified since the drafting stage; Summary Record of the 414th Meeting Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc, E/CN.4/Sub.2/SR.414 (7 February 1964) 8.

46 Warwick McKean, *Equality and Discrimination under International Law* (Clarendon Press 1983) 288.

47 Anna F Vrdoljak, 'Liberty, Equality, Diversity: States, Cultures, and International Law' in Anna F Vrdoljak (ed.), *The Cultural Dimension of Human Rights* (OUP 2013) 51.

48 Federico Lenzerini, 'Reparation, Restitution and Redress' in Jessie Hohman and Alexandra Xanthaki (eds.), *The UN Declaration on the Rights of Indigenous Peoples* (OUP 2018) 574; Anaya (n 12) 995.

49 CERD Summary Record of the 1821st Meeting, UN Doc, CERD/C/SR.1821 (21 September 2007) paras 58, 60; Summary Record of the 1822nd Meeting, UN Doc, CERD/C/SR.1822 (8 August 2007) para 21. See art 2 of Treaty of Waitangi (6 February 1840).

complained that the right to land of the indigenous peoples was occasionally interpreted as a temporary entitlement and that this could not return or remedy the historic marginalisation indigenous peoples suffered.[50] This kind of treaty like Waitangi Treaty, created between indigenous peoples and colonial states including Canada, New Zealand and the United States, still cannot be ignored for reversing the injustices.[51]

3.1.3 The Right to Land as a Retroactive Remedy

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

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

50 Waitangi Tribunal, The Taranaki Report: Kaupapa Tuatahi-Wai 143 (Crown, Reprinted with Correction, 2001) 161, (h).

51 Gilbert (n 7) 62.

52 Andre Nolkaemper, 'The International Rule of Law' (2009) 1 Hague Journal on the Rule of Law 74, 75. See also, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 17(2).

53 See, Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc, A/CONF.189/12 (Durban, 31 August - 8 September 2001) 143–4; Shea E Esterling, 'Under the Umbrella: The Remedial Penumbra of Self-Determination, Retroactivity and the Restitution of Cultural Property to Indigenous Peoples' in Alexandra Xanthaki (ed.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges* (BRILL 2017) 300–2.

54 Patrick Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 7th rev., 1997) 155; Tasnim Eilas, 'The Doctrine of Intertemporal Law' (1980) 74 American Journal of International Law 285, 285. See *Island of Palmas Case* (4 April 1928) 2 R.I.A.A. 831, 845.

55 Miranda Johnson, 'Reconciliation, Indigeneity, and Postcolonial Nationhood in Settler States' (2011) 14(2) Postcolonial Studies 187, 197; Kim Stanton, 'Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission' (2017) 26(2) Journal of Law and Social Policy 21, 32. See, *R v Sparrow* (31 May 1990) 1 SCR 1075, 1109; *Tsilhqot'in v BC* (n 37) para 23. See also, Constitution Act, 1982 art. 35(1) 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'.

56 Royal Commission on Aboriginal Peoples, Restructuring the Relationship (October 1996) 35 <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

57 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, UN Doc, E/CN.4/Sub.2/1993/28 (28 July 1993) paras 24–8, 36–117.

58 ibid 157. See, 'UNESCO and UNIDROIT' Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Doc CLT-2005/Conf/803/2 (Paris, 24 June 2005) I. 1. a*;* UNIDROIT Convention on Stolen or Illegal Exported Cultural Objects (Rome, adopted 24 June 1995, entered into force 1 July 1998) art 2.

59 Jessie Hohman, 'The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation' in Hohman and Xanthaki (n 48) 284.

60 Anaya (n 40) 107.

retroactivity of UNDRIP can be explained as *sui generis*.[61] While some terms such as 'compensation' and 'restitution' were criticized for their association with retroactive application of law and even with human rights violation in the *travaux préparatoires*, these words ended up in article 28 of UNDRIP.[62] During the drafting process of UNDRIP, the USA emphasized that the lands of indigenous peoples will be protected and compensated in current and future cases.[63]

