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Tribal Land Ownership and the Forest Rights Act: Is India Truly International?

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by

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Abstract

This thesis examines the statutory framework of the *Forest Rights Act* in light of India's obligations under the *ILO Convention 107*, the *CERD*, and Article 27 of the *ICCPR* with respect to tribal land ownership. The *Forest Rights Act* is an express measure to address the 'historic injustice' perpetrated against tribal communities in matters of land rights. This thesis examines whether the Act fulfills India's human rights obligations under international law, particularly the obligation to recognize and protect the right to tribal ownership in traditional lands. The analysis focuses on two main aspects of India's obligations: whether the *Forest Rights Act* fulfills the obligation to fully recognize, delimit and demarcate the right to ownership of forest dwelling tribals based on traditional occupation of forestlands; and, whether the *Forest Rights Act* fulfills the obligation of effective participation imposed by international law before decisions (including state authorized resource development projects) are undertaken on traditional forest lands? The author concludes that the statutory framework of the *Forest Rights Act* does not fulfill India's international human rights obligations with respect to the land rights of forest dwelling tribal communities, in particular with respect to the tribal right to ownership of traditional lands.

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CHAPTER ONE

INTRODUCTION

1.1 The Research Problem

India is home to nearly a hundred million diverse tribal people who are spread across the country and are engaged in the constant struggle for existence, both at a biological and cultural level.[1] The tribal population in India can be divided into two broad regions: the tribes of the Northeast and the tribes of the highlands and plains of peninsular India. The former comprises the provinces of Assam, Meghalaya, Mizoram and Tripura, while the latter refers to the remaining country and is home to about 80% of the total Indian tribal population.[2] The two tribal regions are administered in accordance with the Fifth and the Sixth Schedule of the *Constitution of India*.[3] While the northeastern tribal areas enjoy a considerable degree of autonomy under the Sixth Schedule; the provincial Governors administer the peninsular tribal regions in accordance with the Fifth Schedule. The tribal populations of peninsular India, unlike the northeastern tribes, have suffered significantly greater intrusion by the dominant Indian culture.

Each sub group within the genus of tribal groups has chosen its own distinct name and collectively "[t]hey also refer to themselves as '*adivasi*' – the Hindi word used throughout India, meaning, literally, 'original dwellers'."[4] Most of the tribal groups in India have been declared as Scheduled Tribes by the state in the exercise of the powers conferred by the

[1] Ministry of Tribal Affairs, Government of India, *Annual Report 2016-17*, online: Ministry of Tribal Affairs <https://tribal.nic.in/writereaddata/AnnualReport/AnnualReport2016-17.pdf>. Chapter four of the Report contains statistical information regarding the Indian tribes. I will be using the terms tribal populations, tribal people and tribal communities/groups interchangeably in this thesis. The use of the term people is general and independent of the legal and political implications of this term in contemporary international law.
[2] *Ibid*.
[3] *Constitution of India*, 1950.
[4] Bradford Morse & Thomas R Berger, *Sardar Sarovar: The Report of The Independent Review* (Ottawa: Resource Futures International, [nd]) at 62 [emphasis in the original]. However, all the people of India are original in the sense that there is no concept of first people from the historical perspective in India.

Constitution of India.[5] A large number of tribal populations in India are forest dwelling and are economically, socially and culturally, dependent upon the forests in, or in the vicinity of which, they ordinarily reside.[6] The tribal communities assert a variety of rights with respect to the forest land and its produce including ownership/title rights. As in several other parts of the world, the issue of recognizing and protecting tribal land rights has been a central feature of the discourse on tribal-state relations in India.[7] The problem is rooted in the fact that there is no record of the rights of these forest dwelling tribal communities documenting the nature and extent of their rights over the forests they have inhabited since time immemorial. Consequently, the pre and post-colonial forest legislation have in effect resulted in large areas of tribal occupied lands being declared as state owned forests without adequate regard to the pre-existing land rights of the tribal populations, including the claims of land ownership.[8] This historical inaction and indifference has resulted in injustice in the matters of acknowledging tribal land rights and according them due recognition. It is now a major area of concern and debate in India.

In 2006, an important piece of legislation was enacted to remedy the situation of the forest dwelling tribes. *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006*[9] ("*Forest Rights Act*"), has been enacted specifically for remedying the 'historic injustice' committed by the state in not recognizing the land rights

[5] Article 366 of the *Constitution of India*, *supra* note 3, refers to Scheduled Tribes as the communities declared scheduled in accordance with Article 342 of the Constitution. Article 342 of the Indian Constitution empowers the President to declare tribes or tribal communities or parts thereof as Scheduled Tribes by way of a notification. The term Scheduled Tribe has not, as such, been defined.

[6] I am assuming the economic, cultural and spiritual importance of forest lands to all the forest dwelling tribal communities. However, I understand that this assumption may require evidence in concrete situations.

[7] See generally Kinsuk Mitra & Radhika Gupta, "Indigenous Peoples' Forest Tenure in India" in Jayantha Perera, ed, *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia* (Philippines: Asian Development Bank, 2009) 193.

[8] The legislation referred to is a series of forest laws adopted from 1876 leading upto the *Indian Forest Act 1927,* still operational today, and the *Wildlife (Protection) Act 1972*. In fact it has been alleged that the post-colonial state was even more unresponsive to tribal land rights claims than the colonial state. By virtue of the powers conferred by these laws, the state has declared many areas that tribals claim as traditional property as state owned forests. While some of these lands were actual forests in the dictionary meaning of the term, others were regular tribal occupied lands; see *ibid*.

[9] Act No 2 of 2007 [*Forest Rights Act*]. The Act came into force on 1 January 2008.

of the forest dwelling tribes in India when declaring forests state property. With that objective the statute recognizes individual and collective land rights, including "some measure of ownership" of the forest dwelling tribes in India over forest lands and its resources for the first time.[10] The *Forest Rights Act* provides for restitution of traditional forest rights to the forest dwellers across India, including individual and collective rights to 'hold' cultivated land in forested landscapes and collective use rights including the collective right to control, manage and use the community forest resources.[11] As discussed in Section 1.3, below, the Indian Parliament has endeavored to keep up with the evolving understanding of the rights of tribals and indigenous peoples within the umbrella of human rights by adopting the *Forest Rights Act*.

1.2 International Human Rights Law and Tribal Land Rights

A significant development in contemporary international law is the increasing and effective use of the human rights framework for addressing indigenous and tribal issues including land rights issues. The projection of tribal land issues through the lens of human rights has gradually led to the development of an advanced and transformed contemporary international normative regime relevant to tribal and indigenous land rights.[12] Tribal and indigenous rights, including land rights, under the rubric of international human rights law can be located within two distinct yet interconnected sources. First, they are encoded in specialized instruments, which include the *Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*[13] ("*ILO Conventions 107*"), *Convention (No. 169) Concerning Indigenous and*

[10] *Ibid*, c III; see Vasundhara, "About FRA", online: Forest Rights Act <www.fra.org.in> [Vasundhara, "About FRA"].
[11] *Supra* note 9, c III.
[12] See James Anaya, "Indigenous Rights Norms in Contemporary International Law" (1991) 8:2 Ariz J Int'l & Comp L 1 (HeinOnline) [Anaya, "Norms"]. Anaya has discussed some of the contemporary indigenous and tribal human rights norms.
[13] 26 June 1957, 328 UNTS 247, 40 International Labour Office Official Bulletin 12 (entered into force June 2, 1959, ratified by India 29 September 1958) [*ILO Convention 107*].

Tribal Peoples in Independent Countries[14] ("*ILO Convention 169*") and the *United Nations Declaration on the Rights of Indigenous Peoples*[15] ("*UNDRIP*"), which is not a binding instrument. Second, tribal and indigenous land rights are also developing within the jurisprudence of several regional and global general human rights instruments. Since the relationship with land is central to tribal cultural, economic and social way of life, "land rights are addressed through different lenses of the human right discourse including civil, political, economic, social and cultural rights."[16] Thus several general human rights norms including the right to property, right to self-determination, right to participation, right to private life, right to culture, right to equality and right to freedom of religion are considered relevant to the issue of tribal land rights.[17] The nature and "scope of contemporary international indigenous [and tribal] rights varies depending on the legal and institutional

[14] 27 June 1989, 1650 UNTS 383, 28 ILM 1384 (entered into force 5 September 1991, not ratified by India) [*ILO Convention 169*].
[15] GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49, (2008) 15 [*UNDRIP*].
[16] Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, 2d ed (Leiden: Brill Nijhoff, 2016) at 107 [Gilbert, *Land Rights*].
[17] See Nigel Bankes, "Land Claim Agreements in Arctic Canada in Light of International Human Rights Norms" (2009) The Yearbook of Polar Law 175 [Bankes, "Arctic"]; Sarah Pritchard, "Native Title from the Perspective of International Standards" (1997) 18 Australian Yearbook of International Law 127 [Pritchard, "Native Title"]; Gaetano Pentassuglia, "Towards a Jurisprudential Articulation of Indigenous Land Rights" (2011) 22:1 EJIL 165. Consequently, at a global level, Articles 1 and 27 of the *International Covenant on Civil and Political Rights* have been interpreted to apply to the situation of indigenous and tribal populations. 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976, accession by India 10 April 1979), online: United Nations Treaty Collection <http://treaties.un.org> [*ICCPR*]. However the *ICCPR* does not address tribal and indigenous issues specifically. Similarly, notwithstanding that the right to equality contained in the *International Convention on the Elimination of All Forms of Racial Discrimination* has been interpreted to affirm tribal and indigenous rights and cast corresponding state duties in international law, it is a general Convention that is not specifically dedicated to the issues of indigenous and tribal peoples. 7 March 1966, 660 UNTS 211 (entered into force 21 December 1965, ratified by India 3 December 1968), online: United Nations Treaty Collection <http://treaties.un.org> [*CERD*]. At the regional level, general human rights, particularly the right to property, contained in the *American Convention on Human Rights*, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European) and, the *African Charter on Human and Peoples' Rights* have been interpreted to extend recognition and protection to tribal and indigenous land rights. *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 143 (entered into force 18 July 1978), online: United Nations Treaty Collection <http://treaties.un.org> [*ACHR*]; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), online: United Nations Treaty Collection <http://treaties.un.org> [*ECHR*]; *African Charter on Human and Peoples' Rights*, 26 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), online: United Nations Treaty Collection <http://treaties.un.org>[*AfCHR*]. The aforementioned instruments are clearly illustrative and not exhaustive of the sources.

setting concerned."[18] While the *ILO Convention 107* and the *ILO Convention 169* specifically recognize and protect land rights including the tribal right to ownership of traditional lands, at present not all of the relevant general human rights norms form the normative basis for a claim to recognize and protect the tribal right to ownership of traditional lands based in customary law.[19]

It is relevant to briefly allude here to a body of literature analyzing the status of these norms. It has been argued that certain indigenous and tribal rights norms, around which an international consensus has emerged, have reached the status of customary international law.[20] The argument draws on the implications of the specialized international standards, especially the *ILO Convention 169* and the *UNDRIP*, and the jurisprudence of the *ICCPR*[21] and the regional human rights bodies.[22] Anaya asserts that the right to cultural integrity and the right to tribal title based in customary law are such norms.[23] He claims that the *ILO Convention 169*, largely, reflects customary international law and concludes that the jurisprudence of the regional human rights bodies reflects the application of these specialized standards as customary international law.[24] However, Pentassuglia considers the argument premature and non-pragmatic, and argues that while:

> specialized instruments may reflect…customary law in relation to relatively uncontroversial layers of protection which are encompassed by international human rights instruments and practice, such as…protection to cultural identity,

[18] Pentassuglia, *supra* note 17; see Nigel Bankes, "The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments" (2011) 57 The Yearbook of Polar Law 57 [Bankes, "Protection"]. Bankes has thoroughly analyzed the jurisprudence of the regional human rights instruments in the context of land rights.

[19] Nigel Bankes asserts that international human rights law now places a legal obligation on the state to recognize, delimit and title traditional occupation lands; "Arctic", *supra* note 17. The general human right to property read in conjunction with the right to equality is the most prominent human right norm that has been interpreted to form the normative basis of such an obligation, especially by the Inter-American Court of Human Rights, created under the *ACHR*, *supra* note 17. The right to equality in matters of property rights in the *CERD*, *supra* note 17, has also been interpreted to include this obligation.

[20] S James Anaya, *Indigenous Peoples in International Law*, 2d ed (New York: Oxford University Press, 2004) at 58 [Anaya, *Indigenous Peoples*].

[21] *Supra*, note 17.

[22] Anaya, *supra* note 20.

[23] *Ibid*.

[24] Anaya is referring especially to the decision of the Inter- American Court of Human Rights in the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001, Inter-Am Ct HR (Ser C) No 79 [*Awas Tingni*].

> or the right to participate in decisions affecting the community. Yet, when it comes to central elements of rights over lands and resources, (more) extensive reliance on (mainly soft) standards as a springboard for international customary law appears questionable, or is at least premature.[25]

Pentassuglia asserts that while the "notion that indigenous land rights serve the purpose of protecting indigenous identity as defined by the cultural and spiritual connection to its traditional lands" is uncontroversial, the specific land rights that originate upon the elaboration of this notion are engulfed in uncertainty in the specialized instruments.[26] Their clarity rests on judicial and quasi-judicial bodies that are for the most part regional and thus their capability to develop customary international law is questionable. He further argues that tribal land rights jurisprudence within the regional general human rights system is a distinctive human rights discourse wherein the scope of the general human right to property "is being expanded on the basis of the wider framework of human rights law relevant to indigenous [and tribal] rights" rather than an implementation of specialized standards as customary international law.[27] In that sense the jurisprudence is effectively filling specialized rights with meaning and content by relying on them but is at the same time going beyond them. Nigel Bankes concurs and asserts that the indigenous and tribal rights decisions within the general human rights system is a jurisprudential dialogue and not an implementation of specialized standards as customary international law per se.[28] Irrespective of the divergent opinions on the status of tribal and indigenous rights, it is widely accepted that international human rights law now places a legal obligation on the state to recognize and protect customary land rights including the right to ownership.

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[25] *Supra* note 17 at 199.
[26] *Ibid* at 167.
[27] *Ibid* at 181.
[28] Nigel Bankes, "Indigenous Land and Resource Rights in the Jurisprudence of the Inter-American Court of Human Rights: Comparisons with the Draft Nordic Saami Convention" (2011) 54 German Yearbook of International Law 231 at 232 (HeinOnline) [Bankes, "Comparison"].

1.3 Justification for Research[29]

Nigel Bankes has pointed out the reluctance of some states "…to concede the full implications of the proposition" that the relationship between tribal and indigenous peoples and the state "is not governed solely by the domestic law of the state concerned but is also properly the subject of international law and in particular international human rights law."[30] Arguably, India is among such states.[31] In India, like many of these other states, the principal discourse on the land rights of the tribal communities and the obligations of the state is 'framed in domestic terms…rather than in terms of international law."[32] The *Forest Rights Act* has been enacted specifically for remedying the 'historic injustice' committed by the state in not recognizing the land rights of the forest dwelling tribes in India and with that objective the legislation recognizes pre-existing individual and collective land rights over forest lands and its resources for the first time.[33] Yet, it was drafted without any serious analysis of India's international human rights obligations.[34]

Recently, the Ministry of Environment, Forest and Climate Change of the central government had constituted the Saxena Committee to examine and recommend whether clearance for a highly controversial bauxite-mining project should be granted in the

[29] The justification for this thesis is inspired by the observations made by Nigel Bankes with respect to the general outlook of some countries, particularly Canada, to refrain from engaging with international law in finding domestic solutions to tribal and indigenous land rights issues; "Arctic", *supra* note 17.

[30] *Ibid* at 176; Bankes has pointed out that even though it is "trite law", the reluctance of the states to concede this fact is one of the challenges that hinder states from "working through the full implications of this proposition" at the domestic level (*ibid* at 175).

[31] India's unwillingness to ratify the *ILO Convention 169* and the dilatory attitude in reporting to the Human Rights Committee with respect to the *ICCPR*, are evidence of this reluctance. India has not submitted a periodic report to the Human Rights Committee since 1996. Similarly, India has not submitted a report to the Committee under the *International Convention on the Elimination of All Forms of Racial Discrimination* since 2007. See also CR Bijoy, Shankar Gopalakrishnan & Shomona Khanna, *India and the Rights of Indigenous Peoples: Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and their Relation to International Law on Indigenous Peoples* (2010), online: Asia Indigenous Peoples Pact <https://aippnet.org/india-and-the-rights-of-indigenous-peoples-2> at 10.

[32] Bankes, "Arctic", *supra* note 17 at 177. Bankes discusses Canada's position in this respect before analyzing the Nunavut land claims agreement in light of international law.

[33] Vasundhara, "About FRA", *supra* note 10.

[34] This is especially surprising given that the literature suggests that human rights concerns and international commitments contributed to the adoption of the *Forest Rights Act*; see Indranil Bose, *How did the Indian Forest Rights Act, 2006, emerge? Discussion Paper Series Thirty Nine* (May 2010), online: IPPG <http://www.ippg.org.uk/papers/dp39.pdf>.

Niyamgiri forest area occupied by the Dongria Kondh and Kutia Kondh tribes in the province of Orissa in the face of stern opposition that had dominated the national media for a while.[35] The Saxena Committee submitted a detailed report (the "Saxena Report"), observing that it was undisputed that the entire Niyamgiri hill area, including the area of the proposed mining project, is traditionally used and occupied by the tribal communities.[36] Further the report acknowledged that the two communities have a distinct culture that is inseparably connected with the forests of the Niyamgiri hills and that the project will result in a denial of access to their traditional lands.[37] The Committee recommended that clearance for the project should be refused.[38] However, the recommendation was solely based on the violation of domestic laws, particularly the *Forest Rights Act*. Even though India is a party to the *ILO Convention 107*, the *CERD*[39] and the *ICCPR*, the report does not even refer to the land rights and cultural right provisions of these instruments. In fact, the only reference to human rights was a sentence with respect to the failure of the two Environment Impact Assessment Reports to give attention to the likely impact of the project on human rights.[40]

Similarly, while the literature on the *Forest Rights Act* has focused on the evolution of the *Forest Rights Act*, the lacuna in law and gaps in implementation, I was unable to find any literature assessing whether the provisions of the *Forest Rights Act*, especially given the law's express objective, are consistent with the emerging body of international human rights norms on tribal and indigenous peoples, especially India's obligations under international

[35] See Saxena et al, *Report of the four member committee for investigation into the proposal submitted by the Orissa Mining Company for Bauxite Mining in Niyamgiri* (16 August 2010), online: Ministry of Environment, Forest and Climate Change <http://envfor.nic.in/sites/default/files/Saxena_Vedanta-1.pdf>.
[36] *Ibid*.
[37] *Ibid*.
[38] *Ibid*. The Central Government accepted the report of the Committee and refused clearance for the project. The project proponents approached the Supreme Court of India, which led to the most significant decision involving the *Forest Rights Act*; *Orissa Mining*, *infra* note 46.
[39] *Supra* note 17.
[40] Saxena et al, *supra* note 35.

law.[41] Notably, a study was conducted some time ago as a part of an Asia-wide research initiative by the International Labour Organization and the Asia Indigenous Peoples Pact.[42] The study report examined the Indian policy and legal framework relevant to tribal rights "…through the lens of the values and spirit of international law on the subject."[43] The report is very detailed and provides a comprehensive overview of Indian policy and law on the subject. It focuses on a broad spectrum of tribal rights issues and contains a section on "land, natural resources and environment."[44] The report has concluded that India has failed to comply with the chosen international standards but, given the scope of the study, the assessment is broad and largely implementation oriented. In particular, it does not critically

[41] See Samarthan, *Recognition of community rights under Forest Rights Act in Madhya Pradesh and Chhatisgarh: Challenges and way forward* (July 2012), online: United Nations Development Program <http://www.undp.org/content/dam/india/docs/DG/recognition-of-community-rights-under-forest-rights-act-in-madhya-pradesh-and-chhattisgarh-challenges-and-way-forward.pdf>. Chapter 2 of this publication reviews the literature on the *Forest Rights Act*. Most of the recent literature focuses on the failure of the state to implement the community rights provisions of the Act. Notably, the much publicized dispute between the state and Dongria Kondh and Kutia Kondh tribal population in Niyamgiri, Orissa, referred to above, was discussed in detail by the Amnesty International focusing on the issue of prior consultation and consent. The discussion by Amnesty International refers to India's obligations in international law to recognize and protect the land rights of tribal populations, especially the obligation to obtain tribal consent before initiating mining projects in tribal lands. Amnesty International argued that India had breached its obligations in international law to respect and protect the human rights of the Dongria Kondh and Kutia Kondh tribes. However, the discussion focuses on India's failure with respect to the facts of that particular project. The Report does not comment on India's relevant legislative framework; Amnesty International, *Don't Mine Us Out of Existence: Bauxite Mine and Refinery Devastate Lives in India* (London: Amnesty International, 2010). The monitoring body of the *ILO Convention 107* has acknowledged the adoption of the *Forest Rights Act* and has asked India, perhaps in the context of non-forest dwelling tribal communities of India, if it was contemplating adopting further legislation in addition to the *Forest Rights Act* "to ensure that the rights of the tribal populations to the land they have traditionally occupied are identified and protected to give effect to Article 11 of the Convention." However, that body has not commented on the provisions of the *Forest Rights Act* as such; International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 99th Sess, Report III (Part 1A), (2010) at 772 [ILC, *Report 2010*]. Similarly, while the CERD Committee noted India's failure to fully *implement* the tribals' right to ownership over traditional occupation lands, it has not assessed whether the provisions of law, including the *Forest Rights Act*, fully recognize the right to begin with; Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, India*, UNCERDOR, 70th Sess, UN Doc CERD/C/IND/CO/19 (2007) at para 19. [CERD Committee, *Concluding Observations India 2007*].

[42] Bijoy, Gopalakrishnan & Khanna, *supra* note 31.

[43] *Ibid* at 10. The report focused on the rights guaranteed to tribal and indigenous peoples under the *ILO Convention 107*, the *ILO Convention 169* and the *United Nations Declarations on the Rights of Indigenous Peoples, 2007*. The report also contains two case studies.

[44] *Ibid* at 88. Forests have been discussed within this section. Some of the other areas focused on are gender equality, education, tribal children, equality, socio-economic rights etc.

assess the provisions of the *Forest Rights Act* in much detail but instead focuses on the domestic non-compliance of its provisions, as they exist.[45]

A recent Supreme Court decision is an exception to the general reluctance at the domestic level to engage with international law. The judgment[46] emphasized the importance of such an assessment of the *Forest Rights Act* and, in disposing of the petition challenging the central government's refusal to grant clearance for bauxite-mining in the Niyamgiri forest area in Orissa, pursuant to the Saxena Report,[47] the Court made a limited reference to the international human rights norms including the *ILO Convention 107* and the *ILO Convention 169*. The Court affirmed that India has a duty in international law to recognize and protect the distinct cultural identity of the forest dwelling tribals and that the tribals have the "right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands."[48] Based on these observations, the Court proceeded to interpret the nature of the rights that can be protected within the framework of the *Forest Rights Act*.[49] The decision of the Supreme Court, *inter-alia*, draws attention to the central role of international human rights law in matters of tribal land rights. It is also a reminder that India must recognize and protect tribal land rights in a manner consistent with the relevant international human rights norms. Thus, an examination of the provisions of the *Forest Rights Act* against relevant international human rights norms is appropriate and may even be helpful for the purpose of legislative and policy reforms.[50]

[45] In fact, the report appears to endorse the *Forest Rights Act* as a sound legislative measure whose implementation has been a challenge; Bijoy, Gopalakrishnan & Khanna, *supra* note 31.
[46] *Orissa Mining Corporation Ltd v Ministry of Environment and Forest & Others*, (2013) 6 SCC 476, [2013] 6 SCR 881 (India SC) [*Orissa Mining* cited to SCC].
[47] *Supra* note 35.
[48] *Orissa Mining*, *supra* note 46 at para 46.
[49] The Court used these observations to determine that the rights protected under the *Forest Rights Act* include cultural and religious rights; *ibid* at para 48.
[50] Though a discussion of possible legislative reforms is beyond the scope of this thesis.

1.4 Scope of Research and Research Question

To keep this research manageable and focused, I have narrowed down the scope of my research and confined it to only three international human rights instruments: the land rights provisions of the *ILO Convention 107*, the right to equality in matters of property rights in the *CERD*, and Article 27 of the *ICCPR*.[51] This research project focuses on the right of tribal land ownership and the corresponding state obligations in these instruments to critically analyze the land rights provisions of the *Forest Rights Act*. Further, it is confined to the issue of land ownership rights of the forest dwelling peninsular tribes.[52] It is acknowledged that the provisions of the *Forest Rights Act* are expressly additive to other applicable laws.[53] Some of the provisions of the other laws may add to the protection extended to the land rights of forest dwelling peninsular tribes and thus may be relevant in assessing the extent to which the *Forest Rights Act* serves to fulfill India's international obligations. However, to keep it manageable, the scope of this thesis is limited to the assessment of the framework of the *Forest Rights Act* alone in light of the relevant international human rights standards.[54]

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[51] See Section 1.5.1, below, for an explanation of the scope of doctrinal research with regard to international law.

[52] A common feature between the two tribal regions in India mentioned earlier is the economic, social and cultural dependence of a large number of tribal groups on forest land; see Section 1.1, above. The British colonial government and the government of India have generally respected the customary land rights of the two hundred and forty tribal communities in the Northeast and thus these tribal communities collectively own most of the forest land. To the contrary, in addition to the issue of autonomy or self-governance, the issue of legal recognition of land ownership and use rights has been a central issue for the forest dwelling peninsular tribes. The *Forest Rights Act*, though applicable throughout India, is thus of greater significance for the land rights of tribal communities in peninsular forest areas; Mark Poffenberger, *Forest Sector Review of Northeast India*: *Background Paper No 12* (March 2006), online: World Bank <http://siteresources.worldbank.org/INTSAREGTOPWATRES/Resources/Background_Paper_12.pdf>. A discussion of the status of the forest land rights of the forest dwelling tribes of the Northeast in light of international standards requires a detailed analysis of local laws along with the *Forest Right Act* and is beyond the scope of this thesis.

[53] Unless expressly provided, the provisions of the *Forest Rights Act* "are in addition to and not in derogation of the provisions of any other law for the time being in force." *Supra* note 9, s 13. As noted earlier, the *Forest Rights Act* recognizes land rights of the forest dwelling tribes in India for the first time and is thus the most important statute with respect to tribal land rights; see Vasundhara, "About FRA", *supra* note 10.

[54] Similarly, a comprehensive assessment of India's approach with respect to tribal land rights in general, outside the context of forests, in light of the relevant international human rights law requires a much wider analysis of the Constitutional and statutory law as well as policy. See Bijoy, Gopalakrishnan & Khanna, *supra* note 31, for a broad assessment of this nature.

The analysis employs the norms in international law applicable to the ownership rights of tribals and minorities as critical tools. It is argued that the *Forest Rights Act*, as an express measure to address the historic injustice perpetrated against tribal communities in matters of land rights, ought to fulfill India's human rights obligations in international law, particularly the obligation to recognize and protect the right to tribal ownership of traditional lands.[55] The question sought to be answered in this thesis is: does the statutory framework of the *Forest Rights Act* fulfill India's international human rights obligations with respect to land rights of forest dwelling tribal communities, and in particular with respect to the tribal right to ownership of traditional lands? The analysis of the *Forest Rights Act* in chapter five focuses on two main aspects of India's obligations to answer the research question. First, whether the *Forest Rights Act* fulfills the obligation to fully recognize, delimit and demarcate the right to ownership of forest dwelling tribals based on traditional occupation of forestlands; and second, whether the *Forest Rights Act* fulfills the obligation of effective participation imposed by international law before decisions including state authorized resource development projects are undertaken on traditional forest lands?[56]

1.5 Research Methodology

For the purpose of the present research, I have assumed that the forest dwelling tribal communities in India are 'tribal populations' and 'minorities' but not 'indigenous peoples'. The assumption flows from the argument that if the parameter for such categorization is

[55] "To the extent that legislation is a unilateral act it seems self evident that the state bears the burden of showing that the legislative solution meets its international obligations under relevant human rights instruments." Bankes, "Arctic", *supra* note 17 at 228, n 176. I will not discuss the status of international law in India or the general rules governing such status. However, international treaties and agreements do not become legally enforceable in India, unless the Parliament passes legislation to that effect. For a discussion, see Bijoy, Gopalakrishnan & Khanna, *supra* note 31 at 52. As a responsible member of the international community, and especially given the express emphasis on its commitment to human rights, India ought to fulfill its international human rights obligations irrespective of whether international treaties or agreements are enforceable domestically.

[56] I have selected these obligations based on the central theme that has emerged from my assessment of the duty to recognize and protect land rights, particularly the right to ownership of traditional lands, as articulated in the international human rights instruments discussed in Chapters Two-Four, below.

historical priority then all people in India are indigenous.[57] The tribes are cultural and linguistic minorities in India by the fact of their numbers. Further, most of these tribes have been officially declared as Scheduled Tribes in India and India's annual reports to the International Labour Organization reflect that India accepts that its tribal populations are 'non-indigenous tribal and semi tribal populations' as defined in Article 1(1)(a) of the *ILO Convention 107*.[58]

I commenced my research by reviewing the authoritative secondary sources on the land rights provisions of the three international instruments, as well as secondary sources on the *Forest Rights Act*. In choosing the secondary sources for international law, I began my research with the electronically available databases such as Google Scholar and HeinOnline and concentrated on scholarly works written post 1957 and cited or relied upon most frequently in further research in this area of law. Further, to ensure comprehensive coverage of the most relevant work, I have searched the references of the retrieved sources. I have reviewed the literature that has assessed the obligations of the state to recognize and protect tribal and minority land rights, particularly the right to ownership of traditional lands in the three international human rights instruments set out in the following sub-section. I have adopted a similar approach in choosing secondary sources on the *Forest Rights Act*, except I focused on the secondary literature on the issue of tribal ownership of forest lands in India written post 2005, since it was then that the *Forest Rights Act* was in its drafting stages.

This was followed by a doctrinal study in order to acquire a comprehensive understanding of the law in this particular area, both at the international and domestic level. This was meant to serve as the groundwork to eventually pave the way to adopting a critical

[57] There is considerable debate and no consensus on the definition of the term indigenous peoples; see Patrick Thornberry, *Indigenous peoples and human rights* (Manchester: Manchester University Press, 2002) at 33 [Thornberry, *Human Rights*]. Further, India has also maintained a strong stance that the concept of indigenous peoples is not applicable to India; see Bijoy, Gopalakrishnan & Khanna, *supra* note 31 at 88.
[58] *ILO Convention 107*, *supra* note 13, art 1(1)(a). For the provisions of the Indian Constitution governing the declaration of Scheduled Tribes, see *supra* note 5.

and analytical approach for determining whether the *Forest Rights Act* fulfills the requirements of the relevant international human rights norms.

1.5.1 Scope of Doctrinal Research: International Law

As noted earlier, to keep this research manageable and focused, I have narrowed down the scope of my research and confined it to only three international human rights instruments: the land rights provisions of the *ILO Convention 107*, the right to equality in matters of property rights in the *CERD*, and Article 27 of the *ICCPR*. The choice of the three human rights instruments is guided by the definition of tribals I have set out i.e. the forest dwelling tribes in India are 'tribals' and 'minorities' but not 'indigenous peoples', and by their ratification by India.[59] First, I have discussed the rights and obligations with respect to the tribal right to ownership of traditional occupation lands in the specialized *ILO Convention No. 107*.[60] The rights recognized in this Convention are procedural rather than substantive and, therefore, the emphasis in the Convention is on procedural fairness on the part of the state rather than the outcome of state actions.[61] However, the Articles of the Convention concerning the obligations of the state to recognize land rights are substantive, requiring concrete outcomes.[62] Second, I have discussed the right to equality in matters of property contained in the *CERD* and the corresponding state obligations.[63] Lastly, the minorities' right

[59] See Section 1.5, above. India has not ratified the *ILO Convention 169*. I am proceeding on the assumption that tribal populations in India are not 'indigenous peoples' and thus, the *UNDRIP* has not been dealt with in this thesis. Among the general human rights norms, the right to property and the right to culture have been given significant importance in the evolving standards of tribal land rights; see Gilbert, *Land Rights*, *supra* note 16 at 107. While India is not a party to any regional human rights treaty containing a right to property, India is a party to the *CERD*. At a global level, India has ratified the *ICCPR* and Article 27 is applicable to the minorities in India, including the forest dwelling tribals.

[60] *ILO Convention 107*, *supra* note 13. The *ILO Convention 107* has been rendered obsolete after the adoption of the revised *ILO Convention 169* and is not open for ratification anymore. However, it still remains in force for the eighteen countries, including India, that have not ratified the latter.

[61] Fergus MacKay, *A Guide to Indigenous Peoples' Rights in the International Labour Organization* (UK: Forest Peoples Programme, 2003), online: Forest Peoples Programme <http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/iloguideiprightsjul02eng.pdf> [MacKay, *ILO*].

[62] *Ibid* at 12.

[63] A state is under obligation in view of Article 5 of the *CERD*, *supra* note 17, to eliminate discrimination and guarantee everyone individual and collective rights to property.

to culture in Article 27 of the *ICCPR*[64] has been discussed to ascertain if the right to culture offers jurisprudential support to the recognition and protection of the right to own tribal traditional lands.[65] The periodic reports submitted by states, including India to the supervisory bodies established under each of these three Conventions together with the comments thereon have been examined in detail to determine the nature and scope of the rights contained in the three Conventions.

1.5.2 Scope of Doctrinal Research: Indian Law

I have identified and evaluated the provisions in the *Forest Rights Act*, along with the Rules[66] framed thereunder, that recognize and extend protection to the land rights of the forest dwelling tribes in India. The focus has been on understanding and describing the specific body of law and analyzing legal principles and how these principles have been applied. The Ministry of Tribal Affairs has issued several letters and circulars clarifying the provisions of the Act that were available on the Ministry's official website. There is only one significant decision of the Supreme Court of India interpreting the relevant statutory provisions of the *Forest Rights Act*.[67]

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[64] *Supra* note 17.

[65] The right to self-determination is relevant to peoples' land right claims and the recognition of customary laws. However, I will not be dealing with Article 1 of the *ICCPR* primarily because of the scope of the definition of tribals in India that I have adopted. I have also refrained from arguing whether tribals are 'peoples' in international law and simply assumed they are not, to keep this thesis manageable. Also, the content of the right to self-determination is unclear at the moment; see James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" (2004) 21:1 Ariz J Int'l & Comp L 13 at 50 [Anaya, "Multicultural"]; Hans Petter Graver & Geir Ulfstein, "The Sami People's Right to Land in Norway" (2004) 11:4 International Journal on Minority and Group Rights 337 at 341. Further, apparently referencing the definitions of tribal and indigenous populations/peoples in the two ILO Conventions, Thornberry suggests that the status of tribal populations is governed both internally i.e. by internal consent to such status and also externally by special legislation and thus the right to self-determination inherent in the concept of peoples is less forceful in the case of tribal populations. He further points out that "[t]he account of indigenous distinctiveness resides in their description as peoples who retain some of their own institutions…[and] are cultures, 'more or less institutionally complete'…The institutions which distinguish indigenous peoples contrast with the distinguishing 'conditions' and 'customs or traditions' of the tribal peoples." *Human Rights*, *supra* note 57 at 44 [footnotes omitted]. Thus, the different accounts of distinctiveness of indigenous and tribal populations offer dissimilar force to the claim of self-determination of the two categories.

[66] *Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Rules*, (2008), Gazette of India Extraordinary II, s 3(i) (vide number GSR 1(E)) [*Rules*].

[67] *Orissa Mining*, *supra* note 46.

1.6 Framework of Research Project

This thesis is divided into six chapters. Chapter one is introductory and contains the research problem that sets the background for this thesis. It also contains a brief account of the international human rights framework relevant to tribal land rights followed by the justification for this research. This chapter also explains the limited scope of this research work, sets out the research question that will be answered in chapter five along with the research methodology adopted.

Chapter two focuses on the land rights provisions in the *ILO Convention 107*. It is divided into five sections. Section one is introductory and lends context to the discussion that follows. Section two will briefly deal with the definitions of the categories of populations to which the Convention applies. Apart from establishing a clear understanding of the applicability of the Convention, this section will also help identify the reasoning behind the adoption of the standards that is crucial for evaluating the standards themselves.[68] In section three, I will discuss the land right provisions of the *ILO Convention 107*. The discussion is limited to ascertaining the rights of the tribal populations and the duties of the state with respect to tribal land ownership. Section three is divided into two sub-sections. The first sub-section discusses the duty of the state to fully recognize tribal title/ownership contained in the *ILO Convention 107*. The second sub-section discusses the duty to effectively protect the land rights, including ownership, of tribal and indigenous populations i.e. the duties imposed on the state with respect to the segregation of the tribal populations from their lands in two scenarios: a) when effected involuntarily either by the state i.e. removal or by non-tribal encroachment; and b) when effected voluntarily by the tribal populations themselves i.e. alienation. Section four comments on the right to collaboration and participation contained in the *ILO Convention 107*. I will conclude in the last section.

[68] The adoption of a definition "implies normative understanding, accounting for the rationale behind adopting special standards…." Luis Rodriguez Pinéro, *Indigenous Peoples, Postcolonialism, and International Law: ILO Regime 1919-1989* (New York: Oxford University Press, 2005) at 145.

Chapter three focuses on the right to equality in matters of property contained in the *CERD*. It is divided into six sections. The first section is introductory. The application of the principle of non-discrimination in matters of violation of the legally recognized property rights of tribal within a state will be discussed in the second section. The third section will comment upon the obligations of a state within the *CERD* to recognize and protect tribal ownership of land and tribal customary law with reference to international developments in the content of the human right to property in conjunction with the principle of non-discrimination. In the fourth section, the content of right to equality as the jurisprudential basis for the obligation to recognize and protect the customary property rights of tribal populations to land sourced in tribal law will be explored. Section five will discuss the obligations of effective participation, informed consent, restitution and compensation contained in the *CERD*. The last section concludes the chapter.

Chapter four focuses on the right to culture in Article 27 of the *ICCPR*. It is divided into six sections. The first section is introductory. The *ICCPR* does not contain an express property clause or land rights clause and Article 27 has never been invoked directly in support of a specific claim to ownership of traditional lands. Therefore, an analysis of the content of the right to culture relevant to tribal land rights has been approached from two vantage points to indirectly determine its normative support for the recognition and protection of the right to ownership of traditional lands by tribals based in customary law: is the non-material concept of property or the right to ownership of traditional lands an aspect of the notion of culture in Article 27 and thus embraced by the right to culture? If not, does Article 27 place a positive obligation on the state to recognize and protect tribal ownership of traditional lands as a *means/arrangement* of assuring and protecting the right to culture in

Article 27?[69] A discussion on what is embraced by the notion of culture in Article 27 i.e. its content relevant to tribal land rights is a prerequisite to answer both these questions.[70] However, a right's nature has an important bearing on its content and thus, I have briefly discussed the nature of the right to culture before proceeding with the analysis of the right's content. Accordingly, the second section of this chapter focuses on the nature of the right to culture. The balance of the chapter discusses the content of the right to culture. The present understanding of the reach of the notion of culture in Article 27 with respect to the material and non-material aspects of a land-based way of life is discussed in section three. Section four discusses the scope of the positive obligations placed by Article 27 on the state followed by a discussion on the remedial content of the right. Section five discusses the right to effective participation. The last section contains the conclusion.

Chapter five is the culminating chapter of this thesis. The chapter assesses the provisions of the *Forest Rights Act* in light of the discussion in chapters two to four and answers the research question. This chapter is divided into three broad sections. Following the introduction, the second section of this chapter contains a summary of the key provisions of the *Forest Rights Act* along with the relevant provisions of the applicable Rules. This section is intended to provide a broad summary of the main provisions of the *Forest Rights Act* and the relevant Rules.[71] It is not intended to be an exhaustive description of the details of the provisions of the *Forest Rights Act* or the manner in which the legislation has been

[69] This chapter is still focused on the question relevant to this thesis i.e. does Article 27 impose an obligation on state to recognize and protect the right to tribal ownership of traditional lands based in customary law, and if so, what standards are set by the Article? However, given the nature of the right protected by Article 27 i.e. the 'right to culture' as opposed to a 'right to property' or the 'right to equality' in matters of property rights, it appears more logical to approach the analysis indirectly through these two questions.

[70] Since the scope of the concept of 'culture' is highly contextual and subject to interpretation, the content of the right to culture protected by Article 27 may have numerous aspects or dimensions such as works of art, songs, human knowledge etc. Given the scope of my thesis, I have confined my discussion to the aspects relevant to the issue of tribal land rights alone and the discussion of the content of Article 27 in Chapter Four, below, is limited in that respect.

[71] The summary does not strictly follow a section-by-section description of the legislation but groups some of the sections together for making the summary coherent.

implemented.[72] I have also not included a discussion of the drafts that led to the final legislation and confine myself to the provisions of the *Forest Rights Act* as adopted. In section three, I have examined the framework of the *Forest Rights Act* in light of the international human rights obligations discussed in chapters two to four with respect to the right to ownership of tribal lands. This section begins with a preliminary objection to the *Forest Rights Act* that bears on both the questions that follow. The analysis itself focuses on two main aspects of India's obligations to answer the research question. First, whether the *Forest Rights Act* fulfills the obligation to fully recognize, delimit and demarcate the right to ownership of forest dwelling tribals based on traditional occupation of forestlands; and second, whether the *Forest Rights Act* fulfills the obligation of effective participation imposed by international law before decisions including state authorized resource development projects are undertaken on traditional forest lands? I have selected these obligations based on the central theme that has emerged from my assessment of the duty to recognize and protect the right to ownership of traditional lands as articulated in the international human rights instruments discussed in the preceding chapters.

Chapter six summarizes the discussion on the *Forest Rights Act* and ends with some suggestions for further research on the subject.

[72] However, there appears to be wide agreement in the literature that the implementation of the *Forest Rights Act* is highly unsatisfactory; see e.g. Citizens' Report as part of Community Forest Rights-Learning and Advocacy Process, *Promise and Performance: Ten years of the Forest Rights Act in India* (2016), online: CFR-LA <http://www.fra.org.in/document/Promise%20and%20Performance%20Report.pdf>.

CHAPTER TWO

THE RIGHT TO OWNERSHIP IN *ILO CONVENTION 107*

2.1 Introduction

The ILO adopted *Convention 107* on 26th June 1957.[73] *Recommendation No. 104*, adopted on the same date supplements the Convention.[74] The *ILO Convention 169*[75] revised the old *Convention 107* and was adopted on 27th June 1989. So far, the two ILO Conventions are the only legally binding instruments that deal specifically and comprehensively with the situation of the tribal and indigenous populations/peoples.[76] As noted above, India has yet to ratify the *ILO Convention 169*.

