2 The relevance of the UN Declaration on the Rights of Indigenous Peoples to vibrant, viable and sustainable Sámi communities

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1. Introduction

Evidence suggest that domestic laws do not ensure vibrant, viable or sustainable Sámi communities. Indeed, rather than shielding Sámi communities from harmful inroads into their lands, national legislators may facilitate such. In *Rönnbäcken* (2020), the UN Committee on the Elimination of Racial Discrimination (CERD) held that Swedish mining and environmental legislation structurally discriminates Sámi reindeer-herding communities by not prohibiting but rather paving the way for mining activities causing unproportionate harm.[1] In *Girjas* (2020), the Swedish Supreme Court found that domestic legal sources on Sámi land and resource rights shall be interpreted so to as far as possible dovetail with international Indigenous rights. The court thus signalled a concern that by itself, domestic law does not meet international standards and fails to acknowledge and protect Sámi land and resource rights.[2] In *Fosen* (2021),[3] the Norwegian Supreme Court ruled the establishment of a wind power plant in a Sámi reindeer-herding community's traditional land unlawful as at odds with the International Covenant on Civil and Political Rights[4] (ICCPR) article 27. Had the ICCPR not been incorporated into domestic law,[5] and the court, therefore, only had recourse to 'purely' domestic legal sources, the wind power plant would have been held lawful. These examples suggest that vibrant, viable and sustainable Sámi communities rely on international Indigenous rights finding their way into the national legal systems. Domestic legislators seemingly cannot be trusted with this task.

The foregoing shows how international law entering the national legal systems is a prerequisite for thriving Sámi communities but also that such imprints are possible. Nordic courts are open to internationalisation and national law on Sámi rights to influences of international law.[6] Will and means are, however, not sufficient for such impregnation. Knowledge of the law is needed too. *Girjas* and *Fosen* could be precursors of a development to come but remain rare examples of international law impacting on domestic law. Assumingly, the inertia can in large part be ascribed to a lack of cognition of Indigenous rights, as distinct from capacity to cite isolated Indigenous rights sources or conjuring mythical creatures such as 'FPIC'.[7]

In an effort to shed light on how international Indigenous rights law can promote vibrant, viable and sustainable Sámi communities, the chapter aspires to

DOI: 10.4324/9781003220640-2

outline the basis of the Indigenous rights regime, assuming that the specific rights it contains are only properly understood against the backdrop of its fundament. For that purpose, the article identifies two tangled norms at the nucleus of that base. Both stem from who Indigenous peoples are—from their core traits. It is explained how Indigenous peoples are (legally) identified by an intrinsic connection to their historically used lands, and by having formed distinct societies on these, and elaborated how these *de facto* recognitions have prompted the further acknowledgement that Indigenous peoples then hold *legal* rights to such lands and societies. The chapter further explores how it follows from that Indigenous peoples' core rights derive from their core traits that a principal objective of the international Indigenous rights regime is to protect those traits, in other words to protect Indigenous peoples' distinctiveness. Put otherwise, a right to be different is at the regime's nucleus, aligning it with the aspect of the right to non-discrimination calling for differential treatment of those different. The chapter highlights how the international Indigenous rights regime first crystalised through an interplay with the deliberations on the UN Declaration on the Rights of Indigenous Peoples[8] (UNDRIP or the Declaration) and, following the UNDRIP's adoption, has continued to be influenced by it. As a consequence, both the regime's discussed fundament and the concrete rights which sprout from it are, first and foremost, manifested in the Declaration. It follows, the chapter submits, that those aspiring to understand and operationalise international Indigenous rights law in a Sámi context are well advised to consult the UNDRIP as a baseline. It concludes by pointing to what basic rights then appear, in support of Sámi communities seeking to remain vibrant, viable and sustainable.

2. Briefly on the UNDRIP's legal status

Identifying the UNDRIP as a keystone of the international Indigenous rights regime, one may pre-emptively strike at a likely counterargument. As a declaration adopted by the UN General Assembly (UNGA), the UNDRIP is not *in itself* legally binding. Those eager to point this out tend to overlook, however, that it does not follow that the same is true for *the rights the Declaration enshrines*. A couple of examples illustrate. The Universal Declaration on Human Rights[9] (UDHR), too, is a declaration adopted by the UNGA: It has the same legal status as the UNDRIP. Notwithstanding, it is generally agreed that essentially all the rights the UDHR reflects are binding upon states as customary international law.[10] Pursuant to UNDRIP article 2, 'Indigenous . . . individuals are . . . equal to all other . . . individuals and have the right to be free from . . . discrimination'. This right thus appears in a formally non-binding *instrument*. Obviously though, one cannot, based on that, infer that the *right* is not binding upon states and that these may treat Indigenous individuals as unequal human beings and discriminate against them.

Remarks that the UNDRIP is non-legally binding are thus formally correct but also factually uninteresting. What is legally relevant is whether *the rights* the Declaration enshrines are binding; not the legal status of *the instrument in which they appear*. Whether the rights the UNDRIP reflects are legally binding or not must in

turn, as the UDHR exemplifies, be established on a case-to-case basis, by resolving whether they form part of binding customary international law.