3.2 Refutation: Declining Exclusivity and Balancing with Human Rights

3.2.1 Diffusion of 'Indigenous Peoples' and 'Decolonisation'

The context of protection of indigenous peoples can expand, and therefore the *sui generis* approach cannot be retained easily. Basically, although one example is shown above,[64] the definition of indigenous peoples is not fixed in international law.[65] Even the central concepts of 'indigenous' and 'colonisation' are controversial and have remained unclear in international law.[66] Despite the common belief that colonisation is mainly about European countries' conquest, remedial self-determination suggests that the rights of indigenous peoples should be preserved in Asian and African countries, which experienced state-building after World War II, because that process may have ignored the ethnic distinction.[67] This is especially shown in the *Scheduled Tribes and Other Traditional Forest Dwellers* (*Recognition of Forest Rights*) *Act*, 2006 (FRA) of India, which is assessed to follow the general framework of UNDRIP.[68] The FRA understands the subjects of the rights to land as those who suffered from 'historical injustice' brought about 'during the colonial period as well as in independent India'.[69]

Furthermore, the land right has been referred to as an entitlement for other subjects in international legal documents. When it comes to the 'minorities', not only are they protected under the same provisions of ICCPR and ICESCR, but the rights assigned to them are as comprehensive as those for indigenous peoples. This is especially evident in the supervision of the *Framework Convention on the Protection of National Minorities* (FCNM) by its Advisory Committee, in which non-indigenous minorities such as Romani people are protected broadly.[70] Also, it is argued that the collective right to land of 'peasants' is a part of international law since the adoption of the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDRPO). In relation to land, this declaration understands the 'peasants' as 'any person who engages or who seeks to engage … in small-scale agricultural production for subsistence and/or for the market, and … who has *a special dependency on and attachment to the land* (emphasis added)' while also including the indigenous peoples.[71] In its drafting process, the right

61 Anna F Vrdoljak, 'Reparations for Cultural Loss' in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples-International and Comparative Perspectives* (OUP 2008) 214–5.

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

63 UN Commission on Human Rights, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, UN Doc, E/CN.4/2003/92 (06 January 2003) para 34.

64 See above 'Introduction', n 1.

65 UN Human Rights Council, 27th Session, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc, A/HRC/27/52 (11 August 2014) para 13.

66 Thornberry (n 17) 37–8.

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

68 Deidre N Dlugoleski, 'Undoing Historical Injustice: The Role of the Forest Rights Act and the Supreme Court in Departing from Colonial Forest Laws' (2020) 4(2) Indian Law Review 221, 225.

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

70 Framework Convention on the Protection of National Minorities, European Treaty Series No. 157 (adopted 10 November 1994, entered into force 1 February 1998). See, Julie Ringelheim, 'Minority Rights in a Time of Multiculturalism' (2010) 10(1) Human Rights Law Review 100–28; Advisory Committee for the Framework Convention on the Rights of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, Doc, ACFC/31DOC (2008)001 14, 18, 31.

71 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Doc, A/73/165 (adopted 17 December 2018) arts 1(1), 1(3).

to land, which is actually referred to as being supported 'individually and/or collectively' in the declaration[72] was deemed necessary in terms of the decolonisation process.[73]

As far as indigenous sovereignty is concerned, it is related to human rights both in terms of the rights to self-government and property. According to Pentassuglia, although the right to autonomy (self-government) has been especially mentioned in relation to the right to self-determination of indigenous peoples, it is required in the context of diversity protection rather than the decolonization process.[74] Both the United Nations and European human rights bodies have recognised self-government as an effective measure to achieve minorities' rights to effective participation.[75] Even in the US, especially since the 1980s, indigenous sovereignty has been compared to the rights to non-indigenous ownership of lands and restricted to require a consensual agreement with non-indigenous populations.[76]

3.2.2 Permanency and Continuity of Substantive Non-Discrimination

Despite the apparent conflict between temporality and permanency, there has been an attempt to coordinate the right to land of indigenous peoples with special measures. According to Åhrén, the position of CERD illustrated in the *General Recommendation No. 32* is inappropriate, partly because it does not consider the possibility of applying the right to non-discrimination of indigenous peoples mentioned in the *General Recommendation No. 23*.[77] The latter recommendation has been widely supported to protect indigenous peoples' right to land.[78] He suggests that such an interpretation can even incentivize countries to reject indigenous rights based on equality.[79]