Part II of the Convention contains the provisions concerning land.[77] Correspondingly, Part II of the *Recommendation No. 104* also contains guidelines for the states to follow on tribal land matters.[78] The adoption of the Convention, as laid out in the Preamble, is premised on the consideration of equal opportunity for all human beings.[79] The Preamble suggests that the social, economic and cultural conditions of the non-integrated tribal and indigenous

[73] *Supra* note 13. The use of term Convention in this chapter refers to the *ILO Convention 107*. The International Labour Organization ("ILO") was established in 1919 and in 1946 it became the first of the sixteen specialized agencies of the United Nations. The Convention was ratified by twenty seven states and is currently in force in seventeen of those states including India. The remaining ten states have now ratified the newer *ILO Convention 169*, *supra* note 14. Thus for the seventeen countries, including India, that have not yet ratified the new *Convention 169*, the old Convention still remains in force and internationally relevant.

[74] International Labour Office, "Recommendation (No. 104) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Conference" in *Compendium of International Labour Conventions and Recommendations* (Geneva: ILO, 2015) 966 [*Recommendation*].

[75] *Supra* note 14.

[76] See *supra* note 17, for a short note on the specialized and general sources of tribal and indigenous rights under the rubric of international human rights law.

[77] The Convention contains thirty-seven Articles divided within eight parts. Articles 11 to 14 are specifically dedicated to the recognition and protection of tribal lands; *supra* note 13.

[78] See *Recommendation*, *supra* note 74; see also Pinéro, *supra* note 68 at 138, for a brief discussion of how the standards came to be adopted in the form of a binding Convention supplemented by a guiding Recommendation.

[79] See *ILO Convention 107*, *supra* note 13; Patrick Thornberry, *International Law and the Rights of Minorities* (New York: Oxford University Press, 1991) at 337 [Thornberry, *Minorities*]. Thornberry notes that the general policy of the Convention endorses the objective of integration that promotes some version of equality like the non-discrimination treaties; Pinéro, *supra* note 68 at 195, concludes that the Convention is essentially an "equality instrument" aimed at "bringing real equality…while the state of 'lack of integration' denotes a condition of discrimination that prevents the achievement of that equality" (*ibid*). Thus, the version of equality contemplated in the Convention is based on integration or assimilation. Anaya asserts that domestic and international law endorsed the formal vision of equality in the 1950s and 1960s when the Convention was negotiated. Equality simply meant sameness; S James Anaya, "Keynote Address: Indigenous Peoples and Their Mark on the International Legal System" (2006-2007) 31 Am Indian L Rev 257 at 266 [Anaya, "Keynote"].

populations are the *reason* why these populations do not benefit fully "from rights and advantages enjoyed by other elements of the population."[80] The major themes in the Convention to achieve this equality are integration, protection and improving the living and working conditions of these populations, with integration being the dominant theme.[81]

While the original thrust of the Convention is the integration of the tribal populations into the dominant society, the Convention was the first legally binding instrument to impose obligations on states, *inter-alia*, with respect to the land rights of tribal populations within its protection program.[82] The Convention catapulted tribal and indigenous land issues into the international law arena "through the conceptual and institutional medium of human rights" and is the most prominent example of the first use of the international human rights framework by the ILO for addressing indigenous and tribal issues.[83] As noted in chapter one, this projection of tribal issues through the lens of human rights has initiated and gradually led to the development of an advanced and transformed contemporary international normative

[80] *ILO Convention 107*, *supra* note 13, Preamble. The Convention enables the adoption of special measures for the protection of these populations "[s]o long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country…" (*ibid*, art 3(1)). Thus, the Convention speaks to the non-integrated tribal and indigenous populations only and considers their distinctness as a hindrance in their equal enjoyment of the rights under general law. Clearly endorsing the vision of (formal) equality, the *ILO Convention 107* does not embrace cultural dignity as its inherent element and equates cultural pluralism with a state of discrimination or the absence of equality. See Chapter Three, below, for a brief discussion of the concept of formal equality versus substantive equality.

[81] See Pinéro, *supra* note 68. Driven by the notion of formal equality endorsed by the international community in those times, integration was considered to be the best solution to ensure that tribal populations participated in the development process and benefitted from the *general* laws on an equal footing; Anaya, *Indigenous Peoples*, *supra* note 20 at 58. Interestingly, India has been pointed as the clearest case of such endorsement; see Pinéro, *supra* note 68 at 182. The term integration as the central theme appears throughout the Convention and the *Recommendation No. 104* but has not been defined. Anaya points out that the objective of assimilation or integration in the Convention was aimed at achieving a political model of a "culturally homogenous independent nation-state." *Indigenous Peoples*, *supra* note 20 at 55.

[82] Thornberry, *Minorities*, *supra* note 79 at 345.

[83] Anaya, *Indigenous Peoples*, *supra* note 20 at 56. But see Pinéro, *supra* note 68. Based upon an in-depth analysis of the normative basis of the Convention, Pinéro alleges that the Convention and the Recommendation were not "genuinely conceived as human rights" instruments but were nevertheless placed within the "normative umbrella" of the international human rights regime (*ibid* at 194). Pentassuglia considers it important that specialized tribal and indigenous standards are regarded as part of the general framework of international human rights law; *supra* note 17 at 197.

regime on tribal and indigenous issues.[84] Thus, it becomes relevant to cull out the rights and duties contained in the Convention with respect to tribal land ownership, for a meaningful assessment of the contemporary international human rights standards on the subject. I will discuss the land rights provisions of the Convention by drawing support from the literature and the annual reports of the supervisory machinery of the ILO consisting of the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") and the Conference Committee on the Application of Standards ("Conference Committee").[85]

Following the introduction, section two of this chapter will briefly discuss the definitions of the categories of populations to which the Convention applies. The conceptual understanding that conditions the definitions has an important bearing on the rights and obligations in the Convention. Section three discusses the land right provisions of the *ILO Convention 107*. It is divided into two sub-sections. The first sub-section focuses on the duty of the state to fully recognize tribal ownership of traditional lands. The second sub-section discusses the obligations imposed on the state with respect to the segregation of the tribal populations from their lands in two scenarios: a) when effected involuntarily either by the state i.e. removal or by non-tribal encroachment; and b) when effected voluntarily by the tribal populations themselves i.e. alienation. Section four comments on the right to collaboration and participation. The last section summarizes the discussion in the chapter.

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[84] See Section 1.2, above; Anaya, *Indigenous Peoples*, *supra* note 20 at 56; Pinéro, *supra* note 68 at 145. Even though the Convention was born in an assimilationist era, it has grown to become a key instrument for the protection of tribal and indigenous land rights in contemporary times, as discussed in Section 2.3, below.

[85] The CEACR consists of twenty experts nominated by the Governing Body for three years. Per Article 22 of the ILO Constitution, a state is under an obligation to submit reports annually to the CEACR. However, at present, a state is required to submit reports every two years. Along with the periodic governmental reports, the Governing Body may also forward any comments that it may have received from the Employer and trades union organizations of the reporting countries for examination by the CEACR. The CEACR examines periodic state reports and comments, if any, and publishes annual reports with its observations on serious concerns. The CEACR can also make Direct Requests to the states pertaining to the problems in implementing the Convention. The annual reports of the CEACR are submitted to the International Labour Conference ("ILC") wherein the Conference Committee further discusses serious issues with the representatives of the state concerned and its report is published each year in the proceedings of the ILC. The Conference Committee has not discussed the Convention since 1999. The ILO also provides for redress through complaints and representations. However, no complaints have ever been initiated qua the implementation of the Convention thus far. See Thornberry, *Human Rights*, *supra* note 57 at 323, for a brief discussion of the structure of the ILO.

2.2 The Integrationist Definition

The Convention uses the term populations and not peoples.[86] In fact the ILO used the terms 'groups', 'peoples', and 'populations' interchangeably and without distinction during the drafting of the Convention, as the terms did not have the legal and political implications attached to them in contemporary international law.[87] However, the use of the terminology does not create or fetter the right to self-determination that these populations may have under international law.[88]

Article 1 of the *ILO Convention 107* defines these categories of populations.[89] The definition reads:[90]

> 1 1a) *members of tribal or semi-tribal populations* in independent countries whose *social and economic conditions* are at a *less advanced stage* than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> b) *members of tribal or semi-tribal populations* in independent countries which are regarded as indigenous on account of their *descent* from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social,

[86] The revised *ILO Convention 169* uses the term 'peoples'. The choice and the use of this terminology was a highly debated matter during the drafting stage of the *ILO Convention 169*, *supra* note 14.
[87] Pinéro, *supra* note 68 at 163.
[88] The Convention does not expressly or impliedly conclude that the populations covered by the Convention have the right of self-determination; see GT Morris, "In Support of the Right of Self-Determination for Indigenous Peoples under International Law" (1986) 29 German Yearbook of Intl Law 277 at 311. The ILO's use of these terms is a part of a very complex international debate. Whether the right exists is a matter of international law, specifically, of the United Nations, and its use in the two Conventions will not affect the right of self-determination of these peoples, if it exists; Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989" (1990) 15:3 Okla City UL Rev 677 at 694 [Swepston, "New Step"]; see Anaya, *Indigenous Peoples*, *supra* note 20 at 97, for a discussion of the right to self-determination. As pointed out in Chapter One, above, the discussion of the right to self-determination is beyond the scope of this thesis.
[89] *Supra* note 13. This was the first attempt at legally defining the term indigenous in the modern sense and hence it demanded constructing the "definition out of inchoate social realities, state policies, and legal regimes." Pinéro, *supra* note 68 at 151. For a detailed discussion of the contemporary debate on the concept of "indigenous peoples", see Thornberry, *Human Rights*, *supra* note 57; B Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 Am J Int'l L 414.
[90] In the draft definition before the ILC, the legislative body of the ILO, both tribal and indigenous populations were defined under the umbrella category of "indigenous populations". It was subsequently split into three parts: indigenous, tribal and semi-tribal. The split was, *inter-alia*, an attempt to address the concern of several Asian and African states, including India with the overarching use of the term indigenous in light of their argument that the entire population of their country is indigenous from a historical descent point of view; see Pinéro, *supra* note 68 at 159.

> economic and cultural institutions of that time than with the institutions of the nation to which they belong.
> 2. For the purpose of this Convention, the *term semi-tribal* includes *groups and person* who, although they are in the process of losing their tribal characteristics, are *not yet integrated* into the national community.[91]

The Convention applies to "members of tribal or semi-tribal populations" and thus the principal thrust of the Convention is on individual rights.[92] Part (1)(a) of the definition applies to countries like India where the native population gained independence from colonial rule and thus the entire population is regarded as indigenous.[93] Tribal populations are posited as socially and economically distinct from the dominant society and possessing their own "customs and traditions" that may regulate their status.[94] Indigenous populations are described as distinct on account of historical descent and for living in conformity with their own social, economic and cultural institutions.[95] Thus, the definition of tribal and indigenous populations is based on an understanding of social, economic, and cultural difference between these populations and the rest of the society.[96]

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[91] *ILO Convention 107*, *supra* note 13, art 1 [emphasis added]. Pinéro suggests that the term semi-tribal may have been derived from the Indian Scheduled Tribe policy; *supra* note 68 at 169.

[92] It has been pointed out that the provisions of the Convention apply to "members" of the populations defined in the Convention; see Gordon Bennett, *Aboriginal Rights in International Law: Occasional Paper No. 37* (London: Royal Anthropological Institute of Great Britain and Ireland, 1978). Article 2(3) also lays that "[t]he primary objective of all [such] action shall be the fostering individual dignity, and the advancement of individual usefulness and initiative." *ILO Convention 107*, *supra* note 13, art 2(3). However, the Convention employs the language of collective rights even though it is "rudimentary" and the definition of semi tribal includes both 'groups' and 'persons'; Thornberry, *Human Rights*, *supra* note 57 at 320. Also, the provisions in the Convention pertaining to the respect for tribal customary laws and recognition of collective land rights, relevant to the present analysis, have group dimensions; see Anaya, *Indigenous Peoples*, *supra* note 20 at 55. Other substantive provisions of the Convention also make use of mixed terminology.

[93] See Bennett, *supra* note 92 at 17. Even though technically, Article 1(1)(a) applies to non-indigenous tribal and semi-tribal populations and Article 1(1)(b) applies to indigenous tribal and semi-tribal populations. For simplicity, I shall use the term tribal populations to refer to the former category and indigenous populations to refer to the latter category. The Convention, including the land rights provisions, applies equally to the populations defined in part a and b of Article 1(1); Thornberry, *Human Rights*, *supra* note 57 at 44. Thornberry affirms that the source of the rights contained in the Convention does not lie in historical precedence but in the history of being distinct. India's annual reports to the ILO reflect that the Convention is applicable to all the tribal people within its borders.

[94] *ILO Convention 107*, *supra* note 13, art 1(1)(a); Bennett, *supra* note 92, explains that the word 'cultural' is missing from the definition of tribal populations in Article 1(1)(a) so as to accommodate the concerns of the Middle East even though normally tribal populations also differ culturally from the main society. *ILO Convention 169*, *supra* note 14, now uses the term 'cultural' as a distinguishing condition in the definition of "tribal peoples" in its Article 1.

[95] *ILO Convention 107*, *supra* note 13, art 1(1)(b).

[96] See Pinéro, *supra* note 68 at 165. Bennett asserts that the definition of indigenous and tribal populations has legal elements and not cultural elements. The definition is based on the living conditions of these populations

The definition does not halt at just classifying these populations as distinct. Tribalness is the ultimate common criterion for both the indigenous populations and tribal populations that determines the scope of the Convention.[97] Further, the term "not yet integrated" in Article 1(2) reflects that the definition of tribal and indigenous populations is conceptually dependent on the ill-defined notion of integration.[98] Tribal populations and indigenous populations are "placed in the continuum tribalness/integration, where the category of 'semi-tribal' represents an intermediate state in a progressive, though inescapable, process towards a final stage of 'integration in the national community'."[99] Thus tribal and indigenous populations are projected as socially, economically and culturally inferior to the dominant society and consequently less value is attached to their distinctness.[100] At least three conclusions can be drawn from this discussion. Firstly, a distinct tribal and indigenous existence is acknowledged in the Convention but is regarded as inferior and inherently undesirable for the vision of formal equality that the Convention endorses.[101] Secondly, the Convention endorses an integrationist/assimilationist agenda for 'dealing' with the

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and not their cultural features; *supra* note 92 at 17. Thornberry disagrees and opines that the definition is based on an understanding of cultural difference and not merely on their standard of living; *Minorities*, *supra* note 79 at 339.

[97] See Thornberry, *Human Rights*, *supra* note 57 at 327; Pinéro, *supra* note 68 at 167. The Convention does not explicitly define tribal. However, in light of the intellectual atmosphere of the times, Pinéro opines that the term tribe "occup[ies] the same conceptual space as notions such as 'primitive,' 'traditional', 'pre-modern', 'pre-industrial', and 'folk'" (*ibid* at 168).

[98] *Ibid* at 165. Thus the level of integration or assimilation of these populations in the dominant national society determines the scope of the definition.

[99] *Ibid* at 164. This conceptual dependency of the definition of tribal and indigenous implicitly creates a vertical scale of human cultural evolution where indigenous/non-indigenous tribal populations are at the lowest end of the continuum, indigenous/non-indigenous semi-tribal populations are in the middle and fully integrated indigenous/non-indigenous tribal populations are at the desired end. Pinéro asserts that the Convention has simply replaced the politically incorrect "scale of 'civilization'/'primitiveness'" with the "allegedly neutral, 'scientific' scale of 'integration/non-integration'" (*ibid* at 168).

[100] The term "less advanced" in Article 1(1)(a) of the *ILO Convention 107* reflects, "the cultures described therein require advancement and are not valued in their own terms." Thornberry, *Minorities*, *supra* note 79 at 339. Pinéro holds that the use of the term tribal and the conceptual dependency of the notion of indigenous [and tribal] on the concept of integration lend a cultural content to the definition of indigenous in the Convention and projects indigenous cultures as being inferior to the dominant culture into which integration is being promoted; *supra* note 68 at 167. However Bennett argues that integration is sought in the Convention not because these populations are culturally inferior but because their standard of living is inferior to that of the dominant society; *supra* note 92 at 17.

[101] Thornberry, *Minorities*, *supra* note 79 at 350.

distinctness of these populations and achieving a state of formal equality.[102] The objective of integration, both as a process and as an end, targets cultural homogeneity.[103] Thirdly, tribal and indigenous issues are those of the non-integrated groups alone and thus, tribal and indigenous cultures are envisioned as a temporary stage of human evolution pending full integration.[104]

Thornberry has aptly commented that the Convention lacks the recognition and affirmation of these populations' 'right to be different'.[105] The normative understanding underlying the definition conditions the provisions of the entire Convention.[106] The Convention can be broadly divided between two sets of obligations for the states: duty to integrate and duty to protect.[107] The land right provisions of the Convention fall within the Convention's general protection program and I will turn to that now.

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[102] See *supra* note 79 and accompanying text, for a note on the concept of equality endorsed by the Convention.

[103] Pinéro, *supra* note 68 at 175. The goal of the Convention "is to promote improved social and economic conditions for indigenous [and tribal] populations generally, but within a perceptual scheme that does not seem to envisage a place in the long term for robust, politically significant cultural and associational patterns of indigenous groups." Anaya, *Indigenous Peoples*, *supra* note 20 at 55; see also Pritchard, "Native Title", *supra* note 17. Thus, at the end of the process of integration, the Convention envisions only equality of form for the tribal and indigenous populations and not equality in substance that inherently encompasses both individual and cultural integrity. Integration or assimilation endorses the perception of inequality between the culture of the 'less advanced' populations vis-à-vis the more advanced populations. It is doubtful how an objective that endorses such a perception can secure equality for all human beings. Rejecting this inherent element of inequality in the objective of integration in the Convention, Thornberry questions that "…if the cultures of humankind form a horizontal pattern of equality rather than a vertical pattern of 'superiority' and 'inferiority', why should it be considered valuable to ensure the merging of one in another except in terms of the choice of the people concerned opting for cultural change?" *Minorities*, *supra* note 79 at 342.

[104] The objective of integration lends temporality to the scope of the definition and in fact to the entire Convention; see Pinéro, *supra* note 68 at 164. Thus, theoretically, the Convention ceases to apply to the members of the populations who have fully integrated into the dominant society and have lost their tribal characteristics, necessary for the application of the Convention.

[105] *Minorities*, *supra* note 79 at 353. As noted earlier "[t]he problem stems from the ethos of the period in which it was adopted i.e. at the height of the paternalistic era of the United Nations…[and] the ILO…did something perfectly acceptable at the time." Lee Swepston, "Indigenous and Tribal Populations: A Return to Centre Stage" (1987) 126 International Labour Review 447 at 450 [Swepston, "Centre Stage"].

[106] The entire Convention "reflects the premise of assimilation operative among dominant political elements in national and international circles at the time of the convention's adoption." Anaya, *Indigenous Peoples*, *supra* note 20 at 55.

[107] Bennett, *supra* note 92 at 18. The objective of integration does not vest rights in 'beneficiaries' but imposes a duty on the state; see Thornberry, *Minorities*, *supra* note 79 at 352. Further, the objective of integration attracted immense criticism around the 1970s and was eventually abandoned; see Section 2.3, below. Thus, rights and corresponding state obligations in the Convention arise out of the duty to protect.

2.3 Duty to Protect: Tribal Lands

It has been argued that the protection provisions in the Convention, including those pertaining to tribal land, were inconsistent with the norm of formal equality endorsed by the Convention at the time of drafting and were, irrespective of the humanitarian motive, adopted as a temporary infringement of the principle of formal equality.[108] To address this perceived inconsistency between protection and the norm of equality, protection in the Convention was constructed in the language of temporary special measures, adhering to the vision of formal equality and made expressly subject to the objective of integration.[109] Consequently, Article 3(1) in Part I of the Convention places a positive obligation on the state to adopt "special measures", *inter-alia*, for the protection of property of tribal and indigenous populations pending full integration.[110] Further, such special measures must only continue for "…so *long*

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[108] Pinéro considers that protection provisions were incorporated in the Convention for their instrumental role in dealing with "social anomie", a potential threat to the effectiveness of integration policies. He defines "social anomie" as "social disruption arising from a natural or induced social change resulting in the destruction of elements of social cohesion without substituting new ones, and the eventual collapse of the targeted societies." *Supra* note 68 at 204. Therefore, "'protection' [in the Convention] represents simply another method of 'integration'" (*ibid*). However, it has also been argued that all the efforts to articulate norms governing tribal and indigenous rights and corresponding state obligations in international law are based on the assumption that these standards of behavior are indispensible "to uphold widely shared values of human rights" of these populations; see Anaya, *Indigenous Peoples*, *supra* note 20 at 69. Bennett considers that the principal aim of the Convention is to secure equality for the tribal populations and opines that the protection program is a parallel, though subordinate, aim to integration introduced to shelter the populations from "unregulated contact with the non-indigenous society." *Supra* note 92 at 18.

[109] See Pinéro, *supra* note 68 at 204. Though proportionally speaking, provisions dealing with the objective of protection are more than the provisions dealing with integration, the scope and definition of the standards contained in the protection provisions of the Convention are structured by reference to the objective of integration and the temporal dimension attached to it (*ibid* at 165); see also Athanasios Yupsanis, "ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview" (2010) 79 Nordic J Int'l L 433 at 434. It has been argued that the imposition of the objective of integration on the protection provisions is an "internal inconsistency" in the Convention that affects the credibility of the purpose of protection. This inconsistency has caused tribal and indigenous populations to shy away from utilizing the protection provisions of the Convention for their cause; see Swepston, "Centre Stage", *supra* note 105 at 451.

[110] Article 3(1) reads:

> So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, *property*, and labour of these populations. (2) care shall be taken to ensure that such special measures of protection—(a) are not used as a means of creating or prolonging a state of segregation; and (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

ILO Convention 107, *supra* note 13, art 3(1) [emphasis added]. Thornberry notes that Article 3 of the Convention serves the same purpose as analogous provisions in other anti-discrimination instruments i.e. to provide temporary protection until formal equality by means of integration is achieved. He further notes that

as there is need for special protection and *only to the extent* that such protection is necessary."[111] Pinéro claims that this understanding pervades the entire protection program under the Convention including protection of land in Part II of the Convention in spite of its contextual placement.[112] Thus, the rights and obligations arising out of the duty to protect tribal land in the Convention were also meant to be short-term special measures pending full integration of these populations and are thus simple in language and scope.[113]

Nevertheless, the Convention contains general as well as specific land rights for tribal and indigenous populations.[114] In application, the Convention has provided significant protection to tribal land.[115] The supervisory bodies of the ILO "have effectively interpreted government obligations under the *ILO Convention 107*, not principally on the basis of that convention's express provisions, but instead according to general normative precepts

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though the vision of formal equality and the attendant special measures in the Convention are suitable for removing the disabilities in the enjoyment of general rights where the target population is socially and culturally analogous, it is unsuitable for addressing issues of culturally distinct groups; *Minorities*, *supra* note 79 at 350.

[111] *ILO Convention 107*, *supra* note 13, art 3(1) [emphasis added]. This reflects that the Convention incorporates the model of 'dynamic protection'; Pinéro, *supra* note 68 at 205. Confirming this understanding, the CEACR observed with reference to Bolivia that Article 3 of the Convention does not apply to "the settled rural populations to the same extent or in all the same ways as it does to the forest dwelling indigenous populations." International Labour Conference, *Summary of Reports, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 75th Sess, Report III (Parts 1, 2 and 3), (1988) at 281 [ILC, *Report 1988*]. Thus technically, the special protection afforded by the Convention is inversely related to the level of integration of the populations in the dominant society.

[112] *Supra* note 68 at 207.

[113] Swepston, "New Step", *supra* note 88 at 696.

[114] The Convention recognizes that indigenous and tribal populations constitute distinct and separate populations and they possess protectable interests in their land and culture; see Morris, *supra* note 88 at 311. The Convention "was a positive though feeble and diffident, step forward," for the period when it was adopted; Yupsanis, *supra* note 109 at 434; see also Swepston, "Centre Stage", *supra* note 105 at 451.

[115] It has been contended that for the time of its adoption, the Convention "went very far in recognizing the right of an internal minority to maintain a distinct identity within a state." Swepston, "New Step", *supra* note 88 at 682. This achievement of the Convention is credited to the application of the Convention by the supervisory bodies in close interaction with the NGO movement; see Pinéro, *supra* note 68 at 251. I shall concern myself with the comments and observations of the CEACR and Conference Committee post 1980 because there is a wide agreement among scholars that it was around this period when the protection provisions of the Convention were applied in the light of the contemporary normative understanding regarding tribal and indigenous rights. In fact the Committees had shown no interest in the Convention until then. The reason for the lack of supervisory interest was the classification of the Convention as a 'promotional convention' as opposed to a 'standard setting convention'. Unlike the latter, promotional conventions merely encourage the state to work towards a desirable goal as opposed to laying out enforceable standards; see Bennett, *supra* note 92 at 45. It was around 1980 that the objective of integration fell out of favour and use, and the Convention was interpreted in light of contemporary international norms on account of three reasons: to avoid the need for the revision of the Convention, to adapt to the changing normative understanding of tribal rights internationally, and to deal with the increasing number of cases involving serious violations of human rights of tribals worldwide; see Pinéro, *supra* note 68 at 244. Pinéro divides the period prior to mid 1970 as the promotional policy phase of the Convention and the period post mid 1970 as the period of indigenous rights.

consistent with the newer Convention No. 169."[116] The integrationist and paternalistic elements of the Convention contradict the contemporary norms of international law pertaining to tribal and indigenous peoples reflected in the *ILO Convention 169*.[117] The CEACR has noted that the "governments remain under the obligation to give effect to the provisions of Convention No. 107 which remain relevant…[and] may be applied while respecting generally accepted human rights principles pertaining to indigenous and tribal peoples."[118] Thus, the relevant provisions of the Convention are now being interpreted and their application supervised "in light of standards that do not incorporate the now discredited elements of that Convention."[119] Consequently, the Convention is now being interpreted to extend permanent protection to tribal land.[120] The following sub-section will examine the

[116] Anaya, *Indigenous Peoples*, *supra* note 20 at 228. For a note on the supervisory machinery of the ILO, see *supra* note 85 and accompanying text.

[117] See Anaya, *Indigenous Peoples*, *supra* note 20 at 227; Anaya, "Norms", *supra* note 12, for a discussion of some of the contemporary indigenous and tribal human rights norms. Importantly, these norms are seen as derivatives of generally accepted human rights norms.

[118] International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 100th Sess, ILC 100/III/1A, (2011) at 797 [ILC, *Report 2011*]. According to the CEACR, these relevant provisions include Article 5, 7, 11 and 12 that are central to the present discussion. It is interesting to note that the CEACR's observation supports the existence of generally accepted human rights principles pertaining to tribal and indigenous peoples and thus the status of some of these norms as customary international law. For a discussion of the status of tribal and indigenous norms as customary international law, see Section 1.2, above.

[119] Anaya, "Indigenous Peoples", *supra* note 20 at 227. Anaya justifies this mode of interpretation on the ground that the main concern of member states is to "advance the human rights and legitimate interests" of the tribal and indigenous populations covered by the Convention and thus, "[i]t would be anomalous to apply the convention without regard to those rights and interest" (*ibid* at 228). *Inter-alia*, the interpretation of the right to equality that does not encompass cultural integrity and consequently the Convention's goal of integration have been rejected by contemporary international law.

[120] In 2010, the CEACR reiterated the obligations of Panama under Article 7, 11 and 12 of the Convention with respect to a hydro-electric project being undertaken on indigenous land, and asked the government of Panama to ensure that measures under Article 3 of the Convention are adopted to protect the property of the communities affected until the permanent land rights of the communities under Article 7, 11 and 12 are recognized; ILC, *Report 2010*, *supra* note 41 at 779. Thus, it is evident that the while Article 3 obliges the adoption of temporary special measures of protection, the protection in the provisions recognizing and protecting tribal title is permanent in nature. This understanding is consistent with the contemporary understanding of the right to equality that is at the heart of the Convention. Dynamic protection serves the notion of formal equality "…as opposed to the 'protection of minorities'…[and] temporality…bears out the *perceived* difference between minority protection and equality." Pinéro, *supra* note 68 at 204 [emphasis added]. Thus temporary special measures of protection are contemplated in the Convention to afford protection for as long as discrimination exists in the enjoyment of general rights. Temporality is a feature of special anti-discriminatory measures. Special measures in anti-discrimination instruments may be seen as advancement measures by the state that contemplates and confers protection in given circumstances thereby creating temporary privileges. On the other hand, 'protection of minorities' calls for measures that are permanent in nature and which were understood, at the time of drafting of the Convention, to be disconnected with the principle of equality. However, the duty to

contemporary understanding of the rights and duties contained in the land provisions of the Convention based on the literature and the observations of the supervisory Committees. Other provisions of the Convention and *Recommendation No. 104* will be referenced only to the extent they bear on the land right provisions of the Convention.

2.3.1 Duty to Fully Recognize the Right to Ownership

Article 11 of Part II of the Convention obliges the state to recognize the human right to property of tribal populations.[121] Article 11 of the Convention reads: "The right of *ownership, collective or individual*, of the members of the population concerned over the lands which these populations *traditionally occupy* shall be recognised."[122] Thus, the Convention obliges the state to recognize the individual or collective right of ownership in traditionally occupied tribal lands.

2.3.1.1 *Traditionally Occupy*

The Convention does not create a right to ownership in land but casts a positive obligation on the state to recognize the existing right to ownership in land of tribal and indigenous populations. Thus, the right to ownership envisioned in the Convention does not

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protect minorities including tribal and indigenous peoples' land rights is a positive mandate originating from the right to substantive equality itself in contemporary international law and calls for permanent measures of recognizing and protecting their existing rights. See Chapter Three, below, for a discussion of the content of the right to equality.

[121] *Supra* note 13, art 11. It is widely accepted now that the rights of tribal and indigenous populations are derivatives of generally applicable principles of human rights: the human right to property read with the right to equality in this case; see Anaya, *Indigenous Peoples*, *supra* note 20. "*[A]spects* of tribal land rights, cut through entire spectrum of human rights [including the right to property and the right to culture] to evolving peoples' rights." Pentassuglia, *supra* note 17 at 198 [emphasis added]. Pritchard has also argued that it is the general human right to property read in conjunction with the principle of non-discrimination that forms the basis for the international recognition and protection of the land rights of tribal and indigenous peoples; "Native Title", *supra* note 17.

[122] *ILO Convention 107*, *supra* note 13 [emphasis added]. Bennett, *supra* note 92, notes that tribal title involves very complex issues, "yet Article 11 is one of the shortest provisions of the Convention" (*ibid* at 33). Further, Bennett opines that Article 11 of the Convention does not apply to nomadic and semi-nomadic tribal populations (*ibid*). However, Thornberry disagrees and considers Article 11 applicable to nomads; *Minorities*, *supra* note 79. Thornberry's understanding is clearly reinforced by the CEACR and Conference Committee's extensive supervision of the application of the land right provisions of the Convention, including Article 11, in Brazil, especially with regards to the land rights of the Yanomami. Yanomami are a semi nomadic indigenous population that wanders between Brazil and Venezuela; see e.g. International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 87th Sess, Report III (Part 1A), (1999) at 438.

accrue from a grant by the state but is based in traditional occupation of lands by tribes.[123] By casting the obligation in this way, Article 11 prohibits the unrestrained alienation of tribal lands under traditional occupation by the state without respect for the right of tribal ownership.[124] Article 11 is significant as the provision reinforces that a right to tribal title exists in international human rights law and the evidence necessary for the recognition of this right is traditional occupation.[125] The "traditional occupation" approach is highly relevant to tribal populations whose ownership is almost always undocumented and/or un-acknowledged by the state. The CEACR and the Conference Committee extensively examined the term "traditional occupation" during its detailed supervision of the controversial Sardar Sarovar Dam Project in India in the 1980s.[126] Two main points emerge from the examination of the supervisory committees. Firstly, the occupation of lands by tribals does not require state authorization to fall within the scope of Article 11. Where tribals occupy land to which they do not hold a formal title, such occupation may still amount to traditional occupation under Article 11 irrespective of who holds the formal title.[127] The CEACR noted that "[i]t cannot fully accept the distinction drawn by the Government between traditional occupation and encroachment. Traditional occupation, whether or not it has been authorized, does create

[123] Thornberry, *Human Rights*, *supra* note 57 at 333, n 91. Bennett points out that the term 'recognise' was deliberately used as a replacement of the word 'grant' so as to avoid the reading that Article 11 presupposed a prior proprietary right of the state in such lands; s*upra* note 92. The right to ownership envisaged in the Convention is not contingent on an express or implied acknowledgment of this right by the state.

[124] Thornberry, *Minorities*, *supra* note 79 at 357. Understandably, the Convention does not put an absolute embargo on the alienation of traditional tribal lands and imposes restraints by way of Article 12.

[125] Thus when assuming obligations under Article 11 of the Convention, all ratifying states including India, impliedly admit to the existence of tribal title to land evidenced by traditional occupation. It has been argued that in a state, that requires an official grant to support the claim of title in land, tribal populations can rely on the ratification of the Convention as evidence of an implied grant; Bennett, *supra* note 92 at 31.

[126] Sardar Sarovar Dam was a part of a larger hydroelectric and irrigation project called Narmada Valley Project. It was estimated that the construction of this dam would displace approximately sixty thousand tribals and as many as one million tribals would be displaced in the wider scheme; see International Labour Conference, *Summary of Reports, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations,* ILO, 78th Sess, Report III (Parts 1, 2 and 3), (1991) at 355 [ILC, *Report 1991*]. The World Bank was originally funding the dam. The World Bank withdrew support in 1994 partly because of the international criticism that the project received within the ILO supervisory framework. For a discussion of the project, see Morse & Berger, *supra* note 4.

[127] In the Indian case, they were state owned lands and forest lands, that also vests in the state; see International Labour Conference, *Summary of Reports, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations,* ILO, 77th Sess, Report III (Parts 1, 2 and 3), (1990) at 324 [ILC, *Report 1990*].

ownership rights under the Convention."[128] Secondly, the kinds of land use that constitute occupation under Article 11 include tribal practices of various kinds and not merely the use of land for cultivation.[129] The CEACR observed that:

> use of forest or waste lands, title of which is held by the Government for hunting and gathering – again, whether or not this has been authorized – satisfies the use of the term "occupation", and if it is traditional it meets the requirement of this Article. The term "traditional occupation is imprecise, but it clearly conveys that the lands over which these groups' land rights should be recognized are those whose use has become part of their way of life.[130]

Thus all lands, including forest land, irrespective of formal title/authorization that are occupied by the tribal populations by way of tribal practice of various forms may fall within the scope of Article 11.[131] The test for the recognition of the right to ownership on such lands

[128] *Ibid* at 328. India had tried to argue that tribal populations' occupation of clearly defined state or forest lands amount to encroachment and thus, such an occupation cannot amount to traditional occupation requiring 'special measures' under Article 11. The argument seems to imply that Article 11 applies only where tribals occupy untitled land. Also the use of the word 'special measures' resonates with the argument that protection provisions including Article 11 were considered to be temporary deviations from the principle of (formal) equality; see Section 2.3, above, for more on this topic. Notably, India had divided the tribals likely to be displaced by the project into two categories: the landed and the landless, for the purpose of the resettlement and rehabilitation measures. While the former category comprised tribals who held title to their cultivable plots, the latter were deemed to occupy state owned lands as encroachers. Due to international pressure, the governments of the three provinces that were directly concerned with the project decided to regularize the 'unauthorized' occupation of all landless tribals by giving them title to the land they were cultivating. However, the occupation of the remaining lands for purposes other than cultivation, to which both the categories above still did not have formal title, was deemed to be unauthorized and thus, out of the scope of Article 11. International Federation of Plantation, Agriculture and Allied Workers ("IFPAAW"), the main body pursuing the matter before the CEACR alleged the violation of the Convention, *inter-alia*, on the grounds that 1) only the ownership of those who possessed formal title to cultivable lands was recognized; 2) the compensation being paid to landless tribals by regularizing their "unauthorized" occupation is "ex-gratia rather than a consequence of a recognized right to the ownership of the lands they are occupying…." ILC, *Report 1990*, *supra* note 127 at 326.

[129] *Ibid* at 328. The tribals being displaced by the Sardar Sarovar Dam in India were in occupation of lands for activities other than cultivation, such as hunting, collecting, grazing, fishing etc. without formal title. While right to tribal ownership of cultivable plots to which tribals held title, whether to begin with or as a consequence of regularization of their unauthorized occupations, was being recognized for commensurate compensation under Article 12, no such right under Article 11 was being recognized for their occupation by way of these other forms of land use.

[130] *Ibid.* The CEACR remarked, "that the kind of land use for which no compensation is given would appear to fall within the meaning of the term "occupation"." ILC, *Report 1991*, *supra* note 126 at 357. The CEACR was referring to a diverse set of tribal practices including "forms of shared use, gathering of forest products and herding on these lands" and not only settled cultivation (*ibid* at 356).

[131] The linking of occupation to all forms of land use that have become a part of the tribal way of life and not merely cultivation is significant. This understanding reflects that the term occupation does not acknowledge merely the economic connection of tribals to lands but a broader cultural connection to land. This resonates with the widely accepted "notion that indigenous land rights serve the purpose of protecting indigenous identity as defined by the cultural and spiritual connection to its traditional lands." Pentassuglia, *supra* note 17 at 167.

is that their occupation must be traditional.[132] The qualitative/subjective dimension of the term "traditional" was clearly spelled out by the CEACR as lands whose use has become an integral part of the tribal way of life.[133] However, its quantitative/objective dimension i.e. the length of traditional occupation that will raise the presumption of the subjective dimension is contestable.[134] The CEACR was unable to determine whether the length of occupation in the case of India amounted to traditional occupation due to paucity of relevant information.[135] Further, it is clear that the term traditionally *occupy* denotes that the populations must have some present connection with the lands such as current occupation or recent expulsion.[136] Article 11 does not address the case of historic dispossession.[137]

2.3.1.2 *Ownership*

It has been argued that the legal status of the right to ownership that the Convention obliges the state to recognize should not be any less than the status of the ownership

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[132] In fact, the Conference Committee indicated, "while a distinction could be made between traditional occupation and encroachment, the question was where should the line be drawn." International Labour Conference, *Record of Proceedings*, ILO, 77th Sess, (1990) at 27/56 [ILC, *Proceedings 1990*]. The fine line would depend on the meaning/temporal limit assigned to the term traditional.

[133] See ILC, *Report 1990*, *supra* note 127 at 328. The government of India, referring to the comments of the CEACR, had raised the question before the Conference Committee that while it was evident that "the lands over which these groups' land rights should be recognized were those whose use had become part of their way of life. The question still remained: since when?" ILC, *Proceedings 1990*, *supra* note 132 at 27/55.

[134] See Thornberry, *Human Rights*, *supra* note 57 at 353. The term 'traditional occupation' and 'immemorial possession' has been used interchangeably in the literature; Bennett, *supra* note 92.

[135] However, the CEACR pointed out that if the information provided by IFPAAW was accurate, it "…would create a presumption of land rights under the Convention." ILC, *Report 1990*, *supra* note 127 at 328. IFPAAW had asserted that these tribals had occupied these lands for a very long time even during British domination. The approach of the Committees demonstrates that in suitable cases and where the relevant information is available, it may comment on this aspect of Article 11.

[136] See Swepston, "New Step", *supra* note 88 at 701; Anaya, "Norms", *supra* note 12 at 27. The supervisory committees had repeatedly called upon Bangladesh in the 1980s and 1990s to recognize the right to ownership of tribals of the Chittagong Hill Tract who had recently lost their lands; see e.g. CEACR, *Direct Request to Bangladesh - adopted 2000*, ILO, 89th Sess, (2001), online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2197420> [CEACR, *Direct R Bangladesh 2000*].

[137] In fact the Committees have never dealt with a case of historic dispossession while supervising the application of the Convention. In an older observation on Ecuador in 1981, the CEACR commented that there was an immediate need to restore to the indigenous peoples the traditional lands that they have lost "or to provide them land adequate to survive as a distinct segment of the national population." International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 67th Sess, Report III (Part 4A), (1981) at 167. However, this was a general observation not addressed to the application of the Convention to cases of historic dispossession.

conferred on others by the state.[138] It appears that Article 11 does not require formal titling of traditional lands and the state is not under an obligation to recognize "all rights that accrue to an owner in a legal and factual sense" as long as what is recognized is the "owners powers in the legal and factual sense."[139] Bennett holds that the Convention deliberately uses the word ownership to reflect that tribal title in the Convention is more than a possessory right and that the tribal populations "…are to enjoy a full proprietary status on their ancestral lands."[140] But what must be the content of this full proprietary status? The CEACR has recognized that the content of the concept of ownership is contextual and varies in different countries and different legal systems.[141] However, the right to ownership recognized in Article 11 is an articulation of the human right to property of culturally distinct groups and thus, its content is likely to be different than the content of statutory ownership.[142] The content of the human

[138] Russel Lawrence Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples" (1990) 15 Okla City UL Rev at 225 (HeinOnline). Any lesser understanding of the legal status of the tribal right to ownership, once it has been recognized by the state, will be discriminatory.

[139] Graver & Ulfstein, *supra* note 65 at 350 [emphasis added]. The authors made the comment with respect to the *ILO Convention 169*. However, the position can be assumed to be true for the *ILO Convention 107* especially since its provisions are being implemented in light of the general human rights norms contained in the newer Convention.

[140] *Supra* note 92 at 32. Bennett points out that the word "property rights" was replaced by the word "right to ownership" during drafting. This makes it clear that only recognition of fee simple title will result in full compliance with the Convention. Article 11, like all the other protection provisions of the Convention, has an instrumental role in the process of integration and thus it was intended to be a 'statement of intent' as opposed to imposing rigorous obligations on the state. The Convention was considered to be one of ILOs "promotional" conventions; Pinéro, *supra* note 68 at 210. Certain concepts were adopted as interim measures pending full conformity to the Convention. Thus, the ILO has been flexible in determining whether legal arrangements made by a state comply with the requirements of Article 11; see Swepston, "New Step", *supra* note 88 at 690. On several occasions, it was found that "firm, permanent and assured possession did not constitute a violation of the requirement of ownership" in the Convention (*ibid* at 701). Possession and ownership were not considered to be equivalent concepts in the Convention. However, as a promotional interim measure, where a state ensured firm assurance of use and possession, such an assurance was found not to constitute a violation of the right to ownership in Article 11. Such an assurance was considered a good interim measure until the state fully conformed to its obligations under the Convention (*ibid*). In the case of Brazil, the CEACR insisted that the state assure the continued and permanent occupation of the traditional land of the Yanomami by demarcating reserves and granting them guaranteed permanent usufruct rights in order to comply with Article 11; International Labour Conference, *Summary of Reports, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 73rd Sess, Report III (Parts 1, 2 and 3), (1987) at 349.