The following explains how the UNDRIP has interplayed (also as a draft) and continues to interplay with other international legal sources. The product is not seldom customary international norms. Hence, a substantial number of the rights the Declaration enshrines are legally binding upon states. As is also clear from the following, this is for natural reasons particularly true for those rights most immediately emanating from the fundament of the international Indigenous rights regime.[11] As indicated, the chapter returns to which those rights are. At this point is merely underlined that its assertion that the UNDRIP is at the axis of international Indigenous rights law is not dismissed by referring to its legal status. The rights which appear in the Declaration are not binding because of appearing there. Rather, the UNDRIP is the instrument through which customary international law on Indigenous rights binding upon states is most accessible. Conversely, the described interaction implies that the UNDRIP cannot be read in isolation. To ascribe UNDRIP provisions correct meanings, these must be apprehended in light of other international legal sources.[12]

3. The international legal framework

3.1 Classical law

To understand what international Indigenous rights are at their core, a comparison with minority rights is helpful. International law confronted minorities and Indigenous peoples[13] at its infancy, when essentially a European affair. To the European states, Indigenous peoples (and other peoples in foreign continents) were groups *external* to Europe; populations they encountered in their colonial aspirations. Minorities, or more accurately members of groups in minority, were *internal* to the continent; individuals with certain traits different from those of the majority but 'European' nonetheless. The European states responded very differently to these 'collectives'.

From the outset, international law embraced certain rights of members of certain minority groups.[14] Hence, not all smaller groups were considered 'legal minorities'. The groups the European state law-makers identified as such were populations with certain religious, cultural and/or linguistic characteristics which separated them from the majority. This understanding in turn identified which rights the law bestowed on members of such minority groups. As minorities were distinct in terms of religion, culture and/or language, minority rights were rights of the members to practice their religion, exercise their culture and use their language.[15]

The European law-making states' initial stance towards Indigenous peoples stemmed from an aspiration to legitimise placing them and their lands and resources under European hegemony.[16] International law was promulgated to that effect. It proclaimed Indigenous peoples' *societal structures* insufficiently developed, structured and sophisticated to constitute states, thereby disqualifying Indigenous peoples from sovereign and other *political rights*.[17] It further declared their *land*

and natural resource uses underdeveloped too, barring them from *private rights*.[18] In short, the nature of Indigenous peoples' societal organisation and of their land and resource uses was invoked to proclaim them without rights, both political and private (and as lacking status as international legal subjects).

For the present purposes, classical international law's distinction between Indigenous peoples and minorities is of interest for two reasons. It is pertinent that the international *corpus juris* from its inception (1) viewed Indigenous peoples and minorities through different lenses and (2) derived both populations' rights (or lack thereof) from their respective traits. Minorities being marked by religious, cultural and/or linguistic characteristics prompted the conclusion that their members have the right to practice their religion, exercise their culture and use their language. For their part, Indigenous peoples' societal structures and land and resource uses caught the international law-makers' attention, but initially were utilised to deprive them of rights to both. International law's positions on Indigenous peoples and minorities got entrenched over time. They were hence essentially the same post–World War II as when emerging post-Westphalia.

3.2 Contemporary law: a sui generis *Indigenous rights regime*

Contemporary international law has essentially continued the minority rights of the classical period. It, too, thus understands 'minorities' in terms of religion, culture and language,[19] and identifies minority rights based on that definition, i.e. as rights of members of such groups to practice their religion, exercise their culture and use their language.[20]

At first, the contemporary international normative order also embraced classical international law's position on Indigenous peoples; i.e. it ignored them.[21] In the late 1970s, however, it commenced revisiting this stance. At this juncture, there were two basic options. International law could have treated Indigenous peoples as minorities. This would have entitled Indigenous individuals to minority rights but blocked the development of Indigenous rights—and indeed Indigenous peoples from emerging as legal peoples. This path was not pursued though. Instead, the UN and its member states embarked on elaborating a legal regime *sui generis* to Indigenous peoples. This development maintained international law's distinction between Indigenous peoples and minorities but placed the two rights regimes on very different trajectories.

International law continued to distinguish between Indigenous peoples and minorities also when incorporating the former group into the international normative order because it identified Indigenous rights through the same method it already identified minority rights. The Indigenous rights regime happened because Indigenous peoples were held to differ from minorities. And the perceived differences, i.e. Indigenous peoples' core *traits*, became the basis for Indigenous peoples' core *rights*. In other words, Indigenous rights derive from who Indigenous peoples *de facto* are (or at least were perceived to be [as minority rights derive from the understanding of minorities]).

4. The fundaments of the international Indigenous rights regime as manifested in the UNDRIP

4.1 The making of the UNDRIP

Authored during a decade around 1980, the 'Cobo report' heralded the emergence of an international Indigenous rights regime.[22] Consisting of a series of progress reports with sets of conclusions and recommendations, it profoundly impacted on how the regime unfolded.[23] Immediate recommendations were that the UN should adopt an Indigenous rights declaration, and establish a body within its human rights system solely focusing on the rights of Indigenous peoples. In response, the UN Working Group on Indigenous Populations (WGIP) was established, holding its inaugural session in 1982. As essentially its first action, it embarked on elaborating a draft UNDRIP. Following a decade of deliberations, the WGIP presented a draft UNDRIP in 1993.[24] Fourteen years of further negotiations ensued, whereafter the UNGA adopted the Declaration in 2007.