Alternatively, special measures are often considered as long-standing to protect the diversity of social groups. Bossuyt suggests that special measures are occasionally reviewed in terms of the preservation of racial or ethnic diversity, referring to the article 1 of the UNESCO Declaration of 1978 which says that 'All individuals and *groups* have the *right to be different*' in article 1 (emphasis added).[80]

Furthermore, special measures have not been necessarily distinguished from specific rights generally in international human rights law. For instance, CEDAW separates the special measures under article 4(1) from the permanent measures under article 4(2), as those based on biological differences compared to men.[81] However, 'maternity' as a biological feature of women becomes vague if it can also mean the 'social function' of women.[82] If it includes the social aspects of women's rights, it suggests discrimination based on stereotypes, which are also common grounds of discrimination against minorities.[83] In the case of *Alyne de Sylva*, CEDAW demonstrates that women's reproductive rights differentiated from men were questioned as 'specific needs of women'. Nevertheless, CEDAW also indicates that the discriminations based

72 ibid, art 17(1).

73 UN Human Rights Council, Report of the Open-Ended Intergovernmental Working Group on a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Doc, A/HRC/36/58 (25 July 2017) 80 (art 17).

74 Gaetano Pentassuglia, 'Do Human Rights Have Anything to Say about Group Autonomy?' in Gaetano Pentassuglia (ed.), *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques* (CUP 2017) 135-43, 162-3.

75 See, Commentary of the Working Group on Minorities to the United Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2005/2 (4 April 2005) paras 20, 39; Council of Europe, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note (1 September 1999) arts 14-20. <https://www.osce.org/hcnm/lund-recommendations>.

76 Jessica Shoemaker, 'An Introduction to American Indian Land Tenure: Mapping the Legal Landscape' (2020) 5 Journal of Law, Property and Society 1, 58-62; *Montana v United States* (24 March 1981) 450 US 544, 558-9, 564-5.

77 Matthias Åhrén, *Indigenous Peoples' Status in International Legal System* (OUP 2016) 156–7.

78 CERD General Recommendation No. 23 (n 17) paras 1, 6;

79 Åhrén (n 77) 159.

80 UN Doc, E/CN.4/Sub.2/2002/21 (n 34) paras 20–1, 62. For the other debates on the continuity of affirmative action and diversity, Kasper Lippert-Rasmussen, *Making Sense of Affirmative Action* (OUP 2020) 20; Marie McGregor, 'Categorisation and Affirmative Action' (2007) 70 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 596, 597.

81 CEDAW General Recommendation No. 25 (n 36) para 16.

82 Marsha Freeman and others, *Oxford Commentaries on International Law: UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 223–4.

83 ibid 244–5. See Åhrén (n 77) 156.

on sex and gender should be resolved, as both types are 'inextricably linked' in this case.[84] They are basically categorized as the biological and social identifications of women respectively.[85]

3.2.3 Retroactive Application of Law as an Evolution or Balancing

The principle of inter-temporal law does not necessarily deny the retrospective application of law, as 'the evolution of law' is also considered.[86] According to Gilbert, this principle can have two contradictory aspects; it legitimises land acquisition, which was legal at the time of the action, while also encouraging changes in the law, which can illegalise the previous legal activities.[87] The *Western Sahara* case of the International Court of Justice (ICJ) shows that laws can be applied in the context of *terra nullius,* depending on the evolving international law about self-determination.[88] Such a decision is made while it does not agree with Spanish entitlement.[89] Indeed, UNDRIP is frequently seen as a sign of the transition in norms regarding the rights of indigenous peoples, especially in the light of self-determination.[90]

Moreover, human rights are inclined to be called rather for remedy for historical injustice against indigenous peoples, than maintaining the scope of formal non-discrimination. According to Francioni, the principle of non-retroactivity cannot deal with the gravest human rights violations, including those against indigenous peoples, as states have justified them based on the right to equality.[91] Scholarly writings suggest that United States should introduce C169, even when there has been a concern to recognise the indigenous peoples' rights on the policies and judiciaries.[92]