[141] See also Swepston, "New Step", *supra* note 88 at 701. The understanding of the CEACR is consistent with the principle of formal equality in the Convention. Even though the Convention mandates the recognition of the human right to property of a culturally distinct population as understood separately from the concept of statutory ownership, the content of the right is expected to adhere to the state's legal system thereby preventing the possibility of legal plurality.

[142] The right to ownership of tribal lands is a derivative of the general human right to property; see *supra* note 121.

right to property/ownership "can only be understood in the social context in which it exists."[143] In the context of tribal and indigenous populations, the content of the human right to property/ownership must also envisage the "cultural importance of connection with land and territory."[144] Customary laws/the tribal legal system is a window on tribal culture and thus, it is there that the content of tribal ownership must be located.[145] In this regard, Article 7(1) has specific relevance for the right to ownership contained in Article 11.[146] Article 7(1) imposes a duty on the state to pay regard to the customary laws of the tribal, semi tribal and indigenous populations concerned, in defining their rights and duties under the Convention.[147] Clearly, Article 7(1) does not impose an independent duty on the state to recognize and protect tribal customary laws as an integral part of the state's legal system.[148] Neither does the Convention recognize tribal customary law as the source of the right to ownership in the Convention.[149] However, a state must pay regard to the traditional land tenure system of tribal

[143] The content of the right to property as a human right must be determined by considering whether the "…relationship [of the populations] with others concerning the use or disposition of things [land] is essential to their equality, autonomy or dignity, whether or not that relationship is reflected in national law as a form of property." Tom Allen, "Restitution and Transitional Justice in the European Court of Human Rights" (2006) 13 Colum J Eur L 1 at 21 (HeinOnline).

[144] Bankes, "Protection", *supra* note 18 at 77, n 91.

[145] If tribal land rights are to effectively protect tribal identity, which is a function of their cultural and spiritual connection to land, the specific connections that are to be recognized and protected as land rights must be located in tribal customary law.

[146] *ILO Convention 107*, *supra* note 13, art 7(1). Article 7(1) reads: "In defining the rights and duties of the populations concerned regard shall be had to their customary laws."

[147] This Article of the Convention has been termed as a weak cultural respect provision Thornberry notes that the Convention alludes to respect for traditional cultures in its standards but unsuccessfully tries to strike a balance "…between integration and *what may be termed* cultural respect." *Minorities*, *supra* note 79 at 350 [emphasis added]. Article 7 and Article 13(1) are two such 'cultural respect' provisions relevant to the present discussion.

[148] *Ibid*. Tribal culture and customary laws were considered to be inferior and inherently valueless and an independent recognition for customary laws would have also violated the principle of formal equality endorsed by the Convention.

[149] This contradicts the position of tribal customary law in the *ILO Convention 169* and the *UNDRIP*. Also, the jurisprudence of the regional general human rights instruments has interpreted the right to property to include an obligation to recognize customary tribal title and traditional laws and customs of tribal peoples as the source of that right; see e.g. *Awas Tingni*, *supra* note 24; case of *Sawhoyamaxa Indigenous Community v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 146; case of the *Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 172 [*Saramaka*]; *Maya Indigenous Communities of the Toledo District v Belize* (2004), Inter-Am Comm HR, No 40/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122/doc.5, rev.1 (2005) 727. Notably, the regional human rights bodies did not rely on any express provision pertaining to the respect for tribal customary law but based their interpretation on the right to property read with the principle of non-discrimination. Anaya notes that "[i]nasmuch as property is a human right, fundamental norm of non-discrimination requires recognition of the forms of property that arise from the

populations when determining the nature and scope of the right to tribal ownership in land "and new concepts must be developed to ensure a form of land tenure which is both meaningful to the aboriginal [and tribal] community and capable of enforcement through the conventional machinery of the law."[150] However, this already inchoate duty of the state to pay 'regard' to tribal customary law is further diluted by adherence to the notion of formal equality and the explicit reference to the objective of integration. Article 7(2) thus reads: "These populations *shall be allowed* to retain their own customs and institutions where these are not incompatible *with the national legal system* or the *objective of integration*."[151] Article 7(2) applies to all aspects of tribal customary law and not merely the morally offensive aspects.[152] Thus, where the conception of ownership in tribal customary law is found incompatible with the legal system of the state or the objective of integration, the state may determine the content of tribal ownership in disregard of tribal customary law. The

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traditional or customary land tenure of indigenous [and tribal] peoples, in addition to the property regimes created by the dominant society." Anaya, "Multicultural, *supra* note 65 at 37; Also see Nigel Bankes, "Recognizing the Property Interests of Indigenous Peoples within Settler Societies: Some Different Conceptual Approaches" in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart, 2013) 21. Anaya has also argued that the right to ownership sourced in customary law has attained the status of customary international law; *Indigenous Peoples*, *supra* note 20. But see Alexandra Xanthaki, "Indigenous Rights in International Law over the last Ten Years and Future Developments" (2009) 10 Melbourne Journal of International Law 27. Xanthaki disagrees with Anaya's claim and considers it ambitious and argues that if it were so, the *UNDRIP* would be redundant; see also Stephen Allen, "The United Nations Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project" in S Allen & A Xanthaki, eds, *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (UK: Hart, 2011) 225.

[150] Bennett, *supra* note 92 at 20. However, the absence of well-developed proprietary concepts within tribal customary law does not preclude such tribal populations from the application of Article 11 (*ibid*). While Article 7(1) obliges the state to pay regard to customary laws, the actual extent of regard that is to be paid to customary laws depends upon the working of domestic law. Pentassuglia has argued that even though the *ILO Convention 169* and the *UNDRIP* recognize tribal customary laws as the source of tribal title, they are also unclear on how domestic law and practice and tribal customary laws are to be reconciled; *supra* note 17 at 168.

[151] *ILO Convention 107*, *supra* note 13, art 7(2) [emphasis added]. Bennett points out that the incompatibility with the 'national legal system' entails a wider limitation than incompatibility with 'national laws'. While the latter refers to particular legal rules, the former encompasses the principles that constitute the legal system of the state. He points out that it is difficult to determine whether the permissive language of Article 7(2), i.e. "these populations shall be allowed to retain", places a positive obligation on the state to prohibit any act which may hinder the retention of these customs; *supra* note 92. However, Thornberry, impliedly denying the existence of such a positive duty, points out that the word "allow" reflects the position that these populations do not have an inherent right to retain their customary laws; *Minorities*, *supra* note 79 at 351. The Convention acknowledges the pre-existence of customary laws but does not accord them recognition independent of state permission. This position in the Convention contradicts the position in the majority of other human rights instruments including the *ILO Convention 169*; see *supra* note 149 for a brief comment on the position in other human rights instruments.

[152] Thornberry, *Minorities*, *supra* note 79.

Convention affords a similar discretion to the state in determining the nature of tribal title. Article 11 refers to both individual and collective ownership and allows the state to choose between the two when recognizing tribal title.[153] However, in this context also, Article 7(1) obliges the state to pay regard to the customary laws of the tribal when making the choice.[154]

On the whole, the Convention does not place an independent duty on the state to recognize and protect tribal customary laws. It also does not contemplate a separate land rights regime for tribal populations but was drafted to "provide protection in the context of "inevitable" integration."[155] Thus the strong duty cast on the state to recognize tribal title may not be the title based in customary law.[156] This approach may not necessarily injure tribal interests. Bankes alludes to the literature to draw attention to an important debate as to the consequences of recognizing title based in customary law vis-à-vis title based in state law:

> [m]uch of the literature argues that the recognition and titling of customary interests may limit the protection offered to the community to a bundle of disaggregated and traditional rights. By contrast, if titling and recognition draws on [state] ideas of title (and not just use rights) then the autonomous space that is reserved to the indigenous community within the settler society and legal system may be enlarged.[157]

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[153] See *ibid* at 357. In the Indian Sardar Sarovar Dam matter, IFPAAW raised the issue that India was in violation of Article 11, as it did not recognize the right to collective ownership of tribal lands of the tribals being displaced. The CEACR did not categorically address this allegation; International Labour Conference, *Summary of Reports, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 72nd Sess, Report III (Parts 1, 2 and 3), (1986) at 257 [ILC, *Report 1986]*.

[154] In addition, Article 13(1) of the Convention obliges the state to 'respect' the customary procedures for allocation and use of land. Article 13(1) reads: "[p]rocedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development." *ILO Convention 107*, *supra* note 13, art 13(1).

[155] Swepston, "New Step", *supra* note 88 at 696. The Convention was never drafted to address the complex issues that arise from the interaction between different legal systems; see Bennett, *supra* note 92 at 23.

[156] Nevertheless it may be argued that Article 11 itself, without reference to Article 7(1) or 13(1) must be interpreted in a manner that keeps up with the international interpretation of the human rights to property. The interpretation of human rights must adapt to the current situations where the relevant regime is functionally adjusted "as 'living instrument' by locating it within a wider set of developments…." Pentassuglia, *supra* note 17 at 199. Nigel Bankes notes that scholars have argued for specialized instruments dealing with rights of tribal and indigenous populations because of the apprehension that general human rights instruments may not be able to fully recognize and protect the rights of these populations; "Comparison", *supra* note 28 at 232. Thus the Convention, which is expected to be ahead of general human rights interpretation, should at least be at par with those standards.

[157] *Ibid* at 246.

The recent observations of the CEACR reflect a move towards a greater recognition of traditional laws of tribal populations. In 2010, the CEACR noted Panama's failure to recognize the right to ownership of the indigenous populations under Article 11 and reiterated the obligation of the state under Article 7, notably, without reference to the limitation in Article 7(2).[158] More recent observations of the CEACR have expressed concern for the protection of the cultural identity of the tribal populations in Bangladesh, and to that end it called upon Bangladesh to recognize the traditional food production systems of the tribals.[159] Bangladesh was urged to recognize land rights in a manner that ensures that the tribal communities have the opportunity to continue to engage in their customary form of cultivation.[160]

2.3.1.3 *Ramifications of the Right to Ownership*

The Convention is silent on the specific manner in which the provisions of the Convention, including Article 11, are to be given effect by the state.[161] However, it is evident

[158] The CEACR reiterated the duty of the state under Article 11 "and emphasize[d] that consideration must be given in defining the rights of these populations to their customary laws in accordance with Article 7." ILC, *Report 2010*, *supra* note 41 at 778.

[159] In 2014, the CEACR reiterated its ongoing concern about Bangladesh's efforts to abolish the traditional form of cultivation, jhum, of the tribal populations and "request[ed] the government to indicate the measures taken to ensure that indigenous communities have the possibility to continue to engage in jhum cultivation, including through accelerating measures protecting their land rights…." International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 103rd Sess, ILC 103/III(1A), (2014) at 555 [ILC, *Report 2014*].

[160] *Ibid.*

[161] The Convention lays out basic obligations and the manner of implementation is left to state. Governments strive for this "flexibility" in international obligations because all domestic legal systems function differently; see Barsh, *supra* note 138 at 211. Article 2 of the *Recommendation No. 104* calls for legislative or administrative measures; *supra* note 74. The supervisory committees have emphasized the legal recognition of the right to ownership; see e.g. International Labour Conference, *Summary of Reports, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 76th Sess, Report III (Parts 1, 2 and 3), (1989) at 364 [ILC, *Report 1989*]. Bangladesh's CHT Regulation 1900 conferred certain land rights on the tribal populations but not the right to ownership. The government's policy for land settlement encouraged tribals to own a specific area of land. The CEACR noted that Bangladesh needed to re-evaluate its policy towards tribal land ownership and asked the state to clarify "how land ownership by tribals will now be recognized in law…" (*ibid*). The CEACR has time and again called upon states to adopt legislation dealing with issues of tribal land ownership. Even though the Convention allows flexibility in the state's choice of measures giving effect to the provisions of the Convention, such measures must be adopted in collaboration/consultation of the tribal populations; see section 2.4, below.

that the Convention requires that its provisions be given both legal and practical effect.[162] The legal recognition of the right to ownership necessarily has practical ramifications but the Convention is silent in that respect.[163] However, the duty to delimit and demarcate tribal land and the duty to settle land disputes between tribals and non-tribals have been recurring themes in the supervisory process of the Convention.[164] It is now evident that Article 11 of the Convention places an obligation on the state to delimit and demarcate tribal and indigenous lands.[165] But the CEACR and the Conference Committee have not elaborated on the contours of the duty to demarcate tribal lands.[166]

Similarly, as part of the practical implementation of Article 11, the CEACR has repeatedly called upon states to adopt procedures to resolve tribal land claims with respect to traditional lands that tribals are in possession of, irrespective of formal title; or traditional lands that tribals have been dispossessed of recently.[167] Consequently, a state is under an obligation to settle conflicting land claims between tribals and non-tribals.[168] The observations of the CEACR raise a strong presumption that where tribals have recently

[162] The supervisory committees have repeatedly stressed that legislations are inoperative unless accompanied by concrete measures of implementation.
[163] Demarcation and identification of tribal lands and the settlement of land disputes between tribals and non-tribals are such ramifications. The Convention does not contain the express duty to demarcate land; see Thornberry, *Human Rights*, *supra* note 57 at 334. Pentassuglia finds that these ramifications of recognizing ownership rights in land have not been clearly stated in the *ILO Convention 169* either; *supra* note 17 at 170.
[164] Swepston, "New Step", *supra* note 88 at 702; Bennett, *supra* note 92 at 32.
[165] The CEACR asked India if it was contemplating adopting further legislation in addition to the *Forest Rights Act* "to ensure that the rights of the tribal population to the land they have traditionally occupied are identified and protected to give effect to Article 11 of the Convention." ILC, *Report 2010*, *supra* note 41 at 772; see also ILC, *Report 1989*, *supra* note 161 at 367, wherein the CEACR expressed concern over the slow progress in demarcation of tribal lands in Bangladesh and Brazil. In fact, in the case of Brazil, the CEACR noted that demarcation is "only the first of several steps in guaranteeing full protection of Indian lands" (*ibid*).
[166] However, since the duty is to demarcate traditional lands that have become a part of the tribal way of life, the process to demarcate must be such that allows the tribals to continue to lead their traditional way of life. Brazil had demarcated Yanomami territory in a manner that resulted in the creation of nineteen separate areas. This was criticized by the CEACR as damaging Yanomami interest; ILC, *Report 1990*, *supra* note 127. Brazil eventually had to re-demarcate Yanomami territory.
[167] The CEACR called upon Bangladesh to establish appropriate procedures to resolve tribal land claims and to adopt "measures to determine which tribal lands may have been lost to non-tribals through government-sponsored or spontaneous settlement programmes in recent years…." ILC, *Report 1989*, *supra* note 161 at 361. The CEACR was speaking of both the tribals that had been forced to flee to India from their traditional lands and the tribals that had been internally displaced within the Chittagong Hill Tract region in recent years. As mentioned earlier, the Convention does not address historic dispossession.
[168] ILC, *Report 1989*, *supra* note 161 at 361; see also CEACR, *Direct R Bangladesh 2000*, *supra* note 136. However, it is unclear how the competing tribal and non-tribal land claims are to be reconciled with each other.

involuntarily lost their traditional lands to non-tribals, they have a right to recover such lands.[169] It may reasonably be asserted that the duty to settle land disputed between tribals and non-tribals over traditional tribal lands is a pre-requisite for effectively discharging the duty to delimit and demarcate tribal lands.[170]

2.3.1.4 *Minerals*

The term land in the Convention is generic in nature and includes forests, lakes and rivers.[171] The right to sub-surface minerals does not feature in the Convention as such. Article 4 of *Recommendation No. 104* provides that tribal populations "should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth."[172] Thus, while the Convention admits of the existence of a tribal right to ownership in land evidenced by traditional occupation, it does not concede an ownership right in the minerals underneath the land traditionally occupied by tribal populations.[173] The exploitation of minerals in tribal

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[169] In 1996, the CEACR stressed that Bangladesh should adopt appropriate procedures for the recovery of recently lost traditional lands by the tribals that had fled to India and also the tribals that had been displaced internally; see International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, General Report and Observations concerning Particular Countries,* ILO, 83rd Sess, Report III (Part 4A), (1996) at 265 [ILC, *Report 1996]*; CEACR, *Direct Request to India - adopted 1994*, ILO, 81st Sess, (1994), online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2129035>, wherein India was questioned about the measures it has taken or is contemplating for restoration of tribal lands and to prevent the further alienation of tribal lands in twelve Indian provinces. In fact, this recent involuntary dispossession of traditional lands may have been a result of state sponsored action without regard to Articles 11 and 12 or spontaneous non-tribal encroachment on traditional lands. Notably, a state is under an obligation to effectively protect against such involuntary dispossession of tribal lands as discussed in Section 2.3.2, below. The right to recovery of recently lost traditional lands is thus connected to the state's failure to effectively protect tribal title.

[170] See CEACR, *Direct R Bangladesh 2000*, *supra* note 136. The CEACR highlighted that if a cadastral survey for demarcation is "conducted prior to a resolution of conflicting land claims between the non-tribals and tribal people" it will result in the creation of third party interests and thus significantly affect the recovery of traditional lands by displaced tribals (*ibid* at para 2).

[171] Bennett, *supra* note 92 at 32. Bennett has relied on the travaux preparatories to draw this conclusion.

[172] *Supra* note 74. Article 4 promotes equality of treatment in the matter of recognizing right to minerals and to the preferential right to development of such minerals and makes no reference to recognition of such rights where the 'national population' does not enjoy them. The right to minerals is contingent upon the vesting of such a right by the state. The Convention, thus, assumes the centrality of state ownership of sub-soil minerals.

[173] Pentassuglia, with reference to the *ILO Convention 169* and the *UNDRIP* notes that there is more 'uncertainty' in the specialized tribal and indigenous rights instruments with regards to sub-soil resource rights than the jurisprudence within the regional human rights system wherein "natural resources, including sub soil resources, [are held to be] a part of an autonomous right to property under international law…to the extent they are traditionally used by the groups and thus essential for their physical and cultural survival." *Supra* note 17 at

lands does not per se violate the Convention, however such exploitation may amount to a violation "depending on the manner in which and the extent to which such exploitation is conducted."[174] Thus, where state sponsored exploitation of sub-soil minerals in conducted in a manner that adversely affects tribal rights and interests that have been recognized and protected in the Convention, such exploitation may amount to the violation of the Convention.[175]

2.3.2 Segregation From the Land: Duty to Effectively Protect Against Removal and Alienation

While Article 11 expressly places the obligation on the state to fully recognize tribal title, this title must also be effectively protected both against state sponsored action and spontaneous non-tribal encroachment on tribal lands.[176] The Convention "seek[s] to protect indigenous and tribal populations…in cases of incursions into these lands by programmes of development or internal settlement."[177]

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178. This recognition subjects interference with natural resources found in tribal land to procedural and substantive safeguards available to the human right to property that are wider than the domestic safeguards. Since tribal and indigenous land claims are unique, the Inter-American Court of Human Rights' jurisprudence has actually developed some special safeguards in addition to the ones available to the right to property in general (*ibid* at 175); Interestingly, it has been suggested that the issue of mineral rights may be covered by the Convention implicitly as part of Article 11. Since the reference to 'underground wealth' is contained in the 'Land' section of *Recommendation No. 104*, it might be read as an explanation of the meaning of the term 'land'; Thornberry, *Minorities*, *supra* note 79 at 362. Nevertheless, Thornberry further notes that the ILO has indicated in its reports that the matter is better left for a revised convention to address.

[174] International Labour Conference, *Summary of Reports, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 71st Sess, Report III (Parts 1, 2 and 3), (1985) at 274.

[175] Recently, the CEACR expressed serious concern regarding leasing of the traditional tribal land of the Dongria Kondh and Kutia Kondh tribes in India for bauxite mining without tribal consultation; see ILC, *Report 2010*, *supra* note 41. While the Convention does not recognize tribal right to sub-soil minerals, leasing of traditional land for mining purposes impacts tribal land rights and, therefore, invokes the general right to participate under Article 5 (1), discussed in Section 2.4, below.

[176] Bangladesh was called upon by the CEACR to ensure that tribal ownership is fully recognized and effectively protected against illegal seizures; see International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 105th Sess, ILC 105/III(1A), **(**2016**)** [ILC, *Report 2016*].

[177] ILC, *Report 1988*, *supra* note 111 at 282.

2.3.2.1 Protection from Removal

Article 12 expressly restricts the actions of the state vis à vis the "habitual territories" occupied by tribal populations.[178] The term "habitual territories" is wider than, and is free from, the burden of "traditionally occupy" in Article 11 and encompasses tribal occupation of lands that may or may not amount to ownership.[179] Thus, Article 12(1) acknowledges that tribal populations acquire certain use rights, not amounting to ownership, over the lands that they occupy even for a short time and extends protection in the context of state sponsored loss of traditional lands where owned by tribals or the loss of use of tribal lands that were recently occupied.[180]

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[178] Article 12 reads:

> 1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
> 2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.
> 3. Persons thus removed shall be fully compensated for any resulting loss or injury

ILO Convention 107, *supra* note 13, art 12. The Convention made the first attempt to regulate the expropriation of tribal lands; Bennett, *supra* note 92 at 39.

[179] See Thornberry *Minorities*, *supra* note 79 at 360. Thornberry terms this protection to be the general human "right to remain". In interpreting this Article in the Sardar Sarovar Dam matter in India, the CEACR held that Article 12 rights attach to recent occupation of tribal lands in the same manner as they attach to the lands for which ownership right is recognized under Article 11. India had unsuccessfully argued that Article 12 limits compensable land rights to populations that can demonstrate immemorial possession and added that "[e]ncroachment could not be considered as "traditional occupation" in the sense of Article 11, or as "habitual territories" in the sense of Article 12." ILC, *Report 1990*, *supra* note 127 at 327. The ILO Committees categorically rejected such an interpretation of Article 12 and pointed out that Article 12 refers to land occupied and recent occupation of state owned land did not mean that tribals had no land rights (*ibid*). The CEACR hoped that India will fulfill its obligation under Article 12(2) and 12(3) to compensate the displaced tribals for the loss of lands where owned or for the loss of the use of these lands where merely occupied. Further, the CEACR clarified that the "use of forest or waste lands, title of which is held by the Government for hunting and gathering – again, whether or not this has been authorized – satisfies the use of the term "occupation"…" (*ibid* at 328). If the occupation is traditional, it creates rights under Article 11 and Article 12. If the occupation is recent, it nevertheless creates rights under Article 12.

[180] In addition to arguing that Article 12 limits compensable land rights to populations that can demonstrate immemorial possession, the government of India had identified cultivation as the only compensable land right under Article 12(2) and 12(3), and excluded other forms of use/occupation such as hunting, fishing, gathering etc. In line with its interpretation of "traditional occupation" the CEACR has indicated that in determining the kinds of use that amount to occupation, and are thus to be treated as compensable land rights under Article 12, "the government[s] will ensure that the cost of the project does not fall heavily on these helpless and already impoverished tribals, and that they are not deprived of the means of subsistence which they have had for many years" (*ibid*).

Article 12(1) of the Convention places a general prohibition on the state not to remove these populations from their "habitual territories" without obtaining their free consent.[181] However, there are sweeping exceptions to this prohibition.[182] Article 12(1) provides that tribal populations may be involuntarily removed from their habitual territories on grounds of national security, national economic development or health of these populations.[183] Even though removal from tribal lands has been contemplated as an exceptional measure in Article 12(2), removal on the listed grounds has been deemed as authorized by the government.[184] However, the CEACR has indicated that a state must endeavor to obtain the free consent of the tribal populations before involuntary removal is contemplated.[185] Further, a state is under a duty to ensure that the involuntary removal from tribal lands is not effected arbitrarily but in

[181] The rights under Article 12 are collective rights of the populations and not individual rights; see Thornberry, *Minorities*, *supra* note 79 at 360.

[182] Pinéro skeptically suggests that Article 12 reflects the instrumentality of recognizing the right to ownership in Article 11 i.e. recognition to facilitate removal; *supra* note 68 at 210.

[183] *ILO Convention 107*, *supra* note 13, art 12(1). Economic development, an open-ended ground, is most frequently employed; Bennett, *supra* note 92. The CEACR has held that an inquiry into the merits of the economic development project is beyond its scope and that "[i]ts only concern…is that the burden of these projects should not fall disproportionately on the tribal people…." International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 86th Sess, Report III (Part 1A), (1998) at 322. IFPAAW had tried to argue that the Sardar Sarovar Dam and its larger project would not benefit the economic development of the country.

Further, where national economic development is a ground, Article 6 of the Convention obliges the state to give "high priority" to the improvement of the conditions of life and work and level of education of the populations" in the economic development plans of the "areas inhabited by these population." *ILO Convention 107*, *supra* note 13, art 6. However, even though Article 6 employees the word "shall", the language of Section 6 shuns binding commitment; Bennett, *supra* note 90 at 19. The CEACR has been called upon to deliberate on the alleged violation of Article 6. IFPAAW argued that the Sardar Sarovar Dam project is not oriented to benefit the tribal populations, which *prima facie* violates Article 6. The CEACR noted that Article 6 "does not preclude economic development efforts which assist both tribals and non tribals" but requires that the costs of the project must not fall heavily on the tribal populations and "whether these costs can be reduced or compensated depends on how the other Articles are applied." ILC, *Report 1990*, *supra* note 127 at 325. Article 12(2) and 12(3) read with the duty to collaborate in Article 5(1) serve to account for, mitigate and compensate for these costs. The duty to collaborate under Article 5(1) is discussed in Section 2.4, below.

[184] See Swepston, "New Step", *supra* note 88 at 706; The CEACR has noted that Article 12 serves to mitigate the effects of development projects that may require relocation of tribal populations as an exceptional measure. CEACR, *Direct Request to India - adopted 2009*, ILO, 99th Sess, (2010), online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2308060> [CEACR, *Direct R India 2009*].

[185] The CEACR asked India for the "information on any cases in which tribal populations are displaced from their territories and on the measures taken to obtain their consent and to compensate them as required by the Convention." CEACR, *Direct Request to India - adopted 1996*, ILO, 85th Sess, (1997), online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2151526> at para 11.

accordance with the laws and regulations of the country.[186] Thus, Article 12 requires that involuntary removals must have statutory authorization.[187] The specification of these laws and regulations and what they must contain as procedural safeguards has not been detailed in the Convention.[188] Article 12(2) and 12(3), principally, create mitigating rights and duties in the context of such voluntary and involuntary removals.[189]

Where removal is carried out, whether voluntarily or involuntarily, the state is under an obligation to provide alternative lands of at least equal quality and suitable to meet present needs and the needs of future development of the affected populations.[190] Further, it may be argued that the nature of tribal title that the displaced tribal populations acquire to the new lands shall be identical to (or no less beneficial than) the one they lost.[191] While Article 12(2)

[186] *ILO Convention 107*, *supra* note 13, art 12(1). Bennett considers this duty to be the only significant restriction to removals in Article 12. Expressing faith in the intent of the legislature he holds that administrative decisions are often responsible for threatening tribal interests as opposed to well-defined statutorily regulated removals. But he points out to a danger where the statute leaves wide discretion to the executive, thereby complying with Article 12 in letter but not in spirit; *supra* note 92.

[187] The CEACR questioned India about the national laws and regulations authorizing the removal for the Sardar Sarovar Dam. India referred to its general land acquisition statute; see ILC, *Report 1986*, *supra* note 153 at 259. It appears that an umbrella statute authorizing tribal removals is sufficient as long as removals are effected in accordance with the Convention. The Convention does not call for tribal specific laws and regulations authorizing acquisitions of tribal lands.

[188] However, it appears that the state is under a duty to "seek the collaboration of these populations or their representatives" when such laws are enacted; see discussion in Section 2.4, below.

[189] See *ILO Convention 107*, *supra* note 13. The words "in such cases" in Article 12(2) give the impression that the duties contained in Articles 12(2) and (3) are restricted to the involuntary removals necessitated by the three conditions contained in Article 12(1). Pinéro appears to concur with this reading in noting that Article 12 provides "for compensation for indigenous [and tribal] peoples' loss of land and 'any other resulting loss or injury as a consequence of *forced removal*, while failing to recognize the principle of compensation in land; *supra* note 68 at 210 [emphasis added]. But Swepston notes that the duties of the state in Articles 12(2) and (3) exist in case of both voluntary and involuntary removals; "New Step", *supra* note 88. Further Article 12 seems to apply to situations where the tribes are required to vacate their habitual lands by official order, whether voluntarily or involuntarily, and not where circumstances, including commercial activities on neighboring lands, compel them to abandon their lands without such formal orders; Bennett, *supra* note 92.

[190] ILC, *Report 1986*, *supra* note 153. Noting the allegation that India was not providing the displaced tribals with lands of equal quality, the CEACR noted that "[t]he Committee would affirm that the words "lands of quality atleast equal to that of the lands previously occupied by them…" would create a presumption that displaced tribals should receive agricultural lands for lost agricultural lands, and forest lands for lost forest lands" (*ibid* at 330).

[191] The Convention is silent on the nature of the title the populations will have on the new lands. The new lands will be beyond the purview of Article 11 due to the lack of traditional occupation; Bennett, *supra* note 92 at 40. However, Bennett argues that the 'quality of land' includes the "nature of the occupier's" title and thus where the populations were owners of the lands, they shall be the owners of the new lands also. Bennett also draws support from the language of Article 12(2) for his argument and asserts that the new lands will be "suitable to provide for their present needs and future development" only if the tribal community exercises title over such lands. This also implies that the relocation mandated by the Convention is permanent in nature; see Lee

does not refer to quantity, the CEACR has called upon states to base the quantity of the resettlement land on "…the amount of land previously occupied by the displaced tribal population…."[192] Article 12(2) provides for an alternative recourse for the states to their duty to relocate. The CEACR has held that where the tribal populations being removed have not been offered land before the alternative is resorted to, the "…requirements of Article 12(2) are prima facie not met."[193] It appears that the duty to relocate is absolute and unqualified qua the state and the choice of opting for the alternative forms of compensation in Article 12(2) rests with the tribal populations.[194]

Where chances of alternative employment for the populations exist *and* where the populations so prefer, the state may discharge its obligation under Article 12(2) by providing compensation to the displaced tribals in money or kind "under appropriate guarantees."[195] Thus, compensation in money or kind in lieu of compensation in lands is sufficient to discharge the obligation of the state under Article 12(2) only: where the populations have been offered land but prefer this alternative to relocation coupled with the chance of alternative employment.[196]

Swepston & Roger Plant, "International standards and the protection of the land rights of indigenous and tribal populations" (1985) 124:1 International Labour Review 91 at 103 [Swepston & Plant, "Standards"].

[192] ILC, *Report 1996*, *supra* note 169 at 269. Whenever tribals that have a right to ownership under Article 11 are being displaced, the quantity of the land ought to take into account the entire land that they "traditionally occupy".

[193] ILC, *Report 1986*, *supra* note 153 at 260. The government of India had notified the CEACR that for the Sardar Sarovar Dam project, it was contemplating compensation and employment guarantees instead of compensation in the form of alternative lands for the displaced tribals that were not in cultivation of lands; see Section 2.3.1, above, for context.

[194] See also Bennett, *supra* note 92. The continued supervision of the ILO Committees prompted India to adopt the *Forest Rights Act* in furtherance of its international obligations. The Act includes the duty to relocate. The CEACR has questioned India whether such relocations comply with Article 12 of the Convention; see ILC, *Report 2014*, *supra* note 159. Swepston notes that the use of the word removal in Article 12 does not carry with it the strong implications of mandatory relocation in all circumstances; "New Step", *supra* note 88 at 706. But see CEACR, *Direct R India 2009*, *supra* note 184. The CEACR used the word relocation in place of removal and noted that the Convention mandates "the Government to mitigate the effects of development projects involving, as an exceptional measure, relocation of the tribal populations through resettlement and compensation" (*ibid*). Also this duty is viewed as very important because it may induce tribal populations to voluntarily relocate to the new lands; see Swepston & Plant, "Standards", *supra* note 191 at 103.

[195] *ILO Convention 107*, *supra* note 13, art 12(2). The Convention is silent about the procedural obligations for providing alternate lands and compensation.

[196] See text accompanying note 193.

In addition to the afore-stated alternatives, the populations are entitled to full compensation for any loss or injury caused to them by the removal/relocation.[197] However, Articles 12(2) and 12(3) have been criticized for being very weak.[198] The Convention is silent on the basis for determining compensation.[199] Bennett suggests that factors in determining compensation must include "acreage, topography, climate and soil, availability of water, timber (commercial value and/or local use value), proximity to transportation routes, population density and movement, local and national economic conditions, and the highest and best use of the land."[200] But these factors are purely economic in nature and "…do not reflect concern about the noxious effects of removal upon indigenous [and tribal] peoples and cultures…." [201] Unfortunately, the ILO Committees have not addressed the basis of determining compensation under Articles 12(2) and (3).

Article 12 reflects the state's duty to effectively protect tribal title vis-à-vis state sponsored action on tribal lands. But the Convention is silent on aspects of non-state illegal intrusion by "…alien invaders, whether multinational corporation[s] or individual prospector[s]…" on the traditional tribal lands.[202] However, Article 11 has been read to impose a positive obligation on the state to effectively protect traditional tribal lands from

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[197] *ILO Convention 107*, *supra* note 13, art 12(3).

[198] See e.g. Swepston, "New Step", *supra* note 88 at 705.

[199] Pinéro suggests that the duty to compensate in the Convention stems from the notion of formal equality and is thus purely economic in nature.; *supra* note 68 at 211. Bennett agrees that the purpose of Part II of the Convention is to guarantee equality in land ownership to the tribal communities at par with the rest of the non-tribal society. Given the purpose, compensation for the compulsory expropriation of tribal land must be paid at full market value or on the basis that is used to assess compensation of the compulsory acquisition of land of other non-tribal land within the state. Bennett further comments, that based on the state reports, it can be inferred that in theory, most of the member states agree with this reading of the Article, however, their practice may vary; *Supra* note 92 at 40. But the difficulty with full compensation is that tribal populations often have a spiritual and cultural connection with land that is not capable of monetary translation; see Thornberry, *Human Rights*, *supra* note 57 at 361.

[200] *Supra* note 92 at 40.

[201] Pinéro, *supra* note 68 at 211. Thornberry has noted that the Convention does not cast a duty on the state to recognize the spiritual value of land to such populations; *Human Rights*, *supra* note 57 at 334.

[202] Thornberry, *Minorities*, *supra* note 79 at 361. This omission has been credited to the ILO's endorsement of the free enterprise system and the proposal to include an express provision of restoration of lands unlawfully appropriated from tribal populations was rejected as being too drastic by the ILO; Bennett, *supra* note 92 at 20. However, as pointed out in *supra* note 169, the supervisory committees have held that tribals have a right to recover traditional lands involuntarily lost to non-tribal in recent years under Article 11.

spontaneous encroachment by non-tribals and prevent the assignment of title or use of traditional lands to non-tribals.[203]

2.3.2.2 Alienation of Land

While Articles 11 and 12 seek to protect tribal title against involuntary segregation of tribals from their traditional tribal lands, Article 13(1) extends protection to tribal title in the context of alienation that may involve a form of tribal consent.[204] Article 13 (2) imposes a duty on the state to make arrangements:

> to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.[205]

Thus, Article 13(2) of the Convention places an obligation on the state to make arrangements to ensure that non-tribal persons do not obtain title or use of traditional tribal lands by taking advantage of the customs of the tribal community concerned or their lack of understanding of national laws.[206] Further, Article 5(1) of *Recommendation No. 104* encourages the state to restrict "…the direct or indirect lease of land owned by members of the populations concerned to persons or bodies not belonging to these populations…" except in "exceptional circumstances defined by law."[207] Article 6 of *Recommendation No. 104* further states "[t]hat

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[203] See ILC, *Report 2014*, *supra* note 159; ILC, *Report 2016*, *supra* note 176. In both cases, Bangladesh was questioned by the CEACR about the measures it had taken to fully investigate cases of illegal seizure of traditional tribal lands by non-tribals. Similarly, the CEACR noted in the case of Peru that the state had failed to intervene to prevent forceful invasion of indigenous lands by non-tribal settlers in violation of Article 11; ILC, *Report 1991*, *supra* note 126.

[204] *ILO Convention 107*, *supra* note 13, art 13(1).

[205] *Ibid*, art 13(2). The purpose of Article 13(2) appears to be to protect tribal land from mala-fide transactions. Thus, the Article does not seem to operate to restrict tribal communities from transferring title or use rights to non-tribal individuals but operates to prohibit such transfers based in tribal peoples' ignorance of law and misuse of tribal customs. Bennett argues that imposing an absolute prohibition on the alienation of tribal land would have perpetuated segregation and violated the integrationist thrust of the Convention; *Supra* note 92 at 41. The Article is not self-executing but requires a state to make arrangements to prevent such transfers. The Convention is silent on the nature or arrangements that the state is obliged to make.

[206] It is unclear whether tribals have a right to recover lands whose ownership or use may have been obtained in such a manner. However, given the language of the provision, securing such ownership or use of tribal lands by non-tribals appears to amount to encroachment on tribal lands and thus may require restoration of lands recently lost in this manner; see *supra* note 169.

[207] *Recommendation*, *supra* note 74, art 5(1). Article 5(2) of the Recommendation further states that "[i]n cases in which such lease is allowed, arrangements should be made to ensure that the owners will be paid equitable

the mortgaging of land owned by members of the populations concerned to persons or bodies not belonging to these populations should be restricted."[208]

2.4 Collaboration and Participation[209]

The Convention does not explicitly require the state to ensure direct participation of tribal populations in decision-making as a measure to safeguard their rights and interests.[210] Article 5(1) imposes a vague duty to collaborate.[211] Article 5(1) obliges the state to "seek the collaboration of these populations and of their representatives" when adopting measures giving effect to the relevant provisions of the Convention.[212] Thus, all measures to give effect to the duty to fully recognize and effectively protect tribal title discussed above must be formulated and implemented in collaboration with the tribal populations and their representatives.[213] The CEACR has clearly indicated that this duty of the state extends to the adoption of legislation.[214]

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rents. Rents paid in respect of collectively owned lands should be used, under appropriate regulations, for the benefit of the group which owns it" (*ibid*, art 5(2)).

[208] *Ibid*, art 6. Only Article 13(2) of the Convention creates binding obligations. The vague provisions of *Recommendation No. 104* are merely directory in nature.

[209] While the Convention only uses the term collaboration, recent reports of the ILO supervisory committees use the heading collaboration and participation" for their discussion of Article 5(1) of the Convention.

[210] See Barsh, *supra* note 138 at 218.

[211] Article 5 reads:

> [i]n applying the provisions of this Convention relating to the protection and integration of the populations concerned, governments shall - (a) seek the collaboration of these populations and of their representatives; (b) provide these populations with opportunities for the full development of their initiative; (c) stimulate by all possible means the development among these populations of civil liberties and the establishment of or participation on elective institutions.

ILO Convention 107, *supra* note 13, art 5. However, the Committees have been using the terms consultation, participation and collaboration, interchangeably.

[212] *Ibid*. In 2012, the CEACR asked Tunisia for information "on the measures adopted or envisaged to give effect to the relevant provisions of the Convention…specifically the measures adopted to seek the collaboration of the representatives of these populations…." International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations*, ILO, 101st Sess, ILO 100/III1A, (2012) at 955. According to Thornberry, the term "representatives" is a tool to bypass collaboration with the traditional leadership of these populations; *Minorities*, *supra* note 79 at 350. However, the Committees have stressed that Article 5(1) requires participation of tribal peoples and tribal leaders in addition to their formal representatives; see e.g. International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Articles 19, 22 and 35 of the Constitution, Information and Reports on the Application of Conventions and Recommendations,* ILO, 93rd Sess, Report III (Part 1A), (2005) at 471 [ILC, *Report 2005*], observations on Bangladesh.

[213] See ILC, *Report 2016*, *supra* note 176 and 538, wherein the CEACR reiterated for Bangladesh the duty of the state to fully recognize and effectively protect the land rights of the tribals in collaboration with their

Notably the express duty to collaborate/consult in the Convention is narrow in scope and is limited to the measures, including legislation, applying the provisions of the Convention and does not expressly extend to all matters/decisions that may affect the rights and interests of tribal populations.[215] Yet, in line with the reading of the land rights provisions of the Convention, the CEACR has amplified the role of this scanty duty to collaborate. Article 5(1) has been interpreted to place a general obligation on the state to collaborate/consult with tribal populations in respect of any matter that may directly affect them.[216] Thus where any action of the state, including any economic development project that may directly affect tribal land rights is being contemplated, the state is under a duty to consult with the affected tribal populations regarding matters that affect them directly.[217] Further, the

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leaders. The comment was made in the context of adopting measures to effectively protect against illegal encroachment of traditional tribal lands by non-tribals in violation of Article 11 and Article 13. In 2013, CEACR noted in its observation for Panama that Article 5 obliges the state to "seek the collaboration of the [tribal] and indigenous populations and their representatives…[in] the formulation and implementation of the relevant measures." CEACR, *Direct Request to Panama - adopted 2013*, ILO, 103rd Sess, (2014), online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3148877> [CEACR, *Direct R Panama 2013*]. The CEACR expressed concern for the displacement of indigenous populations from their traditional lands to make way for a hydroelectric project in Panama. The lands were incorrectly deemed to be state lands but the CEACR called upon the state to take all necessary measures to recognize the right of ownership of the affected indigenous communities, in collaboration with their representatives. Similarly, in 1989 CEACR had hoped that the land survey for the purpose of demarcation of tribal lands in Bangladesh would be conducted in consultation with tribal leaders and their organizations; ILC, *Report 1989*, *supra* note 161.

[214] See ILC, *Report 2010*, *supra* note 41. The CEACR asked Panama about the extent to which indigenous peoples were consulted in the preparation of the draft legislation that contained a special procedure for recognizing the collective right to ownership of indigenous peoples to their traditional lands.

[215] Pinéro opines that this duty to collaborate was also subordinate to the objective of integration and the *travaux préparatoires* clearly indicate that this provision was not included to promote the involvement of these populations in deciding the need or the direction of state policies qua tribal peoples; *supra* note 68 at 193. The Convention does not place a general duty to consult on the state. The absence of this duty reflects that, at the time of drafting if the Convention, tribal populations were presumed to be incapable of expressing their opinions or that their opinion was considered to deserve no respect; Bennett, *supra* note 92 at 22.

[216] The duty to consult in all matters that directly affect tribal rights and interests is now considered a norm of customary international law; see Pentassuglia, *supra* note 17 at 199. The CEACR reiterated to Bangladesh that Article 5(1) requires tribal collaboration and participation in formulating and implementing all measures that affect tribal peoples; ILC, *Report 2014*, *supra* note 159.