The making of the UNDRIP is significant. Common grounds and arguments emanating out of the UNDRIP deliberations influenced how international Indigenous rights took form, at the same time as these rights informed the UNDRIP process. This interplay was pivotal for how the Declaration unfolded and for the trajectory of the Indigenous rights regime in general.[25] As elaborated in the following, that the UNDRIP crystalised in this manner, coming to embrace the same or similar norms as other international legal sources, is the main reason that many of the rights the UNDRIP enshrines reflect customary international law binding upon states and that these can only be properly understood against the backdrop of international law in general.

4.2 Fundaments of the international Indigenous rights regime: facts

The international Indigenous rights regime taking shape following the Cobo report in parallel with the UNDRIP deliberations thus departed from who Indigenous peoples are. Two tangled core traits came to the fore. Indigenous peoples are (legally) populations whose cultures, ways of life (including traditional livelihoods) and ultimately very identities are inexorably and inalienably interwoven with their historically used lands and who have established distinct societies on such lands. These core traits were reflected in the earliest sources forming the Indigenous rights regime and have subsequently been affirmed and reaffirmed.

As to the first, the Cobo report includes a working definition of 'Indigenous peoples', still the by far most cited and used of its kind.[26] It identifies Indigenous peoples as populations marked by a resolve 'to preserve, develop and transmit to future generations their ancestral territories, *and* their ethnic identity, as the basis of their continued existence as peoples' [italics here].[27] The Cobo definition thus places on par preservation of identity *and* land, should Indigenous peoples be able to remain as distinct peoples. Loss of *either* precludes their continued being, it assumes. The Cobo report contextualises that it is critical to understand the profound and special

relation Indigenous peoples have with their lands, as a basis for their value systems, customs, traditions and cultures—and very existence as Indigenous peoples.[28]

Similarly, the first 1993 draft UNDRIP article 25 provided that

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters . . . and other resources which they have traditionally . . . occupied or used, and to uphold their responsibilities to future generations in this regard.

The drafting of the UNDRIP thus started from a perception of Indigenous peoples as populations marked by a unique and inalienable relationship with their historically used lands. (Only populations with such a tie can maintain and strengthen it.) 'Spiritual' should not be read literary. It encapsulates how Indigenous peoples and their lands are inseparable in an all-encompassing manner, including in terms of culture and identity.[29] Article 25 appears in the adopted UNDRIP essentially as in the 1993 draft. Save some editorial changes, the only difference is that the reference to 'material' has been deleted. To the extent this at all changes the meaning of the provision, it does so in ways not relevant here.

That Indigenous peoples' cultures, ways of life and, ultimately, identities are inexorably and inalienably tied to their historically used lands thus entered the realm of the Indigenous rights regime from the outset. It has been consistently reiterated. By example, the UN Committee on Economic, Social and Cultural Rights (CESCR) has underscored that

> Indigenous peoples'. . . ancestral lands and their relationship with nature should be . . . protected, in order to prevent the degradation of their particular way of life, including their means of subsistence . . . and, ultimately, their cultural identity.[30]

For its part, the CERD has succinctly and pointedly observed that it is generally accepted that Indigenous land rights are unique in that the right identifies the holder.[31] The presence of a link between land and people thus engenders both the conclusion that the entity with the link is an Indigenous people and that the link shall (therefore) be protected by law. As a final illustration, reference can be made to the jurisprudence of the Inter-American Court on Human Rights (IACtHR). It has repeatedly underlined how Indigenous peoples are characterised by an inherent tie to their historically used lands. For instance, in *Sawhoyamaxa*, the court pronounced that

> [t]he culture of . . . indigenous communities reflects a particular way of life . . . the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their . . . cultural identity.[32]

In short, Indigenous peoples 'are indigenous because their ancestral roots are embedded in the lands'.[33]

The second core trait, that Indigenous peoples are populations who have established distinct societies on their historically used lands, saturates the Cobo report, albeit perhaps mostly implicitly so. By example, according to the Cobo definition, Indigenous peoples are populations marked by a determination 'to preserve, develop and transmit to future generations their existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems'.[34] A natural presupposition for Indigenous peoples' identified resolve to *preserve* societal features, such as cultural patterns, social institutions and legal systems, is that they *possess* such. The Cobo report further identifies self-determination as a 'basic precondition for [Indigenous peoples'] . . . determination of their own future'.[35] Similarly, associating self-determination with Indigenous peoples presumes a societal organisation capable of being self-determining.

That the authors of the 1993 draft UNDRIP understood the Declaration to pertain to populations organised through their own distinct societies is reflected throughout. Perhaps most explicitly, article 4 proclaimed that 'Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal system'. As with the Cobo definition, embedded in the articulated right is the assumption that Indigenous peoples are populations with such features. Further, article 3 postulated that 'Indigenous peoples have the right to self-determination'. Again implicit is the existence of societies which can be self-determining. Article 3 appears verbatim in the adopted UNDRIP. Article 4 (now 5) is essentially intact too. Beyond certain editorial changes, the only difference is that 'institutions' has replaced 'characteristics', rendering it more explicit that the provision refers to features of societies.