When it comes to the right to self-determination, the indigenous peoples' entitlement has not only been regarded as remedial but also can be understood as a reflection of ongoing discrimination. As Anaya says, this kind of self-determination can be seen as a right for restoration from the continuous discrimination which has been produced by the connection between *terra nullius* and 'extinguishment practice' in the common law countries, which usually means expropriation without compensation.[93] The system of extinguishment has been criticized for being discriminatory by the human rights bodies in terms of its intent and effect.[94] In the Concluding Observation for Canada, CERD requires proof that the extinguishment practice was given up, as both Canada and CERD admit that land grabbing is directly related to the marginalization of indigenous peoples.[95] According to Waldron, reparations for indigenous peoples should apply more to ongoing discriminatory situations than only to past injustices, considering the reconciliation between historic and current interests.[96]

84 *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW, UN Doc, CEDAW/C/49/D/17/2008 (10 August 2011) paras 7.6-7.7; Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-Discrimination and Equality' (2013) 14 Melbourne Journal of International Law 54, 71-2.

85 CEDAW 47th Session, General Recommendation No. 28 on the Core Obligations of States parties under Article 2, UN Doc CEDAW/C/GC/28 (16 December 2010) para 5.

86 *Island of Palmas Case* (n 54) 845.

87 Jérémie Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title' (2007) 56(3) International and Comparative Law Quarterly 583, 593–4.

88 Karen Knop, *Diversity and Self-Determination in International Law* (CUP 2002) 160–1.

89 *Western Sahara* (n 30) para 70. For the Spanish entitlement, see UNGA 2318th Plenary Meeting, Question of Spanish Sahara, UN Doc, A/RES/3292 (13 December 1974). See also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (21 June 1971) ICJ Advisory Opinion para 53.

90 Patrick Macklem, *Sovereignty of Human Rights* (OUP 2015) 154.

91 Francesco Francioni, 'Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?' in Lenzerini (n 61) 42–4.

92 Anonymous, 'Notes: International Law as an Interpretive Force in Federal Indian Law' (2003) 116(6) Harvard Law Review 1751, 1757, 1771–3; David Williams, 'In Praise of Guilt: How the Yearning for Moral Purity Blocks Reparations for Native Americans' in Lenzerini (n 61) 241–2.

93 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (n 4) paras 42–3. Anaya (n 40) 142; Gilbert (n 87) 609–610; Native Title Act No. 110, 1993 of Australia defines 'extinguish' in art 237A: 'after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect'.

94 Åhrén (n 77) 188-92.

95 Report of the CERD, 60th and 61st session, Consideration of Reports, Comments and Information Submitted by States Parties under Article 9 of the Convention, UN Doc, A/57/18 (21 August 2002) para 331.

96 Jeremy Waldron, 'Settlement, Return, and the Supersession Thesis' (2004) 5(2) Theoretical Inquiries in Law 237, 244–245. See also, UN Doc, E/CN.4/Sub.2/2002/21 (n 34) para 8; Dinah Shelton, *Remedies in International Human Rights Law* (OUP, 3rd ed., 2015) 266.

IACtHR observes the continuing violation of article 21 by connecting the state's obligation to prevent the crimes from happening, as tribal and indigenous peoples are inclined to be the victims of displacement.[97]

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

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

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

Special measures for the land entitlement of indigenous peoples have become permanent because of increasing reference to preservation of their culture. ILO's C107 assessment points that indigenous peoples should be assimilated with the rest of society. Although C107 acknowledges the collective ownership of lands by indigenous peoples, it sees it as transitory, which is reflected in article 3.[98] Underlying this view is the fact that national economic development is regarded inseparable from integration, and therefore the continuous land right of the indigenous peoples was seen as an obstacle for economy under C107. This view is also supported by the requirement for equality of individuals under international human rights law.[99] However, the reference to temporality of the land right cannot be seen in C169.[100] It was required to deemphasise the mention of special measures for the right to land in the drafting process of C169.[101] According to Thornberry, the possibilities for permanency of special measures can also be shown in the other ILO treaties, especially in the ILO Convention No. 111 (C111).[102] Even though C111 is not specifically for indigenous people, it is regarded as a meaningful source to protect indigenous peoples.[103] Likewise, ICERD is also criticized for maintaining only the temporary framework of special measures as it may sometimes be led to assimilation.[104]

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

97 *Case of the Moiwana Community v Suriname* (15 June 2005) IACtHR Series C No. 124 paras 43, 122.