[217] Pertinently, the CEACR expressed concern over the decision of leasing of tribal traditional land of the Dongria Kondh and Kutia Kondh tribes in India for a bauxite-mining project without the "…involvement of the tribal communities affected in matters relating to the project which affect them directly." ILC, *Report 2010*, *supra* note 41 at 771. In another instance, the CEACR noted the displacement of tribal populations from their traditional lands for a hydroelectric project and questioned El Salvador about the manner in which those populations were involved in the decisions that affected them directly; ILC, *Report 2005*, *supra* note 212 at 474. In 2013 the CEACR noted that the indigenous communities in Panama were not consulted in the decision to implement a hydroelectric project on traditional tribal lands; CEACR, *Direct R Panama 2013*, *supra* note 213; Recently, India contended that when contemplated development projects are located in tribal areas, environment

affected tribal populations must be consulted prior to undertaking the action/activity.[218] While the supervisory bodies have not spelled out the procedural and substantive elements of the duty to consult, consultations must be effective and ensure that tribal interests are fully taken into account and accommodated.[219] Clearly, the Convention does not recognize the right to free, prior and informed consent.[220] Also, the ramifications of consultation and collaboration as constituents of effective participation are unclear.[221]

2.5 Conclusion

Until India ratifies the *ILO Convention 169*, the rights and obligations with respect to traditional lands in the *ILO Convention 107* are central to the discourse on tribal land rights in India. The CEACR has noted that a state is under the obligation to give effect to the provisions of *Convention No. 107* that are relevant and consistent with the generally accepted

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clearance and proper rehabilitation and resettlement plans are required as measures to safeguard tribal rights and interest. The CEACR noted the importance of environmental clearance in protecting the tribal habitat "…which is inseparably linked to their cultural, religious and spiritual values and traditions" but questioned the state about how the collaboration of the tribal populations was sought "…in the context of elaborating and authorizing development projects…" located in tribal areas; CEACR, *Direct R India 2009*, *supra* note 184. Notably, India has now adopted the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013*. This statute regulates land acquisition by the state for public purposes and ensures tribal participation in preparing social impact assessment studies and rehabilitation and resettlement measures. Similarly, the CEACR asked India about how the tribal populations and their representatives are being consulted in the preparation of a *National Tribal Policy* that bears upon tribal rights and interests; CEACR, *Direct Request to India - adopted 2015*, ILO, 105th Sess, (2016), online: ILO <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3248871>.

[218] See e.g. CEACR, *Direct R India 2009*, *supra* note 184.

[219] It was alleged that the public hearing held in India prior to leasing out Dongria Kondh land for bauxite mining were insufficient to account for the rights and interests of the tribal community. The CEACR expressed serious concern at this lack of tribal involvement; ILC, *Report 2010*, *supra* note 41.

In fact, the duty to effectively collaborate/consult bears upon a state's compliance with the obligations under Article 6 of the Convention. As mentioned earlier, Article 6 obliges a state to give "high priority" to the improvement of the conditions of life and work and level of education of the populations" in the economic development plans of the "areas inhabited by these population." *ILO Convention 107*, *supra* note 13, art 6. The CEACR noted that Article 6 "does not preclude economic development efforts which assist both tribals and non tribals" but requires that the burden/costs of the project must not fall heavily on the tribal populations and "whether these costs can be reduced or compensated depends on how the other Articles are applied." ILC, *Report 1990*, *supra* note 127 at 325; see *supra* note 183, for a note on compliance with Article 6 in case the activity entails removal from tribal lands. Further, the obligation under Article 6 "clearly extends to any development likely to affect the interests of the local [tribal] community, whether or not it actually entails construction on the customary lands." Bennett, *supra* note 92 at 40. Where the development project affecting tribal lands does not entail removal, compliance with Article 6 will likely depend on how Article 5(1) i.e. the duty to collaborate/consult is discharged.

[220] See Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free prior and informed consent* (New York: Routledge, 2015), for a discussion of the concept of Free, Prior and Informed Consent.

[221] Pentassuglia notes that these ramifications are also unclear in the *ILO Convention 169* and the *UNDRIP*; *supra* note 17 at 170.

human rights principles pertaining to tribal peoples.[222] The land rights provisions fall in this category.[223]

Article 11 of the *ILO Convention 107* is an articulation of the human right to property of tribal and indigenous populations and obliges the state to recognize individual or collective rights of ownership in traditionally occupied tribal lands.[224] Article 11 prohibits state interference with tribal lands under traditional occupation without respect for the pre-existing right of tribal land ownership. The extensive examination of India's Sardar Sarovar Dam project by the supervisory committees of the ILO clarifies that all lands, including forest lands, irrespective of formal title/authorization that are occupied by the tribal populations by way of tribal practice of various forms, not limited to cultivation, may fall within the scope of Article 11.[225] The test for the recognition of the right to ownership on occupied lands is that such occupation must be traditional. The qualitative/subjective dimension of the term 'traditional' has been clearly spelled out by the CEACR as lands whose use has become an integral part of the tribal way of life.[226] However, its quantitative/objective dimension i.e. the length of traditional occupation that will raise the presumption of the subjective dimension is less clear.[227]

As a promotional interim measure, where a state ensures firm assurance of use and possession, such assurance will not constitute a violation of the right to ownership in Article 11.[228] Such an assurance *is a good interim measure* until the state fully conforms to its obligations under the Convention.[229] The legal status of the right to ownership that the *ILO Convention 107* obliges the state to recognize should not be any less than the status of

[222] ILC, *Report 2011*, *supra* note 118 at 797.
[223] *Ibid*.
[224] *Supra* note 13.
[225] See Section 2.3.1.1, above.
[226] *Ibid*.
[227] See Thornberry, *Human Rights*, *supra* note 57 at 353.
[228] See Swepston, "New Step", *supra* note 88 at 701.
[229] *Ibid*.

ownership conferred on others by the state.[230] Any lesser understanding of the legal status of the tribal right to ownership, once it has been recognized by the state, will be discriminatory. Article 11 does not seem to require formal titling of traditional lands, but the state is under an obligation to recognize the "owner's powers in the legal and factual sense" over the lands in question.[231] Further, even though the state must pay regard to the customary laws of tribals in determining the nature and scope of the right to ownership, the Convention does not contemplate a separate land rights regime for tribal populations. Article 11 of the Convention has been interpreted to place an obligation on the state to delimit and demarcate tribal and indigenous lands and to adopt procedures to settle conflicting land claims between tribals and non-tribals.[232] The Convention does not recognize tribal ownership rights in the minerals underneath the land traditionally occupied by tribal populations.[233] However, where state sponsored exploitation of sub-soil minerals in conducted in a manner that adversely affects tribal rights and interests that have been recognized and protected in the Convention, such exploitation may amount to the violation of the Convention.[234]

The Convention also seeks to effectively protect tribal ownership from state sponsored incursions and non-tribal encroachment. Article 12 expressly restricts the actions of the state vis à vis the "habitual territories" occupied by tribal populations.[235] Article 12(1) of the Convention places a general prohibition on the state not to remove these populations from their 'habitual territories' without obtaining their collective free consent.[236] However, Article 12(1) provides that tribal populations may be involuntarily removed from their

[230] Barsh, *supra* note 138 at 225.
[231] Graver & Ulfstein, *supra* note 65 at 350.
[232] See Section 2.3.1.3, above.
[233] See Section 2.3.1.4, above.
[234] *Ibid*. As already pointed out, the CEACR has expressed serious concern regarding leasing of the traditional tribal land of the Dongria Kondh and Kutia Kondh tribes in India for bauxite mining without tribal consultation; see ILC, *Report 2010*, *supra* note 41.
[235] *ILO Convention 107*, *supra* note 13, art 12. The Convention does not prohibit development projects on traditional lands but Article 12(2) and 12(3) read with the duty to collaborate in Article 5(1) serve to account for, mitigate and compensate for the costs of the projects.
[236] *Ibid*; see also Thornberry, *Minorities*, *supra* note 79 at 360.

habitual territories, as an exceptional measure, on grounds of national security, national economic development or health of these populations.[237] Nevertheless, the CEACR has indicated that the state must endeavor to obtain the free consent of the tribal populations before involuntary removal is contemplated.[238] Also such removals must be statutorily authorized.[239] Where removal is carried out, whether voluntarily or involuntarily, the state is under an obligation to provide alternative lands of at least equal quality and suitable to meet present needs and the needs of future development of the affected populations.[240] Article 12(2) provides for an alternative recourse for the state to fulfill its duty to relocate in the form of payment of compensation.[241] However, the state must offer alternate land before the affected tribal populations opt for compensation instead and must ensure that chances for alternative employment exist.[242] In addition to the afore-stated alternatives, the populations are entitled to full compensation for any loss or injury caused to them by the removal/relocation.[243]

Article 5(1) of the *ILO Convention 107* has been interpreted to place a general obligation on the state to collaborate/consult with tribal populations in respect of any matter that may directly affect them.[244] Thus, where any action of the state is being contemplated, including any economic development project that may directly affect tribal land rights, the state is under a duty of prior consultation with the affected tribal populations regarding matters that affect them directly. While the supervisory bodies have not spelled out the procedural and substantive elements of the duty to consult, consultations must be effective and ensure that tribal interests are fully taken into account and accommodated.

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[237] *ILO Convention 107*, *supra* note 13, art 12(1).
[238] ILC, *Report 1996*, *supra* note 169.
[239] *ILO Convention 107*, *supra* note 13, art 12(1).
[240] *Ibid*, art 12(2).
[241] *Ibid*.
[242] *Ibid*.
[243] *Ibid*, art 12(3).
[244] See Section 2.4, above. The duty to consult in all matters that directly affect tribal rights and interests in now considered a norm of customary international law; see Pentassuglia, *supra* note 17 at 199.

As discussed, the original thrust of the *ILO Convention 107* was the integration of the tribal populations into the dominant society. Yet, it was the first legally binding instrument to impose obligations on the state, *inter-alia*, with respect to the land rights of tribal populations.[245] In spite of the integrationist and paternalistic elements of the *ILO Convention 107*, the Convention has provided significant protection to tribal lands in its contemporary application. The progressive interpretation of the Convention by the supervisory bodies of the ILO paved the way to:

> …the emergence of a *sui generis* regime on the rights of tribal and indigenous peoples within the framework of the contemporary human rights system. A regime that emerged as a response to, yet inextricably linked with, international legal norms that actively promoted indigenous peoples' final assimilation.[246]

Even though the ILO has gone far in adapting the language of the *ILO Convention 107* to the contemporary understanding of tribal land rights, there are limits to the interpretive transformations that can be introduced through the language of an instrument. A demand for revision of the Convention led to the birth of a stronger *ILO Convention 169*.[247] However, credit for the strength of the *ILO Convention 169* goes to the limitations of the *ILO Convention 107*.[248]

[245] Thornberry, *Minorities*, *supra* note 79 at 345.
[246] Pinéro, *supra* note 68 at 234 [emphasis in original].
[247] *Supra* note 14.
[248] Swepston, "New Step", *supra* note 88 at 683.

CHAPTER THREE

CERD AND THE RIGHT TO TRIBAL PROPERTY

3.1 Introduction

The norm of non-discrimination is central "to the human rights enterprise - part of its architecture."[249] As is evident from its title, the obligation of abolishing racial discrimination is central to the *CERD*.[250] In compliance with this obligation, the *CERD* demands equality before the law, *inter-alia*, in the enjoyment of the human right to own property alone as well as in association with others.[251] However, human rights are not absolute and *General Recommendation No. XIV* adopted by the Committee on the Elimination of Racial Discrimination ("CERD Committee"), elaborates upon reasonable differentiation in treatment that may not amount to discrimination.[252] Thus, even though the *CERD* does not create a human right to property, Article 2 and Article 5 of the *CERD* guarantee racial non-

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[249] Patrick Thornberry, "Confronting Racial Discrimination: A CERD Perspective" (2005) 5:2 Human Right Law Review 239 at 254 (HeinOnline) [Thornberry, "A CERD Perspective"]. Human rights by definition are rights inherent in all human beings.

[250] *Supra* note 17. The principle of non-discrimination is contained in all major human rights instruments adopted within the framework of the United Nations. The principle is widely accepted as a norm of customary international law today. In fact the principle is regarded as a member of the class jus cogens or overriding principles of international law; see Pritchard, "Native Title", *supra* note 17; Gillian Triggs, "Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)" (1999) 23 Melbourne UL Rev 372; Fergus MacKay, "Indigenous Peoples' Rights and the UN Committee on the Elimination of Racial Discrimination" in Solomon Dersso, ed, *Perspectives on the rights of minorities and indigenous peoples in Africa* (Cape Town: PULP, 2010) [MacKay, "CERD"]; Thornberry, "A CERD Perspective", *supra* note 249.

[251] A similar guarantee is included in Article 17 of the *Universal Declaration of Human Rights*: "17(1)- Everyone has the right to own property alone as well as in association with others; 17(2)- No one shall be arbitrarily deprived of his property". *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*]. Thus no one can be deprived of their property in an arbitrary or discriminatory manner and the "right to property, in this sense, has attained the status of customary international law." Pritchard, "Native Title", *supra* note 17 at 137. Triggs asserts that the *Universal Declaration of Human Rights* which was originally contemplated to contain a "statement of guiding principles…is now recognized as an authoritative interpretation of international standards in respect of human rights." *Supra* note 250 at 376.

[252] Committee on the Elimination of Racial Discrimination, "*General Recommendation No XIV (42) on article 1, paragraph 1, of the Convention*" in *Report of the Committee on the Elimination of Racial Discrimination* UNCERDOR, 42nd Sess, UN Doc A/48/18 (1994) 114. [*GR XIV*]. Differential treatment that may affect the enjoyment of the human rights of individuals including the right to property is permissible provided it does not have an "unjustified disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin" (*ibid* at para 2). The Committee on the Elimination of Racial Discrimination is comprised of eighteen independent experts and is responsible for overseeing the implementation of the *CERD*. Like other treaty bodies under the United Nations, the Committee also adopts General Recommendations that elaborate upon provisions of the *CERD* or deal with specific issues.

discrimination and equality before the law in the enjoyment of human rights including the human right to property.[253] *General Recommendation No. XXIII* reaffirms that the guarantee in the *CERD* extends to indigenous peoples.[254] The CERD Committee receives periodic state reports and makes comments and recommendation upon them.[255] The Committee also reaches decisions and makes recommendations under its Early Warning Measures and Urgent Action Procedures ("EW/UA procedures").[256] This chapter examines how the obligation of

[253] *Supra* note 17. The human rights enumerated in Article 5 are not exhaustive; see Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Covenant on the Elimination of All Forms of Racial Discrimination*, UNCERDOR, 75th Sess, UN Doc CERD/C/GC/32 (2009) [*GR 32*]; Thornberry, *Human Rights*, *supra* note 57. Further, equality before the law in matters of property mandates recognition and protection of customary ownership of indigenous and tribal peoples and in that sense, the *CERD* may be said to reaffirm the status of right to property sourced in the customary law of peoples; see discussion of the content of the right to equality in Section 3.4, below. Bayefsky notes that equality and non-discrimination are positive and negative expressions of the same principle; Anne F Bayefsky, "The principle of equality or non-discrimination in international law" (1999) 11 HRLJ 1. The two expressions have been used interchangeably in this thesis.

[254] Committee on the Elimination of Racial Discrimination, "General Recommendation on the rights of indigenous peoples, adopted by the Committee, at its 1235th meeting, on 18 August 1997" in *Report of the Committee on the Elimination of Racial Discrimination*, UNCERDOR, 52nd Sess, Supp No 8, UN Doc A/52/18 (1997) 122 [*GR XXIII*]; see Claire Charters & Andrew Erueti, "Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) VUWLR at 259. Further, Thornberry notes that the *CERD* "is group-oriented…opening up significant possibilities for addressing the collective interests of indigenous groups within the parameters of the Convention rights." *Human Rights*, *supra* note 57 at 208.

The *CERD* hinges on non-discrimination based on race, colour or national or ethnic origin and thus, will apply equally to other ethnic groups including tribals. Further, tribal peoples are more akin to indigenous peoples than to any other minority; see *Saramaka*, *supra* note 149. Notably, India has always maintained a stance in its periodic reports under the *CERD* that tribes in India are not distinct groups entitled to special protection under the Convention; see e.g. Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under article 9 of the Convention: Nineteenth periodic reports of States parties due in 2006, Addendum, India*, UNCERDOR, 2006, UN Doc CERD/C/IND/19 at para 17. The Committee in its concluding observations on India's 2006 periodic report directed the attention of the state to *General Recommendation No. XXIII* while noting "with concern that the State party does not recognize its tribal peoples as distinct groups entitled to special protection under the Convention." CERD Committee, *Concluding Observations India 2007*, *supra* note 41 at para 10. Thus the rights and obligations discussed in this chapter apply equally to both indigenous peoples and tribals and any reference to one with regards to the rights and obligations will include the other.

[255] *CERD*, *supra* note 17, art 9.

[256] The CERD Committee adopted a working paper in 1993 to guide its working in dealing with the possible measures to prevent serious violations of the *CERD* and to deal effectively with such violations; Committee on the Elimination of Racial Discrimination, "Prevention of racial discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination" in *Report of the Committee on the Elimination of Racial Discrimination* UNCERDOR, 42nd Sess, UN Doc A/48/18 (1993) 125. In 1994, during its 45th session, the Committee decided that EW/UA procedures should become part of its regular agenda; "Encroachment on the traditional lands of indigenous peoples or forced removal of these peoples from their lands…" may call for invoking the EW/UA procedure; Committee on the Elimination of Racial Discrimination, "Guidelines for the Use of the Early Warning and Urgent Action Procedures" in *Report of the Committee on the Elimination of Racial Discrimination* UNCERDOR, 70th & 71st Sess, UN Doc A/62/18 (2007) Annex 3 at para 12. See MacKay, "CERD", *supra* note 250, for a brief discussion of the procedure. Apart from state reports and EW/UA measures, Article 11 of the Convention provides for a state-to state complaint procedure; in addition states may declare the competence of the Committee to hear individual complaints under Article 14 of the *CERD*; s*upra* note 17, art 14.

non-discrimination and equality before law, especially in matters of property contained within the *CERD*, bear upon the issues of tribal/minority title rights to land. In other words, this chapter will canvass the rights and obligations in international law that are created by the operation of the international norm of non-discrimination when applied to tribal/minority property rights. The principle of non-discrimination in the *CERD* bears upon the issue of enjoyment of tribal title rights in international law in two ways:[257] in matters of alleged violations of the human right to property; and as a distinct right not to be discriminated against. The two influences are complex and permeable.

The second section of this chapter discusses the implications of the application of the principle of non-discrimination in matters of violation of the legally recognized property rights of tribal/indigenous peoples within a state. The third section focuses on the obligations of a state to recognize and protect tribal ownership of traditional lands with reference to international developments in the content of the human right to property read in conjunction with the principle of non-discrimination. The fourth section explores the content of the right to substantive equality as the jurisprudential basis for the obligation to recognize and protect the land rights of tribal populations sourced in customary laws. Section five will discuss the obligations of effective participation, informed consent, restitution and compensation. The last section concludes the chapter.

3.2 Equality Within Legal Systems

The Preamble to the *CERD* encourages universal observance and respect for human rights.[258] The right to own property in international law is a human right that may or may not be enforceable under municipal law.[259] However, the enjoyment of the international human

[257] Pritchard, "Native Title", *supra* note 17 at 138.
[258] *Supra* note 17, Preamble.
[259] *Mabo v Queensland (No 1)*, [1988] HCA 69, (1988-89) 166 CLR 186 [*Mabo#1*]. However, the right to property, as a domestic concept is now a feature of most domestic legal systems; see John G Sprankling, "The

right to property is dependent upon domestic law and a domestic law that operates in a manner that causes unequal enjoyment of the human right by persons of different ethnic origins is discriminatory in the eyes of international law.[260] Article 5 of the *CERD* reads:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> …
> (d) Other civil rights, in particular:
> …
> (v) The right to own property alone as well as in association with others;
> (vi) The right to inherit;….[261]

Thus, the denial of the enjoyment of the human right to property to peoples on the basis of race, colour, or national or ethnic origin amounts to racial discrimination.[262] In that sense, racial equality can be seen as a further obligation to be fulfilled by the state in addition to the already existing obligations implicit in the human right to property.[263] The impairment of proprietary rights "without any compensation or any procedure for ascertaining or assessing the existence and extent of the claims of particular individuals is a denial of the entitlement to ownership and inheritance of property including the implicit immunity from arbitrary dispossession…" and this denial is further discriminatory if it is confined to traditional property or tribal/indigenous property alone.[264] The principle of non-discrimination "clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and

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Global Right to Property" (2014) 52 Colum J Transnat'l L 464. But clearly the content of the human right to property and the domestically recognized right to property differ.

[260] *Mabo#1*, *supra* note 259.

[261] *Supra* note 17.

[262] Article 1 of the *CERD* states that racial discrimination "shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." *Supra* note 17, art 1. The related rights and freedoms are set out in Article 5.

[263] The content of the human right to property is constantly evolving. The most relevant evolution is with regards to the customary property rights of tribals and indigenous peoples.

[264] *Mabo#1*, *supra* note 259 at 232.

inherit property as it clothes other persons in the community."[265] Where domestic law recognizes the right to property, tribal peoples are entitled to their customary property rights in the same manner and to the same extent as all the other right holders within the legal system. Whenever persons are arbitrarily deprived of their existing legal rights to property, it constitutes a violation of their human right to property and "it is not the source or history of legal rights which is material but their existence."[266] The source of legal rights may be municipal law or customary law of minorities. Thus, the legally recognized right to property sourced in customary law of tribals is protected in the same manner as the proprietary rights recognized by municipal law as long as the rights under customary law have not been lawfully extinguished.[267] Therefore, tribal and indigenous peoples are entitled to the equal enjoyment of both the customary property rights particular to them and also the property rights that everyone is entitled to under the law of the state.[268] Violation of both these classes of legal rights in an arbitrary and discriminatory manner will violate the provisions of the *CERD*.[269] The right not to be discriminated against in the enjoyment of property is violated

[265] *Ibid* at 219. The court made the observation with regards to the native title rights of the Meriam peoples of Australia. Native title, as one form of domestic recognition of property rights of indigenous people, has been recognized by common law in Canada, Australia and New Zealand.
[266] *Ibid* at 218.
[267] The human right to property is not absolute and thus may be extinguished lawfully and justly without discrimination. The substantive and procedural safeguards against unlawful extinguishment in international law are beyond the scope of this thesis.
[268] See *Mabo#1*, *supra* note 259. The Court was proceeding with the demurrer on the assumption that traditional rights of the Meriam people had survived annexation and therefore they were entitled to the right to property under customary law that had survived and was recognized by common law and also the right to property guaranteed by the state to all Australians. It may *prima facie* appear that deprivation of the 'exclusive' property rights enjoyed by minorities in customary law within a state will not be discriminatory since it merely equates everyone. However, such formal treatment is contrary to the concept of substantive equality discussed in Section 3.4, below; see Pritchard, "Native Title", *supra* note 17; Triggs, *supra* note 250.
[269] In fact, in the *New Zealand Foreshore and Seabed Act* ["*FSA*"] matter, the Maori Land Court was authorized under the *Te Ture Whenua Maori Act 1993* to determine customary ownership of land in accordance with customary law and to further convert it into a fee simple title. Thus, the customary ownership rights of the Maori had formal legal status in the settler legal system in addition to common law native title. The *FSA* extinguished these legal rights of the Maori. The CERD Committee took up the matter under its EW/UA procedure and found that the Act discriminated against the Maori; Committee on the Elimination of Racial Discrimination, *Decision 1 (66): New Zealand Foreshore and Seabed Act 2004*, Dec 1 (66), UNCERDOR, 66th Sess, UN Doc CERD/C/66/NZL/Dec1 (2005) [*NZ Decision 1(66)]*. In its state report in 2012, New Zealand, after much resistance to the CERD Committee's decision, intimated the Committee that the *FSA* has been repealed and replaced by the *Marine and Coastal Area (Takutai Moana) Act 2011*, particularly in view the finding of its discriminatory effect on Maori land rights; see Committee on the Elimination of Racial

when similarly situated persons are treated differently without a reasonable justification.[270] Any domestic proposal that abrogates/affects property rights sourced in tribal customary law alone and not in state law is discriminatory.[271] Thus, any practice or legislation that has the effect of extinguishing or diminishing the legal property rights of tribals or indigenous peoples without affecting the property rights of other right holders, without reasonable justification, violates the non-discrimination principle.[272] In the Committees' decision on New Zealand, counsel for the Maori had argued that the *FSA* was discriminatory, *inter-alia*, on the ground that it abrogated property interests in the foreshore and seabed found in customary law without affecting non-customary property rights.[273]

However, what if customary ownership under traditional law is not accorded the status of recognized legal rights within the state? Does the principle of racial non-discrimination or equality in matters of property contained in the *CERD* place an obligation to take positive measures to recognize and protect customary ownership under traditional law?

Discrimination, *Reports Submitted by States Parties Under article 9 of the Convention: Eighteenth to twentieth periodic reports of States parties due in 2011, New Zealand*, UNCERDOR, 2012, UN Doc CERD/C/NZL/18-20 at para 42.

[270] Thornberry, "A CERD Perspective", *supra* note 249. *General Recommendation No. XIV*, *supra* note 252, explains legitimate differentiation.

[271] Pritchard, "Native Title", *supra* note 17.

[272] The *CERD* prohibits any practice or legislation that has the 'purpose' or the 'effect' of discriminating. Intent is irrelevant; see Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America*, UNCERDOR, 72nd Sess, UN Doc CERD/C/USA/CO/6 (2008) at para 10. Bayefsky opines that, thus, intention is not a requirement for determining a denial of equality in international law; *supra* note 253.

[273] The committee found the *FSA*, "…on balance, to contain discriminatory aspects against the Maori.…" *NZ Decision 1(66)*, *supra* note 269 at para 6; see Charters & Erueti, *supra* note 254. The *FSA* extinguished the customary rights of the Maori capable of recognition by the Maori Land Court and also impeded the common law native title rights with regards to the foreshore and seabed and replaced it with a statutory rights regime. In particular, the jurisdiction of the Maori Land Courts was diminished to the recognition of particular customary use rights only. On the other hand, non-customary property rights in the foreshore remained unaffected. An interesting argument in the literature is that where a statute validates violative acts and protects such acts from invalidity on the grounds of existence of native title to land alone by providing for extinguishment of such rights while the validity of such acts on "other non-racially based causes of potential invalidity" remains open and unaffected, such a statute is discriminatory; see Triggs, *supra* note 250 at 379.

3.3 Equality Between Legal Systems

Counsel in the New Zealand matter argued before the CERD Committee that the principle of equality requires treating indigenous legal systems at par with state legal systems.[274] Consequently, international law forbids "discrimination between property rights recognized under state law and property rights recognized under indigenous law."[275] Pritchard has argued that the human right to property read in conjunction with the principle of non-discrimination forms a basis for the international recognition and protection of the land rights of indigenous peoples and tribals.[276] Contemporary international law recognizes and protects land rights under indigenous law and recognizes traditional laws and customs of indigenous and tribal peoples as sources of these rights.[277] Thus, one of the arguments before the Committee in New Zealand's EW/UA matter was that the *FSA's* narrow statutory regime does not recognize property rights that the tribals may have within their customary laws.[278] It was asserted that where recognition of property rights is confined to particular activities that are integral to the culture of peoples, the customary legal system that create these rights is left without recognition.[279] Accordingly, counsel for the Maori argued that the *FSA* was discriminatory for not recognizing Maori property rights according to Maori customary law.

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[274] Charters & Erueti, *supra* note 254 at 271. James Anaya notes, "if the world is to treat indigenous peoples equally, it must regard their own property systems as valid." Anaya, "Keynote", *supra* note 79 at 266.

[275] Charters & Erueti, *supra* note 254 at 271.

[276] *Supra* note 17.

[277] This may be argued as an additional basis for the obligation to recognize and protect the land rights of indigenous peoples; see *supra* note 149, above, for more on this topic.

[278] Charters & Erueti, *supra* note 254. The New Zealand government had asserted that *FSA* contains all the rights that common law native title offers and actually goes beyond it by recognizing a native title right to exclusive occupation in seabed (however the recognition of this right merely created the right to negotiate). Interestingly, the state did not make any reference to the extinguishing impact of the Act on the customary ownership rights capable of recognition under the Maori Land Courts whose jurisdiction had been reduced to merely recognizing prescribed customary use rights even in its subsequent periodic reports to the Committee; see Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under article 9 of the Convention: Seventeenth periodic reports of States parties due in 2005, Addendum, New Zealand,* UNCERDOR, 2006, UN Doc CERD/C/NZL/17. Perhaps the reason was that the state had recognized the Act was discriminatory but considered it to be justified differentiation; see Charters & Erueti, *supra* note 254.

[279] Andrew Erueti, "The Use of International Human Rights Fora to Protect Maori Property Rights in the Foreshore and Seabed and in Minerals" (2004) 7 Yearbook of New Zealand Jurisprudence 86 (HeinOnline). Erueti appears to be arguing that for a true equality of the customary and state legal systems suggesting that there must be avenues for recognizing a stronger and more robust property right such as title sourced in customary law.

The counsel argued that *CERD* obliged New Zealand to recognize customary ownership sourced in customary law and that the right to property in conjunction with the principle of non-discrimination must be interpreted to include the obligation to recognize and protect traditional property rights and the traditional legal systems within which they arise.[280] In an interesting observation Thornberry notes that the *CERD* merely lists the human rights and does not define them.[281] This allows for interpretation to stay abreast of developments in international human rights law.[282] This is especially relevant in the area of minority and indigenous land rights.[283] In fact, the CERD Committee has taken note of this development in the interpretation of the international human right to property in conjunction with the non-discrimination principle as manifest in the Committees *General Recommendation No. XXIII*.[284]

> *General Recommendation No. XXIII* places positive obligation on the states to:
>
> (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
> (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
> (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
> (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to

[280] Charters & Erueti, *supra* note 254. The authors note that in accepting this argument, the difficulty that one of the members of the CERD Committee raised was that the international instruments and jurisprudence that recognized traditional land rights of communities found in their traditional law were not binding on New Zealand. However, they assert that the "Committee's jurisprudence should not fall below the standards set by other international instruments and institutions" and further the principle of non-discrimination must be interpreted "to prohibit states treating indigenous property rights under indigenous law differently from other kinds of property rights" (*ibid* at 273, n 59). Even though this finding was not included in the decision handed down by the Committee, Thornberry, one of the members of the Committee hearing the New Zealand matter noted that the *FSA* raised wider questions about the relationship between indigenous customary law and state legal systems (*ibid* at 273).
[281] "A CERD Perspective", *supra* note 249.
[282] *Ibid*.
[283] *Ibid*.
[284] *Supra* note 254. One of the reasons for adopting *General Recommendation No. XXIII* was the concern of some of the Committee members that the Committee's role in human rights protection was being downplayed in some matters, including indigenous issues, and such matters were being referred to the Human Rights Committee instead of the CERD Committee; Doyle, *supra* note 220 at 165.

> their rights and interests are taken without their informed consent;
> (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.
> 5. *The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources* and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[285]

Hence it is obvious that customary title enjoys equal respect under international law including in the *CERD*.[286] Thus, it may be argued that since international law recognizes and protects customary property rights of indigenous and tribal peoples sourced in customary law as part of the human right to property read in conjunction with the principle of non-discrimination, the *CERD*, especially in light of *General Recommendation No. XXIII* should also be interpreted to include this duty to recognize and protect customary property rights of tribals and indigenous peoples sourced in customary law.[287]

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[285] *Supra* note 254 [emphasis added]. *General Recommendation No. XXIII* is technically non-binding. However, it reflects the Committee's understanding of the content of the principle of non-discrimination in matters of indigenous rights; see Anaya, *Indigenous People*, *supra* note 20.

[286] Comments of Patrick Thornberry, member of the CERD Committee addressed to the New Zealand government as noted by Claire Charters and published in Charters & Erueti, *supra* note 254 at 280.

[287] The Committee has on several occasions made recommendations to state parties to fulfill this obligation. For instance in its concluding observations on Suriname's report, the Committee recommended "legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands…." Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname*, UNCERDOR, 64th Sess, UN Doc CERD/C/64/CO/9 (2004) at para 11. This recommendation was again reiterated to Suriname by the CERD Committee acting under its EW/UA procedure. The action was necessitated by the violative impact of Suriname's draft Mining Act; Committee on the Elimination of Racial Discrimination, *Prevention of Racial Discrimination, including early warning measures and urgent action procedure, Decision 1(69), Suriname*, Dec 1(69), UNCERDOR, 69th Sess, UN Doc CERD/C/DEC/SUR/5 (2006); Committee on the Elimination of Racial Discrimination, *Prevention of Racial Discrimination, including early warning measures and urgent action procedure, Decision 1(67), Suriname*, Dec 1(67), UNCERDOR, 67th Sess, UN Doc CERD/C/DEC/SUR/2 (2005) [*Suriname Decisions 1(67)*]. Notably the same issue later led to the important decision by the Inter-American Court of Human Rights; *Saramaka*, *supra* note 149. In the 2014 Suriname informed the CERD Committee about the visit of the Special Rapporteur on the rights of indigenous people, James Anaya and his suggestions in respect of the content and procedure for adopting such a statute recognizing the right of tribals. The report indicated the acceptance of the obligation on part of Suriname; see Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under article 9 of the Convention: Thirteenth to fifteenth periodic reports of States parties due in 2013, Suriname*, UNCERDOR, 2014, UN Doc

To take the argument further, apart from staying abreast of developments in international human rights law, this obligation to recognize and protect may also arise from an interpretation of the fundamental human rights norm of equality found throughout the *CERD* as an independent right, without direct reference to the content of the human right to property being developed in international law.[288] The next section discusses the right to equality as the jurisprudential basis for the obligation to adopt measures, including legislation, to recognize and protect customary ownership sourced in customary law.[289]

3.4 Content of the Norm of Equality and Non-Discrimination

The right to equality imposes both negative and positive obligations upon a state. Thornberry asserts that the principle of non-discrimination is "a way of getting to equality in the enjoyment of human rights by addressing negative practices denying equality."[290] These negative practices include both commissions and omissions. Addressing commissions will require placing negative obligations on the state, while addressing omissions will impose a positive obligation to do what is necessary. Thus, the principle of non-discrimination contains a mandate for positive action within itself. Racial non-discrimination is principally a domestic concern but a "'hands-off', 'neutral' or 'laissez-faire' policy is not enough."[291] But will the principle of racial non-discrimination be violated if the positive action required is race or ethnic origin conscious?

CERD/C/SUR/13-15 at paras 15-16.

[288] It must be acknowledged though that the human right to property in international law has been interpreted to include customary ownership *in conjunction* with the principle of non-discrimination. Thus, the two arguments are interconnected and support each other. The conjunctive reading of the right to property and the norm of non-discrimination illustrate the use of the right to equality as a subordinate clause i.e. a clause that complements another normative principle with no independent existence. However, the analysis that follows relates to the right to equality, now accepted as a customary rule of international law, as an autonomous right. See Bayefsky, *supra* note 253, for a discussion of the use of the right to equality as a subordinate clause and an autonomous right in international law.

[289] Pritchard has posed the question as follows: Are such measures discriminatory? Are these measures special temporary "catch-up" measures or are these measures "implicit or mandated by the principle of equality?" "Native Title", *supra* note 17 at 129.

[290] "A CERD Perspective", *supra* note 249 at 254.

[291] *Ibid* at 261.

The positive obligation implicit in the principle of non-discrimination is a means to achieve equality in the enjoyment of human rights. James Anaya notes that the language of the *CERD* appears to endorse a view of equality that is founded on assimilation.[292] Thus, in that sense the positive obligation, as a means to achieve equality should adhere to the notion of sameness. But the right to equality contained in the *CERD* does not call for equality in form or formal equality but for equality in substance or substantive equality.[293] Substantive equality is contextual in nature and it encompasses both individual and cultural integrity.[294] Although formal equality may call for identical treatment for all, the principle of substantive equality is in fact offended when equal treatment in meted out to persons in unequal circumstances.[295] In other words, the right to equality is offended when a state fails to treat

[292] Anaya, "Keynote", *supra* note 79. Anaya asserts that the reason for the language is that domestic and international law endorsed the formal vision of equality in the 1950s and 1960s when the *CERD* was negotiated. Equality at that time simply meant sameness.

[293] Erueti, *supra* note 279.

[294] Anaya, "Keynote", *supra* note 79. Referring to the CERD Committee's EW/UA decision 1(68) of 2006 with regards to USA's treatment of the Shoshone indigenous peoples, Anaya commented that "the decision reflects a vision of equality that values difference and that sees equality not just in terms of the individual within a presumably homogeneous society, but also sees the individual as part of a group, part of a cultural group, and values that cultural group" (*ibid* at 259). Anaya refers to this interpretive approach as the "realist approach" wherein the underlying values and principles of the treaty are applied in a contextual manner to interpret the relevant norm. Anaya asserts that the decision is landmark because the Committee accepted the vision of equality that encompasses respect for customary land rights.

For the CERD' Committee's decision, see Committee on the Elimination of Racial Discrimination, *Early warning and urgent action procedure, Decision 1 (68), United States of America*, Dec 1(68), UNCERDOR, 68th Sess, UN Doc CERD/C/USA/DEC/1 (2006) [*Shoshone Decision 1(68)*]. The decision pertained to the denial of the traditional rights to land of the Shoshone peoples. The Shoshone peoples' rights to land had been declared to be extinguished by 'gradual encroachment' by the US Indian Claims Commission in 1962 in spite of the fact that the Shoshone peoples were in occupation and use of their lands. The government was undertaking several activities, including legislation to privatize the 'federal' land. The Inter-American Commission on Human Rights had already decided the matter in 2002 in favour of the Shoshone (*Mary and Carrie Dann v United States* (2002), Inter-Am Comm HR, No 75/02, Annual Report of the Inter-American Commission on Human Rights: 2003, OEA/SerL/V/II127/doc1, rev1 (2003) 860). In 2004, the Shoshone peoples approached the CERD Committee, *inter-alia*, claiming that the actions of the government were discriminatory for failing to recognize and protect the customary land rights of the Western Shoshone peoples. The CERD Committee asked the USA to 'stop', 'freeze' and 'desist' from activities on the Shoshone ancestral land and to enter into dialogue with the Shoshone peoples to reach a solution acceptable to them and which complies with their rights under the *CERD* and *General Recommendation No. XXIII*, especially their "right to own, develop, control and use their communal lands, territories and resources." *Shoshone Decision 1(68), supra* note 294 at paras 9-10; see Julie Ann Fishel, "United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level" (2006-2007) 31 Am Indian L Rev 619, for a detailed discussion of the Shoshone case.

[295] Thornberry, "A CERD Perspective", *supra* note 249; Also, *General Recommendation No. 32* on Special Measures states 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

persons in unequal circumstances differently. Thus, the principle of non-discrimination prohibits discrimination among equals while at the same time requires legitimate differential treatment among unequals to attain substantive equality in the enjoyment of human rights.[296] While tribal peoples are equal citizens of the state, they are distinct cultural groups and are thus unequals in matters peculiar to their culture. Thus, the norm of non-discrimination requires sameness of treatment of the tribals with the dominant majority in matters of rights conferred by the state, while a differential protective treatment is required in matters peculiar to the culture of the tribals.[297]

In the *General Recommendation No. XIV* on Article 1 (1):

> The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.[298]

Thus, differential treatment is implicit in the right to substantive equality and the principle of non-discrimination calls for differences in treatment provided the differentiation is legitimate for the purpose of securing substantive equality.[299] The test for legitimacy under the *CERD* is whether such treatment has an "unjustifiable disparate impact" upon a distinct group.[300] Thus, not all race or ethnic origin conscious distinctions amount to discrimination; in fact

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the same." *Supra* note 253 at para 8. See Pritchard, "Native Title", *supra* note 17, for a discussion of the status and content of right to equality in international law.

[296] See *Gerhardy v Brown*, [1985] HCA 11, (1985) 159 CLR 70; the famous dissenting opinion of Judge Tanaka in *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)*, [1966] ICJ Rep 6, online: ICJ <http://www.icj-cij.org/en/case/47/judgments>.

[297] *Ibid*.

[298] *Supra* note 252.

[299] After an analysis of the international human rights jurisprudence, Bayefsky notes certain aspects of the right to equality including that "not all differences in treatment are discriminatory or equality does not mean identical treatment; [and] a distinction is discriminatory if it (a) has no objective or reasonable justification, or pursues no legitimate aim, or (b) if there is not a reasonable relationship between that aim and the means employed to attain it." *Supra* note 253 at 34.

[300] *GR XIV*, *supra* note 252 at para 2. Clearly, this applies to differential treatment both for and against minority communities.

such distinctions are obligatory when required to achieve substantive equality, a notion that embraces respect for a distinct cultural identity.[301]

The right to substantive equality entails that the property rights of tribals and their distinct connection with land are respected as much as the property rights of the dominant majority.[302] The non-recognition of tribal land rights and tribal law is a negative practice within a state that hinders the equal enjoyment of the human right to property by the tribals. This negative practice or omission needs to be addressed by the application of the principle of non-discrimination thus requiring positive action by the state. Further, since the aim of the obligation is to achieve substantive equality and not formal equality, the legislative or other measures that are conscious of the rights of tribals and indigenous peoples as distinct racial or ethnic groups will not offend the principle of non-discrimination. They are in fact mandated by and implicit in the right to substantive equality that "has regard to cultural identity as an important aspect of a commitment to substantive equality."[303] Thus, a state is under an international obligation to recognize and protect tribal land rights and the traditional legal systems they are sourced in. A state must adopt measures including legislation to protect the distinct identities of these minorities and such an obligation flows from within the obligation to achieve substantive equality.[304]

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[301] See Pritchard, "Native Title", *supra* note 17. The obligation to achieve substantive equality includes the obligation to safeguard unique characteristics of minority culture.
[302] Anaya, "Keynote", *supra* note 79.
[303] Pritchard, "Native Title", *supra* note 17 at 153.
[304] Article 2(1) of the *CERD* places obligations on the state, *inter-alia*, for adopting laws, policies and other measures to give effect to the rights in the *CERD* at domestic level; see MacKay, "CERD", *supra* note 250. Pertinently, Australia asserted that under international law a state enjoys a 'margin of appreciation' in the implementation of the international obligations because "national institutions are best placed to assess the need for substantive equality measures and to find a balance between a range of competing interests." See Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under article 9 of the Convention: Fourteenth periodic reports of States parties due in 2002, Addendum, Australia,* UNCERDOR, 2004, UN Doc CERD/C/428/Add 2 at para 124 [footnote omitted] [CERD Committee, *Report Australia 2004*]. The CERD Committee commented that such a margin of appreciation is limited by the obligations of the state under Article 5 thus affirming that the principle of equality contained in the *CERD* mandates such positive state measures; see Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, Australia,* UNCERDOR, 66th Sess, UN Doc CERD/C/AUS/CO/14 (2005) at para 16 [CERD Committee, *Concluding Observations Australia 2005*].