In sum, as with their attachment to land, Indigenous peoples entered the realm of international law based on an understanding that they are populations characterised by having rooted distinct societies in their historically used land. This trait too has been confirmed by a spectrum of subsequent international legal sources, in addition to by the adoption of the UNDRIP.[36]

4.3 Fundaments of the international Indigenous rights regime: facts identify rights

Establishing what factually distinguish Indigenous peoples carries no legal implications in itself, even if done by legal sources. However, it was clear from the outset that attendant to these *facts* (established by law) were *legal consequences*.

Following article 25's observation that Indigenous peoples are de facto tied to their lands, 1993 draft UNDRIP article 26 proceeded to postulate that 'Indigenous peoples have the right to own . . . and use the lands . . . they have traditionally owned or otherwise occupied or used'. Thus, coupled to the acknowledgement that Indigenous peoples are factually interwoven with their historically used lands was recognition that they are then also legally tied to these. Article 26 underwent certain changes and reconstructions during the final stages of the UNDRIP deliberations, but the cited language appears largely verbatim in the adopted article 26.2.

The outlined connection between facts and law is manifested in a large number of subsequent international legal sources (in addition to in the adopted UNDRIP). Reference can, *inter alia*, be made to the previously mentioned conclusions by the CERD and the CESCR. The IACtHR, too, has repeatedly affirmed that Indigenous peoples' de facto ties to their lands entail that they hold rights to these. By example, in *Sawhoyamaxa*, the court underscored that 'the close ties . . . indigenous communities have with their traditional lands and the natural resources . . . must be secured under . . . the American Convention'.[37] The African Commission on Human and Peoples' Rights (AfCommHPR) has aligned itself with this conclusion, following a thorough examination of international legal sources relevant to the matter including, in addition to the IACtHR's and its own case law, jurisprudence from UN treaty bodies and the European Court on Human Rights (ECtHR).[38]

Also, the recognition that Indigenous peoples *have* distinct societies has been accompanied by acknowledgement that they then hold *rights* to these. Following the recognition that Indigenous peoples are marked by possessing their own societies (articles 3 and 4), the UNDRIP proceeds to provide that they have the right to 'maintain and strengthen' (article 5) and determine these (article 3). Several other international legal sources too affirm that attendant to Indigenous peoples *having* distinct societies is the *right* to preserve, develop and govern these.[39]

4.4 Fundaments of the international Indigenous rights regime: facts motivate protection of rights

Recognition that Indigenous peoples' cultures, ways of life and ultimately very identities are tied to their historically used lands has not only engendered acknowledgement that they *hold* rights to the lands. An additional immediate corollary to this recognition of fact was an understanding that these rights shall *be legally protected*. The 1993 draft UNDRIP article 26 provided not only that Indigenous peoples hold rights to lands traditionally used but also that they have the right to 'control' (access to) such lands. This aspect of the provision too is retained in the adopted UNDRIP article 26. Thus, also the acknowledgement that Indigenous peoples' factual ties to their historically used lands requires that the right which follow from that link shall be protected entered the rubric of the international Indigenous rights regime essentially from its inception. And again, not only the subsequent adoption of UNDRIP article 26 but an array of additional international legal sources have subsequently confirmed the norm.

By example, in *Saramaka*, the IACtHR first recalled its earlier acknowledgement in, *inter alia*, *Sawhoyamaxa* that Indigenous communities hold rights to traditionally used lands because '[w]ithout them, the very . . . cultural survival of such peoples are at stake'. It then added that '[h]ence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people'.[40] The AfCommHPR has concurred with the IACtHR's conclusions, again based on an extensive analysis of relevant law.[41] Similarly, in *Rönnbäcken*, the CERD reiterated that Indigenous land rights are unique in that the subject matter protected constitutes central elements of the right-holders' cultural identities. This, the Committee

inferred, called for protection of the Sámi reindeer-herding community's right to land.[42] As a final example, CESCR affirmed that Indigenous peoples' identities are tied to their lands. It has added that this obligates states to 'take measures to . . . protect the rights of indigenous peoples to . . . control . . . their communal lands . . . and resources'.[43]

4.5 Fundaments of the international Indigenous rights regime: summary

The international Indigenous rights regime as manifested in the UNDRIP and confirmed by other sources of authority took shape based on recognition that certain core traits distinguish Indigenous peoples (from minorities). In particular, two tangled features were understood to characterise such peoples. First, their cultures, ways of life (including traditional livelihoods) and, ultimately, very identities are inexorably and inalienably interwoven with their historically used lands, waters and natural resources. Second, Indigenous peoples are marked by having established distinct societies on such lands. From these de facto *core traits* have been derived Indigenous peoples' *core rights*. Attendant to such peoples' factual tie to their traditionally used lands is that they hold rights to the lands, which shall be protected. That Indigenous peoples possess distinct societies is accompanied by rights to continuously preserve, develop and determine these.