98 Anaya (n 40) 55–6; C107 (n 13) art 3.2 (b).

99 Luis Rodriguez-Pinero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime* (OUP 2005) 184–5, 193–9, 208–9. See C107 (n 13) art 6.

100 Compare art 3.2.b of C107 (n 13) with art 4 of C169 (n 14).

101 Report VI (1): Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107) International Labour Conference 75th Session (1988) 38. <https://www.ilo.org/public/libdoc/conventions/Technical_Conventions/Convention_no._169/169_English/87B09_172_engl.pdf>.

102 Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination- A Commentary* (OUP 2016) 206–7; Discrimination (Employment and Occupation) Convention (No. 111) International Labour Conference 42nd Session (adopted 25 June 1958, entered into force 15 June 1960) art 5(1).

103 Fergus MacKay, 'The ILO Convention No. 111: An Alternative Means of Protecting Indigenous Peoples' Rights?' (2020) 24(2/3) The International Journal of Human Rights 144, 146.

104 Kevin Boyle and Anneliese Baldaccini, 'A Critical Evaluation of International Human Rights Approaches to Racism' in Sandra Fredman (ed.), *Discrimination and Human Rights: The Case of Racism* (OUP 2001) 157-8.

105 *Saramaka v Suriname* (n 21) paras. 103, 116. See also, *Kichwa v Ecuador* (n 21) para 171.

Commission on Human and Peoples' Rights (AfCHPR) also recognises that special measures are to protect the continuous traditional livelihoods of indigenous peoples, which includes the right to land.[106] This position was also visible in the drafting process of ICERD, as special measures are indicated as becoming permanent in some cases, as in the case of the land right of the indigenous peoples in Mexico.[107] In India, CERD evaluated that the 'effective environment' of affirmative action for the marginalised subjects has been produced, and it is said to be comparable to the Inter-American jurisprudence.[108] In the landmark case of *Orissa Mining Corp v Ministry* (*Niyamgiri*), land rights under FRA was construed as a 'permanent stake' without any kind of time restriction.[109]

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

The interpretation of remedial self-determination as continuing non-discrimination plays an important role in interpreting the right to land of indigenous peoples. According to Corntassel, the 'ongoing' discrimination that is mentioned by Anaya should be interpreted to imply 'sustainable self-determination'.[110] This understanding is premised on the idea that the decolonisation process has not been properly handled, and therefore protecting the livelihoods of indigenous peoples is a necessary aim.[111]

This understanding of historical discrimination suggests a connection between the 'remedial' and 'substantive' self-determination, which is necessary for upholding the rights of indigenous peoples. Posner and Vermeule propose that the return of lands as compensation for historical wrongdoing to culturally cohesive subjects is justified as part of the right to self-government.[112] Such a view is supported by UNDRIP, in which the right to self-government is considered in article 4 as a main measure of the indigenous self-determination.[113] They also point out that compensation for past injustices tends to become continuous because of multi-factorial nature of the issue.[114] The expansive feature of self-determination is also derived from the abstract meaning of the common article 1 of ICCPR and ICESCR.[115]

This connection between historical and current discrimination can be described as the position in which special measures are not ceased until they have a sufficient 'effect' in reality. Unlike the approach that emphasises the 'intention' to recognize the particular discrimination, the effects in real life situation are frequently seen as a standard to identify discrimination.[116] This seems to be supported broadly by international human rights law and practices, including C111, ICCPR, ICEDAW, ICERD and ICESCR.[117] For example, CEDAW, in the *General Recommendation No. 25* states that special measures can be sustained for a long period even if they are temporary, as '[t]he duration of a temporary special measure should be determined by its *functional result*' (emphasis added.[118] During its drafting process, it

106 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (25 November 2009) AfCHPR No. 276/03 paras 187, 260.