General Recommendation No. XXIII is regarded as an elaboration of the norm of non-discrimination and the consequent obligations that arise under the *CERD*.[305] The Recommendation clearly demonstrates that recognition and protection of land rights of tribals and indigenous peoples is a legitimate aim mandated by the *CERD*.[306] The CERD Committee has made recommendations to state parties on several occasions for adopting suitable legislation and other measures for recognizing the customary land rights of tribals and indigenous peoples.[307] Further, merely recognizing the rights does not satisfy the duty imposed by the principle of non-discrimination in the *CERD*, the rights must be secured in fact and effectively protected.[308] Additionally, since the principle of racial non-discrimination is widely accepted not only as a customary rule of international law but also a jus cogens norm, it can be assumed to place a comprehensive duty on a state to adopt measures to recognize and protect the rights of tribals to land irrespective of its membership of the *CERD* or any other treaty.[309]

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[305] MacKay, "CERD", *supra* note 250; Anaya, *Indigenous Peoples*, *supra* note 20 at 230.
[306] MacKay, "CERD", *supra* note 250 at 166.
[307] See the observations of the Committee on Suriname, *supra* note 287; *Shoshone Decision 1(68)*, *supra* note 294. Also, the CERD Committee recommended that India "formally recognize its tribal peoples as distinct groups entitled to special protection under national and international law, including the Convention." CERD Committee, *Concluding Observations India 2007, supra* note 41 at para 10. Interestingly, these observations were made in light of the statements submitted to the Committee by several Non-Governmental Organizations. Amongst them, Survival International insisted that the Committee pose questions to India relating to the Jarawa tribe of Andaman including that the ownership of their land should be recognized as contemplated by a 2004 Indian government policy. United NGOs Mission Manipur & Forest Peoples Programme submitted a report that requested the adoption of a decision under the Early Warning and Urgent Action procedure given the alarming situation of indigenous/tribal peoples in northeast India. The alleged discrimination included the inadequate recognition of the right of tribals to own and control their traditional lands. The Committee has constantly considered the matters under its early warning and urgent action procedure since the 78th session in March 2011 and sent out several communications to India with regards these matters with the latest communication sent out on 7th March 2014. The concluding recommendation mentioned above has been reiterated time and again. Notably, India has not submitted a state report since 2007.
[308] See MacKay, "CERD", *supra* note 250, for a discussion of some relevant decisions of the Committee on this aspect. Pertinently, the CERD Committee recommended that India ensures that "bans on leasing tribal lands to third persons or companies are effectively enforced, and that adequate safeguards against the acquisition of tribal lands are included in the Recognition of Forest Rights Act (2006) and other relevant legislation." CERD Committee, *Concluding Observations India 2007, supra* note 41 at para 20. Also, the Committee noted "that the State party does not fully implement the right of ownership, collective or individual, of the members of tribal communities over the lands traditionally occupied by them in its practice concerning tribal peoples" (*ibid* at para 19).
[309] See *supra* note 250, for a note on the status of the norm of equality in international law.

This implicit requirement of the norm of substantive equality must be understood separately from the special measures provision in the *CERD.*[310] The CERD Committee opines that:

> [T]he obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention…Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as…the rights of indigenous peoples, including rights to lands traditionally occupied by them…[s]uch rights are permanent rights, recognised as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies.[311]

Further, Article 2(2) of *CERD* mandates:

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.[312]

Thus, the *CERD* recognizes that it may be necessary to introduce legislation that may in ordinary circumstances amount to discrimination to "ensure the adequate development and protection of certain racial groups."[313] Such measures are meant to be temporary.[314]

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[310] Triggs, *supra* note 250 at 380. The need for clarity in the distinction is necessary because measures to recognize land rights of tribals and indigenous peoples are often mistaken as special privileges that have been conferred by the state. Thus "taking away" these privileges is considered to be fair and promoting equal law for all; see Pritchard, "Native Title", *supra* note 17. However, while special measures may be seen as advancement measures contemplated and conferred by the state in given circumstances, measures to recognize and protect land rights of tribal communities are merely acknowledgments of what already exists. In that sense, it is not a privilege but a right.

[311] *GR 32*, *supra* note 253 at paras 14-15.

[312] *Supra* note 17, art 2(2).

[313] *GR 32*, *supra* note 253 at para 28. As indicated earlier, *General Recommendation No. 32* elaborates upon special measures envisaged within the Convention. Thus, while special measures are an express exemption from the rule of equality, measures including legislation that recognize and protect tribal land rights sources in tribal law are not exceptions to the norm of equality but its embodiment; see Anaya, "Keynote", *supra* note 79; Bayefsky, *supra* note 253.

[314] Thornberry opines that this requirement may be misunderstood in case of minority rights and indigenous peoples rights, "the recognition and respect for which will demand more than temporary measures." "A CERD

Thornberry clarifies that minorities enjoy certain rights under international law that "stand independently of the case for special measures."[315] In the current context that would imply that the obligation to recognize and protect the customary land rights of the tribal peoples under international law also arises independent of and in addition to the obligation to employ special measures when circumstances so warrant. The former obligation is rooted in the right to substantive equality read with the human right to property while the latter originates from Article 2(2) read with Article 1(1) of the *CERD*.[316]

Logically, once a state enacts legislations or adopts other measures recognizing and protecting tribal rights to land sourced in tribal law, rolling back from these laws is prohibited in international law. The laws that recognize and protect the land rights of tribal communities are required by the duty to achieve substantive equality and any discriminatory derogation from these laws violates the principle of non-discrimination.[317] The roll back of legislative recognition and protection of the customary property rights offends the basic principles that: measures to achieve substantive equality are mandated; such measures are permanent; and a roll back violate a recognized legal rights of such tribes or peoples.[318]

Perspective", *supra* note 249 at 257. The "more" in this case refers to the duty to recognize and protect customary title implicit in substantive equality by enacting laws.

[315] *Ibid*. However, Thornberry agrees that certain state policies regarding minorities and indigenous peoples may be regarded as special measures. In its Concluding Observations on New Zealand, the CERD Committee observed that special and temporary measures are distinct from the permanent rights of indigenous peoples. Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, New Zealand,* UNCERDOR, 70th Sess, UN Doc CERD/C/NZL/CO/17 (2007).

[316] Further, *General Recommendation No. 32* on special measures clarifies that special measures are also mandatory and the phrase "when the circumstances so warrant" does not dilute the mandate but lends context to the measures. *Supra* note 253 at para 30.

[317] Triggs, *supra* note 250 at 379, n 34. Triggs relies on the approach adopted by Mick Dodson, former Aboriginal and Torres Strait Islander Social Justice Commissioner.

[318] See Section 3.2, above. Arguably, the roll back law may be defended on the ground of being a special measure contemplated within the *CERD*. However, since both the general obligation of positive measures and the special measures are contextual in nature, it is highly arguable that an obligation for adopting special measures of roll back can exist to nullify the fulfilled positive obligation of recognizing customary property rights in the same set of circumstances; see also MacKay, "CERD", *supra* note 250.

3.5 Effective Participation, Informed Consent, Restitution and Compensation

The Committee's *General Recommendation No. XXIII* emphasizes the requirement of informed consent before decisions affecting indigenous rights are adopted.[319] The state is obliged to:

> [E]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.[320]

The language of the reproduced obligation clearly establishes a general right of effective participation in public life and a narrower right of informed consent prior to making decisions directly affecting the rights of indigenous and tribal populations.[321]

The CERD Committee regularly refers to informed consent in its concluding observations on state reports alongside references to the *General Recommendation No. XXIII*.[322] In the concluding observation on Suriname's report in 2015, "[t]he Committee

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[319] *General Recommendation No. XXIII* and Article 5(c) of the *CERD* also entitle indigenous persons to effectively participate in state institutions.

[320] *GR XXIII*, *supra* note 254 at para 4(d). Pritchard concludes that there are two dimensions of internal self-determination for ethnic groups: the right to maintain and develop their institutional identities and the right to effective participation in decisions that affect them. "Native Title", *supra* note 17. MacKay has noted that the CERD Committee has addressed key aspects of the right to self-determination such as the right to property and informed consent without express reference to the controversial term; "CERD", *supra* note 250 at 203. For a detailed discussion of the concept of free, prior and informed consent, see Doyle, *supra* note 220.

[321] Thornberry, "A CERD Perspective", *supra* note 249 at 260. MacKay points that the inclusion of 'informed consent' was intensely debated by the CERD Committee and some members involved in the drafting process of *General Recommendation No. XXIII* preferred the standard of informed participation instead. "CERD", *supra* note 250. However, Wolfrum, one of the main drafters, insisted upon the inadequacy of the mere right to participate and pressed for informed consent as the required standard; see Doyle, *supra* note 220. On the questions whether informed consent confers the right to veto, it has been asserted that informed consent as an aspect of self-determination includes the right to reject proposals (*ibid* at 167*).* Also, Thornberry notes that the deliberation of the Committee during the drafting of the Recommendation indicates that there is a right to veto; *Human Rights*, *supra* note 57 at 217. However, *General Recommendation No. XXIII*'s drafting history and the CERD Committee's subsequent jurisprudence suggests that the invocation of this right is based on its need for the fulfillment of other human rights of indigenous peoples rather than "emerging from a discourse advocating a veto power." See Doyle, *supra* note 220 at 167.

[322] These references pertain to both general and specific activities that may affect indigenous rights; see MacKay, "CERD", *supra* note 250 at 198. In 2005, the Committee expressed serious concern that Suriname had authorized additional resource exploitation and allied projects on tribal land in complete disregard of the Committee's previous recommendations and without obtaining the "prior agreement or informed consent" of the peoples; *Suriname Decisions 1(67)*, *supra* note 287 at para 3.

Pertinently, the CERD Committee took note of the eviction of tribal peoples in India from their lands under the *Forest (Conservation) Act 1980* or for mining purposes and asked India to "ensure that the tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation." CERD Committee, *Concluding Observations India 2007*, *supra* note 41 at paras 19-20. India was also asked to seek "prior informed consent of [tribal] communities affected by

urge[d] the State party to obtain the free and prior informed consent of indigenous and tribal peoples prior to the approval of any project affecting their lands."[323]

An interesting question that has emerged from practice within the CERD Committee is that of whether the requirement for obtaining informed consent for "decisions" directly affecting rights and interests of indigenous peoples includes legislation that directly affect land rights of indigenous peoples? In the concluding observations on the 2000 Australian report:

> [t]he Committee reaffirm[ed] all aspects of its decisions 2 (54) and 2 (55) and reiterate[d] its recommendation that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5 (c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of securing the informed consent of indigenous peoples.[324]

However, Australia in its report denied that the *CERD* requires informed consent in the exercise of legislative power, even if it affected the land rights of indigenous peoples.[325] The Committee however, again recommended:

> the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible

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the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects, and provide adequate compensation and alternative land and housing to those communities" (*ibid*). A similar requirement of obtaining the informed consent of indigenous people was contained in the Concluding Observation on Australia. CERD Committee, *Concluding Observations Australia 2005*, *supra* note 304. However, Thornberry notes that the Committee has not always strictly enforced the obligation; "A CERD Perspective", *supra* note 249.

[323] Committee on the Elimination of Racial Discrimination, *Advance Unedited Version: Concluding observations of the thirteenth to fifteenth periodic reports of Suriname*, UNCERDOR, 2015, UN Doc CERD/C/SUR/CO/13-15 at para 26 [CERD Committee, *Concluding Observations Suriname 2015*]. The use of the term free, prior and informed consent instead of informed consent alone, clearly reflects the influence of the *UNDRIP* on the terminology of the CERD Committee.

[324] Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, Australia*, UNCERDOR, 56th Sess, UN Doc CERD/C/304/Add101 (2000) at para 9. The concluding observations were made in the context of the Committee's decisions under the EW/UA procedure, wherein the Committee was concerned about the lack of effective participation of indigenous peoples in the formulation of the amendments to the discriminatory *Native Title Act* and found it to be a direct violation of the *General Recommendation No. XXIII* and Article 5(c) of the *CERD*.

[325] CERD Committee, *Report Australia 2004*, *supra* note 304.

amendments to the Native Title Act and finding solutions acceptable to all.[326]

In its concluding observations on Suriname in 2015, the CERD Committee underlined the requirement for informed consent in adopting legislation. The Committee recommended, "that State party ensure that no *decision or legislation directly affecting the rights and interests of indigenous and tribal peoples* is adopted or taken without their free, prior and informed consent."[327]

Thus, while article 5(c) of the *CERD* relates to the general requirement of effective participation of indigenous/tribal peoples in public life, including representation in the legislature, the requirement of informed consent contained in the *General Recommendation No. XXIII* places an obligation on the state to obtain the informed consent of indigenous/tribal peoples before making decisions including legislation that directly affect their rights and interests.

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[326] CERD Committee, *Concluding Observations Australia 2005*, *supra* note 304 at para 16; In regards to the abolition of the Aboriginal and Torres State Islander Commission in Australia:

> the Committee recommend[ed] that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII. The Committee [further] recommends that the State party reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision and policy-making relating to their rights and interests (*ibid*).

The Australian government also responded to the observation in its additional report in 2006 and asserted that *General Recommendation No. XXIII* is not binding and that the state does not accept that the informed consent of indigenous peoples is required in making decisions that directly affect their rights; Committee on the Elimination of Racial Discrimination, *Comments by the Government of Australia on the concluding observations of the Committee on the Elimination of Racial Discrimination, additional report of Australia*, UNCERDOR, 2006, UN Doc CERD/C/AUS/CO/14/Add 1. The issue has not been addressed in Australia's 2009 report and the CERD Committee's concluding observations in 2010 only reiterate the obligations of the state under the *CERD*; see Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under article 9 of the Convention: Combined Fifteenth, sixteenth and seventeenth periodic reports of States parties due in 2008, Australia*, UNCERDOR, 2010, UN Doc CERD/C/AUS/15-17; Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, Australia*, UNCERDOR, 77th Sess, UN Doc CERD/C/AUS/CO/15-17 (2010).

[327] CERD Committee, *Concluding Observations Suriname 2015*, *supra* note 323 at para 32 [emphasis added]. The observation pertained to the CERD Committee's concern on "the absence of consultation of indigenous and tribal peoples in the drafting process of the draft law on traditional authorities and in the negotiation of the Reducing Emissions from Deforestation and Forest Degradation" (*ibid* at para 31). Similarly, in its concluding observations on the USA in 2014, the Committee recalled its *General Recommendation No. XXIII* and called upon the state to "[g]uarantee, in law and in practice, the right of indigenous peoples to effective participation in public life and in decisions that affect them, based on their free, prior and informed consent." Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, UNCERDOR, 2014, UN Doc CERD/C/USA/CO/7-9 at para 24.

The term informed consent has also been used in paragraph 5 of the *General Recommendation No. XXIII* which addresses remedies for situations in which indigenous peoples have been deprived of their land without their informed consent. The *General Recommendation No. XXIII* provides for remedies in cases of deprivation of lands traditionally owned or otherwise inhabited or used by the indigenous peoples in the absence of their free and informed consent.[328] The primary obligation imposed upon the state is of restitution of the lands.[329] Where such restitution is not factually possible, indigenous peoples are entitled to compensation in the form of lands followed by compensation that is "just, fair and prompt."[330]

3.6 Conclusion

Unlike the *ILO Convention 107* discussed in the preceding chapter, the *CERD* does not expressly recognize a human right to property.[331] Article 2 and Article 5 of the *CERD* guarantee racial non-discrimination and equality before the law in the enjoyment of human rights including the human right to property.[332] The *General Recommendation No. XXIII* reaffirms that the *CERD* is group oriented and extends protection to tribal and indigenous groups.[333] The principle of non-discrimination in matters of property bears upon the issue of enjoyment of tribal right to ownership in international law and has been interpreted to impose both negative and positive obligations on the state.

The principle of non-discrimination requires equality within legal systems in matters of enjoyment of the human right to property and, thus, prohibits state action that causes

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[328] *Supra* note 254 at para 5.
[329] *Ibid.*
[330] *Ibid*; see also MacKay, "CERD" *supra* note 250. Further, just compensation for acquisition of title to property is also a general principle of common law and features as a statutory entitlement in the domestic laws of several states including India.
[331] However, equality before the law in matters of property rights impliedly mandates the recognition and protection of customary ownership of indigenous and tribal peoples and in that sense, may be said to reaffirm the status of right to property sourced in the customary law of tribal and indigenous peoples.
[332] *Supra* note 17.
[333] *Supra* note 254; see Thornberry, "A CERD Perspective" *supra* note 249.

unequal enjoyment of the right by persons of different ethnic origin.[334] Where a state recognizes the right to property, tribal populations are entitled to protection of their recognized customary property rights in the same manner and to the same extent as all the other property right holders within the legal system.[335] Interference with customary property rights in an arbitrary and discriminatory manner will violate the provisions of the *CERD*. Thus, any practice or legislation, that has the effect of extinguishing or diminishing the legal property rights of tribals or indigenous peoples without affecting the property rights of other right holders, without reasonable justification, violates the non-discrimination principle.[336]

Further, the principle of non-discrimination in the *CERD* has also been interpreted to place a positive obligation on the state to recognize and protect the tribal right to ownership of traditional lands. First, this positive obligation in the *CERD* can be inferred with reference to the developments in the content of the right to property read with the right to equality in international law; and which the *CERD* Committee in the *General Recommendation No. XXIII* now endorses.[337] International law now recognizes and protects customary property rights of indigenous and tribal peoples as a part of the human right to property read in conjunction with the principle of non-discrimination.[338] The *CERD*, especially in light of the *General Recommendation No. XXIII*, is also being interpreted to require a state to recognize and protect customary property rights of tribals and indigenous peoples.[339]

Second, the obligation may also arise from an interpretation of the fundamental human rights norm of equality found throughout the *CERD* as an independent right. The principle of non-discrimination contains a mandate for positive action within itself and

[334] See Mabo #1, *supra* note 259.
[335] See discussion in Section 3.2, above.
[336] As discussed above, the *CERD* permits differential treatment in the manner elaborated upon in *General Recommendation No. XIV*, *supra* note 252.
[337] See discussion in Section 3.3, above.
[338] See *supra* note 149, for a brief discussion.
[339] The Committee has called upon state parties to fulfill this obligation on several occasions; see *supra* note 287.

requires addressing omissions that hinder the achievement of equality within a state.[340] Further, the notion of equality that the *CERD* obliges a state to achieve is substantive in nature, and embraces respect for a distinct cultural identity.[341] Thus, a state is required to ensure legitimate differential treatment among unequals to attain substantive equality in the enjoyment of human rights.[342] The test for legitimacy in the *CERD* is whether the treatment has an "unjustifiable disparate impact" upon a distinct group.[343] Thus, in the context of customary property rights, the state is under an obligation to adopt legal measures to recognize tribal customary property rights, including land ownership. Since the aim is to achieve substantive equality, measures that are conscious of the rights of tribal populations as distinct ethnic groups, especially in light of the *General Recommendation No. XXIII*, will not offend the principle of non-discrimination. They are in fact implicit in and mandated by the right to substantive equality that stands apart from the obligation of temporary special measures in the *CERD*.[344] The interpretation of the right to equality as the jurisprudential basis for recognizing and protecting tribal land rights is highly significant in my opinion. The right to equality is accepted as a norm of customary international law, in fact regarded as a jus cogens norm,[345] and can thus be argued to impose obligations on a state irrespective of its membership to any treaty.

The *General Recommendation No. XXIII* emphasizes the requirement of informed consent prior to adopting decisions, including development projects, that affect tribal and indigenous rights.[346] The requirement extends to the adoption of legislation.[347] The *General Recommendation No. XXIII* provides for restitution of lands where tribal and indigenous

[340] See discussion in Section 3.4, above; Thornberry, "A CERD Perspective", *supra* note 249.
[341] Erueti, *supra* note 279; Pritchard, "Native Title", *supra* note 17.
[342] See *supra* note 296 and accompanying text.
[343] *GR XIV*, *supra* note 252 at para 2.
[344] See *GR 32*, *supra* note 253 at paras 14-15.
[345] See *supra* note 250.
[346] See discussion in Section 3.5, above.
[347] *Ibid*.

peoples have been deprived of traditional lands without obtaining their free and informed consent. Where restitution is impossible, alternative lands, followed by just compensation may be sufficient to discharge the obligation.[348]

[348] *GR XXIII*, *supra* note 254 at para 5.

CHAPTER FOUR

ARTICLE 27 OF THE *ICCPR* AND THE RIGHT TO OWNERSHIP

4.1 Introduction

The goal of preserving the distinct tribal and indigenous cultural identity and way of life is at the root of all claims including land rights claims made by tribal and indigenous peoples within the international human rights domain.[349] Hence, tribal and indigenous communities' claims for the recognition and protection of the right to ownership of traditional lands based in customary laws within the international human rights system are also motivated by the broader agenda of preserving their distinct tribal cultural identity and tribal way of life based on land resources.[350] Irrespective of the goal, all claims including tribal land rights claims require a normative basis for their justification. To that end, general human rights law provides "…several points of entry into the discourse of protecting the particular way of life, based on traditions and on the natural resources traditionally available for a specific community."[351] However, the nature or specific type of tribal land rights claim that a particular general human rights norm may support and accommodate depends on the

[349] See Brendan Tobin, *Indigenous Peoples Customary Law and Human Rights - Why Living Law Matters* (New York: Routledge, 2014); Siegfried Wiessner, "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges" (2011) 22:1 EJIL 121. Wiessner repeats the widely accepted notion that "[c]ultural preservation and flourishing is…at the root of the claims…" made by indigenous peoples (*ibid* at 129). The international human rights regime concerning tribal and indigenous rights that has emerged as a response to the efforts and claims of these groups is inspired by this goal and advances "…a multicultural model of political ordering…" endorsing their collective right to 'cultural integrity'; Anaya, "Multicultural", *supra* note 65 at 15.

[350] *Ibid*; see Martin Scheinin, "The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land" in Theodore S Orlin, Allan Rosas & Martin Scheinin eds, *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Finland: Institute for Human Rights, 2000) 159 at 159 [Scheinin, "Competing Uses"]. The pursuit to defend lands also stems from their struggle for economic and political survival; see Aoife Duffy, "Indigenous Peoples' Land Rights: Developing a *Sui Generis* Approach to Ownership and Restitution" (2008) 15 International Journal on Minority and Group Rights 505 at 511.

[351] See Scheinin, "Competing Uses", *supra* note 350 at 159. Since the relationship with land is central to tribal cultural, economic and social way of life, "land rights are addressed through different lenses of the human right discourse including civil, political, economic, social and cultural rights." Gilbert, *Land Rights*, *supra* note 16 at 107. Several general human rights including the right to property, right to self-determination, right to participation, right to private life, right to culture, right to equality and right to freedom of religion are considered relevant to the issue of tribal land rights. For an interesting comparative perspective on how tribal and indigenous land rights jurisprudence under general human rights treaties provides answers to some of the ambiguities in the specialized standards, see Pentassuglia, *supra* note 17.

interpretation of the content of the specific norm.[352] These "several points of entry" or the relevant general international human rights norms have, in practice, been interpreted as imposing obligations of varying nature and extent on the state with respect to tribal and indigenous lands with the aim of achieving the broader goal of cultural integrity.[353] At present, not all of these relevant general human rights norms form the normative basis for a claim to recognize and protect the tribal right to ownership of traditional lands based in customary law.[354]

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[352] The broad goal of cultural preservation or the '*why'* behind making tribal land claims may resonate with the general purpose aimed to be achieved by all these relevant international human rights norms in their application to tribal and indigenous situation. But the specific kind of land rights that these norms are individually capable of accommodating i.e. recognizing and protecting depends on '*how'* these norms are interpreted in relation to tribal land rights i.e. '*how'* a specific land rights claim is justified as being supported by a specific norm. A similar observation has been made by Kingsbury who notes that claims (land related or otherwise) by non-state groups, including tribals, in international law are generally made and addressed within three separate "domains of discourse": as claims to self-determination, minority rights claims and human rights claims. Kingsbury points out that each of these "domains of discourse" has a separate structure that shapes the claim and its resolution and the choice of domain will affect the nature of the claim, its merits, justification and outcome; see Benedict Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 Cornell International Law Journal 481 [Kingsbury, "Non-State Groups"]. Yet Kingsbury also points out that all these domains of discourse have a common 'justificatory purpose' and calls for further normative development in international law, *inter-alia*, to reconcile the application of the three domains for providing a stronger protection to the claims of non-state groups. The *ICCPR* is a step towards this reconciliation and brings together all the three domains noted by Kingsbury under the umbrella of human rights. The text of the *ICCPR, supra* note 17, is divided into six parts and contains fifty three articles that incorporate a wide range of fundamental human rights. It contains universal individual rights in Part III, collective rights in Article 1 and individual minority rights with collective dimensions in Article 27.

[353] Nigel Bankes has indicated that there is an emerging trend within the international human rights system's jurisprudence to interpret these relevant human rights norms as requiring the state to consider the relationship of indigenous peoples with their lands *prior* to allowing developmental activities on such lands. This requirement limits the authority of the state when dealing with tribal and indigenous lands; see Nigel Bankes, "International Human Rights Law and Natural Resource Projects within the Traditional Territories of Indigenous Peoples" (2010) 47:2 Alta L Rev 457 at 457 [Bankes, "Projects"]. The precise standards i.e. limitations and obligations that these norms impose on the state, as a part of this requirement of prior consideration, varies depending on the content of the norm in question. It must be emphasized that all human rights are interdependent and indivisible and thus, the content of one will have a bearing on the other; see Scheinin, "Competing Uses", *supra* note 350. An apt example of this interdependence is the interpretation of the right to property in conjunction with the norm of non-discrimination to form the basis of recognizing and protecting tribal and indigenous right to ownership of traditional lands based in customary law. Yet this interdependence does not imply that all these human rights norms are "…capable of affording an identical degree of protection for the particular way of life of the members of a minority or an indigenous group" (*ibid* at 221).

[354] Nigel Bankes asserts that international human rights law now places a legal obligation on the state to recognize, delimit and title traditional occupation lands; "Arctic", *supra* note 17. The general human right to property read in conjunction with the right to equality is the most prominent human right norm that has been interpreted to form the normative basis of such an obligation, especially within the regional human rights system. The right to equality in matters of property rights in the *CERD* has also been interpreted to include this obligation. Apart from evolving as a part of these general human rights norm, the specialized *ILO Convention 107* and *ILO Convention 169* specifically recognize and protect land rights including the tribal right to ownership of traditional lands. It has even been argued, though not without a debate, that this right has gained the status of customary international law; see Section 1.2, above.

The *ICCPR*[355], based on the *Universal Declaration of Human Rights*, is one of the most prominent general human rights treaties of global application.[356] While Article 17 of the *UDHR* contains an express right to property, the *ICCPR* is noticeably silent in this regard.[357] The Human Rights Committee ("HRC") has confirmed that the *ICCPR* does not contain a right to property, whether individual or communal.[358] Thus, the normative support for the recognition and protection of a tribal right to ownership of traditional lands based in customary law, if it exists at all within the *ICCPR*, must be located within its other relevant provisions. The most relevant points of entry in the *ICCPR* in this regard are Article 1, Article 26 and Article 27.[359] Article 27 reads:

> 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*

[355] *Supra* note 17.

[356] The *Universal Declaration of Human Rights* ("*UDHR"*) is a non-binding document; *supra* note 251. However, unlike the *UDHR* that emphasizes the universality of human rights, the *ICCPR* contains a specific provision for members of minorities; see Martin Scheinin, "Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights" in Joshua Castellino & Niamh Walsh, eds, *International Law and Indigenous Peoples* (Leiden, NLD: Martinus Nijhoff, 2004) 3 [Scheinin, "ICCPR"].

[357] The parties could not reach an agreement on this issue during the drafting stage of the *ICCPR* because of the ideological differences between the East and the West (*ibid)*. There is significant consensus among scholars that the right to property as contained in Article 17 of the *UDHR* i.e. the notion that no one can be deprived of his property in an arbitrary and discriminatory manner, has gained the status of customary international law and, thus, binds a state irrespective of a lack of treaty obligations; Pritchard, "Native Title", *supra* note 17. Further, the recognition of the right to property in the *UDHR* extends to both its individual and collective forms; see Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (UK: Cambridge University Press, 2007) at 244 [Xanthaki, "Culture"].

[358] Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication 505/1992, submitted by Kéténguéré Ackla), UNHRCOR, 56th Sess., UN Doc CCPR/C/51/D/505/1992 (1996). The HRC is established under Article 28 of the *ICCPR* and is the Covenant's monitoring body. For a brief note on its functions, see *infra*, note 364.

[359] Even though land rights issues of tribals and indigenous peoples can also be approached through other general human rights norms as illustrated in *supra* note 351, the literature suggests that the right to property read with the right to equality, and the right to culture have so far been utilized the most to support tribal and indigenous land claims in international law.

The right to self-determination is certainly relevant to peoples' land right claims and the recognition of customary laws. However, as indicated in Chapter One, above, I will not be dealing with Article 1 of the *ICCPR*. Article 26 affirms the right to equality in respect of all rights and obligations granted by the state. The HRC's understanding of the content of Article 27 draws upon the *CERD*; see Thornberry, *Human Rights*, *supra* note 57. The relevance of the right to equality, a norm that has now achieved the status of customary international law, as a basis for recognizing and protecting tribal ownership of lands has been discussed in detail in Chapter Three, above. Any discussion here will be redundant.

> *culture*, to profess and practice their own religion, or to use their own language.[360]

Article 27 does not specifically address land rights but is concerned with cultural, linguistic and religious rights.[361] Nevertheless, Article 27 rights are, *inter-alia*, "directed to ensure the survival and continued development of the cultural…identity of the minorities concerned…."[362] As noted earlier, tribal claims of land ownership are also motivated by the same goal and thus an analysis of the interpretation of the right to culture in Article 27 as the normative basis for the recognition and protection of tribal land rights, in particular the right to ownership of traditional lands based in customary law is reasonable.[363] The 'views'

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[360] *ICCPR*, *supra* note 17 [emphasis added]. Even though Article 27 applies to minorities and not to tribals as such, I have assumed that tribals in India are minorities and, hence, Article 27 is relevant to them. Pritchard has opined that there seems to be considerable support for the proposition that the rights of minorities have achieved the status of customary international law; "Native Title", *supra* note 17 at 157. I will use the terms tribals and indigenous peoples as a sub group of minorities, and the term minorities interchangeably for the present discussion of Article 27.

[361] Geir Ulfstein, "Indigenous Peoples' Right to Land" (2004) 8 Max Planck Yearbook United Nations Law 1 at 8; see also Jérémie Gilbert, *Nomadic Peoples and Human Rights* (London: Routledge, 2014) at 113.

[362] Human Rights Committee, *General Comment adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Addendum, General comment No. 23 (50)(art 27)*, UNHRCOR, 50th Sess, UN Doc CCPR/C/21/Rev1/Add5 (1994) at para 9 [*GC 23*]. General Comments are not binding on the HRC and the parties but reflect the HRC's views on the interpretation of those provisions/rights. Article 27 is an articulation of what Anaya refers to as the customary international norm of cultural integrity; "Multicultural", *supra* note 65. Thornberry notes that Article 27 is in fact the "only expression of the right to an identity in modern human rights conventions intended for universal application." *Minorities*, *supra* note 79 at 142. It must be pointed out that the right to substantive equality also upholds the right to cultural integrity. However, Thornberry considers it important that the right is recognized and protected in a "…direct way rather than to expect this as an implication for an imaginatively interpreted standard or rule of non-discrimination" (*ibid* at 128). Nevertheless, Thornberry agrees that both the principles allow for group support. While the rationale for the right to equality is to correct discriminatory conditions, the rationale for Article 27 is "because the minority is a minority." Thornberry, *Human Rights*, *supra* note 57 at 132; see Chapter Three, above, for a discussion of the right to equality and tribal land rights.

[363] See text accompanying note 350. Nigel Bankes pertinently points out that the right to religion or even language in Article 27 may also support indigenous land claims; "Projects", *supra* note 353 at 465. For a discussion of religion and land rights, see Gilbert, *Land Rights*, *supra* note 16 at 192. Hitherto, the HRC has focused on the right of the members of the minority to enjoy their own culture in community with other members of the group in Article 27 in matters that involve claims to traditional lands. I will hereinafter refer to this aspect of the rights in Article 27 as the right to culture and will confine my discussion to this right alone. Any reference to Article 27 here on will thus be a reference to this aspect of the provision.

The relevance of Article 27 to a discussion of tribal land rights is highlighted by Scheinin who notes that the right to culture in Article 27 is interlinked with the rights related to the norm of equality, self-determination and property rights and the latter three have been interpreted to be relevant to tribal and indigenous land ownership claims; "Competing Uses", *supra* note 350. Scheinin has noted elsewhere that Article 27 has become an important tool for minority land rights claims; "ICCPR", *supra* note 356. Pritchard also asserts that Article 27 "…can be of assistance in compelling States parties to recognize and secure the special relationship of indigenous peoples with their land…." "Native Title", *supra* note 17 at 155. Further, it has been pointed out that the decisions on Article 27 are also a part of the emerging trend within the international human rights system's jurisprudence to interpret human rights as requiring the state to consider the

adopted by the HRC, its comments on the states' periodic reports, and the General Comments adopted by it from time to time, are useful sources for understanding the interpretation and content of the human rights contained in the *ICCPR* and will be relied upon in this chapter along with the literature.[364]

In this chapter, the content of the right to culture relevant to tribal land rights, particularly the right to ownership is explored by posing two questions: is the non-material concept of property or the right to ownership of traditional lands an aspect of the notion of 'culture' in Article 27 and thus embraced by the right to culture? If not, does Article 27 place a positive obligation on a state to recognize and protect tribal ownership of traditional lands as a *means/arrangement* of assuring and protecting the right to culture in Article 27? However, a right's nature has an important bearing on its content, therefore, I have briefly discussed the nature of the right to culture before proceeding with the analysis of the right's content. The second section of this chapter focuses on the nature of the right to culture. The balance of the chapter discusses the content of the right to culture. The present understanding of the reach of the notion of 'culture' in Article 27 with respect to the material and non-material aspects of a land-based way of life is discussed in section three. Section three ends with a discussion on the right not to be 'denied' a land based way of life or culture. Section four discusses the scope of the positive obligations Article 27 imposes on a state followed by

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relationship of indigenous peoples with their lands prior to allowing developmental activities on such lands and are thus, relevant to an analysis of tribal land rights; see Bankes, "Projects", *supra* note 353 at 457.

[364] The *Optional Protocol to the International Covenant of Civil and Political Rights* authorizes the HRC to entertain individual communications/complaints of violations. GA Res 63/117, UNGAOR, 2008, UN Doc A/63/435 [*Optional Protocol*]. The Optional Protocol was adopted on 16 December 1966, at the same time as the *ICCPR*. India has not opted into the *Optional Protocol*. The HRC is not a court but it is empowered to make recommendations in the form of 'views' to states upon hearing grievances. There is also a state-to-state complaint mechanism available, however, it has never been utilized so far. A state party is under an obligation to submit periodic reports to the HRC, which then comments on the state's compliance with the provisions of the *ICCPR*. The HRC adopts General Comments on the various provisions of the *ICCPR*. For a brief discussion of these functions of the HRC, see Katja Gocke, "The case of *Angela Poma Poma v. Peru* before the Human Rights Committee: The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights" (2010) 14 Max Planck Yearbook of United Nations Law 337. India has not submitted a periodic report to the HRC since 1996; that report made no reference to the tribal situation in India.

a discussion on the remedial content of the right. Section five discusses the right to effective participation. The last section contains the conclusion.

4.2 The Nature of the Right to Culture

The right to culture in Article 27 has both an individual and a group dimension.[365] Article 27 affirms the individual right of the members of the minority to enjoy their own culture.[366] At the same time, the right to culture implicitly contains a collective dimension. Culture is the creation of a group and can only be meaningfully enjoyed by a member within a group context.[367] Article 27 also endorses this understanding by recognizing that the individual right of members to enjoy their culture does not operate in isolation but is to be exercised "in community with other members of their group."[368] The survival and development of a group's distinct cultural identity is thus a pre-requisite for a meaningful

[365] The right is a "hybrid between individual and collective rights." Thornberry, *Minorities*, *supra* note 79 at 173. Communications to the HRC are admissible only where the violation of the individual's right to culture has been alleged; see *Optional Protocol*, *supra* note 364; Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication 1457/2006, submitted by Angela Poma Poma), UNHRCOR, 95th Sess, UN Doc CCPR/C/95/D/1457/2006 (2009) [*Poma Poma*]. Thus, the content of the group dimension of the right is more likely to be developed through periodic reporting and comments. However the HRC's jurisprudence suggests that it will accept a communication filed by an individual representing all the affected members of a group. The Lubicon Lake Band matter was one such communication and the HRC's findings address the violation of the Band's right rather than the petitioner's alone; Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication 167/1984, submitted by Chief Bernard Ominayak and the Lubicon Lake Band), UNHRCOR, 38th Sess, UN Doc CCPR/C/38/D/167/1984 (1990) [*Lubicon*]. In fact, the HRC's decisions with respect to other communications including the three *Lansman* cases and *Mahuika* also have a group thrust; Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 511/1992, submitted by Ilmari Lansman et al), UNHRCOR, 52nd Sess, UN Doc CCPR/C/52/D/511/1992 (1994) [*Lansman 1*]; Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 671/1995, submitted by Jouni E Lansman et al), UNHRCOR, 58th Sess, UN Doc CCPR/C/58/D/671/1995 [*Lansman 2*]; Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 1023/2001, submitted by Jouni Lansman, Eimo Lansman and the Muotkatunturi Herdsmen's Committee), UNHRCOR, 83rd Sess, UN Doc CCPR/C/83/DR/1023/2001 (2005) [*Lansman 3*]; Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 547/1993, submitted by Apirana Mahuika et al), UNHRCOR, 70th Sess, UN Doc CCP/C/70/D/547/1993 [*Mahuika*].

[366] Even though Article 27 uses a negative terminology, it nevertheless affirms the existence of a right; see *GC 23*, *supra* note 362 at para. 6.1.

[367] Anaya, "Multicultural", *supra* note 65 at 22.

[368] *GC 23*, *supra* note 362 at para 6.2. Thus, the enjoyment of the right to culture presupposes the existence of a "community of individuals endowed with similar rights." Thornberry, *Minorities*, *supra* note 79 at 173.

enjoyment of a member's individual right in a collective context.[369] Consequently, it has been argued that "[t]he [individual's] right to enjoyment of culture also…extend[s] to the maintenance of the group's cohesiveness…."[370] The HRC supports this assertion and holds that "although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture…."[371] Thus, the right to culture in Article 27 includes the collective right of a minority to maintain and develop its distinct cultural identity and each individual member "…is, in his or her own right, an important beneficiary of cultural integrity."[372] But what is the content of the notion of 'culture' in Article 27 that bears on the issue of tribal land rights and that members of a minority have an individual and collective right to enjoy, preserve and develop? More particularly, is the non-material concept of property or the right to ownership of traditional lands an aspect of the notion of 'culture' in Article 27 and thus embraced by the right to culture?

4.3 The Content of the Right to Culture

4.3.1 Land Based Material Aspects of Culture

The HRC endorses the understanding of culture as a way of life and has interpreted the notion of 'culture' in Article 27 expansively.[373] Pertinently, the HRC formally

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[369] In addition to the collective dimension being a prerequisite for the enjoyment of the individual right to culture, and therefore being included in the right to culture, the characterization of culture as a way of life also supports the recognition of the collective cultural rights of the minority. Xanthaki argues that "[i]f culture relates to all aspects of life of a sub-national group, the collective element of the right to a culture seems generic and its recognition necessary." "Culture", *supra* note 357 at 209. The HRC advocates the understanding of culture as a way of life which is discussed in Section 4.3.1, below.

[370] Kingsbury, "Non-State Groups", *supra* note 352 at 491.

[371] *GC 23*, *supra* note 362 at para 6.2.

[372] Anaya, "Multicultural", *supra* note 65 at 22. Article 27 of the *ICCPR* has been interpreted as recognizing and protecting "…both collective and individual rights to cultural integrity…." Tobin, *supra* note 349 at 144. Thornberry describes the right in Article 27 as a right that benefits individuals but is to be exercised collectively. *Minorities*, *supra* note 79 at 173. Article 27 in this sense promotes equal respect for distinct cultures and is an antithesis to involuntary assimilation. The non-discrimination principle is reflected throughout the *ICCPR* and forms the background for Article 27 that stands for maintaining cultural diversity and prohibits forced assimilation.

[373] Culture is a very complex term and international law conceptualizes culture in more than one way; see Thornberry, *Human Rights*, *supra* note 57 at 194, for a brief discussion of the different conceptualizations of culture. Thornberry broadly divides culture into three categories: western centric high culture, globalized culture and culture as a way of life. Gilbert points out to the understanding of culture as capital, as creativity and as a way of life; *Land Rights*, *supra* note 16 at 195. However, Thornberry asserts that in practice, the concept of culture is understood "…as a process of community self-creation and development…." *Human Rights*, *supra*

acknowledges the land-culture nexus by recognizing that some aspects/facets of the distinct way of life or culture of a minority may be inseparably bound up or connected with land such that "…the right to culture may entail a connection between a member or members of a minority and a particular territory."[374] The HRC has concluded:

> 3.2 The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of the State party. At the same time, one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – *may consist in a way of life which is closely associated with territory and use of its resources*. This may particularly be true of members of indigenous communities constituting a minority.[375]

As hinted above, for a connection with land to be a protected right under Article 27, it must be the manifestation of the group's distinctive way of life i.e. an essential component of their culture.[376] The Committee further elaborates on its understanding of the manner in which or the aspects in which culture may be bound up with lands and resources i.e. the nature of this connection:

> With regards to the exercise of cultural rights protected under Article 27, the Committee observes that *culture manifests itself in many forms, including a*

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note 57 at 194. The HRC recognizes that "…culture manifests itself in many forms, *including* a particular way of life associated with the use of land resources…." *GC 23 supra* note 362 at para 7. Further Xanthaki notes that where an international instrument recognizes the collective right to culture for minorities, it implicitly endorses the broader understanding of culture as a way of life; "Culture", *supra* note 357 at 209. The conceptualization of culture as a way of life is consistent with the indigenous and tribal understanding of the concept (*ibid* at 204).