4.6 A principal objective of the international Indigenous rights regime

The international Indigenous rights regime having as point of departure what makes Indigenous peoples Indigenous peoples identifies its principal purpose. As Indigenous peoples core rights derive from their core traits, the regime must protect those distinct traits. Put differently, at the nucleus of international Indigenous rights law is a right of Indigenous peoples to remain different. This feature aligns it with the aspect of the right to non-discrimination which calls for differential treatment of those significantly different.

As conventionally understood, non-discrimination meant equal treatment of equal situations.[44] Differential treatment was allowed only as a means for elevating those different in the meaning 'less developed' to the same level as the population in general.[45] Subsequent developments have, however, furnished the right to non-discrimination with an additional understanding. First was acknowledged that differential treatment need not amount to discrimination, are there reasonable and objective reasons for differentiation.[46] But not only has differentiation been *allowed*. In *Thlimmenos* the ECtHR first recalled how it 'has so far considered the right to [non-discrimination] . . . violated when States treat differently persons in analogous situations'. It then proceeded to proclaim that 'it now considers that this is not the only facet of the [right]. The right not to be discriminated against . . . is also violated when States without an objective and reasonable justification fail to treat differently persons whose situation are significantly different'.[47] The court thus went beyond affirming that

not all differential treatment is discriminatory, postulating that failure to treat those differently who are in a significantly different situation *can in itself be* discriminatory, absent reasonable and objective justifications *not to* differentiate. Having reiterated this position in a few subsequent cases, the ECtHR recapitulated that there is discrimination if a state either (1) treats those in analogous situations differently or (2) in certain situations fails to treat those differently whose situations are significantly different.[48] Other human rights institutions have concurred. By example, the CERD has held that '[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same'.[49]

International judicial institutions have highlighted the relevance of this norm in Indigenous contexts. In *Rönnbäcken* the CERD recalled that to deprive Indigenous peoples of their lands constitute a particular form of discrimination targeting them[50] and is thus *prima facie* discriminatory. While the Committee added that this does not shield Indigenous lands from infringements of any sort, it underscored that not only do exceptions from the general rule require proportionality. The proportionality test must also be accustomed to Indigenous communities' cultural background, as Indigenous property rights to land are unique in that they protect Indigenous communities' cultural identities and ways of life. The Committee accentuated that states must avoid discrimination, not only in theory but also in practice. Therefore, resolving whether there is proportionality must not be done *in abstracto*. On the contrary, such assessments shall be based on who the property rights holder is, namely an Indigenous community.[51] In sum, assessing whether an inroad in an Indigenous community's land is proportionate shall be conducted based on that damage to the community's land is damage to its culture, way of life and very identity. As these are weighty values, the societal aim which motivates the infringement must assumingly be massive for it to be lawful. The IACtHR, too, has held that the right to non-discrimination involves a need for differential treatment when applied to Indigenous peoples,[52] as has the AfCommHPR.[53]

The UNDRIP manifests also this aspect of the international Indigenous rights regime. An affirmation in the preamble that 'indigenous peoples are equal to all other peoples' comes with a specifier that this embeds a right to be different and to be respected as such (paragraph 2). As human rights instruments in general, the Declaration's operative part, including the non-discrimination provisions (articles 1 and 2), shall be understood in light of the preamble.

In sum, innate in the international Indigenous rights regime is a right of Indigenous peoples to remain distinct, with a corresponding duty on states to treat them differently so that they can preserve and develop those distinct core traits which make them, them. Here, the regime finds robust support in the aspect of the right to non-discrimination which calls on states to in certain situations treat those differently who are significantly different. As mentioned, Indigenous peoples are not only significantly but singularly different. They must be said to epitomise those 'certain situations' which call for differentiation.

4.7 Conclusions

International law never viewed Indigenous peoples and minorities through the same lenses. As it derives both collectives' core rights from their (identified) respective core traits, the minority rights and Indigenous rights regimes have taken very different trajectories. The former targets individuals *within* the majority society. At its nucleus, the latter bestows Indigenous groups, and by extension their members, with rights to exist *in parallel with* the same.

The Indigenous peoples' core traits from which their core rights derive are that their cultures, ways of life and, ultimately, very identities are inexorably and inalienably interwoven with their historically used lands and that they have established distinct societies on these lands. Being de facto tied to their lands, Indigenous peoples are also legally bound to the same, a link which is protected from severance. Having distinct societies, Indigenous peoples also have the right to preserve, develop and govern these. Corresponding to these core rights, a principal purpose of the Indigenous rights regime is to allow Indigenous peoples to preserve and develop their distinctiveness; the core traits which make them them. This feature of the regime aligns it with the part of non-discrimination law which calls for differential treatment of those significantly different. The two legal frameworks in chorus require states to treat Indigenous peoples as Indigenous peoples, allowing them to remain as distinct peoples, through preserving and developing their distinct societies, cultures, ways of life (including traditional livelihoods and other land and resource uses) and, ultimately, distinct identities.