107 UN Sub-commission on the Prevention of Discrimination and Protection of Minorities, 16th Session, Summary Record of the 411th Meeting, UN Doc, E/CN.4/Sub.2/SR.411 (16 January 1964) 9. See also, Commission on Human Rights, 20th Session, Summary Record of the 784th Meeting, UN Doc, E/CN.4/SR.784 (25 February 1964) 10.

108 Concluding Observations of the CERD- India, UN Doc, CERD/C/IND/19 (5 May 2007) para 26; Dlugoleski (n 68) 238-9.

109 *Orissa Mining Corp v Ministry of Environment and Forests* (*Niyamgiri*) (18 April 2013) Supreme Court of India, Writ Petition (Civil) No. 180 of 2011 paras 42, 49 (iv) (a).

110 Jeff Corntassel, 'Towards Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 Alternative 105, 116.

111 ibid 117–9.

112 Eric Posner and Adrian Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 Columbia Law Review 689, 733–5.

113 Wiessner (n 2) 44.

114 Posner and Vermeule (n 112) 742.

115 Xanthaki (n 13) 175.

116 See, Committee on Economic, Social and Cultural Rights, Report of the Fifth Session, UN Doc, E/1991/23 (26 November-14 December 1990) 91 (para 3(a)).

117 ibid 90; *Simunek et al v The Czech Republic,* Human Rights Committee 54th Session, UN Doc, CCPR/C/54/D/516/1992 (19 July 1995) para 11.7.

118 CEDAW General Recommendation No. 25 (n 36) para 20.

was even indicated that the government are obliged to explain the reasons for adoption of such temporary measures.[119] According to Craven, although this does not necessarily mean group rights, it can suggest an entitlement towards a member of specific groups.[120]

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

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

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

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

119 Rikki Holtmaat, 'Building Blocks for a General Recommendation on Article 4 (1) of the CEDAW Convention: Report of the Expert Meeting in Maastricht 10-12 October 2002' in Ineke Boerefijn and others (eds.), *Temporary Special Measures- Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia 2003) 235-6.

120 Matthew Craven, *The International Covenant on Social, Economic and Social Rights: A Perspective on Its Development* (Clarendon Press 1995) 165–7.

121 Human Rights Council, 36th Session, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc, A/HRC/36/46 (1 November 2017) paras 64–70.

122 *Case of the Yakye Axa Indigenous Community v Paraguay* (17 June 2005) IACtHR, Series C No. 125 para 175.

123 *Kichwa v Ecuador* (n 21) paras 212-4; *Lhaka Honhat v Argentina* (n 21) paras 243-54.

124 *Niyamgiri* (n 109) paras 39, 41-2.

125 *T N Godavarman Thirumulpad v Union of India and Others* (6 July 2011) Supreme Court of India, Writ Petition (C) No. 202 of 1995 paras 26, 31.

126 Åhrén (n 77) 164-6.

127 John G Sprankling, *The International Law of Property* (OUP 2014) 125–9.

128 CERD Concluding Observations on El Salvador (n 17) paras 20, 21(a).

129 *Endorois v Kenya* (n 106) para 187.

130 *African Commission on Human and People's Rights v Kenya* (26 May 2017) AfCtHPR, Application No. 006/2012 para 153.

title to property' on the creation of UNDRIP.[131] Thus, as Åhrén suggests, the interpretation of non-discrimination of indigenous peoples under ICERD can be developed with the adoption of UNDRIP.[132]

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

Furthermore, indigenous peoples' right to land has been mentioned as a reason for restriction of others' property rights. The rights of property are limited in regional international human rights law, depending on public interests, relationship to another person's property right and the general principles of international law.[135] In the *Yakye Axa v Paraguay,* IACtHR indicates that individual and collective rights to land should be balanced, while 'restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities'.[136] IACtHR also states that the rights to property can be restricted because of public interests, including the indigenous peoples' right to land.[137] The framework of FRA seems to show that the communal land rights stipulated in this act do not necessarily violate the rights of others who are not indigenous communities, as they are based on remedy for past eviction.[138] In *Niyamgiri,* the Supreme Court of India says that communal rights to land based on customary uses can be more than property rights because they focus on social welfare and remedial entitlement.[139] During the drafting of UNDRIP, although Japan opposed the concept of collective rights as harmful to other individuals, it accepted public interests as a restriction on human rights.[140] With regards to sustainable development, although IACtHR is of the opinion that property rights to land can be restricted in relation to environmental protection as a legitimate public interest, it admits that the right to land of indigenous peoples can help such a purpose.[141]