[374] Bankes, "Projects", *supra* note 353 at 466. In other words, the HRC recognizes that land may be the basis of certain facets of minority culture. Where land and its resources are essential to the maintenance of a culture, they are the material basis of that culture and hence Article 27 extends to this material basis also; see Bankes, "Arctic", *supra* note 17. In *Lubicon*, *supra* note 365, the HRC acknowledged that the survival of the Lubicon Lake Band as a distinct cultural community was inseparably bound up with the sustenance that it derived from the land. The HRC has had a similar approach in the three *Lansman* cases and *Poma Poma*.

[375] *GC 23*, *supra* note 362 at para 3.2. Interestingly, the paragraph begins with the notion of state sovereignty and goes on to emphasize how, the right to culture may limit the authority of the state and require a degree of freedom for the minorities with respect to traditional lands and its resources. This reading of the right to culture appears to be consistent with the notion of internal self-determination and highlights the connection between Article 1 and Article 27 of the *ICCPR*. As noted earlier, the HRC has indicated that the right to self-determination is relevant to the issue of 'peoples' right to land ownership but Article 1 has so far not influenced the HRC's interpretation of Article 27; see *Mahuika*, *supra* note 365.

[376] Not all connections with land and its resources, however old, may be a result of a relationship that is essential to a culture and thus embraced by the right to culture. Minorities may have evolved a lifestyle for which land is a necessary basis but if this lifestyle is not in turn an essential part of the culture of the minority, it is not an aspect of culture and the resultant connection with land is not a protected right under Article 27. Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 760/1997, submitted by JGA Diergaardt et al), UNHRCOR, 69th Sess, UN Doc CCPR/C/69/D/76/1997 (2000) [*Diergaardt*]. The HRC held that the Rehoboth Baster community's connection with the lands in question, though 125 years old "is not the result of a relationship that would have given rise to a distinctive culture" (*ibid* at para 10.6).

> *particular way of life associated with the use of land resources*, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.[377]

The HRC's comment is inclusive and open-ended and acknowledges that the notion of culture embraces the material aspects of a minority's way of life founded on the use of lands and resources i.e. a connection with lands and resources that is visible or material in nature and is defined by 'use'.[378] In other words, the Committee recognizes that a tribal minority's way of life or culture may be inseparably bound up or connected with the physical *use* of traditional lands and its resources.[379] That material connection with land may comprise a broad range of activities or land use patterns including activities of an economic nature that are essential for sustaining the group's distinct cultural identity.[380] Hence, where land use

[377] *GC 23*, *supra* note 362 at para 7 [emphasis added]. A culture may consist of both material and non-material aspects and land may be the basis for both these aspects of a distinct way of life. Thus, the connection of a minority's culture with lands and resources may be both material and non-material in nature. For example, land may be the basis of cultural activities such as hunting or fishing and at the same time may also be the subject of customary laws essential to a culture.

[378] For example, the HRC called on Panama to recognize the indigenous community's right of collective *use* of their traditional lands; Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee, Panama*, UNHRCOR, 92nd Sess, UN Doc CCPR/C/PAN/CO/3 (2008) at para 21 [HRC, *Concluding Observations Panama 2008*].

[379] While this may be true for all minorities, the presumption is stronger in case of indigenous peoples who "…can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands…." *Diergaardt*, *supra* note 376 at 13; see *GC 23*, *supra* note 362 at para 7.

[380] The HRC has consistently held that "[t]he regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant…." Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 197/1985, submitted by Ivan Kitok), UNHRCOR, 32nd Sess, UN Doc CCPR/C/33/D/197/1985 at para 9.2 [*Kitok*]. Economic activities may be both a form of survival and cultural expression; see Thornberry, *Human Rights*, *supra* note 57 at 160. In *Lubicon*, the HRC held that "the rights protected by Article 27, include the right of persons in community with others, to engage in economic and social activities which are a part of the culture of the community to which they belong." *Supra* note 365 at para 32.2. In *Diergaardt*, the HRC pointed out that "…indigenous communities…can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities…." *Supra* note at 376 at 13. Scheinin suggests that had Article 27 been available in *Hopu's* case, it would include protection for both the traditional burial grounds and fishing; "Competing Uses", *supra* note 350; HRC's views on *Hopu* can be accessed at, Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 549/1993, submitted by Francis Hopu and Tepoaitu Bessert), UNHRCOR, 60th Sess, UN Doc CCPR/C/60/D/549/1993 (1997) [*Hopu*]. Pritchard notes that HRC's views in *Lansman 1* suggest that development activities on lands that affect minority "…cultural rights – including places of spiritual significance and the pursuit of economic and social activities…" trigger Article 27; "Native Title", *supra* note 17 at 157.

patterns are essential elements of a distinct culture, the concept of culture in Article 27 will also embrace those land use patterns.

Therefore, in the context of minority land rights, the right to culture in Article 27 includes the right of the members of a minority to enjoy, preserve and develop all the material aspects of a culture founded on the use of land and resources within an area.[381] The HRC acknowledges that land and its resources may be the basis for a culture's material aspects and hence the access and use of such a material basis is necessary for the enjoyment, preservation and development of that culture.[382] Expressed in the language of land rights, this interpretation of Article 27 supports the recognition and protection of the right to access and exploit lands and resources to the extent necessary for culture. In this sense, Article 27's scope with respect to land rights is limited by consideration of purpose.[383] As pointed out earlier, the right does not extend to all the land use patterns of a group.[384] Establishing that the material connection with land and resources is indispensable for the minority group's culture is a prerequisite for sustaining the contingent claim to access and use lands and resources.[385] Similarly, the right does not extend to all the lands and natural resources

[381] Graver & Ulfstein, *supra* note 65. In *Lansman 1*, the HRC inquired whether quarrying on Mount Riutusvaara "…effectively deny to the authors the right to enjoy their cultural rights in that region…." *Supra* note 365 at para 9.5.

[382] The right to culture includes the right to access culture; see Miles Hogan, "The Nisga'a Final Agreement and International Norms" (2004) 11 International Journal on Minority and Group Rights 299.

[383] Bankes, "Arctic", *supra* note 17 at 221. Clearly, the recognition and protection of land rights is purposive in nature and not the primary goal of Article 27.

[384] See *supra* note 380 and accompanying text.

[385] See also the comments in *supra* note 376. Long standing or traditional activities are more likely to qualify as culture, however, "…this is a matter of appreciation; no such limitation is inherent in Article 27." Kingsbury, "Non-State Groups", *supra* note 352 at 491. It has been argued that the HRC's decision in *Diergaardt* suggests that while there is no time frame as such, a 'historical' relationship with land is necessary for an activity to be recognized as a component of culture; Gilbert, *Land Rights*, *supra* note 16 at 188. In *Diergaardt*, *supra* note 376, the HRC found that the claim to use and access lands was a purely economic rather than a cultural claim even though the community had been using the lands for 125 years. Further, Article 27 does not depict culture as static and the fact that members of the minority may employ modern technology and have adapted the method of carrying out their activities over time does not prevent them from invoking the protection of Article 27; see *Lansman 1*, *supra* note 365; *Mahuika*, *supra* note 365. Importantly, it appears that this determination or appreciation ought to be inward looking. In analyzing the Finnmark Bill in the light of Article 27, Graver and Ulfstein question the *discretion* of the state in determining activities or land use patterns that fall within the ambit of the right on a case-by-case basis. The authors note that Article 27 does not allow any margin of discretion to the states in the matter; *supra* note 65 at 344. Thus, the determination of the scope of the material aspects is inward looking.

traditionally used by the members of the minority but to an adequate land and resource base necessary to preserve and develop minority culture.[386] It is evident that land use and access rights have been recognized "…not in their own right, but because they constitute the basis for and are a part of the exercise of cultural rights."[387]

However, the connection of a minority's culture with lands and resources may be both material and non-material in nature. An interpretation of Article 27 that embraces the non-material aspects of a distinct way of life will lend support to the recognition and protection of customary land rights based in customary laws as freestanding rights.

4.3.2 Land Based Non-Material Aspects of Culture

Indigenous peoples and tribals "…have redefined the notion of culture to embrace a wide range of tangible and intangible manifestations of culture…."[388] As noted earlier, the HRC endorses the understanding of culture as a way of life and thus, the notion of culture should logically encompass all manifestations that make up a distinct culture, including but not limited to its material or tangible aspects.[389] Anaya asserts that the norm of cultural integrity in Article 27 has been held to embrace all aspects necessary for a group's survival as a distinct culture i.e. Article 27 upholds the right of members to enjoy all cultural attributes/characteristics that define the culture of a particular group *including* land use patterns.[390] Accordingly, it has been argued that the HRC is advocating the interpretation of the right to culture in Article 27 as the right of minorities "to their [distinct] 'way of life',

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The approach of the HRC is quite problematic with regards to minerals within traditional lands. Underground resources need to be extracted before they can be used and thus it is difficult to establish a cultural dependence or connection with the use of these resources; see Gilbert, *Land Rights*, *supra* note 16 at 188.

[386] The decision of how much is adequate appears to a subjective one; see the discussion of the substantive limit inherent in Article 27 in Section 4.3.3, below. Thus, the determining criterion for both the type of land use and the physical extent of lands and resources that a claim under Article 27 may cover is the notion of 'culture' as interpreted by the HRC and not 'traditional occupation and use'.

[387] Graver and Ulfstein refer to *Lansman 1* and opine that the HRC's focus is on the protection of the right to enjoy one's cultural rights and protection of traditional economic activities. *Supra* note 65 at 344.

[388] Tobin, *supra* note 349 at 141.

[389] See Section 4.3.1, above. For a discussion of a "right to a 'way of life'", see Tobin, *supra* note 349 at 141.

[390] "Multicultural", *supra* note 65 at 28. Similarly, Thornberry submits that "the right to enjoy culture in Article 27 means all aspects of that culture; what is at stake is the ability of ethnic minorities to preserve their cultural identity and their cultural inheritance, *their own culture*." *Human Rights*, *supra* note 57 at 187 [emphasis in original].

which [should] include their rights to their customary legal regimes."[391] Land and resource rights are based in and are defined by the customary legal systems of tribals and indigenous peoples.[392] Recognition and protection of tribal customary laws will necessarily include its constituent property laws. Pertinently, Daes asserts with authority "…that traditional indigenous land tenure systems and patterns of land use are an aspect of culture that is protected by Article 27 of the Covenant."[393]

Further, discussing the customary international norm of cultural integrity, Anaya opines that for tribal and indigenous peoples the right to cultural integrity means the maintenance of a "range of cultural patterns" including customary laws embodying norms that establish rights to lands and resources, including ownership.[394] Anaya further argues that "custom and customary law are themselves critical elements of indigenous culture and as such are to be protected by the cultural integrity norm…."[395] Therefore, arguably, the right to culture in Article 27 ought to include the right to enjoy, maintain and develop the non-material aspects of a distinct way of life including customary laws and its constituent property laws that establish rights to land. If the right to ownership of traditional lands is a part of the customary laws of minorities, that right must not be denied.

However, irrespective of the merits of the foregoing arguments, the HRC has yet to consider minority customary laws and the right to ownership as an aspect of the right to culture.[396] Even though ownership was disputed in domestic proceedings in some of

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[391] Tobin, *supra* note 349 at 144. The author asserts that the right to culture as a way of life implies "the existence of a right to require respect for the underlying pillars of cultural integrity, including customary law and traditional decision-making institutions" (*ibid* at 143).
[392] Anaya "Multicultural", *supra* note 65 at 48.
[393] Erica-Irene A Daes, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous peoples and their relationship to land*, UNESCOR, 53rd Sess, UN Doc E/CN4/Sub2/2001/21 (2001) at 54. Daes' comment about the traditional land tenure system is interesting. It implies that a community's system of laws, including property laws, may be a non-material aspect of culture protected under Article 27.
[394] "Multicultural", *supra* note 65 at 15. Anaya asserts that cultural integrity is a norm of customary international law. Though this comment was not made qua the norm as articulated in Article 27, it is nevertheless relevant.
[395] *Ibid* at 49.
[396] See Tobin, *supra* note 349.

complaints before the HRC, the Committee came to a decision without referring to the issue of ownership.[397] Pertinently, the HRC has certainly indicated that it might draw on customs to determine the extent/scope of the rights to cultural integrity. In its concluding observation on New Zealand's periodic report, the HRC directed New Zealand to "revise the Marine and Coastal Area (Takutai Moana) Act, 2011 with a view to ensuring respect for the customary rights of Maori on their land and resources, and their cultural development."[398] In *Hopu* the HRC determined the notion of 'family' by identifying the relevant custom and drawing upon its meaning as understood by the group.[399] But so far, the HRC has not "…decided on whether and to what extent a breach of [if considered an element of culture], or failure to

[397] See e.g. *Lansman 1*, *supra* note 365 at paras 2.2 & 7.1; *Lubicon*, *supra* note 365. HRC, in effect, accepted state ownership over these lands; Anaya "Multicultural", *supra* note 65. Tobin points out that these decisions "demonstrate the difficulties…in overcoming ingrained notions of state sovereignty over lands over which they claim ancestral territorial rights and in securing respect and enforcement of their customary laws." *Supra* note 349 at 145. In *Poma Poma*, *supra* note 365, the petitioner was the owner of the lands and the act of the state had clearly affected the right to ownership, yet, the HRC did not assess it as an interference with the right to ownership as an aspect of culture, but rather as an interference with the culturally significant activity of raising alpacas and llamas. This approach suggests that Article 27 is not concerned with the violation of the right to ownership of traditional lands as such. Interestingly, Pentassuglia, in the context of *Poma Poma*, notes that the HRC "did not consider the land encroachments in question as raising distinctive property rights matters under the ICCPR" irrespective of the fact that "…community practices were clearly rooted in traditional land tenure patterns…." *Supra* note 17 at 183. *Inter-alia*, Pentassuglia's comment highlights the inseparability of the land based traditional activities that constitute a culture and the traditional land tenure systems regulating those activities. Thus, in addition to the argument that customary laws are an essential element of a way of life, it may also be argued that tribal land usage or practices are often rooted in and accompanied by harmonized customary laws and recognition of the former is incomplete without the latter. Where recognition of land rights is confined to particular activities, that are integral to a culture, the customary legal system that creates these rights is left without recognition; Erueti, *supra* note 279 at 94. The right to apply customary laws is fundamental for the ability of tribals to develop their cultures, including their use of lands and resources; Anaya "Multicultural", *supra* note 65 at 51. In this sense the recognition of customary laws is indispensable for the realization of the human right to maintain and develop the land based material aspects of a distinct culture in an area. See discussion of the positive obligations under Article 27 in Section 4.4, below.

[398] The Act has replaced the discriminatory *Foreshore and Seabed Act 2004*; Human Rights Committee, *Concluding observations on the sixth periodic report of New Zealand*, UNHRCOR, 2016, UN Doc CCPR/C/NZL/CO/6 at para 44. This confirms that the determination of the scope of the material aspects i.e. the specific land use activities that are aspects of the culture of a minority is inward looking; see *supra* note 385, for more on this aspect. Anaya supports this approach and argues that in determining whether a particular cultural practice is protected by the norm of cultural integrity,

> …the cultural group concerned should be accorded a certain deference for its own interpretive and decision-making processes in the application of universal human rights norms….It may be paradoxical to think of universal human rights as having to accommodate diverse cultural traditions, but that is a paradox embraced by the international human rights regime by including rights of cultural integrity among the universally applicable human rights.

"Multicultural", *supra* note 65 at 26.

[399] *Hopu*, *supra* note 380, did not involve a decision on Article 27 because France had expressly reserved its application. However, the HRC interpreted the notion of family in a manner that aimed at protecting the cultural integrity of the group; see Tobin, *supra* note 349; Anaya "Multicultural", *supra* note 65 at 49.

recognize Indigenous peoples' rights to apply their own customary laws [including property laws] would be considered a violation of Article 27."[400] In an interesting analysis of the *Nunavut Agreement,* Nigel Bankes confirms this understanding by concluding that a law extinguishing undefined tribal and indigenous land and resource rights, including ownership, will not, *itself*, be found to violate Article 27 by the HRC unless the extinguishment has a particular effect: a denial of the right of the members of the minority to access and use lands and resources to the necessary extent.[401] Had Article 27 required an autonomous recognition and protection of tribal land rights, including the right to ownership, an extinguishment of undefined land rights, *in itself*, would have violated Article 27.[402]

4.3.3 The Concept of Denial

The right to access and use lands and resources to the extent necessary for culture is also not absolute. Article 27 prohibits the *denial* of the right but interference short of denial

[400] Tobin, *supra* note 349 at 145.

[401] "Arctic", *supra* note 17 at 215. Bankes reached this conclusion based on the HRCs decision in *Mahuika*, *supra* note 365. In *Mahuika*, the Settlement and subsequent legislation extinguished Maori commercial fishing rights including commercial aspects of traditional fishing rights arising from all sources. The HRC noted that while the extinguishment of fishing rights does *affect* the engagement of the minority in fishing activities, the question is does it amount to a *denial* of rights. Thus extinguishment was treated as a simple act of interference and assessed as such. Bankes has pointed out that the HRC "…did not seriously engage with the finality/extinguishment provisions of the legislation…." "Arctic", *supra* note 17 at 214. Pritchard notes that the HRC's jurisprudence suggests that extinguishing recognized native title, that results in a denial of the right to use and access lands necessary for culture, amounts to a violation of Article 27. Any interference short of extinguishment will be examined for its impact on the minority culture; "Native Title", *supra* note 17 at 157. In its concluding observations on Canada's report, while the HRC expressed concern over reports of potential extinguishment of land rights, it did not point it out as incompatible with Article 27; see Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, UNHRCOR, 2015, UN Doc CCPR/C/CAN/CO/6 at para 16 [HRC, *Concluding Observations Canada 2015*].

New Zealand's *Foreshore and Seabed Act 2004* extinguished Maori customary title over the foreshore and seabed. The HRC certainly expressed concern that the extinguishment provisions of the statute were discriminatory in this respect (this aspect has been discussed in detail in Chapter Three, above). Yet with regards to Article 27, the HRC limited its observations to directing New Zealand to pay special attention to the cultural significance of access to the foreshore and seabed for the Maori when amending or repealing the Act; see Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee, New Zealand*, UNHRCOR, 98th Sess, UN Doc CCPR/C/NZL/CO/5 (2010).

[402] Referring to the three *Lansman* cases and *Mahuika*, Anaya opines that "[a] different conclusion about the legality of the impugned acts could result from the application of international norms upholding property rights of [tribal] and indigenous peoples over their traditional lands." "Multicultural", *supra* note 65 at 32. The decision of the HRC in these cases implies that Article 27 does not in its current interpretation uphold the property rights of tribals.

does not violate Article 27.[403] However, the concept of denial is not limited to 'legal prohibition' or 'factual impossibility' in accessing the material basis of culture and engaging in culturally significant activities within an area.[404] The HRC insists that when contemplating actions that affect the right to use and access the material basis of culture by the members of a minority, a state must ensure the sustainability of the minority culture and way of life and the participation of the members of the minority in such decisions prior to executing the action.[405] Thus, the HRC applies a two part 'cultural test' when assessing whether interference by the state, including development activities on traditional lands, crosses the threshold and ventures into the realm of denial of the right.[406] In the *Poma Poma* matter, the HRC found Peru in violation of Article 27 and noted the failure of the state to consult with the members of the minority community prior to undertaking activities that affected their

[403] The HRC expressly recognizes the right of the state to adopt measures promoting national development that may affect the right to culture; see e.g. *Poma Poma*, *supra* note 365; Gocke, *supra* note 364 at 345. Therefore, the threshold for violating Article 27 is very high.

[404] Denial in Article 27 is not limited to 'legal prohibition' or 'factual impossibility' in engaging in the activity "…but also a situation in which a specific economic activity forming an essential element in the culture of a minority community would lose its capacity to sustain the members of the community." Scheinin, "Competing Uses", *supra* note 350 at 170. Scheinin considers this part of the test to be "…a very demanding requirement with far reaching consequences' (*ibid*). In *Poma Poma*, *supra* note 365 at para 7.6, the HRC concluded that for measures to be admissible under Article 27, they must be proportional and ensure that the very survival of the distinct culture is not threatened.

[405] *Ibid*; see Gilbert, *Land Rights*, *supra* note 16. Thornberry defines sustainability in this context as "…the ability of an indigenous group to maintain its cultural cohesiveness and choose the development it wishes to embrace without that choice being overborne by outside powers." *Human Rights*, *supra* note 57 at 168. It must be noted that this requirement does not only apply to an act of the state that affects the right to culture in a negative manner but is a barometer to assess all actions/measures that may affect the right in Article 27. Therefore, the positive measures of protection and the remedy for violations of Article 27 must also satisfy the twin requirement. The right to participation in Article 27 is discussed in detail in Section 4.5, below.

[406] The impact of interference is to be judged based on the two-fold test and general economic development "…is not a legitimate justification for eroding the culture of persons belonging to a minority." Scheinin, "Competing Uses", *supra* note 350 at 169. The HRC has developed this two-part test of *consultation* and *sustainability* in cases where state approved development activities were planned or undertaken on traditional lands interfering with the practice of the culturally significant activities of the minority group; see *Lansman 1*, *supra* note 365; *Lansman 2*, *supra* note 365; *Lansman 3*, *supra* note 365; *Mahuika*, *supra* note 365. The HRC has also highlighted the cumulative effect of separate measures and held that "…though different activities [or measures] in themselves may not constitute a violation of this article, such activities [or measures], taken together, may erode the rights…" in Article 27; *Lansman 2*, *supra* note 365 at para 10.7.

Interestingly, Nigel Bankes has noted that the HRC determines the scale of the minority for the deprivation analysis; "Arctic", *supra* note 17 at 214. In *Mahuika*, *supra* note 365, the HRC assessed the legislation extinguishing traditional fishing rights and found that the legislation was held to meet the sustainability test, and was rather held to exceed it by enhancing the rights of the Maori to access the material aspects of their culture. Further, there was extensive consultation and 'substantial Maori support for the Settlement'. The petitioners had objected to the Settlement. Bankes notes that the HRC did not make the deprivation analysis at the individual or sub-group level and held that the legislation did not amount to a denial of the rights of the Maori as a whole; "Arctic", *supra* note 17 at 214.

culturally significant activities and rendered those activities unsustainable.[407] The obligation not to deny the rights in Article 27 clearly extends to the effects of the state's actions.[408] This is relevant in matters of historic dispossession.[409] Gilbert notes that "[w]hile human rights treaty bodies are not designed to deal with historic dispossession, the HRC has shown that past wrongs could be used as proof of continuous violation of indigenous peoples' land rights."[410]

Even though Article 27 does not recognize and protect the right to ownership of traditional lands, the right to culture in Article 27 enhances the protection offered to tribal lands by the right to property in international law on its own, *inter-alia*, in the event of expropriation of the material basis of culture (lands and resources) for national development.[411] As discussed earlier, Article 27 places an absolute barrier on the denial of the right "…and the HRC has strongly rejected recourse to the notion of "margin of

[407] *Supra* note 365. The author of the case belonged to the Aymara community who has practiced raising llamas and alpacas as a part of their culture for thousands of years. Peru had undertaken the construction of several wells in the Ayro region that had led to the drying and degradation of the traditional pastures, and the consequential loss of livestock of the community including the author. The HRC found that Peru had denied the author the right to culture in Article 27.

[408] For instance in *Mahuika*, the impugned legislation was found admissible on the application of the twin test. However, the HRC emphasized the state continues to be bound by its obligations to ensure the sustainability of Maori fishing activities under Article 27 in the implementation of the Act; *Supra* note 365 at para. 9.9.

[409] In the *Lovelace* matter, the legislation that affected the rights of the petitioner was adopted before the coming into force of the *ICCPR*, the HRC took cognizance of the continuing effect of the legislation. The HRC held that it was competent to examine the effects "…without regard to their original cause." Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No R6/24, submitted by Sandra Lovelace), UNHRCOR, 13th Sess, UN Doc CCPR/C/DR (XIII)/R6/24 (1981) at paras 10-13 [*Lovelace*]. A similar approach of the HRC is evident in the *Lubicon* case especially with regards to land rights. The HRC held that "[h]istorical inequities…and certain more recent developments threaten the way of life and culture of Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue." *Supra* note 365 at para 33. Thus the HRC took 'historical inequities' into consideration when determining whether state interference with traditional lands amounts to a denial of the right; see also Gilbert, *Land Rights*, *supra* note 16. Thus even though an event of historic dispossession itself cannot be a ground for violation, if the continuing effects of that event amount to a denial of the right to use and access lands and resources necessary for culture, such continuing interference violates Article 27. See discussion in Section 4.4.1, below, for remedies in such cases.

[410] *Land Rights*, *supra* note 16 at 162.

[411] By expropriation, I mean an act of taking lands whereby the geographical ambit of the cultural rights is actually reduced. The human right to property, in itself, does not prohibit expropriation of tribal traditional lands. Traditional lands may be lawfully expropriated just like any other lands within the state and any claims thereon may be satisfied by payment of monetary compensation. But in contemporary international law, the right to property is joined by the notion of cultural integrity and substantive equality to impose additional obligations on the state when expropriating traditional lands. Thus, the protection offered by a simple recognition of tribal land rights as property rights is enhanced by the norm of cultural integrity; see Anaya "Multicultural", *supra* note 65.

appreciation"" in the matter.[412] Consequently, it has been argued that Article 27 imposes a substantive limit on land expropriation.[413] While expropriation of traditional lands that are the material basis of a culture may only be considered interference until it reaches a certain threshold, any expropriation of lands beyond that threshold will fail the test of sustainability and amount to a *denial* of the right to culture.[414] Since the use and access of lands and resources within this ceiling is absolutely necessary for the sustainability of culture, Article 27 prohibits expropriation of that minimum land and resource base.[415]

However, the HRC, so far, has yet to affirm minority customary laws and the right to ownership as an aspect the right to culture.[416] I will now turn to discussing whether Article 27 places a positive obligation on the state to recognize and protect tribal ownership of traditional lands as a *means/arrangement* to assure the right of the members of the minority to use and access lands and resources necessary for culture.

4.4 The Positive Obligations

The right in Article 27 is couched negatively. As discussed above, Article 27 obliges a state to refrain from denying the members of the minorities the right to culture including its land based material aspects. Nevertheless, the norm of cultural integrity articulated in Article 27 not only abjures a state from acts of forced assimilation and abandonment of cultural

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[412] Gilbert, *Land Rights*, *supra* note 16 at 131; see Ulfstein, *supra* note 361 at 9; Tobin, *supra* note 349 at 144. "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27…. Thus, measures whose impact amounts to a denial of the right will not be compatible with the obligations under Article 27. " *Lansman 1*, *supra* note 365 at para 9.4.

[413] Nigel Bankes points that this substantive limit is difficult to frame but, "[a]t the very least, the art. 27 jurisprudence supports the proposition that a threshold is necessary." "Projects", *supra* note 353 at 475. Clearly this limit is independent of the issue of ownership and applies even where tribals do not own the land under state law or the land is state or private owned.

[414] The expropriation of the entire land base of tribals may result in a legal and factual denial to use and access lands and resources and, thus, violate Article 27 as such. But expropriation of lands short of the entire land, but beyond the threshold may fail on the 'sustainability' part of the test.

[415] The HRC questioned Suriname about "whether, as a result of mining and logging activities carried out by national and foreign companies, numerous villages have been relocated in violation of the rights of their inhabitants." Human Rights Committee, *List of issues to be taken up in connection with the consideration of the second periodic report of Suriname (CCPR/C/SUR/2003/2), adopted by the Human Rights Committee on 24 October 2003*, UNHRCOR, 79th Sess, UN Doc CCPR/C/80/L/SUR (2003) para 21.

[416] Pentassuglia, *supra* note 17, notes that the right to property route for claiming land rights is not available under the *ICCPR* because it does not 'specifically' recognize such a right.

practices but also requires affirmative action to protect the cultural matrix of minorities.[417] The HRC's position is clear on the matter and it has consistently rejected a "minimalist interpretation" of the provision.[418] Thus, while Article 27 places a negative obligation on the state to refrain from acts that result in a denial of the right to culture, a state must also adopt "…positive measures of protection to ensure that members of minorities…are not denied their *protected* rights and their opportunity to practice them."[419] Thus, in the context of tribal lands and resources, the state is under an obligation to adopt legal measures to assure the protected right of the members of the minorities to use and access lands and resources to the extent necessary for culture.[420] Is the legal recognition of tribal ownership of traditional lands that serve as the basis of the material aspects of minority culture, a required *means/arrangement* to assure the right to use and access lands and resources necessary for culture?[421]

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[417] Anaya, "Multicultural", *supra* note 65 at 26. *General Comment No. 23* explicitly states that "[a]lthough Article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied." *Supra* note 362 at para 6.1. The denial of a right can occur by way of both acts and omissions. Hence, the duty not to deny a right impliedly includes the duty to 'do' certain things, the omission of which amount to a denial of the right.

[418] See Pritchard, "Native Title", *supra* note 17 at 155; Thornberry, *Human Rights*, *supra* note 57 at 161. The *General Comment No. 23* on Article 27 expressly states that Article 27 obliges the state to adopt "positive measures…necessary to protect the identity of a minority and the rights of its members." *Supra* note 362 at para 6.2. This reading of the scope of obligation in Article 27 is consistent with the broader understanding of the scope of the right to equality that embraces the right to cultural integrity. The right to 'substantive' equality is also a jurisprudential basis for the state's duty to adopt positive measures to protect the distinct tribal cultural identity including "…measures which seek to secure protection of their distinct relationship with their lands…." Pritchard, "Native Title", *supra* note 17 at 129. Such measures are not *prima facie* discriminatory special measures but are "…implicit and mandated by the principle of equality" (*ibid*). See the discussion of the right to equality in Chapter Three, above.

[419] Bankes, "Projects", *supra* note 353 at 466 [emphasis added]. The duty to adopt positive measures to protect the cultural identity of a minority is coextensive with the current interpretation of the scope of the right to 'culture' in Article 27.

[420] See Bankes, "Arctic", *supra* note 17 at 219. Where the right to culture includes the right to enjoy a particular way of life associated with the use of land resources, its enjoyment "…may require positive legal measures of protection…." *GC 23*, *supra* note 362 at para 7; see *Lubicon*, *supra* note 365; *Mahuika*, *supra* note 365; *Lansman 1*, *supra* note 365; *Lansman 2*, *supra* note 365. Merely adopting legislation recognizing the right is not enough, legal measures must be adopted to ensure that the rights recognized in Article 27 are in fact respected and protected. Further, the duty to adopt legal measures of protection extends not only to acts of denial by the state but also the violation of the right by other persons within the state; see *GC 23*, *supra* note 362 at para 6.1.

[421] Graver and Ulfstein pose the question this way: "…whether it is necessary to assure the minority group's self-determination over natural resources, or whether Article 27 presents a required *ultimate* outcome which can also be achieved if the State manages the natural resources in such way as to protect the culture in question?" *Supra* note 65 at 343 [emphasis in original]. Referring to the strong disagreement on the issue of ownership within the Sami Rights Committee's working group on legal matters in 1993, Graver and Ulfstein have noted

The HRC does not specify 'how' the protected rights in Article 27 are to be guaranteed.[422] It appears that the positive obligation in Article 27 is largely result oriented.[423] Article 27 does not require specific measures to assure the rights to use and exploit lands and resources to the necessary extent.[424] A state's compliance with the positive duty in Article 27 "…must be assessed on the basis of the assembled measures specified by the law with a view to protecting the basis for [the minority's] enjoyment of their cultural rights" i.e. an assessment whether the positive legal measures, taken together, are adequate to ensure the sustainability of the minority culture.[425] Effective participation and sustainability of minority culture are the decisive criteria in determining if measures are adequate to protect the material basis of culture and not how the issue of ownership is resolved.[426] Scheinin argues Article 27 will support the recognition of ownership of lands "…only in cases where it is proven that no other arrangement" will satisfy the test.[427] In this context, reflecting on the finding of 'historical inequity' in the *Lubicon* decision by the HRC, Kingsbury concludes that the group's right to culture was 'threatened', *inter-alia*, by the failure to assure ownership to

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that Jebens, one of the members of the Committee, opined that "it must "be assumed that Article 27 entails a positive requirement for the Sami population to have sufficient control over such natural resources as can serve a basis for preservation and continuation of Sami culture"" (*ibid* at 342).

[422] See Graver and Ulfstein, *supra* note 65 at 342.

[423] In assessing the Finnmark Bill, Graver & Ulfstein did not assess the sufficiency of the measures to meet the 'positive measure' requirements of Article 27, but instead commented on those aspects of the Bill that "…contribute to meeting the obligation of Article 27…" (*ibid* at 345). This assessment, focusing on fulfillment of the obligations rather than compliance by way of specific measures, indicates that the obligation to adopt positive measures under Article 27 is result oriented.

[424] See Bankes, "Arctic", *supra* note 17. Even though the HRC has specifically called for certain measures to be adopted by the state in its concluding observations on periodic reports. Those measures are contextual and do not constitute a universal obligation arising out of Article 27 in all cases.

[425] Graver & Ulfstein, *supra* note 65 at 344. The right protected by Article 27 is a hybrid right and may require constant balancing; see Thornberry, *Minorities*, *supra* note 79. In some of the matters before it, the HRC has been faced with a situation where a law purporting to protect the culture of the minority has the effect of restricting the right of the individual members. In such cases, the HRC has adopted a balancing approach and held that "…restriction…must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority [culture] as a whole." Kitok, *supra* note 380 at para 9.8.

[426] Article 27 is not concerned with how the issue of ownership of lands is resolved i.e. with who owns the land but rather with how the land is managed; see Graver & Ulfstein, *supra* note 65.

[427] Martin Scheinin, "Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights", online: (2004) Aboriginal Policy Research Consortium International <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1249&context=aprci>. However, where a state may desire to recognize ownership as a means to assure the right to culture, Article 27 certainly does not present an obstacle. Further, Article 27 places no obligation to recognize title to minerals as such. It simply prevents a state from allowing resource development activities in a manner that amounts to a denial to access their traditional resources and activities; see Bankes, "Arctic", *supra* note 17 at 225.

a land base through a reserve to which the Band had a strong "moral and perhaps a legal claim."[428] Kingsbury opines that the decision in *Lubicon* "implies that the right of members of a group to enjoy their culture *may* be violated where they are not allocated the land and control of resource development necessary to pursue economic activities of central importance to their culture, such as hunting and trapping."[429] However, it has been argued that 'historical inequity' is an inadequate criterion for determining a violation of Article 27 and the decision is vague with respect to the "…factors that were decisive for the finding of a violation."[430]

An additional argument for the positive obligation to recognize customary property laws may be made on the ground of inseparability of the land based traditional activities that constitute a culture and traditional land tenure system regulating those activities.[431] Even though customary laws are not yet protected as an aspect of the right to culture, it may be argued that the protected tribal land usage or practices essential to culture are often rooted in and accompanied by harmonized customary laws.[432] Assuring the right to these material aspects of culture may require adopting measures recognizing the customary laws they are rooted in.[433] However, "[i]t remains to be seen whether positive actions required of State

[428] Kingsbury, "Non-State Groups", *supra* note 352 at 491.
[429] *Ibid* at 490. Thornberry argues that the *Lubicon* decision implies that, in "analogous circumstances", states are under a duty to assure land ownership of the material basis of culture; *Human Rights*, *supra* note 57 at 167. Thus where recognition of ownership is the only measure that can satisfy the test and the failure to assure the ownership of the land base *will* have the effect of denial of the right to culture, Article 27 requires the recognition of ownership of the land base necessary for culture.
[430] Nigel Bankes describes the HRC's reasoning in support of its findings to be 'very thin'. "Projects", *supra* note 353 at 467; see Scheinin, "Competing Uses", *supra* note 350 at 166.
[431] See *supra* note 397, for more on this topic.
[432] *Ibid*.
[433] In other words, non-recognition of customary laws regulating such practices may be argued to be a condition that impairs the enjoyment of the rights protected in Article 27. It is not far fetched to argue that such recognition is essential for the sustainability of the minority culture in this respect. Anaya argues that the right to apply customary laws is fundamental for the ability of tribals to develop their cultures, including their use of lands and resources; "Multicultural", *supra* note 65 at 51. In this sense, the recognition of customary laws is indispensable for the enjoyment of the right to maintain and develop the land based material aspects of a distinct culture in an area. Even though this argument is limited to customary laws governing the land based material aspects of culture, any recognition of customary laws will be a step in the promising direction. Tobin thinks it likely "that such a claim would prosper in the case of customary laws essential for the realization of rights to enjoy cultural identity, apply traditional land and resource management practices, and enforce customary control of the use and sharing of both tangible and intangible aspects of culture." *Supra* note 349 at 145.

parties to implement their obligations under Article 27 will…support…the recognition of their law and customs."[434]

Further, it appears that Article 27 does not obligate the state to identify individual land use rights or to demarcate the material basis (lands and resources) of culture either.[435] A state may fulfill its obligation of adopting positive legal measures without identifying and spelling out the individual land and resource use rights.[436] Bankes makes a persuasive argument that "…the positive measures owed by a State as part of the duty not to deny access to the material aspects of culture includes, as a starting point, the duty to delineate those material aspects of culture."[437] It is difficult to ascertain if interference by the state has crossed the threshold of denial without "…an overall sense of the resource and territorial basis of that people or minority, and in particular the spatial distribution of those resources."[438] However, the failure of the state to delimit and demarcate traditional occupation lands does not in itself violate Article 27.[439]

4.4.1 Remedies and Compensation

Article 2(3) recognizes the right to an effective remedy in case of violation of the rights in the *ICCPR*.[440] The *General Comment No. 31* on Article 2 of the *ICCPR* clarifies that

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[434] Sarah Pritchard, "The International Covenant on Civil and Political Rights and Indigenous Peoples" in Sarah Pritchard, ed *Indigenous peoples, the United Nations and human rights* (London: Zed Books, 1998) 184 at 199.
[435] See Bankes, "Arctic", *supra* note 17; Graver & Ulfstein, *supra* note 65. But see Erica Daes, *supra* note 393 at para 54. Daes suggests that Article 27 places an *obligation* on the state to demarcate and respect traditional lands. Even though the HRC has questioned Brazil about the slow progress in demarcation of traditional lands, it appears that the measure was voluntarily adopted by Brazil as a measure to fulfill the obligations in Article 27; see Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee, Brazil*, UNHRCOR, 85th Sess, UN Doc CCPR/C/BRA/CO/2 (2005) at para 6.
[436] Graver & Ulfstein, *supra* note 65 at 344. The authors consider that such a determination is contextual in nature. However, as noted earlier, the state does not enjoy a margin of appreciation in the matter.
[437] "Arctic", *supra* note 17 at 219.
[438] *Ibid.*
[439] *Ibid* at 220. Bankes also refers to Graver and Ulfstein's assessment of the Finnmark Bill in arriving at the conclusion. Graver and Ulfstein, *supra* note 65, have commented that even though the various cultural land use rights that a minority has the right to enjoy in an area are not recognized in the Bill, this does not in itself violate the positive measure obligation. Further, "…the Bill also lacks instruments…to carry out such identification" (*ibid* at 345). However, Graver and Ulfstein concede that the requirements of Article 27 are so vague that it cannot be asserted that even this violates Article 27. Thus, the failure to adopt legal measures to carry out land demarcation does not violate Article 27.
[440] *Supra* note 17, art 2(3).

termination of the violation is a necessary component of the right to an effective remedy.[441] Further, the sustainability part of the test implies that for a remedy to be effective, it must aid the continued viability of the culture of the affected minority.[442] Thus, the remedy for a violation is the cessation of the interference and the restoration of circumstances necessary for enjoying the distinct way of life.[443] The requirement of ensuring sustainability emphasizes the maintenance of a continued connection with traditional occupation lands and thus compensation and relocation may not be an effective remedy under Article 27.[444] However, it does not imply that pecuniary compensation may never be an effective remedy. Pecuniary compensation in part "…in cases where the economic hardship caused to the sustainability of the economic activities cannot fully be restituted through measures that seek to restore the natural environment is acceptable, [n]evertheless, the provision of a lump sum of money can never, *as such*, be an effective remedy."[445]

Where the "…viable economy based on traditional or otherwise typical means of livelihood of the community has already been destroyed and is unlikely to recover…", it is a case of historical inequity and compensation may be the effective remedy for the loss of the viable economy.[446] However, even in such cases, the emphasis should be on ensuring the survival of the distinct culture.[447] Thus, the effectiveness of compensation as an effective remedy will depend upon how the money will be spent to preserve the distinct cultural connection of the group with their traditional lands.[448] It has been argued that where

[441] Human Rights Committee, *General Comment No. 31 [80]*: *The nature of the General Legal Obligation imposed on State Parties to the Covenant*, UNHRCOR, 80th Sess, UN Doc CCPR/C/21/Rev1/Add13 (2004) at para 15.
[442] Scheinin, "Competing Uses", *supra* note 350 at 171; Duffy, *supra* note 350, agrees that the HRC requires that the cultural integrity of the group must be taken into account when determining the appropriate remedy for violations. Such measures must respect the cultural test discussed in Section 4.3.3, above.
[443] See Scheinin," Competing Uses", *supra* note 350 at 171.
[444] Duffy, *supra* note 350 at 530; Thornberry, *Human Rights*, *supra* note 57 at 167.
[445] Scheinin, "Competing Uses", *supra* note 350 at 171 [emphasis in original].
[446] *Ibid* at 172. Scheinin reaches this conclusion based on HRC's decision in *Lubicon*, *supra* note 365.
[447] Scheinin, "Competing Uses", *supra* note 350 at 172.
[448] *Ibid*.

restitution is impossible securing access and use rights to adequate equivalent lands must be preferred to monetary compensation.[449]

4.5 From Effective Participation to Free, Prior and Informed Consent[450]

The right to effective participation is integral to Article 27.[451] Article 27 places an obligation on the state to adopt measures to ensure the effective participation of the members of the minorities in decisions "…that may affect their cultural attributes, including decisions concerning cultural ties with lands and natural resources."[452] The right to participate in Article 27 is an individual right of the members of a minority community.[453] Thus, measures adopted by a state must guarantee the right to effective participation to the individual members of the tribal community in all decisions affecting them and their culture.[454]

The HRC's decision in *Poma Poma*[455] significantly elaborated on the content of the right to effective participation in decisions that "substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community."[456] The HRC went a step beyond its earlier approach where consultation was deemed sufficient for

[449] Duffy *supra* note 350 at 525.
[450] As pointed out earlier, the right of tribal and indigenous peoples to participate in decisions affecting them has attained the status of customary international law; Pentassuglia, *supra* note 17.
[451] *Ibid*.
[452] Anaya, "Multicultural", *supra* note 65 at 57; see Bankes, "Arctic", *supra* note 17 at 213; *GC 23*, *supra* note 362 at para 7. This duty is also evident as part of the cultural test evolved by the HRC and discussed in Section 4.3.3, above. This duty is again result oriented and does not require the adoption of any specific measures. The end result must be effective participation. Clearly this duty is not limited to decisions that may have a negative impact on the rights of the minorities under Article 27 but to "…decisions-making in all areas having an impact on their rights." Human Rights Committee, *Concluding observations on the third periodic report of Suriname*, UNHRCOR, 2015, UN Doc CCPR/C/SUR/CO/3 at para 48. The periodic reports submitted by the states and HRCs concluding observations reflect that even where a decision that may affect the right to culture in Article 27 is in the form of a proposed legislation, the minority's effective participation is necessary. The HRC recently directed Canada to *seek* free, prior and informed consent whenever contemplating action and legislation that impact the lands and rights of indigenous peoples; HRC, *Concluding Observations Canada 2015*, *supra* note 401 at para 16.
[453] Graver and Ulfstein, *supra* note 65 at 345. The right to participate in Article 27 is a right that accrues to 'members of minority communities' (*ibid*).
[454] The Finnmark Bill envisaged participation through Finnmark Estate bodies and the Sami Parliament when decisions that may affect the Sami and their culture were being made. The right was not granted to the members of the community as such. Graver and Ulfstein found this to be a failure to meet the requirements of Article 27; see *ibid*.
[455] *Supra* note 365.
[456] *Ibid* at para 7.6.

fulfilling the obligation of effective participation in Article 27.[457] The HRC held that "…participation in the decision-making process must be effective which requires not mere consultation but the free, prior and informed consent of the members of the community."[458] It has been argued that the *Poma Poma* decision is vague with respect to the extent of the obligation to obtain free, prior and informed consent.[459] Even though it may appear otherwise, free, prior and informed consent is not required for participation to be effective in all cases.[460] Pentassuglia argues that "group consent is required in the event that the activities in questions are bound to have a particularly serious substantive impact on indigenous lands, whereas consultation must, *de minimis*, be conducted in good faith with a view to achieving such consent."[461] Thus, 'limited' impact or proportionate measures permissible under Article 27 may have a minor or a major/substantial impact on the right of the members of the minority. The standard for effective participation is good faith consultation with a view to

[457] For the HRC's earlier approach, see *Lansman 1*, *supra* note 365; *Lansman 2*, *supra* note 365; *Lansman 3*, *supra* note 365; *Mahuika*, *supra* note 365; see also Gocke, *supra* note 364 at 357.