This is the fundament of the international Indigenous rights regime. It was blueprinted in the very first documents to map out the regime, including the 1993 draft UNDRIP, and has subsequently entered the realm of law. This international lawmaking in large part occurred first through an interplay between the draft UNDRIP deliberations and other processes and institutions and, following the adoption of the Declaration, through the UNDRIP serving as a benchmark for or at least inspiring such processes and institutions.[54] Due to these interactions, the fundament of the Indigenous rights regime and the rights which sprout from it are first and foremost enshrined in the UNDRIP, as reflected in its preambular paragraph 7. It identifies an

> urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.

As the layout for the fundament of the Indigenous rights regime appeared immediately and then served as the keystone upon which the regime was built, it is only natural that there is broad agreement that it forms part of customary international law.[55] Indeed, one can hardly talk about an international Indigenous rights regime absent this base. Concrete Indigenous rights can only be fully and properly grasped if understood against the backdrop of this fundament and must be realised in ways loyal to and supportive of it.

It may assist this understanding if mindful of that the law being a coloniser's weapon for centuries does not evidence an eternal condition. While, under classical international law, Indigenous peoples' unique ways of using lands and organising their societies barred them from their rights, under contemporary law the same qualities qualify them for such. It is precisely Indigenous peoples' unique relationship with the land which has engendered recognition that they hold private rights to these. And the resilience of their unique societies has granted them status as peoples with (political) rights as such. In short, international law has transcended from an instrument of colonialism to a supporter of Indigenous claims for equal rights to land and self-determination.[56] A *sui generis* international Indigenous rights law has antiqued colonial law.

5. Conclusions: the relevance of international Indigenous rights as manifested in the UNDRIP to vibrant, viable and sustainable Sámi communities

If allowed to impregnate the domestic legal systems, the rights springing from the fundament of the international Indigenous rights regime as manifested in the UNDRIP can be tools for Sámi communities who wish to remain vibrant, viable and sustainable. In particular, such rights entitle Sámi communities to control their lands, deciding who enters these and for what purposes. Put differently, the rights, both private and public, bestow Sámi communities with autonomy.

The UNDRIP reiterates that Indigenous communities hold property rights to lands, waters and natural resources historically and traditionally used, exclusive or shared, depending on the circumstances (article 26.2). The right to differential treatment prescribes that the use which has established these rights is that which follows from the Sámi culture and tradition. If a Sámi community has used land in accordance with that culture and tradition, a property right has been established. Domestic law is not allowed to prescribe that the community has used land in other manners (e.g. such common to the majority culture) for property rights to materialise.

The differential treatment requirement applies also to domestic rules of evidence and similar norms. These, too, must be accustomed to Sámi communities' cultural background. This entails, *inter alia*, that the presence of a Sámi cultural landscape in the environment evidences historic use (also when only visible to an initiated eye) (compare article 27).

The UNDRIP confirms that Indigenous communities not only hold property rights to lands, waters and natural resources historically and traditionally used but are also entitled to have such rights protected (article 26.2). This side of the right to property also recruits its reach from the right to be different and to differential treatment. This entails, *inter alia*, that the proportionality test innate to the right to property shall be accustomed to a Sámi community's cultural background. Consequently, when resolving whether an inroad in such a community's land is proportionate, the damage the infringement would cause an anonymous property rights holder is of no import. Legally relevant is the damage the infringement would

cause the Sámi community *because it is a Sámi community*, i.e. the damage it would cause to the community's culturally based land uses, such as reindeer husbandry, and to the land as a basis for such.[57] Since, under international law, a Sámi community's land and traditional land uses are inseparable from its identity, few infringements of scale assumingly meet this proportionality test. Monetary compensation does not achieve proportionality with respect to Sámi communities in ways it does in non-Sámi contexts. Absent proportionality, the infringement may only proceed with the Sámi community's consent. The outlined norm applies irrespective of whether inroads take the form of resource extraction, other industrial activities, infrastructure, residential or recreational settlements, tourism, military activities, presence of predators due to state action, or other. Such is the scope of Sámi communities' private autonomy.

The UNDRIP reflects that the Sámi people, as a people, is bestowed with the right to self-determination, encompassing an entitlement to freely pursue its economic, social and cultural development (article 3). Sámi communities may realise this right at the local level. While the ramifications of the right to self-determination when exercised by Indigenous peoples remain largely untested, the principle of equality between peoples provides that it attaches equally to the Sámi and Fennoscandinavian peoples (article 2, preambular paragraph 2). The *right* to self-determination may be operationalised through different *processes*. Of these, self-governance/autonomy (as distinct from consultation) is expected to be the process of choice among Indigenous peoples (including the Sámi) (article 4). Hence, Sámi communities may be self-determining and autonomous at the local level, the ambit of which must be resolved taking the principle of equality between peoples into account. This political autonomy compliments the private autonomy Sámi communities enjoy based on the right to property. The former should also allow Sámi communities to shape their local societies, economically, socially and culturally, so to remain vibrant, viable and sustainable.