5 CONCLUSION

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

131 UNGA 61st Session, Official Records, 107th Plenary Meeting, UN Doc, A/61/PV.107 (13 September 2007) 21.
132 Åhrén (n 77) 157. See also, the evolutionary interpretation brought to art 21 of the ACHR. Summers (n 18) 169.
133 CERD, Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Paraguay, UN Doc, CERD/C/PRY/CO/4-6 (4 October 2016) paras 19-20.
134 CERD, Concluding Observations on the Initial Report of South Africa, UN Doc, CCPR/C/ZAF/CO/1 (27 April 2016) paras 44-5.
135 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) art 14; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 21(1); Optional Protocol No. 1 to the European Convention on Human Rights (adopted 4 November 1950, entered into force 3 March 1952) art 1.
136 *Yakye Axa v Paraguay* (n 122) paras 148–9.
137 *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (29 March 2006) IACtHR, Series C No. 146 para 138.
138 Atrayee Banerjee and Chowdhury Madhurima, 'Forest Degradation and Livelihood of Local Communities in India: A Human Rights Approach' (2013) 5(8) Journal of Horticulture and Forestry 122, 127.
139 *Niyamgiri* (n 109) para 43.
140 UN Doc, A/61/PV.107 (n 131) 20.
141 *Case of the Kalina and Lokono Peoples v Suriname* (25 November 2015) IACtHR Series C No. 309 paras 168, 171-181
142 See, Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22(1) European Journal of International Law 165, 199.

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

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

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

Specifically on the rights of indigenous peoples, the connection between ongoing non-discrimination and sustainable development should be analysed. While remedial and substantive self-determination seem to be connected, it does not necessarily suggest sustainable development. Sustainable development aims at intra-generational equity; however, the legal relationship has not been clarified in that regard.[152]

Furthermore, the controversy over the separation of collective rights and individual ones is important as well, especially in the sense of how to balance them. The rights of indigenous peoples are not absolute, even in the context of UNDRIP, as shown in the procedural aspect of this norm.[153] Similarly, the concept of public interest should also be understood clearly.[154] Reconsidering the relationship between collective rights and individual rights can result in a discussion of the philosophy underlying international human rights law.[155] The recognition of right to land of indigenous peoples will serve twin benefits. Firstly, it will foster a substantive regime for individuals or groups who are usually under substantive discrimination, such as minorities, peasants and women. Secondly, it will also stimulate discussion on how to consider the interests of future generations as well as even non-indigenous peoples whose interests can collide with those of indigenous peoples.

143 See, Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 Modern Law Review 671, 677.

144 See, Kristin Henrard, *Equal Rights versus Special Rights?* (European Communities 2007) 15, 17.

145 See, Pentassuglia (n 142) 198; Åhrén (n 77) 96.

146 See, Henrard (n 144) 67-68.

147 UNGA 16th Session, Official Records, 3rd Committee, 1102nd Meeting, UN Doc., A/C.3/SR.1102 (13 November 1961) para 33.

148 Anne F Bayefsky 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 Human Rights Law Journal 1, 18–24.

149 Raymond F Betts, 'Decolonization: A Brief History of the Word' in Els Bogerts and Remco Raven, *Beyond Empire and Nation: The Decolonization of African and Asian Societies, 1930s-1960s* (KITLV Press 2012) 25–33.

150 See UNGA Declaration on the Right to Development, UN Doc, A/RES/41/128 (adopted 4 December 1986) preambular; African Charter (n 135) preambular.

151 Macklem (n 90) 156–157, 161.

152 Edith B Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8(1) American University International Law Review 19, 19–26.

153 See Human Rights Council, 12th Session, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/12/34 (15 July 2009) para 49.

154 McHarg (n 143) 696. See, Anna-Lena Wolf, 'Juridification of the Right to Development in India' (2016) 49(2) Verfassung in Recht und Übersee 175, 191-192.

155 See, Thornberry (n 102) 213.

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