[458] *Poma Poma*, *supra* note 365 at para 7.6. Although the HRC had already stressed that a state must *seek* the informed consent of members of the minority before adopting decisions affecting them; see Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee, Canada,* UNHRCOR, 85th Sess, UN Doc CCPR/C/CAN/CO/5 (2006). *Poma Poma* was the first instance where the HRC held that a mere attempt was not sufficient and free, prior and informed consent must be *granted* where measures substantially affecting/interfering with culturally significant activities are being contemplated; see also Gocke, *supra* note 364 at 357; Pentassuglia, *supra* note 17, thinks that the HRC used Article 27 in a manner consistent with the wider theme of indigenous land rights in the Inter-American jurisprudence. Gocke argues that the approach of the HRC is not novel but the affirmation of the right to free, prior and informed consent must be appreciated "…as a welcome step towards unification of public international law norms." *Supra* note 364 at 367.

[459] *Ibid*. Gocke draws out two contrasting readings of the decision of the HRC in this respect. First, the decision may imply that the obligations of proportionality of the measures and free, prior and informed consent are alternative to each other. Thus, free, prior and informed consent may serve as a tool to justify disproportionate measures. Second, Gocke notes that the HRC explicitly held that "[i]n addition" to the free prior and informed consent "the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members" (*ibid* at 368); *Poma Poma*, *supra* note 365 at para 7.6. Gocke understands this statement to have a completely contrasting implication: proportionality and free, prior and informed consent are cumulative conditions and free, prior and informed consent is required where any measure is adopted that may interfere with the right of the community, even where it is proportional. But see Pentassuglia, *supra* note 17.

[460] Pentassuglia argues that this understanding is "stretching the scope of Article 27" and is not "warranted in the context of the [*Poma Poma*] case." *Ibid* at 184.

[461] *Ibid* [emphasis in original]. Pentassuglia considers that the HRC is linking its sliding scale approach to the views on effective participation of the Inter-American Court of Human Rights in *Saramaka*, *supra* note 149. The HRC also referred to the lack of independent studies to see the impact of the wells and this reflects a wider approach like *Saramaka* to use Environmental and Social Impact Assessments to further articulate the test for effective participation under Article 27; Pentassuglia, *supra* note 17.

achieving free, prior and informed consent when adopting such decisions.[462] However, where measures are likely to have a substantial impact, not amounting to denial, on the rights of the minority, the state must secure the free, prior and informed consent of the affected minority to comply with Article 27.[463] Even though this condition may work as a veto against substantial impact measures, there appear to be no general criteria to determine when an impact is substantial enough to attract this obligation. On the other hand, Article 27 absolutely prohibits measures that are disproportionate and amount to a denial of the rights in Article 27.[464] Thus, all measures contemplated by the state must adhere to "the principle of proportionality so as not to endanger the very survival of the community and its members."[465]

4.6 Conclusion

The *ICCPR* does not contain an express right to property. However, the right to culture contained in Article 27 of the *ICCPR* is relevant for the recognition and protection

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[462] See Human Rights Committee, *List of issues prior to submission of the seventh periodic report of Norway*, UNHRCOR, 2016, UN Doc CCPR/C/NOR/QPR/7 at para 20. The HRC sought "information on measures taken to consult Sami communities with a view to seeking free, prior and informed consent and effective participation in decision-making whenever their rights may be affected by projects, including for the extraction of natural resources, carried out in their traditional territories and impacting on the means of subsistence for the Sami people" (*ibid*). In its seventh periodic report, Norway informed the HRC about a decision on a mining permit that may have a limited impact on Coastal Sami fishing. The state considered the impact to be minor and hence found implementing mitigation measures unnecessary. Yet, the state has reported consultation even though, admittedly, no agreement was reached. However, the state has not reported an effort to seek free, prior and informed consent; see Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant pursuant to the optional reporting procedure: seventh periodic reports of States parties due in 2017, Norway*, UNHRCOR, 2017, UN Doc CCPR/C/NOR/7. The HRC has yet to consider the report. Similarly, the HRC expressed concern on the "absence of a process of consultation to *seek* the free, prior and informed consent of communities to the exploitation of natural resources in their territories" in Panama; HRC, *Concluding Observations Panama* 2008, *supra* note 378 at para 21.

[463] The HRC directed Chile to:

> [e]stablish an effective consultation mechanism, in line with the principles set forth in Article 27 of the Covenant, with a view to obtaining indigenous communities' free, prior and informed consent to decisions about projects that affect their rights, and in particular, ensure that their free, prior and informed consent is obtained before any measure that might jeopardize, or substantially hinder, their culturally significant economic activities are taken.

Human Rights Committee, *Concluding observations on the sixth periodic report of Chile*, UNHRCOR, 2014, UN Doc CCPR/C/CHL/CO/6 at para 10.

[464] This links with the substantive limit pointed out by Nigel Bankes and discussed in Section 4.3.3, above. The HRC directed Panama to consult with the community before granting exploitation licences on their traditional lands and to "ensure that in no case shall such exploitation violate the rights recognized in the Covenant." HRC, *Concluding Observations Panama* 2008, *supra* note 378 at para 21. Clearly, the decision that is reached after consultation must still be consistent with the substantive rights in Article 27; see Anaya, "Multicultural", *supra* note 65 at 56.

[465] *Poma Poma*, *supra* note 365 at para 7.6.

of tribal land rights and has been successfully invoked in matters involving land rights claims.[466] The right to culture in Article 27 has both an individual and a group dimension.[467] While the individual members of a minority have the express right to enjoy their culture, Article 27 also implicitly recognizes their collective right to preserve and develop that culture.

The right to culture in Article 27 has been interpreted to embrace the material aspects of a land based way of life or culture i.e. the material connection with lands and resources that are integral to the minority group's culture. The HRC acknowledges that land and its resources may be the basis for a culture's material aspects and hence, the access and use of such a material basis is necessary for the enjoyment, preservation and development of that culture. Thus, Article 27 supports the recognition and protection of the right to access and exploit lands and resources to the necessary extent. Article 27 prohibits the denial of the right to access and use lands and resources to the extent necessary for culture. The HRC applies the two part 'cultural test' of sustainability and effective participation when assessing whether interference by the state, including development activities on traditional lands, crosses the threshold and ventures into the realm of denial of the right.[468] It has been argued that Article 27 imposes a substantive limit on the expropriation of the material basis of culture (traditional lands and resources).[469] Article 27 places an absolute barrier on the denial of the right and expropriation of lands beyond a threshold will fail the test of sustainability.[470] However, while the HRC has certainly indicated that it might draw on customs to determine the extent/scope of the rights to culture, it has yet to consider minority customary laws and the right to ownership as an aspect of the right to culture.[471]

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[466] *Ibid*. The relevance of Article 27 to the issue of tribal land rights is discussed in Section 4.1, above.
[467] See discussion in Section 4.2, above.
[468] Scheinin, "Competing Uses", *supra* note 350; see discussion on 'denial' in Section 4.3.3, above.
[469] Bankes, "Projects", *supra* note 353 at 475.
[470] See the discussion in Section 4.3.3, above.
[471] Tobin, *supra* note 349; see also Section 4.3.2, above, for the arguments supporting such interpretation.

In addition to the negative obligation imposed on the state, Article 27 obliges a state to adopt legal measures to assure the protected right of the members of the minorities to use and access lands and resources to the extent necessary for culture.[472] However, Article 27 does not require the state to recognize and protect tribal ownership of traditional lands as the means/arrangement of assuring that right. Effective participation and sustainability of minority culture are the decisive criteria in determining if measures are adequate to protect the material basis of culture and not how the issue of ownership is resolved.[473] Article 2(3) of the *ICCPR* requires an effective remedy in case of violations of the rights in Article 27.[474] The emphasis is yet again on the sustainability of the minority culture.

Importantly, Article 27 obliges the state to adopt measures guaranteeing the right to effective participation to the individual members of the tribal community in all decisions affecting them and their culture.[475] The standard for effective participation in 'limited' impact or proportionate measures permissible under Article 27, that have a minor impact on the right of the members of the minority, is good faith consultation with a view to achieving free, prior and informed consent when adopting such decisions.[476] However, where measures are likely to have a substantial impact on the rights of the minority, the state must secure the free, prior and informed consent of the affected minority to comply with Article 27.[477]

The interpretation of the notion of culture in Article 27 that bears on the issue of tribal land rights has been developed by the HRC largely in response to the claims of indigenous peoples to use and access lands in the face of state authorized development activities on traditional lands.[478] This has influenced the way the content of the right to

[472] The obligation is discussed in detail in Section 4.4, above.
[473] Graver and Ulfstein, *supra* note 65.
[474] *Supra* note 17, art 2(3).
[475] See Graver & Ulfstein, *supra* note 65 at 345.
[476] See *Poma Poma*, *supra* note 365; Pentassuglia, *supra* note 17. Article 27 absolutely prohibits measures that are disproportionate and amount to a denial of the rights in Article 27.
[477] *Ibid*; see *Poma Poma*, *supra* note 365.
[478] See Scheinin, "Competing Uses", *supra* note 350 at 159; see also Walter Kalin & Jorg Kunzli, *The Law of International Human Rights Protection*, (New York: Oxford University Press, 2009) at 378.

culture has been developed by the HRC. It is acknowledged that the right to equality and Article 27 mandate positive measures in their respective domains[479] but the two rights are not mutually exclusive.[480] The right to maintain a distinct cultural identity is an issue of substantive equality for tribal and indigenous peoples.[481] With reference to the HRC's mandate that the positive measures of protection must respect the principles of equality, Thornberry notes that "…the equality/non-discrimination pairing appears to control Article 27, unless the term 'respect' is given a softer meaning."[482] As discussed in chapter three, above, the right to equality in the *CERD* has been interpreted in conjunction with the right to property to require the recognition and protection of tribal ownership of traditional lands. Thus, it may be reasonably expected that the HRC may, in the future, draw upon the developing understanding of the implications of the right to substantive equality to tribal land rights in interpreting the collective right of tribals to maintain and develop their distinct culture in Article 27.

[479] Thornberry, *Human Rights*, *supra* note 57 at 132.
[480] See the discussion of substantive equality in Section 3.4, above.
[481] See Anaya, "Multicultural", *supra* note 65 at 16.
[482] *Human Rights*, *supra* note 57 at 132.

CHAPTER FIVE

THE *FOREST RIGHTS ACT* THROUGH THE LENS OF INTERNATIONAL LAW[483]

5.1 Introduction

The close connection between ancestral land rights and tribal cultural identity and survival "…has perhaps been most acutely brought into focus in the forestry sector in India and continues to be fraught with contention as [tribal] communities experience new forms of encroachment on their customary land rights by developmental interventions such as large dams, mining and conservation."[484] The problem has its roots in the pre and post-colonial forest laws that have resulted in large areas of tribal occupied lands to be declared state owned forests without adequate regard to the pre-existing land rights of the tribal populations, including claims of land ownership.[485] Tribal struggle for land rights in the

[483] *Forest Rights Act*, *supra* note 9. Even though the Act is also referred to as the Tribal Bill or the Tribal Rights Act, it not only recognizes land rights of forest dwelling Scheduled Tribes ("forest dwelling STs") but also of the non-tribal Other Traditional Forest Dwellers' ("OTFDs"). Section 2(c) of the *Forest Rights Act* defines forest dwelling STs as individual members or community of Scheduled Tribes, including pastoralist Scheduled Tribes who 'primarily reside' in the forest and depend on the forestland or its resources for '*bona fide* livelihood needs' (*ibid*, s 2(c)). Article 342 of the Indian Constitution empowers the President to declare tribes or tribal communities or parts thereof as Scheduled Tribes by way of a notification. The term Scheduled Tribe has not, as such, been defined in the Indian Constitution. Further, section 2(o) of the *Forest Rights Act* defines OTFDs as individual members or communities who have 'primarily resided' in the forest for at least three generations prior to 13th December 2005 AND depend on the forest land or its resources for '*bona fide* livelihood needs' (*ibid*, s 2(o) [emphasis in original]). The Ministry of Tribal Affairs, the nodal Ministry for the implementation of the *Forest Rights Act* has clarified that the term 'primarily' resides includes forest dwelling STs and OTFDs that may not be residing inside the forests but use the forests for their 'bona fide livelihood needs'; see Letter from Government of India, Ministry of Tribal Affairs to all Sate Secretaries in-charge of Tribal Welfare (9 June 2008) "Clarification on Primarily Reside in" No 17014/02/2007-PC&V (VOL VII), online: Ministry of Tribal Affairs <https://tribal.nic.in/FRA/declarationsClarifications/Clarification.pdf>; Government of India, Ministry of Tribal Affairs, *Frequently Asked Questions on the Forest Rights Act*, online: Ministry of Tribal Affairs <https://tribal.nic.in/FRA/data/FAQ.pdf> [Ministry of Tribal Affairs, *FAQ*].

[484] Mitra & Gupta, *supra* note 7 at 198. The authors note that in India, the 'locus' of the international struggle between tribal and indigenous peoples and states over lands "has been the forests - who owns them, who lives in them and who can use them" (*ibid* at 199); see also Citizens' Report as part of Community Forest Rights-Learning and Advocacy Process, *supra* note 72.

[485] This fact is admitted in the Preamble of the *Forest Rights Act*, *supra* note 9. The pre and post colonial legislation referred to is a series of forest laws adopted from 1876 leading up to the *Indian Forest Act 1927*, still operational today, and the *Wildlife (Protection) Act 1972*. In fact it has been alleged that the post-colonial state was even more unresponsive to tribal land rights claims than the colonial state; Mitra & Gupta, *supra* note 7. By virtue of the powers conferred by these statutes, the state has declared many areas that tribals claim as traditional property are state owned forests. While some of these lands were actual forests in the dictionary meaning of the term, others were regular tribal occupied lands. These statutes contained provisions to 'settle' the rights of communities before such declarations. However, "in many parts of the country, 'settlement' of rights under the colonial legislations took place through deeming clauses, legal fictions and assumption, while in many areas it was not done at all." Ministry of Tribal Affairs, *FAQ*, *supra* note 483 at 6. Broadly, the 'settlements' were to be effected by recognizing certain forest resource use rights and allowing such use to continue or by

forests intensified to an unprecedented level after a Supreme Court decision that, *inter-alia*, eventually led to the adoption of the *Forest Rights Act*.[486] Apart from domestic considerations, the adoption of the *Forest Rights Act* was also influenced by international human rights developments in the rights of tribal and indigenous peoples and the international recognition of the importance of local communities for forest and biodiversity conservation and protection.[487] The express objective of the *Forest Rights Act* is, *inter-alia*, to undo the 'historic injustice' perpetrated against the forest dwelling tribal communities by the forest governance regime.[488] To that end, the *Forest Rights Act* for the first time recognizes individual and collective land rights, including "some measure of ownership" of the forest dwelling tribes in India over forestlands and its resources.[489] Yet, the *Forest Rights Act* was drafted without any serious analysis of the relevant international human rights norms.[490] I argue that a statute that is adopted as a measure to address the 'historic injustice' perpetrated against tribal communities in matters of land rights ought to fulfill India's human

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extinguishing the rights upon payment of compensation when declaring areas 'reserved forests' or 'protected areas' by law. However, in practice such 'settlements' almost never took place and the tribal communities, *ipso facto*, suddenly became encroachers on the lands they had traditionally used and occupied. The validity of such 'settlements' in contemporary times is highly questionable; see Bankes, "Arctic", *supra* note 17.

[486] See Bose, *supra* note 34. The *Godavarman* decision of the Court directing the Central Government to stop forest encroachments was 'erroneously' understood as a direction for tribal eviction; *TN Godavarman Thirumulpad v Union of India & Others*, (1997) 2 SCC 267 (India SC) [*Godavarman*]. Intense tribal protests resulted in the formation of the Ministry of Tribal Affairs in 1999, which was entrusted with the task of drafting the statute; see Armin Rosencranz, Edward Boenig & Brinda Dutta, "The *Godavarman* Case, the Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests" (2007) 37 Environmental Law Reporter 10032, online: ELR <https://elr.info/sites/default/files/articles/37.10032.pdf>.

The Fifth Schedule of the Indian Constitution also enjoins the state to respect and uphold the land rights of the Scheduled Tribes in the areas declared as Scheduled Areas under Article 244(1) of the Constitution. Thus, the *Forest Rights Act* in its application to forests within Scheduled Area also purports to fulfill this constitutional duty of the state; *Constitution of India, 1950*, *supra* note 3.

[487] Several authors opine that human rights commitments and the evolving tribal land rights standards in the two ILO Conventions were contributory factors in initiating this legislation; see e.g. Bose, *supra* note 34. India had informed the ILO of the adoption of the *Forest Rights Act* as a measure to give effect to its obligations in the *ILO Convention 107*; ILC, *Report 2010*, *supra* note 41 at 772.

[488] *Supra* note 9, Preamble. The *Forest Rights Act* has the twin objectives of redressing the "historic injustice" meted out to the forest dwelling STs and OTFDs and also to make forest and biodiversity conservation effective; see the summary of the Preamble of the *Forest Rights Act* in Section 5.2, below.

[489] Vasundhara, "About FRA", *supra* note 10; The *Forest Rights Act* has been noted to be a legislative step towards the recognition of so called 'third generation rights'; Mitra and Gupta, *supra* note 7 at 203.

[490] See Bose, *supra* note 34, for a discussion of India's casual attitude with respect to its human rights obligations in general; P Karunakar, "Building of Large Dams and the rights of Tribes in India" (2012) 11:1 Fourth World Journal 27 (Academic Search Complete). This is especially surprising given that the literature suggests that human rights concerns and international commitments, especially in the *ILO Convention 107*, contributed to the adoption of the *Forest Rights Act*.

rights obligations in international law, including the obligation to recognize and protect the right to tribal ownership of traditional lands.[491]

This chapter focuses on the following question: does the statutory framework of the *Forest Rights Act* fulfill India's international human rights obligations with respect to land rights of forest dwelling tribal communities, and in particular with respect to the tribal right to ownership of traditional lands?[492] The provisions of the *Forest Rights Act* are expressly additive to other applicable laws.[493] Some of the provisions of other laws may add to the protection extended to the land rights of forest dwelling tribes and thus, may be relevant in assessing the extent to which the *Forest Rights Act* serves to fulfill India's international obligations. However, the scope of this thesis is limited to the assessment of the framework of the *Forest Rights Act* in light of the relevant international human rights standards.[494]

Section two of this chapter contains a summary of the key provisions of the *Forest Rights Act* along with the relevant provisions of the applicable Rules. In section three, I have examined the framework of the *Forest Rights Act* in light of the international human rights obligations discussed in chapters two to four with respect to the right to ownership of tribal lands. The section begins with a preliminary objection to the *Forest Rights Act* that bears on both the questions that follow. The evaluation focuses on two questions. First, whether the *Forest Rights Act* fulfills the obligation to fully recognize, delimit and demarcate the right to ownership of forest dwelling tribals based on traditional occupation of forestlands; and second, whether the *Forest Rights Act* fulfills the obligation of effective participation

[491] As discussed in the preceding chapters, India is under an obligation in international law to adopt legal measures recognizing and protecting tribal land rights, including the right to ownership. Further, "[t]o the extent that legislation is a unilateral act it seems self evident that the state bears the burden of showing that the legislative solution meets its international obligations under relevant human rights instruments." Bankes, "Arctic", *supra* note 17 at 228, n 176.

[492] As noted in Chapter One, above, the focus of this thesis is the right of tribal land ownership and the corresponding state obligations in international law.

[493] Unless expressly provided, the provisions of the *Forest Rights Act* "are in addition to and not in derogation of the provisions of any other law for the time being in force." *Supra* note 9, s 13.

[494] See Section 1.4, above, for the scope of this thesis. Also, a broader assessment of whether India fulfills its international human rights obligations with respect to tribal land ownership more generally, outside the context of forests, requires a much wider research of Indian law and policy.

imposed by international law before decisions including state authorized resource development projects are undertaken on traditional forest lands? The last section summarizes the evaluation.

5.2 Summary of the *Forest Rights Act*

The *Forest Rights Act* comprises a Preamble and fourteen sections divided into six chapters.[495] It is acknowledged in the Preamble that inadequate recognition of "the forest rights on ancestral lands and…habitat", thus far, has resulted in "historical injustice" to the forest dwelling Scheduled Tribes ("forest dwelling STs") and Other Traditional Forest Dwellers ("OTFDs") "who are integral to the very survival and sustainability of the forest ecosystem."[496] Founded on this acknowledgment and insight, the Preamble articulates the legislation's twin objectives of "…strengthening the conservation regime of the forests while ensuring livelihood and food security" of the forest dwelling STs and OTFDs.[497] The *Forest Rights Act* seeks to achieve the two objectives by providing that the rights recognized therein "include the responsibility and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance."[498] The legislation is designed to address the 'need' to assure the "tenurial and access rights" of the forest dwelling STs and OTFDs including the victims of forced displacement to achieve its objectives.[499] The Preamble recites that the *Forest Rights Act* accomplishes three things within its framework with the aim of achieving the legislation's objectives:[500] firstly, it recognizes and vests "the forest rights and occupation in forest land in forest dwelling STs and OTFDs who have been residing in such forests for

[495] *Supra* note 9. For a short commentary on the *Forest Rights Act* and its Rules, see Amisha Jain & Rama Sharma, "The Indian Forest Rights Act, 2006: Salient Features, Scope and 2012 Amendment Rules" (2015) 4:2 International Journal of Social Science and Humanities 95, online: <wrpjournals http://wrpjournals.com/sites/default/files/issues-pdf/1109.pdf>.
[496] *Forest Rights Act*, *supra* note 9, Preamble.
[497] *Ibid.*
[498] *Ibid.*
[499] *Ibid.*
[500] *Ibid.*

generations but whose rights could not be recorded."[501] Secondly, the Act specifies a framework for recording these rights. Thirdly, it stipulates the nature of evidence that is required for the purpose of the recognition and vesting rights.

Section 1 contains the territorial jurisdiction clause of the legislation, making it applicable to the entire country except the province of Jammu and Kashmir, while section 2 contains a list of definitions.[502] Chapter II, titled "Forest Rights" is the core of the statute and contains only one section, section 3, which is divided into two clauses. Clause 1 of section 3 enumerates a list of forest rights, "which secure individual or community tenure or both."[503] Both individuals and groups may claim the rights recognized in section 3(1).[504] The right to hold forest land, popularly, and in my opinion erroneously, known as the individual forest right, is recognized in section 3(1)(a) as:

> [the] right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribes or other traditional forest dwellers.[505]

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[501] *Ibid*.

[502] *Forest Rights Act*, *supra* note 9. The relevant definitions have been reproduced along with the summary, where needed.

[503] *Ibid*, s 3(1).

[504] A particular forest tribal group is often divided into several clans organized into separate settlements. It is also not uncommon for a tribal group to be scattered over several provinces. Notably, the *Forest Rights Act* is designed to recognize individual or collective land rights at the village or hamlet level i.e. at the level of individual settlements that may consist of both forest dwelling STs and OTFDs, even though forest rights may transcend village boundaries. It has been clarified by the Ministry of Tribal Affairs that the formal titles to forest rights may be assigned to "an individual, a group of individuals, a user group, or a Gram Sabha, unless such vesting is inconsistent with the nature of the right itself. The Gram Sabha is defined in the *Forest Rights Act* and refers to a body consisting of all the adult members of the village or settlement. The Gram Sabha is not an organic tribal institution but a state created and defined institution arising out of the state's decentralization model (the Panchayati Raj System). In areas, where the Panchayati Raj System has not been extended so far, the traditional village community institutions may represent the village community and be the titleholder; see *Forest Rights Act*, *supra* note 9, s 2(g). Pertinently, the title for the right under section 3(1)(i) that bears on the right to effective participation under the *Forest Rights Act*, can only be assigned to the Gram Sabha; see Ministry of Tribal Affairs, *FAQ*, *supra* note 483 at 13.

[505] *Forest Rights Act*, *supra* note 9. The literature refers to this right as the individual forest right, hereinafter referred to as the right to hold forest land. The term "forest land" has been defined widely including all categories of forest land such as "unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, Sanctuaries and National Parks" (*ibid*, s 2(d)). The Ministry of Tribal Affairs has clarified that the *Forest Rights Act* applies to all areas that may be termed as forests as per the decision in *Godavarman*, *supra* note 486, and thus, "[t]he term forest land…will not only include "forest" as understood in the dictionary sense, but also any areas recorded as forest in the Government record irrespective of the ownership." Ministry of Tribal Affairs, *FAQ*, *supra* note 483 at 5.

The Rules under the *Forest Rights Act* elaborate on the scope of self-cultivation for the purpose of the provision to include "forest lands used for allied activities ancillary to cultivation such as, for keeping cattle, for winnowing and other post-harvest activities, rotational fallows, tree crops and storage of produce."[506] Rule 2(1)(b) defines the term 'bona fide livelihood needs' used in the *Forest Rights Act*.[507] It refers to the exercise of the forest rights to fulfill personal needs and includes the sale of surplus produce.[508] Article 4(6) stipulates that for the purpose of the right to hold forest land in Section 3(1)(a), such lands must be occupied by the individual or the group on the date of the commencement of the *Forest Rights Act*. Further, the right shall be restricted to the land under actual possession subject to a maximum of 4 hectares.

Section 4(8) recognizes and vests forest dwelling STs and OTFDs with the "right of land", where it can be demonstrated that (i) they were displaced from the forest lands under their cultivation and dwelling, (ii) this displacement was on account of the developmental activities of the state, (iii) without the payment of compensation, and (iv) the lands so acquired have not been used for such purpose within five years from the date of acquisition.[509] The remaining sub-clauses of Section 3(1) articulate the "community rights" to access and use forestland and its resources that may also be claimed by an individual or a group:[510]

> (b) community rights such as *nistar*[511], by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;
> (c) right of ownership, access to collect, use and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;[512]

[506] *Rules*, *supra* note 66, rule 12(A)8.
[507] *Ibid*, rule 2(1)(b). This concept is integral to both the definitions of the forest dwelling STs and OTFDs.
[508] However, the term does not imply "mere subsistence, but rather…a healthy standard of living…." Ministry of Tribal Affairs, *FAQ*, *supra* note 483 at 9.
[509] *Forest Rights Act*, *supra* note 9, s 4(8).
[510] These rights except the rights in sub clauses f, g and m are referred to as the 'community rights'; *Rules*, *supra* note 66, rule 2c(ca). As mentioned earlier, these rights may be assigned to an individual, a group of individuals or a village community represented by the Gram Sabha, unless the nature of the group is such that it can only be assigned to the village community; see *supra* note 504.
[511] Nistar rights refer to 'concessions' granted to the tribals throughout the different forest regimes permitting the collection and use of forest resources such as firewood, water etc. for household needs.

(d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;
(e) rights including community tenures of habitat and habitation for primitive tribal groups and pre agricultural communities;[513]
(f) rights in or over disputed lands under any nomenclature in any state where claims are disputed;
(g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles;
(h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;
(i) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;[514]
(j) rights which are recognized under any State law or laws of an Autonomous District Council or Autonomous Regional Council or which are accepted as

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[512] The definition of minor forest produce includes all plant based produce except timber; *Forest Rights Act*, *supra* note 9, s 2(i).

[513] The right in this sub-clause is commonly referred to as the right to habitat. Rule 12(d) provides that claims under section 3(1)(e) may be made through the community or traditional community institutions. *Rules*, *supra* note 66, rule 12(d); The right to habitat is thus a group right. The term habitat is defined in section 2(h) of the Act to include "the area comprising the customary habitat and such other habitats in reserved forests and protected forests of primitive tribal groups and pre-agricultural communities and other forest dwelling Scheduled Tribes." *Forest Rights Act*, *supra* note 9, s 2(h). The definition implies that the right to habitat is recognized for all forest dwelling STs including primitive tribal groups and pre-agricultural communities; see Subrat Kumar Nayak, "Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: Habitat Rights" (August 2015), online: Forest Rights Act, <http://www.fra.org.in/document/Habitat%20Rights%20Brochure_Dec.pdf>. It is relevant to note that the definition of 'habitat' does not refer to the OTFDs. Further, the term 'primitive tribal groups' is not used anymore and has been replaced by the term Particularly Vulnerable Tribal Groups. A Particularly Vulnerable Tribal Group is an administratively defined category within Scheduled Tribes who have been identified as the most vulnerable. There are currently 75 recognized Particularly Vulnerable Tribal Groups in the country (*ibid*). The Ministry of Tribal Affairs has clarified that the right to habitat of a Particularly Vulnerable Tribal Group may be recognized over the entire customary territory of the group used for "habitation, livelihoods, social, economic, spiritual, cultural and other purposes." Letter from Government of India, Ministry of Tribal Affairs to the Chief Secretaries of all State Governments (23 April 2015) in Vasundhara, ed, "The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, Amendment Rule, 2012 & Guidelines": Clarification pertaining to recognition of Habitat rights under Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No 23011/16/2015-FRA, online: Forest Rights Act <http://fra.org.in/document/FRA_English_Final_July15.pdf>. [Ministry of Tribal Affairs, "Clarification"]. By implication, the same must be true where a claim is made by other forest dwelling STs. Clearly, 'habitat' maybe common to a large number of settlements/villages or an entire tribe; see Saxena et al, *supra* note 35. The customary territories over which the right to habitat may be recognized may "overlap with forest and other rights of other people/communities." See Ministry of Tribal Affairs, *FAQ*, *supra* note 483 at 11. Unfortunately, there are no guidelines on how this right is to be recognized except that such communities must be consulted when their rights are being determined; Rules, *supra* note 66, rule 12(B)(1). However, it has been asserted that the recognition process must not dilute the traditional and cultural practices of the community; see Nayak, *supra* note 513.

[514] "Community Forest Resources" is defined as "customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in case of pastoral communities, including reserved forests, protected forests and protected area such as Sanctuaries and National Parks to which the community had traditional access." *Forest Rights Act*, *supra* note 9, s 2(a). This right is commonly referred to as the 'community forest resource right'.

> rights of tribals under any traditional or customary law of the concerned tribes of any State;[515]
> (k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;
> (l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal.

Section 3(1) also includes the right of "in situ" rehabilitation including the right to alternative lands for the forest dwelling STs and OTFDs who "have been illegally evicted or displaced from forest land…without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005."[516] Section 3(2) places an obligation on the government to "provide for diversion of forest land" for the purpose of infrastructure facilities managed by the government whenever such facilities are recommended by the Gram Sabha representing the village community.[517]

Section 4(1) contains a statutory declaration of recognition and vesting of all the forest rights contained in section 3 in the forest dwelling STs and OTFDs. Section 4(2) provides for the resettlement of the rights' holders or the modification of their forest rights that have been recognized in "critical wildlife habitats of National Parks and Sanctuaries" for creating "inviolate areas for wildlife conservation", subject to certain conditions:[518] (1) the process of recognition and vesting of the forest rights must be complete before such modification or resettlement is initiated, (2) an assessment has been undertaken to determine that the impact of continuing such use and occupation "is sufficient to cause irreversible

[515] In the Constitutional scheme of legislative powers, both the federal and the provincial governments are competent to legislate on the subject of 'Forests'. Thus, tribes in some provinces also have certain use rights on forestland and its resources under provincial laws and/or under the traditional and customary laws of tribals recognized by the provinces. Similarly, special statutes in the northeastern forest regions also recognize community rights in forest lands. The *Forest Rights Act* includes all these pre-existing use rights and claims to go beyond; see Ministry of Tribal Affairs, *FAQ*, *supra* note 483.
[516] *Forest Rights Act*, *supra* note 9, s 3(1)(m).
[517] *Ibid*, s 3(2). The provision operates notwithstanding the requirements of the *Forest (Conservation) Act, 1980* that requires a formal clearance before diverting forest lands for non-forest purposes. The clause contains a list of thirteen facilities including roads, schools, hospitals etc.
[518] *Ibid*, s 4(2). Where the right holders have been relocated from such areas, the section prohibits the subsequent diversion of such areas for any other use.

damage and threaten the existence of such species and their habitat,"[519] (3) the state government has concluded that there is no reasonable alternative including co-existence, (4) a proposed 'resettlement or alternative package' that secures the livelihood needs of the affected persons of communities and fulfills the requirements of relevant laws and policies applicable in this situation has been prepared, (5) the free informed consent of the Gram Sabha/community of the area to the "resettlement or alternative package" has been obtained, and (6) resettlement shall be effected only when the land allocation and facilities as promised in the package are complete at the resettlement site.

Section 4(3) provides that all the forest rights in the *Forest Rights Act* are recognized and vest only in those forest dwelling STs and OTFDs who have occupied forest lands prior to 13th December 2005. Section 4(4) declares that all the forest rights in section 3(1) are heritable but inalienable. Section 4(5) prohibits the eviction or removal of any member of the forest dwelling STs and OTFDs from the forest land under his occupation until the process of recognition and verification is complete.

Section 5 of the *Forest Rights Act*, titled 'duties of holders of forest rights', is relevant in cases where activities are being contemplated on forest lands.[520] The provision 'empowers' and obligates Gram Sabhas and village level institutions in an areas where there are right holders:[521] (a) to protect the forest, its biodiversity and wildlife, (b) to ensure the adequate protection of the adjacent "catchment areas, water sources and other ecological sensitive areas", (c) to ensure that the habitat of the forest dwelling STs and OTFDs is preserved from practices that may adversely affect 'their cultural and natural heritage', and (d) to ensure compliance with the decisions taken by the Gram Sabha to regulate access to community

[519] *Ibid*. This is the function of the provincial government as per the *Wildlife (Protection) Act, 1972*.
[520] *Forest Rights Act*, *supra* note 9, s 5.
[521] In other words, this section "vests the Gram Sabhas and the forest dwellers with statutory rights to their habitats where they have the authority to conserve, protect and manage forests, biodiversity, wildlife, water catchment areas and their cultural and natural heritage." Saxena et al, *supra* note 35 at 4.

forest resources and stop any activity which adversely affects the forest, biodiversity and wildlife.

Section 6 of Chapter IV authorizes the Gram Sabha "to initiate the process for determining the nature and extent of the individual or community forest rights or both" within its local limits.[522] The Gram Sabha shall receive claims, verify them and prepare maps demarcating the areas for each claim and make recommendations for approval to the statutory authorities. [523] The section further provides the procedures for appeals against the determination made by the Gram Sabha and the approval of the claims recommended by the Gram Sabha. Chapter V deals with the penalties for violations of the provisions of the *Forest Rights Act*. The last chapter relates to miscellaneous matters such as protection for acts done in good faith, power to make rules and give direction etc. Section 13 of this chapter declares that unless otherwise provided, the provisions of the *Forest Rights Act* do not derogate from other laws in force, but are in addition to them.[524]

The *Forest Rights Act* was perceived as landmark legislation culminating from the struggle of the Indian forest dwelling tribes, but its implementation has been patchy and challenging to say the least.[525] However, the main focus of this chapter is not the issue of implementation but to assess the extent to which the framework of the *Forest Rights Act* fulfills India's obligations to recognize and protect the tribal right to ownership of traditional lands in international human rights law.[526]

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[522] *Forest Rights Act*, *supra* note 9, s 6.
[523] The procedure is detailed in the *Rules*, *supra* note 66.
[524] *Forest Rights Act*, *supra* note 9, s 13.
[525] See Vasundhara & Kalpavriksh, "A National Report on Community Forest Rights under Forest Rights Act: Status & Issues" (2012), online: Forest Rights Act <http://fra.org.in/document/A%20National%20Report%20on%20Community%20Forest%20Rights%20under%20FRA%20-%20Status%20&%20Issues%20-%202012.pdf> [Vasundhara & Kalpavriksh, "Report"]. It is a comprehensive report regarding the status or the implementation of the provisions of the *Forest Rights Act*.
[526] Nigel Bankes has expressed the purpose of such an assessment as an inquiry to ascertain whether state measures are informed merely by policy and a subjective sense of reasonableness or by a sense of entitlement and obligation; "Arctic", *supra* note 17.

5.3 The Evaluation

5.3.1 Preliminary Objection

The principal objection to the *Forest Rights Act* and one that bears on the assessment of the fulfillment of India's obligations that follows is that its equal treatment of tribal populations (who are distinct cultural groups) and non-tribal persons offends the principle of substantive equality.[527] While the members of the forest dwelling tribal communities are equal citizens of the state with the rest of the population, including the forest dwelling non-tribals, they are also members of distinct cultural groups and, thus, unequal in matters peculiar to their culture including the issue of land rights.[528] A common framework for the recognition and protection of land rights in the *Forest Rights Act* implies that such recognition and protection of land rights in the *Forest Rights Act* is not grounded on the notion that tribal land rights "…serve the purpose of protecting [tribal] identity as defined by the cultural and spiritual connection to their traditional lands."[529] Thus, India has failed to fulfill its obligation to ensure substantive equality in the matter of enjoyment of the human right to property by failing to treat tribal populations differently. Recognition of land rights

[527] See discussion of the notion of substantive equality in Section 3.4, above. *General Recommendation No. 32* on 'Special Measures' under the *CERD* states 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." *Supra* note 253 at para 8. In this context, the CERD Committee has called upon India on several occasions to recognize tribals as distinct cultural groups entitled to special protection under the Convention; see e.g. CERD Committee, *Concluding Observations India 2007*, *supra* note 41. India's approach in the *Forest Rights Act* is not surprising since India has always endorsed the notion of integration as the best solution to ensure that its tribal population participates in the development process and benefits from the general laws of the county on an equal footing; see Pinéro, *supra* note 68 at 182.

[528] Tribal populations are generally socially, economically and culturally distinct from the dominant society and possess their own customs and traditions that regulate their status. The acknowledgement of this fact underlies the special protection afforded to them under international law discussed in the preceding chapters. The acute and sustained threat to the right of tribals to forest lands is a result of their political, economic and cultural marginalization in India; see Mitra and Gupta, *supra* note 7 at 198. The inclusion of the exclusive right to habitat in section 3(1)(e), for the forest dwelling tribal populations in the *Forest Rights Act* reflects the implied acknowledgment of the drafters of the legislation that the forest dwelling STs' connection to land is different than the non-tribal forest dwelling populations; *supra* note 9, s 3(1)(e). Yet, the *Forest Rights Act* groups the two distinct segments of the society in a single framework.

[529] Pentassuglia, *supra* note 17 at 167.

for both the categories within the same framework has significantly diluted the recognition and protection that the *Forest Rights Act* offers to tribal land rights.[530]

5.3.2 *Forest Rights Act* and Ownership of Traditional Occupation Lands

Does the *Forest Rights Act* fulfill the obligation to fully recognize, delimit and demarcate the right to ownership of forest dwelling tribals based on traditional occupation of forestlands?

A perusal of the bare provisions of the *Forest Rights Act* reveals that the forest rights it recognizes in section 3(1) can be divided into three broad categories.[531] First, the rights of forest dwelling STs and OTFDs to legally hold forest lands under occupation for habitation and cultivation purposes.[532] Second, the rights of the forest dwelling STs and OTFDs to access and use traditional forest land and its resources.[533] The various use and access rights are statutorily enumerated with a residuary provision "recognizing any other traditional right customarily enjoyed" by the members of the forest dwelling STs and OTFDs.[534] Third, the

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[530] The result is that:

> [t]he forest dwelling Scheduled Tribes no longer remain the focus of the law contrary to what it originally envisaged. With such dilution, the law has lost its aims, objectives, essence and spirit that the Ministry of Tribal Affairs initiated with so much fan fare to undo what it calls "historic injustice" that the forest dwelling Scheduled Tribes have been facing. Rather than improving the lot of the tribals, the Act will lead to conflict of interest between the forest dwelling Scheduled Tribes and other traditional forest dwellers.

Srabanee Ghosh, "Tribal Laws and Customs in India" October 6 2011, archived at <https://web.archive.org/web/20120415174216/http://legalservicesindia.com/article/article/tribal-laws-&-customs-in-india-847-1.html>. In this context, it may be recalled that the *ILO Convention 107* obliges the state to adopt measures to resolve conflicts between tribals and non-tribals with respect to land rights as a part of its obligations under Article 11; see discussion in section 2.3.1.3, above.

[531] The Gram Sabha is the statutory authority to initiate the determination of the nature and extent of these forest rights for which titles maybe conferred under the *Forest Rights Act*. *supra* note 9, s 6; *Rules*, *supra* note 66, rule 8(h). For a note on the Gram Sabha, see *supra* note 504.

[532] *Forest Rights Act*, *supra* note 9, s 3(1)(a).

[533] These rights are contained in clauses b, c, d, j, k and l of section 3(1); *Forest Rights Act*, *supra* note 9. The right in sub-clause b has an element of ownership for minor forest produce, which is not directly relevant to my research and is hence grouped under the right to use and access forest lands and resources. As mentioned earlier, the rights in the first two categories can be claimed both as individual forest rights and community forest rights; see *supra* note 504 and accompanying text.