Notes

1 *Lars-Anders Ågren and others v Sweden (Rönnbäcken)* (Communication No 54/2013) UN Doc CERD/C/102/D/54/2013 (CERD 26 November 2020).
2 Supreme Court of Sweden, NJA 2020 s 3 (Girjas) ss 131, 134, 147, 162. See also Eivind Torp, 'The Interplay of Politics and Jurisprudence in the Girjas Court Case' in Dorothée Cambou and Øyvind Ravna (eds), *The Significance of Sámi Rights: Law, Justice, and Sustainability for the Indigenous Sámi in the Nordic Countries* (Routledge 2024).
3 Supreme Court of Norway, HR-2021-1975-S (Fosen). See also Dorothée Cambou, 'The Fosen decision and its significance for protecting the cultural rights of the Sámi Indigenous people in the green transition' in Cambou and Ravna (n 2).
4 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
5 Menneskerettsloven (LOV-1999-05-21-30), § 2.
6 Mattias Åhrén, 'Rättigheternas renässans och samiska markanvändares egendomsrättigheter till Land' (2018) 2 Rettfærd—Nordisk juridisk tidskrift 160.
7 Mattias Åhrén, 'Indigenous Resource Rights at Their Core (and What These Are Not)' in Dwight Newman (ed), *Research Handbook on the International Law of Indigenous Rights* (Edward Elgar 2022).

8 United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA A/RES/61/295.
9 Universal Declaration on Human Rights (adopted 10 December 1948) UNGA A/RES/217 A.
10 See, e.g., Louis Henkin, *The Age of Rights* (Columbia UP 1990) 19; Sir Nigel Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 International and Comparative Law Quarterly 333; Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995–6) 25 Georgia Journal of International and Comparative Law 287.
11 Here it cannot be explained in any detail how customary international legal norms are formed. It is only pointed out that two elements are needed. States must *objectively* act in a concerted manner (*usus*) and do so under the *subjective* impression that they are legally obligated to act accordingly (*opinio juris*). States' 'acts' are not only those occurring in the 'real world'. On the contrary, states most frequently form customary norms through their voting and other actions in the UNGA and other international fora. Such state actions and expressions of will can significantly contribute to that rights expressed in formally non-legally binding instruments become binding law. See, e.g., Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007); Olivier De Schutter, *International Human Rights Law* (3rd edn, CUP 2019) ch 4; Brian D Lepard, *Customary International Law* (CUP 2010); and, for a more theoretical approach, Martti Koskenniemi, *From Apology to Utopia* (CUP 2005).
12 cf. UN Human Rights Resolution A/HRC/RES/48/11 (15 October 2021), preambular para 3, and, generally, Lepard (n 11) 8.
13 It is of course anachronistic to refer to Indigenous populations as 'Indigenous peoples' before the concept legally existed. For simplicity, the article does so nonetheless.
14 These rights did not make up a coherent minority rights system. Rather, their bases were singular treaties between a few, almost always two, states, although already the Treaty of Westphalia included certain protections of members of religious minorities. See Francesco Capotorti, UN Special Rapporteur, 'Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (1979) UN Doc E/CN.4/Sub2/384/REV 1, paras 5, 7–15; Khenikor Lamarr, 'Jurisprudence of Minority Rights: The Changing Contours of Minority Rights' (2018) 8th International Research Association for Interdisciplinary Studies 166–68.
15 David Wippman, 'The Evolution and Implementation of Minority Rights' (1997) 66 Fordham Law Review 597, 600; Patrick Macklem, 'Minority Rights in International Law' (2008) 6(3–4) International Journal of Constitutional Law Issue 547; Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (n 14) 14.
16 Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016) 9–12 with references; Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 183; Margaret Davies, *Property: Meanings, History, Theories* (Routledge-Cavendish 2007) 86.
17 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 34; Martti Koskenniemi, *The Gentle Civilizers of Nations* (CUP 2002).
18 Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 2, 7; James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (CUP 1995) 72.
19 For example, according to the UN special rapporteur on minority issues, minorities are 'ethnic, religious or linguistic . . . group[s] . . . that constitute less than half of the population . . . of a State whose members share common characteristics of culture, religion or

language, or any combination of these'. See UNCHR, 'Report of the Special Rapporteur on Minority Issues: Education, Language and the Human Rights of Minorities' (2020) UN Doc A/HRC/43/47, 70.

20 Contemporary international law adds that the right to non-discrimination attaches to members of minorities and also provides them with certain participatory rights. See, e.g., the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UNGA RES/61/295, in particular arts 2.1, 2.3, 3, 4.1.

21 ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959) does not impact on this conclusion, as this instrument essentially aspired to integrate members of Indigenous populations into the majority society. See, generally, Luis Rodriguez-Pinero, *Indigenous Peoples, Postcolonialism and International Law* (OUP 2005).

22 José R Martinez Cobo, UN Special Rapporteur, 'Study on the Problem of Discrimination Against Indigenous Populations, Conclusions, Proposals and Recommandations' (1986–7) UN Doc E/CN4/Sub2/1986/7/Add1–4 (*The Cobo Report*).

23 See, e.g., James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 62–63; Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge 2016) 5–6.

24 'Report of the Working Group on Indigenous Populations on Its 11th Session' (26 August 1994) UN Doc E/CN4/Sub.2/1993/29/Annex I.

25 Allen and Xanthaki (n 16) chs 1–3, 11–20 with references; Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (OUP 2016) chs 5–9.

26 See, e.g., Barelli (n 23) 5; Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015) 152–53.

27 *The Cobo Report* (n 22), 'paras 379–80.

28 ibid.

29 See, e.g., Claire Charters, 'Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 410–11.

30 CESCR, 'General Comment No 21, Right of Everyone to Take Part in Cultural Life (art 15, Para 1a of the Covenant on Economic, Social and Cultural Rights)' (21 December 2009) UN Doc E/C.12/GC/21, para 36.

31 CERD, 'Decision 2 (54) on Australia' (18 March 1999) UN Doc A/54/18, paras 4–7.

32 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Inter-American Court on Human Rights Series C No 146 (29 March 2006) para 118.

33 Anaya (n 23) 3.

34 *The Cobo Report* (n 22).

35 ibid para 269; José R Martinez Cobo, UN Special Rapporteur, 'Final Report (Last Part) Submitted by the Special Rapporteur' (1983) UN Doc E/CN4/Sub2/1983/21/Add8, para 580.

36 See, e.g., UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Canada' (7 April 1999) UN Doc CCPR/C/79/Add/105, 8; UN Human Rights Committee, 'Report of the Human Rights Committee' (2000) UN Doc A55/40, paras 498–528; CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation' (12 December 2003) UN Doc E/C12/1/Add94, paras 11, 39; CERD, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname' (13 March 2009) UN Doc CERD/C/SUR/CO/12, para 18. Also, Martin Scheinin, 'Indigenous Peoples Rights Under the International Covenant on Civil and Political Rights' in Joshua Castellino and Niamh

Walsh (eds), *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers 2005) 3, 10–11; Thornberry (n 16) 334–36; Federico Lenzirini, 'The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law' in Federico Lenzirini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (OUP 2008) 73–116.

37 *Sawhoyamaxa* (n 32) para 118.

38 *Endorois Welfare Council v Kenya*, 276/03 (2009) paras 185–238.

39 See, e.g., Will Kymlicka, *Multicultural Odysseys—Navigating the New International Politics of Diversity* (OUP 2007) 31, 272–93; Macklem (n 26) 208; Marc Weller, 'Self-Determination of Indigenous Peoples' in Hohmann and Weller (n 29) with references; Åhrén (n 25) chs 5–6 with references.

40 *Case of the Saramaka People v Suriname* (Judgment) Inter-American Court on Human Rights Series C No 172 (28 November 2007) para 121.

41 *Endorois* (n 38) paras 185–238.

42 *Rönnbäcken* (n 1) para 6.14.

43 CESCR (n 30) para 36.

44 See, Francesco Capotorti, UN Special Rapporteur, 'Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (1979) UN Doc E/CN.4/Sub2/384/REV 1, para 241.

45 See, e.g., the wording of the International Convention on the Elimination of all Forms of Racial Discrimination (adopted on 21 December 1965, entered into force on 4 January 1969) UNTS 660 arts 1.4 and 2.2 and of the ICCPR arts 2 and 26. Also, Patrick Thornberry, *International Law and the Rights of Minorities* (OUP 1993) 266–68; Bertrand G Ramcharan, 'Equality and Non-Discrimination' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP 1981) 259–61.

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

47 *Thlimmenos v Greece* App no 34369/97 (ECHR, 6 April 2000) para 44.

48 *Taddeucci and McCall v Italy* App no 51362/09 (ECHR, 30 June 2016) para 81. The right to differential treatment is hence now well-established ECtHR jurisprudence. See, e.g., Pieter Van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 1004–5.

49 CERD, 'General Recommendation No 32, The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination' (24 September 2009) UN Doc CERD/C/GC/32, para 8; Thornberry (n 16) 133.

50 cf. CERD, 'General Recommendation No 23 Indigenous Peoples' (18 August 1997) UN Doc A/52/18 Annex V, para 3.

51 *Rönnbäcken* (n 1) paras 6.7, 6.10, 6.13, 6.14, 6.20.

52 *Saramaka* (n 40) para 103.

53 *Endorois* (n 38) para 196.

54 See Hohmann and Weller (n 29) with references.

55 See, e.g., Committee of the Implementation of the Rights of Indigenous Peoples, 'Final Report' in International Law Association Report of the Seventy-Ninth Conference (Kyoto 2020) 4, 11, 12; Committee of Rights of Indigenous Peoples 'Interim Report' in the International Law Association Report of the Seventy-Fourth Conference (The Hague 2010) 8, 15, 22, 23, 38; Hohmann and Weller (n 29); Anaya (n 23) 141–48; Barelli (n 23) 29, 53; Charters (n 29) 397, 410–14; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (CUP 2007) pt II; Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) The European Journal of International

Law; Mattias Åhrén, 'Recognition of Indigenous Peoples' Rights to Lands, Territories and Resources' in *State of the World's Indigenous Peoples* (5th vol, UN Department of Economic and Social Affairs 2021).

56 cf. Anaya (n 23) 4.

57 cf. *Rönnbäcken* (n 1). Here, the CERD held that a mine in a Sámi reindeer-herding community's traditional land did not meet the proportionality test and was hence unlawful as at odds with the right to property.