[534] *Forest Rights Act*, *supra* note 9, s 3(1)(l). However, "the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal" has been expressly excluded (*ibid*). Though not directly relevant to this thesis, the denial of these rights may have a direct implication for India's obligations under Article 27 of the *ICCPR*; see the discussion in Chapter Four, above.

right to habitat of the forest dwelling STs including Particularly Vulnerable Tribal Groups ("PVTGs") and pre-agricultural communities.[535]

Section 3(1)(a) of the *Forest Rights Act* recognizes the right to hold and live in forest lands that are "under the individual or common occupation for habitation or for self-cultivation for livelihood" and to obtain legal titles to such lands.[536] Even though section 3(1)(a) of the *Forest Rights Act* does not use the term ownership, it is the land ownership provision of the *Forest Rights Act* and has been implemented as such.[537] The provision fails to fulfill India's obligations under the *ILO Convention 107* and the *CERD* for several interconnected reasons.[538] The nature of 'occupation' as the criterion for the recognition of ownership in the *Forest Rights Act* is limited to habitation and self-cultivation and the allied activities ancillary to cultivation.[539] Further, the extent of the occupation in the *Forest Rights Act* is subjected to a statutory limit of a meager area of up to four hectares.[540] This narrow

[535] The right to habitat in section 3(1)(e) is a collective right by nature and is exclusive to forest dwelling STs including PVTGs and pre-agricultural communities. The customary land use rights that have been recognized as a part of the right to habitat have not been specified and as previously mentioned, may include the use of the customary territory of the group for habitation, social, economic, spiritual, cultural, livelihoods, and other purposes; see *supra* note 513 and accompanying text.

[536] *Supra* note 9, s 3(1)(a). The forest dwelling STs and OTFDs can also claim title to all the lands on which their occupation is state authorized, whether disputed or not, where they can produce documents to substantiate the claim (*ibid*, s 3(1)(f) & (g)); see Jain & Sharma, *supra* note 495 at 99.

[537] On the question whether the titleholders of this right also have the right to fell trees on such lands, the Ministry of Tribal Affairs has clarified that the titleholders have the right to such trees like other private land owners and the felling and disposal of trees is subject to the same statutory conditions as other private lands; see Ministry of Tribal Affairs, *FAQ*, *supra* note 483 at 21. The Ministry of Tribal Affairs has clarified that the concept of ownership in the *Forest Rights Act* is not comparable to the concept of private property (*ibid*); see also Jain & Sharma, *supra* note 495 at 99.

[538] As discussed in the Chapters Two & Three, above, both the *ILO Convention 107* and the *CERD* place an obligation on the state to recognize the tribal right to ownership of traditional lands. While the *ILO Convention 107* contains an express provision on land ownership, the CERD Committee has affirmed the obligation to recognize tribal ownership of traditional lands and included it as a part of the Convention through the implementation of its provisions. The *ICCPR* on the other hand does not impose an independent obligation on the state to recognize the right to tribal ownership of traditional lands; see Chapter Four, above.

[539] See *Rules*, *supra* note 66, rule 12(A)(8). Other forms of occupation such as grazing, shifting cultivation, forest product collection etc. have not been recognized as 'occupation' for this purpose.

[540] Notably, tribal communities have made demands for assigning titles in 'common names' emphasizing the communal aspect of land ownership among these communities; see Ministry of Tribal Affairs, *FAQ*, *supra* note 483. Even though the *Forest Rights Act* permits titling in the 'name of a community of tribals', it is limited to the statutory area of four hectares. Thus, it is not surprising that so far, an overwhelming majority of claims under this provision are individual claims. A community stands to benefit, in terms of area, by making individual claims rather than community claims. Interestingly, a Bhil tribal interviewed during a study remarked,

and arbitrary conceptualization of the nature and extent of occupation in the *Forest Rights Act* clearly violates the obligations under the *ILO Convention 107* and the *CERD*.[541] Ironically, the ILO's supervisory bodies undertook the most detailed analysis of the term 'traditional occupation' in the 1980s in the context of the Sardar Sarovar Dam Project in India.[542] International law does not create or grant property rights in traditional lands, but obliges the state to recognize a tribal population's existing land rights, including the right to ownership of traditional occupation lands.[543] The duty to recognize ownership of traditional lands in international law extends to all the lands under traditional occupation or traditionally owned and cannot be confined to a limited area considered reasonable by the state.[544]

> …[d]espite the forest being degraded [for cultivation purposes], we claimed individual forest land because this forest has social and cultural significance for us. Things have changed politically and we realized that getting tenure rights from government also means recognition of our identity – as forest dependent Bhil *adivasi* (original inhabitants) – and our land. At least we can save some of our forest lands on the basis of our individual claims.

Purabi Bose, "Individual tenure rights, citizenship, and conflicts: outcome from tribal India's forest governance" (2013) 33 Forest Policy and Economics 71 at 75. It is widely accepted that land rights serve to protect tribal identity defined by their cultural and spiritual connection to land; see Pentassuglia, *supra* note 17. It may be argued that even though technically the *Forest Rights Act* recognizes the right to hold/own land collectively, the recognition of land ownership right in the *Forest Rights Act* is effectively eroding tribal culture and the communal notion of land ownership. The statute, thus, violates the duty of the state to protect the cultural identity of tribal groups implicit in the norm of substantive equality and the right to culture in the *ICCPR*.

[541] The *ILO Convention 107* bases the entitlement of tribal populations to claim the recognition of land ownership on 'traditional occupation'; see the discussion of "traditionally occupy" in Section, 2.3.1.1, above. Notably, the ILO interpreted traditional occupation to include activities such as the collection of forest produce, forms of shared use, herding etc. in the Sardar Sarovar Dam matter involving forest lands; see *supra* note 130 and accompanying text. Thus, Article 11 recognizes all customary tribal uses of land as 'occupation' and where such occupation in 'traditional', the requirement of Article 11 is satisfied. The qualitative test for 'traditional' is where the customary use of land has become a part of the tribal way of life; see Section 2.3.1.1, above.

The *CERD* recognizes the right to lands and resources 'traditionally owned' by tribal populations. Thus, the nature and extent of occupation that forms the basis of the right to ownership must be determined with reference to the customary law and practice of tribal populations rather than an arbitrary determination by the state. The contrary is discriminatory. For a discussion of the right to equality contained in the *CERD*, see Chapter Three, above.

[542] See *supra* note 126, for a brief description of the Sardar Sarovar Dam project. The narrow nature of occupation that forms the basis of the right to hold land in the *Forest Rights Act* was categorically rejected as inconsistent with the concept of occupation in Article 11; see the discussion in Section, 2.3.1.1, above. It is surprising that India adopted the language in the *Forest Rights Act* irrespective of the clear understanding of its obligations under the *ILO Convention 107*.

[543] See *supra* note 123 and accompanying text; Bankes, "Arctic", *supra* note 17 at 221. Section 3(1)(a) of *Forest Rights Act*, by recognizing ownership based on state defined narrow criteria contradicts the very objective of the statute of recognizing *pre-existing* rights on forest lands and its resources. It appears that the state has reached its own conclusions about the nature and extent of the *pre-existing* right of ownership.

[544] While the right to culture in Article 27 is limited by the objective of ensuring access to adequate lands and resources, the right to ownership of traditional lands in international law, including in the *ILO Convention 107* and the *CERD*, is not subject to such a purposive reading; see Bankes, "Arctic", *supra* note 17. Such an

Further, the scope of the concept of occupation cannot be confined to state defined uses of habitation and cultivation.[545] Defining occupation in terms of 'settled' uses such as habitation and cultivation in the *Forest Rights Act* is also problematic because it fails to recognize land ownership of the nomadic and semi nomadic tribal populations as required by international law.[546]

The Ministry of Tribal Affairs has clarified that "[t]he notion of 'ownership' under the *Forest Rights Act* does not fall within the framework of the extant understanding of the right to private property, where ownership means absolute power to use and dispose of the subject property."[547] Notably, the *ILO Convention 107* and the newer *ILO Convention 169* do not require formal titling of traditional lands and a state is not under an obligation to recognize "all rights that accrue to an owner in a legal and factual sense" as long as what is recognized is the "owner's powers in the legal and factual sense."[548] Recognition to the contrary is discriminatory.[549]

In addition to the right to hold property, the *Forest Rights Act* recognizes use and access rights to forest lands and its resources and these rights of use and access extend to the entire area traditionally or customarily used by the forest dwelling tribal communities and OTFDs.[550] The Supreme Court of India has held that the various rights enumerated in the

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approach is paternalistic and as such contradicts the contemporary norms of international law pertaining to tribal and indigenous peoples and reflected in the *ILO Convention 169*; see *supra* note 117 and accompanying text.

[545] See Section 2.3.1.1, above.

[546] See *supra* note 122, for a discussion of the applicability of the *ILO Convention 107* to nomadic and semi nomadic tribal populations. Also, the norm of non-discrimination implies that the duty to recognize the right to ownership of traditional lands under *CERD* applies to settled and nomadic tribal populations equally. However, the *Forest Rights Act* recognizes only use and access rights for such communities; see *supra* note 9, s 3(1).

[547] Ministry of Tribal Affairs, *FAQ*, *supra* note 483 at 14.

[548] Graver & Ulfstein, *supra* note 65 at 350 [emphasis added]. Graver & Ulfstein have made the comment with respect to the *ILO Convention 169*. However, the position can be assumed to be true for the *ILO Convention 107* especially since its provisions are being implemented in light of the general human rights norms contained in the *ILO Convention 169*; see Section 2.3, above. However in contrast, the jurisprudence of the Inter-American Court of Human Rights suggests that the state is under an obligation to delimit, demarcate and title traditional occupation lands; see Bankes, "Projects", *supra* note 353 at 479.

[549] See discussion in Chapter Three, above.

[550] See *supra* note 533, for a reference to the clauses of the *Forest Rights Act* that contain these use and access rights. Vasundhara & Kalpavriksh surveyed the status of recognition of community forest rights and concluded

Forest Rights Act make it clear that the statute intends to recognize and protect "…customs, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers."[551] Thus, the rights to use and access forest lands and its resources include all cultural and religious rights of the forest dwelling STs and OTFDs.[552] Amongst the use and access rights, the group right to habitat and habitation for the forest dwelling STs, PVTGs and other pre-agricultural communities recognized in section 3(1)(e) is exclusive to the forest dwelling STs.[553] The provision recognizes the right of the PVTGs and other pre-agricultural communities to use and access their entire customary territories in the forests. This right on customary territory includes uses for not only habitation but also uses for social, economic, religious, cultural and other purposes.[554] These rights are properly the rights to use and access traditional occupation forest lands and resources and the threshold objection to these provisions is that they do not recognize the right to ownership that the tribals may have to their traditional lands. Thus, these provisions do not fulfill the obligation of the state in the *ILO Convention 107* or the *CERD*. While the obligation to recognize ownership under Article 11 of the *ILO Convention 107* may be satisfied without a formal titling process, the rights recognized by the state cannot be limited to use rights alone but must include the right to control and dispose much like the owner of a state granted ownership.[555] Recognition of only use rights also violates the duty not to discriminate in matters of property rights.[556]

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that non-recognition of these rights over the entire customary forest lands and resources is one of the main implementation issues; "Report", *supra* note 525.

[551] *Orissa Mining*, *supra* note 46 at para 55.

[552] *Ibid* at para 48.

[553] *Forest Rights Act*, *supra* note 9, s 3(1)(e); see *supra* note 513, for a brief discussion of the applicability of section 3(1)(e).

[554] Ministry of Tribal Affairs, "Clarification", *supra* note 513.

[555] See Section 2.3.1.2, above; Bankes, "Arctic", *supra* note 17 at 220. The literature and the concluding observations of the ILO supervisory bodies on state reports suggest that measures containing a firm assurance of use and possession of traditional lands by the state do not 'violate' the obligations under the Convention, and are acceptable as promotional interim measures; see *supra* note 140. However, a guarantee of permanent usufruct rights, while it may not *violate* the Convention, cannot, as such, 'fulfill' the obligations under the *ILO Convention 107*.

[556] The legal status of the right recognized in compliance with the obligation under the *ILO Convention 107* should not be any less than the status of the ownership conferred on others in the state; see Section 2.3.1.2, above. The contrary will be discriminatory; see Section 3.2, above.

As pointed out above, the recognition of land rights in the *Forest Rights Act* is not aimed at achieving substantive equality and protecting the distinct tribal cultural identity. The language of the Preamble of the *Forest Rights Act* makes it evident that recognizing the pre-existing right of ownership of the distinct tribal communities to traditionally occupied forest lands, is not the goal of the legislation.[557] It suggests that the recognition of tenurial and access rights to forest land and its resources has become 'necessary' for ensuring the livelihood and food security of the forest dwelling STs and OTFDs and for strengthening the existing forest conservation regime.[558] Thus, the rationale behind adopting the legislation is predominantly to secure the livelihood of the forest dwelling STs and OTFDs. Consequently, the criteria for determining the quantum of forest land for the recognition of ownership also appears to have been guided by the state's perception of 'how much' land is adequate for ensuring livelihood and food security rather than the land that is traditionally occupied or owned. Clearly, the legislation in the context of ownership rights represents a unilateral political solution to the problem rather than a measure to fulfill the legal duty to fully recognize tribal ownership of traditional lands.

India's failure to fully recognize the right to ownership of tribal lands does not, as such, breach India's obligations under Article 27.[559] In fact, to the extent that the *Forest Rights Act* recognizes customary use and access rights of the tribals to traditional lands, especially the right to habitat, it may be seen as a positive measure to address a situation where tribal land rights and thus, the tribal right to culture was being violated.[560] Whether

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[557] *Supra* note 9, Preamble. Even though the Preamble implies that the legislation aims to recognize pre-existing rights 'that were not adequately recognized', the focus of the legislation is on customary use and access rights, instead of the customary right of ownership of forest lands; see the summary of the Preamble in Section 5.2, above.

[558] *Ibid.*

[559] The inadequate recognition of ownership in the *Forest Rights Act*, does not, in itself, violate Article 27 of the *ICCPR* unless this failure amounts to a denial of the rights to use and access lands and resources necessary for culture. The right to culture has not yet been interpreted to include the right to the recognition of tribal customary laws; see Chapter Four, above.

[560] The *Forest Rights Act* not only secures the right to use and access lands and resources for customary practices, it also has "an element of management authority and control." Bankes, "Arctic", *supra* note 17 at 213;

India is under an obligation to specifically recognize ownership of traditional lands in the *Forest Rights Act* as a positive obligation under Article 27 depends upon whether recognizing ownership is the only arrangement that can ensure the right to use and access lands and resources to the extent necessary for culture, i.e. it is the only arrangement that meets the test under Article 27.[561]

5.3.3 *Forest Rights Act* and Effective Participation

Does the *Forest Rights Act* fulfill the obligation of effective participation imposed by international law before decisions including state authorized resource development projects are undertaken on traditional forestlands?

The foremost implication of the obligation to recognize the customary right to ownership of traditional lands in the *ILO Convention 107* and the *CERD*, and the obligation to recognize and guarantee the right to use and access traditional lands and resources necessary for culture in the *ICCPR*, is that it limits the power of the state to undertake resource development projects within traditional tribal lands without first fully recognizing, delimiting, and demarcating tribal land rights, including the right to ownership.[562] To that

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Mahuika, *supra* note 365 para 9.7. In the *Mahuika* decision, the HRC assessed the legislation extinguishing traditional fishing rights and held that the statute met, rather exceeded, the sustainability test in Article 27. The HRC found that the statute not only enhanced the rights of the Maori to access the material aspects of their culture but also recognized Maori authority and control of fishery.
However, it may be noted that since the *Forest Rights Act* itself affects the cultural connection of tribals with traditional lands, it ought to have been adopted after consultation with the forest tribal communities. See Section 4.5, above, for a discussion of the right to effective participation in Article 27.

[561] The obligation in Article 27 does not require specific measures to assure the right to use and access lands and resources to the extent necessary for culture. A state's compliance with the positive duty in Article 27 "…must be assessed on the basis of the assembled measures specified by the law with a view to protecting the basis for [the minority's] enjoyment of their cultural rights." Graver & Ulfstein, *supra* note 65 at 344. It requires an assessment of whether the positive legal measures, taken together, are adequate to ensure the test of sustainability of the minority culture and ensure the effective participation of members of the minority in decisions that affect their cultural connection with lands and resources; see discussion in Section 4.4, above. The requirement of effective participation prior to decisions affecting tribal traditional forest lands in the *Forest Rights Act* is discussed in Section 5.3.3, below. The broader question whether the *Forest Rights Act* as such fulfills India's obligation under Article 27 of the *ICCPR* or whether ownership is the only arrangement that will ensure the sustainability of tribal culture is beyond the scope this thesis. However, see *infra* note 563, for a comment on the failure of the *Forest Rights Act* to fulfill India's obligations under Article 27.

[562] See Bankes, "Projects", *supra* 353 at 457. This is crucial for fulfilling the obligations that international law imposes, including the payment of compensation, when recognized property rights are being interfered with. These obligations are based on the notion that no one can be deprived of their property in an arbitrary and

end, the *Forest Rights Act* mandates the completion of the process of rights' recognition and vesting before effecting the removal or eviction of the forest dwelling STs and OTFDs from forest lands under their occupation.[563] However, as discussed above, the *Forest Rights Act* has failed to fulfill the obligation to fully recognize the right to ownership of traditional occupation lands. Thus, it may be argued that any interference with traditional lands, where tribals assert customary ownership based on traditional occupation, violates international law as such even where the state may, hypothetically, comply with the obligation of effective participation that international law imposes on the state as a part of the duty to protect the recognized land rights.[564] Nevertheless, it will be useful to assess whether the *Forest Rights Act* 'fulfills' this obligation to protect land rights with respect to the rights, including the right to ownership, to the extent recognized in the *Forest Rights Act*.[565]

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discriminatory manner, a norm of customary international law. While some of these obligations are with respect to property rights in general, others are specific to tribal property. A discussion of the former obligations is beyond the scope of this thesis. However, pertinently, the *CERD* requires that the general safeguards against arbitrary interference with property rights within a state must apply to tribal property equally; see Section 3.2, above. The right that no one can be deprived of his property except by the authority of law is a constitutional right in India; see *Constitution of India, 1950*, *supra* note 3, art 300A. The general laws that govern compulsory acquisition of property in India apply to the land rights under the *Forest Rights Act* without discrimination; see *supra* note 9, s 13. Thus, the *Forest Rights Act* fulfills the obligation of equality within the *CERD*. The latter obligations that apply specifically in cases of interference with tribal property have been discussed in the preceding chapters. This chapter focuses on the obligation of effective participation only.

[563] See *supra* note 9, s 4(5). The prohibition is of an absolute nature; see *Orissa Mining*, *supra* note 46. Notably, the term occupation in section 4(5) has been accorded a wider scope than the concept of occupation in section 3(1)(a) of the *Forest Rights Act*. The term occupation here has been interpreted to mean all forms of customary rights of access, use, and habitation included in section 3(1) of the Act. Thus, the prohibition against removal not only includes actual physical displacement from forest lands but also includes limitations on the recognized rights to use and access traditional lands. Any other interpretation would be against the purpose of the Act and render the usufructuary rights in the *Forest Rights Act* meaningless; Saxena et al, *supra* note 35. This understanding is supported by section 4(2) of the *Forest Rights Act*, which requires that the process of rights recognition must be complete before the rights can be *modified* for creating "inviolable areas for wildlife conservation." *Supra* note 9, s 4(2).

In this context, it may be recalled that interference with traditional lands of tribal populations that results in a denial of the right to use and access lands and resources necessary for culture violates Article 27 of the *ICCPR*. A state does not enjoy any margin of appreciation in this regard. While prior effective participation is one aspect of the test for denial, the other is sustainability. To the extent that section 4(5) of the *Forest Rights Act* can be read to permit appropriation or interference with tribal forest lands beyond the threshold of denial or the substantive limit placed by Article 27, the *Forest Rights Act* fails to fulfill India's obligation to ensure sustainability of tribal culture under the *ICCPR*; see discussion in Section 4.3.3, above.

[564] I use the word hypothetically because it is practically impossible to fully discharge the obligation of effective participation of the 'affected tribals', or any other relevant obligation for that matter, prior to interference with traditional lands without first fully delimiting and identifying tribal land rights. The duty impliedly requires prior identification and delimitation of traditional occupation lands to identify the individuals and groups whose participation or consent is to be secured; see Bankes, "Arctic", *supra* note 17.

[565] The term 'fulfill' is thus limited in this context.

The *Forest Rights Act* recognizes "*the community as a statutory forest management authority*" having rights and powers to "manage, control and protect forests."[566] The forest dwelling community represented by the Gram Sabha has the right "to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use."[567] The Gram Sabha's powers in this respect "…are in consonance with the duties as defined in section 5."[568] Further, the powers in section 5 of the *Forest Rights Act* are not limited to the Gram Sabhas whose rights to community forest resource under section 3(1)(i) have been recognized. Every Gram Sabha of an area that has forest right holders has the inherent powers of protection under section 5.[569] The Ministry of Environment, Forest and Climate Change has clarified that the implication of these provisions in the *Forest Rights Act* is that the informed consent of the Gram Sabha is required before authorizing any use or diversion of the forest land for non-forest purposes.[570] Importantly, "[i]n framing the issue of consent, the [*Forest Rights Act*] clearly indicates that the community ha[s] the right of refusal, if the proposed development project [is] injurious to

[566] Saxena et al, *supra* note 35 at 49 [emphasis in original].
[567] *Forest Rights Act*, *supra* note 9, s 3(1)(i).
[568] See Letter from Government of India, Ministry of Tribal Affairs to the Chief Secretaries of all State Governments & the Administrators of all Union Territories (12 July 2012) "Implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act), 2006 – guidelines regarding" No 23011/32/2010-FRA [Vol II(Pt)], online: Ministry of Tribal Affairs <https://tribal.nic.in/FRA/data/Guidelines.pdf> [Ministry of Tribal Affairs, "Guidelines"].
[569] Saxena et al, *supra* note 35. Thus, for instance, in the *Orissa Mining* case, the two tribal communities had the right to habitat on the entire Niyamgiri hill forest area including the proposed mining site. The Gram Sabhas of the all the twelve villages/settlements inhabited by the tribal communities were empowered to discharge their duties under section 5 with respect to their entire habitat.
[570] Government of India, Ministry of Environment, Forest and Climate Change, "Diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 - ensuring compliance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act), 2006" (circular no. 11-9/1998-FC (pt) dated 30 July 2009), online: Forest Rights Act <http://fra.org.in/document/FRA_English_Final_July15.pdf> at 79. 'Clearances' under several regulatory statutes are required before projects can be undertaken on forest lands. 'Forest Clearance' is required under the *Forest (Conservation) Act, 1980* for diverting forest land for non-forest purposes. The circular by the Ministry requires written "consent of the affected Gram Sabhas to the proposed diversions and the compensatory and ameliorative measures, if any, having understood the purposes and details of [the] proposed diversion" whenever the state governments submit applications for such diversion *(ibid)*. On the possible clash between the powers to authorize diversions, Saxena et al note that the *Forest Rights Act* is a special statute and thus, the authorization to the Gram Sabha overrides the authorities in the *Forest (Conservation) Act, 1980*, a general law, for this purpose; *supra* note 35 at 4. Thus, irrespective of the authority in the *Forest Conservation Act, 1980*, it is the Gram Sabha i.e. the community that must give consent.

their well being"[571] Section 5(d) empowers the Gram Sabha to regulate and *stop* any activity that adversely affects the forest, biodiversity and wildlife.[572] The term 'empower' is vital, because it implies that where a project endangers forest, wildlife or biodiversity, the affected community has the legal authority to regulate and stop such projects.[573] The fact that economic development projects more often than not end up adversely affecting the 'cultural and natural heritage' of these populations, and adversely affect the forests, "…the implication is that the gram sabha has the powers to stop such projects, and that project proponents need to get its consent."[574] Consequently, in view of section 5 of the *Forest Rights Act*, no diversion of forest lands for non-forest purposes, including for development project can be initiated without obtaining the free, prior and informed consent of the community, represented by the Gram Sabha.[575]

This obligation to obtain the free, prior and informed consent of the Gram Sabha has been noted as the most significant feature of the *Forest Rights Act*.[576] International law places the obligation on the state of ensuring the effective participation of *tribals* before adopting any decision, including *any activity* on traditional lands that may directly *affect their land*

[571] *Ibid* at 44. The *Orissa Mining* decision was the first case where this power of veto was recognized by the court and actually exercised by the twelve Gram Sabhas; *supra* note 46. Since then, several proposed projects, including mining and hydroelectric projects, in forest lands that have been vetoed; see Ashish Kothari, "Decisions of the people, by the people, for the people", Opinion, online: The Hindu (May 18, 2016), online *The Hindu* <http://www.thehindu.com>.

[572] *Forest Rights Act*, *supra* note 9, s 5(d).

[573] Kalpavriksh, "Community Forest Resource Rights under the Forest Rights Act: Potential for Enhancing Conservation and Livelihoods" (Discussion Paper delivered at the 2nd National Workshop on Critical Wildlife Habitats and Community Forest Rights, Future of Conservation Network, July 2009)), online: Kalpavriksha <http://www.kalpavriksh.org/images/LawsNPolicies/Communityforestrights_noteCWHmeet_July09.pdf>.

[574] *Ibid*. Section 5(c) of the *Forest Rights Act* obliges the Gram Sabha to protect the 'natural and cultural heritage' or their habitat; *supra* note 9, s 5(c).

[575] Clearly, the requirement is to be complied with irrespective of whether land rights claims have been formally made or not since the rights have already been recognized and vested by the statute; see Saxena et al, *supra* note 35. Saxena et al clarify that the *Forest Rights Act* requires the free, prior and informed consent of the affected community before authorizing activities that are likely to affect or damage the habitat of that community. The term 'habitat' was used because the Saxena Report related to mining on the traditional lands of the Dongria Kondh and Kutia Kondh tribal communities who are classified as PVTGs and thus, have a right to habitat under the *Forest Rights Act*.

[576] See Citizens' Report as part of Community Forest Rights-Learning and Advocacy Process, *supra* note 72.

rights.[577] The *CERD* clearly imposes the requirement of informed consent as the standard for effective participation, as a part of the duty to protect land rights prior to adopting such decisions.[578] It may also be recalled that the *ILO Convention 107* obliges a state to obtain consent where activities on traditional lands will result in the removal of tribals except in certain circumstances, including for economic development projects. Nevertheless, in a case where a development project on traditional lands has an effect tantamount to removal, the state is obliged to attempt to secure the consent of the tribal communities. For all other decisions affecting traditional lands, a state is under an obligation to consult with tribals.[579] In spite of adopting the contemporary terminology, the requirement of free, prior and informed consent as a standard of effective participation, the scope of the duty in the *Forest Rights Act* is clearly narrower than India's obligation under international law and fails to fulfill the obligation of effective participation for at least three reasons.

First, the *Forest Rights Act* does not contain a general duty to consult tribal communities before adopting decisions with respect to tribal lands, a norm of customary international law. The duty of effective participation in the form of free, prior and informed consent is limited to a specific category of decisions i.e. decisions with respect to diversion of forest land for non-forest purposes.[580] Thus, while the requirement of free, prior and

[577] Even though not directly relevant to the question under assessment, in so far as the *Forest Rights Act* affects tribal land rights, it has itself been adopted in disregard of the obligation of effective participation imposed by international law. As discussed in the preceding chapters, international law imposes the obligation of effective participation with tribal communities prior to adopting any measures, including laws that may affect tribal land rights. This duty is, in fact, now accepted as a part of customary international law; see Pentassuglia, *supra* note 17 at 199.

[578] The requirement applies irrespective of whether the decision or activity on traditional lands results in actual physical removal of the tribals or not. The *ICCPR* imposes a similar obligation of free, prior and informed consent where decisions, not amounting to denial, may 'substantially compromise or interfere' with the culturally significant activities of a minority; see the discussion in Section 4.5, above.

[579] See the discussion in Chapter Two, above. Similarly, the *ICCPR* requires good faith consultations with a view to achieving free, prior and informed consent when adopting decisions with respect to tribal traditional lands that do not amount to denial, but may have a minor impact on the land rights of the minority; see Section 4.5, above.

[580] Notably, the duty of effective participation in the *ILO Convention 107* does not include the right to veto decisions affecting tribal land rights. Similarly, while it has been argued that the requirement of informed consent in the *CERD* confers a right to reject proposals, the practice of the CERD Committee suggests that the invocation of this right is based on its need for the fulfillment of other human rights of tribal populations rather

informed consent in the *Forest Rights Act* may apply prior to development projects on traditional lands, the *Forest Rights Act* does not require tribal consultation where decisions with respect to forest lands are being adopted that do not result in non-forest use.[581] This understanding is supported by the provision in the *Forest Rights Act* that enables the state to create "inviolable areas for wildlife conservation" notably without the prior effective participation of the affected tribal communities. [582] The provision lists conditions that must be fulfilled prior to making this decision with respect to traditional lands. While the completion of the process of rights recognition and vesting under the *Forest Rights Act* is one of the conditions, prior effective participation of the tribal communities is not required. The Saxena Committee asserted that two conditions must be fulfilled before tribals are displaced from forest lands: the process of rights recognition and vesting under the *Forest Rights Act* must be complete and the consent of the community represented by the Gram Sabha must be obtained.[583] Clearly the first condition must be fulfilled before displacement as a result of any activity on traditional lands, while the second condition must be met only where the displacement is a result of an activity that adversely affects the forests i.e. a non-forest activity.[584]

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than "emerging from a discourse advocating a veto power." Doyle *supra* note 220 at 167. The *ICCPR* on the other hand requires obtaining the free, prior and informed consent of the members of the minority before adopting decisions that "substantially compromise" their culturally essential land rights. It is noteworthy that the standard of consent in the *Forest Rights Act* includes the right to reject project proposals that may adversely affect traditional forest lands and, in the limited context, are at par or even exceed international standards.

[581] For instance, where the decision to acquire forest lands on which tribal right to ownership has been recognized by the *Forest Rights Act* is being contemplated for forestry purposes, say afforestation, such acquisitions are lawful as long as the procedure for rights recognition and vesting is complete and the general obligations under relevant domestic laws, including compensation, are complied with. The *Forest Rights Act* does not require consultation before such acquisitions. The *Forest Rights Act*, in this aspect clearly falls short of India's obligation under the *ILO Convention 107*, the *CERD* and the *ICCPR*. Pertinently, the CERD Committee, in its concluding observation in 2007, recommended that India ensure that "…adequate safeguards against the acquisition of tribal lands are included in the Recognition of Forest Rights Act (2006) and other relevant legislation." CERD Committee, *Concluding Observations India 2007*, *supra* note 41 at para 20.

[582] *Supra* note 9, s 4(2). The provision allows for modification of forest rights or the resettlement of the rights' holders for the purpose of creating "inviolable areas for wildlife conservation" subject to certain conditions.

[583] Saxena et al, *supra* note 35. The Saxena Report uses the term 'displacement' to include both actual physical displacement and interference with the rights to use and access forest lands.

[584] *Ibid*. The Saxena Report is with respect to a proposed mining project within tribal lands, a non-forest purpose.

Second, land often has a special cultural and spiritual significance for tribal and indigenous communities and, thus, the protection of land rights is more than a question of economic survival for tribal communities. Consequently, in contemporary international law, notions of cultural integrity and substantive equality join the right to property to impose additional obligations on the state when adopting decisions affecting tribal lands.[585] Thus, the imposition of the obligation of effective participation of tribal populations in international law before interfering with tribal lands, as a measure of protecting the recognized land rights, including the right to ownership of the tribal communities, serves the purpose of fulfilling the other human rights of tribal populations.[586] Tribal participation ensures that their unique concerns are addressed when contemplating decisions affecting their lands. The requirement of free, prior and informed consent in the *Forest Rights Act* is not connected to the duty of the state to protect tribal land rights. In fact, it is linked to the duty of the forest dwelling community to protect and conserve the forests.[587] The language of section 5 of the *Forest Rights Act* implies that the consent that is granted by the Gram Sabha is in the capacity of a statutory body empowered and obliged to protect the forests, wildlife and biodiversity within its 'jurisdiction' and not primarily to protect the *land rights* of the tribals.[588] This disconnect may not always prejudice the interest of the tribal communities where activities or economic

[585] Anaya, *Indigenous Peoples*, *supra* note 20.
[586] See Doyle, *supra* note 220 at 167.
[587] *Forest Rights Act*, *supra* note 9, Preamble.
[588] The decision of the Gram Sabha to refuse consent under section 5 can be challenged in an appropriate forum; see Kothari, *supra* note 571. Notably, the Supreme Court has held that section 6 of the *Forest Rights Act* authorizes the Gram Sabha to determine the nature and extent of claims, including religious and cultural claims of the Dongria Kondh and Kutia Kondh tribes on their habitat. On the question of whether the Gram Sabha can stop activities *that affect these rights*, the Supreme Court did not rely on section 5 of the Act but instead drew support from the provisions of the *Panchayat (Extension to Scheduled Areas) Act, 2006* (*PESA*) to uphold such a power. The Court referred to the obligation of the Gram Sabha to "protect the traditions, customs, cultural identity, community resources and community mode of dispute resolution of tribal" under the *PESA* and held that if the Gram Sabha determines that the tribals have religious and cultural rights under the *Forest Rights Act* in the area under question, *PESA* empowers the Gram Sabha to consider the impact of the proposed mining on these rights and to protect and preserve these rights; *Orissa Mining*, *supra* note 46. As noted earlier, the provisions of the *Forest Rights Act* are in addition to other laws; *supra* note 9, s 13. However, the *PESA* is not applicable to forest lands throughout India. Thus, where the *PESA* is not applicable, the Gram Sabha cannot technically base its consent or refusal on the effect of the activities on tribal land rights alone. The consent must be based on the duties and powers in section 5 of the *Forest Rights Act*.

development projects are being contemplated.[589] Yet, it does dilute the very purpose for which the duty of effective participation has been recognized in international law by shifting the focus from human rights concerns to environmental concerns, which may affect the quality and nature of the mitigating conditions that are imposed on the project proponents. Thus, the purpose that underlies the tribal participation envisioned in the *Forest Rights Act* dilutes the potential of such participation to effectively protect the special interests of the tribals with respect to their traditional lands.[590]

Third, and perhaps most significantly, the *Forest Rights Act* imposes the obligation to obtain the free and informed consent of the Gram Sabha before decisions for non-forest use, including development projects are undertaken on traditional forest lands. The Gram Sabha is not a tribal institution. It is a state created and defined entity that has emerged out of the state's decentralization model and comprises all the adult members of a village or settlement.[591] Thus, the *Forest Rights Act* fails to fulfill the obligation of prior effective participation with the *tribals whose rights are being affected*. Article 300A of the *Constitution of India* prohibits the deprivation of property "save by authority of law" and the appropriation of property rights in general, against the will of the property right holder, requires statutory authorization.[592] The norm of non-discrimination requires that consent of individuals or groups who hold the land rights under the *Forest Rights Act*, and not of the Gram Sabha, must be obtained before their rights are interfered with. In case of compulsory

[589] While it may be generally assumed that a non-forest activity on forest lands that affects land rights will also adversely affect forests and, thus, consent or refusal for protecting the latter will also implicitly protect the former. However, it may not always be true.
[590] While the *ILO Convention 107*, the *CERD* and Article 27 of the *ICCPR* do not impose specific obligations as to the substantive and procedural requirements of the duty of effective participation, the participation must be effective.
[591] See *supra* note 504, for a description of the Gram Sabha.
[592] *Supra* note 3, art 300A. The appropriation of land in the case of *Orissa Mining*, *supra* note 46, did not have statutory authorization. Saxena et al pointed out this fact to buttress their argument that the appropriation of land rights for the proposed mining project, without the consent of the right holders was illegal. The report notes that "[c]learance to destroy forests without the voluntary consent of the right holders would expropriate their authority and cannot take place except with their voluntary consent." *Supra* note 35 at 52. But the Saxena Committee relied on these observations to argue that "[a]ny action that would have the implication of destroying the forests therefore clearly requires the consent of the Gram Sabha…." In my opinion, this observation is untenable and violates the right to equality of tribals (*ibid*).

appropriation of land rights in the exercise of the power of eminent domain, international law requires the effective participation of the 'tribals', in accordance with their internal rules, before the decision to compulsorily appropriate their land rights is adopted. Again, the consent of the Gram Sabha, a creation of the state, clearly does not fulfill this obligation.[593]

[593] In addition to Gram Sabhas being non-tribal state defined bodies, their membership consists of both tribals and non-tribal OTFDs residing in that village or settlement. Given the differences in the nature of connection that the two categories are likely to have with the forest lands, their consent or denial will be based on entirely different considerations.

CHAPTER SIX

CONCLUSION

Regardless of the divergent opinions as to whether tribal and indigenous land rights have attained the status of customary international law, it is evident that the obligation to recognize and protect tribal customary land rights, including the right to ownership, is now firmly grounded in the international human rights framework.[594] The Indian Parliament has apparently tried to keep up with the evolving understanding of the rights of tribals and indigenous peoples within the umbrella of human rights, *inter-alia*, by adopting the *Forest Rights Act*.[595] The *Forest Rights Act* was welcomed as a historic step towards undoing the injustice perpetrated against the forest dwelling tribal communities in matters of customary land rights.[596] As discussed above, the *Forest Rights Act* provides for the restitution of traditional forest rights to the forest dwelling tribals, including individual and collective rights to own cultivated forest lands, customary use and access rights and the collective right to control, manage and use the community forest resources.[597]

The *Forest Rights Act*, as an express measure to address the 'historic injustice' perpetrated against tribal communities in matters of land rights, ought to fulfill India's human rights obligations in international law, particularly the obligation to recognize and protect the right to tribal ownership of traditional lands. While the literature on the *Forest Rights Act* has focused on the evolution of the statute, the lacuna in law and especially the gaps in implementation, I was unable to find any literature assessing whether the legislative framework of the *Forest Rights Act* fulfills India's obligations under the international human rights law. This thesis is a modest attempt to fill that gap.[598]

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[594] See Section 1.2, above.
[595] *Supra* note 9.
[596] *Ibid*, Preamble.
[597] *Ibid*, c III.
[598] See Section 1.3, above, for the justification for this research.

This thesis is limited to the right of tribal land ownership and India's corresponding obligations contained in the *ILO Convention 107,* Article 5 of the *CERD* and Article 27 of the *ICCPR*. In conclusion, the statutory framework of the *Forest Rights Act* does not fulfill India's international human rights obligations with respect to the land rights of forest dwelling tribal communities, in particular with respect to the tribal right to ownership of traditional lands in at least two important aspects.

First, the *Forest Rights Act* fails to fulfill the obligation in the *ILO Convention 107* and the *CERD* to fully recognize the right to tribal land ownership. The nature and extent of the concept of 'occupation' set out as the basis of the right to hold/own forest land in section 3(1)(a) of the *Forest Rights Act* has been arbitrarily determined by the state without reference to the concept of 'traditional occupation' in the *ILO Convention 107* or the customary law and practice of the tribal populations. The balance of the forest rights recognized in the *Forest Rights Act* are properly the right to use and access traditional forest land and thus, do not serve to fulfill India's obligation to recognize the right to tribal land ownership in international law. Limiting the recognition of land rights to use rights in fact violates the duty not to discriminate in matters of property.[599] However, India's failure to fully recognize the right of tribal land ownership does not, in itself, violate its obligation in Article 27 of the *ICCPR* unless this failure amounts to a denial of the rights to use and access lands and resources necessary for culture.

Second, the *Forest Right Act* also fails to fulfill the obligation of effective participation imposed by international law before decisions including state authorized resource development projects are undertaken on traditional lands. India's failure to fully recognize, delimit and identify tribal lands renders it practically impossible to fully discharge

[599] See Section 3.2, above.

the obligation of prior effective participation in international law.[600] Even in the limited context of the rights, including the right to ownership recognized in the *Forest Rights Act*, the statute fails to fulfill India's obligations in the *ILO Convention 107*, the *CERD* and Article 27 of the *ICCPR* for at least three reasons: First, the scope of the duty of prior effective participation in the *Forest Rights Act* is narrow and is limited to decisions with respect to diversion of forest land for non-forest purposes. Notably, while the standard of effective participation in the *Forest Rights Act* includes the right to reject proposals of such diversion (and as such in this limited context meets or even exceeds international standards) the Act does not contain a general duty to consult tribals with respect to decisions affecting traditional lands generally. Second, the principal purpose that underlies the requirement of free, prior and informed consent in the *Forest Rights Act* is the protection of forest and wildlife and not the protection of tribal land rights. This purpose, which informs the provisions of tribal participation in the *Forest Rights Act*, dilutes the potential of such participation to effectively protect tribal interests. Third, the *Forest Rights Act* requires the consent of the Gram Sabha, a non-tribal body, before decision for non-forest use, including development projects are undertaken on traditional lands. Thus, it fails to fulfill the obligation of prior effective participation of the tribals whose rights are being affected.

The critique of the *Forest Rights Act* in the afore discussed aspects is further deepened by its grouping of two distinct segments of the Indian society in a single framework. The failure to treat the forest dwelling tribal populations (who are distinct cultural groups) differently from the non-tribal forest dwelling populations (OTFDs) clearly offends the principle of substantive equality.

[600] Bankes, "Arctic", *supra* note 17.

Suggestions for Further Research

This thesis is a modest attempt to critically examine India's approach to tribal land rights, particularly the customary right to ownership of traditional lands, as reflected in the *Forest Rights Act*. It has been argued that the *Forest Rights Act* does not fulfill India's obligations to fully recognize and protect the customary right to land ownership of the forest dwelling tribes. The analysis is certainly not exhaustive but is primarily focused on two broad aspects of India's international obligations: the obligation to fully recognize, delimit, and demarcate the right to ownership of forest dwelling tribals based on traditional occupation of forestlands; and the obligation of effective participation imposed by international law before decisions including state authorized resource development projects are undertaken on traditional forest lands. Building upon the existing framework established in this thesis, further research on the other aspects of India's international obligations may be undertaken.

The focus of thesis is not to critically analyze the land rights provisions of the three human rights instruments but to identify the rights and obligations within them, which the Indian government, policymakers, legal advisors and the academia may draw upon to improve the framework of the *Forest Rights Act*. However, I have not offered suggestions for amending the *Forest Rights Act.* To this end, this thesis is meant to serve as a quick reference guide on the subject. The analysis is also not exhaustive of all the laws relevant to the land rights of peninsular forest dwelling tribal communities and is exclusively focused on the *Forest Rights Act*. This thesis may contribute to a more comprehensive analysis of India's laws and policy relevant to the issue of land ownership of the forest dwelling tribes.

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